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

Claim No: QB-2022-001259 (“Shell Centre Tower Proceedings”)

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

IN THE HIGH COURT OF JUSTICE

KINGS BENCH DIVISION

B E T W E E N :

(1) SHELL U.K. LIMITED

Claimant: (QB-2022-001241)

(2) SHELL INTERNATIONAL PETROLEUM COMPANY LIMITED

Claimant (QB-2022-001259)

(3) SHELL U.K. OIL PRODUCTS LIMITED

Claimant (QB-2022-001420)

- and –

PERSONS UNKNOWN
[more fully described in the Relevant Claim Form]

Defendants

AUTHORITIES BUNDLE

Tab	Authority	Page
Shell Cases		
1	Shell U.K. Oil Products Ltd v Persons Unknown [2022] EWHC 1215 (QB) ("*the Johnson Judgment*")	3
2	Shell UK v Persons Unknown [2023] EWHC 1229; [2023] 1 W.L.R. 4358 ("*the Hill Judgment*")	24
3	Shell v Persons Unknown [2024] EWHC 1546 (KB) ("*the Cotter Judgment*")	60
Other Cases		
4	Mayor of London v Hall [2010] EWCACiv 817; [2011] 1 WLR 504	79
5	R (SG) v Secretary of State for Work and Pensions [2015] UKSC 16; [2015] 1 WLR 1449	103
6	Vastint Leeds BV v. Persons Unknown [2018] EWHC 2456 (Ch); [2019] 4 WLR 2	181
7	Canada Goose v Persons Unknown [2020] EWCA Civ 303; [2020] 1 WLR 2802	190
8	Sharif v Birmingham City Council [2020] EWCA Civ 1488; [2021] 1 WLR 685	216
9	DPP v Ziegler [2021] UKSC 23, [2022] AC 408	231
10	HS2 Ltd v Persons Unknown [2022] EWHC 2360 (KB)	284
11	DPP v Cuciurean [2022] EWHC 736 (Admin); [2022] 3 WLR 446	360
12	Esso Petroleum Company Ltd v Persons Unknown [2023] EWHC 1837 (KB)	381
13	Wolverhampton CC v London Gypsies and Travellers [2024] 2 WLR 45	414
14	Valero Energy Ltd v Persons Unknown [2024] EWHC 134 (KB)	484
15	High Speed Two (HS2) Ltd v Persons Unknown [2024] EWHC 1277 (KB)	522
16	Esso Petroleum Company Ltd v Persons Unknown [2023] EWHC 1837 (KB)	551
Other Authorities		
17	Aarhus Convention (Full title: The United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters)	567
18	Public Order Act 2023, Part 1	592

Neutral Citation Number: [2022] EWHC 1215 (QB)

Case No: QB-2022-001420

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 May 2022

Before :

MR JUSTICE JOHNSON

- -

Between :

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

- -
- -

Toby Watkin QC (instructed by CMS Cameron McKenna Nabarro Olswang LLP) for the Claimant

Hearing date: 13 May 2022

- -

Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be 10am on 20 May 2022.

Mr Justice Johnson :

1. The claimant sells fossil fuels to those who run Shell branded petrol stations. The defendants are climate and environmental activists who say that the claimant's activities are destroying the planet. They engage in protests to draw attention to the issue and to encourage governmental and societal change.

2. The claimant seeks to maintain an injunction that was granted on an emergency basis by McGowan J on 5 May 2022. It restrains the defendants from undertaking certain activities such as damaging petrol pumps and preventing motorists from entering petrol station forecourts when that is done to prevent the claimant from carrying on its business – see paragraph 20 below. The claimant recognises that the injunction interferes with rights of assembly and expression but contends that the interference is proportionate and justified to protect its rights to trade.

3. The order of McGowan J was necessarily made without notice to the defendants or anybody else. McGowan J made provision for the order to be widely published (including at every Shell filling station in England and Wales, and to over 50 email addresses that are associated with protest groups). McGowan J also required that the order be reconsidered at a public hearing on 13 May 2022 so that the court could reconsider the continuation of the order, and its terms. This provided a specific opportunity for anyone affected by the order to seek to argue that it should be set aside or varied. In the event, nobody did so.

4. Mrs Nancy Friel, who describes herself as an environmental activist, attended the hearing. She asked for the hearing to be adjourned so that she could secure representation and argue that the order should be set aside or varied. I declined the request to adjourn. It was important that this injunction, which was granted without notice to the defendants and which impacts on their rights of assembly and expression, was considered by a court at a public hearing without further delay. Continuing with the hearing does not prejudice any application that Mrs Friel (or anybody else) might wish to make to vary the order or to set it aside: the terms of the order itself permit such an application to be made (and see also rule 40.9 of the Civil Procedure Rules).

5. Mrs Friel was concerned that the terms of the order require that any person who wishes to apply to vary or discharge the order must first apply to be joined as a named defendant. She did not consider that was appropriate, because she is not taking part in any unlawful activity and does not therefore come within the scope of the description of the defendants. There are two answers to that concern. First, the description of the "unknown" defendants does not prevent Mrs Friel from being added as a second defendant to the proceedings; she may be affected by the order – and may be entitled to be joined as a party – even if she does not come within that description. Second, if she otherwise has a right to apply to set aside the order without being joined as a party then she may do so under CPR 40.9, notwithstanding the terms of the order (see *National Highways Limited v Persons Unknown* [2022] EWHC

1105 (QB) *per* Bennathan J at [20]-[22] and *Barking and Dagenham LBC v Persons Unknown* [2022] EWCA Civ 13 *per* Sir Geoffrey Vos MR at [89]).

6. It is not, however, appropriate to vary the terms of the order to give a general right to anyone (beyond that recognised by CPR 40.9) to apply to vary the order without first applying to be a party. That would risk going beyond the ambit of CPR 40.9: although that provision is stated in wide terms, in practice the circumstances in which a non-party may successfully apply to vary an order are more limited (see the commentary to CPR 40.9 in the 2022 White Book). There is therefore a risk of creating an unjustified advantage for such an applicant (for example, as regards costs) or an unjustified disadvantage for the claimant, without first considering the particular circumstances of the application. The question of whether it is necessary for a person to be joined as a party is best addressed (if and when the issue arises) as and when any application is made, and on the facts of the particular application.

Factual background

7. Benjamin Austin is the claimant's Health, Safety and Security Manager. He has provided two witness statements, supported with extensive exhibits. I take the account of events from his statements and exhibits.

The claimant

8. The claimant is part of a group of companies that are ultimately owned and controlled by Shell plc. It markets and sells fuels to retail customers in England and Wales through a network of 1,062 "Shell-branded" petrol stations ("Shell petrol stations"). The stations are operated by third party contractors, but the fuel is supplied by the claimant. In some cases, the claimant has an interest in the land where the Shell petrol station is located.

Insulate Britain, Just Stop Oil and Extinction Rebellion

9. Insulate Britain, Just Stop Oil and Extinction Rebellion are environmental protest groups that seek to influence government policy in respect of the fossil fuel industry, so as to mitigate climate change. These groups say that they are not violent. I was not shown any evidence to suggest that they have resorted to physical violence against others. They are, however, committed to protesting in ways that are unlawful, short of physical violence to the person. Their public websites demonstrate this, with references to "civil disobedience", "direct action", and a willingness to risk "arrest" and "jail time". The activities of their supporters also demonstrate this, as explained below.

The protests

10. In autumn 2021 a number of protests took place. These involved blocking major roads in the UK, including the M25, including by activists gluing themselves to roads, immovable objects, or each other. Injunctions to restrain such activities were made by the court on the

application of National Highways Limited. There were many breaches of those injunctions. Committal proceedings were brought. Initially, the defendants to those proceedings evinced an intention to carry on with the protests in defiance of court orders. Orders for immediate imprisonment for contempt of court were imposed - see *National Highways Ltd v Heyatawin* [2021] EWHC 3078 (QB). Thereafter, unlawful protests in this form came to an end. In subsequent committal hearings, the respondents were unrepentant. They maintained that they were justified in their conduct because of the very great dangers of climate change. However, they did not demonstrate an intention to commit further breaches of court orders. Many indicated that they would find other, lawful, ways to draw attention to the climate crisis and to seek to influence government policy. The court responded by imposing orders of imprisonment for contempt of court that were suspended, subject to compliance with conditions imposed by the court – *National Highways Ltd v Buse* [2021] EWHC 3404 (QB) (*per* Dingemans LJ at [57]) and *National Highways Ltd v Springorum* [2022] EWHC 205 (QB) (*per* William Davis LJ at [65]).

11. In spring 2022, protests involving similar tactics re-commenced, but directed at the fossil fuel industry rather than the road network. Reports include cases of protesters climbing onto fuel delivery lorries, cutting the air brake cables so that the lorries cannot move, tunnelling under roadways to seek to make them impassable to lorries, climbing onto equipment used for storage of fuels, and tampering with safety equipment, such as valves. One of these protests was at a terminal owned by the Shell Group.

12. On 28 April 2022, there were protests at two petrol stations (one of which was a Shell petrol station) on the M25, Clacket Lane and Cobham. Protestors arrived at around 7am. Video, photographic and written evidence (largely deriving from the websites and media releases of protest groups) show that:

(1) The entrance to the forecourts were blocked.

(2) The display screens of fuel pumps were smashed with hammers.

(3) The display screens of fuel pumps were obscured with spray paint.

(4) The kiosks were “sabotaged… to stop the flow of petrol”.

(5) Protestors variously glued themselves to the floor, a fuel pump, the roof of a fuel tanker, or each other.

13. A total of 55 fuel pumps were damaged (including 35 out of 36 pumps at Cobham) to the extent that they were not safe for use, and the whole forecourt had to be closed. Five people were arrested and charged with offences, including criminal damage. They are subject to bail conditions. The claimant has not sought to join them as individual named defendants to this claim because (in the case of four of them) it considers that, in the light of the bail conditions, there is not now a significant risk that they will carry out further similar activities, and (in the

case of the fifth) it is not sufficiently clear that the conduct of that individual comes within the scope of the injunction.

14. In April 2022 there were protests at an oil storage depot in Warwickshire, which is partly owned by the claimant. These involved the digging of a tunnel under a tanker route, to stop oil tankers leaving the terminal and distributing fuel. An injunction was granted on an application made by the local authority. Protests at the depot have continued. On 9 May 2022 drones were flown over the depot and along its external fence. The claimant thinks this may have been a form of reconnaissance by a group of protestors.

15. On 3 May 2022 more than 50 protestors from Just Stop Oil attended the Nustar Clydebank Oil Depot in Glasgow. They climbed on top of tankers, locked themselves to the entrance of the terminal and climbed onto pipework at height. Their actions halted operations at the depot.

16. The campaign orchestrated by these (and other) groups of environmental activists continues. Just Stop Oil's website says that the disruption will continue "until the government makes a statement that it will end new oil and gas projects in the UK."

17. The claimant says that there is thus an ongoing risk of further incidents of a similar nature to those seen on 28 April 2022.

The risks at petrol stations

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

19. The use of mobile telephones on the forecourt (outside a vehicle) is prohibited for that reason (see annex 6 to the Highway Code: "Never smoke, or use a mobile phone, on the forecourt of petrol stations as these are major fire risks and could cause an explosion."). The evidence shows that at the protests on 28 April 2022 protestors used mobile phones on the forecourts to photograph and film their activities. Further, as regards the use of hammers to damage pumps, Mr Austin says: "Breaking the pump screens with any implement could cause a spark and in turn potentially harm anyone in the vicinity. The severity of any vapour cloud ignition could be catastrophic and cause multiple fatalities. Unfortunately, Shell Group has tragically

lost several service station employees in Pakistan in the last year when vapour clouds have been ignited during routine operations." I was not shown any positive evidence as to the risks posed by spray paint, glue or other solvents in the vicinity of fuel or fuel vapour, but I was told that this, too, was a potential cause for concern.

The injunction

20. The operative paragraphs of the injunction are:

> "2. For the period until 4pm on 12 May 2023, and subject to any further order of the Court, the Defendants must not do any of the acts listed in paragraph 3 of this Order in express or implied agreement with any other person, and with the intention of disrupting the sale or supply of fuel to or from a Shell Petrol Station.
>
> 3. The acts referred to in paragraph 2 of this order are:
>
> 3.1. blocking or impeding access to any pedestrian or vehicular entrance to a Shell Petrol Station or to a building within the Shell Petrol Station;
>
> 3.2. causing damage to any part of a Shell Petrol Station or to any equipment or infrastructure (including but not limited to fuel pumps) upon it;
>
> 3.3. operating or disabling any switch or other device in or on a Shell Petrol Station so as to interrupt the supply of fuel from that Shell Petrol Station, or from one of its fuel pumps, or so as to prevent the emergency interruption of the supply of fuel at the Shell Petrol Station.
>
> 3.4. affixing or locking themselves, or any object or person, to any part of a Shell Petrol Station, or to any other person or object on or in a Shell Petrol Station;
>
> 3.5. erecting any structure in, on or against any part of a Shell Petrol Station;
>
> 3.6. spraying, painting, pouring, depositing or writing any substance on to any part of a Shell Petrol Station.
>
> 3.7. encouraging or assisting any other person do any of the acts referred to in sub-paragraphs 3.1 to 3.6."

21. Some of the conduct referred to in paragraph 3 is, in isolation, potentially innocuous ("depositing… any substance on… any part of a Shell Petrol Station" would, literally, cover the disposal of a sweet wrapper in a rubbish bin). The injunction does not prohibit such conduct. The structure is important. The injunction only applies to the defendants. The defendants are those who are "damaging, and/or blocking the use of or access to any Shell petrol station in England and Wales, or to any equipment or infrastructure upon it, by express or implied agreement with others, with the intention of disrupting the sale or supply of fuel to or from the said station." So, the prohibitions in the injunction only apply to those who fall within that description. Further, the order does not impose a blanket prohibition on the conduct identified in paragraph 3. It only does so where that conduct is undertaken "in express or implied agreement with any other person, and with the intention of disrupting the sale or supply of fuel to or from a Shell Petrol Station."

22. It follows that while paragraph 3 is drafted quite widely, its impact is narrowed by the requirements of paragraph 2. This is deliberate. It is because the claimant is not able to maintain an action in respect of the activity in paragraph 3 (read in isolation) in respect of those Shell petrol stations where it has no interest in the land. It is only actionable where that conduct fulfils the ingredients of the tort of conspiracy to injure (as to which see paragraph 26 below). The terms of the injunction are therefore deliberately drafted so as only to capture conduct that amounts to the tort of conspiracy to injure.

The legal controls on the grant of an injunction

23. The injunction is sought on an interim basis before trial, rather than a final basis after trial. It is sought against "persons unknown". It is sought on a precautionary basis to restrain anticipated future conduct. It interferes with freedom of assembly and expression. For these reasons, the law imposes different tests that must all be satisfied before the order can be made. The claimant must demonstrate:

    (1) There is a serious question to be tried: *American Cyanamid v Ethicon* [1975] AC 396 *per* Lord Diplock at 407G.

    (2) Damages would not be an adequate remedy for the claimant, but a cross-undertaking in damages would adequately protect the defendants, or

    (3) The balance of convenience otherwise lies in favour of the grant of the order: *American Cyanamid per* Lord Diplock at 408C-F.

    (4) There is a sufficiently real and imminent risk of damage so as to justify the grant of what is a precautionary injunction: *Islington London Borough Council v Elliott* [2012] EWCA Civ 56 *per* Patten LJ at [28], *Ineos Upstream Ltd v Persons Unknown* [2019] EWCA Civ 515 [2019] 4 WLR 100 *per* Longmore LJ at [34], *Canada Goose UK Retail Limited v Persons Unknown* [2020] EWCA Civ 303 [2020] 1 WLR 2802 *per* Sir Terence Etherton MR at [82(3)].

(5) The prohibited acts correspond to the threatened tort and only include lawful conduct if there is no other proportionate means of protecting the claimant's rights: *Canada Goose* at [78] and [82(5)].

(6) The terms of the injunction are sufficiently clear and precise: *Canada Goose* at [82(6)].

(7) The injunction has clear geographical and temporal limits: *Canada Goose* at [82(7)] (as refined and explained in *Barking and Dagenham LBC v Persons Unknown* [2022] EWCA Civ 13 *per* Sir Geoffrey Vos MR at [79] - [92]).

(8) The defendants have not been identified but are, in principle, capable of being identified and served with the order: *Canada Goose* at [82(1)] and [82(4)].

(9) The defendants are identified in the Claim Form (and the injunction) by reference to their conduct: *Canada Goose* at [82(2)].

(10) The interferences with the defendants' rights of free assembly and expression are necessary for and proportionate to the need to protect the claimant's rights: articles 10(2) and 11(2) of the European Convention on Human Rights ("ECHR"), read with section 6(1) of the Human Rights Act 1998.

(11) All practical steps have been taken to notify the defendants: section 12(2) of the Human Rights Act 1998.

(12) The order does not restrain "publication", or, if it does, the claimant is likely to establish at trial that publication should not be allowed: section 12(3) of the Human Rights Act 1998.

24. Section 12 Human Rights Act 1998 (see paragraphs 23(11) and (12) above) states:

> "**12 Freedom of expression.**
>
> (1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
>
> (2) If the person against whom the application for relief is made ("the respondent") is neither present nor represented, no such relief is to be granted unless the court is satisfied—
>
> (a) that the applicant has taken all practicable steps to notify the respondent; or
>
> (b) that there are compelling reasons why the respondent should not be notified.

(3) 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)."

(1) Serious issue to be tried

25. The claimant has a strong case that on 28 April 2022 the defendants committed the activities identified in paragraph 3 of the draft order: those activities are shown in photographs and videos. There are apparent instances of trespass to goods (the damage to the petrol pumps and the application of glue), trespass to land (the general implied licence to enter for the purpose of purchasing petrol does not extend to what the defendants did) and nuisance (preventing access to the petrol stations). None of this gives rise to a right of action by the claimant in respect of those Shell petrol stations where it does not have an interest in the land and does not own the petrol pumps. It is therefore not, itself, able to maintain a claim in trespass or nuisance in respect of all Shell petrol stations.

26. The claim advanced by the claimant is framed in the tort of conspiracy to injure by unlawful means ("conspiracy to injure"). The ingredients of that tort are identified in *Cuadrilla Bowland Ltd v Persons Unknown* [2020] EWCA Civ 9 [2020] 4 WLR 29 *per* Leggatt LJ at [18]: (a) an unlawful act by the defendant, (b) with the intention of injuring the claimant, (c) pursuant to an agreement with others, (d) which injures the claimant.

27. As I have explained, the claimant has a strong case that the defendants have acted unlawfully. To establish the tort of conspiracy to injure, it is not necessary to show that the underlying unlawful conduct (to satisfy limb (a)) is actionable by the claimant. Criminal conduct which is not actionable in tort can suffice (so long as it is directed at the claimant): *Revenue and Customs Commissioners v Total Network SL* [2008] UKHL 19 [2008] 1 AC 1174 *per* Lord Walker at [94] and Lord Hope at [44]. A breach of contract can also suffice, even though it is not actionable by the claimant: *The Racing Partnership Ltd v Done Bros (Cash Betting) Ltd* [2020] EWCA Civ 1300 [2021] Ch 233 *per* Arnold LJ at [155].

28. The question of whether a tort, or a breach of statutory duty, can suffice was left open by the Supreme Court in *JST BTS Bank v Ablyaszov (No 14)* [2018] UKSC 19 [2020] AC 727. Lord Sumption and Lord Lloyd-Jones observed, at [15], that the issue was complex, not least because it might – in the case of a breach of statutory duty – depend on the purpose and scope of the underlying statute and whether that is consistent "with its deployment as an element in the tort of conspiracy."

29. For the purposes of the present case, it is not necessary to decide whether a breach of statutory duty can found a claim for conspiracy to injure, or whether every (other) tort can do so. It is only necessary to decide whether the claimant has established a serious issue to be tried as to whether the torts that are here in play may suffice as the unlawful act necessary to found a claim for conspiracy to injure. Those torts involve interference with rights in land and goods where those rights are being exercised for the benefit of the claimant (where the petrol station is being operated under the claimant's brand, selling the claimant's fuel). Recognising the torts as capable of supporting a claim in conspiracy to injure does not undermine or undercut the rationale for those torts. It would be anomalous if a breach of contract (where the existence of the cause of action is dependent on the choice of the contracting parties) could support a claim for conspiracy to injure, but a claim for trespass could not do so. Likewise, it would be anomalous if trespass to goods did not suffice given that criminal damage does. I am therefore satisfied that the claimant has established a serious issue to be tried in respect of a relevant unlawful act.

30. There is no difficulty in establishing a serious issue to be tried in respect of the remaining elements of the tort. The intention of the defendants' unlawful activities is plain from their conduct and from the published statements on the websites of the protest groups: it is to disrupt the sale of fuel in order to draw attention to the contribution that fossil fuels make to climate change. They are not solitary activities but are protests involving numbers of activists acting in concert. They therefore apparently undertake their protest activities in agreement with one another. Loss is occasioned because the petrol stations are unable to sell the claimant's fuel.

31. I am therefore satisfied that there is a serious issue to be tried.

32. Further, the evidence advanced by the claimant appears credible and is supported by material that is published by the groups to which the defendants appear to be aligned. That evidence is therefore likely to be accepted at trial. I would (if this had been a trial) wished to have clearer and more detailed evidence (perhaps including expert evidence) as to the risks that arise from the use of mobile phones, glue and spray paint in close proximity to fuel, but it is not necessary precisely to calibrate those risks to determine this application. It is also, I find, likely that the court at trial will adopt the legal analysis set out above in respect of the tort of conspiracy to injure (including, in particular, that the necessary unlawful act could be a tort that is not itself actionable by the claimant). It follows that not only is there a serious issue to be tried, but the claimant is also more likely than not to succeed at trial in establishing its claim.

(2) Adequacy of damages

33. The claimant asserts that damages are not an adequate remedy because they could not be quantified. It is difficult to see why that should be so. Any losses ought to be capable of assessment. For example, loss of sales can be assessed by (broadly) identifying the time period when sales were affected, and comparing the sales made during that period with the sales made during the equivalent period the previous week. The possible difficulties in calculation are not a convincing reason for concluding that damages are an inadequate remedy.

34. There is, though, no evidence that the defendants have the financial means to satisfy an award of damages. It is very possible that any award of damages would not, practically, be enforceable. Further, the defendants' conduct gives rise to potential health and safety risks. If such risks materialise then they could not adequately be remedied by way of an award of damages to the claimant.

35. For these reasons, damages are not an adequate remedy for the claimant.

36. Conversely, if any defendant sustains loss as a result of the injunction, then the claimant undertakes to pay any damages which the court considers ought to be paid. It has the means to satisfy any such order. The injunction interferes with rights of expression and assembly, but it does not impact on the core of those rights. It does not prevent the defendants from congregating and expressing their opposition to the claimant's conduct (including in a loud or disruptive fashion, in a location close to Shell petrol stations), so long as it is not done in a way which involves the unlawful conduct prohibited by paragraphs 2 and 3 of the injunction. To the extent that there is an interference with rights of assembly and expression then (if a court subsequently finds that to be unjustified) that can be met by the cross-undertaking: interferences with such rights to assembly and expression can be remedied by an award of damages, even where the loss is not monetary in nature (see section 8 of the Human Rights Act 1998).

37. So, while damages are not an adequate remedy for the claimant, the cross-undertaking in damages is an adequate remedy for the defendants.

(3) Balance of convenience

38. The fact that damages are not an adequate remedy for the claimant but that the cross-undertaking is adequate protection for the defendants means that it may not be necessary separately to consider the balance of convenience.

39. In any event, the balance of convenience favours the grant of injunctive relief. If an injunction is not granted, then there is a risk of substantial damage to the claimant's legal rights which might not be capable of remedy. Conversely, it is open to the defendants (or anybody else that is affected by the injunction) at any point to apply to vary or set aside the order. Further, although the injunction has a wide effect, there are both temporal and geographical restrictions. It will only run for a maximum of a year before having to be reconsidered by a court. It only applies to Shell petrol stations (not other places where the claimant does business).

(4) Real and imminent risk of harm

40. Harm has already occurred as a result of the protests on 28 April 2022. The risk of repetition is demonstrated by the further protests that have occurred since then, and the public statements that have been made by protest groups as to their determination to continue with similar activities.

41. If the claimant is given sufficient warning of a protest that would involve a conspiracy to injure, then it can seek injunctive relief in respect of that specific event. If there were grounds for confidence that such warnings will be given, then the risk now (in advance of any such warning) might not be sufficiently imminent to justify a more general injunction. There is some indication that protest groups sometimes engage with the police and give prior warning of planned activities. But it is unlikely that sufficient warning would be given to enable an injunction to be obtained. That would be self-defeating. Further, it is not always the case that warnings are given. Extinction Rebellion say in terms (on its website) that it will not always give such warnings. Moreover, the claimant did not receive sufficient (or any) warning of the activities on 28 April 2022.

42. Accordingly, I am satisfied that this application is not premature, and that the risk now is sufficiently imminent. The claimant may not have a further opportunity to seek an injunction before a further protest causes actionable harm.

(5) Prohibited acts to correspond to the threatened tort

43. The acts that are prohibited by the injunction necessarily amount to conduct that constitutes the tort of conspiracy to injure. The structure and terms of the injunction have been drafted to achieve that.

44. It would be permissible for an injunction to prohibit behaviour which is otherwise lawful (or which is not actionable by the claimant) if there are no other proportionate means of protecting the claimant's rights. The claimant does not contend that is the case here, because an order that closely corresponds to the threatened tort will afford adequate protection. I agree.

(6) Terms sufficiently clear and precise

45. The terms of the injunction (see paragraph 20 above) are in clear and simple language that avoids technical legal expression.

46. It is usually desirable that such terms should, so far as possible, be based on objective conduct rather than subjective intention. The drafting of paragraph 3 satisfies that criterion. There is an element of subjective intention in paragraph 2 ("with the intention of disrupting the sale or supply of fuel to or from a Shell Petrol Station") but that is unavoidable because of the nature of the tort of conspiracy to injure. It is the inevitable price to be paid for closely tracking the tort. The alternative would be to leave out the subjective element and focus only on the objective conduct. That would give wider protection than is necessary or proportionate. It is also necessary to introduce the language of intention to avoid some of the prohibitions having a much broader effect than could ever be justified (for example, the sweet wrapper example at paragraph 21 above).

(7) Clear geographical and temporal limits

47. There are clear geographical limits to the order: it applies only to Shell petrol stations.

48. It is convenient, at this point, to address the question of whether those geographical limits can be justified as being no more than is necessary and proportionate to protect the claimant's interests (so as to ensure compatibility with articles 10 and 11 ECHR – see paragraphs 55-62 below). The only Shell petrol station where acts of conspiracy to injure have occurred so far is on the M25. It is perhaps unsurprising that petrol stations of that profile (large, and on the London orbital motorway) have been targeted. It would be possible to grant an injunction that only applied to the station that has been targeted, but that would leave many other petrol stations vulnerable. The claimant's interests would not be sufficiently protected. It would be possible to fashion an injunction that only targeted certain types of petrol station (for example, those on motorways, or those on trunk roads). Again, that would not properly protect the claimant's interests because there would be plenty of other available targets. It is possible to envisage that the risk at some individual Shell petrol stations is very low, but it is

not practical to draft the order in a way that excludes such petrol stations: that would be self-defeating because any excluded station would then be at a heightened risk. I have concluded that the ambit of coverage is justified as being necessary and proportionate to protect the claimant's interests.

49. There is also a clear temporal limit. It will not last for longer than 12 months, without a further order of the court. *Canada Goose*, on one view, might suggest (and at first instance in the cases that led to *Barking and Dagenham* was taken as suggesting) that interim orders should not last for as long as this, that there is an obligation to progress litigation to a final hearing, and that an interim order should only be imposed for so long as is necessary for the case to be progressed to a final hearing. However, the notion that there is a fundamental difference between what can be justified by an interim order, and what can be justified by a final order, was dispelled in *Barking and Dagenham*. In that case, Sir Geoffrey Vos MR made it clear that both interim and final orders should be time-limited, and that it is good practice to provide for a review. Sir Geoffrey Vos MR agreed with the suggestion of Coulson LJ in *Canada Goose* that "persons unknown injunctions against unauthorised encampments should be limited in time, perhaps to one year at a time before a review." I do not consider it appropriate to grant this interim injunction for longer than a year. But I consider that a year can be justified (bearing in mind the right to apply to vary or set aside at any earlier point). The pattern of protest activity is unpredictable. Providing a much shorter time period might mean that the court will be in no better position then than it is now to predict what is necessary to protect the claimant's interests. Moreover, the period of a year will allow the claimant to progress the litigation so that if continued restraint is necessary after the current order expires the court may have the option of making a final order (albeit, as *Barking and Dagenham* shows, that too will have to be time-limited).

(8) Persons unknown are unidentified but could, in principle, be identified and served

50. Five of those who took part in the protests on 28 April 2022 have been identified. For the reasons explained at paragraph 13 above, the claimant does not seek injunctive relief against them. Others who were involved on 28 April 2022, and others who may undertake such activities in the future, have not been identified. In principle, as and when they take part in such protests, they could be identified and could then be personally served with court documents.

51. In the interim, the issue as to how service should take place was the subject of careful consideration by McGowan J and is reflected in the order that was made on 5 May 2022. That provides on the face of the order that the matter would be considered by the court on 13 May 2022. It also provides that the claimant must send a copy of the order to more than 50 email addresses that are linked with the protest groups. That was done. It also provides that a copy should be made available on the claimant's website "shell.co.uk". Again, that was done. The frontpage of the website contains a link, with the text "Notice of injunction", from which the court documents, including the order of 5 May 2022, can be downloaded. The

order also requires that the claimant use all reasonable endeavours to display notices at the entrances of every Shell Petrol station (and also elsewhere within the station) that identify a point of contact from which the order can be requested and identify a website where it can be downloaded. At the time of the hearing, the claimant had done this in respect of well over 50% of Shell petrol stations.

52. As to the future, there is good reason to make slight adjustments to the order that was made by McGowan J. That order was designed only to cover the short period between 5 May 2022 and 13 May 2022. The injunction will (subject to any further order) now remain in place for a longer period of time. It is appropriate therefore to require the claimant not just to take steps to ensure that the notices are displayed at the Shell petrol stations, but also now to take steps to ensure that those notices remain in place. On the other hand, the order made by McGowan J required a degree of saturation (notices on every entrance to the petrol station, and on every upright steel structure forming part of the canopy infrastructure, and every entrance door to every retail establishment at the petrol station). That was appropriate to ensure initial notification of the existence of the order, but it is logistically difficult to maintain in the long term. It remains necessary for there to be clear notices at every Shell petrol station that draw attention to the injunction, but I do not consider that it remains necessary for these to be displayed on every single upright steel structure. It is also possible to make the order a little more flexible. That will ensure that notices are clearly visible but that the precise mechanism by which this is done can be tailored to the circumstances of individual petrol stations. I will adjust the order accordingly. This means that it is practically unlikely that a defendant could embark on conduct that would be in breach of the injunction without knowing of its existence.

53. By these means I am satisfied that effective service on the defendants can continue to take place.

(9) Persons unknown are identified by reference to their conduct

54. The persons unknown are described in the claim form, and in the injunction, in the way set out in the heading to this judgment. That description is in clear and simple language and relates to their conduct. It is usually desirable that such descriptions should, so far as possible, be based on objective conduct rather than subjective intention. The description that has been used does that. There is an element of subjective intention ("with the intention of disrupting the sale or supply of fuel to or from the said station") but (as with the terms of the injunction) that is unavoidable because of the nature of the tort of conspiracy to injure.

(10) Is the injunction necessary for and proportionate to the need to protect the claimant's rights?

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

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

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

58. There is a rational connection between the terms of the injunction and the aim that it seeks to achieve. As explained at paragraphs 43-44 above, the terms are constructed so as only to prohibit activity that would amount to the tort of conspiracy to injure. That also means that the terms are no more intrusive than necessary to achieve the aim of the injunction. For the reasons given above (at paragraphs 47-49) the territorial and temporal provisions within the injunction are no more than is necessary to achieve its aim.

59. The injunction also strikes a fair balance between the important rights of the defendants to assembly and expression, and the rights of the claimant. It protects the latter so far as it is necessary to do so, but no further. It does not remove the rights of the defendants to assemble and express their opposition to the fossil fuel industry. It does not prevent them from

expressing their views (including in a way that is noisy and/or otherwise disruptive) in close proximity to places where that industry takes place (including Shell petrol stations). It does not therefore prevent activities that are "at the core of these Convention rights" or which form "the essence" of such rights – see *DPP v Cuciurean* [2022] EWHC 736 *per* Lord Burnet of Maldon CJ at [31], [36] and [46]. Although the defendants' activities come within the scope of articles 10 and 11, they are right at the margin of what is protected.

60. All that is prohibited is specified deliberate tortious conduct (in one sense deliberate doubly tortious conduct, because of the nature of conspiracy to injure) that is carried out as part of an agreement and with the intention of harming the claimant's lawful business interests. It would not strike a fair balance between the competing rights simply to leave matters to the police to enforce the criminal law. Such enforcement could only, practicably, take place after the event, meaning that loss to the claimant is inevitable. Moreover, some of the activities that the injunction seeks to restrain are not breaches of the criminal law and could not be enforced by the exercise of conventional policing functions.

61. In *Cuadrilla* Leggatt LJ said (at [94]-[95]):

> "... the disruption caused was not a side-effect of protest held in a public place but was an intended aim of the protest... this is an important distinction. ...intentional disruption of activities of others is not "at the core" of the freedom protected by article 11 of the Convention .... one reason for this [is] that the essence of the rights of peaceful assembly and freedom of expression is the opportunity to persuade others... ...persuasion is very different from attempting (through physical obstruction or similar conduct) to *compel* others to act in a way you desire.
>
> Where... individuals not only resort to compulsion to try to stop lawful activities of others of which they disapprove, but do so in deliberate defiance of a court order, they have no reason to expect their conscientious motives will insulate them from the sanction of imprisonment." [original emphasis]

62. The context was different (the case was concerned with an appeal against an order for committal), but the same essential distinction applies to the fair balance question. Here, the injunction restrains protests which have as their aim (rather than as a side-effect) intentional unlawful interference with the claimant's activities.

(11) Notification of defendants

63. Section 12(2) of the Human Rights Act 1998 (see paragraph 24 above) requires that the claimant has taken all practical steps to notify the defendants of its application, or else that there are compelling reasons not to notify the defendants.

64. The identity of the defendants is unknown. It was thus impossible to serve them personally with the application. As explained at paragraph 51 above, McGowan J made extensive directions in respect of the service of the injunction (which contains details of the return date).

65. By these means, I am satisfied that the claimant has taken all practical steps to notify the defendants of its application (and I note that Mrs Friel was aware of the application, because she attended the hearing).

(12) Does the order restrain "publication"?

66. The injunction affects the exercise of the Convention right to freedom of expression. Section 12(3) of the Human Rights Act 1998 (see paragraph 24 above) provides that "[n]o 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."

67. Nothing in the injunction explicitly restrains publication of anything. Nor does it have that effect. The defendants can publish anything they wish without breaching the injunction. The activities that the injunction restrains do not include publication. It does not, for example, restrain the publication of photographs and videos of the protests that have already taken place. Nor does it prevent anyone from, for example, chanting anything, or from displaying any message on any placard or from placing any material on any website or social media site.

68. Lord Nicholls explained the origin of section 12(3) in *Cream Holdings Limited v Banerjee* [2004] UKHL 44 [2005] 1 AC 253 (at [15]). There was concern that the incorporation of article 8 ECHR into domestic law might result in the courts readily granting interim applications to restrain the publication by newspapers (or others) of material that interferes with privacy rights. Parliament enacted section 12(3) to address that concern, by setting a high threshold for the grant of an interim injunction in such a case. It codifies the prior restraint principle that previously operated at common law. The policy motivation that gave rise to section 12(3) has no application here.

69. The word "publication" does not have an unduly narrow meaning so as to apply only to commercial publications: "publication does not mean commercial publication, but communication to a reader or hearer other than the claimant" – *Lachaux v Independent Print Limited* [2019] UKSC 27 [2020] AC 612 *per* Lord Sumption at [18]. Lord Sumption's observation was made in the context of defamation, but Parliament legislated against this well-established backdrop. Section 12(3) should be applied accordingly so that "publication" covers "any form of communication": *Birmingham City Council v Asfar* [2019] EWHC 1560 (QB) *per* Warby J at [60].

70. The meaning set out by Lord Sumption in *Lachaux* is sufficient to achieve the underlying policy intention. There is therefore no good reason for giving the word "publication" an

artificially broad meaning so as to cover (for example) demonstrative acts of trespass in the course of a protest. Such acts are intended to publicise the protestor's views, but they do not amount to a publication.

71. Further, the wording of section 12 itself indicates that the word "publication" has a narrower reach than the term "freedom of expression". That is because the term "freedom of expression" is expressly used in the side-heading to section 12, and in section 12(1), and is used (by reference ("no such relief")) in section 12(2) and section 12(3). The term "publication" is then used in section 12(3) to signify one form of expression. If Parliament had intended section 12(3) to apply to all forms of expression, then there would have been no need to introduce the word "publication".

72. I therefore respectfully agree with the observation of Lavender J in *National Highways Limited v Persons Unknown* [2021] EWHC 3081 (QB) at [41] that section 12(3) is "not applicable" in this context.

73. It is, though, necessary to address the decisions in *Ineos Upstream v Persons Unknown* [2017] EWHC 2945. That case concerned an injunction that appears to have been similar in scope to the injunction in the present case. At first instance, Morgan J held (a) that section 12(3) applied (at [86]) and (b) the statutory test was satisfied because if the court accepted the evidence put forward by the claimants, then it would be likely, at trial, to grant a final injunction (at [98] and [105]). As to the applicability of section 12(3), Morgan J found the injunction that he was considering might affect the exercise of the right to freedom of expression. That was plainly correct, because the injunction restrained activities that were intended to express support for a particular cause. It does not, however, necessarily follow that section 12(3) is engaged (because, as above, "publication" is not the same as "expression"). There does not appear to have been any argument on that point – rather the focus was on the question of whether there was an interference with the right to freedom of expression. To the extent that Morgan J in *Ineos* and Lavender J in *National Highways* reached different conclusions about the applicability of section 12(3) in this context, I respectfully adopt the latter's approach for the reasons I have given.

74. On appeal ([2019] EWCA Civ 515 [2019] 4 WLR 100), there was no challenge to the holding of Morgan J that section 12(3) applies. The Court of Appeal did not therefore consider or rule on that question. It did not need to do so because it was not in issue. The only issue in relation to section 12(3) was whether (on the assumed basis that it applied) the judge was wrong to approach the statutory test without subjecting the claimants' evidence to critical scrutiny. In that respect, the court accepted the "submissions of principle" and remitted the case for the judge to reconsider "whether interim relief should be granted in the light of section 12(3) HRA."

75. The Court of Appeal decision in *Ineos* is authority for the approach that should be taken where section 12(3) applies, but (because it was assumed rather than determined that section

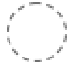
12(3) applied) I do not consider that it is authority that section 12(3) applies in the circumstances of the present case: *Re Hetherington* [1990] Ch 1 *per* Sir Nicholas Lord Browne Wilkinson VC at 10, *R (Khadim) v Brent London Borough Council Housing Benefit Review Board* [2001] QB 955 *per* Buxton LJ at [33] and [38].

76. *Ineos* does not therefore determine that section 12(3) applies to a case such as the present where there is no question of restraining the defendants from publishing anything. *Ineos* does not mandate a finding in this case that section 12(3) applies. I have concluded that section 12(3) does not apply. If I am wrong, then I have, anyway, found that the claimant is likely to succeed at a final trial (see paragraph 32 above).

Outcome

77. The claimant succeeds in securing the continuation of the order made by McGowan J so as to restrain, for a period of up to a year, at any Shell petrol station, the specified acts of the defendants (set out at paragraph 20 above) that amount to a conspiracy to injure the claimant.

**4358* Shell UK Ltd v Persons Unknown Shell International Petroleum Ltd v Persons Unknown Shell UK Oil Products Ltd v Persons Unknown

 No Substantial Judicial Treatment

Court
King's Bench Division

Judgment Date
23 May 2023

Report Citation
[2023] EWHC 1229 (KB)
[2023] 1 W.L.R. 4358

King's Bench Division

Hill J

2023 April 25, 26; May 23

Injunction— Interim—Persons unknown—Claimants applying to continue interim injunctions against persons unknown—Non-party applying for permission to set aside or vary injunctions without being joined as defendant—Whether permission to be granted—Whether non-party "directly affected" by injunctions—Whether court retaining residual discretion to refuse permission— CPR r 40.9

The claimants, who were all companies within a group of oil and gas companies, obtained interim injunctions against persons unknown by which they sought to restrain unlawful protests by environmental activists at an oil refinery, an office and various petrol stations. Each injunction included a provision that anyone affected could apply to vary or discharge the injunction at any time, providing their name and address and applying to be joined as a defendant. The claimants applied for those injunctions to be continued. One day before the hearing of that application, B, who was not a party to the proceedings but was a member of one of the key protest groups, applied to be heard by the court on the application while making it clear that she did not wish to be joined as a defendant. In particular she contended that this could be done by the court formally recognising her under CPR r 40.9 [1] [2] , which permitted a person who was not a party but who was "directly affected" by an order to apply to have the order set aside or varied.

On B's application to be heard and the claimants' applications to continue the interim injunctions—

Held , allowing the applications, that a non-party would have the right to be heard by the court pursuant to CPR r 40.9 provided they passed through a "gateway" by satisfying the court that they (i) were "directly affected" by the order in question and (ii) had a good point to raise; that in order for a non-party to be "directly affected" by an order for the purposes of rule 40.9 , it was necessary that some interest capable of recognition by the law was, or would be, materially and adversely affected by the order; that an order could directly affect a person in many ways, including by affecting the person financially, by affecting the person's property rights or possession of property, by affecting the person's investments or pension, by affecting

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the person's ability to travel or to use a public highway or by affecting the person's ability to work or enjoy private life or social life or to obtain work; that, given the draconian nature of injunctions against persons unknown and the fact that they might be wide in geographical and/or temporal scope, there should be a low threshold for interested persons to be able to take part pursuant to rule 40.9 ; that, accordingly, an application under rule 40.9 should not be approached by asking whether the applicant had a real prospect of success in showing that the order should be set aside or varied; that, further, joinder as a defendant was not a prerequisite to making an application under rule 40.9 to set aside or vary an injunction, notwithstanding that the injunction ***4359*** contained a provision to the effect that any party seeking to vary or discharge the injunction had to apply to be joined as a defendant; that, moreover, the court had no discretion as to whether to permit a person to apply where both elements of the rule 40.9 "gateway" were satisfied; that, in the present case, B was directly affected by the injunctions, since they adversely affected her rights under articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms and if she breached any of them this would affect her financial interests and expose her to the risk of a prison sentence, and had good points to raise in relation to all three injunctions; that, therefore, B should be permitted to apply to set aside or vary the three injunctions under rule 40.9 ; but that, since the claimants had shown that they were more likely than not to succeed at trial in establishing their claims, that damages would not be an adequate remedy while a cross-undertaking in damages would adequately protect the defendants, and that there was a sufficiently real and imminent risk of damage, the three injunctions would be continued, subject to amendment to ensure that their terms were sufficiently clear and precise and had clear geographical and temporal limits (post, paras 52–65, 68–69, 73–74, 76, 99, 115, 133–140, 146–148, 154, 159, 199, 220).

Abdelmamoud v The Egyptian Association in Great Britain Ltd [2018] Bus LR 1354 , CA, *Canada Goose UK Retail Ltd v Persons Unknown [2020] 1 WLR 2802* , CA, *National Highways Ltd v Persons Unknown [2021] EWHC 3081 (QB)* , *Esso Petroleum Co Ltd v Breen [2022] EWHC 2600 (KB)* and *Barking and Dagenham London Borough Council v Persons Unknown [2023] QB 295* , CA applied.

The following cases are referred to in the judgment:

Abdelmamoud v The Egyptian Association in Great Britain Ltd [2015] EWHC 1013 (Ch); [2015] Bus LR 928 ; *[2018] EWCA Civ 879; [2018] Bus LR 1354* , CA
Ageas Insurance Ltd v Stoodley [2019] Lloyd's Rep IR 1
Allergan Inc v Sauflon Pharmaceuticals Ltd (2000) 23 IPD 23030
American Cyanamid Co v Ethicon Ltd [1975] AC 396; [1975] 2 WLR 316; [1975] 1 All ER 504 , HL(E)
Attorney General's Reference (No 1 of 2022) [2022] EWCA Crim 1259; [2023] KB 37; [2023] 2 WLR 651; [2023] 1 All ER 549 , CA
Barking and Dagenham London Borough Council v Persons Unknown [2022] EWCA Civ 13; [2023] QB 295; [2022] 2 WLR 946; [2022] 4 All ER 51 , CA
Birmingham City Council v Afsar [2019] EWHC 1560 (QB); [2019] ELR 373
Canada Goose UK Retail Ltd v Persons Unknown [2020] EWCA Civ 303; [2020] 1 WLR 2802; [2020] 4 All ER 575 , CA
City of London Corpn v Samede [2012] EWCA Civ 160; [2012] PTSR 1624; [2012] 2 All ER 1039 , CA
Cuadrilla Bowland Ltd v Persons Unknown [2020] EWCA Civ 9; [2020] 4 WLR 29 , CA
Director of Public Prosecutions v Cuciurean [2022] EWHC 736 (Admin); [2022] QB 888; [2022] 3 WLR 446; [2022] 4 All ER 1043 , DC
Director of Public Prosecutions v Ziegler [2021] UKSC 23; [2022] AC 408; [2021] 3 WLR 179; [2021] 4 All ER 985 , SC(E)
EDO MBM Technology Ltd v Campaign to Smash EDO [2005] EWHC 837 (QB)
Esso Petroleum Co Ltd v Breen [2022] EWHC 2600 (KB)
Esso Petroleum Co Ltd v Persons Unknown [2022] EWHC 1477 (QB)
Frankson v Home Office [2003] EWCA Civ 655; [2003] 1 WLR 1952 , CA
High Speed Two (HS2) Ltd v Persons Unknown [2022] EWHC 2360 (KB)
Ineos Upstream Ltd v Persons Unknown [2017] EWHC 2945 (Ch) ; *[2019] EWCA Civ 515; [2019] 4 WLR 100; [2019] 4 All ER 699* , CA
National Highways Ltd v Persons Unknown [2021] EWHC 3081 (QB) ***4360***
National Highways Ltd v Persons Unknown [2022] EWHC 1105 (QB)
PeCe Beheer BV v Alevere Ltd [2016] EWHC 434 (IPEC)
Secretary of State for Transport v Cuciurean [2020] EWHC 2614 (Ch)

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Shell UK Oil Products Ltd v Persons Unknown [2022] EWHC 1215 (QB)
Tabernacle v Secretary of State for Defence [2009] EWCA Civ 23 ; The Times, 25 February 2009, CA
Transport for London v Lee [2022] EWHC 3102 (KB)
Transport for London v Lee [2023] EWHC 402 (KB)
Vastint Leeds BV v Persons Unknown [2018] EWHC 2456 (Ch); [2019] 4 WLR 2
Vural v Turkey (Application No 9540/07) (unreported) 21 October 2014, ECtHR

The following additional cases were cited in argument or referred to in the skeleton arguments:

Bromley London Borough Council v Persons Unknown [2020] EWCA Civ 12; [2020] PTSR 1043; [2020] 4 All ER 114 , CA
Cameron v Liverpool Victoria Insurance Co Ltd [2019] UKSC 6; [2019] 1 WLR 1471; [2019] 3 All ER 1 , SC(E)
Canada Goose UK Retail Ltd v Persons Unknown [2019] EWHC 2459 (QB); [2020] 1 WLR 417
Christian Democratic People's Party v Moldova (Application No 28793/02) (2006) 45 EHRR 13 , ECtHR
Director of Public Prosecutions v Jones [1999] 2 AC 240; [1999] 2 WLR 625; [1999] 2 All ER 257 , HL(E)
Director of Public Prosecutions v Ziegler [2019] EWHC 71 (Admin); [2020] QB 253; [2019] 2 WLR 1451 , DC
Elliott v Islington London Borough Council [2012] EWCA Civ 56; [2012] 7 EG 90 (CS) , CA
Harper v G N Haden & Sons Ltd [1933] Ch 298 , CA
Ineos Upstream Ltd v Persons Unknown [2017] EWHC 3427 (Ch)
JSC BTA Bank v Ablyazov (No 14) [2018] UKSC 19; [2020] AC 727; [2018] 2 WLR 1125; [2018] 3 All ER 293 , SC(E)
Kerner v WX [2015] EWHC 1247 (QB)
Marshall v Blackpool Corpn [1935] AC 16 , HL(E)
Moosun v HSBC Bank plc (trading as First Direct) [2015] EWHC 3308 (Ch)
OBG Ltd v Allan [2007] UKHL 21; [2008] AC 1; [2007] 2 WLR 920; [2007] Bus LR 1600; [2007] 4 All ER 545 , HL(E)
R v Rimmington [2005] UKHL 63; [2006] 1 AC 459; [2005] 3 WLR 982; [2006] 2 All ER 257 , HL(E)
R v Secretary of State for the Home Department, Ex p Salem [1999] QB 805; [1999] 2 WLR 1 ; *[1999] 2 All ER 42* , CA
R (Laporte) v Chief Constable of Gloucestershire Constabulary [2006] UKHL 55; [2007] 2 AC 105; [2007] 2 WLR 46; [2007] 2 All ER 529 , HL(E)
RWE Npower plc v Carrol [2007] EWHC 947 (QB)
Racing Partnership Ltd v Done Bros (Cash Betting) Ltd [2020] EWCA Civ 1300; [2021] Ch 233; [2021] 2 WLR 469; [2021] 3 All ER 739 , CA
Revenue and Customs Comrs v Total Network SL [2008] UKHL 19; [2008] AC 1174; [2008] 2 WLR 711; [2008] 2 All ER 413 , HL(E)
Sáska v Hungary (Application No 58050/08) (unreported) 27 November 2012, ECtHR
Secretary of State for the Environment, Food and Rural Affairs v Meier [2008] EWCA Civ 903; [2009] 1 WLR 828; [2009] PTSR 357; [2009] 1 All ER 614 , CA
UK Oil and Gas plc (formerly UK Oil and Gas Investments plc) v Persons Unknown [2021] EWHC 599 (Ch) ***4361**

APPLICATIONS

Shell UK Ltd v Persons Unknown

By a claim form the claimant, Shell UK Ltd, the freehold owner of the Shell Haven Oil Refinery ("the Haven"), a substantial fuel storage and distribution installation, applied for an injunction against persons unknown entering or remaining on the claimant's refinery site, following protests by persons who sought, inter alia, to raise public awareness of the climate change damage caused by fossil fuels and to put pressure on the Government to halt new investment in the fossil fuel industry and immediately to halt all future licensing and consents for the exploration, development and production of fossil fuels in the United Kingdom. The grounds of claim were that the actions of the protesters amounted to, inter alia: (i) trespass to the claimant's land; (ii) public nuisance in the form of obstruction of the highway occasioning particular damage; (iii) private nuisance in the form of unlawful interference with the claimant's right of access to its land via the highway; and (iv) private nuisance in the form of substantial interference with the exercise by the claimant of a private right of way.

On 5 May 2022 Bennathan J granted an interim injunction expiring on 2 May 2023 against persons unknown in respect of the Haven, ordering that the defendants were not to (i) enter or remain upon any part of the Haven without the consent of the claimant; (ii) block access to any of the gateways to the Haven, the locations of which were identified marked blue on plans appended to the order; or (iii) cause damage to any part of the Haven whether by (a) affixing themselves, or any object, or thing, to any part of the Haven, or to any other person or object or thing on or at the Haven, (b) erecting any structure in, on or against the Haven, (c) spraying, painting, pouring, sticking or writing any substance on or inside any part of the Haven or (d) otherwise.

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The injunction further provided that a defendant was not to do any of those actions by means of another person acting on their behalf or acting on their instructions or by another person acting with their encouragement.

By an application notice dated 30 March 2023 the claimant sought an extension of that injunction for a maximum of one year and various other orders. The applications were listed to be heard on 25 and 26 April 2023 together with those made by two other related companies in similar proceedings. During the morning of 24 April 2023, Jessica Branch, a member of one of the key protest groups, Extinction Rebellion, served a witness statement and lengthy skeleton argument asking to be heard at the hearing, by the exercise of the court's inherent power or by it formally recognising her under CPR r 40.9 . The claimants objected to her being heard given the lateness of her documentation and for other reasons. The issues which required determination were: (i) whether to permit Ms Branch, a non-party, to make submissions, and, if so, on what basis and to what extent; (ii) whether to extend the three injunctions for up to a further year in the manner sought by the claimants; and (iii) whether to grant the claimants permission to serve any order and ancillary documents by alternative means.

The facts are stated in the judgment, post, paras 1, 3, 4, 10–14, 22, 27, 30. ***4362**

Shell International *Petroleum Ltd v Persons Unknown*

By a claim form the claimant, Shell International Petroleum Ltd, the freehold owner of the Shell Centre Tower ("the Tower"), a large office building, applied for an injunction against persons unknown entering or remaining on the claimant's site, following protests by persons who sought, inter alia, to raise public awareness of the climate change damage caused by fossil fuels and to put pressure on the Government to halt new investment in the fossil fuel industry and immediately to halt all future licensing and consents for the exploration, development and production of fossil fuels in the United Kingdom. The grounds of claim were that the actions of the protesters amounted to, inter alia: (i) trespass to the claimant's land; (ii) public nuisance in the form of obstruction of the highway occasioning particular damage; (iii) private nuisance in the form of unlawful interference with the claimant's right of access to its land via the highway; and (iv) private nuisance in the form of substantial interference with the exercise by the claimant of a private right of way.

On 5 May 2022 Bennathan J granted the claimant an interim injunction expiring on 2 May 2023 against persons unknown in respect of the Tower, ordering that the defendants were not to (i) enter or remain upon any part of the Tower without the consent of the claimant; (ii) block access to any of the gateways to the Tower, the locations of which were identified marked blue on plans appended to the order; or (iii) cause damage to any part of the Tower whether by (a) affixing themselves, or any object, or thing, to any part of the Tower, or to any other person or object or thing on or at the Tower, (b) erecting any structure in, on or against the Tower, (c) spraying, painting, pouring, sticking or writing any substance on or inside any part of the Tower or (d) otherwise. The injunction further provided that a defendant was not to do any of those actions by means of another person acting on their behalf or acting on their instructions or by another person acting with their encouragement.

By an application notice dated 30 March 2023 the claimant sought an extension of that injunction for a maximum of one year and various other orders. The applications were listed to be heard over 25 and 26 April 2023 together with those made by two other related companies in similar proceedings. During the morning of 24 April 2023, Jessica Branch, a member of one of the key protest groups, Extinction Rebellion, served a witness statement and lengthy skeleton argument asking to be heard at the hearing, by the exercise of the court's inherent power or by it formally recognising her under CPR r 40.9 . The claimants objected to her being heard at the hearing given the lateness of her documentation and for other reasons. The issues which required determination were: (i) whether to permit Ms Branch, a non-party, to make submissions, and, if so, on what basis and to what extent; (ii) whether to extend the three injunctions for up to a further year in the manner sought by the claimants; and (iii) whether to grant the claimants permission to serve any order and ancillary documents by alternative means.

The facts are stated in the judgment, post, paras 1, 3, 4, 10, 11, 15–17, 22, 23, 27, 31.

Shell UK Oil Products Ltd v Persons Unknown

By a claim form the claimant, Shell UK Oil Products Ltd, which supplied Shell petrol stations in England and Wales, applied for an injunction against ***4363** persons unknown to restrain them from obstructing access to or damaging petrol stations using its brand, by unlawful means and in combination with others, following protests by persons who sought, inter alia, to raise public awareness of the climate change damage caused by fossil fuels and to put pressure on the Government to halt new

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investment in the fossil fuel industry and immediately to halt all future licensing and consents for the exploration, development and production of fossil fuels in the United Kingdom.

On 17 May 2022 Johnson J granted the claimant an interim injunction, expiring on 12 May 2023, against persons unknown in respect of Shell petrol stations to restrain unlawful protests by environmental activists. As amended on 20 May 2022, the injunction ordered that the defendants were not to do any of the acts listed in paragraph 3 of the order in express or implied agreement with any other person, and with the intention of disrupting the sale or supply of fuel to or from a Shell petrol station, those acts being: (i) blocking or impeding access to any pedestrian or vehicular entrance to a Shell petrol station or to a building within the Shell petrol station; (ii) causing damage to any part of a Shell petrol station or to any equipment or infrastructure (including but not limited to fuel pumps) upon it; (iii) operating or disabling any switch or other device in or on a Shell petrol station so as to interrupt the supply of fuel from that Shell petrol station, or from one of its fuel pumps, or so as to prevent the emergency interruption of the supply of fuel at the Shell petrol station; (iv) affixing or locking themselves, or any object or person, to any part of a Shell petrol station, or to any other person or object on or in a Shell petrol station; (v) erecting any structure in, on or against any part of a Shell petrol station; (vi) spraying, painting, pouring, depositing or writing any substance on to any part of a Shell petrol station; (vii) encouraging or assisting any other person do any of the acts referred to in sub-paragraphs (i) to (vi). Paragraph 4 then provided that a defendant was not to do any of those acts by means of another person acting on their behalf or acting on their instructions or by another person acting with their encouragement.

By an application notice dated 30 March 2023 the claimant sought an extension of the interim injunction for a maximum of one year and various other orders. The claimant also sought permission under CPR rr 19.4(1) and 17.1(3) to amend the description of the persons unknown defendant to remove the word "environmental" from "environmental protest campaigns". The applications were listed to be heard over 25 and 26 April 2023 together with those made by two other related companies in similar proceedings. During the morning of 24 April 2023, Jessica Branch, a member of one of the key protest groups, Extinction Rebellion served a witness statement and lengthy skeleton argument asking to be heard at the hearing, by the exercise of the court's inherent power or by it formally recognising her under CPR r 40.9 . The claimants objected to her being heard at the hearing given the lateness of her documentation and for other reasons. The issues which required determination were: (i) whether to permit Ms Branch, a non-party, to make submissions, and, if so, on what basis and to what extent; (ii) whether to grant the claimant in the petrol stations claim permission to amend the description of the persons unknown defendants; (iii) whether to extend the three injunctions for up to a further year in the manner sought by the claimants; (iv) whether to grant the claimants permission to serve any order and ancillary documents by alternative means; and (v) whether to grant ***4364** the claimant in the petrol stations claim its application for a third party disclosure order against the Commissioner of Police of the Metropolis.

The facts are stated in the judgment, post, paras 2–4, 10, 11, 18–21, 24–27, 32–34.

Myriam Stacey KC and *Joel Semakula* (instructed by *Eversheds Sutherland (International) LLP*) for the claimants.

Stephen Simblet KC and *Owen Greenhall* (instructed by *Hodge Jones & Allen LLP*) for Ms Branch.

The court took time for consideration.

23 May 2023. HILL J

handed down the following judgment.

Introduction

1. The claimants in the first two of these claims are Shell UK Ltd and Shell International Petroleum Ltd. They are, respectively, the freehold owners of (i) the Shell Haven Oil Refinery ("Haven"), a substantial fuel storage and distribution installation; and (ii) the Shell Centre Tower ("Tower"), a large office building. On 5 May 2022 Bennathan J granted these two claimants interim injunctions against Persons Unknown in respect of the Haven and the Tower.

2. The claimant in the third claim is Shell UK Oil Products Ltd. It markets and sells fuels to retail customers in England and Wales through a network of Shell-branded petrol stations, and in some cases has an interest in the land where the Shell petrol station is located. On 20 May 2022 Johnson J granted this claimant an interim injunction against Persons Unknown in respect of Shell petrol stations.

3. All three injunctions seek to restrain unlawful protests by environmental activists. The Haven and Tower injunctions were due to expire on 2 May 2023, with the petrol stations injunction expiring on 12 May 2023. By application notices dated 30 March 2023 Shell sought extensions of all three injunctions for a maximum of one year and various other orders. The applications were listed together over 25 and 26 April 2023.

4. During the morning of 24 April 2023, Jessica Branch, a member of one of the key protest groups, Extinction Rebellion ("XR"), served a witness statement and lengthy skeleton argument asking to be heard at the hearing. The claimants objected to her being heard at the hearing given the lateness of her documentation and for other reasons. It was not possible to resolve the issue of Ms Branch's participation easily at the outset of the hearing. Mr Stephen Simblet KC, on her behalf, indicated that she was keen to avoid incurring further costs by being required to return on a further day. I therefore heard all his submissions on a provisional basis.

5. The issues that required determination were as follows:

(1) Whether to permit Ms Branch to make submissions, and, if so, on what basis and to what extent;
(2) Whether to grant the claimant in the petrol stations claim permission to amend the description of the persons unknown defendants;
(3) Whether to extend the three injunctions for up to a further year in the manner sought by the claimants; ***4365**
(4) Whether to grant the claimants permission to serve any order and ancillary documents by alternative means; and
(5) Whether to grant the claimant in the petrol stations claim its application for a third party disclosure order against the Commissioner of Police of the Metropolis ("the Commissioner").

6. There were only two working days between the end of the hearing and the expiry of the Haven and Tower injunctions; and only three working days until the last date on which Shell could begin complying with the extensive service requirements in respect of any further injunction covering the petrol stations.

7. In those circumstances, the parties raised the possibility of granting a short extension to the injunctions to permit proper consideration of the arguments raised, including certain novel legal points relating to CPR r 40.9 advanced by Ms Myriam Stacey KC. On 27 April 2023 I indicated to the parties that I considered that this course was appropriate. On 28 April 2023 I made orders with the effect of extending the injunctions for one calendar month, until 25 May 2023. I also made the third party disclosure order sought.

8. This judgment gives my decisions and reasons on issues (1)–(4) and my reasons for making the third party disclosure order referred to under issue (5).

9. Regrettably, despite the fact that their submissions invited me to uphold the detail of Bennathan J's reasoning on the Haven and Tower claims, and despite the passage of over a year since his judgment, no transcript of his judgment has been obtained by the claimants. It was therefore necessary to work from a note of his judgment taken by the claimants' former solicitor. Johnson J's judgment can be found at *Shell UK Oil Products Ltd v Persons Unknown [2022] EWHC 1215 (QB)* .

The background to the May 2022 injunctions

10. The background to the obtaining of the three injunctions was summarised in a witness statement from Christopher Prichard-Gamble, the country security manager for the Shell group of companies' UK assets, dated 30 March 2023.

11. He explained that in early 2022 Shell became aware that XR, a campaign group formed in October 2018, which seeks to affect Government policy on climate change through civil disobedience, had published guidance about its intention to take disruptive action to end the fossil fuel economy. It called upon members of the public to support its aims. Several other groups were associated with XR's stance, including Just Stop Oil ("JSO"), Youth Climate Swarm ("YCS") and Scientist Rebellion. Matters came to a head in April and May 2022 when various activities were undertaken with, what Mr Prichard-Gamble described as, the "apparent aim of causing maximum disruption to Shell's lawful activities and thereby generating publicity for the protest movement".

Haven

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12. Bennathan J was provided with witness statements from Ian Brown, distribution operations manager, dated 13 and 22 April 2022, in respect of the Haven. The protest activities relating to the Haven which Mr Brown **4366* described included (i) a six-hour incident on 3 April 2022, which saw a group of protesters blocking the main access road to the Haven, boarding tankers and blocking a tanker, requiring police attendance; (ii) protesters scoping and attempting to access the jetty at Haven; and (iii) similar incidents at fuel-related sites geographically proximate to the Haven, causing concern that the Haven could be an imminent target.

13. In Mr Brown's second witness statement, provided after the grant of the ex parte injunction by Sweeting J on 15 April 2022, he indicated that there had been no further protests targeted at the Haven. However, he said that there had been other protests in the vicinity and indications of future action.

14. Mr Brown explained that his main concerns related to the fact that the Haven site is used for the storage and distribution of highly flammable hazardous products. If unauthorised access is gained, this could lead to a leak causing a fire or explosion and very significant danger. Unauthorised access to the jetty created an additional risk of damage which could lead to significant release of hydrocarbons into the Thames Estuary. He had concerns over the personal safety of staff/contractors and the protesters themselves (who had, for example, climbed on to moving vehicles) as well as the security of energy supply and Shell's assets.

Tower

15. Bennathan J was provided with witness statements from Keith Garwood, asset protection manager, dated 14 and 22 April 2022, in respect of this claim. The matters he referred to included (i) an occasion on 6 April 2022, when a paint-like substance was thrown, leaving large black marks and splashes on the walls and above one of the staff entrances to the Tower; (ii) a significant incident, on 13 April 2022, when around 500 protesters converged on the Tower, banging drums and displaying banners stating, “Jump Ship” and “Shell=Death” directed at Shell staff, with several gluing themselves to the reception area of the Tower and another Shell office nearby; (iii) an incident on 15 April 2022 when around 30 protesters holding banners obstructed the road where the Tower is located; and (iv) an incident on 20 April 2022 when 11 protesters held banners, used a megaphone and ignited smoke flares. He also described protesters having graffitied and stuck stickers on the outside of the Tower with the XR logo and how, on several occasions, it was necessary to place the Tower in “lockdown”.

16. Having reviewed the evidence from Mr Brown and Mr Garwood, Bennathan J emphasised that there was “no account of any violence against any person” and that “[t]he protests are loud, no doubt upsetting to some and potentially disruptive, but are peaceful”.

17. Mr Garwood expressed his concerns that protesters would continue to enter, vandalise or damage the Tower, intimidate staff/visitors and block the entrances and exits to the Tower. The latter was a health and safety risk, in particular, because it restricted access for emergency vehicles and sometimes meant that members of the public had to walk on the road.

The petrol stations

18. Johnson J was provided with witness statements from Benjamin Austin, the claimant's health, safety and security manager, dated 3 and **4367* 10 May 2022. In his judgment, he explained that, on 28 April 2022, there were protests at two petrol stations (one of which was a Shell petrol station) on the M25, at Clacket Lane and Cobham. Entrances to the forecourts were blocked. The display screens of fuel pumps were smashed with hammers and obscured with spray paint. The kiosks were “sabotaged … to stop the flow of petrol”. Protesters variously glued themselves to the floor, a fuel pump, the roof of a fuel tanker or each other. A total of 55 fuel pumps were damaged (including 35 out of 36 pumps at Cobham) to the extent that they were not safe for use, and the whole forecourt had to be closed: paras 12–13. Johnson J also referred to wider protests in April/early May 2022 at oil depots in Warwickshire and Glasgow: paras 14–15.

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

20. He summarised the various risks that arise from these types of protest, in addition to the physical damage and the direct financial impact on the claimant (from lost sales), as follows:

> "18. … Petrol is highly flammable. Ignition can occur not just where an ignition source is brought into contact with the fuel itself, but also where there is a spark (for example from static electricity or the use of a device powered by electricity) in the vicinity of invisible vapour in the surrounding atmosphere. Such vapour does not disperse easily and can travel long distances. There is therefore close regulation …
>
> "19. The use of mobile telephones on the forecourt (outside a vehicle) is prohibited for that reason … The evidence shows that at the protests on 28 April 2022 protesters used mobile phones on the forecourts to photograph and film their activities. Further, as regards the use of hammers to damage pumps, Mr Austin says: 'Breaking the pump screens with any implement could cause a spark and in turn potentially harm anyone in the vicinity. The severity of any vapour cloud ignition could be catastrophic and cause multiple fatalities. Unfortunately, Shell Group has tragically lost several service station employees in Pakistan in the last year when vapour clouds have been ignited during routine operations.' I was not shown any positive evidence as to the risks posed by spray paint, glue or other solvents in the vicinity of fuel or fuel vapour, but I was told that this, too, was a potential cause for concern."

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

The terms of the injunctions

22. The Haven injunction provides that the defendants must not (i) enter or remain upon any part of the Haven without the consent of the claimant; (ii) block access to any of the gateways to the Haven, the locations of which are identified marked blue on plans appended to the order; or (iii) cause ***4368*** damage to any part of the Haven whether by (a) affixing themselves, or any object, or thing, to any part of the Haven, or to any other person or object or thing on or at the Haven; (b) erecting any structure in, on or against the Haven; (c) spraying, painting, pouring, sticking or writing with any substance on or inside any part of the Haven; or (d) otherwise. The injunction further provides that a defendant must not do any of these actions by means of another person acting on his/her/their behalf, or acting on his/her/their instructions, or by another person acting with his/her/their encouragement.

23. The Tower injunction is in materially similar terms.

24. The petrol stations injunction provides that:

> "2. … the defendants must not do any of the acts listed in paragraph 3 of this Order in express or implied agreement with any other person, and with the intention of disrupting the sale or supply of fuel to or from a Shell Petrol Station.
>
> "3. The acts referred to in paragraph 2 of this order are:
>
> > "3.1. blocking or impeding access to any pedestrian or vehicular entrance to a Shell Petrol Station or to a building within the Shell Petrol Station;

> "3.2. causing damage to any part of a Shell Petrol Station or to any equipment or infrastructure (including but not limited to fuel pumps) upon it;
>
> "3.3. operating or disabling any switch or other device in or on a Shell Petrol Station so as to interrupt the supply of fuel from that Shell Petrol Station, or from one of its fuel pumps, or so as to prevent the emergency interruption of the supply of fuel at the Shell Petrol Station;
>
> "3.4. affixing or locking themselves, or any object or person, to any part of a Shell Petrol Station, or to any other person or object on or in a Shell Petrol Station;
>
> "3.5. erecting any structure in, on or against any part of a Shell Petrol Station;
>
> "3.6. spraying, painting, pouring, depositing or writing any substance on to any part of a Shell Petrol Station.
>
> "3.7. encouraging or assisting any other person do any of the acts referred to in sub-paragraphs 3.1 to 3.6."

25. Paragraph 4 then provides that a defendant must not do any of these acts by means of another person acting on his/her/their behalf, or acting on his/her/their instructions, or by another person acting with his/her/their encouragement. This appears to replicate clause 3.7.

26. Johnson J made the following observations on how the injunction operates:

> "21. Some of the conduct referred to in paragraph 3 is, in isolation, potentially innocuous ('depositing … any substance on … any part of a Shell Petrol Station' would, literally, cover the disposal of a sweet wrapper in a rubbish bin). The injunction does not prohibit such conduct. The structure is important. The injunction only applies to the defendants. The defendants are those who are 'damaging, and/or blocking the use of or access to any Shell petrol station in England and Wales, or to any equipment or infrastructure upon it, by express or implied agreement with ***4369** others, with the intention of disrupting the sale or supply of fuel to or from the said station'. So, the prohibitions in the injunction only apply to those who fall within that description. Further, the order does not impose a blanket prohibition on the conduct identified in paragraph 3. It only does so where that conduct is undertaken 'in express or implied agreement with any other person, and with the intention of disrupting the sale or supply of fuel to or from a Shell Petrol Station'.
>
> "22. It follows that while paragraph 3 is drafted quite widely, its impact is narrowed by the requirements of paragraph 2. This is deliberate. It is because the claimant is not able to maintain an action in respect of the activity in paragraph 3 (read in isolation) in respect of those Shell petrol stations where it has no interest in the land. It is only actionable where that conduct fulfils the ingredients of the tort of conspiracy to injure (as to which see para 26 below). The terms of the injunction are therefore deliberately drafted so as only to capture conduct that amounts to the tort of conspiracy to injure."

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27. The claimants seek orders extending all three injunctions on the same terms for up to one further year, save that the claimant on the petrol s claim seeks to amend the definition of persons unknown (see further under issue (2) below).

Evidence in support of the applications to extend the injunctions

28. The claimants' solicitors provided detailed chronologies setting out the incidents which they have been able to identify since May 2022 of direct action protest against the claimants, the Shell business and those operating within the wider oil/gas industry. Specific chronologies were prepared setting out incidents involving protest activity at the Haven and other oil refinery sites, the Tower and other corporate buildings and at petrol stations.

29. These incidents were more fully described in (i) a witness statement from Fay Lashbrook, the Haven's terminal manager; (ii) a third statement from Mr Garwood in respect of the Tower; and (iii) a third statement from Mr Austin in respect of the petrol stations. These statements were all dated 30 March 2023. They were supported by voluminous exhibits. The statement from Mr Prichard-Gamble, referred to at para 10 above, provided further detail.

Haven

30. There do not appear to have been any further unlawful protest incidents at the Haven. However, the evidence shows a significant number of incidents in relation to oil refinery sites between August 2022 and February 2023. These included protest action at a number of oil refineries located in Kingsbury. The main road used to access the site was closed as a result of protesters making the road unsafe, by digging and occupying a tunnel underneath it, access roads were also blocked by protesters performing a sit-down roadblock. Similar activity occurred at the Gray's oil terminal in West Thurrock in August/September 2022. On 28 August 2022 eight people were arrested after protesters blocked an oil tanker in the vicinity of the Gray's terminal, climbing on top of it and deflating its tyres. On 14 September 2022 around fifty protesters acted in breach of the North Warwickshire local authority injunction in relation to the Kingsbury site. ***4370***

Tower

31. In respect of the Tower, the evidence suggests that Bennathan J's injunction has had a deterrent effect: the claimant's evidence shows no incidences of unlawful activity during protests held within the vicinity of the Tower. However, it continued to be a prime location for protests; and corporate buildings, more broadly, have been the target of unlawful activity since the injunction was made. For example, the evidence referred to (i) prominent buildings and venues across London having been targeted by JSO; (ii) various government and high-profile buildings, such as a Rolex shop and high-end car dealerships, having been targeted by protest groups; and (iii) on 14 November 2022, JSO supporters having targeted the Silver Fin building in Aberdeen where the Shell group have offices, covering it in orange paint.

The petrol stations

32. In relation to the petrol stations, there have been two further incidents, on 24 August and 26 August 2022. Fuel pumps were vandalised, customers's access to the forecourt was blocked and, on the first of these dates, protesters superglued themselves to the forecourt. The first incident involved three petrol stations on the M25 and the second related to seven across London.

33. Mr Prichard-Gamble also described a significant number of incidents of direct action protest against the wider Shell business and the wider oil and gas industry and operators within it. He described over twenty such incidents between May 2022 and February 2023. These included (i) the targeting of Shell's annual shareholders meeting in May 2022; (ii) JSO's call, in May 2022, for the seizure of Shell's assets; (iii) protesters spraying paint on the Treasury building; (iv) JSO's month-long campaign of civil disobedience and protest involving a series of incidents in October 2022; (v) JSO protesters starting a campaign of targeting motorway gantries in different locations on the M25 in November 2022, causing police to halt the traffic; and (vi) an

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incident in early 2023 involving protesters boarding and beginning to occupy a moving Shell floating production and storage facility while it was in transit heading for the North Sea.

34. These activities have led the claimants to incur the costs of further security at the Kingsbury oil facility and the Tower and an additional vessel to shadow the floating facility referred to above.

The risk of future harm

35. Mr Prichard-Gamble's evidence on this issue was, in summary, as follows.

36. The claimants liaise regularly with the police, whose intelligence indicates that there continues to be an ongoing threat; that the protest campaign is not over; and that protest groups will continue to attempt to put pressure on the Government to halt new investment in fossil fuels. It is apparent that JSO continues to have the ability to draw on a large group of protesters who are willing to be arrested; that they take action using a variety of tactics and target locations across the UK; and that they employ tactics that attract the media and public interest. Further, there is a high level of crossover between the individual protest groups, who appear to ***4371** share disruptive tactics between them. His view was that activities of the sort described above would be likely to increase as a result of the Government's recent approval of the building of a new power station, the cost-of-living crisis and the likely increase in support for JSO given that environmental concerns affect the majority of the public.

37. There is the following specific evidence of the likelihood of continuing action against the claimants and the wider Shell business: (i) a 30 November 2022 report that JSO had stated they will "continue to escalate unless the government meets our demand to stop future gas and oil projects"; (ii) an 11 January 2023 report that JSO had said that they planned more large-scale disruption this year; (iii) a 29 January 2023 Twitter post from Fossil Free London inviting people to a meeting on the basis that "in the last year, we've closed down Shell's AGM, challenged their legal director, sabotaged their CEO's leaving party & more! Now we want to go bigger"; and (iv) JSO's 14 February 2023 "ultimatum letter" issued to 10 Downing Street which stated that unless the UK Government provided an assurance that it would immediately halt all future licensing and consents for the exploration, development and production of fossil fuels in the UK by 10 April 2023, they would be forced to escalate their campaign.

38. Further, during the hearing Ms Stacey took me to press coverage dated 26 April 2023 indicating that following a four-day demonstration XR and other groups said that it would step up campaigns to force the Government to tackle the climate emergency. The co-founder of XR was quoted as saying that the Government had a week to respond to the group's demands.

39. Mr Prichard-Gamble's overall view was that (i) the incidents described demonstrate a clear nationwide targeting of members of the wider Shell group of companies and its business operations since April/May 2022; (ii) such demonstrations will continue for the foreseeable future; and (iii) the injunctions need to be extended as they provide a strong deterrent effect and mitigate against the risk of harm to which unlawful activities at the sites would otherwise give rise. Unlawful activity at the sites presents an unacceptable risk of continuing and significant danger to the health and safety of staff, contractors, the general public and other persons visiting them.

40. He emphasised that the claimants do not wish to stop protesters from undertaking peaceful protests, whether near their sites or otherwise. Many such peaceful protests have in fact taken place without breaching the injunctions, in particular outside and in the vicinity of the Tower and outside Shell petrol stations.

Issue (1): whether to permit Ms Branch to make submissions and, if so, on what basis and to what extent

Ms Branch's application

41. Ms Branch provided witness statements, dated 24 and 26 April 2023, a statement from Nancy Friel and a detailed skeleton argument from Mr Simblet and Mr Owen Greenhall.

42. Ms Branch is an environmental activist who has been a member of XR since April 2019. She has not breached any of the injunctions obtained by the claimants. However, she contended that she is directly affected by them as she is keen to participate in protests which make people aware of the ***4372** damage caused by fossil fuels but does not wish to risk breaching the

injunctions. She believes that the injunctions have a chilling effect on her right to protest peacefully, in the manner and at the location of her choosing.

43. In relation to the Haven, Ms Branch noted that the injunction covers anyone who enters or remains at the site without consent. She was concerned that if a Shell employee asked her to leave the area outside the site and she chose to remain she could be caught by the injunction, even though she had not entered the site, blocked any of its entrances or sought to do so. She was also concerned that she could breach the injunction by placing a poster or flyer on the external walls of the site.

44. In respect of the Tower, she said that XR and many other protest groups see it as a key site from which to make their points. They often gather outside the building, hold banners and signs and chant slogans to make the reason for their protests clear. They do often cause some disruption but they allow traffic to pass and they do not prevent pedestrians from passing through. They welcome interaction with the public and make the most of the opportunities to speak to people about their protest. She said that, in light of the fact that the injunction prohibits blocking the entrance or sticking anything to the building, she would be nervous about joining a protest outside the Tower because even if she blocked the entrance inadvertently for a few minutes this would risk breaching the order.

45. She is particularly troubled by the petrol stations injunction. She explained that they are a symbolically important place to hold demonstrations because they will gain the attention of people who drive cars and encourage them to think about their choices. She would be happy to participate in such a protest if that persuaded people to use their cars less and would be happy if petrol sales were drastically reduced. She is therefore concerned that simply by participating in protests at a petrol station she would be understood to be doing so with the intention of disrupting the sale or supply of fuel and would thus be within the wording of the injunction.

46. She argued that (i) the geographical scope of the injunction was unclear and it was not apparent whether it included areas of the public highway or other areas not necessarily owned by the Shell-branded petrol station where there is public access; (ii) there is a lack of clarity about the "blocking or impeding access" provisions; (iii) the prohibition on "affixing any object" might prevent her attaching a leaflet or flyer to a petrol station or a vehicle in a petrol station, including in the public area not owned by Shell but within the vicinity of a petrol station; (iv) and the "encouraging" provisions within the injunction might mean that if she was present and chanting, waving banners or handing out leaflets while someone else was blocking an entrance, even briefly, or placing leaflets on cars, she would be at risk of breaching the injunction. She also opposed Shell's application to extend the scope of the current petrol station injunction to all protesters and not simply environmental protesters: she argued that this would significantly increase the number of people who could be caught by it.

47. Several of Ms Branch's observations about the wording of parts of the petrol stations injunction also applied to the Haven and Tower injunctions.

48. Finally, Ms Branch made several overarching points about articles 10 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the ECHR"). She referenced the fact ***4373** that the injunctions all state that they do not intend to prevent lawful protest. She said this did not reassure her: simply because the injunctions are not intended to have that effect does not mean that they will not, in practice, do so. She fears being arrested, especially if her children are present with her at the protest.

49. The skeleton argument from Mr Simblet and Mr Greenhall made detailed legal submissions in support of Ms Branch's position. In particular, he addressed articles 10 and 11 , the tort underlying the petrol stations claim, the applicability of the Human Rights Act 1998 ("the HRA "), section 12(3) and Ms Branch's concerns about the wording of some specific terms in the injunctions.

50. Ms Branch was clear that she did not wish to be joined as a defendant: she explained that the risk of having damages and costs awarded against her would be catastrophic for her as she does not have the resources to defend a civil action; and would cause her numerous difficulties in respect of her employability, credit score and other matters.

51. However, she sought the right to make submissions on the injunctions. Mr Simblet contended that this could be achieved by the inherent power of the court or by formally recognising Ms Branch under CPR r 40.9 .

CPR r 40.9

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52. CPR r 40.9 provides that "A person who is not a party but who is directly affected by a judgment or order may apply to have the judgment or order set aside or varied". This provision has been recognised by the Court of Appeal as the route, or at least the primary route, to be used by non-parties wishing to set aside or vary persons unknown injunctions: see *Barking and Dagenham London Borough Council v Persons Unknown [2023] QB 295, para 89* , per Sir Geoffrey Vos MR.

53. The injunctions in this case all provided, as it is common in cases of this nature, that anyone "affected" by the order may apply to the court to vary or discharge it "at any time", upon giving not less than 24 hours' notice to the claimant. Such a party was required to provide their name and address and "must" also apply to be joined as a defendant.

54. However, it has been recognised that joinder as a defendant is not a prerequisite to applying under CPR r 40.9 , notwithstanding the existence of such a provision: see Johnson J's judgment on the petrol *stations claim [2022] EWHC 1215 (QB) at [5]–[6]* , citing *National Highways Ltd v Persons Unknown [2022] EWHC 1105 (QB) at [20]–[22]* and *Barking and Dagenham* , para 89. In *Esso Petroleum Co Ltd v Breen [2022] EWHC 2600 (KB) ("Breen")* , Ritchie J set out a series of factors he had found helpful in deciding whether to require someone to become a named defendant or simply permit them to apply under CPR r 40.9 .

55. Accordingly, despite the terms of the injunctions referred to at para 53 above, the fact that Ms Branch did not wish to be joined as a defendant was not fatal to her CPR r 40.9 application. Ms Stacey did not argue that Ms Branch should be so joined.

56. In *National Highways Ltd v Persons Unknown [2022] EWHC 1105 (QB) at [20]* , Bennathan J observed that CPR r 40.9 is, on its face, a "strikingly wide" rule which gives no guidance as to how its provisions are to be interpreted; nor is there appellate authority on the issue. In *Breen* , at ***4374** para 40, Ritchie J made a similar observation about the lack of appellate authority on CPR r 40.9 cited in the *White Book* .

57. In post-hearing submissions, Ms Stacey referred to *Abdelmamoud v The Egyptian Association in Great Britain Ltd [2018] Bus LR 1354, para 27* , where Newey LJ said:

> "It is clear from its terms … that CPR r 40.9 does not empower the court to set aside a judgment or order wherever it might think that appropriate. It is a precondition that the applicant is 'directly affected' by the judgment or order. That the power should not be untrammelled makes obvious sense. In general, a defendant to a claim should be left to decide for himself whether to defend it. Further, it could hardly be appropriate to allow a third party to apply to have a judgment set aside unless he would then be in a position either to defend the claim on the defendant's behalf or to put forward a defence of his own."

58. She also cited the underlying judgment which was upheld by the Court of Appeal, at *[2015] Bus LR 928* . At paras 58–59 Edward Murray (as he then was, sitting as a deputy judge of the Chancery Division), after referring to a number of previous cases on CPR r 40.9 , held:

> "[These cases] support the proposition that in order for a non-party to be 'directly affected' by a judgment or order for the purposes of CPR r 40.9 , it is necessary that some interest capable of recognition by the law is materially and adversely affected by the judgment or order or would be materially and adversely affected by the enforcement of the judgment or order …
>
> "Since the 'directly affected' test is for the purpose of establishing locus standi, it is sufficient that the relevant judgment or order would prima facie be capable of materially and adversely affecting a legal interest. It is not necessary to show that it would, in fact, do so, for that would be the subject of the application itself."

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59. It does not appear that either judgment in *Abdelmamoud* was cited to Bennathan or Ritchie JJ in the cases referred to in para 56 above. That said, in *Breen [2022] EWHC 2600 (KB)* at [43.1], Ritchie J observed that:

> "A person can be directly affected in many ways. The order may affect the person financially. It may affect the person's property rights or possession of property. It may affect the person's investments or pension. The order may affect a person's ability to travel or to use a public highway. The order may affect the person's ability to work or enjoy private life or social life or to obtain work and in so many other ways. It may affect rights enshrined in the Human Rights Act 1988 [sic]."

60. Further, one of the factors he identified as pertinent to the issue of CPR r 40.9 status in *Breen* was "Whether the final decision in the litigation will adversely affect the interested person, whether by way of civil rights, financial interests, property rights or otherwise" (factor (3), para 45).

61. Both of these formulations chime with the test set out in *Abdelmamoud [2018] Bus LR 1354* .

62. In *Breen* , Ritchie J concluded that affording someone the right to be heard under CPR r 40.9 required them to pass through a "gateway", ***4375** requiring them to satisfy the court that they were (i) "directly affected" by the injunction; and (ii) had a "good point" to raise.

63. At para 45(6) he observed that given the draconian nature of injunctions against unknown persons and the fact that they may be wide in geographical and/or temporal scope, there should be a "low" threshold for interested persons to be able to take part. This reflects Bennathan J's observations in *National Highways Ltd v Persons Unknown [2022] EWHC 1105 (QB) at [21* (2)–(3)] that (i) in cases where orders are sought against unnamed and unknown defendants and where Convention rights are engaged, it is proper for the court to adopt a "flexible" approach to CPR r 40.9 ; and (ii) 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 to those advanced by the claimants, it is desirable to take a "generous" view of such applications. I agree with and gratefully adopt these sentiments.

64. In *Ageas Insurance Ltd v Stoodley [2019] Lloyd's Rep IR 1* Judge Cotter QC, as he then was, in the County Court at Bristol had approached an application under CPR r 40.9 by asking whether the applicant had a "real prospect of success" in showing that the order should be set aside or varied. Ms Stacey contended that the court should determine Ms Branch's CPR r 40.9 application by applying this and/or something akin to the test used for determining whether permission to appeal should be granted.

65. *Ageas* was not a persons unknown case. As *Breen* is the most recent High Court authority on the use of CPR r 40.9 and is specific to the context of persons unknown injunctions, I consider it appropriate to follow Ritchie J's approach set out therein. I observe that applying an unduly strict approach to the merits of a CPR r 40.9 application in a persons unknown case could cut across the need for a low threshold for involvement and a flexible/generous approach, given the particular features of these cases, as set out at para 63 above.

(i) Direct effect

66. Ms Stacey initially conceded that Ms Branch was directly affected by the petrol stations injunction (albeit not the Haven and Tower injunctions) but then withdrew that concession in her post-hearing submissions.

67. She relied on the fact that Ms Branch has expressly stated that she has no intention of breaching the prohibitions in the injunctions. On that basis, she would not fall within the definition of persons unknown, is not a party and has no prospect of

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being a defendant. It was, therefore, difficult to see on what basis she would be entitled to seek to defend the claim on a potential defendant's behalf and to do so without being exposed to any of the costs risks associated with joinder. Moreover, given that the orders only prohibit specific acts which are by their nature unlawful it is difficult to see how Ms Branch can assert that her interests are "materially" affected. She contended that the approach of Bennathan J and Ritchie J renders the qualifier "directly" in the phrase "directly affected" otiose and is contrary to the approach of the Court of Appeal in *Abdelmamoud [2018] Bus LR 1354* .

68. I disagree. A key concern Ms Branch has raised is that the injunctions have a chilling effect on her rights under articles 10 and 11 of the ECHR . She does not accept that the injunctions only prohibit unlawful acts. She is keen to understand the limits of the injunctions, as she fears ***4376** inadvertently breaching them through her protest activity and thus leaving herself vulnerable to the damaging consequences of committal proceedings. She has specific concerns about the existence, scope and wording of each of these injunctions and considers that they impede her right to lawful protest at those locations. I accept Ms Branch's evidence that a final decision in the litigation would adversely affect her civil rights under articles 10 and 11 (albeit in a manner which is said to be justified) and if she breached any of them this would affect her financial interests and expose her to the risk of a prison sentence.

69. For these reasons, I consider that she meets the "direct effect" test set out in *Abdelmamoud* at first instance and in the Court of Appeal test: the injunctions are prima facie capable of materially and adversely affecting her recognised legal interests.

70. Although determinations under CPR r 40.9 turn on their own facts, and although it does not appear that *Abdelmamoud* has been previously cited, my assessment as to Ms Branch's status mirrors Bennathan J's "tentative" view, when considering the Haven and Tower injunctions, that the words "directly affected" are "just wide enough" to encompass someone in Ms Branch's position, such that her submissions would have been taken into account had she not withdrawn her application under CPR r 40.9 (on the basis that a named defendant had applied to join the action). It is also consistent with the recognition of Ms Branch under CPR r 40.9 in (i) *National Highways Ltd v Persons Unknown [2021] EWHC 3081 (QB) at [20]–[22]* , where Lavender J concluded that she was affected by the initial injunction although she had not taken part in the relevant protests and so took into account her submissions; and (ii) *National Highways Ltd v Persons Unknown [2022] EWHC 1105 (QB) at [21] and [21* (1)], where Bennathan J accepted that her concern that the order "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" was "not fanciful and would amount to a sensible basis to regard her as 'directly affected'".

(ii) "Good point"

71. In *Breen [2022] EWHC 2600 (KB)* at [43.2], Ritchie J framed the relevant question thus: "Does the IP have a good point to raise? If the point raised is weak or irrelevant there is no need for the CPR r 40.9 permission."

72. Ms Stacey argued that Ms Branch did not have a good point to make and therefore did not proceed through the second of Ritchie J's gateways. She argued that all the points Ms Branch wished to advance had been made at the earlier hearings by the claimants' counsel and fully considered by Bennathan J and Johnson J: for example, they had grappled with the issues she raised relating to *Director of Public Prosecutions v Ziegler [2022] AC 408* and section 12(3) of the HRA .

73. I found this submission conceptually troubling: it amounted to an invitation to the court to approve a process by which one party is assumed to have advanced all of the opposing party's submissions, in exactly the same way as they would have done, such that the opposing party should be denied the right to be heard. Putting aside the question of whether such a ***4377** submission might find favour in a conventional case, a court would surely be particularly nervous about adopting such a course in cases of this nature, for the reasons given at para 63 above.

74. In any event, I am satisfied that Ms Branch had good points to make on all three injunctions. Her evidence and skeleton argument raised a series of important and helpful points about the tension between the injunctions and articles 10 and 11 ; the conspiracy to injure tort underpinning the petrol stations claim; the section 12(3) issue and about the specific wording of some of the terms. As will become apparent, I have accepted some of her arguments.

The Breen factors and discretion under CPR r 40.9

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75. The factors identified by Ritchie J in *Breen* are focused on whether someone should be afforded CPR r 40.9 status or joined as a defendant. As Ms Stacey did not press any application to join Ms Branch as a defendant, they are of limited direct relevance.

76. However, Ms Stacey contended that even if someone satisfied both elements of the CPR r 40.9 "gateway", the use of the word "may" in the rule indicates that the court retains a residual discretion as to whether to permit that person to make an application under CPR r 40.9 . I am not confident that such an analysis is correct: it seems to me that this places a further gloss on the rule that is not indicated by its wording (which does not suggest that anything is necessary beyond the "gateways") nor supported by authority. It seems to me that the wording of CPR r 40.9 simply establishes the basis on which someone "may" apply to have a judgment or order set aside or varied, but whether they succeed in doing so is a separate matter.

77. In case Ms Stacey's analysis is correct, and in case any or all of the factors identified by Ritchie J in *Breen* are relevant to how that discretion is exercised, I have considered them. In fact, taken as a whole they support the view that Ms Branch should be recognised under CPR r 40.9 and not joined as a defendant.

78. I understood Ms Stacey to accept Mr Simblet's submissions on factors (1) and (4)–(7): Ms Branch will not profit from the litigation financially or otherwise; she is not funding the defence of the litigation; she is raising a substantial public interest or civil liberties point; there is a need for a "low" threshold given the draconian and potentially wide nature of these injunctions; and Ms Branch could be faced with costs risks and difficulties due to orders which she did not instigate.

79. As to factor (2), Ms Branch is not "controlling the whole or a substantial part of the litigation": she is making wide-ranging submissions but does not purport to speak for all the protest groups caught by the orders or for those who have already been caught by the orders, even if they have not yet been named.

80. As to factor (3), as noted above, I accept Ms Branch's evidence that a final decision in the litigation would adversely affect her rights as set out at para 68 above.

81. Factor (8) is whether there would be any prejudice to the claimant by granting someone CPR r 40.9 status rather than requiring them to become parties. Ms Stacey did not press an argument about particular prejudice in this sense. ***4378***

82. She did advance a much broader point about prejudice, which she contended was relevant to the general discretion under CPR r 40.9 , to the effect that the claimants had been "ambushed" by Ms Branch's late application. She was keen to stress that the claimants did not wish to "shut down" Ms Branch's submissions but argued that Ms Branch had inappropriately delayed. She had been aware of the injunctions since they were made in May 2022 and her solicitors had been on notice since 28 February 2023 that applications to renew all three injunctions were being made.

83. I had limited sympathy with this argument. The injunctions obtained by the claimants all permit someone who is merely "affected" (not "directly" so) to apply to vary or discharge them on 24 hours' notice, a timescale with which Ms Branch had complied. Interested members of protest groups regularly attend hearings of this kind and seek to be heard, as the cases referred to at para 70 above and *Breen* illustrate: indeed, Ms Branch had attended the hearing before Bennathan J and Ms Friel had attended before Johnson J. If the claimants wish to ensure they are given greater notice of such applications it is open to them to seek to increase the 24 hours' notice provision. If they are concerned to make sure review hearings are not "derailed" by such applications it is open to them to provide more realistic time estimates for hearings which do not assume a lack of opposition to the orders they seek.

84. Further, Ms Branch provided a credible reason for only applying to the court when she did: she was willing to live with the May 2022 injunctions for a year but wished to wait to see if the claimant sought to extend them for a further year; and she acted reasonably promptly once she became aware of that fact, especially bearing in mind she does not retain solicitors on a standing basis.

85. I also accept Mr Simblet's submissions that (i) Ms Branch could be placed in no worse a position than someone who sought joinder as a defendant who only had to give 24 hours' notice under the order; (ii) it was consistent with the overriding objective for her to make her application at a hearing when the court would already be reviewing the injunctions, rather than by insisting that the court conduct a further hearing to hear her submissions; and (iii) she was entitled to limit her costs liability in this way. As to the overriding objective, her actions in seeking to have her application dealt with at the review hearing were consistent with CPR r 1.4(2) , which provides that active case management includes "(i) dealing with as many aspects of the case as it can on the same occasion".

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86. In the event, Ms Stacey was able to reply in detail to Mr Simblet's submissions during the hearing (a half day of further court time having been made available for it) and was permitted to make additional written submissions after it, to which Mr Simblet could respond. Accordingly, any prejudice the claimants suffered by the timing of Ms Branch's application has been mitigated by these case management steps.

87. Ms Stacey argued that the poor merits of Ms Branch's submissions were also relevant to the residual discretion under CPR r 40.9 . Aside from the issue of whether such a discretion exists (see para 76 above) I have addressed the merits in the context of the "good point" element of the gateway at para 74 above. ***4379***

The limits of CPR r 40.9

88. During the hearing, Ms Stacey advanced a novel point about the limits of CPR r 40.9 which does not appear to have been taken in any of the other persons unknown cases. She developed this further in her written post-hearing submissions.

89. She contended that CPR r 40.9 must be construed by reference to its language which sets out its parameters. It only permits submissions to be made as to whether an order that has already been made should be set aside or varied but cannot relate to any future order the court was being asked to make. She submitted that there was a window of time in which Ms Branch could have made her application in relation to the May 2022 orders but she had now lost that opportunity due to delay. Instead, she would need to wait until the court made any orders extending the injunctions and, if so, return to court to make her submissions.

90. I pause to observe that the "window of time" point in this submission is directly contrary to the wording of the injunctions themselves, which make clear that someone seeking to vary or discharge them may do so "at any time".

91. As to the main point about the scope of CPR r 40.9 involvement, Ms Stacey's interpretation of the provision is understandable in conventional cases between two or more named defendants, where a final order has been made after trial, that does not involve an injunction.

92. However, matters are more complicated in cases involving persons unknown injunctions. This is primarily because, unlike most court orders, they are not made against known individuals; and because the injunctions so made are the subject of regular review by the court: either at the return date (shortly after an ex parte injunction) or at a review hearing (as here, after an injunction has run for a considerable period of time, such as a year). At either type of hearing, if a person seeks to make submissions under CPR r 40.9 , it is, in my judgment, artificial to regard them as only being permitted to do so in relation to the injunction that has already been made because the very focus of that hearing is whether the injunction that has already been made should be set aside, renewed or varied in some form.

93. The point is illustrated by the fact that the only orders Ms Stacey sought from me were ones which had no independent existence of their own but which referred back to the May 2022 injunctions, and amended their temporal scope. Ms Stacey was, herself, effectively seeking a variation of the May 2022 injunctions in those respects. In those circumstances, it is artificial to contend that Ms Branch could not challenge the proposed variation and submit that other variations should be made, if the injunctions were not set aside in full.

94. Albeit that I appreciate this is a novel legal point that has not been taken before, the practical position is illustrated by how previous cases have played out. In *National Highways Ltd v Persons Unknown [2021] EWHC 3081 (QB)* , Lavender J took into account Ms Branch's submissions, not only as to terms but also the service provisions of the injunction he was being asked to make. He clearly did not consider that his role was solely "backward-looking". Indeed, he discharged the interim injunction and made an entirely fresh order for the future. Similarly, in *National Highways Ltd v Persons Unknown [2022] EWHC 1105 (QB)* , Bennathan J took ***4380*** into account Ms Branch's submission to the effect that the Insulate Britain protests described by National Highways Ltd ("NHL") were all in 2021 and there had been no repetition of them in the past year, which was clearly a "future-facing" point about whether the injunctions should be renewed.

95. Indeed, the very nature of the ability to "vary" an order under CPR r 40.9 illustrates that the right to intervene under that rule is to some degree "forward-looking".

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96. Interpreting CPR r 40.9 in this way in persons unknown cases would limit the efficacy of this route for non-parties, the route having been recognised at Court of Appeal level. There is also a need for flexibility of approach in these cases, for the reasons given at para 63 above.

97. Even if Ms Stacey's interpretation of CPR r 40.9 is correct, it would make limited difference on the facts of this case. That is because I would be able to consider all of Ms Branch's submissions on the basis that they related solely to the May 2022 injunctions or, indeed, the short extension orders I made in late April 2023. If I were persuaded by any of her submissions that the orders were wrong in principle and should be set aside or varied, I would, by definition, not be persuaded that extending them in materially identical terms to their current form was appropriate.

98. In her post-hearing submissions, Ms Stacey modified her position that Ms Branch could not be heard now and would need to return to court in the future once I had made any fresh orders. Rather, she contended that it would be open to me to "treat the application as having been made immediately after the review and consider it on that basis". This was a pragmatic suggestion. To the extent that the same is necessary I consider that such a step is sensible case management, consistent with CPR r 1.4(2) (see para 85 above).

99. For all these reasons, I conclude that Ms Branch should be permitted to apply to set aside or vary the May 2022 injunctions under CPR r 40.9 . I do not, therefore, need to determine Mr Simblet's submission that I could have heard her submissions under a wider court power. I simply observe that there may well be force in the argument: for example, I note that in *Ineos Upstream Ltd v Persons Unknown [2019] 4 WLR 100, para 16* the Court of Appeal felt able to take into account submissions from counsel for two named defendants in a persons unknown case, where there were some concerns about their locus standi, on the simple ground that they were of assistance to the court.

The nature of Ms Branch's involvement

100. As to the nature of Ms Branch's involvement, Ms Stacey took me to Gee, *Commercial Injunctions* , 7th ed (2022), paras 24-020–24-021. This provides that where a defendant who wishes to set aside a *Mareva* (i e a freezing) injunction obtained without notice applies to discharge it, they should do so promptly and by application notice; and that what takes place is in the form of a "complete rehearing of the matter, with each party being at liberty to put in evidence".

101. In my judgment, the same should apply to a non-party such as Ms Branch applying under CPR r 40.9 . That said, I accept Ms Stacey's submission that "the matter" in this context necessarily includes consideration of the judgments of the previous judges. ***4381**

Issue (2): whether to grant the claimant in the petrol stations claim permission to amend the description of the persons unknown defendants

102. The claimant in the petrol stations claim seeks permission under CPR rr 19.4(1) and 17.1(3) to amend the description of the persons unknown defendant to remove the word "environmental" from "environmental protest campaigns".

103. Once a claim form has been served, the court's permission is required to add a party under CPR r 19.4(1) . The *White Book* , vol 1 at para 19.4.4 notes that in *Allergan Inc v Sauflon Pharmaceuticals Ltd (2000) 23 IPD 23030* , Pumfrey J refused an application to join a party as a second defendant where the claimant failed to plead a good arguable case. Further, in *PeCe Beheer BV v Alevere Ltd [2016] EWHC 434 (IPEC) at [36]* , Judge Hacon stated that, in most cases, in order to show a good arguable case for this purpose, the correct test to be applied is that which would be applied in an application to strike out a claim against a defendant pursuant to CPR r 3.4(2)(a) or (b)).

104. Paragraph 1.2 of CPR PD 3A ("Striking out a Statement of Case") gives examples of cases where the court may conclude that the particulars of claim disclose no reasonable grounds for bringing the claim under CPR r 3.4(2)(a) , such as those which set out no facts indicating what the claim is about; those which are incoherent and make no sense; and those which contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim against the defendant. CPR r 3.4(2)(b) applies to statements of case which are an abuse of the court's process or are otherwise likely to obstruct the just disposal of the proceedings.

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105. Ms Stacey submitted that the purpose of the amendment was to ensure that the description of persons unknown is as clear and accurate as possible and properly reflects the most recent evidence which suggests that there is movement between groups and protest campaigns which are not necessarily limited to environmental protests.

106. She referred to Mr Austin's evidence, which illustrated the growing trend in recent months of broader interest groups, beyond environmental protest groups, engaging in protest actions against Shell petrol stations. He exhibited a press report to the effect that, on 21 January 2023, two dozen members of Fuel Poverty Action and other groups had protested at a petrol station in Cambridge. They were quoted as accusing Shell of "profiteering as people struggle to pay for essentials such as energy and food". The article confirmed the presence of the notice at the petrol station warning protesters of the existence of the injunction. He also described a protest by austerity protesters on 3 February 2023 at a Shell petrol station in the Bristol area. He confirmed that the protesters on both occasions respected the terms of the injunction.

107. Further, Mr Prichard-Gamble's evidence was that there is a "high level of crossover" between "individual protest groups" and that the cost-of-living crisis is likely to increase JSO's animosity towards oil companies, including the claimant.

108. In light of this evidence, I am satisfied that the CPR r 3.4(2)(a) /(b) test is met.

109. Accordingly, I grant the claimants permission to amend in the manner sought, such that the defendants on the claim form and ancillary documents in the petrol stations claim become: ***4382***

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

110. Whether to grant the claimant an injunction in relation to this more widely defined group of persons unknown is a separate issue which I address at para 148 below.

Issue (3): whether to extend the three injunctions for up to a further year in the manner sought by the claimants

111. I have taken as a framework for my analysis the list of issues identified by Johnson J in his judgment on the petrol stations claim, which had come from the claimants' submissions. This is appropriate given the rehearing approach I have determined was necessary in light of Ms Branch's application under CPR r 40.9 (see para 101 above), rather than the slightly narrower approach appropriate on an uncontested review hearing.

112. As Johnson J explained at para 23 these different legal issues arise because the injunctions are sought on an interim basis before trial against Persons Unknown on a precautionary basis to restrain anticipated future conduct; and because they interfere with the rights to freedom of expression and assembly under articles 10 and 11 .

(1) Is there a serious question to be tried, applying the test set out in American Cyanamid Co v Ethicon Ltd [1975] AC 396 , 407g per Lord Diplock?

The Haven and Tower claims

113. The Haven and Tower injunctions were sought and obtained on the basis of the claimant's underlying claim of trespass to their land and private nuisance, in the form of unlawful interference with their right of access to their land via the highway and their exercise of a private right of way (as discussed in *Cuadrilla Bowland Ltd v Persons Unknown [2020] 4 WLR 29, para 13* and Gale, *Easements* , 21st ed (2020), para 13-01).

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114. Although there do not appear to have been further incidents, specifically at the Haven and Tower sites, the evidence of Mr Brown and Mr Garwood, to which Bennathan J was taken, led him to conclude that the claimants had a strong claim in trespass or nuisance for events that took place before the injunctions were made. I have read all that evidence. The position remains as it was before Bennathan J and the evidence shows that there is a real and imminent risk of the offending conduct occurring.

115. The *American Cyanamid* test is therefore met in relation to these two claims. To the extent that the relevant test is, in fact, that the claimants are "likely" to succeed, due to the operation of the HRA, section 12(3) (see further under sub-issue (12) below), that test is met. ***4383**

The petrol stations claims

116. The claimant's claim in relation to the petrol stations is advanced under the tort of conspiracy to injure by unlawful means. Ms Stacey relied heavily on Johnson J's findings on this issue.

117. His first key finding was as follows:

> "25. The claimant has a strong case that on 28 April 2022 the defendants committed the activities identified in paragraph 3 of the draft order: those activities are shown in photographs and videos. There are apparent instances of trespass to goods (the damage to the petrol pumps and the application of glue), trespass to land (the general implied licence to enter for the purpose of purchasing petrol does not extend to what the defendants did) and nuisance (preventing access to the petrol stations). None of this gives rise to a right of action by the claimant in respect of those Shell petrol stations where it does not have an interest in the land and does not own the petrol pumps. It is therefore not, itself, able to maintain a claim in trespass or nuisance in respect of all Shell petrol stations."

118. As with the Haven and Tower claims, I have reviewed the underlying evidence which led to this conclusion and I agree with it. The claimant has a strong prospect of showing that the various acts said to have taken place on 28 April 2022 did in fact take place. There have also been further incidents at petrol stations on 24 and 26 August 2022 of a similar nature (although no application to amend the particulars of claim to refer to these has been made).

119. The next element of Johnson J's reasoning addressed the legal consequences of his factual finding at para 25, thus:

> "26. The claim advanced by the claimant is framed in the tort of conspiracy to injure by unlawful means ('conspiracy to injure'). The ingredients of that tort are identified in *Cuadrilla Bowland Ltd v Persons Unknown [2020] 4 WLR 29* per Leggatt LJ at para 18: (a) an unlawful act by the defendant, (b) with the intention of injuring the claimant, (c) pursuant to an agreement with others, (d) which injures the claimant.
>
> "27. … To establish the tort of conspiracy to injure, it is not necessary to show that the underlying unlawful conduct (to satisfy limb (a)) is actionable by the claimant. Criminal conduct which is not actionable in tort can suffice (so long as it is directed at the claimant): *Revenue and Customs Commissioners v Total Network SL [2008] AC 1174* per Lord Walker of Gestingthorpe at para 94 and Lord Hope of Craighead at para 44. A breach of contract can also suffice, even though it is not actionable by the claimant: *The Racing Partnership Ltd v Done Bros (Cash Betting) Ltd [2021] Ch 233, para 155* per Arnold LJ.
>
> "28. The question of whether a tort, or a breach of statutory duty, can suffice was left open by the Supreme Court in *JST BTS Bank v Ablyaszov (No 14) [2020] AC 727* . Lord Sumption and Lord Lloyd-Jones JJSC observed, at para 15, that the issue was complex, not least because it might—in the case

of a breach of statutory duty—depend on the purpose and scope of the underlying statute and whether that is consistent 'with its deployment as an element in the tort of conspiracy'. ***4384**

"29. For the purposes of the present case, it is not necessary to decide whether a breach of statutory duty can found a claim for conspiracy to injure, or whether every (other) tort can do so. It is only necessary to decide whether the claimant has established a serious issue to be tried as to whether the torts that are here in play may suffice as the unlawful act necessary to found a claim for conspiracy to injure. Those torts involve interference with rights in land and goods where those rights are being exercised for the benefit of the claimant (where the petrol station is being operated under the claimant's brand, selling the claimant's fuel). Recognising the torts as capable of supporting a claim in conspiracy to injure does not undermine or undercut the rationale for those torts. It would be anomalous if a breach of contract (where the existence of the cause of action is dependent on the choice of the contracting parties) could support a claim for conspiracy to injure, but a claim for trespass could not do so. Likewise, it would be anomalous if trespass to goods did not suffice given that criminal damage does. I am therefore satisfied that the claimant has established a serious issue to be tried in respect of a relevant unlawful act."

120. Having addressed this legal issue, he continued:

"30. There is no difficulty in establishing a serious issue to be tried in respect of the remaining elements of the tort. The intention of the defendants' unlawful activities is plain from their conduct and from the published statements on the websites of the protest groups: it is to disrupt the sale of fuel in order to draw attention to the contribution that fossil fuels make to climate change. They are not solitary activities but are protests involving numbers of activists acting in concert. They therefore apparently undertake their protest activities in agreement with one another. Loss is occasioned because the petrol stations are unable to sell the claimant's fuel."

121. All of the evidence before me leads me to the same factual conclusion as he reached at para 30.

122. Johnson J concluded as follows:

"31. I am therefore satisfied that there is a serious issue to be tried.

"32. Further, the evidence advanced by the claimant appears credible and is supported by material that is published by the groups to which the defendants appear to be aligned. That evidence is therefore likely to be accepted at trial. I would (if this had been a trial) wished to have clearer and more detailed evidence (perhaps including expert evidence) as to the risks that arise from the use of mobile phones, glue and spray paint in close proximity to fuel, but it is not necessary precisely to calibrate those risks to determine this application. It is also, I find, likely that the court at trial will adopt the legal analysis set out above in respect of the tort of conspiracy to injure (including, in particular, that the necessary unlawful act could be a tort that is not itself actionable by the claimant). It follows that not only is there a serious issue to be tried, but the claimant is also more likely than not to succeed at trial in establishing its claim."

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123. Mr Simblet submitted that neither the *American Cyanamid* test nor the "likely to succeed" test derived from the HRA, section 12(3) , were met on this claim. ***4385**

124. First , he was critical of the drafting of the claimant's statements of case and with some good reason. The claim form asserts that the claimant seeks an injunction "to restrain the defendants from obstructing access to or damaging petrol stations using its brand, by unlawful means and in combination with others". The "unlawful means" are not specified. The claim form does not therefore make clear on its face that the overarching tort relied on is the tort of conspiracy to injure by unlawful means. Further, neither the current nor the draft amended version of the particulars of claim specify what the underlying unlawful means are meant to be—Mr Simblet was right to identify that the particulars do not mention the torts of trespass to land, trespass to goods and nuisance referred to by Johnson J. They simply list the unlawful acts that occurred at the Cobham services on 28 April 2022. It is clear from the nature of the unlawful acts that they are said to constitute the torts of trespass to land, trespass to goods and private nuisance but the particulars would benefit from greater clarity. Ms Stacey sought to persuade me that avoiding legalese and writing in plain language was appropriate when dealing with persons unknown. That is correct as far as the injunctions are concerned but the requirements of the CPR and the need for legal clarity still apply to the statements of case.

125. Mr Simblet submitted that the claimant has not complied with the mandatory obligation in CPR PD 16, para 7.5 applying to a claim based upon agreement by conduct, where "the particulars of claim must specify the conduct relied on and state by whom, when and where the acts constituting the conduct were done". The conduct in question has been specified: namely the unlawful acts on 28 April 2022 referred to above. Further, the claimant has pleaded that they involved "co-ordinated action by a group of persons" and were also "carried out as part of the wider [JSO] movement", noting that some of the protesters were carrying or displaying banners which referred to JSO. The requirements of PD 16, para 7.5 have been met, just, by this brief pleading.

126. Second , the claimant is relying on the tort of conspiracy to injure because it is not in legal possession of all the petrol stations and does not own all the equipment on them. Accordingly, the underlying torts, depending on their precise location, may only be directly actionable in their own right by third parties. Mr Simblet argued that, given the complexities of land ownership in multi-retailer commercial environments it cannot confidently be asserted that the landowner would not tolerate the presence of those protesting against the claimant in each and every case where this might occur. For present purposes, I am satisfied that there is a serious issue to be tried as to whether the landowners would tolerate unlawful activity of the type restrained by the injunction, noting the observations as to protest on private land in *Director of Public Prosecutions v Cuciurean [2022] QB 888, paras 45–46* . To the extent necessary, I consider it likely that the claimant would succeed at trial on this issue.

127. Third , Mr Simblet contended that as the claimant appeared to accept that it does not have sufficient rights of possession to bring a claim in its own name for trespass or private nuisance, it was not clear on what basis claims of trespass and private nuisance could form the underlying unlawful means for this tort. The answer is found in the case law summarised by Johnson J at para 27, which establish that it is not necessary to show that the underlying unlawful conduct is actionable by the claimant. As he noted at ***4386** para 28, whether the unlawful means relied upon can be a tort actionable by a third party rather than a breach of contract is a novel point that has yet to be determined. The skeleton argument placed before Johnson J advanced reasons why the answer to that question should be in the affirmative. He has alluded to these in the latter part of para 29. As he did, I consider that the claimants can show a serious issue to be tried on that point.

128. Fourth , he argued that "instrumentality"—meaning that the conduct must be the means by which the claimant has suffered loss—is an additional element of the tort of unlawful means conspiracy. He contended that the poor state of the pleadings meant that this issue had not been addressed and that Johnson J had erred by not addressing the instrumentality issue. I disagree. The claimant's pleaded case refers to the significant duration of the protests on 28 April 2022 and the loss suffered by the claimant, due to the fact that petrol sales were significantly prevented or impeded while the protest was ongoing. The claimant's case also refers to different kinds of loss, namely, damage to equipment for the distribution of highly flammable fuels and consequential health and safety risks. Johnson J specifically referred to the fourth limb of the tort as being the injury to the claimant and addressed the evidence on loss: see paras 26 and 30. Further in *Cuadrilla [2020] 4 WLR 29 at paras 67–69* the Court of Appeal explained that the requirement of the conspiracy tort to show damage can be incorporated into a quia timet injunction by reference to the defendants' intention, which is the approach taken here. The extent of actual damage would need to be proved at a final hearing or on any committal.

129. Fifth , he noted that reliance on wide-ranging economic torts, such as conspiracy to injure through unlawful means, was discouraged by the Court of Appeal in *Ineos [2019] 4 WLR 100* . The court discharged those parts of an order based on public nuisance and unlawful means conspiracy, leaving only those based on trespass and private nuisance. Further, in *Cuadrilla* , the prohibitions were made out on the facts from claims in private nuisance and at para 81 the court described the prohibition

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

130. Sixth , he contended that while the courts will, in certain circumstances, allow claims to be brought against persons unknown, this does not mean that claims can be brought against purely hypothetical defendants. The courts will strike out claims brought against persons without legal personality, such as occurred in *EDO MBM Technology Ltd v Campaign to Smash EDO [2005] EWHC 837 (QB)* , a case seeking injunctive relief against protesters. Here, the claimants were simply "imagining or conjuring up" the alleged conspirators and a year into the life of the injunctions, there were still no named individuals involved. This was an ***4387** example of the serious conceptual and practical problems in using "persons unknown" injunctions in protester cases. This was particularly so where the injunctions are underpinned by an alleged conspiracy (namely a state of mind and agreement). However, *Cuadrilla* shows that the use of persons unknown injunctions in cases of this nature is conceptually acceptable.

131. I therefore agree with Johnson J, for the reasons he gave at paras 25–31 that there is a serious issue to be tried on this claim.

132. Further, I share his conclusion, at para 32, that in light of the credible evidence provided and the persuasive nature of the legal arguments on the third party tort issue, the claimant is more likely than not to succeed at trial in establishing its claim.

(2) Would damages be an inadequate remedy for the claimants and would a cross-undertaking in damages adequately protect the defendants?

133. The note of Bennathan J's judgment indicates that he accepted that (i) the activities at the Haven and Tower sites would cause grave and irreparable harm; (ii) trespassing on the sites could lead to highly dangerous outcomes, especially given the presence on the sites of flammable liquids; and (iii) the blocking of entrances could lead to business interruption and large scale cost to the claimant's businesses. He concluded that given the sorts of sums involved and the practicality of obtaining damages, the latter would not be an adequate remedy.

134. Johnson J accepted at para 34 that the defendants' conduct with respect to the petrol stations gives rise to potential health and safety risks and if those risks materialised they could not adequately be remedied by way of an award of damages. He took into account the fact that there is no evidence that the defendants have the financial means to satisfy an award of damages, such that it is "very possible that any award of damages would not, practically, be enforceable".

135. The evidence before me shows that all of these considerations remain valid.

136. There is also an element to which the losses at the Haven and Tower sites may be impossible to quantify, though, like Johnson J at para 33, I do not find the claimants' argument to similar effect with respect to the petrol stations persuasive.

137. However, for the other reasons set out at paras 133–135 above I am satisfied that damages would not be an adequate remedy for the claimants.

138. As to the issue of a cross-undertaking, as Johnson J noted at para 36 of *Shell* that while the petrol stations injunction does interfere with the defendants' rights of expression and assembly, to the extent that a court finds that there has been any unjustified interference with those rights, that could be remedied by an award of damages under the HRA, section 8 .

139. The evidence from Alison Oldfield, the claimants' solicitor, made clear that the claimants have offered a cross-undertaking in damages, in the event that the same becomes necessary. The claimants have the means to satisfy any such order.

140. Accordingly, a cross-undertaking in damages would be an adequate remedy for the defendants. ***4388**

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(3) Alternatively, does the balance of convenience otherwise lie in favour of the grant of the order: American Cyanamid per Lord Diplock at p 408c–f?

141. As damages are not an adequate remedy and the cross-undertaking is adequate protection for the defendants, it is not necessary separately to consider the balance of convenience: see Johnson J at para 38.

142. To the extent necessary, Ms Stacey relied on his further reasoning at para 39 to this effect:

> "the balance of convenience favours the grant of injunctive relief. If an injunction is not granted, then there is a risk of substantial damage to the claimant's legal rights which might not be capable of remedy. Conversely, it is open to the defendants (or anybody else that is affected by the injunction) at any point to apply to vary or set aside the order. Further, although the injunction has a wide effect, there are both temporal and geographical restrictions."

143. She submitted that this analysis, save for the final sentence, applies equally to the Shell Haven and Tower claims, and even more strongly since those orders do not have such wide effect.

144. I agree: for these reasons the balance of convenience is in favour of continuing the relief.

(4) Is there a sufficiently real and imminent risk of damage so as to justify the grant of what is a precautionary injunction?

145. It is only appropriate to grant an interim injunction if there is a sufficiently "real" and "imminent" risk of a tort being committed to justify precautionary relief (see, for example, *Canada Goose UK Retail Ltd v Persons Unknown [2020] 1 WLR 2802, para 82* (3), per Sir Terence Etherton MR).

146. All three injunctions were made because of conduct causing harm that had already taken place. Since then, further conduct and harm has occurred at petrol station sites. The risk of repetition is demonstrated by this further action and the various statements made by the protest groups indicating their intention to continue with similar activities, as summarised at paras 35–40 above.

147. I am, therefore, satisfied that unless restrained by injunctions the defendants will continue to act in breach of the claimants' rights; that there continues to be a real and imminent risk of future harm; and that the harm which might eventuate is sufficiently "grave and irreparable" that damages would not be an adequate remedy: see *Vastint Leeds BV v Persons Unknown [2019] 4 WLR 2, para 31* (3)(b), per Marcus Smith J.

148. It is appropriate to deal, at this juncture, with the element of the claimant's application for an extension of the petrol stations injunction which deals with the newly defined defendants. I deal with the issue here because the evidence in relation to non-environmental protesters at petrol stations, summarised at para 106 above, makes clear that they respected the terms of the injunction. This means that the aspect of the extension to the petrol stations injunction sought by the claimant in relation to this wider group is "purely" precautionary, as it is not based on any past tortious ***4389** conduct. However, in light of the evidence suggesting movement between groups and protest campaigns which are not necessarily limited to environmental protests, summarised at para 107 above, I am satisfied that the *Canada Goose* and *Vastint* tests are met with respect to this more widely defined group of defendants.

149. Finally, I agree with Johnson J's reasoning at paras 41–42, illustrating that the injunctions are not premature, due to the fact that warnings of protests are unlikely to be given in sufficient time to obtain an injunction:

> "41. If the claimant is given sufficient warning of a protest that would involve a conspiracy to injure, then it can seek injunctive relief in respect of that specific event. If there were grounds for confidence

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> that such warnings will be given, then the risk now (in advance of any such warning) might not be sufficiently imminent to justify a more general injunction. There is some indication that protest groups sometimes engage with the police and give prior warning of planned activities. But it is unlikely that sufficient warning would be given to enable an injunction to be obtained. That would be self-defeating. Further, it is not always the case that warnings are given. Extinction Rebellion say in terms (on its website) that it will not always give such warnings. Moreover, the claimant did not receive sufficient (or any) warning of the activities on 28 April 2022.
>
> "42. Accordingly, I am satisfied that this application is not premature, and that the risk now is sufficiently imminent. The claimant may not have a further opportunity to seek an injunction before a further protest causes actionable harm."

(5) Do the prohibited acts correspond to the threatened tort and only include lawful conduct if there is no other proportionate means of protecting the claimant's rights: Canada Goose, paras 78 and 82?

150. The acts prohibited in the Haven and Tower injunctions necessarily correspond to the threatened torts of trespass to their land and private nuisance.

151. The acts prohibited in the petrol stations injunction necessarily amount to conduct that constitutes the tort of conspiracy to injure, provided that the injunction is read in full in the way described by Johnson J at para 26 above. This means that the concerns raised in Mr Simblet's submission to the effect that clause 3.4 ("affixing … any object or person") would prohibit placing leaflets or signs on any objects on or in a Shell petrol station and his similar concerns about clauses 3.5 and 3.6 ("erecting any structure in, on or against any part of" or "painting … depositing or writing any substance on to any part of" a Shell petrol station) are to some degree mitigated by the fact that such activities are only prohibited by the injunction if they are (i) such that they damage the petrol station; (ii) done in agreement with others; and (iii) done with the intention of disrupting the sale or supply of fuel. These are similar to the "sweet wrapper" example given by Johnson J at para 26 above: the prohibited acts in paragraph 3 need to be read in conjunction with the definition of defendants. When that is done, it can be seen that they mirror the torts underlying the overarching tort of conspiracy to injure. ***4390***

152. I do not agree with Mr Simblet that it is necessary to revise the wording to make clear that the conduct must have the "effect" of disrupting the sale or supply of fuel to or from a Shell petrol station as this is an element of the conspiracy to injure tort. The same is not necessary given that this is an anticipatory injunction. The current wording focuses on the defendants' intention to cause harm which is consistent with *Cuadrilla [2020] 4 WLR 29, paras 67–69 (see para 128 above)* . Actual loss or damage can be addressed in due course.

153. Each injunction contains an order making clear that it is not intended to prohibit behaviour which is otherwise lawful. To the extent that it does, the same is a proportionate means of protecting the claimant's rights for the reasons given under sub-issue (10) below.

(6) Are the terms of the injunctions sufficiently clear and precise: Canada Goose at para 82?

154. In my judgment, the wording of all three injunctions is in clear and simple language, save for two caveats with respect to the petrol stations injunction: (i) some wording should be inserted before clauses 3.4–3.6 to reflect that the acts are only prohibited if they cause damage (such wording being clear on the face of the Tower and Haven injunctions but not on the petrol stations one); and (ii) clause 3.7 should be removed as it duplicates paragraph 4.

155. In respect of the petrol stations injunction, as Johnson J noted at para 46, it is usually desirable that such terms should, so far as possible, be based on objective conduct rather than subjective intention. However, for the reasons he gives, the element of subjective intention in paragraph 2 ("with the intention of disrupting the sale or supply of fuel to or from a Shell Petrol Station") is necessary because of the nature of the tort of conspiracy to injure and to avoid the language being wider than is necessary or proportionate (noting the sweet wrapper example he gave at para 21).

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156. I do not accept Mr Simblet's contention that the "encouragement" provisions are unduly vague: they are clearly defined as being linked with the underlying acts and are intended to ensure that the injunctions are effective. To the extent that they capture lawful activity they are proportionate, as explained under sub-issue (10) below.

(7) Do the injunctions have clear geographical and temporal limits: Canada Goose, para 82 (as refined and explained in Barking and Dagenham London Borough Council v Persons Unknown [2023] QB 295 per Sir Geoffrey Vos MR at paras 79–92)?

157. As to geographical limits, the extent of the Haven and Tower injunctions is made clear by the plans appended to them. The Haven injunction includes a clear definition of, and plan showing, the boundary of the injunction. This should address Ms Branch's concern about where she would need to be to risk breaching it if asked to leave by an employee. As to Ms Branch's concern that she might breach the Haven injunction by placing a poster or flyer on the external walls of the site, the injunction only prohibits the affixing of objects which cause damage, within the geographical boundary as defined (the latter of which should help her identify which "external walls" are covered). ***4391***

158. The petrol stations injunction applies only to "petrol stations displaying Shell branding (including any retail unit forming part of such a petrol station, whatever the branding of that retail unit)". I agree with the reasons Johnson J gave at para 48 as to why it is necessary and proportionate to protect the claimant's interests to include all such petrol stations rather than, for example, those that have already been targeted or certain types of petrol station.

159. However, Ms Branch and Mr Simblet had raised valid concerns about the extent to which the injunction covers land around or approaching the petrol stations. Accordingly, in my draft judgment I invited the claimant to propose some words that would greater delineate where the scope of the injunction ends and the public highway over which the injunction does not apply begins (albeit not using wording such as "short" distance as that would be insufficiently clear: see *Cuadrilla [2020] 4 WLR 29, para 57*). Ms Stacey, having explained why a simple "radius" provision was not practicable, proposed that the injunction would apply to those " directly blocking or impeding access to any pedestrian or vehicular entrance to a Shell Petrol Station forecourt or to a building within the Shell petrol station". I am satisfied that this revised wording renders the petrol stations order sufficiently geographically specific, as it makes it clear that the area of focus is the petrol station forecourts. It also correctly focuses on the nature of the prohibited activity, in the form of direct obstructions.

160. As to temporal limits, the claimants seek an extension to each injunction until trial or further order, with a backstop of a duration of one year.

161. Ms Stacey referred to the observations of the Court of Appeal in *Barking and Dagenham [2023] QB 295, paras 89 and 108* , to the effect that "For as long as the court is concerned with the enforcement of an order, the action is not at end" and "There is no rule that an interim injunction can only be granted for any particular period of time. It is good practice to provide for a periodic review, even when a final order is made".

162. She made clear that the claimants intend to await the outcome of the appeal to the Supreme Court in *Barking and Dagenham* , which is expected to clarify the central issue of whether final injunctions are capable of being obtained against persons unknown or whether they can only be obtained against named individuals, before seeking a final hearing on these injunctions. Both interim and final orders must be kept under review, in any event. That said, she put on record that the claimants are mindful of their obligations to progress the litigation and intend to do so by seeking directions to bring the matter to a final hearing as soon as practical once judgment in *Barking and Dagenham* is available. If there is a proper evidential basis to join named defendants that may occur, and then they can be permitted to file a defence.

163. I accept her assurance that the proposed "backstop" period of one year is just that, in light of the matters referred to in the preceding paragraph. I am satisfied that this period strikes the correct balance between the need to keep orders under review and the express indications by JSO and other groups that their campaigns are escalating, rather than being brought to an end in the near term. I note that, for example, in *High Speed Two (HS2) Ltd v Persons Unknown [2022] EWHC 2360 (KB) at [109]* , Julian Knowles J granted an interim injunction on the basis of yearly review periods to determine whether there was a continued threat which justified the continuation of the order, with the usual provisions allowing for persons affected to vary or discharge it.

(8) The defendants having not been identified, are they, in principle, capable of being identified and served with the orders: Canada Goose, paras 82(1) and 82(4)?

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164. The note of the hearing before Bennathan J makes clear that a Mr Smith was joined as a defendant to the Tower claim on an unopposed basis, but he is no longer so joined.

165. Johnson J's judgment explained, at para 13, that on 28 April 2022 five people were arrested and charged with offences, including criminal damage, in respect of the Clacket Lane and Cobham petrol station protests. He noted that the claimant had not sought to join them as individual named defendants to this claim because (in the case of four of them) it considered that, in light of the bail conditions, there was no significant risk that they would carry out further similar activities, and (in the case of the fifth) it was not sufficiently clear that the conduct of that individual came within the scope of the injunction.

166. Accordingly, there are currently no named defendants to any of the claims.

167. However, Ms Oldfield's evidence explains how the claimants are keeping the issue under review. They are liaising with the relevant police forces in an effort to identify persons falling within the persons unknown description; and comply with the undertaking to join such persons as named defendants to the three orders as soon as reasonably practicable following the provision of their names and addresses by the police.

168. Pursuant to the third party disclosure order made by May J (see para 218 below), on 29 March 2023 Surrey Police provided the claimant in the petrol stations claim with the names and addresses of individuals arrested at Clacket Lane and Cobham motorway services on 28 April 2022 and 24 August 2022. The claimant is liaising with Surrey Police to obtain the further information necessary to enable them to decide whether there is a proper evidential basis for applying to join any of the individuals as named defendants, following the approach set out by Freedman J in *Transport for London v Lee [2022] EWHC 3102 (KB) at [71]–[79]* . A similar process is no doubt underway in relation to the Commissioner following the third party disclosure order I made on 28 April 2023.

169. Therefore, while no named defendants have yet been identified, the claimants are taking active steps to identify such people. On that basis, I am satisfied that when people take part in protests at the relevant sites they are, in principle, capable of being identified and that there is a process in place focused on achieving that. Such persons can then be served personally with court documents. In the meantime, effective alternative service on the persons unknown defendants can take place in a manner that can reasonably be expected to bring the proceedings to their attention, as explained under issue (4). ***4393**

(9) Are the defendants identified in the claim forms and the injunctions by reference to their conduct: Canada Goose, para 82(2)?

170. The descriptions of the persons unknown are sufficiently precise to identify the relevant defendants as the descriptions target their conduct. Ms Oldfield's evidence makes clear that (i) effective service has taken place on persons unknown pursuant to the alternative service provisions in the orders; and (ii) the claimants are taking steps to identify persons falling within the description of the persons unknown and to comply with the undertaking to join such persons as named defendants.

(10) Are the interferences with the defendants' rights of free assembly and expression necessary for, and proportionate to the need to protect, the claimants' rights: articles 10(2) and 11(2) of the ECHR, read with the HRA, section 6(1) ?

171. As Mr Simblet highlighted, articles 10 and 11 contain important protections on the right to protest, which supplement those at common law. Further, it is the essence of protest that many, including those in power, will regard it as unwelcome (see, for example, the observations of Laws LJ in *Tabernacle v Secretary of State for Defence [2009] EWCA Civ 23* .

172. All three injunctions interfere with the defendants' rights under articles 10(1) and 11(1) of the ECHR . However, such interferences can be justified where they are necessary and proportionate to the need to protect the claimants' rights. As Lord Sales JSC explained in *Ziegler [2022] AC 408, para 125* , the test is as follows:

> "the interference must be 'necessary in a democratic society' in pursuance of a specified legitimate aim, and this means that it must be proportionate to that aim. The four-stage test of proportionality applies: (i) Is the aim sufficiently important to justify interference with a fundamental right? (ii) Is there a rational connection between the means chosen and the aim in view? (iii) Was there a less intrusive measure which could have been used without compromising the achievement of that aim? (iv) Has a

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fair balance been struck between the rights of the individual and the general interest of the community, including the rights of others?"

173. As to element (i), in the petrol stations claim, Johnson J at para 57 identified the aim of the interference as the need to protect the claimant's right to carry on its business. The same applies to the Haven and Tower claims which also involve the claimants' rights over their privately owned land, as protected by article 1 of the First Protocol to the ECHR . Johnson J observed that the defendants are "motivated by matters of the greatest importance" and "might say that there is an overwhelming global scientific consensus that the business in which the claimant is engaged is contributing to the climate crisis and is thereby putting the world at risk, and that the claimant's interests pale into insignificance by comparison". Ms Branch's statement indicates that these are her firm beliefs. However, as he continued, this is not "a particularly weighty factor: otherwise judges would find themselves according greater protection to views which they think important" (see *City of London Corpn v Samede [2012] PTSR 1624, para 41* , per Lord Neuberger of Abbotsbury MR); and "It is not for the ***4394** court … to adjudicate on the important underlying political and policy issues raised by these protests. It is for Parliament to determine whether legal restrictions should be imposed on the trade in fossil fuels".

174. I agree with his analysis that the claimant in the petrol stations claim is entitled to ask the court to uphold and enforce its legal rights, including its right to engage in a lawful business without tortious interference. The same is even clearer with respect to the claimants on the Haven and Tower claims, given that the injunctions only cover their private property. The claimants' rights in these respects are prescribed by law and their enforcement is necessary in a democratic society. As Johnson J held at para 57, the aims of the injunctions are therefore "sufficiently important to justify interferences with the defendants' rights of assembly and expression".

175. As to issues (ii) and (iii) in the test described by Lord Sales JSC, I am satisfied that in each of the three cases there is a rational connection between the terms of the injunction and the aim that it seeks to achieve. The terms of the injunction are drafted so that they only prohibit activity that would amount to the torts of trespass and private nuisance (in the case of the Haven and Tower claims) and conspiracy to injure (in the case of the petrol stations claim). The terms of the injunctions, including their geographical and temporal scope, are no more intrusive than is necessary to achieve the aims of the injunctions.

176. As to issue (iv), as Johnson J said at paras 36 and 59 of *Shell* , the defendants are not prevented from congregating and expressing their opposition to the claimants' conduct, including, "in a loud or disruptive fashion", in a location close to Shell petrol stations, so long as it is not done in a way which involves the unlawful conduct prohibited by the injunctions. The same applies to the Haven and Tower sites. The injunctions do not therefore prevent activities that are "at the core" or which form "the essence" of the rights in question (see *Cuciurean [2022] QB 888, at paras 31, 36 and 46* , per Lord Burnett of Maldon CJ). All that is prohibited on each of the injunctions is specified deliberate tortious conduct.

177. Leggatt LJ observed in *Cuadrilla [2020] 4 WLR 29, paras 94–95* that intentional disruption of activities of others (as opposed to disruption caused as a side-effect of protest held in a public place) is not "at the core" of the freedom protected by article 11. As Johnson J noted at para 62, the petrol station injunction sought to restrain protests which have as their aim such intentional unlawful interference with the claimant's activities; and the same is true of the Haven and Tower injunctions.

178. On the other hand, as Johnson J observed at para 60, simply leaving it to the police to enforce the criminal law would not adequately protect the rights of the claimant in the petrol stations claim: such enforcement could only take place after the event, meaning inevitable loss to the claimant; and some of the activities that the injunction sought to restrain are not breaches of the criminal law and could not be enforced by the exercise of conventional policing functions. The same is true of the claimants' rights at the Haven and Tower sites. Indeed the balance is even clearer in those respects given that the sites involve the claimants' private property, as to which see *Cuciurean* , paras 45–46, 76 and the conclusion at para 77, that articles 10 and 11 "do not bestow any 'freedom of forum' to justify trespass on private land or publicly owned land which is not accessible by the public". ***4395**

179. The injunctions therefore strike a fair balance between the defendants' rights to assembly and expression and the claimants' rights: they protect the claimants' rights insofar as is necessary to do so but not further.

180. Overall, I am satisfied that the interferences with the defendants' rights of free assembly and expression caused by the injunctions are necessary for and proportionate to the need to protect the claimants' rights.

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(11) Have all practical steps been taken to notify the defendants: the HRA, section 12(2) ?

181. The HRA, section 12(1)–(2) provide as follows:

> “(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.”

182. Ms Oldfield's evidence sets out the steps the claimants have taken to effect service of the orders and thus explains how the claimants have complied with the section 12(2) requirement in respect of the persons unknown defendants.

(12) If the order restrains “publication”, is the claimant likely to establish at trial that publication should not be allowed: the HRA, section 12(3) ?

183. The HRA, section 12(3) provides as follows: “No such relief [i e that defined by section 12(1) at para 181 above] 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.”

184. Johnson J addressed this issue in detail in his judgment. He found that section 12(3) is not applicable in this context as the injunction sought did not restrain publication. His reasons were as follows:

> “67. Nothing in the injunction explicitly restrains publication of anything. Nor does it have that effect. The defendants can publish anything they wish without breaching the injunction. The activities that the injunction restrains do not include publication. It does not, for example, restrain the publication of photographs and videos of the protests that have already taken place. Nor does it prevent anyone from, for example, chanting anything, or from displaying any message on any placard or from placing any material on any website or social media site.
>
> “68. Lord Nicholls explained the origin of section 12(3) in *Cream Holdings Ltd v Banerjee [2005] 1 AC 253, para 15* . There was concern that the incorporation of article 8 ECHR into domestic law might result in the courts readily granting interim applications to restrain the publication by newspapers (or others) of material that interferes with privacy rights. Parliament enacted section 12(3) to address that concern, by setting a high threshold for the grant of an interim injunction in such a case. It codifies the prior restraint principle that previously operated at ****4396*** common law. The policy motivation that gave rise to section 12(3) has no application here.
>
> “69. The word ‘publication’ does not have an unduly narrow meaning so as to apply only to commercial publications: ‘publication does not mean commercial publication, but communication to a reader or hearer other than the claimant’— *Lachaux v Independent Print Ltd [2020] AC 612* per Lord Sumption at para 18. Lord Sumption's observation was made in the context of defamation, but Parliament legislated against this well-established backdrop. Section 12(3) should be applied accordingly so that ‘publication’ covers ‘any form of communication’: *Birmingham City Council v Afsar [2019] ELR 373* per Warby J at para 60.

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> "70. The meaning set out by Lord Sumption in *Lachaux* is sufficient to achieve the underlying policy intention. There is therefore no good reason for giving the word 'publication' an artificially broad meaning so as to cover (for example) demonstrative acts of trespass in the course of a protest. Such acts are intended to publicise the protester's views, but they do not amount to a publication.
>
> "71. Further, the wording of section 12 itself indicates that the word 'publication' has a narrower reach than the term 'freedom of expression'. That is because the term 'freedom of expression' is expressly used in the side-heading to section 12 , and in section 12(1) , and is used (by reference ('no such relief')) in section 12(2) and section 12(3) . The term 'publication' is then used in section 12(3) to signify one form of expression. If Parliament had intended section 12(3) to apply to all forms of expression, then there would have been no need to introduce the word 'publication'."

185. He went on to consider the fact that in *Ineos [2017] EWHC 2945 (Ch)* , at first instance, Morgan J held (i) that section 12(3) applied (at para 86) and (ii) the statutory test was satisfied because if the court accepted the evidence put forward by the claimants, then it would be likely, at trial, to grant a final injunction (at paras 98 and 105). He noted that Morgan J found the injunction that he was considering might affect the exercise of the right to freedom of expression, continuing:

> "73. … That was plainly correct, because the injunction restrained activities that were intended to express support for a particular cause. It does not, however, necessarily follow that section 12(3) is engaged (because, as above, 'publication' is not the same as 'expression'). There does not appear to have been any argument on that point—rather the focus was on the question of whether there was an interference with the right to freedom of expression. To the extent that Morgan J in *Ineos* and Lavender J in *National Highways* [*National Highways Ltd v Persons Unknown [2021] EWHC 3081 (QB) at [41]*] reached different conclusions about the applicability of section 12(3) in this context, I respectfully adopt the latter's approach for the reasons I have given."

186. At paras 74–76, he observed that on appeal (*[2019] 4 WLR 100*), there was no challenge to the holding of Morgan J that section 12(3) applied, such that the Court of Appeal did not consider the issue. On that basis he found that while the Court of Appeal decision in *Ineos* is authority for the approach that should be taken where section 12(3) applies, it is not ***4397** authority for the proposition that section 12(3) applies in the circumstances where "there is no question of restraining the defendants from publishing anything".

187. If he was wrong with respect to section 12(3) not being applicable, he found that the claimant was likely to succeed at a final trial: paras 76 and 32.

188. It appears from the solicitor's note of the judgment on the Haven and Tower claims that Bennathan J took a different view and considered that section 12(3) applied, apparently on the basis that he considered himself bound by the Court of Appeal decision in *Ineos* . That is consistent with the approach he took in *National Highways Ltd v Unknown [2022] EWHC 1105 (QB) at [40]*). The solicitor's note is unclear, though, and can only be properly understood by looking at the *National Highways* judgment to which Mr Simblet referred. This sort of issue underscores why having an approved transcript of Bennathan J's judgment was important.

189. Ms Stacey contended that Johnson J's reasoning was correct and should be adopted in respect of all three injunctions.

190. Mr Simblet took issue with this analysis. He contended that a number of High Court judges, including Bennathan J, have accepted that section 12(3) does apply in cases concerning protest. Further, contrary to Johnson J's findings, the Court of Appeal judgment in *Ineos [2019] 4 WLR 100* is clear authority for the proposition that section 12(3) applies to cases such as the present, permission to appeal having been explicitly granted on the question of whether the trial judge "failed adequately or at all to

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apply section 12(3) of the Human Rights Act 1998 ". *Ineos* was binding on Johnson J, who erred in failing to follow it; and it was binding on me.

191. He referred to the broad definition of "publication" applied by Warby J in *Birmingham City Council v Afsar [2019] ELR 373, para 60* thus:

> "But I would go further. I am satisfied that it would be quite wrong to treat the word 'publication' in section 12(3) as having a limited meaning, restricted, for example, (as [counsel for the claimant's] submission seemed to imply) to commercial publication. It is hard to see how that (sic) such an approach could be rationally defended. It would give commercial publishers preferential treatment compared to other defendants, such as individuals communicating for private purposes, on social media. As everybody knows, some social media accounts have larger readerships than some paid-for newspapers. But there is a more fundamental point. In the law of defamation, 'publication does not mean commercial publication, but communication to a reader or hearer other than the claimant': *Lachaux v Independent Print Ltd [2020] AC 612, para 18 (Lord Sumption)* . This is generally true of the torts associated with the communication of information, sometimes known as 'publication torts', and the related law (see the discussion in *Aitken v Director of Public Prosecutions [2016] 1 WLR 297, paras 41–62*). Parliament must be taken to have legislated against this well-established background. Section 12(3) applies to any application for prior restraint of any form of communication that falls within article 10 of the Convention . This is appropriately reflected in the language of the practice guidance, quoted above." (Emphasis added.) ***4398**

192. He submitted that the proper test for the application of section 12(3) is therefore whether an order restrains: "any form of communication that falls within article 10 of the Convention". Whilst Johnson J was correct that this is narrower than simply acts which fall within the scope of article 10 , this is only to the extent that the act must additionally be a "form of communication". Therefore, whilst an act of expression that was not intended to be communicated to any audience would not be included, the application of section 12(3) is not otherwise restricted. He cited *Vural v Turkey* (Application No 9540/07) (unreported) 21 October 2014, para 54, where the Strasbourg court held that

> "an assessment must be made of the nature of the act or conduct in question, in particular of its expressive character seen from an objective point of view, as well as of the purpose or the intention of the person performing the act or carrying out the conduct in question".

That case involved pouring paint on a statue and the court observed that "from an objective point of view", this "may be seen as an expressive act".

193. Mr Simblet argued that, once an act is categorised as "expressive" it is only if it is violent, incites violence or has violent intentions that the conduct will be considered to fall outside the protection of article 10 ; and that this was recently confirmed in *Attorney General's Reference (No 1 of 2022) [2023] KB 37, para 96* , citing the Strasbourg principle that "an assessment of whether an impugned conduct falls within the scope of article 10 of the Convention should not be restrictive, but inclusive".

194. He submitted that while there could be arguments about whether any form of visible or performative protest amounted to "publication", it was clear that the petrol stations injunction involved publication as it prohibited "writing any substance on to any part of a Shell Petrol station". It was absurd to suggest that this was not a publication, not least as it could make out the necessary component of a libel claim (see *Clerk and Lindsell on Torts* , 23rd ed (2020), ch 21, section 5, referring, for example, to proof of posting a postcard amounting to "publication" for the purposes of a libel claim).

195. I do not consider that *Ineos [2019] 4 WLR 100* is binding authority for the proposition that section 12(3) applies. Johnson J was correct to point out that it proceeded on the assumption that section 12(3) applied and did not hear argument to the contrary, whatever the basis on which permission was originally granted.

196. However, I agree with Mr Simblet that the injunctions in this case do involve some elements of publication for these purposes, at the very least the prohibition on "writing". I make this finding applying the broad approach taken to the definition of "publication" by Warby J in *Birmingham City Council [2019] ELR 373* and the expansive approach of the Strasbourg court to this issue as evidenced by *Vural* 21 October 2014 and *Attorney General's Reference (No 1 of 2022)* . I, therefore, take the same approach as Bennathan J in the Haven and Tower claims and *National Highways [2022] EWHC 1105 (QB)* .

197. It must be remembered that Johnson J did not have the benefit of submissions from anyone other than the claimants. Further, the focus of his reasoning was the general concept of "demonstrative acts of trespass in the course of a protest": see para 184 above. It does not appear that he was ***4399*** asked to give specific consideration to the narrower question of whether the prohibition on "writing" within the petrol stations injunction might engage section 12(3) .

198. On that basis, the test is whether the claimants are "likely" to succeed at a final trial, at least in relation to the "writing" aspects of the injunctions. However, I am satisfied that that test is met for the reasons given under issue (1).

Overall conclusion on issue (3)

199. For all these reasons I consider it appropriate to extend the injunctions in the manner sought by the claimants, with the modifications referred to at paras 154 and 159 above.

Issue (4): whether to grant the claimants permission to serve any order and ancillary documents by alternative means

200. Under CPR r 6.15(1) , in order to authorise service of proceedings by a method or at a place not otherwise permitted by that part of the CPR , the court requires "good reason". That reason is made out here because the defendants are persons unknown, such that it is not possible to serve them personally.

201. The alternative means of service proposed for the order in the Tower claim are (i) affixing warning notices to and around the Tower which (a) warn of the existence and general nature of the order and of the consequences of breaching it; (b) indicate when it was last reviewed and when it will be reviewed in the future; (c) indicate that any person affected by it may apply for it to be varied or discharged; (d) identify a point of contact and contact details from which copies of the order may be requested; and (e) identify http://www.noticespublic.com/ as the website address at which copies of the order may be viewed and downloaded; (ii) uploading a copy of the notice to http://www.noticespublic.com/; (iii) e-mailing a copy of the notice to a series of e-mails relating to the main protest groups listed in the schedule of the order; and (iv) sending a copy of the notice to any person who has previously requested a copy of documents in the proceedings.

202. The alternative means of service proposed for the order in the Haven claim are (i)–(iii) above.

203. The alternative means of service proposed for the order in the petrol stations claim are (i)–(iv) above. The interim orders which I made on 28 April 2023 mirrored the terms of Johnson J's order and provided for the notices to be affixed by use of conspicuous notices in prescribed locations in the petrol stations, or in alternative locations in the stations, depending on the physical layout and configuration of the stations.

204. The alternative means of service proposed for the amended claim form and any ancillary documents in the petrol stations claim are (ii)–(iv) above.

205. Alternative service by means of this kind has been found to be appropriate in respect of Persons Unknown in similar proceedings involving co-ordinated campaigns by protest groups. In *Transport for London v Lee [2023] EWHC 402 (KB) at [32]* , Cavanagh J said:

> "Alternative service is necessary for the relief to be effective. Moreover … the defendants already have a great deal of constructive ***4400*** knowledge that the [injunction] may well be extended: the

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> 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 Ltd, 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 … is unaware that injunctive relief has been granted by the courts."

206. Bennathan and Johnson JJ also approved service of the orders in these proceedings in materially identical terms. The note of Bennathan J's judgment indicates that he observed that in persons unknown cases, it is sensible to adopt a variety of methods of service and considered that the proposals for alternative service in the Tower and Haven claims were "sensible" and "broad". The note of the hearing before Johnson J makes clear that counsel for the claimant in the petrol stations claim explained why other methods of alternative service, such as the use of newspapers and social media, had been considered but discounted.

207. Ms Oldfield's evidence sets out the efforts that have been made to identify individuals who ought properly to be named as defendants and the steps that had been taken to serve the previous three orders and the draft amended claim form and related documents in the petrol stations claim.

208. I am satisfied that the proposed methods of alternative service are appropriate and sufficient. I accept Ms Oldfield's evidence as to why these methods of service remain an appropriate means by which the documents may be brought to the attention of potential defendants. I am satisfied that the proposed methods of alternative service should apply to the further sealed injunctions orders I make and to the amended claim form and ancillary documents in the petrol stations claim. For the purposes of the injunctions, I dispense with personal service for the purposes of CPR r 81.4(2)(c)–(d) .

209. Ms Stacey rightly highlighted that even once alternative service is approved, it remains open to any defendant on a committal application to argue that it has operated unfairly against them: *Secretary of State for Transport v Cuciurean [2020] EWHC 2614 (Ch) at [63* (9)].

Issue (5): whether to grant the claimant in the petrol stations claim its application for a third party disclosure order against the Commissioner

210. The claimant in the petrol stations claim is currently unable to name any individual defendants. The third party disclosure application under CPR r 31.17 sought documents from the Commissioner relating to the arrests of a number of people, some falling within the category of persons ***4401*** unknown, as defined in the petrol stations injunction, who were arrested on 26 August 2022 in protests at the Shell Acton Park and Acton Vale petrol stations, both sites covered by injunction. It has been reported that 43 people were so arrested. The application was supported by the third witness statement from Ms Oldfield.

211. The draft order sought the names and addresses of those arrested. The purpose of this disclosure was to help the claimant identify and name, so far as possible, defendants to the claim, so that the claimant can consider whether to join them as defendants and so that they can be served with the proceedings in the usual way.

212. The draft order also provided for the claimant to revert to the Commissioner on provision of the names and addresses and seek (i) arrest notes, incident logs or similar written records relating to the activity and/or conduct in question and those involved; (ii) other still photographic material; and/or (iii) body-worn or vehicle camera footage; and for the Commissioner to provide the same, insofar as it discloses any conduct and/or activity which may constitute a breach of the injunctions granted in these proceedings and/or may assist in identifying any person who might have undertaken such conduct and/or activity. This information was sought to support potential contempt proceedings.

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213. The Commissioner did not object to providing the disclosure sought, provided a court order was made.

214. In the first hearing in *Transport for London v Lee [2022] EWHC 3102 (KB) at [94]* , Freedman J reiterated that CPR r 31.17 provides a general power for the court to order a non-party to disclose information into the proceedings; and that although it is established that such orders are the exception and not the rule (see *Frankson v Home Office [2003] 1 WLR 1952, para 25*), the court retains a wide discretion to make such an order in appropriate cases.

215. In *Esso Petroleum Co Ltd v Persons Unknown [2022] EWHC 1477 (QB) at [32]* , Bennathan J accepted that ordering the similar disclosure sought from various police forces as "evidence of breaches of the injunctions" was "the most sensible and efficient way to identify any breaches of the injunction" and that it was "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".

216. Further, in *Transport for London v Lee [2022] EWHC 3102 (KB) at [96]* Freedman J made a materially similar order to the one sought in this case in respect of the name and address of the relevant individuals on the basis that:

> "(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 … 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 … injunction without significant impediments; and ***4402** (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."

217. It appears that the order Freedman J made was in materially identical terms to the one sought in this case. I therefore assume it covered not only the names and addresses but also the material described at para 212 above.

218. On 13 March 2023 May J made a materially identical third party order against Surrey Police in these proceedings in relation to arrests at the Shell petrol station at Cobham Motorway Services and Clacket Lane services on 28 April 2022 and/or 24 August 2022, having received submissions from the Equality and Human Rights Commission and having permitted the Attorney General and the Press Association the opportunity to do so.

219. In my judgment, the same general considerations as were set out by Bennathan and Freedman JJ above, and found to apply by May J in the specific context of the petrol stations injunction, applied here. I was satisfied that the names and addresses

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and further information referred to should be the subject of a third party disclosure order because the requirements of CPR r 31.17 were met, in that (i) the documents are relevant to an issue arising out of the claim; (ii) they are likely to support the claimant's case (or adversely affect the case of one of the other parties); and (iii) disclosure is necessary to dispose fairly of the claim or to save costs.

Conclusion

220. For all these reasons I:

(i) Grant Ms Branch permission to apply to set aside or vary the existing injunctions under CPR r 40.9 and have taken her submissions into account;
(ii) Grant the claimant in the petrol stations claim permission to amend the description of the persons unknown defendant:
(iii) Extend the three injunctions for up to a further year, in the manner sought by the claimants, subject to the modifications identified at paras 154 and 159 above; and
(iv) Grant the claimants permission to serve the three orders as well as the amended claim form and ancillary documents in the petrol stations claim by alternative means.

221. This judgment also explains why I made the third party disclosure order sought against the Commissioner. ***4403**

Postscript

222. After circulation of my draft judgment, the claimants provided revised draft orders. These addressed the geographical scope issue, referred to at para 159 above. They also correctly removed the duplicative provisions relating to "encouragement", referred to at paras 24, 25, 154 and 156 above, albeit preserving the word "assisting" which only appeared in one of the original "encouragement" clauses. I am content to approve that revision.

223. I indicated that I was prepared to extend all three orders to 12 May 2024. Accordingly, any hearing to review them will need to take place in April 2024 (not May 2024, as the claimants proposed). Any application to extend them should be made by 28 February 2024 (not by 29 March 2024, as was proposed). I consider a time estimate of 1½ days realistic (not the five hours proposed). That may need to be revised if any applications to vary or set aside the orders are made.

224. As to the notice required for any applications to vary or set aside the orders, the original draft orders provided with these applications sought a notice provision of 48 hours, not the 24 hours originally approved by Bennathan and Johnson JJ. For the reasons alluded to at para 83 I consider a 48 hours' notice provision appropriate.

225. The draft orders, which were provided very shortly before the hand down was due to take place, sought to increase this period to three clear days (excluding weekends and bank holidays). As Mr Simblet highlighted in his response, this issue had not been the subject of argument. It also raises issues as to how the claimants, and the court, deal with unrepresented defendants. If the claimants seek a further variation of the orders to this effect they should apply by way of an application notice, on notice to Ms Branch.

Catherine May, Solicitor ***4404**

Permission granted for non-party to apply under CPR r 40.9 to set aside or vary injunctions.

Injunctions extended subject to certain amendments.

Description of persons unknown amended in third case.

Permission granted for service by alternative means.

Footnotes

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1 C
2 PR r 40.9 : see post, para 52.

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Case No: QB-2022-001259
QB-2022-001420
QB-2022-001241

NCN: [2024] EWHC 1546(KB)
IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

The Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 17 April 2024

BEFORE:

MR JUSTICE COTTER

BETWEEN:

(1) SHELL UK LIMITED
(2) SHELL INTERNATIONAL PETROLEUM LIMITED
(3) SHELL UK OIL PRODUCTS LTD

Claimants

- and -

PERSONS UNKNOWN

Defendants

MS M STACEY KC (instructed by Eversheds Sutherland) appeared on behalf of the Claimants
MR LAURIE the Eighth Defendant appeared in person

JUDGMENT
(Approved)

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Lower Ground, 46 Chancery Lane, London WC2A 1JE
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1. MR JUSTICE COTTER: This is an **ex tempore** judgment following a review of interim injunctions. The three claimants sought and obtained interim injunctions to restrain unlawful protest and activity by the defendants at premises at Shell Haven, Shell Centre Tower and the Shell petrol stations. This judgment follows a hearing to consider the claimants' applications; (i) for the continuation of the orders of Mrs Justice Hill, made on 23 May 2023, in respect of the three claims until the trial of the action; (ii) for orders that deem steps taken in relation to service to have been sufficient; also for alternative service and variations to existing alternative service provisions pursuant to separate applications and (iii) for directions through to trial in respect of all proceedings. This judgment will cover the first two issues, it is only relevance in relation to the third application is that the matter is to be listed for trial in July of this year, so in only a few months' time.

2. This review hearing was required by paragraphs 6 of the orders of Hill J and paragraph 17 of the order of Soole J, made on 15 March 2024. The first and second claimants are respectively the freehold owners of firstly the Shell Haven oil refinery, a substantial fuel storage and distribution installation; and secondly the Shell Centre Tower, a large office building. The third claimant is Shell UK Oil Products Ltd, it markets and sells fuels to retail customers in England through a network of petrol stations.

3. References to Shell in this judgment are references to the three claimants, unless otherwise stated. The three claims have been managed together, although not formally consolidated. There have been a number of interim injunctions granted in these proceedings. Injunctions were granted against persons unknown restraining unlawful protests at the Haven and Tower premises on 5 May 2020 by Bennathan J; an interim injunction was granted on 5 May 2022 by McGowan J and a further interim injunction granted on 20 May 2022 in the petrol stations claim against persons unknown, restraining unlawful protests by Johnson J (the judgment is at [2022] EWHC 1215).

4. Turning to the evidence before Hill J, the claimants' solicitors provided detailed chronologies setting out the incidents which they have been able to identify since of direct action protest against the claimants since Spring 2022. The incidents were fully described in the following witness statements: firstly a statements from Fay Lashbrook,

the Haven terminal manager; secondly a statement from Mr Garwood in respect of The Tower; thirdly a statement from Mr Austin, the claimants' health, safety and security manager in respect of the petrol stations; and finally a statement from Mr Pritchard-Gamble, the security manager. These statements were all dated 30 March 2023 and supported by voluminous exhibits.

5. Since the hearing before Hill J, a second statement has been prepared by Mr Pritchard-Gamble, dated 14 March 2024, and Mr Austin has provided a fourth witness statement dated 14 March. Ms Alison Oldfield, the solicitor with (Inaudible) to the cases, has also provided further statements.

6. No acknowledgments of service (or any evidence) has been served by or on behalf of the defendants despite provision having been made by paragraphs 14 and 15 of the order of Soole J. Paragraphs 20 and 21 of that order required any defendant who wished to participate in the review proceedings to file an acknowledgment of service and any evidence to be relied upon, in default of which permission of the court was required before a defendant could make any submissions. There was also a requirement to give the claimants 48 hours' notice.

7. Mr Laurie, who is attending today, did give 48 hours' notice to the claimants but has not filed an acknowledgment of service or any evidence. He sought permission to make submissions. He said candidly that he had not fully understood the requirements of the order and thought that giving the claimants 48 hours' notice was all that was required. He said he wanted to make an overarching legal point and did not require supporting evidence to make it. Given the widespread interest in these orders and the limited and focused nature of Mr Laurie's intended submission, I gave him permission to address the court.

8. Turning to the background/outline facts, these are adequately set out in the judgment of Johnson J at paragraphs 10 to 19, and within the judgment of Hill J at paragraphs 10 to 21. They need no detailed repetition or expansion by me, save to note that XR, a campaign group, which was formed in October 2018, seeks to affect the government's policy on climate change through civil disobedience. It called upon its members to support its aims. Several other groups are associated with this stance,

including Just Stop Oil, Youth Climate Swarm, and Scientists' Rebellion. These groups have been associated with and grown out of the climate protest movement. Matters came to a head in April and May 2022 when various activities were undertaken with what Mr Pritchard-Gamble described as “the apparent aim of causing maximum disruption to Shell's lawful activities, and thereby generating publicity by the protest movement.”

9. Turning briefly to the separate claims, Bennathan J was provided with witness statements in relation to the Haven protest, which set out the activities including a six-hour incident on 3 April 2022, which saw a group of protesters blocking the main access road; protesters stopping and attempting to access the jetty; and similar incidents at fuel-related sites geographically proximate to the Haven.

10. Within a witness statement, Mr Brown explained that his main concerns related to the fact that the Haven site is used for the storage and distribution of highly flammable hazardous products and if unauthorised access was gained this could lead to a leak, fire or explosion with, consequentially, very significant danger. He had concerns for the personal safety of staff and contractors, and indeed for the protesters themselves.

11. As for the Tower action, Bennathan J was provided with witness statements from Mr Garwood in respect of the claim, again outlining the various incidents, including on 6 April 2022 (when a paint-like substance was thrown leaving marks on the walls, around the staff entrances), on 13 April 2022, when about 500 protesters converged on the Tower, with some gluing themselves to the reception area, on 15 April when about 30 protesters holding banners obstructed the road where the Tower is located, and on 20 April when 11 protesters holding banners, used a megaphone and ignited smoke flares. He also referred to protesters having graffitied and stuck stickers on the outside of the building. He expressed concern about intimidation of staff and visitors, and the blocking of entrances and exits to the Tower. The latter was a health and safety risk, in particular because it restricted access for emergency vehicles and sometimes meant members of the public had to walk on the road.

12. As for the petrol stations action, Johnson J was provided with witness statements from Benjamin Austin, and within his judgment explained at paragraph 2 the details of the

various activities, including the blocking of forecourts, damaging display screens with hammers, kiosks sabotaged and protesters variously glued themselves to the floor, the fuel pump, the roof of a fuel tanker, and each other. A total of 55 fuel pumps were damaged. The hazards arising from the protests being within a petrol station, and petrol being a highly flammable substance, are to a large degree obvious. He summarised such matters at paragraphs 18 and 19 of his judgment.

13. It is important to note that it is the claimants' submission in respect of these applications, as it has been on previous occasions, that the orders do not stop protesters from undertaking peaceful protests, whether near the site or otherwise. Rather the claimants' concern has been to enforce its proprietary rights and mitigate the health and safety risks posed by unlawful activities.

14. The orders of Hill J were carefully drawn up and were aimed at solely prohibiting activity which is clearly unlawful. They were to continue through to the trial of the matter, but with provision for this review.

15. The order now sought by the claimants is for the continuation of the injunctions on materially identical terms to those already in force for the short period of months up until the final trial of this matter. In comprehensive and helpful submissions, Ms Stacey KC has indicated that the issues and legal principles applicable to the claims are essentially identical, and the evidential foundation for the continuation is materially very similar, to what are before Hill J.

16. I turn to the scope of the review hearing and make the following two observations in relation to review hearings and injunctions made in cases where persons restrained are unlikely to have any right or liberty to do that which is prohibited by the order, save potentially when convention rights are weighed up in a proportionality balance.

17. Firstly, and as the Supreme Court has recently observed in the case of *Wolverhampton City Council v London Gypsies and Travellers [2023] UKSC 47*, although there are exceptions, interim injunctions, where they have been made in proceedings where there is unlikely to be significant factual disputes at any trial impacting on the claimants' entitlement to effective protection of disputed rights, need to be viewed in their own

particular circumstances. The defendants have usually had an opportunity to argue the merits of the order and to adduce evidence, including under the liberty to apply provisions. So when the evidence and arguments were carefully considered before an interim order was made and there has been no appeal, the court, is entitled to ask at a review hearing such as this as an initial broadbrush question: "what has changed or is likely to change before the trial?" If the answer is nothing, then this gives a very firm steer towards continuation of the order to trial. This means that a detailed reappraisal of all of the arguments previously considered, with consequential implications in terms of costs and court resources, may not be required. This is all the more so if the trial is likely to take place within a matter of months, as was the case in *Transport for London v Lee and others*, [2023] EWHC 402, (see paragraph 26) and as is the case here, with a proposed trial being listed for the first available date after 24 July 2024, so in just over three months' time, with a backstop date of 12 November 2024.

18. The court must be willing to consider any significant developments since the making of the interim order and any, applications/arguments raised by any defendant or other person entitled to address the court. However, in the absence of any of these, only a short hearing may be necessary. I am sure this is what Hill J envisaged when she referred to the "slightly narrower approach appropriate on an uncontested hearing".

19. Secondly, the courts grant injunctions on the assumption that they will generally be obeyed. Therefore, the court is entitled to expect no breaches to have occurred since the interim order was made, and ordinarily, and without more, the absence of any breaches should be seen as reflecting the effectiveness of the order and not evidence or the lack of evidence undermining the need for it.

20. There has been widespread publicity of the orders made on contempt applications in protester cases of various forms and people are very well aware of what may follow if an order is disobeyed.

21. At this point, it is necessary to turn to the submission made by Mr Laurie, as it is effectively a submission that there has been a change of circumstance.

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

23. In relation to the offence of locking-on, a person commits the offence if they attach themselves to another person or to an object or land that causes or is capable of causing serious disruption to two or more individuals or an organisation in a place other than a dwelling when the person involved intended the consequences of serious disruption. A person who commits an offence under 1 is liable on summary conviction to a term of imprisonment not exceeding the maximum term for summary offences.

24. Section 7 provides that a person commits an offence if they do an act which interferes with the use or operation of any key national infrastructure, and they intend that act to interfere with the use or operation of such infrastructure, or are reckless as to whether it will do so. Under sub-section 4, a person's act interferes with such use if it prevents the infrastructure from being used or operated to any extent for its intended purposes. A person convicted of an offence under this section is liable on summary conviction to a term not exceeding the sentencing limit of the magistrates court, and on conviction to a term of imprisonment not exceeding 12 months.

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

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

27. As I indicated during submissions, it has not been a settled principle adopted by the civil and family courts to date that the courts should refuse to prevent future conduct by an order solely on the basis that if material activity does occur, the defendant may afterwards face criminal prosecution, or indeed to refuse to restrain conduct of a type

which has already been the subject of criminal proceedings. The essential reason for this is that civil orders address prospective behaviour so that damage or harm is avoided. Criminal proceedings, if brought, this being a matter out of the control of the party potentially subject to harm or damage, ordinarily deal with matters once the damage or harm has occurred, save for inchoate offences.

28. My own research during submissions established that the issue of whether to use civil injunctions when criminal or alternative statutory form civil orders are available has been considered by the courts in the past and is not straightforward. In *Stoke-on-Trent City Council v B&Q Retail Ltd* [1984] AC 754, the House of Lords was concerned with the problems faced by local authorities when DIY supermarkets and others sought to open on Sundays in breach of the law as it then was under the Shops Act 1950. The maximum penalty for doing so was of limited financial impact. The House of Lords held that an interlocutory injunction, as it was then described, to restrain Sunday trading had been properly granted. Having said that the Courts should be 'reluctant' to grant an injunction in aid of the criminal law. Lord Templeman stated at paragraph 776:

> "It was said the council should not have taken civil proceedings until criminal proceedings had not persuaded the appellants to obey the law. As a general rule, the local authority should try the effect of criminal proceedings before seeking the assistance of the civil courts. But the council were entitled to take the view that the appellants would not be deterred by the maximum fine which was substantially less than the profits which could be made from illegal Sunday trading."

29. In that case the Claimant was acting pursuant to section 222 of the Local Government Act which does not apply to the claimants. The question whether conduct would be likely to be prevented by the risk of criminal proceedings as submitted by Mr Laurie has not been specifically covered in evidence by the claimants, but this is hardly surprising given that they have only been alerted to this point within the last 48 hours.

30. In the *Mayor of London v Hall* [2011] 1 WLR 508, the Court of Appeal upheld the grant of an injunction restraining protesters from occupying Parliament Square in aid

of the enforcement of bylaws which provided for modest financial penalty. Lord Neuberger MR considered the issue of whether an injunction should have been granted in aid of the criminal law at paragraphs 52-57. Firstly, he stated that the Claimant had a right as the person in possession of property to seek an injunction. Secondly the Judge had properly concluded that demonstrators would not be deterred by the ?? of criminal proceedings.

31. *In Swindon Borough Council v Redpath* [2019] EWCA Civ 943, the court was concerned with the local authority's choice to seek a civil injunction as opposed to what was then essentially a broadly criminal equivalent, an antisocial behaviour order ("ASBO"). As Rix LJ stated:

> "On certain facts, it may be that a local authority has a choice between an antisocial behaviour injunction and an antisocial behaviour order, and if that is a genuine choice, I do not see why it cannot choose which it prefers at any rate so far as the jurisdiction is concerned. As for matters of discretion, however, the difference between the regimes may well enter into the argument. However, there has been no attempt here to show that this is a case more properly relevant to the Asbo regime."

32. In *Birmingham City Council v James* [2014] 1 WLR 23, Jackson LJ observed that in many situations in which on the facts two different preemptive orders are available, and there is no closest fit principle which cuts down the courts' powers to make preemptive orders. However as in *Redpath* the Court was concerned with statutory alternative to control future behaviour.

33. In *Sharif v Birmingham City Council* [2020] EWCA Civ 1488, in a court presided over by the Master of the Rolls was concerned with street or car cruising. It was argued that where Parliament had provided a remedy and a specific procedure in the form of a public space prevention order under part 4 of the Anti-Social Behaviour, Crime and Policing Act 2014 to combat the very type of behaviour complained about, the court should give effect to Parliament's intention, and only in very rare circumstances would it be appropriate to grant injunctive relief.

34. Bean LJ did not accept that argument, stating that in his view car cruising in Birmingham would continue unless and until effectively restrained by the law, and that

nothing short of an injunction would be effective to restrain them; indeed he regarded it as a classic case for the grounds of an injunction.

35. This brief overview of authority has shown that there has been some reluctance on the part of the courts to order civil injunctions when parallel statutory or criminal processes are available. However it appears to me that where there are no statutory alternatives preventing future conduct and the position is the reliance upon subsequent criminal action as a deterrent, the argument in favour of the ability to us an injunction is the stronger.

36. Also the Claimant is able to rely on its right to possession/to control access to its property (the first ground referred to by Neuberger LJ in *Hall*.)

37. The following additional matters are also relevant: firstly, some of the unlawful activity which led to the making of the interim orders already exposed the participants to criminal proceedings, such as for criminal damage, but this was clearly not a sufficient deterrent as the evidence proved. Secondly, the unlawful activity has included activity beyond locking-on, and section 7 only covers the key national infrastructure and not all of the property covered by the injunctions. And thirdly, the maximum sentence for the offences under sections 1 or 7 is 12 months, whereas the maximum penalty for contempt for breach of an order is of course much greater at two years, so a much greater deterrent.

38. For the purposes of this review hearing, I proceed on the basis that the existence of criminal offences that may prevent criminal activity may be a matter relevant in the exercise of the court's discretion at the final hearing. However, I put it no higher than that. It is certainly not a knockout punch as regards the continuation of the order to trial when a full argument may be advanced before the Court.

39. A major problem with Mr Laurie's submission, made without any evidence at a review hearing, is it requires the court to undertake a huge leap of faith, and to assume that the compliance with the order since the Act came into force has at the least very largely been because of the new offences. Given the protracted history of matters, and the nature and extent of activities to delete some of which were clearly “criminal”, I am not

at this hearing prepared to make that leap. So for the purposes of this review hearing, I consider the argument Mr Laurie raises as one which can be weighed in to the discretionary balance in due course at trial but not sufficient to warrant not continuing the orders.

40. The following matters are also of significance when considering the risk of further unlawful activities: firstly, the named defendants and those within the groups identified as likely unless restrained to engage in conduct likely to be unlawful have in no sense gone away or changed their views. It appears that taken as an overview in this regard, nothing has changed or is unlikely to change before trial. This is essentially the same conclusion as that reached by Cavanagh J following a review hearing in *Transport for London v Lee* [2023] EWHC 402. He stated:

> "The real issue before me therefore is whether the evidence of recent events that have taken place since 30 October 2022 provides grounds for declining to extend the injunction on material in identical terms. The answer is there are no such grounds. The activities of Just Stop Oil have continued, albeit with a change of tactics, and in my judgment the justification for the interim injunctive relief to restrain unlawful activities on the roads is as great as it has ever been."

41. Secondly, (and as a consequence) there is force in the submission that there has been no material reduction in risk as evidenced by the content of the second statement of Mr Pritchard-Gamble, dated 14 March 2014, and specifically to the following: the protests outside the claimants' premises as described at paragraphs 4.4.2 and 4.5.2 of the statement. There have been 63 separate protests at Shell Tower since the April renewal hearing. Apart from three incidents in June 2023 when protesters accessed the entrance to the Tower, these appear, I say no more, to have been lawful protests. I pause to observe that this is also of significance as it gives credence to the claimants' repeated assertion that it does not seek to prevent protesters from undertaking lawful peaceful protests, whether or not such protests arise near to its premises. It also highlights how it is possible to protest against the use of fossil fuels without infringing the rights of the claimants or others.

42. Also, the annual general meeting on 23 May 2023 was heavily disrupted and there was a protest at one Shell petrol station in Oxford, (paragraph 4.5.4 of the statement). It seem clear that the wider activities of the groups in question remain targeted at the oil and gas industry. This includes protester activity referred to at paragraphs 4.2.3 and 4.2.5 of the witness statement, including widely reported incidents at sports events, art galleries and museums and also slow marches. Further protests at or close to premises used by organisations involved in the trade or use of fossil fuels or providing support to such organisations, including insurance companies, are set out in detail at paragraph 4.10 of the statement; also protests directed at the government or other political parties.

43. The next point is that there have been comments reiterating that this is "an indefinite campaign of civil resistance" as set out in paragraph 7.3.2 of the statement, until those involved achieve their aims. As recently as 3 March 2024, it was stated:

> "Non-violent civil resistance to a harmful state will continue with coordinated radical actions that reach out to new people and capture the attention of the world. Just Stop Oil will continue to (Inaudible) with a major focus until we win."

44. In my judgment for the purposes of this hearing, it should be assumed, at least as a starting point, that the orders in force have played their part in controlling the claimants' behaviour. Indeed, there have been complaints made about the role of the courts and the orders made as restricting the ability to take action, set out at paragraph 4.3 of the statement.

45. I also take into account the refusal of the named defendants to gave undertakings. I note the observations of Linden J in the Esso Petroleum case: it would have been easy for Defendants to give assurances or evidence to the court that there was no intention to carry out direct action at the various sites, but a decision was taken not to do so. As I have indicated in other cases, this provides an insight into the mindset of those who would, unless restrained, engage in unlawful activities with the aim of halting the Claimants' business in fossil fuels.

46. I am satisfied, having regard to matters which I have set out, that there is a real and continuing risk of imminent and unlawful activities if the orders were to be discharged. In my view, unlawful activity would be likely to resume to some degree.

47. I shall now deal with the legal controls on the grounds of injunctions. I do so by reference to the judgment of Hill J. Whilst I will list the considerations I have taken into account, I will not set out my reasoning in full detail in relation to each consideration, as it is exactly the same as the reason set out by Hill J.

48. The law imposes different tests which must all be satisfied before an injunctive order can be made on an interim basis, or continued.

49. The claimants must demonstrate (i) that there is a serious question to be tried; (ii) that damages would not be an adequate remedy for the claimant, but a cross-undertaking in damages would adequately protect the defendants, or that the balance of convenience otherwise lies in favour of the grant of the order; (iii) that there is a sufficient, real and imminent risk of damage so as to justify the grant of an injunction; (iv) that the prohibited acts correspond to the threatened tort and only include unlawful conduct; (v) there is no other proportionate means of protecting the claimants' rights; (vi) that the terms of the injunction are sufficiently clear and precise; (vii) that the injunction has clear geographical and temporal limits; (viii) that if the defendants have not been identified, they are in principle capable of being identified and served with the order; (ix) that the defendants are identified in the claim form by reference to their conduct; (x) that the interferences with the defendants' rights to free assembly and expression are necessary for and proportionate to the need to protect the claimants' human rights; finally (xi) that the order does not restrain publication, or if it does, the claimants are likely to establish at trial that publication should not be allowed.

50. In my judgment, the position remains the same as at the time the orders were made by Hill J. There is clearly a serious issue to be tried in these claims, applying the test set out in *American Cyanamid v Ethicon* [1975] AC 396. The position is not materially altered by the decision of the Supreme Court in the *Wolverhampton* case.

51. The next question is whether damages is an adequate remedy, ie would damages be an inadequate remedy for the claimants and would a cross-undertaking in damages adequately protect the claimants? I adopt the reasoning and conclusions of Hill J set out at paragraphs 137 to 140 of her judgment. Given the sums involved and the practicality of obtaining damages, the latter would not be an adequate remedy. There remains no evidence that the defendants have the financial means to satisfy an award of damages and, more importantly, the health and safety risks, if triggered, could cause serious or fatal injuries for which damages would not be an adequate remedy. Conversely, Shell has offered a cross-undertaking in damages if it becomes necessary and has the means to satisfy such an order, which would be an adequate remedy for the defendants. So while damages are not an adequate remedy for the claimants, the cross-undertaking in damages is an adequate remedy for the defendants.

52. As damages are not an adequate remedy and the cross-undertaking is adequate, it is not necessary to separately consider the balance of convenience. In any event, it is in favour of continuing the relief.

53. As for the question whether there is sufficient, real and immanent risk of damage so as to justify the grounds of what is a precautionary injunction, it is only appropriate to grant an injunction if there is a sufficient and real immanent risk of a tort being committed. The evidence before this court, satisfies that requirement, and I have already set out why I consider that a risk of unlawful activity remains.

54. Turning to the scope of the order, the court has been asked to continue the orders made by Hill J on materially identical terms. I adopt the reasoning and conclusions reached by Hill J at paragraphs 150 to 151. The acts prohibited in the injunction for the Haven and the Tower necessarily correspond with the threatened tort to trespass to land and private nuisance. The acts prohibited in the petrol stations reflect those necessary to deal with what might be conduct constituting the tort of conspiracy to injure.

55. As for the terms being sufficiently clear and precise, I am satisfied that this is so, as Hill J was, as set out at paragraphs 154 to 156 of her judgment.

56. As for geographical and temporal limits, the extent of the Haven and Tower injunctions are made clear by the plans appended to them. In respect of the petrol stations injunctions, this matter was revised by Hill J, and again I am satisfied that the form of order is appropriate. Turning to the temporal limits, this is a matter which has changed, much as it changed before Cavanagh J in *Transport for London v Lee*. The claimants seek only a short extension of a matter of three months minimum, up to six months also maximum.

57. The claimants have taken active steps to identify persons falling within the "Persons Unknown" description, and there are now 15 named defendants who have been joined to the petrol station claims, not to the other two claims. Those persons were added by the order of Soole J on the basis of the evidence put before the court in the witness statements of Ms Oldfield. This was considered at the last hearing and I need say no more about it. In line with the duty to the court, the claimants have confirmed they will undertake to join any person identified as falling within the "Persons Unknown" description to the three orders as soon as reasonably practicable.

58. As for defendants being identifiable by reference to their conduct, I adopt the reasoning and conclusion of Hill J at paragraph 170; that the description of the persons unknown are sufficiently precise to identify the relevant defendants in circumstances where the descriptions target the conduct.

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

60. As for the question of whether all practical steps have been taken to notify the defendants under section 12(2) of the Human Rights Act, the eighth statement of Ms Oldfield sets out the extensive steps the claimants have taken to effect service of the order of Soole J and the various documents in the proceedings on the relevant

persons. The ninth witness statement sets out steps taken to notify the defendants of this hearing; consequently the claimants have complied with the service requirements and with section 12(2) in respect of all the defendants.

61. Finally in relation to the issue of publication and the question of whether the claimants are likely to establish at trial that publication should not be allowed, arguments on this issue were ventilated in the hearing before Hill J, and also Johnson J. For the present purposes, the claimants do not challenge Hill J's finding at paragraph 196 that the injunctions do involve some elements of publication for these purposes, and that section 12(3) applies. On that basis, the test is whether the claimants are likely to succeed at the final trial, at least in relation to the writing aspect of the injunctions. I adopt Hill J's conclusion in that regard that the test is met.

62. I turn to my conclusion on the continuation of the injunctions. At this stage, and on the evidence and arguments before me, the analysis of Hill J, set out in her comprehensive and lucid judgment, remains good. Mr Laurie's submission as to the effect of criminal proceedings is a matter which may be weighed in to the discretionary balance, but in my judgment it does not alter it sufficiently at this stage to prevent the orders continuing. So for the reasons set out above, it is appropriate to extend the injunctions in the manner sought by the claimants.

63. I turn now to the applications in relation to alternative service provisions and proposed other variations. All the documents in these proceedings, including the application notices, evidence and the order of Soole J have been served on the relevant parties, including non-parties, as provided for in the alternative service provisions of the orders of Hill J and Soole J. Matters have been comprehensively addressed in the eighth statement of Ms Oldfield. The same process has been adopted to serve the relevant parties with notification of this hearing and the skeleton arguments. The alternative method of service, which have already been indulged by this court in relation to persons unknown, remain applicable, and the court is invited to continue such methods, subject to the variations requested within the applications.

64. Those variations are: firstly, by virtue of the fact that Shell has identified that certain addresses are no longer addresses at which some of the named defendants and

a non-party now reside; and secondly because practical difficulties have come to light in relation to the requirement to serve copies of documents by email, given the file size of the relevant attachments. Applications have therefore been made to vary the alternative service provisions so far as they relate to relevant claims as set out within the application notices.

65. The proposed variations in relation to alternative service on named defendants are set out at paragraph 3.5 of the eighth statement of Ms Oldfield. They are variations to the first limb at paragraph 7 of the order of Soole J, which requires documents to be sent to each of the email addresses listed at schedule 2 of the order by sending emails to such email addresses and providing a link to the documents on the data site, rather than sending or attaching copies of the documents themselves to the emails. Secondly, for four of the named defendants, to permit service by the same method which is already set out in the order of Soole J in respect of the 15th defendant, ie by serving them in the manner as persons unknown permitted by paragraph 7.1 and paragraph 7.2 of the order. This variation is sought in circumstances where Shell has now discovered that the last known address supplied by the police for those additional named defendants is not the address at which those named defendants now reside.

66. Further, for two of the named defendants, to the extent that it is reasonably possible, service of documents may also be effected by sending messages to the social media accounts which Shell has obtained by sending them a link to the data site instead of service on the postal addresses previously used, ie by serving them in the same manner as Harrison and Burns, as permitted by paragraphs 7.4 and 7.5 of the order of Soole J; and finally to permit the sending of an email and link to the documents on the data site to named defendants who provided an email address for service, rather than sending or attaching copies of documents themselves to the emails sent.

67. Shell also seeks an order that the steps already taken to effect service as set out in the eighth statement of Ms Oldfield on the named defendants should be good service.

68. I am entirely satisfied that the variations in relation to the named defendants are appropriate in the circumstances, and I make the appropriate order.

69. As for variations to the alternative service for persons unknown, the variations are as follows: firstly to the second limb of paragraph 22 of the order of Soole J, which requires a document to be sent to each of the email addresses by sending an email to such address providing a link rather than attaching the copies themselves, so the same issue of the size of the attachments; secondly, variations to the third limb of paragraph 22 which requires documents to be sent to any person who has previously requested a copy so as to permit the sending of a letter and a link to the documents on the data site to the last known address, or sending an email to the email address and link to the documents on the data site, or sending an email letter to their retained solicitors and a link to the documents on the data site. Again, that is now in circumstances where Shell has discovered that the address held for the one non-party, Jessica Branch, is not the address at which she now resides, and that documents sent to that address may not have come to her attention. Again, I am entirely satisfied that the variations sought are appropriate.

70. So in brief, I extend the injunctions through to trial; and in relation to the variations sought in relation to alternative service, I grant those variations.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Lower Ground, 46 Chancery Lane, London WC2A 1JE
Email: civil@epiqglobal.co.uk

This transcript has been approved by the judge

Court of Appeal

*Mayor of London (on behalf of the Greater London Authority) *v* Hall and others

[2010] EWCA Civ 817

2010 July 9; 16 Lord Neuberger of Abbotsbury MR, Arden, Stanley Burnton LJJ

Injunction — Trespass — Order for possession — Demonstrators setting up camp on square opposite Parliament in breach of byelaws — Title to square vested in Crown but local authority responsible for control and management functions — Mayor on behalf of local authority applying for possession order and injunction requiring demonstrators to leave square — Whether mayor having right to claim possession — Whether injunction impermissible enforcement of criminal law — Whether injunction breaching defendants' Convention rights — Human Rights Act 1998 (c 42), Sch 1, Pt I, arts 10, 11 — Greater London Authority Act 1999 (c 29), ss 384, 385

By section 384(1) of the Greater London Authority Act 1999[1] title to the square opposite the Houses of Parliament was vested in the Crown but by section 384(3) the care, control, management and regulation of the square was the function of the Greater London Authority, to be exercised by the Mayor of London on behalf of the authority under section 384(8). Acting pursuant to section 384(8) the mayor applied for an order for possession of the square against defendants who were encamped there in order to demonstrate in respect of a number of causes and an injunction against certain defendants requiring them to dismantle the structures which they had erected on the square and to leave the square. The majority of the defendants had only been encamped on the square for a few weeks but the second defendant, a long-standing protester who had pitched a tent on a small part of the square, had been there for some nine years without causing damage to the square or discouraging lawful visitors, joined from time to time by the third defendant. The defendants contended (i) that the mayor had no right to possession of the square since title to the land was vested in the Crown; (ii) that since by camping on the square they were in contravention of byelaws made pursuant to section 385(1) of the 1999 Act, which by section section 385(3) was a criminal offence, the grant of an injunction would amount to an impermissible enforcement of the criminal law; and (iii) that the orders sought would breach their rights to freedom of expression and freedom of assembly, guaranteed by articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms, scheduled to the Human Rights Act 1998[2]. The judge made a possession order over the whole of the square against 17 of 19 named defendants and persons unknown and imposed injunctions on 14 of the defendants and persons unknown.

[1] Greater London Authority Act 1999, s 384: see post, para 3.
S 385: see post, para 4.

[2] Human Rights Act 1998, Sch 1, Pt I, art 10: "1. Everyone has the right to freedom of expression . . . 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."

Art 11: "1. Everyone has the right to freedom of peaceful assembly . . . 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others . . ."

A On applications for permission to appeal by seven named defendants—

Held, granting permission to appeal to and allowing the appeals of the second and third defendants but refusing permission to all other defendants, that it was implicit in sections 384 and 385 of the Greater London Authority Act 1999 that the mayor had the right to seek possession of the square in his own name since, although bare title of the square was vested in the Crown, every aspect of ownership and possession was vested in the mayor as part of his own statutory duty and statutory B right, not as an agent of the Crown; that since the mayor was entitled, in his capacity of the person in possession of the square, to maintain an injunction to remove those in unlawful occupation and since there was evidence to support the view that the criminal penalties provided for in section 385(3) of the 1999 Act to enforce the byelaws would not have operated as a deterrent to the defendants, the judge had been entitled to grant injunctive relief; that the defendants' desire to express their views in the square in the form of a relatively long-term occupation with tents and placards C was within the scope of articles 10 and 11 of the Convention; that, although the defendants were trespassers and in breach of the byelaws, they were entitled to have the proportionality of both the making of the possession order and the granting of the injunction assessed by the court, rather than the mayor, in a balancing exercise considering the facts and focusing very sharply and critically on the reasons put forward for curtailing the expression of their beliefs in public; that, balancing the defendants' rights to freedom of expression and assembly with the need to prevent crime, protect health and protect the rights and freedoms of others to access the D square and demonstrate with authorisation, the relief granted in respect of all but the second and third defendants had been a wholly proportionate response; but that, since different considerations applied to the second defendant and those protesting with him, and since he was entitled to have his case decided on the basis of new medical evidence which he wished to put before the court, the question of whether it was proportionate to make an order for possession and to grant an injunction against him would be remitted for reconsideration by the High Court (post, paras 28–30, E 32–33, 37, 40, 43, 53–56, 65, 68–69, 72, 76, 77).

Manchester Airport plc v Dutton [2000] QB 133, CA and *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] 1 WLR 2780, SC(E) considered.

Decision of Griffith Williams J [2010] EWHC 1613 (QB) reversed in part.

The following cases are referred to in the judgment of Lord Neuberger of F Abbotsbury MR:

Asher v Whitlock (1865) LR 1 QB 1
Belfast City Council v Miss Behavin' Ltd [2007] UKHL19; [2007] 1 WLR 1420; [2007] 3 All ER 1007, HL(NI)
Birmingham City Council v Shafi [2008] EWCA Civ 1186; [2009] 1 WLR 1961; [2009] PTSR 503; [2009] 3 All ER 127, CA
City of London Corpn v Bovis Construction Ltd [1992] 3 All ER 697, CA
G *Doherty v Birmingham City Council (Secretary of State for Communities and Local Government intervening)* [2008] UKHL 57; [2009] AC 367; [2008] 3 WLR 636; [2009] 1 All ER 653, HL(E)
Georgeski v Owners Corpn Sp49833 [2004] NSWSC 1096
Harper v Charlesworth (1825) 4 B & C 574
Hill v Tupper (1863) 2 H & C 121
Kay v Lambeth London Borough Council [2006] UKHL 10; [2006] 2 AC 465; [2006] H 2 WLR 570; [2006] 4 All ER 128, HL(E)
Manchester Airport plc v Dutton [2000] QB 133; [1999] 3 WLR 524; [1999] 2 All ER 675, CA
Manchester City Council v Pinnock (Secretary of State for Communities and Local Government intervening) [2009] EWCA Civ 852; [2010] 1 WLR 713; [2010] PTSR 423; [2010] 3 All ER 201, CA

R (Laporte) v Chief Constable of Gloucestershire Constabulary [2006] UKHL 55; [2007] 2 AC 105; [2007] 2 WLR 46; [2007] 2 All ER 529, HL(E)
R (SB) v Governors of Denbigh High School [2006] UKHL 15; [2007] 1 AC 100; [2006] 2 WLR 719; [2006] 2 All ER 487, HL(E)
Roe v Harvey (1769) 4 Burr 2484
Secretary of State for the Environment, Food and Rural Affairs v Meier [2009] UKSC 11; [2009] 1 WLR 2780; [2010] PTSR 321; [2010] 1 All ER 855, SC(E)
Stoke-on-Trent City Council v B & Q (Retail) Ltd [1984] AC 754; [1984] 2 WLR 929; [1984] 2 All ER 332, HL(E)
Tabernacle v Secretary of State for Defence [2009] EWCA Civ 23; The Times, 25 February 2009, CA
University of Essex v Djemal [1980] 1 WLR 1301; [1980] 2 All ER 742, CA
West Bank Estates Ltd v Arthur [1967] 1 AC 665; [1966] 3 WLR 750, PC
Western Australia v Ward (2002) 213 CLR 1

The following additional cases were cited in argument:

Appleby v United Kingdom (2003) 37 EHRR 783
Director of Public Prosecutions v Jones (Margaret) [1999] 2 AC 240; [1999] 2 WLR 625; [1999] 2 All ER 257, HL(E)
Handyside v United Kingdom (1976) 1 EHRR 737
Khorasandjian v Bush [1993] QB 727; [1993] 3 WLR 476; [1993] 3 All ER 669, CA
Özgür Gündem v Turkey (2000) 31 EHRR 1082
Powell v McFarlane (1977) 38 P & CR 452
Pye (J A) (Oxford) Ltd v Graham [2002] UKHL 30; [2003] 1 AC 419; [2002] 3 WLR 221; [2002] 3 All ER 865, HL(E)
Vogt v Germany (1995) 21 EHRR 205
Westminster City Council v Haw [2002] EWHC 2073 (QB)

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

Alamo Housing Co-operative Ltd v Meredith [2003] EWCA Civ 495; [2004] LGR 81, CA
Anonymous (1704) 6 Mod 14
Blum v Director of Public Prosecutions (Secretary of State for the Home Department intervening) [2006] EWHC 3209 (Admin), DC
Buckinghamshire County Council v Moran [1990] Ch 623; [1989] 3 WLR 152; [1989] 2 All ER 225, CA
Chief Constable of Leicestershire v M [1989] 1 WLR 20; [1988] 3 All ER 1015
Christian Democratic People's Party v Moldova (Application No 28793/02) (unreported) given 14 May 2006, ECtHR
Ćosić v Croatia (Application No 28261/06) (unreported) given 15 January 2009, ECtHR
Countryside Residential (North Thames) v Tugwell (2000) 81 P & CR 10, CA
Crisp v Barber (1788) 2 Durn & E 749
Danford v McAnulty (1883) 8 App Cas 456, HL(E)
de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69; [1998] 3 WLR 675, PC
Emmerson v Maddison [1906] AC 569, PC
Fuentes Bobo v Spain (2000) 31 EHRR 1115
Harrow London Borough Council v Qazi [2003] UKHL 43; [2004] 1 AC 983; [2003] 3 WLR 792; [2003] 4 All ER 461, HL(E)
Huang v Secretary of State for the Home Department [2007] UKHL 11; [2007] 2 AC 167; [2007] 2 WLR 581; [2007] 4 All ER 15, HL(E)
Hunter v Canary Wharf Ltd [1997] AC 655; [1997] 2 WLR 684; [1997] 2 All ER 426, HL(E)
Limb v Union Jack Removals Ltd [1998] 1 WLR 1354; [1998] 2 All ER 513, CA

A *McCann v United Kingdom* [2008] LGR 474; 47 EHRR 913
Mullen v Salford City Council [2010] EWCA Civ 336; [2011] 1 All ER 119, CA
Nurettin Aldemir v Turkey (Application Nos 32124/02, 32126/02, 32129/02, 32132/02, 32133/02, 32137/02 and 32138/02) (unreported) given 18 December 2007, ECtHR
Oates v Shepherd (1747) 2 Strange 1272
Paulić v Croatia (Application No 3572/06) (unreported) given 22 October 2009, ECtHR
B *Philipps v Philipps* (1878) 4 QBD 127, CA
Platform "Ärzte für das Leben" v Austria (1988) 13 EHRR 204
R (Animal Defenders International) v Secretary of State for Culture, Media and Sport [2008] UKHL 15; [2008] 1 AC 1312; [2008] 2 WLR 781; [2008] 3 All ER 193, HL(E)
R (Daly) v Secretary of State for the Home Department [2001] UKHL 26; [2001] 2 AC 532; [2001] 2 WLR 1622; [2001] 3 All ER 433, HL(E)
C *Redmond-Bate v Director of Public Prosecutions* [2000] HRLR 249, DC
South Bucks District Council v Porter [2003] UKHL 26; [2003] 2 AC 558; [2003] 2 WLR 1547; [2003] 3 All ER 1, HL(E)
Stankov v Bulgaria (Application Nos 29221/95 and 29225/95) (unreported) given 2 October 2001, ECtHR
VgT Verein gegen Tierfabriken v Switzerland (2001) 34 EHRR 159
Wibberley (Alan) Building Ltd v Insley [1999] 1 WLR 894; [1999] 2 All ER 897,
D HL(E)
Williams v Fawcett [1986] QB 604; [1985] 1 WLR 501; [1985] 1 All ER 787, CA
Young v Bristol Aeroplane Co Ltd [1944] KB 718; [1944] 2 All ER 293, CA
Ziliberberg v Moldova (Application No 61821/00) (unreported) given 4 May 2004, ECtHR

APPLICATIONS for permission to appeal from Griffith Williams J

E By a claim form dated and served on 26 May 2010, and amended pursuant to the order of Maddison J dated 3 June 2010, the claimant, the Mayor of London (on behalf of the Greater London Authority) claimed an order for possession of Parliament Square Gardens as against the defendants, Rebecca Hall, Brian Haw, Barbara Tucker, Charity Sweet, Lew Almond, Chan Aniker, Anna Chithrakla, Chris Coverdale, Joshua Dunn, Dirk Duputall, Friend (also known as Robert Hobbs), Stuart Holmes, Rodge F Kinney, Professor Chris Knight, Peace Little, Simon Moore, Anita Olivacce, Peter Phoenix, Raga Woods and persons unknown, and an injunction as against the first and fourth to twentieth defendants, requiring them forthwith to: (1) dismantle and remove from the grassed area all tents and similar structures on Parliament Square Gardens except with permission granted by the mayor or on his behalf under byelaw 5(9) of the Trafalgar G Square and Parliament Square Gardens Byelaws 2000; (2) cease to organise or take part in the assembly known as Democracy Village and thereafter not to take part in any assembly without permission under byelaw 5 of the 2000 Byelaws or section 133 of the Serious Organised Crime and Police Act 2005; and (3) leave the square in accordance with the lawful directions of the mayor or on his behalf under byelaw 5(7); and as against the second and third defendants, an injunction requiring them forthwith to: (1) dismantle H and remove all tents and similar structures except with permission from the mayor or on his behalf under byelaw 5(7); (2) cease to organise or take part in any assembly on the grassed area without permission under byelaw 5(10) and/or section 133 of the 2005 Act; and (3) leave the grassed area in accordance with the lawful directions issued on behalf of the mayor.

On 29 June 2010 Griffith Williams J granted the relief sought, making an order for possession over the whole of Parliament Square Gardens against all defendants except the fourth and nineteenth and granting injunctions against all the defendants, except the first and nineteenth. A

By an appellant's notice dated 2 July 2010 the first defendant, Rebecca Hall, sought permission to appeal against the possession order made against her on the following grounds, inter alia. (1) The claimant mayor was not entitled to possession of Parliament Square Gardens and accordingly the possession order, made under CPR Pt 55, had been made in error of law. (2) For the law to attribute possession of land to a person who could establish no paper title to possession the claimant had to show both factual possession and the requisite intention to possess, and since the judge had made no finding that the mayor was in physical occupation of Parliament Square Gardens, it had been wrong for the judge to find that the mayor had a right to seek possession. (3) If, which was not accepted, the judge had found that the mayor was in factual possession of the land, in so finding he had erred in law. The Greater London Authority Act 1999 vested the legal estate in the land in the Queen and plainly did not expressly give possession, or even a right of occupation of the square, to the mayor, the duties and functions of "control, management and regulation" of Parliament Square Gardens in section 384 of the 1999 Act being distinct and different from the right to possession of the land and conferring no exclusive right to possession. Nothing in the statutory scheme created a right for the mayor *at will* to exclude *the world* from entering and/or remaining on Parliament Square Gardens which was the hallmark of the right to possession necessary to found a successful possession claim by a claimant with no title. (4) The judge had therefore misconstrued the 1999 Act in three material respects: (i) in deciding that sections 30(2)(c) and 34 were not ancillary to the duty and functions in section 384 but provided greater powers than section 384 itself; (ii) in deciding that the power to regulate the "use" of Parliament Square Gardens in section 386 by byelaws created a power to exclude the world from the square; (iii) in having made no reference to the fact that the byelaws themselves, at byelaw 5(7), did not provide a power to exclude but only a power to give a direction to leave, which direction had to be reasonable. (5) The judge had erred in treating the ability to close or fence off the square to carry out its duties and functions as a general power to exclude the whole world at will. (6) Management functions were not inconsistent with the possibility of having exclusive possession but such responsibilities did not confer a right to possession in the present case. Management functions could be incidental to possession but the converse was not true. (7) The judge had erred in rejecting the first defendant's submission that the statutory scheme under the 1999 Act was in effect no different from control or management functions conferred by a property owner on a managing agent. The judge had failed to recognise the full implications of that extension or development of the common law approach to exclusive possession, based not on a legal estate or physical occupation of the land but on a statutory duty or a function of day-to-day control and management of the land. (8) The judge had impermissibly extended the common law relating to the entitlement to possession in respect of land not owned by the claimant and over which the public had an unfettered right of entry. That approach, following Laws LJ in *Manchester Airport plc v Dutton* [2000] QB 133, was inconsistent with the

B C D E F G H

A observations of Lord Neuberger of Abbotsbury MR in *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] 1 WLR 2780, para 59, as to the limits of the courts' powers to develop the common law. (9) If the first defendant was correct and the judge had erred in law in concluding that the statute had created a right of exclusive possession over Parliament Square Gardens and the mayor sought to rely on *Dutton's* case, it could be distinguished on the facts of the present case, and had in any event B been decided per incuriam in the light of *Hill v Tupper* (1863) 2 H & C 121 and *Hunter v Canary Wharf Ltd* [1997] AC 655, which had not been cited to the court in *Dutton's* case, and/or *Dutton's* case had been wrongly decided.

By an appellant's notice dated 1 July 2010 the second defendant, Brian Haw, sought permission to appeal against the possession order and the injunction against him on the following grounds, inter alia. (1) The judge, C while correctly recognising that the second defendant's rights under articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms were engaged by the issue of whether he required to occupy a small area of Parliament Square Gardens in order to carry out his authorised protest in Parliament Square, had erred in law in concluding that there was a pressing social need not to permit an indefinite camp by the D second defendant in order to protect the rights and freedoms of others to access all of Parliament Square Gardens and to demonstrate with authorisation. (2) The judge ought to have concluded that, in view of the nine-year length of the second defendant's demonstration involving substantial periods during which use of a small part of Parliament Square Gardens had been tolerated by the claimant, and the absence of any evidence that any member of the public had been inconvenienced or prevented from E holding a permitted demonstration by the second defendant's presence there, that there was no pressing social need to require him to cease using Parliament Square Gardens to sleep in a tent. (3) The judge ought to have held that the exclusion of the second defendant from Parliament Square Gardens either by the grant of a possession order or of an injunction, and by the prohibition on the second defendant pitching a tent without F permission by way of injunction, were impermissible restrictions on the second defendant's article 10 and 11 rights.

The third defendant, Barbara Tucker, the eighth defendant, Chris Coverdale, the eleventh defendant, Friend (also known as Ian Robert Hobbs), the twelfth defendant, Stuart Holmes, and the fifteenth defendant, Peace Little, also sought permission to appeal.

The facts are stated in the judgment of Lord Neuberger of G Abbotsbury MR.

Jan Luba QC, Mark Wonnacott, Stephanie Harrison and *John Beckley* (instructed by *Bindmans LLP*) for the first defendant, Ms Hall.

Martin Westgate QC and *Paul Harris* (instructed by *Birnberg Peirce & Partners*) for the second defendant, Mr Haw.

H The third, eighth, eleventh, twelfth and fifteenth defendants appeared in person.

Ashley Underwood QC and *David Forsdick* (instructed by *Eversheds LLP*) for the mayor.

The court took time for consideration.

16 July 2010. The following judgments were handed down. A

LORD NEUBERGER OF ABBOTSBURY MR

1 There are before us applications for permission to appeal, which have been ordered to be heard on the basis that, if permission is given, the hearing of the appeal should follow immediately. We have heard the matter on a "rolled up" basis; in other words, the application and the projected appeal have been, in effect, argued together. B

2 There are two orders which are sought to be appealed, and they were made by Griffith Williams J, following a hearing spread over eight days between 14 and 24 June 2010, with judgment given on 29 June [2010] EWHC 1613 (QB). Both orders were made in favour of the claimant, the Mayor of London, suing "on behalf of the Greater London Authority". The first was an order for possession of Parliament Square Gardens, London SW1 ("PSG"), against 17 out of 19 named defendants and "persons unknown". The second order was an injunction requiring 14 out of the 19 defendants and "persons unknown" (a) to dismantle any structures on, (b) (save in the case of three of the defendants, Mr Haw, Mrs Tucker and Ms Sweet) to cease to organise assemblies on, and (c) to leave, PSG. C

The legislative background D

3 The principal statutory provision governing the ownership and control of PSG is section 384 of the Greater London Authority Act 1999, which is in the following terms:

> "(1) The land comprised in the site of the central garden of Parliament Square (which, at the passing of this Act, is vested in the Secretary of State for Culture, Media and Sport) is by this subsection transferred to and vested in Her Majesty as part of the hereditary possessions and revenues of Her Majesty. E
>
> "(2) Nothing in subsection (1) above affects— (a) any sewers, cables, mains, pipes or other apparatus under that site, or (b) any interest which was, immediately before the passing of this Act, vested in London Regional Transport or any of its subsidiaries. F
>
> "(3) The care, control, management and regulation of the central garden of Parliament Square shall be functions of the authority.
>
> "(4) It shall be the duty of the authority well and sufficiently to light, cleanse, water, pave, repair and keep in good order and condition the central garden of Parliament Square.
>
> "(5) The functions conferred or imposed on the authority by this section are in addition to any other functions of the authority. G
>
> "(6) In consequence of the preceding provisions of this section, any functions of the Secretary of State under or by virtue of section 22 of the Crown Lands Act 1851 (duties and powers of management in relation to the royal parks, gardens and possessions there mentioned), so far as relating to the whole or any part of the central garden of Parliament Square, shall determine. H
>
> "(7) Subsections (3) and (4) above shall have effect notwithstanding any law, statute, custom or usage to the contrary.
>
> "(8) Any functions conferred or imposed on the authority by virtue of this section shall be functions of the authority which are exercisable by the mayor acting on behalf of the authority.

A "(9) In this section 'the central garden of Parliament Square' means the site in Parliament Square on which the Minister of Works was authorised by the Parliament Square (Improvement) Act 1949 to lay out the garden referred to in that Act as 'the new central garden'."

4 It is also relevant to refer to the next section of the same Act ("section 385") which provides, so far as is relevant:

B "(1) The authority may make such byelaws to be observed by persons using Trafalgar Square or Parliament Square Garden as the authority considers necessary for securing the proper management of those squares and the preservation of order and the prevention of abuses there.

"(2) Byelaws under this section may designate specified provisions of the byelaws as trading byelaws.

C "(3) A person who contravenes or fails to comply with any byelaw under this section shall be guilty of an offence and liable on summary conviction— (a) if the byelaw is a trading byelaw, to a fine not exceeding level 3 on the standard scale, or (b) in any other case, to a fine not exceeding level 1 on the standard scale."

5 It is also convenient to set out some of the Trafalgar Square and D Parliament Square Gardens Byelaws 2000 ("the byelaws"), made pursuant to section 385(1):

"3. No person shall within the Squares . . . (6) fail to comply with a reasonable direction given by an authorised person to leave the Squares . . ."

"5. Unless acting in accordance with permission given in writing by . . . E the mayor . . . no person shall within the Squares: (1) attach any article to any tree, plinth, plant box, seat, railing, fence or other structure; (2) interfere with any notice or sign; (3) exhibit any notice, advertisement or any other written or pictorial matter . . . (7) camp, or erect or cause to be erected any structure, tent or enclosure . . . (9) make or give a public speech or address . . . (10) organise or take part in any assembly, display, F performance, representation, parade, procession, review or theatrical event . . . (13) go on any shrubbery or flower bed . . ."

The factual background to the projected appeal

6 The basic facts giving rise to these proceedings are well summarised in the opening five paragraphs of the judge's judgment:

G "1. . . . PSG . . . comprises the central area of Parliament Square around which runs the public highway, including in places pavement. To the east is the Palace of Westminster, to the south Westminster Abbey, to the west the Supreme Court and to the north, Whitehall and various government buildings. It is a highly important open space and garden at the heart of London and our parliamentary democracy; it is an area of significant historic and symbolic value worldwide.

H "2. PSG is part of the Westminster Abbey and Parliament Square conservation area and a UNESCO designated world heritage site . . . It is classified as Grade II on English Heritage's Register of parks and gardens with special historic interest. It provides world renowned views of both the palace of Westminster and Westminster Abbey.

A "3. On 1 May 2010, four separate groups said to represent the four horsemen of the apocalypse and which had formed up at different locations across London arrived and set up a camp which they named their 'Democracy Village'. Their then stated intention was to remain until 6 May 2010, the date of the general election but they have continued to occupy PSG and (on the evidence of a number of the defendants . . .) have every intention to do so for the foreseeable future.

B "4. Brian Haw (the second defendant) has been camping lawfully since 2001 on a pavement on the eastern side of PSG—a part of the highway controlled by Westminster City Council. He was joined some years later by Barbara Tucker (the third defendant). They have been conducting their own protest for love, peace, justice for all. They and those associated with them are in no way a part of the Democracy Village.

C "5. The defendants who are a part of the Democracy Village are demonstrating variously in respect of a number of causes—these include the war in Afghanistan, the war in Iraq, genocide, war crimes and worldwide environmental issues."

7 As this attenuated summary suggests, the full factual background, particularly in the view of the defendants, is wide-ranging and involves very fundamental issues indeed. This was clear from the judge's summary of the evidence he read and heard, and it was brought home to us by the eloquent oral submissions we received from some of the defendants, revealing their strong feelings of moral and ethical outrage at various issues of undoubted public importance, identified in para 5 of the judgment below. Bearing in mind the fundamental nature of these issues, and the location where the defendants are gathered, the centrality of the two freedoms, which are undoubtedly engaged in these proceedings, freedom of expression and freedom of assembly, could not be placed under a sharper focus.

D

E

8 Mr Haw, the second defendant, (represented at first instance by Mr Harris, who was led in this court by Mr Westgate QC) has been a virtually permanent fixture on the pavement area on the east of PSG, facing the Houses of Parliament, since 2001. While some might regard his presence with his placards as an eyesore in the face of Parliament, others see him as something of a national treasure, embodying the right of free speech in the very eye of the democratic storm. There have been various attempts to remove him from the pavement area, but none have so far succeeded, and the present proceedings do not seek to remove him from there, at least directly. At some point, he erected a tent on the grassed area of PSG ("the grassed area") immediately adjoining his pitch on the pavement; there is some dispute as to when that started, he says in 2001, the evidence on behalf of the mayor is much later. The third defendant, Ms Tucker, who represented herself, has joined Mr Haw from time to time, as has the fourth defendant, Ms Sweet.

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G

9 The other defendants have been on PSG for all, or much, of the time since Democracy Village started up at the beginning of May 2010. Of those defendants, Ms Hall, the first defendant, and a member of Democracy Village, was represented by Mr Luba QC, Mr Wonnacott, Ms Harrison and Mr Beckley. The other named defendants are members of Democracy Village, and, in so far as they took part in the proceedings below, they acted in person. All of them were added as named defendants on their application, as the proceedings originally identified only three named defendants, as well as "persons unknown".

H

A 10 After hearing argument and evidence, the judge made the order for possession and granted the injunction against the great majority of the named defendants, although he excluded two defendants from each order. In particular, the judge decided that no injunction should be granted against Ms Hall, although she was included in the order for possession.

11 The application for permission to appeal was made by a number of the defendants, and Smith LJ ordered that the application be heard in open B court, with appeal to follow if permission was granted. I have already referred to the fact that Mr Haw was represented before us; Mrs Tucker represented herself. Of the Democracy Village occupiers, I have already mentioned that Ms Hall was represented; other members of Democracy Village, Mr Coverdale, Friend, Mr Holmes, Mr Knight, and Peace Little (to all of whom the injunction and the order for possession extended) made C oral submissions on their own behalf.

The issues on this appeal

12 A number of issues have been raised. First, whether the trial below was fair—whether it complied with article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the D Convention"). Secondly, whether the claim for possession was properly constituted. Thirdly, whether the order for possession and the injunction complied with articles 10 and 11 of the Convention in terms of proportionality. Fourthly, whether an injunction was a permissible remedy in the light of section 385 and the byelaws. Fifthly, there are issues concerning costs.

13 Mr Haw (together with Mrs Tucker) raises three arguments specific E to his case, one relating to the speed of the proceedings, the second to the form of the possession application and order against him, and the third relating to proportionality.

14 I shall take these various issues in turn, save that those relating to Mr Haw will be discussed before the question of costs.

Did the defendants have a fair trial?

F

15 The gap between the issue of these proceedings, 26 May 2010, and the commencement of the hearing before Griffith Williams J, 14 June 2010, was undoubtedly very short. However, so far as the domestic procedural aspect is concerned, CPR Pt 55 understandably envisages an abbreviated procedure in relation to "a possession claim against trespassers", and that procedure is mandatory in a case such as the present. Injunctive relief, if G justified, should, as a matter of principle, be available speedily.

16 Having said that, this was an unusual case, and it is right to consider whether the defendants were afforded a fair trial which complies with the domestic law and with article 6 (although it would be a rare case where the two requirements would not march together). There is no reason to think that there are any areas of law or fact which could be raised other than H those identified in para 12 above: if there had been, no doubt Mr Luba or Mr Westgate would have drawn them to our attention. The second and fourth issues principally involve legal argument and have been fully canvassed by counsel. The only area where it is, at least on the face of it, conceivable that more time would have been needed to gather evidence or argument would be on proportionality. However, having heard the

arguments and read the evidence and the judgment, I am quite satisfied that no prejudice whatever was caused to any of the defendants (other than Mr Haw) in relation to the presentation of their respective cases on this issue, whether in the form of evidence or arguments, by the short time between the issue of proceedings and the hearing of the claims.

17 The principal concerns expressed by the defendants who pursued this argument related to the importance attached to the issues which those defendants who participated in the Democracy Village stood for (and, in Mrs Tucker's case, the issues which Mr Haw stood for). Those issues are of prime public importance, and in the first rank of topics which article 10 is concerned to respect, in that they are political in nature. The importance of having an unrestricted right to express publicly and strongly a controversial view on a political, or any other, topic cannot be doubted: it is of the essence of a free democratic society and should be vigilantly protected by the legislature, the executive and the judiciary. Accordingly, it was unnecessary for the defendants in this case to expand on their views, with which many may agree strongly and many may disagree strongly, relating to the environment, alleged genocide, the wars in Iraq and Afghanistan, and more specific issues such as the use of depleted uranium.

18 It is true that Mr Holmes (and possibly other defendants) has applied for legal aid, and there has not been the time to have their applications processed. However, in my view, no prejudice has been caused to him as a result of his having to represent himself. The issues have been fully canvassed with the assistance of six barristers, and their instructing solicitors, acting for Mr Haw and Ms Hall, and the factual issues have been fully aired in the form of the evidence put before the judge. Indeed, without in any way intending to criticise anyone (as it is inevitable where so many defendants separately advance their respective cases), the issues were aired more fully below than they would have been if the unrepresented defendants had been represented.

19 It is also right to mention that this was not a case where the parties were forced to present their respective cases on the first occasion that the case came before a judge for hearing. The case came before Maddison J on 3 June, when he gave certain directions, and it came before him again on 7 June, when he gave further directions. The defendants therefore had significantly more time to prepare their respective cases than the minimum which they could have been given under the Civil Procedure Rules and quite rightly in the circumstances. This was not a case where they can have been taken by surprise at the hearing proceeding on 14 June. Further, because Griffith Williams J heard evidence from any party who reasonably wished to give evidence, there was time for further consideration to be given to arguments and evidence during the ten days over which the hearing was spread.

20 Accordingly, even ignoring the point that the Court of Appeal is, as a matter of principle, reluctant to interfere with a judge's case management decision (a point of very considerable importance, I should add), it seems to me that Griffith Williams J was not merely entitled, but was positively correct, in deciding to proceed with the hearing and to refuse an adjournment. If the mayor was entitled to any of the relief which he was seeking, it would be wrong to delay the proceedings for any time greater than was needed to ensure that the defendants had a fair trial.

A *Does the mayor have the right to claim possession?*

21 The powers and duties relating to PSG and conferred on the Greater London Authority (which I shall treat as conferred on the mayor, both in the light of section 384(8) and for the sake of convenience) are in sections 384(3) and (4), 385(1) and (2), and the byelaws. In my view, those provisions, as can be seen from the control which the mayor actually exercised (gardening, B refuse collection, patrolling, enforcement of byelaws), inevitably lead to the conclusion that the mayor was, at any rate until 1 May, in possession of PSG. As the majority of the Australian High Court put it, a person has possession of certain land if he can "control access to the [land] by others, and, in general, decide how the land will be used": *Western Australia v Ward* (2002) 213 CLR 1, para 52. Of course, the grassed area of PSG is not fenced off, as it is intended to be available for general public access, but the precise nature C of the acts and rights required to amount to possession varies with the nature of the land and all the circumstances: see e g *West Bank Estates Ltd v Arthur* [1967] 1 AC 665, 678B–C.

22 The argument advanced by Mr Luba and Mr Wonnacott on this first issue is simply stated, and is based on clear, if somewhat historical, principles, although, at least on its face, the argument seems absurd. Simply D stated the argument is this: a claim for possession of land, if made by a person who has been put out of possession, can only be successfully maintained if that person can establish title of some sort to a legal estate in the land. In particular, it is insufficient for such a person to maintain such a claim, if he is merely relying on an interest or right, falling short of a legal estate, which gives him a claim or right to use and control of the land. The reason I describe the argument as apparently absurd is that it amounts E to saying that the mere fact that a person can establish that he has a right to use and control, which effectively amounts to possession, of land does not entitle him to maintain a claim for possession of that land even against someone on that land who is undoubtedly a trespasser.

23 The basis of this argument, in very summary terms, is that (i) a claim for possession of land is the modern equivalent of a claim for ejectment F (see the discussion in *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] 1 WLR 2780, paras 6–7, 26–33, and 59–61); (ii) a claim for ejectment (as opposed to a claim for an injunction in trespass) could only be maintained by someone who could establish a legal estate in the land (see e g per Lord Mansfield CJ, and Aston and Willes JJ in *Roe v Harvey* (1769) 4 Burr 2484, 2487, 2488 and 2489 respectively, and per Bayley J in *Harper v Charlesworth* (1825) 4 B & C 574, 589); and (iii) it G would represent an unprincipled departure, fraught with inconsistencies and unforeseeable problems and conundrums, to depart from this rule (as the Supreme Court of New South Wales decided in *Georgeski v Owners Corpn Sp49833* [2004] NSWSC 1096).

24 This argument is inconsistent with the majority decision of this court in *Manchester Airport plc v Dutton* [2000] QB 133, where the plaintiff's H case was weaker than the mayor's case here, as the mayor has actually enjoyed possession, and his right is statutory in origin. However, it is said by Mr Luba that the reasoning of the majority in *Dutton's* case is inconsistent with authority not cited to the court in that case (such as *Hill v Tupper* (1863) 2 H & C 121), and that it is inconsistent with the more principle-based approach of the House of Lords in *Meier's* case [2009] 1 WLR 2780,

although *Dutton's* case was referred to without adverse criticism by Lord Rodger of Earlsferry JSC, at para 6. A

25 Mr Underwood QC, who appeared with Mr Forsdick for the mayor, argued that, as the mayor had been in possession before the defendants wrongly dispossessed him, authority showed that, even under the arcane rules relating to ejectment proceedings, he could properly seek possession. That is true, but it is because a claimant's previous possession is evidence of his title (or, strictly speaking, of his prior seisin), but it is rebuttable evidence, and if rebutted by other evidence, the right to claim possession dissolves: see *Asher v Whitlock* (1865) LR 1 QB 1. In this case, therefore, the defendants argue, the presumption of the mayor's right to claim possession arising from his previous possession dissolves once one looks at section 384(1), which makes it clear that the mayor has no title, as the freehold is vested in the Crown. B C

26 As at present advised, at least if one ignores the full effect of sections 384 and 385, I think that there is real force in the defendants' argument, the erudition of whose contents was matched by the clarity and crispness of its presentation. Certainly, if the law governing the right to claim possession is governed by the same principles as those that governed the right to maintain a claim in ejectment, the argument seems very powerful. D

27 However, there is obvious force in the point that the modern law relating to possession claims should not be shackled by the arcane and archaic rules relating to ejectment, and, in particular, that it should develop and adapt to accommodate a claim by anyone entitled to use and control, effectively amounting to possession, of the land in question—along the lines of the views expressed by Laws LJ in *Dutton's* case [2000] QB 133 and by Baroness Hale of Richmond JSC in *Meier's* case [2009] 1 WLR 2780. E Further, it is only my opinion in *Meier's* case, paras 60–69, which can be said plainly to support the argument that a possession order may be subject to the same principles as those that applied to ejectment, and even my opinion was concerned with a very different aspect of a possession order from that raised here, as the claimant's title was not in issue. Lord Rodger JSC at paras 6 and 7 can be said to provide only a little, and then only very indirect, support for the argument, and any such support is rather F undermined by his uncritical citation of *Dutton's* case. The effect of the brief speeches of Lord Walker of Gestingthorpe and Lord Collins of Mapesbury JJSC is neutral on the argument, save that they can be said to have adopted a relatively orthodox approach to the concept of possession. Baroness Hale JSC's observations at paras 26–36 are rather against the argument. G

28 However, even assuming that Mr Luba and Mr Wonnacott are right as a matter of general principle, the answer in this case lies in the relevant statutory provisions. As Stanley Burnton LJ pointed out, and as Mr Luba realistically accepted, it would be open to Parliament to confer by statute the power to claim possession of land on a person who has no title to that land. Although it is true that there is nothing in the 1999 Act which, in express terms, gives the mayor the right to seek possession of PSG in his own name, H I have reached the conclusion that it is implicit in sections 384 and 385 that he has that right.

29 In the two sections, the legislature has distributed different aspects of ownership and control between the Crown and the mayor. Title is

A undoubtedly vested in the Crown by section 384(1), but every aspect of ownership and possession is vested in the mayor, as part of his own statutory duty and statutory right, and not as an agent of the Crown: he has complete control and regulation of PSG. The only satisfactory reason which was advanced at the hearing for vesting title to PSG in the Crown, rather than the mayor, is symbolic: Parliament Square (like Trafalgar Square, which enjoys the same regime) is a place of premier national significance B and importance.

30 While the Crown has no function other than that of bare ownership, the mayor decides what activities can occur on PSG, how it is to be laid out and maintained, what statues and other structures are to be erected there, who can come onto PSG, in what circumstances, what they can and cannot do when they are there, and when they have to leave. It is common ground C that, if, as I consider is clear, the mayor is the person entitled to lawful possession of PSG, he could obtain an injunction, such as that which he has obtained, as a claimant seeking an injunction in trespass only has to show that he is entitled to (or even only that he enjoyed) possession—see per Chadwick LJ, dissenting in *Dutton's* case [2000] QB 133, paras 146–147. In fact, the only thing which the mayor cannot do in relation to PSG, on the D defendants' case, is to seek possession.

31 Mr Luba argued that Parliament must have appreciated, or, more accurately, must be taken to have appreciated, the law, and that, by vesting the freehold of PSG in the Crown, it must have envisaged that only the Crown (presumably by relator action through the Attorney General) could bring proceedings for possession if PSG was invaded by squatters. He suggested that this was reinforced by the absence of a provision such as is E found in section 1(2) of the Crown Estate Act 1961, which specifically bestows on the Crown Estates Commissioners the ability to perform "all such acts as belong to the Crown's rights of ownership".

32 It seems obvious that, in order for the scheme envisaged by sections 384 and 385 to work properly, the mayor should have the ability to seek possession in his own name of PSG. It cannot have been envisaged that he F would have to ask the Attorney General to bring proceedings, with the delay, uncertainty and cost which such a course would involve. Indeed, the Attorney General would have a discretion whether to bring a relator action, and, for reasons which seemed good to him, he might refuse to seek an order for possession. It would be scarcely consistent with the powers and duties conferred on the mayor by sections 384 and 385 if he could be denied the ability to obtain possession of PSG. The national importance of PSG G underlines the need for minimum delay and maximum certainty and simplicity where summary action is required.

33 Reading the two sections together, they show that while bare title to PSG is vested in the Crown, the mayor is given the power to do everything in relation to the land. The mayor can, in my view, rely on the two sections to show not merely that he has a statutory right to possession of PSG, and indeed a statutory duty to enforce that right, but, crucially for present H purposes, to demonstrate that while they confer title to PSG on the Crown, it is a title which it is his right to enforce, and, bearing in mind his duties under sections 384 and 385, his obligation to enforce, in his own name. In other words, far from those two sections undermining his title to sue, they support it.

34 As to the 1961 Act, the Crown Estates Commissioners are the agents of the Crown, so it is understandable why there is specific reference to their powers in section 1(2). However, it goes a little further than that: as Arden LJ said, given the provisions of section 1(2) of that Act and the reference to the 1851 Act in section 384(6), it seems very unlikely that Parliament envisaged that the Crown would have to bring proceedings for possession of PSG in its own name.

35 It is right to refer to the fact that the possession proceedings in *Meier's* case [2009] 1 WLR 2780 were brought by the freehold title owner, the Secretary of State, rather than the Forestry Commission, in whom the management of the land was vested. The powers given to the mayor under sections 384 and 385 are considerably wider than those conferred on the forestry commissioners by the Forestry Act 1967. This would explain why the claimant was not the forestry commissioners, but the Secretary of State, to whom Crown woodlands had devolved through the Minister of Works. There was a similar line of devolution of PSG through the Minister of Works to the Secretary of State for Culture, Media and Sport, but the 1999 Act extinguished all those powers. Those powers included all the rights of the Crown in respect of PSG: hence the need for section 384(1) to revest title in the Crown. It is significant that this was done by extinguishing and not recreating in the Crown Estate Commissioners the wide powers to manage that they have in relation to Crown lands: those powers enable the Crown Estate Commissioners to exercise all the rights of ownership in Crown lands: see section 1(2) of the 1961 Act, referred to above.

Articles 10 and 11 of the Convention and proportionality

36 As I have already said, there can be no doubt that the defendants should have the right to express the views which they wish to express; similarly, there is no doubt that they should enjoy the right to assemble together. Such rights are, of course, specifically protected by, respectively, articles 10 and 11 of the Convention. However, as articles 10.2 and 11.2 of the Convention emphasise, these rights, vitally important though they are, must be subject to some constraints, and those constraints include "restrictions" provided they are, inter alia,

> "prescribed by law and . . . necessary in a democratic society in the interests of . . . public safety, for the prevention of disorder or crime . . . for the protection of the [under article 10, 'reputation or'] rights ['and', under article 11, 'freedoms'] of others."

37 The right to express views publicly, particularly on the important issues about which the defendants feel so strongly, and the right of the defendants to assemble for the purpose of expressing and discussing those views, extends to the manner in which the defendants wish to express their views and to the location where they wish to express and exchange their views. If it were otherwise, these fundamental human rights would be at risk of emasculation. Accordingly, the defendants' desire to express their views in Parliament Square, the open space opposite the main entrance to the Houses of Parliament, and to do so in the form of the Democracy Village, on the basis of relatively long-term occupation with tents and placards, are all, in my opinion, within the scope of articles 10 and 11.

A 38 Having said that, the greater the extent of the right claimed under article 10.1 or article 11.1, the greater the potential for the exercise of the claimed right interfering with the rights of others, and, consequently, the greater the risk of the claim having to be curtailed or rejected by virtue of article 10.2 or article 11.2.

39 The byelaws themselves cannot be said to fall foul of articles 10 and 11: they envisage demonstrations, speeches, camping, placards and the like B being permitted subject to the mayor's consent. In this case, the mayor considered and refused an application (or, strictly, a letter which he treated as an application) for the establishment and continuance of the Democracy Village on PSG, and he refused it for reasons given in a fairly detailed letter dated 20 May 2010. That letter included the observation that:

> C "The effect of the Democracy Village is to prevent the public from exercising their rights over a very significant part of PSG for a prolonged and indefinite period [and] one impact of the Democracy Village has been to exclude others from exercising their right to protest there. The extent and duration of the impact of the Democracy Village on the lawful, reasonable and ordinary activities on PSG is the primary reason for refusing consent."

D The letter also said that "The mayor is seriously concerned about the substantial damage which is being caused by the Democracy Village to PSG", and that "the cost of reparation to return the Square to its former condition is substantial". The letter went on to state that:

> "Permissions for other peaceful protests and rallies on Parliament Square Garden are normally limited to a maximum of three hours, in E order to allow for proper management, to ensure that the day-to-day business of the city is not impeded, and to allow the maximum number of groups or individuals to use the space to exercise their democratic right to peaceful protest. As this period will be extended in appropriate cases, the mayor is not prepared to permit camping by significant numbers for a prolonged period."

F 40 The Democracy Village defendants are plainly trespassers on PSG: rightly, that is no longer in contention, although it was debated before the judge. The defendants' presence on PSG is also in breach of the byelaws, as the mayor's consent to their occupation has been refused. Although those are factors to be weighed against them, particularly after what is now more than two months of effectively exclusive occupation, the Democracy Village G defendants are still entitled to have the proportionality of both the making of the possession order and the granting of the injunction sought by the mayor assessed by the court as articles 10 and 11 are engaged, not least because it is the mayor, the person seeking the relief who could authorise them remaining lawfully on PSG.

41 This is not a case like *Kay v Lambeth London Borough Council* [2006] 2 AC 465 or *Doherty v Birmingham City Council (Secretary of State* H *for Communities and Local Government intervening)* [2009] AC 367, where (at least in the view of the majority of the House of Lords in each case) article 8 could not be invoked by an occupier of a residential property in support of his case against his landlord's claim for possession. That was because the domestic law had already taken into account, and balanced,

the public interest in a public authority landlord obtaining possession and the tenant's right to respect for his home. No such legislative balancing exercise has been carried out here. In any event, it can be argued that recent Strasbourg jurisprudence could be invoked to suggest that the reasoning of the majority in those two cases should no longer hold good (an issue which has just been argued before the Supreme Court on appeal from *Manchester City Council v Pinnock (Secretary of State for Communities and Local Government intervening)* [2010] 1 WLR 713*).

42 Quite apart from this, when freedom of assembly, and, even more, when freedom of expression, are in play, then, save possibly in very unusual and clear circumstances, article 11, and article 10, should be capable of being invoked to enable the merits of the particular case to be considered. Thus, in *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105, paras 36 and 37 Lord Bingham of Cornhill made it clear that state authorities have a positive duty to take steps to ensure that lawful public demonstrations can take place, and that any prior restraint on freedom of speech requires "the most careful scrutiny".

43 Given, therefore, that articles 10 and 11 are in play, it seems to me that the decision on the balancing, or proportionality, issue is ultimately one for the court, not the mayor: see *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100 and *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420. Further, when carrying out that balancing exercise, the court must consider the facts, and, particularly when it comes to article 10 (and article 11), focus very sharply and critically on the reasons put forward for curtailing anyone's desire to express their beliefs—above all their political beliefs—in public.

44 In that connection, it is clear both from the evidence before the judge and from some of the argument before us that the factual basis for some of the reasoning in the mayor's letter of 20 May, refusing Democracy Village the right to occupy PSG, was challenged. In particular, it was said by some of the defendants that the presence of the Democracy Village on PSG had plainly not prevented at least three significant demonstrations in Parliament Square and its vicinity since 1 May, and that, far from putting off people from visiting PSG, whether or not for the purpose of demonstrating, the Democracy Village actually encouraged people to come to Parliament Square to express or discuss the views which the defendants supported.

45 The judge received written and oral evidence from Simon Grinter, the head of the Greater London Authority's Facilities and Squares Management (who was closely cross-examined by or on behalf of a number of the defendants), which included a written note from Syed Shah (a PSG warden). He also read witness statements from nine of the defendants, and from various public figures in support of the defendants' case, and heard oral evidence from about 15 of the defendants and a number of supporting witnesses. The effect of that evidence is pretty fully summarised at [2010] EWHC 1613 (QB) at [23]–[74].

46 The judge concluded, at para 133, that there was:

> "a pressing social need not to permit an indefinite camped protest on PSG for the protection of the rights and freedoms of others to access all of

* *Reporter's note.* The Supreme Court's decision of 3 November 2010 is now reported [2010] 3 WLR 1441.

A PSG and to demonstrate with authorisation but also importantly for the protection of health—the camp has no running water or toilet facilities—and the prevention of crime—there is evidence of criminal damage to the flower beds and of graffiti."

He went on to say that he was:

B "satisfied the GLA and the mayor are being prevented from exercising their necessary powers of control management and care of PSG and the use of PSG by tourists and visitors, by local workers, by those who want to take advantage of its world renowned setting and by others who want to protest lawfully, is being prevented."

47 In my view, in so far as those conclusions amounted to findings of fact, they were, to put it at its lowest, findings which were open to the judge C on the evidence before him. Once those findings were made, there are no grounds for attacking the conclusion reached by the judge in the following paragraph, namely that

"while the removal of the defendants . . . would interfere with their article 10 and article 11 rights, that is a wholly proportionate response and so no defendant has a Convention defence . . . to the claim for D possession."

48 It is important to bear in mind that this was not a case where there is any suggestion that the defendants should not be allowed to express their opinions or to assemble together. The claim against them only relates to their activities on PSG. It is not even a case where they have been absolutely prohibited from expressing themselves and assembling where, or in the E manner, in which they choose. They have been allowed to express their views and assemble together at the location of their choice, PSG, for over two months on an effectively exclusive basis. It is not even as if they will necessarily be excluded from mounting an orthodox demonstration at PSG in the future. Plainly, these points are not necessarily determinative of their case, but, when it comes to balancing their rights against the rights F of others, they are obviously significant factors.

49 The importance of Parliament Square as a location for demonstrations and the importance of the right to demonstrate each cut both ways in this case. It is important that the Democracy Village members are able to express their views through their encampment on PSG, just opposite the Houses of Parliament. However, as Arden LJ rightly said, it is equally important to all the other people who wish to demonstrate on G PSG that the Democracy Village is removed, in the light of the judge's finding, in line with the mayor's view, and (it should be added) the preponderance of the evidence, that the presence of the Democracy Village impedes the ability of others to demonstrate there. Additionally, there are the rights of those who simply want to walk or wander in PSG, not perhaps Convention rights, but none the less important rights connected with H freedom and self-expression. The fact that Democracy Village have been effectively in exclusive occupation of PSG for over two months is also relevant, especially as there is no sign of the camp being struck, as the defendants have, it may be said, had some 70 days to make their point.

50 As to the suggestion that removing all the Democracy Village defendants was an overreaction, Mr Underwood pointed out that this was

very much an "all or nothing" situation: either all the Democracy Village defendants go, or none of them do. He said, with force, that it was not fair, principled or practical to distinguish between the defendants (save, perhaps, Mr Haw, Mrs Tucker and Ms Sweet, the fourth defendant) when considering whom to evict. There is no good reason to let some of them stay while requiring others to leave: it would involve arbitrary selection; it would encourage other, new, supporters of Democracy Village to join the camp; it would be unlikely to achieve the ends which the mayor is seeking, and entitled, to achieve. He also made the point that the mayor needed to recover possession in order to control the use of PSG and bring to an end the "first come first served anarchy" which currently prevailed.

51 The defendants relied on the reasoning of Laws LJ in *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23; The Times, 25 February 2009, where this court held an attempt by the Government to prevent a protest camp being held at Aldermaston to be unlawful. However, as the judge pointed out, the facts of that case were very different from those in this case. The protest camp was on a piece of land adjoining the highway by Aldermaston, and the protest was held one weekend every month, and had taken place for over 20 years; further, there was no evidence of any significant obstruction of the highway or to any other public, or indeed private, right; in addition, no attempt had been made by the Secretary of State to enforce his right, whether to possession or anything else, for all that time. Further, in that case, the need to balance the rights of the defendants to demonstrate against the rights of others to demonstrate did not arise, as of course it does here.

The injunction should not have been granted in aid of the criminal law

52 The defendants argue that the judge should not have granted the injunction, because, as a matter of principle, it was wrong to invoke the civil law to enforce byelaws which have their own criminal sanction—see section 385(3). As a matter of principle, there is clear authority for the proposition that, particularly where "Parliament has legislated in detail", the courts should at least "in general leave the matter to be dealt with as Parliament intended . . . save perhaps in exceptional circumstances": *Birmingham City Council v Shafi* [2009] 1 WLR 1961, para 44, following the principles laid down by Lord Templeman in *Stoke-on-Trent City Council v B & Q (Retail) Ltd* [1984] AC 754, 776, and Bingham LJ in *City of London Corpn v Bovis Construction Ltd* [1992] 3 All ER 697, 714. Further, it is clear that Parliament has legislated relevantly on two fairly recent occasions—namely in the 1999 Act, which, in sections 384 and 385, relates to activities on PSG, and also in the Serious Organised Crime and Police Act 2005, which, in sections 132 and 134, contains rather controversial provisions creating criminal offences out of unauthorised demonstrations and similar activities within a specified distance of the Palace of Westminster.

53 There are, in my view, two answers to this argument. The first is that the mayor is entitled, in his capacity of the person in possession of PSG, to maintain an injunction to remove those in unlawful occupation. Even on the assumption that, as contended by Mr Luba and Mr Wonnacott, the mayor is not entitled to maintain a claim for possession, it is accepted that, if he is entitled to use and control, effectively amounting to possession, he is entitled, in that capacity, to enjoin those in occupation of PSG from

A remaining there. If, as I have concluded, he is entitled to maintain a claim for possession, then, if the facts justify it, he is entitled to an injunction in support of the enforcement of that claim (a view which receives support from the thrust of the reasoning in *Meier's* case [2009] 1 WLR 2780).

54 In this case, the need to ensure that the defendants remove their tents and placards and do not return was, to my mind, plainly established to the judge's satisfaction. He concluded that the great majority of the defendants B would not be deterred by the threat of criminal proceedings in the magistrates' court from continuing to breach the byelaws. It must follow from this that, if not entitled to sue for possession, the mayor, as the person entitled to possession, was justified in seeking injunctive relief, and that, if he was entitled to sue for possession, he was entitled to seek injunctive relief in support.

C 55 Furthermore, the judge's finding that the criminal procedures provided for in section 385(3) would not operate as a deterrent to the defendants justified his decision to grant an injunction in aid of the enforcement of the byelaws. On this point, the judge said [2010] EWHC 1613 (QB) at [143]:

> "Whereas the standard of proof required in civil proceedings is the D balance of probabilities, I am, in fact, sure that these applications (subject to the exercise of the court's discretion) must succeed. I am satisfied, for the reasons which follow that this is an exceptional case: the identities of most of those taking part in the Democracy Village are unknown—but for their insistence in being joined as defendants to these proceedings, the identities of defendants 5 to 19 would not have been ascertained; it would impose an undue burden on the claimant to institute proceedings against E all the occupiers, with the complicating factor that some of those taking part move in and out of occupation; effecting service would not be straightforward; proceedings in the magistrates' courts would have to be by way of summons, a sometimes prolonged procedure; the refusals, hitherto, of those taking part in the Democracy Village to obey lawful instructions gives no grounds for optimism that there will be future F compliance; indeed a number of the defendants made it clear they have no intention of obeying a court order for possession; . . ."

56 Given these conclusions, which were ones which were plainly open to him on the evidence (to put it at its lowest), I consider that the judge was entitled to grant the injunction that he did, even ignoring the fact that it was sought by the person entitled to possession of the land concerned. In the G *B & Q (Retail)* case [1984] AC 754, 776J, having said that the court should, in principle, be "reluctant" to grant an injunction in aid of the criminal law which provided for penalties for Sunday trading, Lord Templeman said that "the council were entitled to take the view that the appellants would not be deterred by a maximum fine which was substantially less than the profits which could be made from illegal Sunday trading". So here: the judge found that, albeit for reasons more admirable than money-making, the defendants H would not have been deterred from continuing to breach the byelaws by a level 1 fine in the magistrates' court.

57 Quite apart from this, I do not think that the byelaws were framed with a view to applying to a long-term, or even indefinite, and exclusive, or near-exclusive, occupation of PSG. Although the words of byelaws 5(a)(7),

A (9) and (10), taken together, cover the sort of operation involved in the Democracy Village, I consider that that sort of exclusive long-term arrangement was not within the contemplation of those who drafted the byelaws. Although I would not suggest that this is a separate reason for upholding the judge's decision to grant an injunction, it is a point which underpins the two reasons which I do consider justify that decision.

B

Mr Haw's arguments

58 Separate arguments are raised on procedural aspects, on the possession application and order, and on proportionality, by Mr Westgate on behalf of Mr Haw, and, at least arguably, by Mrs Tucker who has joined in his demonstration, and by Ms Sweet, who has also done so, albeit to a lesser extent. As explained above, his long-standing presence on the C pavement on the east side of Parliament Square is not challenged in these proceedings. What is challenged is his encroachment onto a small adjoining part of PSG, where he has pitched a tent.

59 Mr Haw makes the general point that he is entirely separate from the other, Democracy Village, defendants. He has pitched his tent on what is only a very small part of the grassed area, and has done so since about 2001 (albeit that he has also pitched it on the pavement where he demonstrates) D and there is no suggestion that his presence, unlike that of the Democracy Village defendants, has discouraged other visitors or demonstrators to PSG or has damaged the flowers on PSG.

60 The first of Mr Haw's arguments that it is convenient to consider is that the application and order for possession against Mr Haw both extend to the whole of PSG, and not just the small part which he occupies. At first E sight that submission derives some support from the decision in *Meier's* case [2009] 1 WLR 2780, which underlines the point that possession can only be sought of the land occupied by the defendant. However, where only part of what can fairly be described as one piece of land is occupied by a defendant, it is clear that the owner of the land can claim possession of the whole piece. The point is most clearly made by Lord Rodger JSC at para 10, where he refers to the right to possession of a piece of land as being "indivisible" (and F see also paras 67 and 97). Further, where, as here, the whole piece of land is occupied by trespassers, and it is difficult precisely to identify who occupies what part, it is particularly unrealistic to expect the claimant to identify which part each defendant occupies, and practicality is a relevant factor, as the decision in *University of Essex v Djemal* [1980] 1 WLR 1301 establishes.

61 The other arguments raised on behalf of Mr Haw both rely on the G contention that his health requires him, or at least makes it better for him, to sleep on the relatively softer grass rather than the pavement, because of an acute medical condition from which he suffers. At first sight, that is answered by Mr Underwood's point that he can get a mattress, but it is said in response that the pavement slopes in a way that prevents sleeping on the pavement being feasible in the light of his medical condition.

62 Mr Haw contends that the application for possession and for the H injunction came on speedily because of factors which applied to the other, Democracy Village, defendants, and which had no application to him, as summarised in para 59 above, and that this caused him prejudice, because he was unable to obtain medical reports to support his case that he needed to be able to sleep on the grass. He says that this is very important because, if he

A has to remove the tent and restrain his presence and activities to the pavement, it would be an unfair and disproportionate interference with his presence and activities on the pavement.

63 This contention is not only based on his medical condition, but it is also based on his alleged need to sleep on the grass for reasons of safety, as he is less likely to be hit by traffic or attacked by thugs than if he sleeps on the pavement. I have some doubts about this: if pitched on the grass, his tent B would be very close to the western edge of the eastern pavement, and therefore would be not much further from the traffic and would be equally accessible to thugs. And there is no evidence of his having been harmed in any traffic accident.

64 Mr Haw's argument on proportionality goes wider, in that he says that, while the judge appeared to accept [2010] EWHC 1613 (QB) at [119] C that he was in a different position from the Democracy Village defendants when embarking on the discussion of proportionality, he did not distinguish between him and the other defendants when actually considering that issue. For the reasons identified in para 59 above, he says that his claim to remain on the very small part of PSG occupied by his tent at least deserved separate consideration from the claim against the other, Democracy Village, defendants—particularly when it came to the issue of proportionality.

D **65** I accept that Mr Haw is in a different position from that of the Democracy Village defendants. He and his demonstration are quite separate from them and theirs, he has been demonstrating for far longer, and his demonstration "pitch" is not under attack in these proceedings. Further, his demonstration has not put off visitors or other demonstrators (one rather suspects that the reverse may be the case), and there is no question of his E having damaged the flora on PSG. The evidence as to when he first pitched his tent on the grass, and how often it was pitched there is in dispute, but it does seem as if he has been encamped on PSG for a significantly longer time than the Democracy Village.

66 Mr Underwood's argument that it is wrong for the mayor to try and distinguish between the various occupiers of PSG has, as I have mentioned, F great force in relation to all the Democracy Village defendants. While I accept that it can also be applied to Mr Haw, it appears to me that it has much less force in his case, essentially for the reasons identified in the preceding paragraph. Those reasons may well justify treating Mr Haw differently from the other defendants, as a matter of principle.

67 The judge did not make any findings of fact as to the effect of making an order for possession or granting an injunction against Mr Haw on his G ability to maintain his demonstration or on his rights under article 10 or article 11. Nor did he expressly consider Mr Haw separately from the other defendants when considering the proportionality under articles 10 and 11 of making the orders against him sought by the mayor, although he did consider Mr Haw separately on the issue of the likelihood of his being deterred by magistrates' court proceedings (see [2010] EWHC 1613 (QB) at H [148]). Further, although the judge received the medical report on Mr Haw before he gave judgment, it was only received on the last day of the hearing and Mr Haw had very limited opportunity to consider its contents and to make submissions about it.

68 With considerable hesitation, I have reached the conclusion that the question of whether it was proportionate to make an order for possession

A and to grant an injunction against Mr Haw should be remitted for reconsideration by the High Court. Although the case against him was weaker than that against the Democracy Village defendants, for the reasons already mentioned, it was still a strong case in the sense that he had no defence to the claims for possession or an injunction other than the argument based on articles 10 and 11. In addition, in an important respect, his argument based on those articles is weaker than that of the other B defendants: the orders are not intended to interfere with his desire to continue with his demonstration in Parliament Square. However, he argues that they would make it more difficult, even medically very difficult, for him to do so, because he will have to pitch his tent on the pavement.

69 I entertain very significant doubts whether Mr Haw will be able to persuade a judge that he should be able to maintain a tent on the grassed C area of PSG, even if he establishes that, for the medical or other reasons, his being prevented from doing so would render it significantly harder for him to maintain his demonstration on the pavement facing the Houses of Parliament. His right to express his views is not being challenged, and it is by no means clear that, if he had to sleep elsewhere, he would be precluded from maintaining his pitch where it is. Even if his ability to maintain his pitch is, albeit indirectly, under challenge, it might well be stretching his D article 10 rights too far to say that he should be entitled, particularly after having done so for so long, to maintain his demonstration in the precise location of his choice, by trespassing on adjoining public property. However, I think that he is entitled to have his case decided on the basis of the medical and other evidence he wishes to put before the court, and to have a reasoned judgment on the issue.

E

Issues relating to costs

70 The main argument on costs was that of Ms Hall, who was ordered to pay the costs of the possession proceedings, but not of the injunction proceedings, as the judge accepted that she would not disobey the possession order, and would be deterred by magistrates' court proceedings. She said it F was illogical that she should have to pay the costs of the possession proceedings and not receive the costs of the injunction proceedings. When Stanley Burnton LJ put to him the point that it would be simpler to make no order for costs as between her and the mayor in relation to the whole proceedings, Mr Underwood realistically and fairly said that he had no submission to make.

71 So far as the other defendants are concerned, it was submitted that it G was unfair that each of them should potentially be liable for the costs of an eight-day action, with two directions hearings. I have some sympathy with that view, but the judge did find that the Democracy Village defendants were, as it were, in it together. He said [2010] EWHC 1613 (QB) at [138]:

> "on the evidence and the balance of probabilities I am satisfied in the case of each defendant that he or she knew of such breaches by others H who were part of Democracy Village and for the purposes of the criminal law aided and abetted the commission of such breaches."

In the light of that finding, I consider that it is hard for the Democracy Village defendants to object to an order which effectively renders each of them jointly and severally liable for the costs of these proceedings. None the

A less, I would limit the extent of those costs to 80% of the total costs, as part of the costs related to Mr Haw, Mrs Tucker, and Ms Sweet, whose case was separate, and anyway is being remitted.

Conclusions

72 On the various substantive issues which have been raised, I would B grant Mr Haw (and Mrs Tucker and Ms Sweet) permission to appeal on the issue whether it is proportionate to make an order for possession or to grant an injunction against him, grant his appeal, and would remit that issue to the High Court. Otherwise, I would refuse permission to appeal on all other substantive issues, save that the order for possession against the other defendants will have to be amended to exclude the area occupied by Mr Haw's tent.

C 73 I would grant Ms Hall permission to appeal on costs, allow her appeal, and substitute for the partial order for costs against her, a direction that there be no order for costs as between her and the mayor. I would also grant permission to the Democracy Village defendants to appeal on costs. As I have indicated, I would allow their appeal to the extent of limiting their liability to 80%, rather than 100%, of the mayor's costs on a standard basis.

74 No doubt counsel can prepare an appropriate form of order. The D order should include directions to ensure that the rehearing of the claims against Mr Haw is disposed of very speedily.

75 Finally, I would like to express my appreciation to all those, whether lawyers or defendants, who addressed the court orally or in writing: this was a case involving a large number of parties and two significant legal issues, as well as other points, and it was disposed of efficiently and fairly in a day. E Our task was also greatly assisted by the quality of the oral and written submissions and the judgment below.

ARDEN LJ

76 I agree.

STANLEY BURNTON LJ

F 77 I also agree.

Appeals of second and third defendants allowed on issue of proportionality only. Issue remitted to High Court for rehearing.

G *Permission to appeal refused to all other applicants.*

Appeal of first defendant on costs allowed.

Order for costs against Democracy Village defendants varied.

SUSAN DENNY, Barrister

H

A

Supreme Court

*Regina (SG and others) *v* Secretary of State for Work and Pensions (Child Poverty Action Group and another intervening)

[On appeal from Regina (JS and another) v Secretary of State for Work and Pensions (Child Poverty Action Group and another intervening)]

B

[2015] UKSC 16

2014 April 29, 30;
2015 March 18

Baroness Hale of Richmond DPSC,
Lord Kerr of Tonaghmore, Lord Reed,
Lord Carnwath, Lord Hughes JJSC

C

Social security — Welfare benefits — Benefit cap — Secretary of State introducing benefit cap — Regulations implementing benefit cap resulting in differential treatment of men and women by reason of greater number of women in non-working lone parent households in receipt of benefits — Whether indirect discriminatory effect on women's enjoyment of property rights justified — Whether legislature's policy choice manifestly without reasonable foundation — Whether policy unjustified in any event if not in best interests of children in households affected by cap — Whether children's best interests test apt where question relating to justification of legislation discriminating between men and women — Human Rights Act 1998 (c 42), Sch 1, Pt I, art 14, Pt II, art 1 — Housing Benefit Regulations 2006 (SI 2006/213), Pt 8A (as inserted by Benefit Cap (Housing Benefit) Regulations 2012 (SI 2012/2994), reg 2(5)) — United Nations Convention on the Rights of the Child (1989) (Cm 1976), art 3.1

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E

Pursuant to a power conferred on the Secretary of State for Work and Pensions by section 96 of the Welfare Reform Act 2012, the Benefit Cap (Housing Benefit) Regulations 2012 inserted Part 8A into the Housing Benefit Regulations 2006[1], which provided for a benefit cap to reduce a person's housing benefit if their total entitlement to welfare benefits exceeded a stated amount equivalent to the net median earnings of working households. The claimants, comprising the mother and youngest child of three lone parent families whose welfare benefits were substantially reduced as a result of the cap, issued judicial review proceedings against the Secretary of State, challenging the lawfulness of the amended Regulations on the grounds, inter alia, that by including child-related benefits in the list of prescribed benefits, alternatively by failing to include among the exceptions to the cap lone parents with several children at home, the Secretary of State had indirectly and unjustifiably discriminated against women, contrary to article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms[2] ("the Convention") read with the right to the peaceful enjoyment of one's possessions in article 1 of the First Protocol to the Convention ("A1P1"), and that he had failed to treat the best interests of children as a primary consideration when making the Regulations, as required by article 3.1 of the United Nations Convention on the Rights of the Child[3] ("the UN Convention"). It was conceded that the Regulations resulted, indirectly, in differential treatment of men and women in relation to welfare benefits, because most non-working households receiving the highest levels of benefit were lone parent households and most lone parents were women, and that the benefits could amount

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[1] Housing Benefit Regulations 2006, regs 75C–75G: see post, paras 163–165.
[2] Human Rights Act 1998, Sch 1, Pt I, art 14: see post, para 5.
Sch 1, Pt II, art 1: see post, para 6.
[3] United Nations Convention on the Rights of the Child (1989) (Cm 1976), art 3.1: see post, para 149.

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to "possessions" within A1P1, but the claim was resisted on the grounds that the differential treatment was justified. The Divisional Court and, on appeal by the claimants from two of the families, the Court of Appeal, dismissed the claim on the grounds that the cap was justified and, in relation to article 3.1 of the UN Convention, that the Secretary of State had shown regard to the interests of children as a primary consideration when making the Regulations. On the claimants' appeal to the Supreme Court, and in post-hearing submissions, the additional argument was advanced by the claimants that compliance with article 3.1 of the UN Convention was determinative as to the question of justification.

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B

On the appeal—

Held, dismissing the appeal (Baroness Hale of Richmond DPSC and Lord Kerr of Tonaghmore JSC dissenting), that it was established law that a violation of article 14 of the Convention would arise where there was a difference in treatment of persons in relevantly similar positions which had no objective and reasonable justification in the sense that the discriminatory effect did not pursue a legitimate aim or was not a proportionate means of realising that aim; that for the purposes of an article 14 claim the legislature's policy choice in relation to general measures of economic or social strategy, including welfare benefits, would be respected unless it was manifestly without reasonable foundation; that the view of the Government, endorsed by Parliament, that achieving the legitimate aims of fiscal savings, incentivising work and imposing a reasonable limit on the amount of benefits which a household could receive was sufficiently important to justify making the Regulations despite their differential impact on men and women, had not been manifestly without reasonable foundation; that although Convention rights protected in domestic law by the Human Rights Act 1998 could be interpreted in the light of international treaties that were applicable in the particular sphere, the United Nations Convention on the Rights of the Child was relevant only to questions concerning the Convention rights of children and not to a claim of alleged discrimination between men and women in the enjoyment of the property rights guaranteed by A1P1; that it followed that even on an assumption (per Lord Reed and Lord Hughes JJSC) or an acceptance (per Lord Carnwath JSC) that the Secretary of State had failed to show how the Housing Benefit Regulations 2006 were compatible with the article 3.1 obligation to treat the best interests of children as a primary consideration, such failure did not have any bearing on whether the legislation unjustifiably discriminated between men and women in relation to their enjoyment of A1P1 property rights; that it followed, further, that it would be inappropriate to substitute a test of non-compliance with article 3.1 of the UN Convention for the accepted test of manifestly without reasonable foundation; and that, accordingly, since on that latter test the discriminatory effect of the measure had been justified, there had been no violation of article 14 of the Convention read with A1P1 (post, paras 7–8, 11, 14, 63, 65, 66, 83, 87–89, 92–93, 96, 128–129, 131, 134, 135, 137, 146).

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E

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Carson v United Kingdom (2010) 51 EHRR 369, GC and *Humphreys v Revenue and Customs Comrs* [2012] 1 WLR 1545, SC(E) applied.

Burnip v Birmingham City Council [2013] PTSR 117, CA considered.

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R v Secretary of State for the Home Department, Ex p Launder [1997] 1 WLR 839, HL(E) and *X v Austria* (2013) 57 EHRR 405, GC distinguished.

Per curiam. Although it has been argued that the cap also affected victims of domestic violence, a case has not been made out for separate treatment of the position of such victims (post, paras 62, 98, 135, 186–187, 233).

Per Lord Hughes JSC. The protected right to respect for family life under article 8 of the Convention is entirely different from the protected rights of women to property under A1P1 coupled with article 14. Since the article 8 right does not extend to requiring the state to provide benefits calculated simply according to need or to provide a home, the article 8 rights of children are not arguably infringed by the benefit cap scheme and so are not here in need of interpretation by reference to article 3.1 of the UN Convention (post, paras 139, 146).

H

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A Decision of the Court of Appeal [2014] EWCA Civ 156; [2014] PTSR 619 affirmed.

The following cases are referred to in the judgments:

A v Secretary of State for the Home Department [2004] UKHL 56; [2005] 2 AC 68; [2005] 2 WLR 87; [2005] 3 All ER 169, HL(E)
A v Secretary of State for the Home Department (No 2) [2004] EWCA Civ 1123; [2005] 1 WLR 414, CA; [2005] UKHL 71; [2006] 2 AC 221; [2005] 3 WLR 1249; [2006] 1 All ER 575, HL(E)
AL (Serbia) v Secretary of State for the Home Department [2008] UKHL 42; [2008] 1 WLR 1434; [2008] 4 All ER 1127, HL(E)
AM v Secretary of State for Work and Pensions [2014] EWCA Civ 286, CA
AXA General Insurance Ltd v HM Advocate [2011] UKSC 46; [2012] 1 AC 868; [2011] 3 WLR 871, SC(Sc)
Abdirahman v Secretary of State for Work and Pensions [2007] EWCA Civ 657; [2008] 1 WLR 254; [2007] 4 All ER 882, CA
Andrejeva v Latvia (2009) 51 EHRR 650, GC
Assange v Swedish Prosecution Authority [2012] UKSC 22; [2012] 2 AC 471; [2012] 2 WLR 1275; [2012] 4 All ER 1249, SC(E)
Bank Mellat v HM Treasury (No 2) (Liberty intervening) [2013] UKSC 38; [2013] UKSC 39; [2014] AC 700; [2013] 3 WLR 179; [2013] 4 All ER 495; [2013] 4 All ER 533, SC(E)
Behluli v Secretary of State for the Home Department [1998] Imm AR 407, CA
Boyce v The Queen [2004] UKPC 32; [2005] 1 AC 400; [2004] 3 WLR 786, PC
Burnip v Birmingham City Council [2012] EWCA Civ 629; [2013] PTSR 117; [2012] LGR 924, CA
Carson v United Kingdom (2010) 51 EHRR 369, GC
Chapman v United Kingdom (2001) 33 EHRR 399
Chundawadra v Immigration Appeal Tribunal [1988] Imm AR 161, CA
Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374; [1984] 3 WLR 1174; [1985] ICR 14; [1984] 3 All ER 935, HL(E)
DH v Czech Republic (2007) 47 EHRR 59, GC
Demir v Turkey (2008) 48 EHRR 1272, GC
Derbyshire County Council v Times Newspapers Ltd [1993] AC 534; [1993] 2 WLR 449; [1993] 1 All ER 1011; 91 LGR 179, HL(E)
Director of Public Prosecutions v Jones (Margaret) [1999] 2 AC 240; [1999] 2 WLR 625; [1999] 2 All ER 257; [1999] 2 Cr App R 348, HL(E)
G (Adoption: Unmarried Couple), In re [2008] UKHL 38; [2009] AC 173; [2008] 3 WLR 76, HL(NI)
Garland v British Rail Engineering Ltd [1983] 2 AC 751; [1982] 2 WLR 918; [1982] ICR 420; [1982] 2 All ER 402, HL(E)
Gas and Dubois v France (Application No 25951/07) (unreported) given 15 June 2012, ECtHR
Glor v Switzerland (Application No 13444/04) (unreported) given 30 April 2009, ECtHR
H (H) v Deputy Prosecutor of the Italian Republic, Genoa (Official Solicitor intervening) [2012] UKSC 25; [2013] 1 AC 338; [2012] 3 WLR 90; [2012] 4 All ER 539, SC(E)
Hoogendijk v Netherlands (2005) 40 EHRR SE 189
Humphreys v Revenue and Customs Comrs [2012] UKSC 18; [2012] 1 WLR 1545; [2012] PTSR 1024; [2012] 4 All ER 27, SC(E)
Inland Revenue Comrs v Collco Dealings Ltd [1962] AC 1; [1961] 2 WLR 401; [1961] 1 All ER 762, HL(E)
James v United Kingdom (1986) 8 EHRR 123
Jordan v United Kingdom (2001) 37 EHRR 52
Lewis v Attorney General of Jamaica [2001] 2 AC 50; [2000] 3 WLR 1785, PC

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McKerr, In re [2004] UKHL 12; [2004] 1 WLR 807; [2004] 2 All ER 409, HL(NI) A
Minister of State for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273
Ministry of Justice (formerly Department for Constitutional Affairs) v O'Brien (Council of Immigration Judges intervening) [2013] UKSC 6; [2013] 1 WLR 522; [2013] ICR 499; [2013] 2 All ER 1, SC(E)
National & Provincial Building Society v United Kingdom (1997) 25 EHRR 127
Neulinger v Switzerland (2010) 54 EHRR 1087, GC
Opuz v Turkey (2009) 50 EHRR 695 B
Ponomaryov v Bulgaria (2011) 59 EHRR 799
Pressos Compania Naviera SA v Belgium (1995) 21 EHRR 301
Pretty v United Kingdom (2002) 35 EHRR 1
Pye (JA) (Oxford) Ltd v Graham [2002] UKHL 30; [2003] 1 AC 419; [2002] 3 WLR 221; [2002] 3 All ER 865, HL(E)
Quazi v Quazi [1980] AC 744; [1979] 3 WLR 833; [1979] 3 All ER 897, HL(E)
R v Brown (Anthony) [1994] 1 AC 212; [1993] 2 WLR 556; [1993] 2 All ER 75; 97 Cr App R 44, HL(E) C
R v Director of Public Prosecutions, Ex p Kebilene [2000] 2 AC 326; [1999] 3 WLR 972; [1999] 4 All ER 801, HL(E)
R v Lyons [2002] UKHL 44; [2003] 1 AC 976; [2002] 3 WLR 1562; [2002] 4 All ER 1028; [2003] 1 Cr App R 359, HL(E)
R v Secretary of State for the Environment, Ex p National and Local Government Officers' Association (1992) 5 Admin LR 785, CA
R v Secretary of State for the Home Department, Ex p Ahmed and Patel [1998] INLR 570, CA D
R v Secretary of State for the Home Department, Ex p Brind [1991] 1 AC 696; [1991] 2 WLR 588; [1991] 1 All ER 720, HL(E)
R v Secretary of State for the Home Department, Ex p Launder [1997] 1 WLR 839; [1997] 3 All ER 961, HL(E)
R v Uxbridge Magistrates' Court, Ex p Adimi [2001] QB 667; [2000] 3 WLR 434; [1999] 4 All ER 520, DC E
R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs [2002] EWCA Civ 1598; [2003] UKHRR 76, CA
R (Animal Defenders International) v Secretary of State for Culture, Media and Sport [2008] UKHL 15; [2008] AC 1312; [2008] 2 WLR 781; [2008] 3 All ER 193, HL(E)
R (Best) v Oxford City Council [2009] EWHC 608 (Admin)
R (Campaign for Nuclear Disarmament) v Prime Minister of the United Kingdom [2002] EWHC 2759 (QB); 126 ILR 727, DC F
R (Corner House Research) v Director of the Serious Fraud Office (JUSTICE intervening) [2008] UKHL 60; [2009] AC 756; [2008] 3 WLR 568; [2008] 4 All ER 927, HL(E)
R (Countryside Alliance) v Attorney General [2007] UKHL 52; [2008] AC 719; [2007] 3 WLR 922; [2008] 2 All ER 95, HL(E)
R (G) v Lambeth London Borough Council (Shelter intervening) [2011] EWCA Civ 526; [2012] PTSR 364; [2011] 4 All ER 453; [2011] LGR 889, CA G
R (Hooper) v Secretary of State for Work and Pensions [2005] UKHL 29; [2005] 1 WLR 1681; [2006] 1 All ER 487, HL(E)
R (T) v Chief Constable of Greater Manchester Police (Liberty intervening) [2014] UKSC 35; [2015] AC 49; [2014] 3 WLR 96; [2014] 2 Cr App R 359, SC(E)
R (Williamson) v Secretary of State for Education and Employment [2005] UKHL 15; [2005] 2 AC 246; [2005] 2 WLR 590; [2005] 2 All ER 1, HL(E) H
Rasmussen v Denmark (1984) 7 EHRR 371
Rayner (JH) (Mincing Lane) Ltd v Department of Trade and Industry [1990] 2 AC 418; [1989] 3 WLR 969; [1989] 3 All ER 523, HL(E)
Recovery of Medical Costs for Asbestos Diseases (Wales) Bill, In re [2015] UKSC 3; [2015] 2 WLR 481, SC(E)

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A *Salomon v Comrs of Customs and Excise* [1967] 2 QB 116; [1966] 3 WLR 1223; [1966] 3 All ER 871; [1966] 2 Lloyd's Rep 460, CA
Sellers v Maritime Safety Inspector [1999] 2 NZLR 44
Sidabras v Lithuania (2004) 42 EHRR 104
Stec v United Kingdom (2006) 43 EHRR 1017, GC
Thlimmenos v Greece (2000) 31 EHRR 411, GC
Uner v Netherlands (2006) 45 EHRR 421, GC
B *V v United Kingdom* (1999) 30 EHRR 121, GC
Valkov v Bulgaria (Application Nos 2033/04, 19125/04, 19475/04, 19490/04, 19495/04, 19497/04, 24729/04, 171/05 and 2041/05) (unreported) given 8 March 2012, ECtHR
Wilson v First County Trust Ltd (No 2) [2003] UKHL 40; [2004] 1 AC 816; [2003] 3 WLR 568; [2003] 4 All ER 97; [2003] 2 All ER (Comm) 491, HL(E)
Winterstein v France (Application No 27013/07) (unreported) given 17 October 2013, ECtHR
C *X v Austria* (2013) 57 EHRR 405, GC
ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4; [2011] 2 AC 166; [2011] 2 WLR 148; [2011] 2 All ER 783, SC(E)
Zoumbas v Secretary of State for the Home Department [2013] UKSC 74; [2013] 1 WLR 3690, SC(Sc)

D The following additional cases were cited in argument:

Asmundsson v Iceland (2004) 41 EHRR 927
Eremia v Moldova (2013) 58 EHRR 16
Open Door Counselling and Dublin Well Woman v Ireland (1992) 15 EHRR 244
R (Carson) v Secretary of State for Work and Pensions [2003] EWCA Civ 797; [2003] 3 All ER 577, CA; [2005] UKHL 37; [2006] 1 AC 173; [2005] 2 WLR 1369; [2005] 4 All ER 545, HL(E)
E *R (RJM) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening)* [2008] UKHL 63; [2009] AC 311; [2008] 3 WLR 1023; [2009] PTSR 336; [2009] 2 All ER 556, HL(E)

APPEAL from the Court of Appeal

By a claim form issued on 22 May 2013 six claimants, JS (through his litigation friend, MG), JK (through his litigation friend, SG) and MS F (through her litigation friend, NS), each being the youngest child in a lone parent family and his or her mother, sought judicial review of the decision of the defendant, the Secretary of State for Work and Pensions, to introduce changes into the Housing Benefit Regulations 2006 by the Benefit Cap (Housing Benefit) Regulations 2012. The grounds of claim included a claim that the benefit cap was unlawful because: (i) it discriminated against G women and large families on grounds of sex, race, religion, age and "other status" (lone parents), contrary to article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") when taken together with article 8 and/or article 1 of the First Protocol ("A1P1") thereto; (ii) it breached article 8 of the Human Rights Convention and/or article 3.1 of the United Nations Convention on the Rights of the Child; and (iii) the Secretary of State had acted irrationally or unreasonably H in failing to obtain relevant information about the impact of the scheme on lone parents escaping domestic violence and on those in temporary accommodation. On 22 May 2013 Collins J granted the parties anonymity and ordered that the claim be identified as *R (JS) v Secretary of State for Work and Pensions*. The Child Poverty Action Group and Shelter Children's

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Legal Service were later given permission to intervene in the proceedings. On 5 November 2013 the Divisional Court (Elias LJ and Bean J) [2013] EWHC 3350 (QB); [2014] PTSR 23, having granted permission to proceed, dismissed the claim. On 21 February 2014, the Court of Appeal (Lord Dyson MR, Longmore and Lloyd Jones LJJ) dismissed an appeal by the claimants SG and JK, and NS and MS. On 2 April 2014 the Supreme Court (Lord Neuberger of Abbotsbury PSC, Baroness Hale of Richmond DPSC and Lord Kerr of Tonaghmore JSC) granted those claimants permission to appeal. The issues for the court, as stated in the parties' agreed statement of facts and issues, were: (1) whether the Court of Appeal was wrong to have declined to decide whether the benefit cap, as formulated in the 2012 Regulations, had an unlawfully disproportionate impact on victims of domestic violence; (2) whether the Court of Appeal was wrong not to have found that the disproportionate effect of the 2012 Regulations on victims of domestic violence was contrary to article 14 of the Convention (read with article 8 and/or A1P1) and unlawful; (3) whether the Court of Appeal was wrong to have found that the discriminatory effects of the 2012 Regulations on lone parents were justified and lawful, and not contrary to article 14 (read with article 8 and/or A1P1); and (4) whether the Court of Appeal was wrong to have found that the Secretary of State had complied with his obligation to treat the best interests of children as a primary consideration when implementing the benefit cap scheme.

The facts are stated in the judgments.

Ian Wise QC, *Caoilfhionn Gallagher* and *Samuel Jacobs* (instructed by *Hopkin Murray Beskine*) for the claimants.

Clive Sheldon QC, *Karen Steyn QC* and *Simon Pritchard* (instructed by *Treasury Solicitor*) for the Secretary of State.

Richard Drabble QC, *Tim Buley* and *Zoe Leventhal* (instructed by *Herbert Smith Freehills LLP*) for the Child Poverty Action Group, intervening.

Jonathan Manning and *Clare Cullen* (instructed by *Freshfields Bruckhaus Deringer LLP*) for Shelter Children's Legal Service, intervening.

The court took time for consideration.

18 March 2015. The following judgments were handed down.

LORD REED JSC

Introduction

1 These appeals raise the question whether it was lawful for the Secretary of State to make subordinate legislation imposing a cap on the amount of welfare benefits which can be received by claimants in non-working households, equivalent to the net median earnings of working households. The legislation is challenged under the Human Rights Act 1998 primarily on the basis that it discriminates unjustifiably between men and women, contrary to article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") read with article 1 of Protocol No 1 to the Convention ("A1P1").

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A **2** The discrimination arises indirectly. The cap affects all non-working households which would otherwise receive benefits in excess of the cap. Those are predominantly households with several children, living in high cost areas of housing. The heads of such households are entitled, in the absence of the cap, to relatively high amounts of child benefit, which is payable in direct proportion to the number of children. They are also entitled, in the absence of the cap, to relatively high amounts of housing B benefit, which reflects the rental cost of the accommodation in which the household lives, and tends therefore to reflect to some extent the size of the household and, more particularly, the level of rental values in the area. In practice, this means that non-working households with several children, living in London, are most likely to be affected. The majority of non-working households with children are single parent households, and the C vast majority of single parents are women (92% in 2011). A statistically higher number of women than men are therefore affected by the cap. The great majority of single parent non-working households are however unaffected by the cap.

3 It is argued that the cap also affects victims of domestic violence, because they may be temporarily housed in accommodation which is relatively expensive (the rent for such accommodation having tended to D reflect the amount of housing benefit payable), and in that event are entitled, in the absence of the cap, to relatively high amounts of housing benefit. That will also be the position if they are entitled to housing benefit in respect of both the temporary accommodation and also other accommodation to which they hope to return. Victims of domestic violence are also predominantly women.

E **4** The justification put forward for the cap is one of economic and social policy, namely that it is necessary (1) to set a reasonable limit to the extent to which the state will support non-working households from public funds, (2) to provide the members of such households of working age with a greater incentive to work, and (3) to achieve savings in public expenditure at a time when such savings are necessary in the interests of the economic well-being F of the country.

Article 14

5 Article 14 provides:

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

6 As is apparent from its terms, article 14 can only be considered in conjunction with one or more of the substantive rights or freedoms set forth in the Convention. In the present case, the relevant right is that set forth in H A1P1:

> "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.

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"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."

The appeal has been argued on the basis that the cap constitutes an interference with the peaceful enjoyment of possessions, within the meaning of A1P1.

7 The general approach followed by the European Court of Human Rights in the application of article 14 was explained by the Grand Chamber in *Carson v United Kingdom* (2010) 51 EHRR 369, para 61:

"in order for an issue to arise under article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations. Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised."

8 A violation of article 14 therefore arises where there is: (1) a difference in treatment, (2) of persons in relevantly similar positions, (3) if it does not pursue a legitimate aim, or (4) if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

9 In practice, the analysis carried out by the European Court of Human Rights usually elides the second element—the comparability of the situations—and focuses on the question whether differential treatment is justified. This reflects the fact that an assessment of whether situations are "relevantly" similar is generally linked to the aims of the measure in question: see, for example, *Rasmussen v Denmark* (1984) 7 EHRR 371, para 37.

10 In relation to the third element, the court has referred to the criteria laid down in the second paragraphs of articles 8 to 11 of the Convention as legitimate aims, where article 14 has been read in conjunction with those articles. In *Sidabras v Lithuania* (2004) 42 EHRR 104, for example, the court stated at para 55 that the difference in treatment "pursued the legitimate aims of the protection of national security, public order, the economic well-being of the country and the rights and freedoms of others". The court has also treated aims which are legitimate in the public interest in the context of A1P1, such as securing social justice and protecting the state's economic well-being, as legitimate aims when article 14 has been read in conjunction with that article, as for example in *Hoogendijk v Netherlands* (2005) 40 EHRR SE 189 and *Andrejeva v Latvia* (2009) 51 EHRR 650.

11 National authorities enjoy a margin of appreciation in assessing whether and to what extent differences in treatment are justified. The European Court of Human Rights has emphasised the width of the margin of appreciation in relation to general measures of economic or social strategy, stating in its *Carson* judgment 51 EHRR 369, para 61:

"The contracting state enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary according

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A to the circumstances, the subject matter and the background. A wide margin is usually allowed to the state under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the court will generally respect the legislature's policy choice unless it B is 'manifestly without reasonable foundation'."

That approach was followed by this court in *Humphreys v Revenue and Customs Comrs* [2012] 1 WLR 1545, where Baroness Hale of Richmond JSC stated at para 19 that the normally strict test for justification of sex discrimination in the enjoyment of the Convention rights gives way to C the "manifestly without reasonable foundation" test in the context of welfare benefits.

12 Article 14 is not confined to the differential treatment of similar cases: "Discrimination may also arise where states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different": *Pretty v United Kingdom* (2002) 35 EHRR 1, para 88. An example is the case of *Thlimmenos v Greece* (2000) 31 EHRR D 411, where this type of discrimination was first recognised.

13 The European Court of Human Rights has also accepted that a difference in treatment may be inferred from the effects of a measure which is neutral on its face. In *DH v Czech Republic* (2007) 47 EHRR 59, para 175 the court stated:

"The court has established in its case law that discrimination means E treating differently, without an objective and reasonable justification, persons in relevantly similar situations . . . The court has also accepted that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group . . ."

In such a case, it will again be necessary to consider whether the difference in F treatment has an objective and reasonable justification, in the light of the aim of the measure and its proportionality as a means of achieving that aim. For example, a rule requiring that employees should be capable of heavy lifting will exclude a higher number of women than men, because of differences in the average bodily strength of the sexes. Whether that difference in treatment has an objective and reasonable justification will G depend on whether the rule which results in the difference in treatment has a legitimate aim and is a proportionate means of realising that aim: a test which might be met in employments where it is necessary to lift heavy objects.

14 The present case is essentially of a similar kind: the cap, in the form in which it has been established, affects a higher number of women than men because of differences in the extent to which the sexes take responsibility for H the care of children following the break-up of relationships. Whether that differential effect has an objective and reasonable justification depends on whether the legislation governing the cap, which brings about that differential effect, has a legitimate aim and is a proportionate means of realising that aim.

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15 When applying article 14 in the context of welfare benefits, the European Court of Human Rights recognises the need for national rules to be framed in broad terms, which may result in hardship in particular cases. In its *Carson* judgment, for example, the Grand Chamber stated 51 EHRR 369, para 62:

> "The court observes at the outset that, as with all complaints of alleged discrimination in a welfare or pensions system, it is concerned with the compatibility with article 14 of the system, not with the individual facts or circumstances of the particular applicants or of others who are or might be affected by the legislation. Much is made in the applicants' submissions and in those of the third-party intervener of the extreme financial hardship which may result from the policy . . . However, the court is not in a position to make an assessment of the effects, if any, on the many thousands in the same position as the applicants and nor should it try to do so. Any welfare system, to be workable, may have to use broad categorisations to distinguish between different groups in need . . . the court's role is to determine the question of principle, namely whether the legislation as such unlawfully discriminates between persons who are in an analogous situation."

It is important to bear this in mind in the present case, where much has again been made of the financial hardship which, it is argued, may result from the cap in particular cases. The relevant question, however, is whether the legislation as such unlawfully discriminates between men and women.

The present case

16 In considering the issues arising under article 14 in the present case, I shall begin by examining the process which led to the legislation with which we are concerned, in order to identify the aims pursued by the legislation and information relevant to the issue which the court has to determine. Consideration of the parliamentary debates for that purpose is not inconsistent with anything said in *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816: the purpose of the exercise is not to assess the quality of the reasons advanced in support of the legislation by ministers or other Members of Parliament, nor to treat anything other than the legislation itself as the expression of the will of Parliament.

The Welfare Reform Bill

17 On 22 June 2010 the Chancellor of the Exchequer laid before Parliament his emergency budget: Budget 2010 (HC 61). It set out a five-year plan to rebuild the British economy by reducing the structural fiscal deficit. The plan involved reductions in Government spending of £32 billion per annum by 2014/2015. These reductions would include £11 billion in savings achieved through reforms of welfare. The reforms were intended to make the welfare system fairer and more affordable, to reduce dependency, and to promote employment.

18 The following month, the Department of Work and Pensions ("the Department") published a consultation document, *21st Century Welfare* (2010) (Cm 7913), seeking views on options to reform the system of working age benefits. In response to a question about the steps which the

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A Government should consider to reduce welfare dependency and poverty, many respondents answered that the most effective way would be to ensure that people were significantly better off working than on benefit, and suggested the introduction of a benefit cap to restrict the amount of welfare payments which people could receive while out of work: *Consultation Responses to 21st Century Welfare* (2010) (Cm 7971). A common view was that the cap should be set by reference to the national minimum wage. This
B idea was then discussed at the Department's Policy and Strategy Forum, at which the Department engages with groups representing benefit recipients.

19 On 11 October 2010 the Secretary of State announced the Government's intention to set a cap on benefits for non-working households. Further details were provided in the *Spending Review 2010* (2010) (Cm 7942) ("the Spending Review"), which announced the intention to cap
C non-working household benefits at around £500 per week for couple and single parent households, and around £350 per week for single adult households, so that no non-working household would receive more in welfare than the median after tax earnings of working households. A "household" would comprise one or two adults living together as a couple, plus any dependent children living with them. The cap would be implemented by local authorities, which would assess the benefit income of
D housing benefit claimants, and reduce the payments of housing benefit where necessary to ensure that they did not receive more than the cap.

20 It is relevant to note, in relation to submissions concerning the impact of the cap on children, that the Spending Review made clear the Government's belief that the proposed reforms would promote the interests of children:

E

> "The UK's existing system of support can trap the poorest families and children in welfare dependency. For many poor children the current system of support delivers little practical change in their long term economic prospects. Many born into the very poorest families will typically spend their entire lives in poverty. The Government wants to fundamentally change the prospects of these children." (Para 1.54.)

F

21 Contemporaneously with the Spending Review, HM Treasury published its *Overview of the Impact of Spending Review 2010 on Equalities* (October 2010). This document considered the impact of the Spending Review on groups protected by equalities legislation, including women. It noted that decisions had been taken within the Spending Review which protected most of the services which women used more than men, in
G particular health, social care, early years and child care. In order to protect those areas of spending, savings had to be made in other areas, including welfare. In relation to benefits, it was noted that *any* changes affecting single parent households would affect more women than men.

22 In November 2010 the White Paper *Universal Credit: welfare that works* (2010) (Cm 7957) was published. It included the benefit cap as part of the design of universal credit. The Parliamentary Select Committee on
H Work and Pensions considered the White Paper, and received evidence from, amongst others, the two interveners in the present proceedings, the Child Poverty Action Group and Shelter, as to the likely impact of the cap: House of Commons Work and Pensions Committee, *White Paper on Universal Credit, Oral and Written Evidence* (2011) (HC 743). The impact on larger

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families, and those living in high cost areas, was highlighted. That reflected the fact, recognised from the outset, that the cap would primarily affect households receiving large amounts of child-related benefits and large amounts of housing benefit.

23 On 16 February 2011 the Welfare Reform Bill received its first reading in the House of Commons. Clauses 93 and 94 set out the proposed provisions in respect of a benefit cap. As is customary in the area of social security, the clauses were drafted on the footing that the primary legislation would establish a framework for secondary legislation in which the rules would be set out in detail.

24 At the same time, the Department laid before Parliament an *Impact Assessment for the Household Benefit Cap*. That document explained the three policy aims: to deliver fiscal savings, to make the system fairer as between non-working households and working households, and to incentivise the non-working to work. It explained the policy options which had been considered, and the reasons for adopting the preferred option. In particular, it explained that consideration had been given to applying the cap to working households which also received benefits, but that it had been decided that they should be exempted, as including "recipients of working tax credit to be among those affected by the cap, would seriously reduce incentives to work": p 5. It had also been decided to exempt those in receipt of disability living allowance and constant attendance allowance, as disabled people with additional care or mobility costs had less ability to alter their spending patterns or reduce their housing costs in response to a cap on benefit. War widows and widowers would also be exempted, in order to recognise their sacrifice. Consideration had also been given to setting the cap at a different level, but it was decided that to base it on net median household earnings would best represent the average take home pay of working households.

25 The document explained that about 50,000 households would have their benefits reduced (representing around 1% of the out-of-work benefit case-load), and that affected households would lose an average of £93 per week. Those affected by the cap would need to choose between taking up work (in which event they would no longer be affected), obtaining other income (such as child maintenance payments from absent parents: other reforms were designed to make it more difficult for absent parents to evade their obligation to provide financial support to single parents), reducing their non-rent expenditure, negotiating a lower rent, or moving to cheaper accommodation.

26 In March 2011 the Department laid before Parliament its *Household Benefit Cap Equality Impact Assessment*. The document stated that the cap was intended to reverse "the disincentive effects and detrimental impacts of benefit dependency on families and children": para 5. The likely impact was analysed according to disability, race, gender, age, gender reassignment, sexual orientation, religion or belief, and pregnancy or maternity. In relation to gender, it was estimated that around 60% of claimants who had their benefits cut would be single females, whereas 3% would be single men. That was because around 60% of households affected would comprise single parents living with children, and single parents living with children were predominantly women. The impact of the cap on single parents would be mitigated by the provision of support to help them to move into work.

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A Single parents would also be exempt from the cap if they worked for only 16 hours per week, whereas other single claimants would have to work for at least 30 hours per week before they were exempt.

27 The policy was subjected to detailed and vigorous scrutiny by both Houses of Parliament, over a period of more than 12 months, during the passage of the Bill through Parliament. That scrutiny was assisted by a number of House of Commons research papers, and by briefings prepared by B organisations opposed to the policy. During the Committee stage which followed the second reading debate in the House of Commons, the Public Bill Committee also received evidence from many organisations with an interest, including the interveners. Consideration was also given to reports on the Bill produced by the Office of the Children's Commissioner, which focused on the impact on children, and by the Equality and Human Rights C Commission. The former report expressed concern about the potential impact on children if households affected by the cap moved home in order to reduce their housing costs. It also expressed concern about the potential impact if households were unable to reduce their housing costs.

28 The discussion in Committee, and in the earlier second reading debate, concerned a number of issues, including the impact of the cap on D single parents, its impact on children, its impact on those living in temporary accommodation, and the appropriateness of fixing the cap according to the net median earnings of working households, when working households receiving net median earnings might also receive certain benefits.

29 In relation to the impact on single parents, it was argued that if such households included children under five years of age, there would be less E likelihood of the parent being able to take up work, because of child-care responsibilities and the potential cost of child care. Amendments to the Bill were tabled in Committee that would have exempted households from the cap where a single parent had children under five years of age, or where work was not financially more advantageous due to child-care costs.

30 In relation to the impact on children, it was argued that if households whose benefits were capped moved to areas where housing was less F expensive, there could be consequent disruption in the supervision of children who were at risk of abuse, and also disruption of children's schooling. If such households did not move to cheaper areas, they would have to economise in other ways. Amendments were moved in both Houses that child-related benefits should be excluded from the scope of the cap, and that the cap should be related to household size.

G **31** The potential impact on households living in temporary accommodation, at a relatively high cost, was also emphasised. Amendments were moved in both Houses that would have exempted households which were owed a duty by the local authority to be supported in temporary accommodation.

32 In relation to the use of net median household earnings as the benchmark, it was argued that the cap would leave the households affected H worse off than working households with equivalent earnings, since some benefits were payable to households receiving average earnings. An amendment was tabled in Committee to require the cap to reflect net average earnings "plus in-work benefits which an average earner might expect to receive": Public Bill Committee Hansard (HC Debates), 17 May 2011,

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col 970. An amendment to similar effect was also proposed in the House of Lords.

33 In responding to these arguments during the discussion in Committee on 17 May 2011, the minister emphasised the need to create a welfare system which was fair in the eyes of the general public and commanded public confidence, and the need to address a culture of welfare dependency. In relation to the former point, he stated that it did no service to welfare claimants if they were seen to be receiving amounts of money from the state that exceeded the average earnings of people who were working. That encouraged the view that there was something wrong, and it had the effect of stigmatising those claimants. It was important to help people into work, and it was also important to have a welfare system in which the public had confidence. At present, it was clearly demonstrable that that was not the case: col 950. In that regard, the minister referred to the stigmatisation of non-working families who received high levels of benefit, and to the level of public support for the introduction of a cap on benefits. He went on to say that it was not reasonable or fair for out-of-work households to have a greater income from benefits than the net average weekly wage of working households: col 952. The proposed cap for couples and families was equivalent to an earned salary of £35,000 per annum, which was considered fair: col 984.

34 In response to the argument that average earnings were not a proper basis for comparison, since households on average earnings might also be in receipt of benefits, the minister responded that it was necessary, for public confidence in the benefit system, to have a cap related to average earnings. He acknowledged that the proposed level of the cap was lower than the total income of a working household on average earnings which was receiving in-work benefits, but said that it was necessary to ensure that people were better off in work: cols 952 and 975. The minister also observed that the policy would only succeed in its objectives of influencing behaviour and increasing public confidence in the benefits system if there was a simple rule which people could understand: col 954.

35 In relation to arguments based on the different needs of different types of household, such as those with several children, the minister observed that there was a divide in philosophical view between those who thought that the cap should vary according to household size and other characteristics, and those who believed that there should be some limit to the overall benefits that the state should provide. Working people on low incomes had to cope with difficult circumstances, and they had to live within their means: cols 952, 973. Their earnings were not determined by the size of their families, and the Government believed that the same principle should apply to the level of the cap: col 975. Households whose benefits were capped might need to move to cheaper accommodation, but like other families they had to live in accommodation that they could afford.

36 In relation to those living in temporary accommodation, the minister observed that local authorities had a legal duty to provide accommodation which was suitable for homeless applicants, and suitability included affordability. That observation was consistent with the decision in *R (Best) v Oxford City Council* [2009] EWHC 608 (Admin), approved by the Divisional Court in the present proceedings: [2014] PTSR 23, para 53. The minister explained that, whatever the cost of the accommodation might be,

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A the local authority could pass on only a charge that the applicant could afford. The issue of housing costs for those in temporary accommodation was being considered.

37 In relation to this matter, it is relevant to note the evidence given in these proceedings by Mr Robert Holmes, the Department's lead official on the benefit cap policy. He explains that the Government used to reimburse local authorities, via the housing benefit system, the rent which they charged B claimants for the provision of temporary accommodation, up to a maximum for each property of £500 per week in London and £375 per week elsewhere. It became clear that some local authorities were using this system to generate surplus revenues, by charging claimants at or about the maximum level regardless of the rental value of the accommodation in question. Claimants in temporary accommodation were then reluctant to seek employment, as C they were concerned that they might lose their housing benefit and be unable to pay these artificially inflated rents. The Government was unwilling to exempt temporary accommodation from the cap, as it considered that to do so would continue to subsidise inflated rents and would discourage claimants from obtaining work. It decided instead to provide additional support for those in temporary accommodation through the discretionary housing payments scheme, to which it will be necessary to return.

D 38 The Bill was also considered in detail by the House of Lords, which was provided with an updated version of the *Housing Benefit Cap Equality Impact Assessment* (2011). The discussion in the House of Lords focused particularly on the impact of the cap on households with children, and on the use of median earnings, rather than income inclusive of benefits, as the benchmark. In the course of the discussion, the minister gave an assurance E that he had considered the requirements of the Human Rights Act 1998 and the Convention in respect of the policy, and was satisfied that the way in which the Government would implement the clauses in question would meet those requirements: Hansard (HL Debates), 23 November 2011, col GC415.

39 In relation to the use of median earnings as the basis of the cap, the F minister explained that it necessarily followed, by definition, that half the working households in the United Kingdom would have earnings below the level of the cap: col GC425.

40 In relation to the impact of the cap on households with children, an amendment seeking to exempt single parents with children under five was opposed by the Government. In response to the argument that, since such parents were not obliged to seek work in order to be eligible to receive G benefits they ought also to be exempted from the cap on the amount of any benefits which they might receive, the minister stated that the cap was intended to act as an incentive to work. Although single parents with children under five were not required to seek work as a condition of receiving benefits, that did not mean that the Government did not want to encourage them to find employment. The amendment would undermine the H fundamental principles underpinning the cap: that ultimately there had to be a limit to the amount of benefit that a household could receive, and that work should always pay: col GC421.

41 A proposed amendment to exclude child benefit from the scope of the cap was opposed by the Government on the basis that its policy was that there should be a reasonable limit to the overall amount of support that

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non-working households could receive in welfare payments, that child benefit was as much part of that support as other welfare payments, and that it should therefore be taken into account in deciding whether the limit had been reached. It was estimated that excluding child benefit from the scope of the cap would reduce the savings from the cap by 40% to 50%, and that also excluding child tax credit would reduce the savings by 80% to 90%: Hansard (HC Debates), 28 November 2011, col 763W. There would be a similar impact on the number of households affected: Hansard (HC Debates), 23 May 2011, col 496W.

42 The Bill was also scrutinised by the House of Lords and House of Commons Joint Committee on Human Rights, which considered the human rights effects of the Bill and published its report in December 2011 (HL Paper 233; HC 1704). In written evidence to the Committee, the Secretary of State stated that it was the Government's view that, if A1P1 was engaged, the measures in the Bill were proportionate to the legitimate aim of securing the economic well-being of the country. He observed that the greater employment of single parents would have a positive effect on child poverty, and that there was a wide range of support available to single parents seeking employment, to take account of their role as the main carer for their child. He added that the Government believed that the effect of the cap was proportionate, taking into account (1) the amount of the cap and the fact that it would be based on average household earnings, (2) the fact that claimants would be notified of the cap and given time to adjust their spending to accommodate their new levels of benefit, and (3) the fact that the cap would affect relatively few households and that those affected would continue to receive a substantial income from benefits.

43 At the report stage in the House of Lords, the Bill was amended so as to exclude child benefit from the scope of the cap. When the Bill returned to the House of Commons, the House considered and voted against that amendment. When the Bill subsequently returned to the House of Lords, the House agreed, on a vote, not to insist on the amendment.

44 During the Bill's passage, ministers indicated that some of the concerns expressed in Parliament, many of them reflected in other proposed amendments, would be considered as the policy was developed. So it proved. One example was the introduction of a period of grace for benefit claimants who had previously been employed, so that their benefits would not be capped for a period of 39 weeks after they had last been in employment. That development reflected concerns which had been expressed about the application of the cap to households in which someone had been in work but had been made redundant or had left work in order to care for a child. It was also understood that child care responsibilities might make it difficult for some single parents to seek work and, by that means, to secure exemption from the cap. Measures were taken to address those difficulties by exempting benefits used to pay for child care (meeting 70% of the cost) from the cap, by providing single parents with job-focused interviews to assist them in finding work, and by setting the number of hours required to be worked by a single parent, in order to obtain exemption from the cap, at a lower level, of 16 hours per week, than for other claimants. Another development was the introduction of an exception to prevent payments covering the cost of accommodation in refuges, for women who had been victims of domestic violence, from being taken into account. It will

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A be necessary to return to that matter. Measures were also taken to ensure that the supervision of children at risk of ill-treatment was not jeopardised in the event that their families moved to less expensive areas to live.

45 A decision was also taken to provide additional funding of £65m in 2013/2014 and £35m in 2014/2015 for discretionary housing payments under the Discretionary Financial Assistance Regulations 2001 (SI 2001/1167) ("the DHP Regulations"). These are payments made by B local authorities to claimants who require further financial assistance, in addition to any welfare benefits, in order to meet housing costs. They do not count towards the cap. As is stated in the guidance for local authorities published by the Government, the additional funding is intended to provide assistance to a number of groups who are likely to be particularly affected by the cap, including those in temporary accommodation, victims of C domestic violence, families with children at school, and households moving to, or having difficulty finding, more appropriate accommodation. Households in those categories may be unable to avoid high costs in the short term: they may, for example, have to delay a move until suitable arrangements can be made for the education of children, or may require financial assistance to pay the deposit on a new home and the initial D instalment of rent. The additional funding was intended to help them to meet those costs. The Government also undertook to review the operation of the cap, as had been recommended by the Joint Committee on Human Rights, and to lay before Parliament a report on its impact after a year of operation.

The Welfare Reform Act 2012

E **46** The Welfare Reform Act 2012 ("the 2012 Act") received Royal Assent in March 2012. The provisions relevant to the cap are sections 96 and 97.

47 Section 96 enables Regulations to provide for a benefit cap to be applied to the welfare benefits to which a single person or couple is entitled. For the purposes of the section, applying a benefit cap means securing: F "where a single person's or couple's total entitlement to welfare benefits in respect of [a period of a prescribed duration] exceeds the relevant amount, their entitlement . . . is reduced by an amount up to or equalling the excess": section 96(2).

48 "Welfare benefit" is any benefit, allowance, payment or credit prescribed in Regulations: section 96(10). The Regulations cannot however G prescribe as welfare benefits either state pension credit or retirement pensions: section 96(11). The "relevant amount" is an amount specified in Regulations, which must be determined by reference to the average weekly earnings of a working household after deductions in respect of tax and national insurance: sections 96(5), (6) and (7). More detailed provision in respect of the benefit cap arrangements, including the welfare benefits or benefits from which a reduction is to be made, and any exceptions to the H application of the benefit cap, are to be set out in the Regulations: section 96(4). The Regulations are to be made by the Secretary of State, and the first such Regulations must be approved by Parliament under the affirmative resolution procedure: sections 96(10) and 97(3). Subsequent Regulations must be approved under the negative resolution procedure.

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The Benefit Cap (Housing Benefit) Regulations 2012 A

49 Before laying draft Regulations before Parliament, the Department consulted interested bodies, including the statutory Social Security Advisory Committee, Citizens Advice, Crisis and Shelter. That consultation influenced some of the policy changes which I mentioned in paras 44–45.

50 On 16 July 2012 the Benefit Cap (Housing Benefit) Regulations 2012 ("the Regulations") were laid in draft before both Houses of Parliament. At B the same time, the Department published updated impact assessments in respect of the cap. It was then estimated that 56,000 households would be affected (1% of the out-of-work benefit caseload), losing on average around £93 per week. 39% of households affected were expected to be couples with children, and 50% were expected to be single parents with children. Because single parents were predominantly women, 60% of affected claimants were expected to be single women, compared with 10% who were expected to be C single men. Almost all the local authorities most affected were expected to be in London, reflecting the higher rents payable there.

51 Parliament received submissions on the draft Regulations from a number of bodies, including Shelter. The draft Regulations were considered by the House of Lords Secondary Legislation Scrutiny Committee, and were debated by the House of Lords Grand Chamber on 6 November 2012. They D were also considered by the House of Commons Delegated Legislation Committee on the same date. The issues then considered included temporary accommodation, including women's refuges and other accommodation for victims of domestic violence, the impact on children of households moving to areas where housing was less expensive, and the greater difficulty which people who moved out of London might experience in obtaining work. The E draft Regulations were approved by both Houses of Parliament, and the Regulations were then made.

52 As had been announced, the Regulations fix the cap at £350 per week for single persons and £500 for families and couples, equivalent to gross salaries of £26,000 and £35,000 per annum respectively. These figures are slightly above the median earnings of single persons and couples respectively. They are well above the national minimum wage, which in F 2012 was about £12,500 per annum for a 40-hour week. The Regulations list the benefits which are to be treated as welfare benefits. As anticipated, they include the main out-of-work benefits, together with child benefit, child tax credit and housing benefit. Again as anticipated, exceptions from the application of the cap are made in respect of households where a person receives specified benefits based on disability or service in the armed forces, G and in respect of households where a single parent works for 16 hours per week or a couple work for 24 hours (provided one of them works for 16 hours). Provision is made for the 39-week period of grace.

53 In response to concerns expressed about the potential impact of the cap on households living in exempt accommodation (i e accommodation provided by housing associations, charities, other voluntary bodies or county councils to persons receiving care, support or supervision provided H by or on behalf of the landlord), including in particular those living in refuges for victims of domestic violence, the Regulations were amended with effect from 15 April 2013 (when, as I shall explain, the cap first came into partial effect) by the Benefit Cap (Housing Benefit) (Amendment)

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A Regulations 2013 (SI 2013/546). The effect of the amendment was that housing benefit provided in respect of such accommodation was to be disregarded for the purposes of the cap. In response to contentions that some women's refuges fell outside the definition of exempt accommodation, the minister announced in April 2013 that the issue was being addressed and that proposals would be brought forward at the earliest opportunity. The Housing Benefit and Universal Credit (Supported Accommodation) B (Amendment) Regulations 2014 (SI 2014/771) ("the 2014 Regulations") were subsequently made, after the present proceedings were under way. They replace the concept of "exempt accommodation" with a broader concept of "specified accommodation", which encompasses a wider range of accommodation provided for vulnerable people, including the women's refuges previously excluded.

C

The implementation of the Regulations

54 The Regulations were made in November 2012, more than two years after the intention to introduce the cap had been announced. From April 2012 jobcentres and local authorities implemented arrangements to provide support to households that would be affected by the cap and assist them in D deciding how to respond. In May 2012 jobcentres wrote to all claimants potentially affected by the cap, notifying them that they might be affected and explaining the support available. That support included assistance from dedicated staff in moving into the labour market, obtaining access to child care provision and negotiating rent reductions with private landlords, together with advice on housing options and household budgets. A help line E was also set up to provide information about the changes and the support available. Employment events were organised with local employers and training bodies. Further letters were sent to claimants in October 2012, February 2013 and March 2013. Claimants were also contacted by telephone and, where that proved ineffective, were visited. The cap was then introduced in phases, during which its impact was monitored by the Department. On 15 April 2013 the cap was applied in four local authority F areas in London. Between 15 July 2013 and the end of September 2013 the cap was applied in other local authority areas.

55 Since the introduction of the cap, its impact has been discussed at meetings of the Benefit Cap Project, a forum for meetings between the Department and interested bodies, including voluntary organisations working with children and the homeless.

G **56** From August 2013 the Department published a number of reports on the impact of the cap. The most recent report, at the time when these appeals were heard, was that published in March 2014, which contained data for the period to January 2014. It reported that 38,665 households had had their housing benefit capped. 28% of the households which had at one time been capped were no longer capped. 39% of those had become exempt because a member of the household had entered work. 27% were no longer H claiming housing benefit or had reduced their rent so as to come below the cap. Of the 20 local authorities with the highest number of capped households, 19 were in London. 95% of capped households included children. 59% of capped households, and 62% of capped households with children, comprised a single parent with children.

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57 In response to a request from this court, counsel also provided the Department's analysis of the data for the period up to March 2014 in respect of single parent households including a child under five years of age. 29% of such households which had at one time been capped were no longer capped. 38% of those had become exempt because a member of the household had entered work. These figures are in line with those for all households.

58 According to the Department's most recent estimate as at the date of the hearing, the cap is expected to save £110m in 2013/2014 and £185m in 2014/2015. This level of savings is expected to continue over the longer term. These figures do not take into account the implementation costs or the additional funding made available for discretionary housing payments. Nor, on the other hand, do they take account of any reduction in benefit payments, or any receipts from income tax or national insurance, resulting from claimants moving into work.

The present proceedings

59 There is no challenge in these proceedings to the 2012 Act: it is not argued that section 96 is incompatible with the Convention. It follows that there is no challenge to the principle of a cap, the impact of which is inevitably greatest for those who would otherwise be entitled to the highest amount of relevant benefits. Nor is there any challenge to the fixing of one "relevant amount" (i e the cap) for single claimants and another for all other households, rather than the relevant amount being tailored to individual circumstances. Nor is there any challenge to the fixing of the "relevant amount" by reference to estimated average net household earnings, rather than by reference to estimated average net household income inclusive of benefits. The challenge is primarily to the compatibility of the Regulations with article 14 of the Convention read in conjunction with A1P1.

Compatibility with article 14 read with A1P1

Interference with possessions

60 In considering the compatibility of the Regulations with article 14 in conjunction with A1P1, the first question is whether there is an interference with possessions. That is not a straightforward question: as the European Court of Human Rights explained in *Valkov v Bulgaria* (Application Nos 2033/04, 19125/04, 19475/04, 19490/04, 19495/04, 19497/04, 24729/04, 171/05 and 2041/05) (unreported) given 8 March 2012, para 85, a cap may be regarded either as a provision limiting the amount of benefit after it has been calculated under the general rules, and thus an interference with a "possession" of the appellants, or as part of the overall set of statutory rules governing the manner in which the amount of benefit should be calculated, and thus as amounting to a rule preventing the appellants from having any "possession" in relation to the surplus. It is however unnecessary to resolve that question in the present appeal, since the applicability of A1P1 has not been contested on behalf of the Secretary of State.

Differential treatment

61 The next question is whether the Regulations result in differential treatment of men and women. This is conceded on behalf of the Secretary of State. Given the statistics as to the proportion of those affected who are

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A single women as compared with the proportion who are single men, that concession is understandable. It is indeed almost inevitable that a measure capping the benefits received by non-working households will mainly affect households with children, since they comprise the great majority of households receiving the highest levels of benefits. It follows inexorably that such a measure will have a greater impact on women than men, since the majority of non-working households with children are single parent B households, and the great majority of single parents are women. That consequence could be avoided only by defining "welfare benefits" so as to exclude benefits which are directly or indirectly linked to responsibility for children, a possibility to which it will be necessary to return.

62 On the other hand, the argument that the Regulations also result in differential treatment of women because of their effect on the victims of C domestic violence has not in my opinion been established. In so far as the argument is based on the failure of the Regulations, as originally made, to exempt housing benefit received in connection with all women's refuges, the amendments effected by the 2014 Regulations were designed to address that problem, and it is not argued in these appeals that they have failed to do so. In so far as the argument was that women fleeing domestic violence may live D in temporary accommodation rather than refuges, and may then be entitled to housing benefit in respect of both their original home and the temporary accommodation, that problem, which is inherently of a temporary nature, is capable of being addressed under the DHP Regulations by the use of discretionary housing payments; and the funding made available by Government for such payments has been increased for that very purpose. As I have explained, guidance has been issued by the Government to local E authorities advising them that the funding is specifically aimed at groups including individuals or families fleeing domestic violence, and that payments can be awarded for two homes when someone is temporarily absent from their main home because of domestic violence. It cannot therefore be said that the Regulations have a disparate impact on victims of domestic violence. Whether problems are avoided in practice will depend on F how the discretionary payments scheme is operated by local authorities in individual cases. It is not suggested that any problems have arisen in the cases with which these appeals are concerned.

Legitimate aim

63 The next question is whether the Regulations pursue a legitimate G aim. In my view that cannot be doubted. They pursue, in the first place, the aim of securing the economic well-being of the country, as the Secretary of State explained to the Parliamentary Joint Committee on Human Rights, and as is evident from the legislative history since the policy of reducing expenditure on benefits was first announced in June 2010. A judgment was made, following the election of a new Government in May 2010, that the current level of expenditure on benefits was unaffordable. The imposition of H a cap on benefits was one of many measures designed to reduce that expenditure, or at least to constrain its further growth. It was argued on behalf of the appellants that savings in public expenditure could never constitute a legitimate aim of measures which had a discriminatory effect, but that submission is inconsistent with the approach adopted by the

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European Court of Human Rights in the cases mentioned in para 10. It is also inconsistent with the acceptance of the economic well-being of the country as a legitimate aim of interferences with Convention rights under the second paragraphs of articles 8 to 11, and under A1P1. An interpretation of the Convention which permitted the economic well-being of the country to constitute a legitimate aim in relation to interferences with the substantive Convention rights, but not as a legitimate aim in relation to the ancillary obligation to secure the enjoyment of those rights without discrimination, would lack coherence.

64 In relation to the case of *Ministry of Justice (formerly Department for Constitutional Affairs) v O'Brien (Council of Immigration Judges intervening)* [2013] 1 WLR 522, para 69, on which the appellants relied, I would observe that acceptance that savings in public expenditure can constitute a legitimate aim for the purposes of article 14 does not entail that that aim will in itself constitute a justification for discriminatory treatment. As I have explained, the question whether a discriminatory measure is justifiable depends not only on its having a legitimate aim but also on there being a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

65 The second aim, of incentivising work, is equally legitimate. It is, in the first place, an aspect of securing the economic well-being of the country. It has however a broader social objective which ministers made clear to Parliament. That objective is based on the view that long term unemployment is socially undesirable, because of its impact on those affected by it (including the children brought up in non-working households), and that it is therefore important to make efforts to assist those capable of working to find work: efforts which can include the removal of financial disincentives.

66 The third aim, of imposing a reasonable limit on the total amount which a household can receive in welfare benefits, is in my opinion equally legitimate. It is again an aspect of securing the economic well-being of the country: it is one of the means of achieving that objective. It also however has a broader aspect, namely to reflect a political view as to the nature of a fair and healthy society. As ministers explained to Parliament, this objective responds in particular to a public perception that the benefits system has been excessively generous to some recipients: a perception which is related to the stigmatisation in the media of non-working households receiving high levels of benefit. The maintenance of public confidence in the welfare system, so that recipients are not stigmatised or resented, is undeniably a legitimate aim. In the language used by the European Court of Human Rights in *Hoogendijk* 40 EHRR SE 189 and other cases, the benefit system is the means by which society expresses solidarity with its most vulnerable members. That being so, it is in principle legitimate to reform the system when necessary to respond to a threat to that solidarity.

Proportionality

67 The remaining question is whether the Regulations maintain a reasonable relationship of proportionality between the means employed and the aims sought to be realised.

68 It was argued by counsel for the appellants and interveners that the aim of setting a reasonable limit to the amount of benefits which a household

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A can receive could have been achieved by using as a benchmark not the average earnings of working households but their average income inclusive of benefits. This would have been "fair", adopting the adjective used by ministers at some points during the Parliamentary debates, since it would have achieved parity between the maximum income received by non-working households and the average income of working households.

B **69** There are three problems with this argument. The first is that section 96 of the 2012 Act, whose compatibility with Convention rights is not challenged, requires the cap to be set by reference to "earnings". The Regulations cannot be unlawful in so far as they follow that approach (section 6(2)(a) of the Human Rights Act 1998), and would be ultra vires if they failed to do so. Secondly, the assessment of the level at which a cap would represent a fair balance between the interests of working and C non-working households is a matter of political judgment. Furthermore, the assumption that fairness requires an equivalence between the incomes of working and non-working households ignores the costs incurred by working households in earning that income: both financial costs in respect of such matters as travel and clothing, and non-financial costs in respect of the time spent commuting and working. As the *Thlimmenos* principle illustrates, D non-discrimination does not require that different situations should be treated in the same way: 31 EHRR 411. Thirdly, and in any event, the Government has made a judgment, endorsed by Parliament, that a cap set at the level of the average income of working households would be less effective in achieving its aims. That is not an unreasonable judgment: plainly, the fiscal savings would be less, and the financial incentive to find work would be reduced. Indeed, if the cap were set at a level which achieved E parity between the income of a person on benefits and the average income of a person in work, it would act as a disincentive to work for below average earnings. Whether the aim of securing a benefit system which was perceived by the public as fair and reasonable would also have been less effectively achieved is again a political judgment, which cannot be said to be manifestly unreasonable.

F **70** It was also argued that the short term fiscal savings appear to be relatively marginal at best. It is true that the savings made are a small proportion of the total welfare budget, the bulk of which is spent on pensions. They nevertheless contribute towards the achievement of the objective of reducing the fiscal deficit. It is also necessary to bear in mind that the Regulations are designed to result in savings over the longer term, as the intended change in the welfare culture takes effect.

G **71** Other criticisms of the Regulations focused on the impact of the cap on the income of the households most severely affected, such as those of the appellants. Emphasis was placed in particular on the inclusion of child benefit and child tax credit among the "welfare benefits", and the difficulties which single parents faced with a loss of income might encounter in finding work, because of their child care responsibilities, or in moving to cheaper accommodation, because of the impact on their children.

H **72** In relation to the reduction in income, it has to be borne in mind that the cap for a household with children has been set by Parliament at the median earnings of working households, equivalent to a salary of £35,000 per annum. By definition, half of all working households earn less than that amount. The exclusion of child benefit and child tax credit from the

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"welfare benefits" counting towards the cap would enable non-working households with children to receive an income from public funds in excess of that amount. Whether that level of benefits ought to be paid by the state is inherently a political question on which opinions within a democratic society may reasonably differ widely. It is not the function of the courts to determine how much public expenditure should be devoted to welfare benefits. It is also important to recognise that the households affected were given advance notice of the reduction in their income, and that assistance was made available to them to enable them to address the implications, as I have explained.

73 In relation to the related criticism that children in households affected by the cap are deprived of the basic necessities of life, that argument was rejected by the courts below, and I see no basis for reaching a different conclusion. As I have explained, the cap for a household with children is equivalent to a gross salary of £35,000 per annum, higher than the earnings of half the working population in the United Kingdom, almost three times the national minimum wage, and not far below the point at which higher rate tax becomes payable (in 2013/2014, a salary of £41,450). Although the compatibility of the Regulations with article 14 does not depend on the individual circumstances of the appellants, as I have explained, the Court of Appeal considered in detail submissions to the effect that the cap would reduce them to a state of destitution, and concluded that their circumstances did not approach that level. The Divisional Court noted that even in cases where the cap had particularly adverse consequences, in the last resort the local authority was under a duty to secure suitable and affordable accommodation for the family.

74 In relation to the difficulties of finding work, data from the Office for National Statistics ("ONS") indicate that 63·4% of single parents with dependent children were in work during the second quarter of 2014. An ONS analysis based on data for 2012 indicated that the employment rate for single parents with a dependent child under the age of two was 32%; for the age range two–four it increased to 42%; for the age range 5–11 it was 63%. Plainly, many single parents, including those on low incomes, make arrangements for the care of children in order to work. Their children over five years of age are required to attend school. Their younger children may attend nurseries or may be looked after by family members or child minders. The amount of work which a single parent has to perform, in order to be exempted from the cap, is only 16 hours per week. Even those hours need not necessarily be worked throughout the year: if a person works in a place of employment which has a recognisable cycle of employment, such as a school, the holiday periods during which she does not work are disregarded. As I have explained, assistance with meeting the cost of child care is available and is excluded from the cap. The statistics set out at paras 56–57 above do not support the contention that single parents with children under five have experienced greater difficulty in obtaining work than other claimants affected by the cap. Some people take the view that it is better for the single parent of a young child to remain at home full-time with the child, but there is no basis for requiring that view to be adopted by Government as a matter of law.

75 In relation to the argument that households with children cannot reasonably be expected to move house, because of the impact on the

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A children, it is not merely a forensic point that one of the two adult appellants came with her family to the United Kingdom from Belgium, and that the other adult appellant came with her family to the United Kingdom from Algeria. Millions of parents in this country have moved house with their children, for a variety of reasons, including economic reasons. It is, in particular, not uncommon for working households to move out of London in order to find more affordable property elsewhere. It is also necessary to B recognise that transitional financial assistance is available for households affected by the cap who cannot move until suitable arrangements have been made in relation to the children, as I have explained. Although assistance of that nature may not constitute a complete or satisfactory answer to a structural problem of a permanent nature arising from discriminatory legislation, such as the inadequacy of housing benefit to meet the cost of C accommodation suitable for the needs of severely disabled claimants (as was held in *Burnip v Birmingham City Council* [2013] PTSR 117), it is relevant to an assessment of the proportionality of a measure which is liable to give rise to transitional difficulties in individual cases.

76 As I have explained, the court is concerned in a case of this kind with the question whether the legislation as such unlawfully discriminates D between men and women, rather than with the hardship which might result from the cap in the cases of those most severely affected. In that regard, it is highly significant that no credible means was suggested in argument by which the legitimate aims of the Regulations might have been achieved without affecting a greater number of women than men. Put shortly, since women head most of the households at which those aims are directed, it appears that a disparity between the numbers of men and women affected E was inevitable if the legitimate aims were to be achieved.

77 The greater number of women affected results from the inclusion of child-related benefits within the scope of the cap. If those benefits had been excluded from the cap, the legitimate aims of the cap would not have been achieved, as ministers made plain to Parliament. The question is raised by Baroness Hale of Richmond DPSC whether taking child-related benefits out F of the cap as it applies to single parents only would have an emasculating effect. I do not recall this point being raised with counsel for the Secretary of State, but the information available enables it to be considered. Parliament was informed that the exclusion of child-related benefits would reduce the savings, and the number of households affected by the cap, by 80 to 90%: para 41. According to the most recent statistics available at the time of the G hearing, single parent households form 62% of the affected households receiving child-related benefits: para 56. It is therefore plain that the exclusion of child-related benefits, even if confined to single parent households, would have compromised the achievement of the legitimate aims of the Regulations.

Article 3.1 of the UNCRC

H

78 An argument of a different character was put forward on the basis of article 3.1 of the United Nations Convention on the Rights of the Child (1989) (Cm 1976) ("the UNCRC"), which provides: "In all actions concerning children . . . the best interests of the child shall be a primary consideration". The argument developed during and after the hearing of the

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appeal. Initially, it was contended that the Secretary of State was obliged by section 6 of the Human Rights Act 1998 to treat the best interests of children as a primary consideration when making the Regulations, in accordance with article 3.1 of the UNCRC, since the cap had an impact on the private and family lives of children forming part of the households affected. Article 8.1 of the Convention was therefore applicable. Since the European Court of Human Rights would have regard to the UNCRC when applying article 8 in relation to children, it followed that the Secretary of State was also obliged to comply with article 3.1 of the UNCRC, but failed to do so.

79 This argument raises a number of questions. In the first place, there is the question whether general legislation which limits welfare benefits, resulting in some cases in a reduction in household income, constitutes, by reason of the impact of that reduction in income on the lives and circumstances of those affected, an interference with their right to respect for their private and family life. If it does, the ambit of article 8 is enlarged beyond current understanding so as to embrace legislation imposing increases in taxation or reductions in social security benefits. Secondly, on the assumption that such legislation falls within the ambit of article 8.1, article 8.2 permits an interference with the right to respect for family life to be justified as being necessary in a democratic society in the interests of the economic well-being of the country. The argument that justification on that ground is impossible unless the best interests of the children affected by the measure in question have been treated as a primary consideration—not only in the sense that they have been taken into account but, as counsel emphasised, in the sense that the legislation is in reality in the best interests of the children affected by it—has major implications for the effect of the Convention in relation to legislation in the field of taxation and social security.

80 These issues were not addressed in the course of the argument. Most of the European authorities cited in support were concerned with the different question of the eviction of individuals from their homes, which is not an issue arising on the facts of the present cases. The cases indicate that a reduction in income may have consequences which are such as to engage article 8, as for example where non-payment of rent leads to the threat of eviction from one's home, but they do not indicate that the reduction in income is itself within the ambit of article 8. The only other European authority cited was *Neulinger v Switzerland* (2010) 54 EHRR 1087, which was concerned with the return of a child under a child abduction Convention. It is unnecessary to say more than that the argument has not been made out.

81 A more closely reasoned argument has been developed in submissions lodged after the hearing, which treats article 3.1 of the UNCRC as forming part of the proportionality assessment under article 14 of the Convention read with A1P1. In consequence, a test of compliance with article 3.1 is effectively substituted for the "manifestly without reasonable foundation" test which all parties agree to be applicable in the present context. On that basis, article 3.1 is argued to be decisive of the appeals. It is therefore necessary to consider carefully how, if at all, article 3.1 bears on the issues in these appeals.

82 As an unincorporated international treaty, the UNCRC is not part of the law of the United Kingdom (nor, it is scarcely necessary to add, are the

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A comments on it of the United Nations Committee on the Rights of the Child). "The spirit, if not the precise language" of article 3.1 has been translated into our law in particular contexts through section 11(2) of the Children Act 2004 and section 55 of the Borders, Citizenship and Immigration Act 2009: *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 AC 166, para 23. The present case is not however concerned with such a context.

B **83** The UNCRC has also been taken into account by the European Court of Human Rights in the interpretation of the Convention, in accordance with article 31 of the Vienna Convention on the Law of Treaties. As the Grand Chamber stated in *Demir v Turkey* (2008) 48 EHRR 1272, para 69:

> "The precise obligations that the substantive obligations of the Convention impose on contracting states may be interpreted, first, in the light of relevant international treaties that are applicable in the particular sphere."

C

It is not in dispute that the Convention rights protected in our domestic law by the Human Rights Act can also be interpreted in the light of international treaties, such as the UNCRC, that are applicable in the particular sphere.

D **84** The approach adopted is illustrated by *V v United Kingdom* (1999) 30 EHRR 121, where the European Court of Human Rights had regard to articles 37 and 40 of the UNCRC when considering how the prohibition of inhuman and degrading treatment in article 3 of the Convention applied to the trial and sentencing of child offenders, and, in a domestic context, by *R (T) v Chief Constable of Greater Manchester Police (Liberty intervening)* [2015] AC 49, where this court referred to article 40 of the UNCRC when E considering whether legislation regulating the disclosure of offences committed by children was compatible with article 8 of the Convention.

85 The case of *X v Austria* (2013) 57 EHRR 405, on which the appellants and the interveners principally rely, concerned the proposed adoption of a child by the female partner of the child's biological mother. The effect of adoption under Austrian law was to sever the legal relationship F between the child and the biological parent of the same sex as the adoptive parent. In consequence, therefore, Austrian law could not recognise a legal relationship between a child, an adoptive parent, and a biological parent of the same sex as the adoptive parent. An application to the European Court of Human Rights was brought by the child, the mother, and her partner, all of whom lived together as a family, on the basis that they had been denied legal recognition of their family life by reason of the sexual orientation of the G two adults, in violation of article 14 of the Convention read together with article 8. The court considered their complaint on the basis that all three applicants enjoyed family life together, and all three were therefore entitled to complain of a violation of their rights. The effect of the Austrian law was to prevent second-parent adoption by same-sex couples. The justifications advanced were the protection of the family in the traditional sense, and the H protection of the interests of children, both of which were legitimate aims. The question was whether the principle of proportionality was adhered to. In considering that question, the court identified a number of considerations which weighed in favour of allowing the courts to carry out an examination of each individual case, rather than imposing an absolute rule. The court added that this would also appear to be more in keeping with the best

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interests of the child, which was a key notion in the relevant international instruments. In that regard, the court had earlier referred to a number of provisions of the UNCRC, including article 3.1.

86 It is clear, therefore, that the UNCRC can be relevant to questions concerning the rights of children under the Convention. There are also cases in which, although the court has not referred to the UNCRC, it has taken the best interests of children into account when considering whether an interference with their father's or mother's right to respect for their family life with the children was justified. An example is *Uner v Netherlands* (2006) 45 EHRR 421, which concerned the deportation of an adult, resulting in his separation from his children. In circumstances of that kind, the proportionality of the interference with family life could not be assessed without consideration of the best interests of the children, a matter which was relevant to respect for his family life with them, as it was also to their right to respect for their family life with him. Indeed, they might themselves have been applicants, on the basis that their own article 8 rights were engaged.

87 The present context, on the other hand, is one of alleged discrimination between men and women in the enjoyment of the property rights guaranteed by A1P1. That is not a context in which the rights of the adults are inseparable from the best interests of their children. It is of course true that legislation limiting the total income which persons can receive from benefits, like any legislation affecting their income, may affect the resources available to them to provide for any children in their care, depending on how they respond to the cap: something which will vary from one case to another. They may increase their income from other sources, for example by obtaining employment or by obtaining financial support for the upkeep of a child from an absent parent; or they may respond by reducing their expenditure, for example by moving to cheaper accommodation. Depending on how parents respond, the consequences of the cap for their children may vary greatly, and may be regarded as positive in some cases and as negative in others.

88 The questions (1) whether legislation of this nature should be regarded as "actions concerning children", within the meaning of article 3.1 of the UNCRC, (2) whether that provision requires such legislation to be in the best interests of all the children affected by it, and (3) whether the Regulations fulfil that requirement, appear to me to be questions which, for reasons I shall explain, it is unnecessary for this court to decide. Even on the assumption, however, (1) that article 3.1 of the UNCRC applies to general legislation of this character, (2) that article 3.1 requires such legislation to be in the best interests of all the children indirectly affected by it, and (3) that the legislation in question is not in reality in the best interests of all the children indirectly affected by it, that does not appear to me to provide an answer to the question whether the legislation unjustifiably discriminates between men and women in relation to their enjoyment of the property rights guaranteed by A1P1.

89 It is true that the benefits which are taken into account when deciding whether the cap has been exceeded include benefits payable to parents by reason of their responsibility for the care of children. It is also true that the differential impact of the measure on men and women arises from the fact that more women than men take on responsibility for the care

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A of their children when they separate. It is argued that it is therefore unrealistic to distinguish between the rights of women under article 14 read with A1P1, and those of their children under the UNCRC. There is nevertheless a clear distinction. In cases where the cap results in a reduction in the resources available to parents to provide for children in their care, the impact of that reduction on a child living with a single father is the same as the impact on a child living with a single mother in similar circumstances, or B for that matter a child living with both parents. The fact that children are statistically more likely to be living with a single mother than with a single father is unrelated to the question whether the children's rights under article 3.1 of the UNCRC have been violated. There is no factual or legal relationship between the fact that the cap affects more women than men, on the one hand, and the (assumed) failure of the legislation to give primacy to C the best interests of children, on the other. The conclusion that the cap is incompatible with the UNCRC rights of the children affected therefore tells one nothing about whether the fact that it affects more women than men is unjustifiable under article 14 of the Convention read with A1P1. The contrary view focuses on the question whether the impact of the legislation on children can be justified under article 3.1 of the UNCRC, rather than on D the question whether the differential impact of the legislation on men and women can be justified under article 14 read with A1P1, and having concluded that the legislation violates article 3.1 of the UNCRC, mistakenly infers that the difference in the impact on men and women cannot therefore be justified.

90 Nor is the argument made stronger by being recast in terms of domestic administrative law, on the basis that the decision to make the E Regulations was vitiated by an error of law as to the interpretation of article 3.1 of the UNCRC. It is firmly established that United Kingdom courts have no jurisdiction to interpret or apply unincorporated international treaties: see, for example, *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 499 and *R v Lyons* [2003] 1 AC 976, para 27. As was made clear in *R (Corner House Research)* F *v Director of the Serious Fraud Office (JUSTICE Intervening)* [2009] AC 756, it is therefore inappropriate for the courts to purport to decide whether or not the executive has correctly understood an unincorporated treaty obligation. As Lord Bingham of Cornhill said, at para 44:

> "Whether, in the event that there had been a live dispute on the meaning of an unincorporated provision on which there was no judicial G authority, the courts would or should have undertaken the task of interpretation from scratch must be at least questionable. It would moreover be unfortunate if decision-makers were to be deterred from seeking to give effect to what they understand to be the international obligations of the United Kingdom by fear that their decisions might be held to be vitiated by an incorrect understanding."

H Lord Brown of Eaton-under-Heywood expressed himself more emphatically, at para 67:

> "It simply cannot be the law that, provided only a public officer asserts that his decision accords with the state's international obligations, the courts will entertain a challenge to the decision based upon his arguable

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misunderstanding of that obligation and then itself decide the point of international law at issue." A

91 The case of *R v Secretary of State for the Home Department, Ex p Launder* [1997] 1 WLR 839, on which reliance is placed, is distinguishable from the present case on the same basis as it was distinguished in the *Corner House Research* case. In the first place, as Lord Bingham pointed out, at para 44, there was in *Launder* no issue between the B parties about the interpretation of the relevant articles of the Convention, whereas in *Corner House*, as in the present case, the court was being asked to determine, in the absence of any international judicial authority, the meaning of a provision of an unincorporated international treaty. Secondly, as Lord Brown noted, at para 66, *Launder* was a case in which it was plain that the decision-maker would have taken a different decision had his C understanding of the Treaty been different: his clear intention was to act consistently with the United Kingdom's international obligations, whatever decision that would have involved him in taking. In *Corner House*, on the other hand, the primary intention behind the decision was to save this country from a threat which it faced, and all that the ministers were really saying was that they believed the decision to be consistent with the international obligation in question. D

The intensity of review

92 Finally, it has been explained many times that the Human Rights Act 1998 entails some adjustment of the respective constitutional roles of the courts, the executive and the legislature, but does not eliminate the differences between them: differences, for example, in relation to their E composition, their expertise, their accountability and their legitimacy. It therefore does not alter the fact that certain matters are by their nature more suitable for determination by Government or Parliament than by the courts. In so far as matters of that nature have to be considered by the courts when deciding whether executive action or legislation is compatible with Convention rights, that is something which the courts can and do properly F take into account, by giving weight to the determination of those matters by the primary decision-maker.

93 That consideration is relevant to these appeals, since the question of proportionality involves controversial issues of social and economic policy, with major implications for public expenditure. The determination of those issues is pre-eminently the function of democratically elected institutions. It is therefore necessary for the court to give due weight to the considered G assessment made by those institutions. Unless manifestly without reasonable foundation, their assessment should be respected.

94 As I have explained, the Regulations were considered and approved by affirmative resolution of both Houses of Parliament. As Lord Sumption JSC observed in *Bank Mellat v HM Treasury (No 2) (Liberty intervening)* [2014] AC 700, para 44: H

> "When a statutory instrument has been reviewed by Parliament, respect for Parliament's constitutional function calls for considerable caution before the courts will hold it to be unlawful on some ground (such as irrationality) which is within the ambit of Parliament's review. This

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A applies with special force to legislative instruments founded on considerations of general policy."

95 Many of the issues discussed in this appeal were considered by Parliament prior to its approving the Regulations. That is a matter to which this court can properly have regard, as has been recognised in such cases as *R (Williamson) v Secretary of State for Education and Employment* [2005] B 2 AC 246, *R (Hooper) v Secretary of State for Work and Pensions* [2005] 1 WLR 1681, *R (Countryside Alliance) v Attorney General* [2008] AC 719 and *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] AC 1312. Furthermore, that consideration followed detailed consideration of clause 93 of the Bill, which became section 96 of the 2012 Act. It is true that the details of the cap scheme were C not contained in the Bill which Parliament was debating, but the Government's proposals had been made clear, they were challenged by means of proposed amendments to the Bill, and they were the subject of full and intense democratic debate. That is an important consideration. As Lord Bingham observed in *R (Countryside Alliance) v Attorney General* [2008] AC 719, para 45: "The democratic process is liable to be subverted if, on a question of moral and political judgment, opponents of the Act achieve D through the courts what they could not achieve in Parliament." The same is true of questions of economic and political judgment.

96 Giving due weight to the assessment of the Government and Parliament, I am not persuaded that the Regulations are incompatible with article 14. The fact that they affect a greater number of women than men has been shown to have an objective and reasonable justification. No one has E been able to suggest an alternative which would have avoided that differential impact without compromising the achievement of the Government's legitimate aims. Put shortly, it was inevitable that measures aimed at limiting public expenditure on welfare benefits, addressing the perception that some of the out-of-work were receiving benefits which were excessive when compared with the earnings of those in work, and incentivising the out-of-work to find employment, would have a differential F impact on women as compared with men. That followed from the fact that women formed the majority of those who were out of work and receiving high levels of benefit. The Government's considered view, endorsed by Parliament, that the achievement of those aims was sufficiently important to justify the making of the Regulations, notwithstanding their differential impact on men and women, was not manifestly without reasonable G foundation. I would accordingly dismiss the appeals.

LORD CARNWATH JSC

97 Others have explained the factual and legal background of these appeals. The following issues were agreed between the parties for consideration by the Supreme Court: (i) Was the Court of Appeal wrong to have declined to decide whether the benefit cap, as formulated in the H 2012 Regulations, had an unlawfully disproportionate impact on victims of domestic violence? (ii) Was the Court of Appeal wrong not to have found that the disproportionate effect of the 2012 Regulations on victims of domestic violence was contrary to article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms (read with article 8

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and/or article 1 of Protocol 1) and unlawful? (iii) Was the Court of Appeal wrong to have found that the discriminatory effects of the 2012 Regulations on lone parents were justified and lawful, and not contrary to article 14 (read with article 8 and/or article 1 of Protocol 1)? (iv) Was the Court of Appeal wrong to have found that the Secretary of State has complied with his obligation to treat the best interests of children as a primary consideration when implementing the benefit cap scheme?

98 The boundaries between these heads of claim have not been very clearly delineated in the arguments before us. However, in agreement with both Baroness Hale of Richmond DPSC and Lord Reed JSC, I find it most helpful to concentrate on issues (iii) and (iv), with specific regard to article 1 of Protocol 1 ("A1P1"). Like them I do not think that a case has been made, at least on the evidence before us, for separate treatment of the position of victims of domestic violence, the subject of issues (i) and (ii). Under issue (iii) it is common ground that the scheme falls within the ambit of A1P1, and that in the context of article 14 it is indirectly discriminatory against women, particularly lone parents. The only issue therefore is justification.

99 Article 8 was also mentioned under issue (iii), and was relied on by Mr Ian Wise QC for the claimants in his printed case. However, as I understood it, this was not by way of challenge to the Court of Appeal's rejection of the "free-standing" claim under article 8, which is consequently not one of the agreed issues for this court. Rather he relied on article 8 either as an alternative route into article 14, or as supporting his "best interest" claim under issue (iv). I note that article 8 was not relied on by Mr Richard Drabble QC for the Child Poverty Action Group. I have not been persuaded that either of Mr Wise's formulations adds anything of substance to the claim based on A1P1.

100 It is important also to understand how the interests of children affected by the scheme may be relevant to the legal analysis, either under the Convention itself, or indirectly by reference to article 3.1 of the United Nations Convention for the Rights of the Child ("UNCRC") (best interests of children as "a primary consideration"). As to the Convention, the children have no relevant possessions under A1P1 in their own right; nor are they a protected class under article 14. However, as Baroness Hale DPSC has said, at para 218, the disproportionate impact on women arises because they are responsible for the care of dependent children. Elias LJ said in the Divisional Court [2014] PTSR 23, para 62:

> "In this case there is no dispute that the rights of the adult claimants under A1P1 (the right to peaceful enjoyment of possessions) are affected by a reduction in the benefits paid to them. And although the child claimants have no A1P1 rights themselves, we agree with [the Child Poverty Action Group's] submission that it would be artificial to treat them as strangers to the article 14/A1P1 arguments. The benefits in each case are paid to the mother to enable her both to feed and house herself and to feed and house her children."

I agree. Accordingly, in considering the nature of the admittedly discriminatory effect of the scheme on lone parents, and its alleged justification, the effects on their children must also be taken into account.

101 The possible relevance of article 3.1 of the UNCRC requires a little more explanation. Before the Divisional Court, at para 45, Mr James

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A Eadie QC was recorded as having submitted on behalf of the Secretary of State that, as "an international instrument with no binding effect in English law", the Convention had no bearing on the case. This argument was rejected by Elias LJ and has not been renewed. The Court of Appeal said [2014] PTSR 619, para 69:

> "The Divisional Court held that, notwithstanding the fact that the B UNCRC is an international convention which has not been incorporated into our domestic law, the court should nevertheless have regard to it as a matter of Convention jurisprudence: see *Neulinger v Switzerland* (2010) 54 EHRR 1087, cited by Baroness Hale JSC in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 AC 166, para 21. This has not been challenged by the Secretary of State on this appeal."

C Whether or not for this reason, issue (iv) was agreed by the Secretary of State in a form which raised directly the issue of compliance with article 3.1, without overtly questioning its legal relevance, or advancing any substantive argument on that issue. In the circumstances it seemed right to proceed on the basis, conceded rather than decided, that the obligations imposed by article 3.1 were matters to be taken into account under the Convention. As will be seen, this has now emerged as a crucial issue following the post- D hearing exchanges. However, before returning to it in that context, I will consider the treatment of the discrimination issues, and in particular article 3.1, in the courts below.

102 It is unnecessary to repeat the accounts given in other judgments of the nature of the discrimination, of the threefold justification put forward by the Secretary of State, and of the criticisms made of it by the appellants, E supported by the interveners. In short, it is said, the two objectives of fairness and increasing incentives to work are largely irrelevant or misconceived in their application to the group which is the object of discrimination; and that the third, saving money, cannot on its own justify discriminatory treatment in the enjoyment of a Convention right. The essential objection was put shortly by Mr Drabble for the Child Poverty Action Group:

F

> "Although this is not the expressed aim of the cap, its discriminatory effect is built in to its structure. Lone parent families are more likely to be affected by the cap precisely because it is so difficult for them to move into work; and the effects of the cap on them will necessarily be much harsher—the corollary is that a lone parent will be far less likely to be able to avoid the cap by moving into work (a point accepted by the G Government). The effects of the cap on a single mother and her children will be more severe the more children she has to clothe, feed and house, and she must do so alone."

103 The Court of Appeal, in agreement with the Divisional Court, rejected these criticisms, holding in particular that there had been compliance with article 3.1: [2014] PTSR 619, para 72 et seq. Applying the H approach of members of this court in *H (H) v Deputy Prosecutor of the Italian Public, Genoa (Official Solicitor intervening)* [2013] 1 AC 338, they held that it was not necessary for the decision-maker to adopt a "tightly structured" approach to consideration of the issues raised by article 3.1: para 72. It was enough for him to "give appropriate weight to the interests

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of children as a primary consideration in the overall balancing exercise": para 73.

104 They found "ample evidence" that the Secretary of State had satisfied this test, citing five matters (para 74): (i) the 2010 Treasury Spending Review made clear that a principal objective was "to raise children out of long term poverty"; (ii) the February 2011 Impact Assessment showed that the Government was "keenly aware" of the likely impact on children; (iii) the March 2011 Equality Impact Assessment stressed the objective of reversing the detrimental impact on families and children of benefits dependency, and indicated that the Government was looking at ways to ease the transition for large families; (iv) the parliamentary debates "focused time and again" on the interests of children; and (v) the July 2012 Impact Assessment revised the assessment of the number of children likely to be affected and addressed the issue of short term relief. These points have been in substance adopted in the submissions of the Secretary of State in this court.

105 The comments in this court in *H (H)* predated, and therefore did not take account of, the most authoritative guidance now available on the effect of article 3.1. This is in "General Comment No 14", adopted by the United Nations Committee on the Rights of the Child early in 2013. Although this guidance was not available at the time of the decisions under challenge, it is as I understand it intended as a restatement of established practice, rather than a new departure.

106 Para 6 explains that "best interests" in this context is a "threefold concept": (a) a substantive right, (b) a fundamental, interpretative legal principle, and (c) a rule of procedure. The first and third are explained as follows:

> "(a) A substantive right: The right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made *concerning a child, a group of identified or unidentified children or children in general*. Article 3, paragraph 1, creates an intrinsic obligation for states, is directly applicable (self-executing) and can be invoked before a court."
>
> "(c) A rule of procedure: Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include *an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned*. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, states parties shall explain how the right has been respected in the decision, that is, *what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations*, be they broad issues of policy or individual cases." (Emphasis added.)

107 Later paragraphs explain that the phrase "actions concerning children" is to be read in a "very broad sense" covering actions including children and other population groups, such as those relating to housing

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A (para 19); that where a decision will have a major impact on children "a greater level of protection and detailed procedures to consider their best interests (are) appropriate" (para 20); and that the child's interests "have high priority and [are] not just one of several considerations . . . larger weight must be attached to what serves the child best" (para 39).

108 In relying on this guidance, Mr Wise accepted that it was not necessary for the decision-maker to address the issues in a "particular B structured order", as the Court of Appeal may have understood his argument. What matters is the substance of what is done rather than the form. However those passages do show in my view that the evaluation needs to consider, where relevant, the interests both of children in general and of those directly affected by the action. It also needs to indicate the criteria by which the "high priority" given to children's interests has been C weighed against other considerations. In so far as that evaluation shows conflict with the best interests of the children affected, it needs either to demonstrate how that conflict will be addressed, or alternatively what other considerations of equal or greater priority justify overriding those interests.

109 Accordingly, as the submissions and evidence stood at the end of the hearing, my view was that, judged by those criteria, the matters relied on by the Court of Appeal fell well short of establishing compliance. The D Treasury's long term objective of taking children out of poverty, laudable in itself, was no substitute for an evaluation of the particular impact on the children immediately and directly concerned, and their parents. The February 2011 Impact Assessment and the March 2011 Equality Impact Assessment may have shown that the Government was "keenly aware" of the likely impact on children, and was "looking at ways to ease the E transition", but they did not provide the answers. In any event, those assessments were related to the statute rather than the Regulations which are now under challenge.

110 Those assessments also predated the report by the Children's Commissioner in January 2012, *A Child Rights Impact Assessment of the Welfare Reform Bill*, which set out a number of "likely outcomes" of concern to the commissioner. They included increase in child poverty (including F diversion to housing costs of money which would otherwise have been spent on "necessities for children's health and wellbeing"), children losing their homes, incentivising family breakdown, and disproportionate impact on children from some BME groups: p 8. The commissioner expressed the view that "the universal imposition of the cap without regard to the individual circumstances of children" would conflict with the best interests principle G under article 3.1 of the UNCRC: p 12. This view had special significance, as that of the authority responsible under the Children Act 2004 for advising the Secretary of State on the interests of children.

111 The subsequent Equality Impact Assessment of July 2012, prepared by the Department in support of the Regulations, did indeed make some revisions to the earlier figures, and mentioned the short term relief to be provided by discretionary housing payments. But it did not in terms respond H to the more fundamental points of concern raised by the commissioner's report. In his evidence for the Secretary of State, Mr Holmes observed simply that the Government did not agree with the commissioner's assessment, but without further detail. The July assessment also indicated that there would in due course be a "full evaluation" of the operation of the

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benefit cap, to be published in autumn 2014. (We have not been given any information relating to this exercise, nor has it been suggested that it is relevant to our consideration of the legal issues relating to the decisions under challenge.)

112 For these reasons, my provisional view at the end of the hearing was that, in their application to lone parents and their dependent children, the Regulations were not compatible with Convention rights, and that the court should so declare.

Post-hearing submissions

113 In post-hearing submissions permitted by the court, the point was taken on behalf of the Secretary of State that A1P1 (with or without article 14) was not the context in which article 3.1 of the UNCRC had hitherto been relied on by the appellants. I observe that this limitation is not apparent from the agreed wording of question (iv). Nor it seems was the discussion in the courts below so limited. Lord Dyson MR's reference to this argument [2014] PTSR 619, paras 67–75, and to its treatment by the Divisional Court, came immediately after his discussion of "article 14 read with A1P1"; he observed that the argument had "featured prominently" in Mr Wise's submissions on justification "in relation to article 14 (as well as in relation to article 8 which we deal with below)". It is fair to say however that at the hearing Mr Wise's submissions in that connection were directed mainly to article 8. For this reason, and because of the importance of the issue for this case and others, counsel for the Secretary of State were given the opportunity to make further written submissions.

114 They summarised their submissions in the following six points: (i) article 3.1 of the UNCRC is a provision of an unincorporated treaty which may only be relied on to the extent that it has been transposed into domestic law; (ii) the European Court of Human Rights ("ECtHR") uses international law when determining the meaning of provisions of the Convention, in accordance with the Vienna Convention on the Interpretation of Treaties; (iii) article 3.1 of the UNCRC is, as a matter of principle and in accordance with Strasbourg authority, not relevant to the question of justification of discrimination under article 14 read with A1P1. It has no role to play in determining the meaning of article 14 (read with A1P1 or otherwise), and does not inform or illuminate the question whether the differential impact on women of the benefit cap is proportionate; (iv) article 3.1 of the UNCRC does not supplant, dilute or compromise the *Stec* test (*Stec v United Kingdom* (2006) 43 EHRR 1017) which all parties have agreed, at every stage of these proceedings, applies both when considering whether the aims are legitimate and when determining whether the 2012 Regulations, having regard to their differential impact on women, are proportionate; (v) even if the court were to consider it foreseeable that the ECtHR may develop its case law to have the effect that a breach of article 3.1 of the UNCRC renders legislation disproportionate, there are strong constitutional reasons why the court should refrain from going beyond the current Strasbourg jurisprudence; and (vi) in any event, the 2012 Regulations do not breach article 3.1 of the UNCRC. The Secretary of State fully took into account the best interests of children, as a primary consideration, and these were extensively debated in Parliament.

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A 115 I have little difficulty with points (i), (ii), (iv) and (v). There has been no dispute as to the application of the *Stec* test to the issue of proportionality (iv), and no one has argued that we should go beyond existing ECtHR jurisprudence (v). As to (i) it is of course trite law that, in this country at least, an international treaty has no direct effect unless and until incorporated by statute, but that it may be taken into account as an aid to interpretation in cases of ambiguity. To that extent the present case is to B be contrasted with cases such as *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 AC 166, in which as Baroness Hale JSC explained at para 23, article 3.1 of the UNCRC was reflected in the relevant statutory provisions. Ministerial statements of the Government's "commitment" to giving "due consideration" to the UNCRC articles (see Baroness Hale DPSC, post, para 216), may have political consequences but C are no substitute for statutory incorporation.

116 It is equally clear (ii) that, under the Convention and in accordance with the Vienna Convention, regard may be had to principles of international law, including international conventions, for the purpose of interpreting the "terms and notions in the text of the Convention": see *Demir v Turkey* (2008) 48 EHRR 1272, paras 65, 67, 85. *Demir* itself is a good D illustration of that proposition. For the purpose of determining whether article 11 (right to join a trade union) extended to civil servants, reference was made to article 22 of the International Covenant on Civil and Political Rights. It was noted by the court (para 99) that the wording of that article was similar to that of article 11 of the Convention, but that it was expressed to be subject to the right of the state to exclude the armed forces and the police, without referring to members of the administration of the state. E Similarly, in *Neulinger v Switzerland* (2010) 54 EHRR 1087, to which Elias LJ referred, the court had regard to the Hague Convention on the Civil Aspects of International Child Abduction in determining whether forced return of a child to Israel would involve a breach of his rights under article 8 of the Convention.

F *Point (iii)—international treaties and article 14*

117 Point (iii) questions the application of this approach in the context of article 14 taken with A1P1, and more specifically to the issue of justification. There seems to be no reason in principle why the *Demir* approach should not apply to article 14. Mr Drabble relies on *X v Austria* (2013) 57 EHRR 405 as the "clearest" example, in that case relating to G article 14 taken with article 8. The court held that a law preventing second parent adoption in the case of same-sex marriages involved discrimination under article 14, and, although the law served a legitimate aim, it had not been shown that an absolute prohibition was necessary for the protection of the families or children. Early in its judgment (para 49) the court had quoted UNCRC article 3, and also article 21 which requires that systems of adoption shall "ensure that the best interests of the child shall be the H paramount consideration". In considering the question of justification, the court listed the factors which seemed rather to "weigh in favour of allowing the courts to carry out an examination of each individual case" adding (with a reference to the earlier quotations), at para 146: "This would appear to be more in keeping with the best interests of the child, which is a key notion in

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the relevant international instruments." Of this case Mr Clive Sheldon QC for the Secretary of State commented: A

> "the court carried out the proportionality exercise (in respect of article 14 read with article 8) in the usual way and only subsequently observed that the outcome 'would also appear to be more in keeping with the best interests of the child'. That is not the same as using the UNCRC for the purposes of carrying out the balancing exercise itself. Still less does it involve using the UNCRC to alter the proportionality test." B

If that was intended to suggest that the reference to the UNCRC was purely incidental to the court's reasoning, I cannot agree. The prominence given to the relevant articles in the earlier exposition of the relevant law shows to my mind that it was treated as a significant part of the consideration of article 14, albeit in a very different factual context to the present case. C

118 Another Strasbourg case in which reliance was placed on the UNCRC as an aid to interpretation of the Convention, in this case in favour of the state, was *Ponomaryov v Bulgaria* (2011) 59 EHRR 799. The complaint was of a violation of article 14 taken with article 2 of Protocol 1 (right to education), by direct discrimination on the grounds of nationality with respect to the provision of secondary education. In dismissing the application, the court relied on article 28 of the UNCRC as supporting the view that the state enjoyed a greater margin of appreciation in relation to secondary as compared to primary education: para 57. D

119 There are examples also in domestic jurisprudence. Baroness Hale DPSC has referred to the judgment of Maurice Kay LJ in *Burnip v Birmingham City Council* [2013] PTSR 117, concerning discrimination in the application of housing benefit for a disabled person. Although the court was able to arrive at its decision on other grounds, Maurice Kay LJ would have relied if necessary on the United Nations Convention on the Rights of Persons with Disabilities ("CRPD") to resolve any uncertainty over "the meaning of article 14 discrimination" in the circumstances of the case: para 22. Of this case Mr Sheldon comments: E

> "Even if that was a correct approach, it does not justify using a treaty involving one group (here, children) to resolve any uncertainty about a claim for discrimination brought by, and in respect of, an entirely different group (here, women)." F

I see no reason to question Maurice Kay LJ's approach as applied to the case before him, which seems wholly consistent with the ECtHR cases already cited. I accept however that the Treaty in question was directly related to the particular form of discrimination there in issue. I will return to that point. G

120 I see no inconsistency between such reference to international treaties where relevant and the *Stec* test. In *Burnip* [2013] PTSR 117, paras 27–28 Henderson J, giving the lead judgment, cited the passage in *Stec* 43 EHRR 1017, para 52 which established the "manifestly without reasonable foundation" test as appropriate for review of "general measures of economic or social strategy", and declined to adopt an "enhanced" test requiring "very weighty reasons" for the discrimination. It was in this context that Maurice Kay LJ, who agreed with Henderson J on the issue of justification (para 23), drew assistance from the CRPD. H

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A 121 Before considering the application of that approach to the present case, it is convenient to consider point (vi), that is whether the latest submissions throw any further light on the issue whether the Regulations were in compliance with article 3.1.

Compliance with article 3.1

B 122 It is not in dispute that, as asserted, issues in relation to the interests of children "were extensively debated in Parliament" or that the views so expressed were taken into account by ministers. But article 3.1 is more than a restatement of the ordinary administrative law duty to have regard to material circumstances. The principles were summarised by Lord Hodge JSC in *Zoumbas v Secretary of State for the Home Department* [2013] 1 WLR 3690, paras 10–13 in seven points. I would emphasise the C first and last, at para 10: "(1) The best interests of a child are an integral part of the proportionality assessment under article 8 of the Convention . . . (7) a child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent". On the other hand, as he added (by reference to *H (H)* [2013] 1 AC 338) there may be circumstances in which "the weight of another primary consideration can tip the balance D and make the interference proportionate even where it has very severe consequences for children": [2013] 1 WLR 3690, para 13.

123 In considering how the Government approached that task, rather than trawling through the parliamentary debates, we are entitled to rely on the evidence given in these proceedings on behalf of the Secretary of State. The Court of Appeal [2014] PTSR 619, paras 32–33 quoted the evidence of E Mr Holmes: "if the level of the benefit cap was based on the number of children in a household it would undermine the intention that there should be a clear upper limit to the amount of benefit families can receive." And:

> "Agreeing to exclude child benefit from the cap would have effectively resulted in there being no limit to the amount of benefit a household could receive. Further, child benefit, like other welfare benefits, is provided by F the state and funded by taxpayers and therefore with the aim of reducing welfare expenditure and reducing the deficit the Government believes it is right that it is taken into account along with other state benefits when applying the cap."

It is noteworthy that, as far as Mr Holmes's evidence went, the Secretary of State offered no substantive response to the specific concerns expressed by G the Childrens' Commissioner and others about the practical impact on children of families affected by the cap. Of the two points made by him, the second is no more than a general statement of the desirability of limiting government expenditure, without any direct reference to the interests of children. The first point—the need for a "clear upper limit"—begs the question whether it is consistent with the statutory framework to treat child benefits as no more than a component of the family income.

H 124 The difficulty with that response, in the context of a duty to treat the best interests of the child as a "primary consideration" is that it ignores the distinctive statutory purpose of the child related benefits. Lord Reed JSC, at para 35, refers to a ministerial response in the course of the parliamentary debate, to the effect that working people on low incomes had

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to "cope with difficult circumstances" and "live within their means"; that their earnings were "not determined by the size of their families", and that "the Government believed that the same principle should apply to the level of the cap".

125 As applied to child related benefits, in my view, this was a false comparison. No doubt for that reason it was not a point made by Mr Holmes. The benefits are paid regardless of whether their parents are in work or not. In this respect therefore workers and non-workers alike were (before the cap) able to rely on this extra assistance in "coping with difficult circumstances" in the interests of their children. Although paid to the parents, these benefits are designed to meet the needs of children considered as individuals. As Baroness Hale JSC said in *Humphreys v Revenue and Customs Comrs* [2012] 1 WLR 1545, para 25 (summarising the case for the Revenue): "The aim of child tax credit is to provide support for children. The principal policy objective is to target that support so as to reduce child poverty. The benefit attaches to the child rather than the parent." The same could be said of child benefit.

126 As Mr Drabble submitted, the cap was a complete innovation in the combined benefits/tax system, which had always contained a mechanism to adjust for family size. The cap has the effect that for the first time some children will lose these benefits, for reasons which have nothing to do with their own needs, but are related solely to the circumstances of their parents. It is difficult to see how this result can be said to be consistent with the best interests of the children concerned, or in particular with the first and seventh principles in *Zoumbas* [2013] 1 WLR 3690.

127 Lord Reed JSC has referred to statements made to Parliament in November 2011 that excluding both child benefit and child tax credit would reduce the savings from the scheme by 80%–90%, and so emasculate the scheme. It is not clear whether these are up-to-date estimates, or how they relate to the Regulations as opposed to the Bill. If correct, they raise the questions why the viability of a scheme, whose avowed purpose is directed at the parents not their children, is so disproportionately dependent on child related benefits. There is nothing in Mr Holmes's evidence which addresses or answers these questions.

128 Accordingly I remain of the view that the Secretary of State has failed to show how the Regulations are compatible with his obligation to treat the best interests of children as a primary consideration.

Article 3.1 of the UNCRC and A1P1

129 The more difficult question, now that it has been put in issue, is how that finding in relation to the interests of children under article 3.1 of the UNCRC affects the resolution of issue (iii): that is the alleged justification for the admittedly discriminatory effects on women as lone parents. As Mr Sheldon submits, even if article 3.1 had a role to play in illuminating article 14, this could only be where the alleged indirect discrimination, or differential treatment, was in respect of children. In the present case, by contrast, the allegation is of discrimination, not against children, but against their mothers. The children, it is said, will be treated the same whether their lone parents are male or female. With considerable reluctance, on this issue agreeing with Lord Reed JSC, I feel driven to the conclusion that he is right.

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A 130 In all the article 14 cases to which we have been referred to in this context there was a direct link between the international treaty relied on and the particular discrimination alleged: (i) In *X v Austria* 57 EHRR 405, where the complaint concerned discrimination by restrictions on adoption by single-sex couples, the court referred not only to article 3.1 of the UNCRC, but also to article 21 which applied the best interests principle specifically to adoption. (ii) In *Ponomaryov v Bulgaria* 59 EHRR 799, where the B complaint was of discrimination in respect of education, reference was made to article 28 of the UNCRC relating also to education. (iii) In *Burnip v Birmingham City Council* [2013] PTSR 117, where the alleged discrimination related to the treatment of the disabled, reference was made to the CRPD, covering the same subject matter. In each of these cases, it can plausibly be argued that the court was using the international materials to fill C out, or reinforce, the content of a Convention article dealing with the same subject matter. They can be justified broadly as exercises in interpretation of "terms and notions" in the Convention, consistently with the *Demir* principle 48 EHRR 1272.

131 There is no such connection in the present case. The discrimination with which we are concerned under article 14 is in relation to women and their D "possessions". Those concepts require no relevant "illumination" by way of interpretation. It is true that the discrimination in this case is related to their responsibilities as lone parents, and to that extent, as Elias LJ accepted, the children are not "strangers to the article 14/A1P1 arguments": [2014] PTSR 23, para 62. But that is a comment on the facts, not on the interpretation of the Convention rights. Indeed, as has been seen, it is the distinct interest of the children in the benefits as individuals that has reinforced my view of the breach E under article 3.1. As Lord Reed JSC says at para 89, the fact that children are statistically more likely to be living with a single mother than with a single father is unrelated to the question whether the children's interests have been treated as a primary consideration as required by article 3.1 of the UNCRC.

132 We have been shown no precedent in the Strasbourg jurisprudence for the use of an international treaty in this indirect way. Mr Sheldon argues F that there are "strong constitutional reasons" why the court should not go beyond Strasbourg on an issue of this kind. Whether or not that is so, we have heard no argument that we should do so. The appellants and their supporters have relied simply on the principles to be extracted from the existing case law.

Conclusion

G 133 In conclusion I would dismiss the appeal, albeit on grounds much narrower than those accepted by the courts below. I would hope that in the course of their review of the scheme, the Government will address the implications of these findings in relation to article 3.1 itself. However, it is in the political, rather than the legal arena, that the consequences of that must be played out.

H **LORD HUGHES JSC**

134 I agree with the judgment and conclusions of Lord Reed JSC and would like him dismiss this appeal. I add only some additional observations in view of the difference of opinion which is disclosed by the judgments of Baroness Hale of Richmond DPSC and Lord Kerr of Tonaghmore JSC.

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135 There is much common ground. (i) The suggested discriminatory effect on the victims of domestic violence adds nothing to the accepted discriminatory effect on women. Moreover neither of the adult appellants is suffering any of the adverse effects of the cap relied on as affecting such victims, so that the Court of Appeal was fully justified in declining to decide the issue of such victims. Further, the principal adverse effects peculiar to such victims which were relied on (the treatment of refuges and the possible need for two sets of rent to be within housing benefit) have both been addressed by amendments to the original form of the Housing Benefit Regulations 2006. (ii) It is agreed on all sides that the scheme has legitimate aims. At the very least, the principal aim of discouraging benefit dependence and encouraging work is agreed to be legitimate. For my part I agree that at a time of national economic crisis it was also legitimate to seek to reduce the overall expense on benefits, and that establishing a different balance between those who worked and paid taxes and those who did not was a further legitimate aim. (iii) Article 1 of the First Protocol ("A1P1") is agreed to be engaged to the extent that *Stec v United Kingdom* (2006) 43 EHRR 1017 establishes that, although it does not give an entitlement to benefits, the Convention does require that if they are provided they must be administered in a manner which is not discriminatory contrary to article 14. Here a discriminatory effect of the Regulations on women is conceded, because they represent much the largest proportion of lone parents forming a household with children. Accordingly the scheme as a whole, including its discriminatory effect, must be justified. The test, in a case involving high level social/economic policy, is agreed by all parties to be that laid down in *Stec*, namely that it fails to be justified if it is manifestly without reasonable foundation.

136 The difference of opinion reduces itself to the place of article 3 of the United Nations Convention on the Rights of the Child ("UNCRC"). That in turn involves two questions: (a) does article 3 have legal effect in English law and if so by what route? and (b) if it does, has there been a breach of it such as to render the Regulations unlawful?

The legal relevance of article 3 of the UNCRC

137 Article 3 of the UNCRC is contained in an international treaty ratified by the United Kingdom. It is binding on this country in international law. It is not, however, part of English law. Such a treaty may be relevant in English law in at least three ways. First, if the construction (i e meaning) of United Kingdom legislation is in doubt, the court may conclude that it should be construed, if otherwise possible, on the footing that this country meant to honour its international obligations. Second, international treaty obligations may guide the development of the common law. For these two propositions see, for example, *R v Lyons* [2003] 1 AC 976, para 13. Neither has any application to this case. This case is concerned with legislation, not with the common law, and it is not suggested that there is any room for doubt about the meaning of the Regulations. Thirdly, however, the UNCRC may be relevant in English law to the extent that it falls to the court to apply the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") via the Human Rights Act 1998. The European Court of Human Rights has sometimes accepted that the

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A Convention should be interpreted, in appropriate cases, in the light of generally accepted international law in the same field, including multi-lateral treaties such as the UNCRC. An example is *Demir v Turkey* (2008) 48 EHRR 1272 which concerned the scope of article 11 (right of freedom of association), and which is cited by Lord Reed JSC, at para 83 above.

138 It was on this third basis that the UNCRC was advanced in argument before this court and, as I understand it, in the courts below. Until B post-hearing submissions in this court, this argument was confined to praying in aid article 3 of the UNCRC on the application or content of article 8 of the Convention (respect for private and family life). In turn, the complaint of infringement of article 8 was based on the rights of the children affected by the cap, not of their mothers except to the extent that they were, as carers, directly involved in the article 8 rights of their children. Article 3 C of the UNCRC was not, until the post-hearing submissions, advanced as relevant to the justification of the admitted indirect discrimination against women in relation to their A1P1 rights.

139 For the reasons set out by the Court of Appeal, the article 8 rights of children are not arguably infringed by the benefit cap scheme. Elastic as that article has undoubtedly proved, it does not extend to requiring the state to provide benefits, still less benefits calculated simply according to need, nor D does it require the state to provide a home: see *Chapman v United Kingdom* (2001) 33 EHRR 399, para 99; *R (G) v Lambeth London Borough Council (Shelter intervening)* [2012] PTSR 364, paras 34 and 40; and *AM v Secretary of State for Work and Pensions* [2014] EWCA Civ 286, para 22 and the cases there cited. *Winterstein v France* (Application No 27013/07) (unreported) given 17 October 2013 depended on the long toleration of itinerants on the E land from which they were evicted and the absence of provision of alternative accommodation, and does not lead to a different conclusion. Moreover, the likely impact of this scheme on some children who are members of larger families living in high-rent homes is at most to make it unavoidable for the family to move; the duty of local authorities to provide accommodation under Part VII of the Housing Act 1996 remains. None of the judgments suggests that article 8 is engaged. I agree that it is not. It F follows that article 3 of the UNCRC cannot have effect in English law on the grounds that it is relevant to its interpretation.

140 The additional argument now formulated before this court and accepted by Baroness Hale DPSC and Lord Kerr JSC would give article 3 of the UNCRC the force of domestic English law on the grounds that it bears on the issue of whether the agreed discrimination against women in relation to G their A1P1 rights was justified. Lord Kerr JSC would additionally give article 3 direct effect on the grounds that the United Kingdom's signature to the Convention is sufficient to impose a domestic duty to comply with it. Like Lord Reed and Lord Carnwath JJSC, I am unable to accept these arguments.

141 It may not be difficult to see that in interpreting the content of the article 8 rights of children, it may be legitimate to take into account the international obligation contained in article 3 of the UNCRC. *ZH (Tanzania)* H *v Secretary of State for the Home Department* [2011] 2 AC 166 was an article 8 case where the relevance to that article of the interests of the children of a potential deportee was conceded. Similarly, *Neulinger v Switzerland* (2010) 54 EHRR 1087 depended on article 8. It concerned an order directly about the upbringing of a child, namely an order for return to another state pursuant to

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the Hague Convention on the Civil Aspects of Child Abduction (1980), and the very first words of that Convention declare the interests of children to be of paramount importance in matters relating to their custody. If article 8 rights are engaged, the question will often become: is such impairment of respect for private and family life nevertheless permissible under article 8.2? If the article 8 rights relied on are those of children, as was asserted here, or of their parents in the form of their relationship with their children, as in *ZH (Tanzania)*, there is scope for the argument that an internationally recognised duty to approach the children's interests in a particular way bears on whether article 8.2 is satisfied—in the context of these Regulations whether any impairment of children's article 8 rights was permitted on the grounds that it is necessary in a democratic society in the interests of the economic well-being of the country or the protection of the rights and freedoms of others, such as those taxpayers who do not claim benefits.

142 The *Demir* approach is not of course limited to article 8, as that case itself shows. And it may extend to cases where discrimination is in issue. *Opuz v Turkey* (2009) 50 EHRR 695 was an article 2/article 14 case involving a complaint of failure to protect from domestic violence. The court relied in part on the Convention on the Elimination of All Forms of Discrimination against Women (1979) ("CEDAW") in determining the scope of article 14: see paras 185–187. *Ponomaryov v Bulgaria* (2011) 59 EHRR 799 was a complaint of discrimination against foreign nationals by charging for education when Bulgarian nationals received free provision. Obiter, the court referred at paras 56–57 to international conventions which indicated that the state's margin of appreciation increased as one moved from primary, through secondary, to tertiary education. *Burnip v Birmingham City Council* [2013] PTSR 117 was a benefits case involving A1P1 and a derivative article 14 claim. In the Court of Appeal Maurice Kay LJ would have been prepared to adopt a similar approach by gaining assistance on the scope of article 14 from the United Nations Convention on the Rights of Persons with Disabilities ("CRPD") if the extent of article 14 had been in doubt. Obiter, he also offered the opinion that CRPD might illuminate the approach to justification, but the occasion to test this did not arise. But before the *Demir* approach to the interpretation of the Convention can be relevant, there has to be the necessary connection between the international law invoked and the Convention right under consideration. This was clearly present in each of *Opuz*, *Ponomaryov* and *Burnip*. In each, the international instruments referred to were directly concerned with the particular form of discrimination in issue. *Demir* does not mean that the UNCRC (in this case) becomes relevant to every ECHR question which arises, simply because children are as a matter of fact affected by the decision or legal framework under consideration.

143 It is said that the Strasbourg court has invoked article 3.1 of the UNCRC in the context of a discrimination claim in *X v Austria* (2013) 57 EHRR 405. That was a case in which the same-sex partner of a child's mother wished to adopt the child, who lived with the two ladies. The effect of Austrian law was that adoption substituted the adoptive parent for the natural parent of the same sex. Thus "second parent adoption" (adoption by the partner of the natural parent) by a same-sex partner was legally ineffective, since if the adoption order were made the same-sex partner of the mother would achieve parental rights, but in place of the natural mother, leaving the legal relationship of the absent father to the child unaltered.

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A Conversely, "second parent adoption" by the different-sex partner of the natural parent was effective. The claimants in that case were scrupulous in limiting their complaint about Austrian law to the resultant difference of treatment between, on the one hand, a different-sex unmarried couple and, on the other, a same-sex unmarried couple such as themselves. They disclaimed any complaint about any different treatment as between married couples and unmarried couples, which the court had previously found to be B within the margin of state appreciation: see *Gas and Dubois v France* (Application No 25951/07) (unreported) given 15 June 2012.

144 The court decided the case on the grounds advanced by the claimants. The discrimination between different-sex couples and same-sex couples was based on sexual orientation alone. Where such discrimination is in question, the margin of appreciation is narrow and proportionality C requires not merely that the measure in question pursues a legitimate aim but also that it is necessary: see paras 140–141. The relevant Convention rights to which the derivative article 14 claim to discrimination was attached were the article 8 rights of all three people, the mother, her partner and the child. In the absence of any evidence submitted to suggest that a child was generally better brought up by a different-sex couple than by a same-sex couple, there was no justification for the different treatment as between such D couples. The court adopted its usual practice of setting out international instruments in the field, and thus included article 3.1 of the UNCRC. The decision in question (adoption) related directly to the upbringing of the child. It is unsurprising that the court referred (somewhat in passing) at para 146 to the fact that its conclusion was *also* more in keeping with the best interests of the child, which it noted to be a key notion in the relevant E international instruments. It might have added that in the great majority of developed states there is consensus that questions of a child's upbringing must be determined by his or her best interests or welfare as the dominant or paramount consideration: in England this principle is long-established law and now encapsulated in section 1(1) of the Children Act 1989.

145 At its highest, this decision is another in which the UNCRC is referred to as relevant to the content of article 8 rights, and thus to the issue F of justification for discrimination in relation to such rights. That is a very long way from saying that article 3.1 is relevant to justification on any kind of discrimination issue, whether or not the decision is about the child's upbringing, and whether or not either the Convention rights of the child or article 8 rights of his family are at stake. Such issues simply did not arise in *X v Austria* 57 EHRR 405.

G **146** If the rights in question are the A1P1 property rights of women, and their associated derivative right not to be discriminated against in relation to those rights, it is an impermissible step further to say that there is any interpretation of those rights which article 3 of the UNCRC can inform. In the case of article 8, the children's interests are part of the substantive right of the parent which is protected, namely respect for her family life. In the case of A1P1 coupled with article 14, the children's interests may well be H affected (as here), but they are not part of the woman's substantive right which is protected, namely the right to be free from discrimination in relation to her property. There is no question of interpreting that article 14 right by reference to the children's interests. The protected right to respect for family life under article 8 is entirely different from the protected right to

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property under A1P1. Nor can the article 8 rights of the child be said to be in need of interpretation when it is clear for the reasons given in all the judgments that they are not infringed. The necessary connection between the Convention right under consideration and the international instrument is not present. That can be seen by considering the position of the appropriate comparator, namely a lone non-working father with the same children and household outgoings. The interests of the children would be exactly the same in his case, but he would have no article 14 claim to discrimination.

147 I also agree that to treat failure to comply with article 3.1 of the UNCRC as determinative of the present case would be tantamount to departing from the *Stec* test for justification which has been agreed on all sides throughout this litigation: 43 EHRR 1017.

Was there a breach of article 3 of the UNCRC?

148 It is unnecessary to decide this question, but I ought to say that in my view it is clear that there was in any event no breach of article 3.

149 The language of article 3.1 does give rise to some difficulty. It is in these terms:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

This departs from the formulation of the paramountcy principle for decisions about the upbringing of a child, or for legislation designed for the protection/advancement of children, mentioned at para 142 above. This paramountcy formulation is employed in the UNCRC but only in relation to one kind of upbringing decision, namely adoption: article 21. The different language of article 3.1 begs two important questions: (a) what is the extent of the expression "actions concerning children"; and (b) what is the meaning of "a primary consideration"?

150 It might be thought that article 3 was intended to apply to decisions directly about a child, or perhaps to those and to others directly affecting him, such as for example decisions relating to the provision of education or child-support facilities, and that "a primary consideration" therefore imports some priority for the best interests of children even if short of making them determinative, as the paramountcy principle does. That might perhaps be suggested by article 3.1 which clearly is specific to the care and protection of children, while article 3.2, which requires states to take appropriate legislative and administrative measures to ensure that the child has such protection and care as is necessary for his well-being, is also perfectly consistent with this. This is not, however, the view taken in General Comment 14, adopted by the United Nations Committee on the Rights of the Child at its 2013 session, referred to by Lord Carnwath JSC at para 105, and foreshadowed by earlier similar documents.

151 That Comment suggests (at paragraph 19) that article 3 extends well beyond decisions directly about children to those which indirectly affect either individual children or children in general, "e g related to the environment, housing or transport". If the meaning of article 3.1 is as broad as this, then all manner of court decisions may fall within it; a planning

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A decision relating to housing development might be one, whilst the making of a possession order against a tenant who has children, or the enforcement of money judgments against the family motor car, or the sentencing of him for a serious criminal offence might be others.

152 Pace Lord Carnwath JSC, I do not take it as read that the committee's views, although entitled to careful consideration coming from the source that they do, can be regarded as binding on party states as to the B meaning of the Treaty to which they agreed. But it is neither necessary nor appropriate to attempt to resolve these issues in this case, especially since we heard no argument on them. All that needs to be said is that it is clear that the wider the reach of the concept of "decisions concerning" either an individual child or children in general, the less possible it is to impose the best interests of such child or children as a determinative or even priority C factor over the frequently complex legal or socio-economic considerations which govern such decisions. The committee's General Comment gives some acknowledgement to this problem in, for example, paragraph 20, which recognises that although all state actions may affect children, a full and formal process of assessing their best interests is not called for in every case, and in paragraph 32 where it is stated that the concept of the child's D best interests is flexible and adaptable.

153 The committee's General Comment also realistically recognises that the relevant best interests of children will, in relation to decisions which are not simply about identified individual children, include those of children generally. This is apparent throughout the document, including in those passages from paragraph 6 cited by Lord Carnwath JSC. I respectfully agree with Baroness Hale DPSC that where article 3.1 applies it is not enough to E consider only the interests of children generally, without also evaluating the interests of any likely to be particularly affected by the legislation in prospect, but the converse is also true. It is obvious that in the context of this kind of socio-economic legislation, there will be a tension between, on the one hand, the interests of children generally in promoting the legitimate aims of reducing a culture of benefit-dependency and encouraging work and, on F the other, the special interests of those children most likely to suffer an adverse effect of the cap, such as the present appellants. This is realistically recognised by the United Nations Committee in, for example, paragraph 32 of the Comment, which reads:

> "The concept of the child's best interests is complex and its content must be determined on a case-by-case basis. It is through the G interpretation and implementation of article 3, paragraph 1, in line with the other provisions of the Convention, that the legislator, judge, administrative, social or educational authority will be able to clarify the concept and make concrete use thereof. Accordingly, the concept of the child's best interests is flexible and adaptable. It should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal H context, situation and needs. For individual decisions, the child's best interests must be assessed and determined in light of the specific circumstances of the particular child. *For collective decisions—such as by the legislator—the best interests of children in general must be assessed and determined in light of the circumstances of the particular group*

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and/or children in general. In both cases, assessment and determination should be carried out with full respect for the rights contained in the Convention and its Optional Protocols." (Emphasis supplied.)

154 Whilst the appellants in the present case relied on article 3.1 as "substantive and not merely procedural" they did not analyse the extent to which it was asserted that priority ought to be given to children's best interests, still less the interests of which children. Their chief reliance was on the suggested failure of the Secretary of State properly to have analysed and considered the best interests of children. Relying on paragraph 6 of the United Nations Committee's General Comment, the principal submission of Mr Wise was that the article 3 obligation required (a) careful consideration of how many children will be or are likely to be affected by the cap, (b) asking what the effect on those children particularly affected by it would be, (c) asking whether the cap could be implemented in a manner protecting such children from adverse effects, and (d) asking whether the general proposition that the cap will lift children out of welfare dependency outweighs the risk to those particularly affected.

155 Like both courts below I regard it as plain that the Secretary of State did not fail to undertake all these exercises. There was the fullest public debate about not only the concept of the cap but its proposed details. This country has four Children's Commissioners, charged with the duty of monitoring children's interests and advocating them publicly. All participated in the debate and made strongly the case now made by the appellants that the general benefits to families and children which would be brought by the cap were outweighed by the likely adverse consequences for particular children in situations exactly like those of the present appellants. The two impact assessments and the equality impact assessment written by the Government recorded the likely adverse consequences for children such as these, in particular those in larger one-parent families living in high rent areas. The parliamentary debate on the detailed proposals returned time and again to this topic. There was a specific proposal, supported by the House of Lords, to amend the Bill by excluding child benefit from the cap, which, as Baroness Hale DPSC observes, would no doubt remove the adverse impact on the appellants here relied upon; this proposal was considered but rejected by the House of Commons and withdrawn in consequence by the House of Lords. The Secretary of State concluded, and still concludes, that to do this would drive a coach and horses through the whole policy. The evidence could not really be clearer that the Secretary of State did indeed ask the questions which Mr Wise contends are required by article 3 of the UNCRC. The appellants' real complaint is that he reached what they say is the wrong value judgment when it came to balancing the interests of children (and society) in general against those of particular children likely to suffer adverse effects from the cap. Reasonable people may well either agree or disagree with this value judgment, but to say that one disagrees is not the same as saying that the decision is unlawful.

BARONESS HALE OF RICHMOND DPSC

156 The "benefit cap" is one of a package of measures provided for in the Welfare Reform Act 2012. The total amount of benefit to which a couple or a single person is entitled is capped at a prescribed sum, irrespective of

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A how much they would otherwise be entitled to. The bare bones of the scheme are provided for in the 2012 Act, but its detailed implementation is contained in the Benefit Cap (Housing Benefit) Regulations 2012.

157 The appellants do not challenge the compatibility of the Act with their rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms, but they do challenge the compatibility of the way in which it has been implemented by the 2012 Regulations. They B argue that it has a disproportionate impact on lone parents and on the victims of domestic violence; both groups are predominantly, although not exclusively, composed of women; hence the scheme is indirectly discriminatory on grounds of sex. As the scheme falls within the ambit of the protection of property rights in article 1 of the First Protocol to the Convention, this violates their right, under article 14 of the Convention, to C enjoy such rights without discrimination unless it can be justified. The Secretary of State accepts that the scheme falls within the ambit of article 1 of the First Protocol and that it is indirectly discriminatory against lone parents and thus against women. The question, therefore, is whether it can be justified. A further question, which has only emerged after the hearing in April 2014, is the extent to which, if at all, the obligations of the United D Kingdom under the United Nations Convention on the Rights of the Child is relevant to that issue.

158 Both the Divisional Court [2014] PTSR 23 and the Court of Appeal [2014] PTSR 619 held that it can be justified. This raises several questions: whether the justification advanced relates to the scheme as a whole rather than to its discriminatory effect; what is the test to be applied in deciding whether the discrimination is justified; and what is the part played by the E international obligations of the United Kingdom under the United Nations Convention on the Rights of the Child in assessing that.

159 The benefit cap is, of course, quintessentially a matter of social and economic policy. In such matters, as Lord Hope of Craighead observed in *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, 381, it will be easier for the courts to recognise a discretionary "area of judgment F within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention". As Lord Reed JSC explains, the introduction of the cap was indeed extensively debated in Parliament and various amendments were proposed and resisted which would have mitigated the adverse effects with which we are here concerned. But the details of the scheme, including those adverse effects, were deliberately left G to be worked out in Regulations. It is therefore the decisions of the Government in working out those details, rather than the decisions of Parliament in passing the legislation, with which we are concerned.

160 Furthermore, as Lord Hope went on to say in *In re G (Adoption: Unmarried Couple)* [2009] AC 173, para 48, protection against discrimination, even in an area of social and economic policy, falls within H the constitutional responsibility of the courts:

> "Cases about discrimination in an area of social policy, which is what this case is, will always be appropriate for judicial scrutiny. The constitutional responsibility in this area of our law resides with the courts. The more contentious the issue is, the greater the risk is that some

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> people will be discriminated against in ways that engage their Convention rights. It is for the courts to see that this does not happen. It is with them that the ultimate safeguard against discrimination rests."

Therefore, even in the area of welfare benefits, where the court would normally defer to the considered decision of the legislature, if that decision results in unjustified discrimination, then it is the duty of the courts to say so. In many cases, the result will be to leave it to the legislature to decide how the matter is to be put right.

The scheme

161 It is not necessary to go into the scheme in great detail, but it is necessary to understand the essentials. Section 96(1) of the 2012 Act provides: "Regulations may provide for a benefit cap to be applied to the welfare benefits to which a single person or couple is entitled". Section 96(2) provides that where their total entitlement to "welfare benefits" exceeds the "relevant amount", their entitlement is reduced by the amount of the excess. This is the cap. The "relevant amount" is to be specified in Regulations (section 96(5)), but "is to be determined by reference to estimated average earnings" (section 96(6)). By this is meant "the amount which, in the opinion of the Secretary of State, represents at any time the average weekly earnings of a working household in Great Britain after deductions in respect of tax and national insurance contributions": section 96(7). "Welfare benefit" means any benefit, allowance, payment or credit prescribed in Regulations (section 96(10)); but retirement pensions and state pension credit may not be prescribed: section 96(11). Regulations may also provide for exceptions to the application of the cap (section 96(4)(c)) and also for the benefit or benefits from which the reduction is to be made (section 96(4)(b)).

162 Thus it will be seen that all the details of the scheme are to be covered in the Regulations. The only principle required by the Act, should the Government decide to introduce a cap at all, is that it is set by reference to average weekly earnings net of tax and national insurance contributions. This, as Mr Holmes, the lead official in the Department of Work and Pensions responsible for the benefit cap policy, points out, produces a much higher figure than would be produced by working 40 hours a week for the minimum wage or even the London living wage. But the Government was left a free hand in deciding what working age benefits would count towards the cap.

163 In fact, the cap operates by way of a deduction from housing benefit. Hence the 2012 Regulations amend the Housing Benefit Regulations 2006, principally by introducing a new Part 8A, entitled "Benefit cap". The "relevant amount" is set at £350 for a single claimant (without dependent children) and £500 for all other claimants (that is, couples and lone parents with dependent children): regulation 75G. This is the equivalent of a gross annual salary of £35,000 a year and £26,000 net. A long list of welfare benefits is prescribed, most importantly for our purposes including housing benefit, child benefit and child tax credit: regulation 75G. Once the cap is reached, therefore, no account is taken of the number of children in the family. On the other hand, the benefit cap does not apply at all where the claimant, the claimant's partner or a child or young person for whom either is responsible is receiving any of a long list of benefits; these are mainly disability-related but include a war pension: regulation 75F.

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A **164** The cap does not apply at all where the claimant is, or the claimant and her partner are jointly, entitled to working tax credit: regulation 75E(1)(2). This effectively exempts most working households from the cap; the rules are complicated, but a lone parent responsible for a child would qualify for working tax credit if she worked at least 16 hours a week, while a couple responsible for a child would qualify if they worked a total of 24 hours a week, as long as one of them worked for at least 16 hours a B week; the normal requirement is 30 hours' work a week: regulation 4 of the Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002 (SI 2002/2005), as amended by regulation 2 of the Tax Credits (Miscellaneous Amendments) Regulations 2012 (SI 2012/848). Not only that, if the claimant or her partner have been employed or engaged in work for payment for 50 out of the preceding 52 weeks, the benefit cap will not C apply for 39 weeks from their last day of work: regulation 75E(1)(3)–(5). This gives a period of grace in which to find another job or to move house.

165 The final regulation which is relevant for our purposes is that which provides, in effect, that the housing benefit payable for what is now (following a recent amendment by regulation 3 of the Housing Benefit and Universal Credit (Supported Accomodation) (Amendment) D Regulations 2014) to be termed "specified accommodation" is disregarded: regulation 75C(2)(a). The amendment means that women's refuges are now covered, whereas previously many of them were not. However, there is no comparable exemption for housing benefit paid in respect of temporary accommodation provided under the homelessness provisions of Part VII of the Housing Act 1996.

166 The benefit cap was introduced in April 2013 in four London E boroughs, "rolled out" in July 2013 to a further 335 local authorities and in August 2013 to the remaining 40 authorities in England, Wales and Scotland. It has not yet been implemented in Northern Ireland. Between April 2013 and January 2014, a total of 38,655 households were capped, 47% of these in London and the vast majority in England.

167 As Elias LJ, giving the judgment of the Divisional Court, observed F [2014] PTSR 23, para 11:

> "It was obvious from the outset that the introduction of the cap would have severe and immediate consequences for claimants who had been receiving substantially in excess of the relevant amount."

To mitigate this, the Government provided additional funds to local authorities to enable them to make discretionary housing payments G ("DHPs") to claimants affected by the cap (along with the other purposes for which such payments may be made). This was specifically intended as a short term solution where transitional help was necessary and not as a long term solution to the needs generated by the cap: see Holmes, witness statement No 1, para 130.

168 Elias LJ continued, at para 12:

H

> "The two items most likely to trigger the operation of the cap [are] housing benefit [and] the number of children in the family. Housing benefit reflects (but does not necessarily meet in full) the cost of housing, whether social or private. Accordingly, the cap will bear most heavily on those in receipt of benefit who live in areas where rental costs are high. In

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practical terms, therefore, this means that those who live in London or in the centre of other big cities where rents tend to be high will be most likely to be affected. It is a striking feature of the scheme—and lies at the heart of this application—that the cap applies equally to a childless couple in an area with cheap and plentiful social housing as it does to a lone parent mother of several children in inner London compelled to rent on the private market."

The appellants' circumstances

169 The four appellants are the lone mother and her youngest child in two families (a third family has now withdrawn from the case as the cap no longer applies to them). The following evidence of their circumstances was before the court when the case was heard in April 2014.

170 Ms S G and her family live in Stamford Hill, North London. This is important because they are members of a particular orthodox Jewish sect. The school age children attend a local Jewish school, kosher food is readily available (but expensive) in the local shops, they can walk to the synagogue and there is a support network of family and friends there. Their lone mother has six children in all, but only three of them live with her: a son now aged four, a daughter now aged seven and another daughter now aged nine. The family used to live in Belgium, but SG left her husband and came to live near her relatives in Stamford Hill in order to escape from her husband's abusive behaviour towards her and their eldest daughter, now aged 18. The daughter was made a ward of court to prevent her father removing her from this country. Because of her behavioural and psychological difficulties she was placed by the local authority in foster care within the same community. She has since married but still lives locally and relies heavily on her mother for support. The oldest son studies in a yeshiva abroad and is unlikely to rejoin the family, but there are currently proceedings in Belgium about the residence of the second son, now aged 12, whom his mother earnestly hopes can return to live with the family in London.

171 The family live in a two-bedroomed flat rented from a private landlord. This is already too small for them and would be quite unsuitable were the 12-year-old boy to come and live with the family again. When these proceedings began, the rent was £300 per week, but the landlord was proposing to put it up. They were entitled to £289·20 housing benefit, £71·70 income support for SG, £167·30 child tax credit (all means-tested benefits), and £47·10 child benefit. Hence their total benefit entitlement before the cap was £575·30 a week. The cap has therefore resulted in a reduction of £75·30 in their weekly income. The landlord has notified an increase in her rent to £420 from 31 January 2014, which would leave them with only £80 to live on.

172 The Secretary of State correctly points out that housing benefit would not in any event meet such a high rent in full (because it exceeds the local housing allowance limit for that part of London). He also argues that there are cheaper two-bedroomed flats available in the area, but the appellants dispute this. We are not in a position to resolve such factual disputes. However, it is obvious that SG has very good reasons for wanting to continue to live in Stamford Hill, that accommodation there is in short supply because of demand from the local community, and that if she does

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A stay there her weekly income will fall well below that which the state deems necessary for her and her three young children to live on.

173 For a time, she did have part time work for 16 hours a week and thus the benefit cap did not apply. But she was unable to sustain this, owing to the demands of the court proceedings relating to her children, both here and in Belgium, and the need to care for the younger children. The 39 week grace period expired in November 2013, since when her benefits have been B capped. She has been receiving a discretionary housing payment to meet the shortfall between her rent and her housing benefit, but only until 30 June 2014, when it was due to be reviewed having regard to the steps she has taken to avoid the cap.

174 Mrs N S is also the lone mother of three children, daughters now aged 4, 11 and 12. There is a long history of sexual abuse and domestic C violence within her marriage, much of it witnessed by the children. She had left her husband to stay in a women's refuge with the children on two previous occasions before their final separation in December 2012. After a period in unsuitable accommodation, she obtained orders excluding her husband from the family home, and returned there with the children in April 2013. Her husband is prohibited from contacting the family there, but last D summer they had to turn to him for help with transport when one child suffered an accident requiring surgery and the other two became ill. NS is concerned that the local children's services authority will consider her children to be at risk of harm if they have contact with their father.

175 Their home is also a two-bedroomed flat rented from a private landlord. It is also too small for them but is close to the children's schools. The rent is £270 a week. She is entitled to £270 housing benefit, £71·70 E income support for NS, child tax credit for the children of £166·94 (although she says that she gets only £162·44), and child benefit of £47·10. Her total entitlement therefore should amount to £555·74 (although she says that she gets only £550·44). Whichever it is, the cap reduces it to £500.

176 NS was awarded discretionary housing payments, but only after a delay during which arrears accrued to her rent account, and only until F 31 March 2014. The local authority has yet to decide on its DHP budget for this year and so she does not know whether or not she will get it. She is of course concerned that the landlord may seek to evict her if she falls into arrears.

177 NS did not work outside the home during her marriage, nor has she done so since it ended. She was allowed very little freedom by her husband and speaks very little English.

G

Why is the scheme discriminatory?

178 It is common ground that the scheme falls within the ambit of article 1 of the First Protocol, which protects the right to peaceful enjoyment of possessions. Possessions for this purpose includes entitlement to welfare benefits, not only those which have been "paid for" by national insurance H contributions, but also those which the state provides on a non-contributory basis to supply its people with the basic necessities of life. As the Strasbourg court explained in *Stec v United Kingdom* (2006) 43 EHRR 1017, para 53:

> "Article 1 of Protocol No 1 does not include a right to acquire property. It places no restriction on the contracting state's freedom to

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decide whether or not to have in place any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme. If, however, a state does decide to create a benefits or pension scheme, it must do so in a manner which is compatible with article 14 of the Convention."

179 It has not been argued that the benefit cap is itself a violation of article 1 of the First Protocol, on the basis that it deprives affected households of the benefits to which they would be entitled under the usual rules relating to needs-related welfare benefits. Instead, it is argued that it violates article 14, which provides "the enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex . . ." It is not suggested that the scheme is directly discriminatory against women, as it affects all benefit claimants in the same way, irrespective of their sex. However, as the Divisional Court observed [2014] PTSR 23, para 71: "It is clear, and indeed conceded, that the benefit cap has a disproportionate adverse impact on women". This brings it within the concept of indirect discrimination, which was recognised by the Grand Chamber of the European Court of Human Rights in *DH v Czech Republic* (2007) 47 EHRR 59, para 175 (see also para 184):

> "The court has also accepted that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group, and that discrimination potentially contrary to the Convention may result from a de facto situation."

The court had earlier recognised the same concept in the cases of *Jordan v United Kingdom* (2001) 37 EHRR 52, para 154 and *Hoogendijk v Netherlands* (2005) 40 EHRR SE 189, 207.

180 The prejudicial effect of the cap is obvious and stark. It breaks the link between benefit and need. Claimants affected by the cap will, by definition, not receive the sums of money which the state deems necessary for them adequately to house, feed, clothe and warm themselves and their children. Furthermore, the greater the need, the greater the adverse effect. The more children there are in a family, the less each of them will have to live on. Ms SG, for example, will receive no more benefit if her 12-year-old son rejoins the family, even though a court (either here or in Belgium) has decided that it is in his best interests to do so. This prejudicial effect has a disproportionate impact on lone parents, the great majority of whom are women, and is also said to have such an impact on victims of domestic violence, most of whom are also women.

181 The disproportionate impact on lone parents is relatively straightforward to explain. The relevant comparison is between those housing benefit claimants who are, and those who are not, affected by the benefit cap. Lone parents constitute around 24% of all claimants for housing benefit, but have so far constituted between 59% and 74% of those affected by the cap. This is more than double their proportion in the housing benefit population as a whole. Overall some 92% of lone parents are women. Hence it is not surprising that the Government predicted, in its first Equality Impact Assessment of the Benefit Cap (March 2011, para 27), that single women, mostly lone parents, would constitute 60% of those affected.

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A 182 The reasons for this are fairly obvious. It is much more difficult for lone parents to move into paid employment, even for the 16 hours which would take them out of the cap. It is more difficult for them to do so, the more children they have, because of the problems of delivering and collecting children from different schools or day care placements, the problems of making appropriate day care arrangements for very young children and for all children during the school holidays, the problems of B responding to their children's illnesses, accidents and to casual school closures. The more children they have, the harder it will be for them to move into work; and the more children they have, the harsher will be the effects of the cap. These problems arise irrespective of the ages of the children, but are obviously more acute when any or all of them are under school age.

183 The disproportionate effect which the cap is said to have on victims C of domestic violence, most of whom will also be parents, is a little more complicated. It stems from the limited options available to victims who wish to escape, with their children, from the violence and abuse which they are suffering at home. Some victims are fortunate enough to be able to stay in their own homes while the perpetrator either agrees or is ordered to leave and having done so can be relied on to stay away. But many are not so fortunate. Their only way of escaping the violence, at least in the first D instance, is to leave home. If they go to a refuge, the problem is that the costs may easily take them over the cap. Under the original scheme, some refuges counted as "exempt" accommodation, which effectively created an exception to the cap, but many did not. Very recently, the Government has addressed this, by amendments which will create an exception for all refuges.

E 184 But not all victims can go to a refuge. Their other alternative is to apply to the local authority for accommodation under the homelessness provisions of Part VII of the Housing Act 1996. Unlike the cost of refuges, the cost of other types of temporary accommodation is not exempt. Temporary accommodation is often in the private sector and much more expensive than permanent accommodation in social or other forms of affordable housing. Furthermore, as the intervention from Shelter makes F clear, a homeless person has very little choice about where she is housed. She has to accept any offer of "suitable" accommodation or risk becoming literally without a home (and even having her children taken away from her as a result). In areas of high housing need, families may stay for a very long time in so-called "temporary" accommodation before affordable permanent housing becomes available.

G 185 Some of these victims will want to keep open the possibility of returning to the family home, or securing a transfer, once the family court has decided who is to live there. Hence, very sensibly, the housing benefit scheme provides that in certain circumstances councils may continue to pay benefits in respect of two homes for a certain length of time: regulation 7(6)(a) of the Housing Benefit Regulations 2006. But this, of course, means that the total amount of housing benefit, when taken together H with other benefits, will take the claimant over the limit where the cap applies.

186 Thus, even with the recent change relating to refuges, the effect of the cap is to undermine the humane treatment given to victims of domestic violence both by the homelessness regime and by the housing benefit scheme.

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However, although both of the families whose cases are before us have suffered from domestic violence and abuse, they have not suffered these particular adverse effects (we do not know whether Mrs NS's family was in receipt of dual housing payments between December 2012 and April 2013, but in any event that was before the cap came into force), nor do they claim to be at risk of suffering them in the future. For this reason, the Divisional Court and the Court of Appeal declined to decide whether the cap did have a disproportionate effect on the victims of domestic violence. Mr Wise, for the appellants, complains that they should have done so. The appellants have both suffered domestic violence and abuse and Mrs N S might well have to flee to expensive temporary accommodation while wishing to retain the family home should her husband once again try to assert his control over her.

187 In my view, however, the problems suffered by the victims of domestic violence are principally suffered because they are parents who have every reason to separate from the other adult in the household, not only for their own sake but also for the sake of their children. Of course, there may be some victims of domestic violence who are not responsible for the care of children, but it has not been shown how likely it is that they will be affected by the cap or how difficult they would find it to escape its adverse impact. I would therefore treat the victims of domestic violence as a subset of lone parents, who may be more likely to be affected by the cap because of the high cost of temporary accommodation and the dual payments problem, and who will have the same problems in escaping its effects.

How is the discrimination justified?

188 The applicable principles are set out in the Grand Chamber judgment in *Stec v United Kingdom* 43 EHRR 1017, para 51:

> "Article 14 does not prohibit a member state from treating groups differently in order to correct 'factual inequalities' between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the article. A difference of treatment is, however, discriminatory if it has no objective and reasonable justification; in order words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The contracting state enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment."

Two points are clear from this. The first is that it is not the scheme as a whole which has to be justified but its discriminatory effect: see *A v Secretary of State for the Home Department* [2005] 2 AC 68, para 68, per Lord Bingham of Cornhill; *AL (Serbia) v Secretary of State for the Home Department* [2008] 1 WLR 1434, para 38, per Baroness Hale of Richmond. It is not enough for the Government to explain why they brought in a benefit cap scheme. That can readily be understood. They have to explain why they brought in the scheme in a way which has disproportionately adverse effects on women.

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A 189 However, it is important to understand that what is needed to justify indirect discrimination is different from what is needed to justify direct discrimination. In direct discrimination, it is necessary to justify treating women differently from men. In indirect discrimination, by definition, women and men are treated in the same way. The measure in question is neutral on its face. It is not (necessarily) targeted at women or intended to treat them less favourably than men. Men also suffer from it. B But women are disproportionally affected, either because there are many more of them affected by it than men, or because they will find it harder to comply with it. It is therefore the measure itself which has to be justified, rather than the fact that women are disproportionately affected by it. The classic example is a maximum age bar on recruitment to particular posts; it applies to all candidates, women and men; but it disadvantages women C because they are more likely to have taken a career break to have or care for children than are men. The question therefore is whether the age bar can be independently justified. This long-standing position is reflected in the definition of indirect discrimination in section 19 of the Equality Act 2010. It was also the approach of the Strasbourg court in *Hoogendijk v Netherlands* 40 EHRR SE 189, a case of indirect discrimination in relation D to welfare benefits.

190 Turning to the explanations offered for the cap, it is important to recognise that the Government has never claimed that its aim is to encourage claimants to limit the size of their families or to penalise those who already have large families (had they done so, they might perhaps have faced discrimination claims on other grounds). The evidence before the court is contained in two witness statements from Mr Holmes. He states that the E Government had three specific aims in introducing the benefit cap: (i) to "introduce greater fairness in the welfare system between those receiving out-of-work benefits and tax payers in employment"; (ii) to make financial savings (anticipated to be £110m in 2013/14 and £185m in 2014/15) and "more broadly, help make the system more affordable by incentivising behaviours that reduce long term dependency on benefits"; and (iii) to F increase incentives to work. This is later described as "the main aim of the policy": Holmes, witness statement No 1, para 107. To a great extent, these objectives overlap, as the principal aim is to make being in work more attractive than being out of work, to encourage people into work, and to reduce long term dependence on benefits, thus not only saving public money but also improving the long term future of these families. No one can G seriously doubt that these are legitimate aims which would probably be supported by most of the population. The question, however, is whether these reasons for bringing in the cap can justify the sex discrimination involved in the way in which it has been implemented. Before turning to that question, however, it is worth examining the criticisms made of each of the objectives claimed.

H *(i) Fairness*

191 It is accepted that achieving fairness between those in work and those out of work is a legitimate aim. As Elias LJ recognised [2014] PTSR 23, para 94: "the fairness concept has sometimes been justified by relying on the notion that those on benefit should face difficult decisions of the kind

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A facing those in work". But there are many different ways of defining such fairness. It could be that a family on benefits should *never be better off* than a working family of the same size living in the same accommodation. It could be that a family on benefits should *always be worse off* than the equivalent working family. Or it could be that a family on benefits should *always be much worse off* than the equivalent working family.

B **192** The criticism levelled at the Government's concept of fairness, in particular in the intervention from the Child Poverty Action Group, is that the benefit cap scheme as implemented does not compare like with like. It compares the maximum level of benefit with average *earnings*, thus ignoring the benefits which are also available to people who are in work. CPAG have produced tables (not challenged in these proceedings) comparing the income available to each of the appellant families according to whether they are C (a) not working but without the cap, (b) working 16 hours per week on the minimum wage, (c) working for average household earnings, and (d) working 35 hours a week for the minimum wage. These show that both Ms S G and her children and Mrs N S and her children would be (in round figures) £94 a week better off in scenario (b) than in scenario (a), £163 better off in scenario (c), and £122 better off in scenario (d). In other words, they D would *always* be significantly better off in work than not in work. CPAG have also produced tables which show that this would also be the case wherever in the country these families were living. The effect of the cap is simply to increase the differential which is already there.

193 Thus, it is said, there was no need to introduce the benefit cap in order to ensure that families on benefit have to make the same difficult choices that working families have to make. They already do have to make E those choices. If this is so, the focus shifts to the other two objectives.

(ii) Saving public money

194 The savings projected by the Treasury in the 2013 budget were £110m in 2013/2014 and £185m in 2014/2015. These did not take into account the possible implementation costs or the additional funding made F available for DHPs of £65m and £35m respectively. On the other hand, nor did they take into account any resulting behavioural changes. The aim was not merely to make savings in the short term but to "produce a positive cultural shift": Holmes, witness statement No 2, para 36.

195 It has to be accepted that the savings made are a drop in the ocean compared with the total benefit bill, let alone the total housing benefit bill. G The Government predicted that only 1% of housing benefit claimants would be affected by the cap. In May 2013, there were approximately five million housing benefit claimants, yet in January 2014 there were less than 28,000 households subject to the cap, not much over half a percent of all claimants. Lone parents subject to the cap were 1·37% of all claimants (further demonstrating that they are disproportionately affected).

H **196** However, the main argument made against this aim is that, standing alone, it is not sufficient to justify discriminatory treatment in the enjoyment of a Convention right. The authority cited for this proposition is *Ministry of Justice (formerly Department for Constitutional Affairs) v O'Brien (Council of Immigration Judges intervening)* [2013] 1 WLR 522. This was a case about discrimination between full-time and part-time

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A workers, which is prohibited by the Framework Agreement on Part-time Work, annexed to Council Directive 97/81/EC.

197 However, in *Andrejeva v Latvia* (2009) 51 EHRR 650, the Strasbourg court accepted that the "protection of the country's economic system" is a legitimate aim which is "broadly compatible with the general objectives of the Convention": para 86. They therefore looked to see whether there was a reasonable relationship of proportionality between that B legitimate aim and the means employed. As the discrimination in that case was based solely on nationality, for which "very weighty reasons" would be required for compatibility with the Convention, the court held that it was not justified: paras 87–88. The same would apply to sex discrimination. If the state introduces a benefit, for example for older people, but denies it to women on the basis that this will save money, this would be contrary to C article 14 read with article 1 of the First Protocol, unless there were some other justification for the difference in treatment. The court found such a justification in *Stec* 43 EHRR 1017, because the difference complained of was the result of the difference between the retirement ages of men and women, itself a response to the disadvantage suffered by women in the workplace. This brings the focus back to the proportionality of any D discrimination involved in a money-saving measure.

198 Mr Holmes also refers in his evidence to "a clear, simple message that there has to be a maximum level of financial support beyond which claimants cannot expect the state to provide" (witness statement No 1, para 98) and "one of the key drivers for introducing the cap, that ultimately there has to be a limit to the overall amount of financial support that households in receipt of out of work benefits can expect to receive in welfare E payments": para 104. However, it is difficult to see how the delivery of such a message can be an aim in itself if the message is the product of a measure which cannot be justified.

(iii) Incentivising work and promoting long term behavioural change

199 On analysis, it is therefore said, the Government's aims come down F to incentivising work and promoting long term behavioural change. Again, no one doubts that these are legitimate aims, not only in order to save public money but also, as Mr Holmes put it, "to achieve long term positive behavioural effects by changing attitudes to welfare and work and encouraging responsible life choices, which will benefit adults and children alike": witness statement No 1, para 121. Put another way, it is not good for G children to grow up in a household which is wholly supported by the state, if thereby they absorb the message that there will be no need for them to support themselves when they grow up.

200 However, the Government has accepted that certain people should not be expected to seek work in order to escape the cap. Thus retirement pension and state pension credit are not taken into account because "the policy is primarily a work incentive aimed at people of working age": H Holmes, witness statement No 1, para 100. Thus also the cost of "supported accommodation" is not taken into account because "households in supported accommodation are likely to be in vulnerable situations . . . and they will not generally be in a position to make quickly the behavioural changes required to remove themselves from the cap": para 105. Thus also

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the "disability-related exemptions mean that the cap will not apply to people who are least likely to be able to work and who perhaps have the least scope to adjust their circumstances to improve their employment prospects": para 112. Lone parents of children under five are also not expected to seek work, but they are subject to the cap.

201 As well as moving into work, the other choices the Government wished to encourage as a way of avoiding the cap included persuading the landlord to take less rent, moving to cheaper accommodation, reducing expenditure on non-housing items, and in the case of lone parents seeking child maintenance from the other parent, which is wholly disregarded for the purpose of the cap: Holmes, witness statement No 1, paragraph 124.

202 Against this, both the appellants and the interveners argue that these expectations are simply unrealistic in the case of the families of lone parents and victims of domestic violence, on whom the policy has such an adverse effect. For the reasons already mentioned, lone parents, especially those with more than one child, find it particularly difficult to obtain even part time work which will fit in with their child care responsibilities. It is accepted, of course, that there are some lone parents, even of very young children, who do manage to do this. Adequate and subsidised day care is now more readily available. But it is unrealistic to assume that parents will always be able to find acceptable solutions without prejudice to their children's welfare. The Government accepts that lone parents of children under five should not be expected to look for work, no doubt partly because of the difficulties of finding acceptable and affordable child care, but perhaps also because many parents and child care professionals consider it better for very young children to have the full time loving care of a committed parent rather than be separated from them and placed in institutional settings, however competent, for a large part of the day. Even if we accept that it is justifiable to deny this choice to those lone parents who are subject to the benefit cap, we should not accept that their children's welfare should be put at risk by their having to make unsatisfactory child care arrangements or (as in the case of Mrs NS) to rely on assistance from a violent partner which the local children's services authority fears may put the children at risk.

203 Nor is it realistic to assume that they will eventually be able to move to cheaper accommodation. Many private landlords, particularly in the more expensive areas, are unwilling to take tenants who are dependent on housing benefit. In any event, they will require deposits and rent in advance, which the family will not be able to afford (unless they can persuade the local children's services authority to help out under section 17 of the Children Act 1989). Social housing is in short supply, with long waiting lists which may well require a qualifying period of residence in the area before a person is even placed on the list. The allocation criteria under Part VI of the Housing Act 1996 do give preference to those homeless families to whom the full housing duty is owed under Part VII of that Act: section 167(2)(a) of the 1996 Act, as substituted by section 16 of the Homlessness Act 2002. But if the family try to move to another local authority area where housing is cheaper or more plentiful, they may be refused on the ground that they have no local connection with that area. It will be particularly difficult for them to move if they have rent arrears, but the benefit cap is very likely to lead to rent arrears unless there is a speedy

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A grant of a discretionary housing payment to fill the gap, which certainly cannot be guaranteed.

204 The Court of Appeal has recognised that discretionary housing payments are not an answer. In *Burnip v Birmingham City Council* [2013] PTSR 117, the Court of Appeal held that it was unjustifiably discriminatory to limit a severely disabled man who needed an overnight carer to the housing benefit payable for a one-bedroomed flat. As Henderson J B explained, at para 46, where there is a gap between objectively verifiable need and the housing benefit payable:

> "Discretionary housing payments were in principle available as a possible way of bridging this gap, but they cannot in my judgment be regarded as a complete or satisfactory answer to the problem. This C follows from the cumulative effect of a number of separate factors. The payments were purely discretionary in nature; their duration was unpredictable; they were payable from a capped fund; and their amount, if they were paid at all, could not be relied upon to cover even the difference between the one and two bedroom rates of LHA [local housing allowance], and still less the full amount of the shortfall. To recognise these shortcomings is not in any way to belittle the valuable assistance D that discretionary housing payments are able to provide, but is merely to make the point that, taken by themselves, they cannot come anywhere near to providing an adequate justification for the discrimination in cases of the present type."

The additional money made available for DHPs when the benefit cap was introduced is not ring-fenced. As Mr Holmes makes clear, these payments E were never intended to be a long term solution to the problems facing claimants like these.

205 It was predicted that there would be an increase in evictions and homelessness as a result of the benefit cap. If the family does become homeless because of the cap, the Government hopes that neither the local housing authority nor the courts will regard them as intentionally homeless. F They will have a priority need and should therefore be owed the full housing duty under Part VII of the 1996 Act: sections 189(1)(b) and 193(2). Nevertheless, it may take a very long time before permanent accommodation becomes available, during which time they will be placed in temporary accommodation, often in the private sector. This is known to be more expensive than permanent accommodation. In other words, if they G become homeless as a result of the cap, they are equally likely to be capped in their temporary accommodation. They do not have a choice. Provided the accommodation is "suitable" they have to take what is offered. The Government points out that affordability is part of suitability, but there may well be nothing else available. Local housing authorities have difficulty finding enough accommodation, and it is simply unrealistic to expect a homeless family to turn down an offer of otherwise suitable accommodation H on the basis that it is not affordable. The Government wishes to encourage local authorities to move people out of temporary accommodation as soon as possible (Holmes, witness statement No 1, para 114), but the question is whether depriving homeless families of the full cost of such accommodation is a proper way to put pressure on local authorities to do so.

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206 In addition, there are many other reasons why it may be quite unreasonable to expect a lone parent to move to another area. Finding new schools for several children in an unfamiliar area is not straightforward, nor is it good for the education which will in the long term be the best way of lifting those children out of poverty. Thus the Divisional Court concluded (at [2014] PTSR 23, para 27, echoed almost precisely at para 22 in the judgment of the Court of Appeal [2014] PTSR 619):

> "In the case of each of these claimants, therefore, there are powerful reasons why the suggested ways of mitigating the effects of the cap are not appropriate. The sums are simply too great to bring [their] finances under control by prudent housekeeping; they are for various reasons not in a position to work; and they have educational and/or cultural and support reasons why they do not want to move any distance from their current homes."

207 As the Child Poverty Action Group point out, the Government accepted in its grounds of resistance to the claim that "the aim of incentivising claimants to work may be less pertinent for those who are not required to work" (such as parents with young children). Hence it has to fall back on "making fiscal savings and creating a system which is fairer as between those receiving out of work benefits and working households".

The test

208 The Strasbourg court will, of course, allow contracting states a margin of appreciation in assessing whether the difference in treatment is justified. As is well known, the width of that margin differs according to the subject matter. In *Stec* 43 EHRR 1017, para 52 the court went on to explain:

> "The scope of this margin will vary according to the circumstances, the subject matter and the background. As a general rule, very weighty reasons would have to be put forward before the court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention. On the other hand, a wide margin is usually allowed to the state under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the court will generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation'."

209 The references cited for the "manifestly without reasonable foundation" test were *James v United Kingdom* (1986) 8 EHRR 123, para 46 and *National & Provincial Building Society v United Kingdom* (1997) 25 EHRR 127, para 80, both cases complaining of a violation of article 1 of the First Protocol. In *AXA General Insurance Ltd v HM Advocate* [2012] 1 AC 868, both Lord Hope of Craighead DPSC, at para 31, and Lord Reed JSC, at para 124, treated this test as directed towards whether the measure is "in the public interest", in other words to whether it has a legitimate aim. They dealt separately with whether the interference

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A with property rights was proportionate. They relied on cases such as *Pressos Compania Naviera SA v Belgium* (1995) 21 EHRR 301, para 38, where the Strasbourg court appears to have regarded this as a separate question:

> "An interference with the peaceful enjoyment of possessions must strike a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's B fundamental rights . . . In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions."

(See also *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] 2 WLR 481, para 52.) In this case, the complaint is of discrimination C in interfering with the peaceful enjoyment of possessions rather than of deprivation of possessions as such. Nevertheless, the benefit cap does come close to a deprivation of possessions, given that it removes, by reference to a fixed limit, benefit to which the claimants would otherwise be entitled by virtue of their needs and, more importantly, the needs of their children.

210 When it comes to justifying the discriminatory impact of an D interference with property rights, a distinction might similarly be drawn between the aims of the interference and the proportionality of the discriminatory means employed. However, it has been accepted throughout this case that the "manifestly without reasonable foundation" test applies to both parts of the analysis; but that, as this court said in *Humphreys v Revenue and Customs Comrs* [2012] 1 WLR 1545, para 22, "the fact that the test is less stringent than the 'weighty reasons' normally required to E justify sex discrimination does not mean that the justifications put forward for the rule should escape careful scrutiny".

Relevance of the United Nations Convention on the Rights of the Child

211 In *Burnip's* case [2013] PTSR 117, para 21 Maurice Kay LJ pointed out that "In the recent past, the European Court of Human Rights has shown F an increased willingness to deploy other international instruments as aids to the construction of the Human Rights Convention". He cited, among others, the important case of *Opuz v Turkey* (2009) 50 EHRR 695, para 185:

> "[When] considering the definition and scope of discrimination against women, in addition to the more general meaning of discrimination as G determined in its case law, the court has to have regard to the provisions of more specialised legal instruments and the decisions of international legal bodies on the question of violence against women."

212 *Burnip* was concerned with discrimination against disabled people by failing to make reasonable accommodation for their special needs. The United Nations Convention on the Rights of Persons with Disabilities ("the H CRPD") was cited to the Court of Appeal, but not, it appears, the case of *Glor v Switzerland* (Application No 13444/04) (unreported) given 30 April 2009, where the Strasbourg court reiterated that the Convention must be interpreted in the light of present-day conditions, including the European and worldwide consensus on the need to protect people with disabilities

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from discriminatory treatment, citing in particular the CRPD. The Court of Appeal in *Burnip* felt able to determine the issue without resort to the CRPD, but had he not been able to do so, Maurice Kay LJ would have resorted to that Convention, which would have resolved any uncertainty in favour of the claimants. He continued, at para 22: "It seems to me that it has the potential to illuminate our approach to both discrimination and justification."

213 Likewise, our approach to both discrimination and justification in this case may be illuminated by reference to other international instruments to which the United Kingdom is party, including not only the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW"), which was the relevant instrument in *Opuz v Turkey* 50 EHRR 695, but also most notably the United Nations Convention on the Rights of the Child ("UNCRC"). In *Neulinger v Switzerland* (2010) 54 EHRR 1087, for example, the Grand Chamber observed, at para 131:

> "The Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law. Account should be taken . . . of 'any relevant rules of international law applicable in the relations between the parties', and in particular the rules concerning the international protection of human rights."

It went on, at para 135, to note "that there is currently a broad consensus—including in international law—in support of the idea that in all decisions concerning children, their best interests must be paramount".

214 This may be putting matters a little too high. The relevant international instruments relied on by the Grand Chamber were, principally, article 3.1 of the UNCRC: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." This is pithily echoed in article 24.2 of the Charter of Fundamental Rights of the European Union: "In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration."

215 As this court recognised in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 AC 166, para 25, "a primary consideration" is not the same as "the primary consideration" still less "the paramount consideration". Nevertheless, the obligation to treat their best interests as a primary consideration in all actions concerning children is binding on the Government of this country in international law. It has also become relevant in domestic law in at least two ways. First, section 11 of the Children Act 2004 places a duty on a wide range of bodies providing public services to carry out their functions "having regard to the need to safeguard and promote the welfare of children". This duty has also been placed on the Secretary of State for the Home Department in the exercise of her functions in relation, among other things, to immigration, asylum or nationality, by section 55 of the Borders, Citizenship and Immigration Act 2009.

216 This duty has not yet, however, been extended to all Government departments, including the Department of Work and Pensions, with whose decisions we are concerned in this case. Nevertheless, in a written statement

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A to Parliament on 6 December 2010, the Minister of State for Children and Families made

> "a clear commitment that the Government will give due consideration to the UNCRC articles when making new policy and legislation. In doing so, we will always consider the UN Committee on the Rights of the Child's recommendations but recognise that, like other state signatories, B the United Kingdom Government and the UN Committee may at times disagree on what compliance with certain articles entails."

It is not surprising, therefore, that the Joint Committee on Human Rights, in its scrutiny of the Welfare Reform Bill, regretted that the Government had failed to carry out any detailed analysis of the compatibility of the Bill with the UNCRC (Session 2010–2012, 21st Report, *Legislative Scrutiny: Welfare* C *Reform Bill*, para 1.35). The Government has not resiled from that commitment, which is repeated in the Cabinet Office *Guide to Making Legislation* (July 2013), para 11.30, but it has not yet been translated into domestic law.

217 However, the international obligations which the United Kingdom has undertaken are also taken into account in our domestic law in so far as D they inform the interpretation and application of the rights contained in the European Human Rights Convention, which are now rights in United Kingdom domestic law. There is no reason at all why those obligations should not inform the interpretation of the Convention right to the enjoyment of the substantive Convention rights without discrimination just as much as they inform the interpretation of the substantive Convention rights. *ZH (Tanzania)* [2011] 2 AC 166 happened to be a case about E article 8, as were *H (H) v Deputy Prosecutor of the Italian Republic, Genoa (Official Solicitor intervening)* [2013] 1 AC 338, and *Neulinger* 54 EHRR 1087 itself. The Strasbourg court has taken the UNCRC into account in construing other articles of the Convention, most notably article 6 in relation to the fair trial of juvenile offenders, in *V v United Kingdom* (1999) 30 EHRR 121.

F **218** For these reasons, echoing Maurine Kay LJ in *Burnip* [2013] PTSR 117, I agree that our international obligations under the UNCRC and CEDAW have the potential to illuminate our approach to both discrimination and justification. Whatever the width of the margin of appreciation in relation to the subject matter of a measure, the Strasbourg court would look with particular care at the justification put forward for any measure which places the United Kingdom in breach of its international G obligations under another human rights Treaty to which we are party.

219 Hence it is no surprise that the Divisional Court held that the court should have regard to the UNCRC as a matter of Convention jurisprudence and the Secretary of State did not challenge that view in the Court of Appeal (see [2014] PTSR 619, para 69) or, initially, in this court. The statement of facts and issues agreed between the parties for this court included:

H

> "(c) was the Court of Appeal wrong to have found that the discriminatory effects of the 2012 Regulations on lone parents were justified and lawful, and not contrary to article 14 (read with article 8 and/or article 1 of Protocol 1); and (d) was the Court of Appeal wrong to have found that the Secretary of State has complied with his obligation to

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> treat the best interests of children as a primary consideration when implementing the benefit cap scheme?"

Not surprisingly, therefore, this court took it as common ground that article 3.1 of the UNCRC was relevant to the discrimination issue. The question was whether it had been complied with. After the hearing, however, it became clear that the Secretary of State no longer accepted that article 3.1 was relevant to whether the admitted indirect discrimination could be justified. He was therefore permitted to file further arguments on the issue, to which the appellants and the interveners were permitted to reply. This has had the beneficial effect of enabling us to consider the issue in more detail.

220 The Secretary of State makes two main arguments against taking article 3.1 of the UNCRC into account in deciding whether this discrimination can be justified. The first is that the UNCRC, like other international conventions, can inform the substantive content of the Convention rights, but not the approach to proportionality and discrimination. As to proportionality, this argument is clearly negated by the Grand Chamber decision in *Neulinger v Switzerland* 54 EHRR 1087, where the best interests of the child were taken into account in deciding whether the interference with the parties' rights to respect for their family life, entailed in an order to return to the child's home country of Israel, was proportionate. Reference was also made to the long line of cases dealing with the expulsion of aliens, "according to which, in order to assess the proportionality of an expulsion measure concerning a child who has settled in the host country, it is necessary to take account of the child's best interests and well-being" (para 146). In those cases, the best interests of a child have been taken into account in assessing the proportionality of an interference with the Convention rights of others: see *Uner v Netherlands* (2006) 45 EHRR 421, paras 57–58.

221 It is no doubt for that reason that the Secretary of State for the Home Department conceded, in *ZH (Tanzania)* [2011] 2 AC 166, that removing the mother would be a disproportionate interference with the children's article 8 rights. This concession was rightly made, irrespective of section 55 of the Borders, Citizenship and Immigration Act 2009. The relevance of the duty in that section was to whether the decision was "in accordance with the law" (see para 24) rather than to its proportionality.

222 As to discrimination, the Secretary of State's argument is clearly negated by the Grand Chamber decision in *X v Austria* (2013) 57 EHRR 405. This was a case of alleged discrimination on grounds of sexual orientation. A same sex partner could not adopt so as to become a joint parent with the birth parent partner, whereas an opposite sex partner could do so. When dealing with the relevant international law, at para 49, the court begins with article 3.1 of the UNCRC, before turning to article 21 and other specific provisions on adoption. When discussing the suggested justifications for the discrimination, at para 146, the court concludes:

> "Unless any other particularly convincing and weighty reasons militate in favour of such an absolute prohibition, the considerations adduced so far would seem rather to weigh in favour of allowing the courts to carry out an examination of each individual case. This would also appear to be

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A more in keeping with the best interests of the child, which is a key notion in the relevant international instruments."

The footnote refers back to para 49. In common with Lord Carnwath JSC, I read this case as clearly indicating that the best interests of the child are to be taken into account in determining whether discrimination is justified under article 14.

B **223** The second argument now advanced by the Secretary of State is that the discrimination in this case is not against the children involved but against their mothers. It is not suggested that the rights of the children themselves have been infringed. This case may be contrasted with *Neulinger* and indeed *ZH (Tanzania),* in which the complaint was of interference with the children's right to respect for their family lives, as well as their mothers'. C However, the same cannot be said of *X v Austria* 57 EHRR 405. The child was a complainant, but it was not suggested that there had been discrimination against her; rather it was that the discrimination against her mother and her mother's same sex partner affected (but did not infringe) her right to respect for her family life. It is difficult indeed to see how the family life of the child in that case was any more affected by the legal status of the people looking after her than is the family life of the children involved in this D case by the financial situation in which the benefit cap has placed their parents.

224 There is the further point, most clearly articulated by Lord Reed JSC, at para 89 of his judgment, that the children living with lone parent fathers suffer just as much as the children living with lone parent mothers. Their welfare cannot therefore be relevant to justifying the E discrimination between them. However, for the reasons explained in para 189 earlier, this point does not arise when the discrimination complained of is indirect rather than direct. It is of the nature of indirect discrimination that the measure in question applies to both men and women. What has to be considered is whether the measure itself, which in this case I take to be the benefit cap as it applies to lone parents, can be justified F independently of its discriminatory effects. In considering whether that measure can be justified, I have no doubt at all that it is right, and indeed necessary, to ask whether proper account was taken of the best interests of the children affected by it.

Application

G **225** Both the Divisional Court [2014] PTSR 23 and the Court of Appeal [2014] PTSR 619 concluded that the Government had complied with its obligation to treat the best interests of the children concerned as a primary consideration: paras 75 and 49, respectively. They were, of course, correct to say that "the Government was keenly aware of the impact the benefits cap would be likely to have on children": Court of Appeal, para 74(2). But it does not follow from that that "the *rights of* children were, throughout, at H the forefront of the decision-maker's mind": para 75, emphasis supplied. Still less does it follow that their best interests were being treated as a primary consideration. In agreement with the powerful judgments of Lord Carnwath and Lord Kerr JJSC on this point, it is clear to me that they were not.

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226 The Government's contention was "the long-term shift in welfare culture", or "reversing the impact of benefit dependency on families and children", would be beneficial to children in the longer run. This may well be so, although it is interesting how little prominence was given to this aspect of the matter in the justifications put forward by the Government for their policy. But in any event, this is to misunderstand what article 3.1 of the UNCRC requires. It requires that first consideration be given to the best interests, not only of children in general, but also of the particular child or children directly affected by the decision in question. It cannot possibly be in the best interests of the children affected by the cap to deprive them of the means to provide them with adequate food, clothing, warmth and housing, the basic necessities of life. It is not enough that children in general, now or in the future, may benefit by a shift in welfare culture. In so far as the Secretary of State relies on this as an answer to article 3.1, he has misdirected himself.

227 It may be worth noting that the UNCRC contains some specific obligations which go beyond treating children's interests as a primary consideration when making decisions concerning them. Article 27.1 provides that "States parties recognise the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development". Although parents have "the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development" (article 27.2), states parties have to "take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing" (article 27.3). The usual approach of the Strasbourg court is that the Convention confers no right to be provided with any particular welfare benefit but that, if it is provided, it must be provided in a non-discriminatory manner. The United Kingdom performs its obligations towards children, among other ways, through the welfare benefits system, which provides specific benefits in order that children shall be free from want. The benefit cap deprives some children, principally those in larger families living in high cost accommodation, of provision for their basic needs in order to incentivise their parents to seek work, but discriminates against those parents who are acknowledged to be least likely to be able to do so. The children affected suffer from a situation which is none of their making and which they themselves can do nothing about.

228 This case is therefore very different from the case of *Humphreys v Revenue and Customs Comrs* [2012] 1 WLR 1545, in which the Government had to justify the discriminatory effect of paying child tax credit to the parent with the main responsibility for looking after the child, even though the care of the child was shared with another parent. This was indirectly discriminatory against fathers, but the object was to concentrate the help for the child where it was most needed and to maximise the amount of public money available to support children. As the Government put it, at para 25: "the benefit attaches to the child rather than the parent".

229 Viewed in the light of the primary consideration of the best interests of the children affected, therefore, the indirect discrimination against women inherent in the way in which the benefit cap has been implemented cannot be seen as a proportionate means of achieving a

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A legitimate aim. Families in work are already better off than those on benefits and so the cap is not necessary in order to achieve fairness between them; saving money cannot be achieved by unjustified discrimination; but the major aim, of incentivising work and changing the benefits culture, has little force in the context of lone parents, whatever the age of their children. Depriving them of the basic means of subsistence cannot be a proportionate B means of achieving it.

Relief

230 The claimants seek both declaratory relief and an order quashing Part 8A of the Housing Benefit Regulations. The latter would not be appropriate, given that it is not suggested in this case that the C implementation of the cap in relation to single person and two parent households is incompatible with the Convention rights. It is the implementation in relation to lone parents, some of whom will be fleeing domestic violence, and their dependent children, which has been shown to be incompatible.

231 There are several different ways in which that incompatibility might be cured, most notably perhaps by taking the child tax credit and/or D child benefit payable to lone parents out of the list of welfare benefits taken into account in calculating the cap. It is true, of course, that the Government resisted amendments to take housing benefit, child benefit and child tax credit out of the cap, on the ground that this would be to emasculate its policy objectives. It is easy to see how this might be so, if it were done for all claimants. But it has not been shown that taking the child-related benefits E out of the cap as it applies to lone parents would do so. In any event, it is obvious that there is sufficient flexibility in the statutory scheme to enable appropriate solutions to be crafted. It is not for this court to suggest any particular way in which the problem might be solved.

232 In my view, therefore, the appropriate relief would be a declaration that Part 8A of the Housing Benefit Regulations 2006, as inserted, is incompatible with the Convention rights in that its application to lone F parents is indirectly discriminatory on grounds of sex, contrary to article 14 of the Convention read with article 1 of the First Protocol.

LORD KERR OF TONAGHMORE JSC

233 As Lord Hughes JSC has observed, there is much common ground among the members of the panel about the issues that arise on this appeal. G He has helpfully outlined the areas of agreement in para 135 of his judgment. I am also in broad agreement with virtually all of Lord Carnwath JSC's judgment (except as to outcome) and am in complete agreement with Baroness Hale of Richmond DPSC that the appeal should be allowed for the reasons that she has given. On one view, therefore, there is nothing to be gained from my contributing further to the debate. But I have changed the view that I originally held about the direct effect of article 3 of H the United Nations Convention on the Rights of the Child ("UNCRC") and wish to explain why. If I am wrong in my revised view, there remain two particular issues which separate the majority from Baroness Hale DPSC's approach (which I would favour as an alternative to my principal conclusion) that I believe are of vital importance and which have

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implications well beyond this appeal. For that reason, I feel constrained to say something of them as well.

234 The two issues are these: (i) if article 3 does not have direct effect, what is the use to which it may be put in considering the proportionality of a measure which interferes with a Convention right; and (ii) whether there is a sufficient identity of interest between a child and her or his lone parent so as to render discrimination against the child discrimination against the parent. Before turning to those issues, however, I wish to begin by examining the role of unincorporated treaties.

The role of unincorporated treaties

235 Two dominant principles have traditionally restricted the use of international treaties in British domestic law. The first is that domestic courts have no jurisdiction to construe or apply treaties which have not been incorporated into national law; that they are effectively non-justiciable. The second is that such treaties, unless incorporated into domestic law, are not part of that law and therefore cannot be given direct effect to create rights and obligations under national or municipal law. This is a matter of constitutional orthodoxy. It underpinned the series of decisions in which courts consistently refused to give effect to Convention rights before the coming into force of the Human Rights Act 1998. See, for instance, *R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696, 747–748 (Lord Bridge of Harwich), p 762B–D (Lord Ackner); *R v Secretary of State for the Environment, Ex p National and Local Government Officers' Association* (1992) 5 Admin LR 785, 798 and *In re McKerr* [2004] 1 WLR 807, para 25 (Lord Nicholls of Birkenhead), para 48 (Lord Steyn), para 63 (Lord Hoffmann), para 80 (Lord Rodger of Earlsferry) and para 90 (Lord Brown of Eaton-under-Heywood).

236 Perhaps the high water mark of the dualist conception of the restriction on the use of international law was reached in *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 ("the *International Tin Council* case"). The House of Lords reaffirmed the two principles of non-justiciability and no direct effect. This was on the basis that domestic courts had no competence in respect of the legal relations between sovereign states, nor was the royal prerogative reviewable. At pp 499F–500C Lord Oliver of Aylmerton said:

> "It is axiomatic that municipal courts have not and cannot have the competence to adjudicate upon or to enforce the rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law . . . On the domestic plane, the power of the Crown to conclude treaties with other sovereign states is an exercise of the Royal Prerogative, the validity of which cannot be challenged in municipal law . . . That is the first of the underlying principles. The second is that, as a matter of the constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not

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A part of English law unless and until it has been incorporated into the law by legislation."

237 Of course the prerogative can now be reviewed, in appropriate circumstances: see, for instance, *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 and *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2003] UKHRR 76. The conduct of B foreign affairs, including the making of treaties is still considered to be beyond the reach of judicial review, however. In *R (Campaign for Nuclear Disarmament) v Prime Minister of the United Kingdom* (2002) 126 ILR 727 the High Court held that domestic courts will not determine the meaning of an international instrument (in this case a United Nations Security Council Resolution) operating purely on the plane of international law. It was said C that the only cases in which the court would pronounce on an issue of international law are those where it is necessary to do so in order to determine rights and obligations under domestic law, so as to "draw the court into the field of international law": paras 36–40, 47(i).

238 Despite the seemingly comprehensive ban on the use by the courts of unincorporated international treaties to recognise rights on the domestic law plane, there are three possible ways which have been considered by the D courts in which such treaties may have an impact on national law: (i) as an aid to statutory interpretation; (ii) as an aid to development of the common law; and (iii) as a basis for legitimate expectation.

Unincorporated treaties as an aid to statutory interpretation

239 Where a legislative provision is ambiguous there is a presumption E that Parliament intended to legislate in a manner which does not involve breach of international treaty obligations: *Salomon v Comrs of Customs and Excise* [1967] 2 QB 116, 143E–G; *Garland v British Rail Engineering Ltd* [1983] 2 AC 751, 771 (Lord Diplock). See also Sir John Laws "Is the High Court the Guardian of Fundamental Constitutional Rights?" [1993] PL 58, 83. While New Zealand allows non-ambiguous legislation to be "read F down", or additional words to be read in for the purpose of consonance with international treaties (e g *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44, CA), this is not currently the case in the United Kingdom: see *Inland Revenue Comrs v Collco Dealings Ltd* [1962] AC 1, 19; *Quazi v Quazi* [1980] AC 744, 808D–E; the *International Tin Council* case [1990] 2 AC 418, 481F–H, 500E; *R v Secretary of State for the Home Department, Ex p Brind* G [1991] 1 AC 696, 747–749, 760D–G; *R v Brown (Anthony)* [1994] 1 AC 212, 256E–F; *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419, para 65; *R v Lyons* [2003] 1 AC 976, para 13; *Boyce v The Queen* [2005] 1 AC 400, paras 25 and 81; and *Abdirahman v Secretary of State for Work and Pensions* [2008] 1 WLR 254, paras 35–40.

240 But the presumption of compatibility of domestic legislation with international law is well established. A recent example is to be found in H *Assange v Swedish Prosecution Authority* [2012] 2 AC 471 where, at para 122, Lord Dyson JSC said: "there is no doubt that there is a 'strong presumption' in favour of interpreting an English statute in a way which does not place the United Kingdom in breach of its international obligations".

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Unincorporated treaties and the development of the common law

241 It is clear that unincorporated treaties may have a bearing on the development of the common law: *R v Lyons* [2003] 1 AC 976, para 13 (Lord Bingham of Cornhill). Developments of the common law should ordinarily be in harmony with the United Kingdom's international obligations: *A v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221, para 27 (Lord Bingham). Unincorporated treaties may also be used to resolve ambiguities in the common law: *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534. See also *Director of Public Prosecutions v Jones (Margaret)* [1999] 2 AC 240, 265D–F (Lord Slynn of Hadley), 277E–278F (Lord Hope of Craighead): reference to the Convention for guidance was found to be inappropriate in context as there was no doubt about the content of the common law. By implication, at least, where such doubt is present, consideration of an international convention or treaty such as the Convention on Human Rights would be appropriate in order to determine what the common law position is or should be.

242 The proposition that the common law cannot be used to incorporate treaties "through the back door" has, however, been reasserted in, for instance, *A v Secretary of State for the Home Department (No 2)* [2005] 1 WLR 414, paras 266–267 (Laws LJ), para 434 (Neuberger LJ).

Unincorporated treaties and legitimate expectation

243 In *Chundawadra v Immigration Appeal Tribunal* [1998] Imm AR 161 it was argued that every citizen had a legitimate expectation that, if the Convention was relevant to a matter under consideration, the minister would take it into account when deciding how to exercise his powers. The Court of Appeal refused to accept this argument, holding that it was not appropriate to introduce the Convention into domestic law by the back door in this way.

244 Arguments based on the Australian authority of *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 were considered by the Court of Appeal in *Behluli v Secretary of State for the Home Department* [1998] Imm AR 407, 415. The court expressly refused to follow *Teoh*; it held that mere ratification of a treaty could not generate a legitimate expectation that the treaty would be followed. Two months later, however, a different division of the Court of Appeal indicated a willingness to adopt and follow *Teoh* in relation to decisions taken under the royal prerogative. In *R v Secretary of State for the Home Department, Ex p Ahmed and Patel* [1998] INLR 570, the Court of Appeal held that the entering into a treaty by the Crown could give rise to a legitimate expectation because, subject to any indication to the contrary, ratification amounted to a representation that the Crown would act in accordance with the obligations imposed on it by the treaty in question. The High Court followed this approach in *R v Uxbridge Magistrates' Court, Ex p Adimi* [2001] QB 667, 686 (Simon Brown LJ), pp 690–691 (Newman J), although apparently without having *Chundawadra* or *Behluli* cited to it.

245 In the High Court in *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326 Lord Bingham of Cornhill CJ rejected an attempt to base a legitimate expectation on the ratification of the Convention, observing that ratification took place nearly half a century ago

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A at a time when it was generally assumed that ratification would have no practical effect on British law or practice. (This view was endorsed by the House of Lords). Laws LJ, at pp 353–356, agreeing with Lord Bingham CJ, referred to what had by then become the somewhat hackneyed theme that the legitimate expectation argument would effectively introduce the Convention through the back door. He acknowledged, however, that the B Convention had "plainly" informed the common law and he noted *Teoh* but suggested that any extension of this area would have to be at a higher level, to overcome the House of Lords authority of *Brind* [1991] 1 AC 696.

246 The proposition that the doctrine of legitimate expectation can generate a right to rely on the provision of an unincorporated treaty in the interpretation and application of domestic law is, at least, controversial. But treaties concerning human rights are, for reasons that I will develop, in a C different position.

Human rights cases

247 A small opening for an exception in relation to human rights treaties can perhaps be seen in *Lewis v Attorney General of Jamaica* [2001] 2 AC 50, where Lord Slynn, although upholding the traditional principles of D non-justiciability and no direct effect, acknowledged the argument that an exception might be read into these rules when the treaty in question was a human rights treaty: "even assuming that that [rule] applies to international treaties dealing with human rights . . .": p 84. In "Foreign Relations and the Judiciary" (2002) 51 ICLQ 485, 496 Lawrence Collins J has commented on this passage:

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> "[these] words contemplate the possibility that unincorporated treaties relating to human rights may be given effect without legislation . . . [It] may be a sign that one day the courts will come to the view that it will not infringe the constitutional principle to create an estoppel against the Crown in favour of individuals in human rights cases."

F **248** In *In re McKerr* [2004] 1 WLR 807, paras 49–50 Lord Steyn cast doubt on the applicability of the fundamental principles set out in the *International Tin Council* case [1990] 2 AC 418 so far as they governed the position in relation to human rights treaties, arguing, at para 50:

> "The rationale of the dualist theory, which underpins the *International Tin Council* case, is that any inroad on it would risk abuses by the G executive to the detriment of citizens. It is, however, difficult to see what relevance this has to international human rights treaties which create fundamental rights for individuals against the state and its agencies. A critical re-examination of this branch of the law may become necessary in the future."

249 While acknowledging that the point had not been the subject of H argument, Lord Steyn referred to some academic criticism of *International Tin Council* and highlighted what he termed "growing support for the view that human rights treaties enjoy a special status", citing the views of *Murray Hunt, Using Human Rights Law in English Courts* (1998), pp 26–28 and the extra-judicial comments of Lawrence Collins J quoted above.

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250 In "International Law in Domestic Courts: The Developing Framework" (2008) 124 LQR 388 Philip Sales QC and Joanne Clement attack this argument, pointing out that the rationale for *International Tin Council* is that the Crown cannot change domestic law by the exercise of prerogative powers as this would infringe the sovereignty of Parliament. In adopting what might be regarded as a somewhat absolutist position, Sales and Clement argue, at p 388:

> "In a dualist state such as the United Kingdom, international law and domestic law are regarded as separate legal systems, operating on different planes. International law does not, as such, form part of the domestic legal system. While in particular instances rules of international law may apply in domestic law, they do so by virtue of their adoption by the internal law of the state."

251 The Sales and Clement article provides a comprehensive survey of international law in this area. They argue forcefully that unincorporated treaties should not be extended so as to have direct effect in national law. The dualist structure of our law, which treats international law as operating on a separate plane, has, they suggest, been repeatedly upheld as a central constitutional, legal and political principle. They conclude, at p 421:

> "The risk of some degree of dissonance between domestic law and international law is the natural consequence of self-government by states and of parliamentary sovereignty as the primary constitutional principle of government within the state, and its elimination is a matter for the political process. It is not the proper function of the domestic courts to change domestic legal principles to eliminate such dissonance."

252 In an article entitled "Human Rights Treaties in the English Legal System" published in [2011] PL 554, Dr Bharat Malkani has challenged the central thesis of Sales and Clement. He argues that one needs to question why Parliament should be treated as the "proper locus of law-making . . . power". Dr Malkani suggests that the enactment of the Human Rights Act 1998 and the incorporation of the Human Rights Convention into domestic law brought about a change in the constitutional order and that parliamentary sovereignty is no longer the principal basis of the British constitution. This was, rather, the rule of law. On this basis he argues that the constitutional principle of parliamentary sovereignty does not require that international conventions on human rights be "transformed" into domestic law in order to create rights, citing Alan Brudner "The Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework" (1985) 35 University of Toronto Law Journal 219. Brudner propounds a theory which would be regarded as highly radical in United Kingdom law to the effect that a convention while in origin a Treaty between independent states, is in content "the legislation of a universal community of rational beings". On this account, he argues that since international conventions on human rights articulate principles rationally connected to the common good, they do not require to be transformed into national law.

253 In light of the authorities that I have earlier considered, it may safely be said that such a far-reaching approach is unlikely to find favour in the courts of this country. It is perhaps noteworthy, however, that other commentators have been critical of the courts' adherence to the dualist

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A theory of international law, especially in relation to human rights conventions: see, for instance, Brice Dickson, "Safe in Their Hands? Britain's Law Lords and Human Rights" (2006) 26 Legal Studies 329, 335; D Beyleveld, "The concept of a human right and incorporation of the European Convention on Human Rights" [1995] PL 577; *M Hunt, Using Human Rights Law in English Courts* (1997).

B **254** I consider that the time has come for the exception to the dualist theory in human rights conventions foreshadowed by Lord Slynn in *Lewis* [2001] 2 AC 50 and rather more firmly expressed by Lord Steyn in *In re McKerr* [2004] 1 WLR 807 to be openly recognised. This can properly be done in relation to such conventions without espousing the complete abandonment of the theory advocated by some of the commentators referred to above.

C **255** If Lord Steyn is right, as I believe he is, to characterise the rationale for the dualist theory as a form of protection of the citizen from abuses by the executive, the justification for refusing to recognise the rights enshrined in an international convention relating to human rights and to which the United Kingdom has subscribed as directly enforceable in domestic law is not easy to find. Why should a convention which expresses the United D Kingdom's commitment to the protection of a particular human right for its citizens not be given effect as an enforceable right in domestic law?

256 Standards expressed in international treaties or conventions dealing with human rights to which the United Kingdom has subscribed must be presumed to be the product of extensive and enlightened consideration. There is no logical reason to deny to United Kingdom citizens E domestic law's vindication of the rights that those conventions proclaim. If the Government commits itself to a standard of human rights protection, it seems to me entirely logical that it should be held to account in the courts as to its actual compliance with that standard. This is particularly so in the case of the UNCRC. On its website UNICEF has stated: "The CRC is the basis of all of UNICEF's work. It is the most complete statement of children's rights ever produced and is the most widely-ratified international human rights F Treaty in history".

257 I therefore consider that article 3.1 of the UNCRC is directly enforceable in United Kingdom domestic law. A primacy of importance ought to have been given to the rights of children in devising the Regulations which bring the benefits cap into force. For the reasons given by Baroness Hale DPSC, I have concluded that this has not taken place.

G

The alternative argument

258 In the Court of Appeal Lord Dyson MR said [2014] PTSR 619, para 69:

> "The Divisional Court held that, notwithstanding the fact that the UNCRC is an international convention which has not been incorporated H into our domestic law, the court should nevertheless have regard to it as a matter of Convention jurisprudence: see *Neulinger v Switzerland* (2010) 54 EHRR 1087, cited by Baroness Hale JSC in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 AC 166, para 21. This has not been challenged by the Secretary of State on this appeal."

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A **259** One starts therefore with the proposition that UNCRC is, as Lord Carnwath JSC has put it, legally relevant. Its legal relevance stems from the fact that, as again Lord Carnwath JSC has put it, under the Human Rights Convention and in accordance with the Vienna Convention, regard may be had to principles of international law, including international conventions in order to interpret the "terms and notions of the Convention": *Demir v Turkey* (2008) 48 EHRR 1272. Lord Carnwath JSC has said that in the B cases of *X v Austria* (2013) 57 EHRR 405, *Ponomaryov v Bulgaria* (2011) 59 EHRR 799 and *Burnip v Birmingham City Council* [2013] PTSR 117, the court used international materials to "fill out, or reinforce, the content of a Convention article": para 130. I would prefer to put the matter slightly differently.

260 What the courts did in those cases, following the *Demir* approach C was to recognise that the nature and content of Convention rights could be informed by international instruments which expressed standards that were internationally recognised. This does not involve directly applying the provisions of an international treaty which had not been incorporated into domestic law. It does not introduce those provisions "by the back door". Rather, it reflects the courts' obligation, charged as we are with the duty of D obtaining a proper understanding of the nature of an avowed right, to have regard to standards which have found expression in those treaties. We should do this for the prosaic but extremely important reason, as I have said in para 256 above, that they have been the product of extensive and, hopefully, enlightened consideration.

261 If the rights enshrined in those treaties are not directly enforceable in domestic law it is, of course, open to domestic courts to refuse to allow E such treaties to have any influence whatever on our conclusions as to the content of the right. Such an approach would be justified where, for instance, the right was too broadly expressed or too remote from the subject under consideration. Or we could conclude that the right was too ambivalently stated to allow any influence to be brought to bear on the content of a right asserted under domestic law. But where the claimed right F is directly relevant to the domestic issue to be decided, then recourse to the standards that the international instrument exemplifies is not only legitimate, it is required. How, otherwise, are we to acquire a true understanding of the proper contours and content of the right under discussion? This is not applying an unincorporated international treaty directly to domestic law. It is merely allowing directly relevant standards to infuse our thinking about what the content of the domestic right should be. G

262 Article 3.1 of the UNCRC is unquestionably directly relevant to the question of whether a primacy of importance was given to the interests of children in formulating the Regulations which give effect to the benefits cap. As I have already said, I agree with Baroness Hale DPSC that it was not. I will say no more on that topic. The critical issue now is whether there is a sufficient connection between the interests of the children and those H discriminated against, viz their lone mothers, to make discrimination against the children of those mothers discrimination against them also. Put another way, as Lord Carnwath JSC does in para 115 of his judgment, is there a direct link between the international treaty relied on and the particular form of discrimination alleged?

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A *The indissociability of a child and her/his lone mother*

263 In this case the Government accepts that the benefits cap discriminates against women as lone parents. Its defence of this admitted discrimination rests exclusively on its claim that it is justified by the social objectives which it pursues. It claims, however, that justification of those objectives does not require it to give primary consideration to the impact of B the benefit cap on the children of lone mothers. That, the Government says, is because the interests of lone mothers can be disassociated from those of their children. Lord Carnwath JSC has accepted this argument. He considers that the interests of children are distinct from their single parent mothers. I cannot agree.

264 The particular species of discriminatory impact here is on women who, *by reason of their position as lone mothers*, claim to suffer a C disproportionate interference with their Convention rights. Justification of the interference must be related to the condition which provides the occasion for the discrimination viz the position of these women as lone parents. A mother's personality, the essence of her parenthood, is defined not simply by her gender but by her role and responsibility as a carer of her children, particularly when she is a lone parent.

D **265** Justification of a discriminatory measure must directly address the impact that it will have on the children of lone mothers because that impact is inextricably bound up with the women's capacity to fulfil their role as mothers. If you take money away from children which mothers would receive on their behalf, money which they use to realise their role as mothers, the discrimination that you perpetrate involves withholding resources E necessary to fully discharge their maternal role. Because, therefore, one cannot segregate the interests of the deprived children from those of their mothers, the discrimination against mothers and their children is of the same stripe. No hermetically sealed compartmentalisation of their interests is possible.

266 A lone mother's interests, when it comes to receiving state benefits, are indissociable from those of her children. The rate of her benefits is fixed F by reference (among other things) to the number and needs of those children. Her capacity to care for her children is likewise directly connected to the amount of state benefits that she receives. The interests of single mothers are, therefore, inextricably bound up with the interests of their dependent children, for the trite and prosaic reason that they are *parents*. Any adverse impact on a lone parent's financial position is inevitably transmitted to the G child because of her or his dependence (financially as well as otherwise) on the parent. For these reasons, when one comes to consider the justification for interference with a lone parent's Convention right, the interests of the children of that parent cannot be left out of account.

267 If the disproportionate effect on lone parents can only be justified by addressing their position as the providers for dependent children, attention to the interests of those children is an integral part of the process. H How, otherwise, are their interests to be taken into account? As Lord Reed JSC has said, regard has been had to the UNCRC by the European Court of Human Rights in the application of the Convention, when considering how its substantive guarantees apply to children. When considering the rights of children as a component part of their mothers'

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rights under A1P1 and article 14, there is no reason that the UNCRC should not likewise infuse the determination of what the content of those rights should be. I therefore agree with Baroness Hale DPSC that, in considering whether the particular species of interference in this case is justified, the interests of the children affected are, by reason of article 3.1 of the UNCRC, to be treated as a primary consideration.

268 Once this position is reached, the question for the Government is how to meet the challenge of showing that the measures which discriminate against the child (and ergo the mother) are no more intrusive than they need to be. In this context, I have no difficulty in accepting that the test set out in *Stec v United Kingdom* (2006) 43 EHRR 1017 continues to apply. So, as a yardstick of the proportionality of this general measure of economic or social strategy, the question is whether it was manifestly without reasonable foundation. But, if article 3.1 of the UNCRC has to play its part in deciding whether the benefits cap was without reasonable foundation, it requires that first consideration be given to the best interests of the children directly affected by the decision.

269 For the reasons given by Baroness Hale DPSC in para 220, it cannot be in the best interests of the children affected by the cap to deprive them of the means of having adequate food, clothing, warmth and housing. Depriving children of (and therefore their mothers of the capacity to ensure that they have) these basic necessities of life is simply antithetical to the notion that first consideration has been given to their best interests.

270 I would therefore allow the appeal and make the order that Baroness Hale DPSC proposes.

Appeal dismissed.

COLIN BERESFORD, Barrister

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Chancery Division

Vastint Leeds BV *v* Persons unknown

[2018] EWHC 2456 (Ch)

2018 July 20; Sept 24 Marcus Smith J

Injunction — Trespass — Quia timet — Proper approach to exercise of court's discretion

The claimant had the immediate right of possession of an industrial site which was in the process of being developed. Despite taking a number of measures to secure the site, the claimant apprehended a threat of trespass from entry involving caravans by travellers seeking to occupy the site, from persons organising and participating in raves, and persons seeking to use the site for fly-tipping. It was contended that the acts of trespass envisaged posed a safety risk to the trespassers themselves, the claimant's contractors and staff, and could result in the claimant incurring considerable expense, which in practice would be irrecoverable. The claimant sought a quia timet injunction against persons unknown restraining them from entering the site.

On the claim—

Held, that a quia timet injunction would be granted in respect of threatened incursions by persons seeking to establish a more than temporary or more than purely transient occupation of the site, and persons organising, involved in, or participating in raves (post, paras 39).

Statement of the established law relating to the granting of final quia timet relief (post, para 31).

CLAIM

By an application notice dated 27 April 2018, the claimant, Vastint Leeds BV, sought an interim injunction against persons unknown enjoining them, without the consent of the claimant, from entering or remaining on the site, the former Tetley Brewery site, Leeds. By a claim form dated 30 April 2018 and amended by the order of Marcus Smith J on 4 July 2018, the claimant sought a final injunction in similar terms. The interim injunction was granted on 4 May 2018 by Hildyard J and ran until 4 July 2018. On 4 July 2018 the order was continued by Marcus Smith J until 31 July 2018.

The facts are stated in the judgment, post, paras 1–5, 8–18.

Brie Stevens-Hoare QC (instructed by *Fieldfisher llp*) for the claimant.

The court took time for consideration.

24 September 2018. **MARCUS SMITH J** handed down the following judgment.

A. Introduction

1 The claimant, Vastint Leeds BV ("Vastint"), has the immediate right to possession of a site known as the "Former Tetley Brewery Site" in Leeds. Before me, this property was referred to as the "Estate".

2 By Part 8 proceedings commenced on 30 April 2018 and amended by my order of 4 July 2018, Vastint seeks a final injunction against "persons unknown" enjoining them, without the consent of Vastint, from entering or remaining on the "Site". The Site comprises five discrete portions of land within the overall Estate.

3 By an application notice dated 27 April 2018, Vastint sought interim relief, in broadly similar terms, also against "persons unknown". That relief was granted by Hildyard J on 4 May 2018. Hildyard J's order (which was endorsed with a penal notice) made provision for the service of his order by ensuring that notices were affixed to the perimeter of and entrances to the Site. Personal service was not, however, dispensed with.

4 The interim injunction ran until 4 July 2018, which date was expressed to be the "return date" for the interim injunction. However, Hildyard J's order made clear that the return date was to be treated as the trial of the action, without pleadings or disclosure: see para 5.

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5 The matter next came before me, in the interim applications court, on 4 July 2018. At that hearing, I indicated certain reservations in making a final order on that occasion. I continued the order of Hildyard J until 31 July 2018 or further order, and made clear that the matter should come back to me, for final hearing, before that date. In the event, the final hearing took place on 20 July 2018. This is my judgment on that final hearing.

6 Vastint seeks a quia timet injunction against persons unknown. It will be necessary to consider both the rules regarding the grant of final quia timet relief (in section D below) and the rules regarding the joinder as defendants of "persons unknown" (in section C below). Matters have been complicated by the fact that none of the "persons unknown" have appeared before me, and I have only heard submissions from Vastint. The manner in which I dispose of this matter is described in section E below.

7 Before considering the rules regarding the grant of final quia timet relief and the rules regarding the joinder as defendants of "persons unknown", it is necessary briefly to describe the facts as presented in the evidence before me.[1]

B. The facts

8 As much of the Site is unoccupied, Vastint has implemented a number of security measures, including but not limited to fencing on the perimeter of the Site, regular security patrols and weekly inspections of vacant properties.

9 Vastint is unable to eliminate entirely the risk of further trespass to the Site despite the security measures it has put in place.

10 The existence of unoccupied buildings on the Site gives rise to safety concerns prior to development taking place: some of the buildings are unsafe and structurally unstable, and there are hazardous materials and substances like asbestos on the Site.

11 During each of the three phases of the development of the Site, there will be different or increased safety risks on the Site arising out of work being done on the Estate and/or the Site, for example: (during demolition), unstable structures and hazardous substances; (during remediation) large excavations; and (during construction) risks from equipment and machinery.

12 There have been four incidents of trespass, primarily involving caravans, at the Estate (including, but not solely, in relation to the Site) in 2011, 2016, 2017 and 2018. Recently, persons unknown have triggered alarms at the Site; these alarms have been sufficient to warn off these persons, but there are further cases of trespass or (at least) attempted trespass.

13 There have also been a number of incidents, primarily involving actual or attempted illegal raves, taking place at a site in East London owned by another member of the group of which Vastint is a part (Vastint UK BV). In the case of this, East London, site, a final injunction against persons unknown was granted by this court in February 2017.

14 There is an increase in gangs using commercial properties for illegal fly-tipping. No specific instances of professional squatters running fly-tipping operations have been identified, but Vastint has incurred clean-up costs of approximately £25,000 after rubbish and unwanted items were left on the Estate and/or the Site following the four incidents mentioned in para 12 above. Other members of the same corporate group have also suffered delay and incurred clean-up costs as a result of fly-tipping elsewhere.

15 There is an emerging illegal rave culture. No specific instances of proposed or attempted illegal raves at the Site have been identified. Vastint relies upon what happened at the East London site, and newspaper articles commenting on the rise of illegal raves; it considers that an empty warehouse on a part of the site known as the "Asda land" may be an attractive location for illegal raves.

16 On 29 May 2018, a high-profile incident occurred at a development site in Blackburn where 20 caravans and 25 vehicles caused significant damage to the value of £100,000.

17 As at 13 June 2018, it was anticipated that demolition would commence in autumn 2018. Remediation (which remains to be agreed) would then follow either at the end of 2018 or early 2019 and, subject to the progress of the first two phases, construction may commence in autumn 2019. There is no evidence before me regarding the anticipated duration of the construction phase of the works.

18 The position, in light of the evidence, may be described as follows:

(1) Despite Vastint taking a number of measures to ensure the physical integrity of the Site, the threat of trespass remains. That threat is said to emanate from three, specific, sources: (a) Entry involving caravans, by travellers, seeking to establish a more than temporary, or more than purely transient, occupation of the Site. (b) Entry of persons organising, involved in, or participating in, raves. (c) Entry of persons seeking to use the Site for fly-tipping.

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(2) The evidence regarding the level of the threat from these sources becomes more exiguous as the three sources, described in the preceding sub-paragraph, are individually considered: (a) There is evidence of actual past entry onto the Estate and/or the Site involving caravans. I do not consider that it is especially profitable to differentiate between trespass involving the Estate and trespass involving the Site. One (the Site) is a subset of the other (the Estate), and in my judgment, trespass onto the Estate albeit not involving the Site is good evidence of a risk of this sort of trespass to the Site. (b) There is no evidence of actual past entry onto the Estate or the Site for the purpose of raves. Vastint's concern regarding this particular threat is informed by what has occurred at the East London site of its sister company, combined with the existence of premises on the Site (the Asda land) which are attractive to those organising raves. (c) There is limited evidence of actual past entry onto *other* Vastint group properties for the purposes of fly-tipping, and there are cases involving the property of third parties, including third party developers.

(3) In terms of the risks that exist in the case of trespass, these are twofold: (a) First, there are risks to the health and safety of those trespassing (to whom Vastint owes a limited duty of care) as well as risks to the health and safety of those having to deal with such trespass (which persons will include employees and contractors engaged by Vastint, to whom a rather more extensive duty of care will be owed). Obviously, were injury or worse to be sustained by a person, that is only compensable in damages in the most rudimentary way. It is clearly better that the trespass —and the consequent risk to health and safety—not occur. (b) Secondly, Vastint may well, in the case of trespass, incur significant costs in dealing with such trespass which (albeit theoretically recoverable from the trespasser) are likely to prove in practice irrecoverable.

(4) In terms of the benefits that an injunction enjoining persons (or a class of person) from entering the Site would confer, these are threefold: (a) First, it was stressed to me that the effect of a court order, enjoining entry, was (in Vastint's experience) a material one; and that this effect was over-and-above the deterrence provided by Vastint's other measures to maintain the integrity of the Site. In short, an injunction, if granted, would have a real effect in preserving the Site from trespass. (b) Secondly, Vastint considered that an injunction would not only affect the conduct of potential trespassers, but also would underline the seriousness of the position to the police, who might be more responsive in the case of any trespass in breach of a court order. (c) Thirdly, given that the order sought by Vastint will be buttressed by a penal notice, Vastint would have easier recourse to the court's contempt jurisdiction. (I say easier because, although both Hildyard J and I ordered service of the interlocutory injunctions in this case by additional means (see para 3 above), personal service was *not* dispensed with. Accordingly, unless personal service *is* dispensed with, it would be necessary for an order to be personally served on a party in breach, and for the order to continue to be breached, before committal proceedings could be contemplated.)

C. Proceedings and orders against persons unknown

19 It was established in *Bloomsbury Publishing Group plc v News Group Newspapers Ltd* [2003] EWHC 1205 (Ch); [2003] 1 WLR 1633 that following the introduction of the CPR, there was no requirement that a defendant must be named in proceedings against him/her/it, but merely a direction that the defendant should be named (if possible).

20 The naming of a defendant thus ceased to be a substantive requirement for the purpose of issuing proceedings, but rather became a question for the case management of the court. In all the circumstances, is it appropriate that, instead of identifying a defendant by name, for the defendant be identified in some other way?

21 The manner in which a defendant can be identified other than by name will vary according to the circumstances of the particular case. Three particular instances may be described:

(1) Where there is a specific defendant, but where the name of that defendant is simply not known. In such a case, it may be appropriate to describe the defendant by reference to an alias, a photograph, or some other descriptor that enables those concerned in the proceedings— including the defendant—to know who is intended to be party to the proceedings.

(2) Where there is a specific *group* or *class* of defendants, some of whom are known but some of whom (because of the fluctuating nature of the group or class or for some other reason) are unknown. In such a case, the persons unknown are defined by reference to their association with that particular group or class.

(3) Where the identity of the defendant is defined by reference *to that defendant's future act of infringement.* In such a case, the identity of the defendant cannot be immediately established: the defendant is established by his/her/its (future) act of infringement.

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22 It is this third class of unknown defendant that is in play here. Accordingly, it is appropriate to pay particular attention to the extent to which the courts have sanctioned the joining of persons to proceedings on this basis.

(1) In *Bloomsbury* itself, the Vice-Chancellor stated, at para 21 as follows:[2]

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

(2) *South Cambridgeshire District Council v Gammell* [2005] EWCA Civ 1429; [2006] 1 WLR 658, the Court of Appeal considered the effect of an injunction granted pursuant to section 187B of the Town and Country Planning Act 1990, which provided for the making of injunctions against persons unknown. The Court of Appeal concluded, at para 32 that a person became a party to proceedings by the very act of infringing the order: "In each of these appeals the appellant became a party to the proceedings when she did an act which brought her within the definition of defendant in the particular case."

(3) In *Ineos Upstream Ltd v Persons Unknown* [2017] EWHC 2945 (Ch) at [119], Morgan J expressed a degree of concern about orders having this effect, but concluded, at para 121 that (particularly in light of the *South Cambridgeshire* decision) this procedure was now open to claimants in cases outside section 187B of the Town and Country Planning Act 1990.

23 At first sight, the notion that a person, through the very act of infringing an order, becomes: (i) a party to the proceedings in which that order was made; (ii) bound by that order; and (iii) in breach of that order, seems counter-intuitive.

24 However, aside from the fact that the making of such orders is now settled practice, *provided* the order is clearly enough drawn (a point I revert to below), it actually works extremely well within the framework of the CPR. Until an act infringing the order is committed, *no-one* is party to the proceedings. It is the act of infringing the order that makes the infringer a party. It follows that—as a non-party—any person affected by the order (provided he or she has not breached it) may apply to set the order aside pursuant to CPR r 40.9. CPR r 40.9 provides: "A person who is not a party but who is directly affected by a judgment or order may apply to have the judgment or order set aside or varied." Thus, were a person to become aware of such an order, and consider the order improperly made, that person (if "directly affected" by the order) could apply to set it aside without more. It is simply that such a person would have to do so *before* infringing the order, whilst still a non-party. It is entirely right that even court orders wrongly made should be obeyed until set aside or varied, and CPR r 40.9 does no more than emphasise the importance of such an approach.[3]

25 In terms of how such an order might be framed, the Vice-Chancellor gave the following guidance in *Hampshire Waste Services Ltd v Intending Trespassers Upon Chineham Incinerator Site* [2003] EWHC 1738 (Ch); [2004] Env LR 9:

(1) First, that the description of the defendant should not involve a legal conclusion, such as is implicit in the use of the word "trespass", para 9.

(2) Secondly, that it is undesirable to use a description such as "intending to trespass", because that depends on the subjective intention of the individual which is not necessarily known to the outside world, and in particular the claimant, and is susceptible of change.[4]

D. Quia timet injunctions

26 *Gee, Commercial Injunctions*, 6th ed (2016), para 2-035 describes a quia timet injunction in the following terms: "A quia timet (since he fears) injunction is an injunction granted where no actionable wrong has been committed, to prevent the occurrence of an actionable wrong, or to prevent repetition of an actionable wrong": see also *Proctor v Bayley* (1889) 42 Ch D 390, 398.

27 The jurisdiction is a preventive jurisdiction and may be exercised both on an interlocutory or interim basis or as a final or perpetual injunction. In this case, of course, a final injunction is sought. That injunction will—if granted—be time limited to the period the perimeter around the Site is in place.

28 *Hooper v Rogers* [1975] Ch 43; [1974] 3 WLR 329 was a case where the Court of Appeal was considering the circumstances in which a *mandatory*[5] final quia timet injunction was being sought. Russell LJ, with whom Stamp and Scarman LJJ agreed, articulated the circumstances in which such an injunction would be granted, at p 50:

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

29 *Gee, Commercial Injunctions*, 6th ed (2016), para 2-035 similarly, suggests that the circumstances in which a quia timet injunction will be granted are relatively flexible:

"There is no fixed or 'absolute' standard for measuring the degree of apprehension of a wrong which must be shown in order to justify quia timet relief. The graver the likely consequences, the more the court will be reluctant to consider the application as 'premature'. But there must be at least some real risk of an actionable wrong."

30 However, in *Islington London Borough Council v Elliott* [2012] EWCA Civ 56; [2012] 7 EG 90, Patten LJ, with whom Longmore and Rafferty LJJ agreed, formulated an altogether more stringent test, at paras 29–31:

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

"30. A much-quoted formulation of this principle is set out in the judgment of Pearson J in *Fletcher v Bealey* (1884) 28 Ch D 688 at 698 where he first quotes from Mellish LJ in *Salvin v North Brancepeth Coal Company* (1874) LR 9 Ch App 705 and then adds his own comments that: 'it is not correct to say, as a strict proposition of law, that, if the plaintiff has not sustained, or cannot prove that he has sustained, substantial damage, this court will give no relief; because, of course, if it could be proved that the plaintiff was certainly about to sustain very substantial damage by what the defendant was doing, and there was no doubt about it, this court would at once stop the defendant, and would not wait until the substantial damage had been sustained. But in nuisance of this particular kind, it is known by experience that unless substantial damage has actually been sustained, it is impossible to be certain that substantial damage ever will be sustained, and, therefore, with reference to this particular description of nuisance, it becomes practically correct to lay down the principle, that, unless substantial damage is proved to have been sustained, this court will not interfere. I do not think, therefore, that I shall be very far wrong if I lay it down that there are at least two necessary ingredients for a quia timet action. There must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended damage will, if it comes, be very substantial. I should almost say it must be proved that it will be irreparable, because, if the danger is not proved to be so imminent that no one can doubt that, if the remedy is delayed, the damage will be suffered, I think it must be shewn that, if the damage does occur at any time, it will come in such a way and under such circumstances that it will be impossible for the plaintiff to protect himself against it if relief is denied to him in a quia timet action.'

"31. More recently in *Lloyd v Symonds* [1998] EWCA Civ 511 (a case involving nuisance caused by noise) Chadwick LJ said: 'On the basis of the judge's finding that the previous nuisance had ceased at the end of May 1996 the injunction which he granted on 7 January 1997 was quia timet. It was an injunction granted, not to restrain anything that the defendants were doing (then or at the commencement of the proceedings on 20 June 1996), but to restrain something which (as the plaintiff alleged) they were threatening or intending to do. Such an injunction should not, ordinarily, be granted unless the plaintiff can show a strong probability that, unless restrained, the defendant

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will do something which will cause the plaintiff irreparable harm—that is to say, harm which, if it occurs, cannot be reversed or restrained by an immediate interlocutory injunction and cannot be adequately compensated by an award for damages. There will be cases in which the court can be satisfied that, if the defendant does what he is threatening to do, there is so strong a probability of an actionable nuisance that it is proper to restrain the act in advance rather than leave the plaintiff to seek an immediate injunction once the nuisance has commenced. "Preventing justice excelleth punishing justice"—see *Graigola Merthyr Co Ltd v Swansea Corpn* [1928] Ch 235, 242. But, short of that, the court ought not to interfere to restrain a threatened action in circumstances in which it is satisfied that it can do complete justice by appropriate orders made if and when the threat of nuisance materialises into actual nuisance (see *Attorney-General v Nottingham Corpn* [1904] 1 Ch 673, 677). … In the present case, therefore, I am persuaded that the judge approached the question whether or not to grant a permanent injunction on the wrong basis. He should have asked himself whether there was a strong probability that, unless restrained by injunction, the defendants would act in breach of the Abatement Notice served on 22 April 1996. That notice itself prohibited the causing of a nuisance. Further he should have asked himself whether, if the defendants did act in contravention of that notice, the damage suffered by the plaintiff would be so grave and irreparable that, notwithstanding the grant of an immediate interlocutory injunction (at that stage) to restrain further occurrence of the acts complained of, a remedy in damages would be inadequate. Had the judge approached the question on that basis, I am satisfied that he could not have reached the conclusion that the grant of a permanent injunction quia timet was appropriate in the circumstances of this case.'"

31 From this, I derive the following propositions:

(1) A distinction is drawn between final *mandatory* and final *prohibitory* quia timet injunctions. Because the former oblige the defendant to do something, whilst the latter merely oblige the defendant not to interfere with the claimant's rights, it is harder to persuade a court to grant a mandatory than a prohibitory injunction. That said, the approach to the granting of a quia timet injunction, whether mandatory or prohibitory, is essentially the same.

(2) Quia timet injunctions are granted where the breach of a claimant's rights is threatened, but where (for some reason) the claimant's cause of action is not complete. This may be for a number of reasons. The threatened wrong may, as here, be entirely anticipatory. On the other hand, as in *Hooper v Rogers*, the cause of action may be substantially complete. In *Hooper v Rogers*, an act constituting nuisance or an unlawful interference with the claimant's land had been committed, but damage not yet sustained by the claimant but was only in prospect for the future.

(3) When considering whether to grant a quia timet injunction, the court follows a two-stage test: (a) First, is there a strong probability that, unless restrained by injunction, the defendant will act in breach of the claimant's rights? (b) Secondly, if the defendant did an act in contravention of the claimant's rights, would the harm resulting be so grave and irreparable that, notwithstanding the grant of an immediate interlocutory injunction (at the time of *actual* infringement of the claimant's rights) to restrain further occurrence of the acts complained of, a remedy of damages would be inadequate?

(4) There will be multiple factors relevant to an assessment of each of these two stages, and there is some overlap between what is material to each. Beginning with the first stage—the strong possibility that there will be an infringement of the claimant's rights—and without seeking to be comprehensive, the following factors are relevant: (a) If the anticipated infringement of the claimant's rights is entirely anticipatory—as here—it will be relevant to ask what other steps the claimant might take to ensure that the infringement does not occur. Here, for example, Vastint has taken considerable steps to prevent trespass; and yet, still, the threat exists. (b) The attitude of the defendant or anticipated defendant in the case of an anticipated infringement is significant. As *Spry, Equitable Remedies*, 9th ed (2013) notes at p 393: "One of the most important indications of the defendant's intentions is ordinarily found in his own statements and actions". (c) Of course, where acts that may lead to an infringement have *already* been committed, it may be that the defendant's intentions are less significant than the natural and probable consequences of his or her act. (d) The time-frame between the application for relief and the threatened infringement may be relevant. The courts often use the language of imminence, meaning that the remedy sought must not be premature. (*Hooper v Rogers* [1975] Ch 43, 50)

(5) Turning to the second stage, it is necessary to ask the counterfactual question: assuming no quia timet injunction, but an infringement of the claimant's rights, how effective will a

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more-or-less immediate interim injunction plus damages in due course be as a remedy for that infringement? Essentially, the question is how easily the harm of the infringement can be undone by an ex post rather than an ex ante intervention, but the following other factors are material: (a) The gravity of the anticipated harm. It seems to me that if some of the consequences of an infringement are potentially very serious and incapable of ex post remedy, albeit only one of many types of harm capable of occurring, the seriousness of these irremediable harms is a factor that must be borne in mind. (b) The distinction between mandatory and prohibitory injunctions.

E. Disposition

(1) Strong probability of a breach of Vastint's rights, unless the defendant is restrained

32 Applying the two-stage test as I have described it, Vastint labours under the considerable disadvantage that it cannot, with any specificity at all, identify the persons likely to trespass on its property. Of course, I accept entirely that this court has jurisdiction to permit proceedings and make orders, even final orders, against "persons unknown", who are only defined by reference to their future acts: see paras 21–24 above. But, I must recognise, as a strong indicator against the granting of an injunction, that Vastint lacks altogether any evidence regarding the attitude of the anticipated defendants.

33 On the other hand, Vastint has taken careful and responsible steps to secure the Site and to prevent trespass on it. Despite these measures, as I have described (see para 18(2) above), there has been actual past entry onto the Estate and/or the Site involving caravans. A future incursion by caravans may very well occur; it is impossible to say when. I consider that, as regards this threatened infringement of Vastint's rights, that the first stage of the test has been made out, and that there is a strong probability that, unless restrained by injunction, there will be a future infringement of Vastint's rights by way of trespass.

34 As regards the entry of persons organised, involved in or participating in raves, the evidence amounts to a combination of: (i) this having happened on another site owned by the Vastint group in East London; (ii) there being a building suitable for, and attractive to the organisers of, raves on the Site; and (iii) various attempts unlawfully to access the Site which do not appear to be related to caravans. With some hesitation, I conclude that there is a strong probability that, unless restrained by injunction, Vastint's rights will be infringed by such persons.

35 The evidence as regards fly-tipping is exiguous at best: in relation to the Estate, it is speculation, and there is no evidence of a substantial risk of infringement beyond the assertion that this is something that goes on at (development) sites elsewhere in England and Wales.

(2) Gravity of resulting harm

36 The harm that Vastint envisages as arising out of an act of trespass has been described in para 18(3) above. It is clear that the risks to health and safety (to trespassers, staff and contractors) that Vastint has identified are serious risks to life and limb that ought, if possible, to be avoided.

37 Additionally, there are the significant costs that Vastint would incur in the case of removing trespassers from the Site. Although I accept that, in theory, such costs are compensable in damages, this court should look to the reality of the situation, and recognise that such costs—in theory recoverable from the trespassers—are unlikely ever to be recovered.[6]

38 I am satisfied that the second limb of the test is met.

(3) The appropriate order in this case

39 For the reasons I have given, it is appropriate to grant a quia timet injunction in respect of threatened incursions by: (1) Persons seeking to establish a more than temporary or more than purely transient occupation of the Site. (2) Persons organising, involved in, or participating in raves.

40 Vastint contended for an order in the following terms: "Those defendants who are not already in occupation of [the Site][7] must not enter or remain on Site without the written consent of [Vastint] …" The duration of the order is time limited to the period in which the perimeter surrounding the Site is in place.

41 The precise formulation of the order is a matter to be considered by Vastint in light of this judgment. However, as drafted, the order extends to *any* person entering the Site without the written consent of Vastint. I do not consider such an order to be workable, satisfactory or appropriate. Because this directly affects the scope of the order I am prepared to make, it is necessary that I should say why I have come to this view:

(1) As I pointed out in argument, as framed, this order would involve police officers and other public authorities entering the property in the lawful execution of their duties being in

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breach of the order. Vastint has sought to deal with this by a recital to the order, whereby Vastint acknowledges "that this order does not apply to police officers, fire fighters, paramedics or others properly forming part of an emergency service related to the protection of or health and welfare of the public". Aside from the fact that this is quite a vague formulation, it is inappropriate for so important a "carve out" to feature in a recital to an order. So far as I can see, a police officer entering the Site in the execution of his lawful duty would be in breach of the order; it is simply that Vastint, by its recital, would be in difficulty in enforcing the order.

(2) Clearly, the Site is being developed. That will involve large numbers of persons *legitimately* working on the Site. I anticipate that the identity of the persons so involved will fluctuate over time, with existing members of this group leaving it, and new members joining it. As the order is drafted, each such person will require Vastint's written consent to be on the Site in order to avoid their being in breach of the order. I have not been addressed on the workability of this. Suffice it to say that I have considerable concerns, and I do not consider that the order, as drafted, meets the criteria framed by the Vice-Chancellor and set out in para 22(1) above.

(3) As framed, the order applies to any person entering the Site without Vastint's written consent, subject to the recital that I have described. Its ambit is not confined to the two classes of unknown defendants in respect of whom I have found there to be a substantial risk that they will infringe Vastint's property rights. It extends to *any* trespasser. I consider that quia timet injunctive relief must be tailored to the threat that is feared and should not be wider than is strictly necessary to deal with this threat.

42 Resisting a narrower order than the one it put forward, Vastint made a number of points:

(1) First, it was suggested that the order as drafted followed the suggested form of words of the Vice-Chancellor in *Hampshire Waste Services Ltd v Intending Trespassers Upon Chineham Incinerator Site* [2003] EWHC 1738 (Ch); [2004] Env LR 9. That is not, in fact, the case. The wording suggested by the Vice-Chancellor at para 10 was as follows:

> "Persons entering or remaining without the consent of the claimants, or any of them, on any of the incinerator sites at [the addresses were then set out] *in connection with the 'Global Day of Action Against Incinerators' (or similarly described event) on or around 14 July 2003*." (Emphasis added.)

The Vice-Chancellor sought to target his order to the class of defendant constituting the threat to the claimants' rights: the order in the present case must do the same.

(2) Secondly, it was suggested that it might not be possible to define, with sufficient clarity, the "persons unknown" to whom the order was directed and/or that such narrow drafting would give rise to argument about whether a given person had or had not infringed the order. There are two answers to this point: (a) First, as a matter of principle, it seems to me that unless the ambit of the order can clearly be drawn, so that it is clear, it ought not to be granted. I do not consider, in this case, that an appropriate order cannot be drafted. (b) Secondly, for the reason given in para 41 above, the draft order as framed by Vastint is itself unsatisfactorily clear, because I am satisfied that Vastint has given insufficient consideration as to how written consent to be present on the Site will be given to the large and fluctuating workforce that will be properly present on the Site.

(3) Thirdly, it was suggested that singling out specific classes of unknown defendants might suggest that for all other persons, not so identified, this court was somehow sanctioning the tort of trespass. I do not accept that. Anyone entering the Site without consent will be a trespasser: it is simply that, as regards those unknown defendants identified by the order, particular (and very serious) consequences attach should they breach the order.

(4) Final matters

43 When the matter was before me on 4 July 2018, I extended the interim relief granted by Hildyard J until 31 July 2018 or further order. Given the date on which this judgment is being circulated in draft (26 July 2018), and given the work that needs to be done in relation to the order, it is appropriate that I extend the interim relief to 30 September 2018 or further order, so that a properly drafted final order can be put in place before then.

44 Finally, the interim orders made by Hildyard J and myself made provision for service by additional means, but did not dispense with personal service. This was described to me as an additional safeguard for persons infringing the order, in that committal proceedings could not be commenced against infringing parties without personal service. Given the narrower class of defendant to which the final order I envisage will apply and given the importance of proper enforcement of the order in case of breach, it is appropriate that process envisaged for bringing these proceedings and the orders made pursuant to these proceedings to the attention

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of potential defendants should constitute the *only* form of service, and that personal service be dispensed with.

Notes

1. The evidence before me comprised: (i) witness statement of Daniel Owen Christopher Talfan Davies dated 27 April 2018; (ii) witness statement of Michael Denis Cronin dated 27 April 2018; (iii) witness statement of Simon Schofield dated 27 April 2018; (iv) second witness statement of Daniel Owen Christopher Talfan Davies dated 13 June 2018; (v) second witness statement of Michael Denis Cronin dated 13 June 2018; (vi) witness statement of Luke Alan Evans dated 13 June 2018; (vii) third witness statement of Daniel Owen Christopher Talfan Davies dated 18 July 2018.

2. Affirmed in *Cameron v Hussain* [2017] EWCA Civ 366 at [50], [53] and [54].

3. It may be that a person infringing the order—and so a party—could apply under CPR r 39.3 to have the order set aside. That, as it seems to me, involves something of a strained reading of CPR r 39.3, since at the time the order was made, such a person would not have been a party.

4. As regards the second point, it is worth noting that there have been later cases where subjective states of mind have been used in the order. Morgan J referred to this in *Ineos* at para 122. See, for example, *Sheffield City Council v Fairhall* [2018] EWHC 1793 (QB).

5. In this case, Vastint does not seek a mandatory but a prohibitive injunction.

6. See *Hampshire Waste Services Ltd v Intending Trespassers Upon Chineham Incinerator Site* [2003] EWHC 1738 (Ch), where such irrecoverable costs (as well as safety risks) were taken into account).

7. It is unclear to me what the purpose of the words "who are not already in occupation of the Site" is.

Order accordingly.

SARAH PARKER, Barrister

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Court of Appeal A

*Canada Goose UK Retail Ltd and another *v* Persons Unknown and another

[2020] EWCA Civ 303

2020 Feb 4, 5; March 5 — Sir Terence Etherton MR, David Richards, Coulson LJJ B

Practice — Parties — Unnamed defendant — Claimants applying for injunction against protestors to restrain harassment and other wrongdoing — Without notice interim injunction granted against "persons unknown" — Numerous protestors served with injunction but none served with claim form — Whether service defective — Guidance on proper formulation of interim injunctions — Limitations on grant of final injunction against persons unknown — Whether claimants entitled to summary judgment — CPR rr 6.15, 6.16 C

The claimants, a retail clothing company and the manager of its London store, brought a claim seeking injunctions against people demonstrating outside the store on the grounds that their actions amounted to harassment, trespass and/or nuisance. A without notice interim injunction was granted against the first defendants, described in the claim form and the injunction as persons unknown who were protestors against the manufacture and sale of clothing made of or containing animal products and against the sale of such clothing at the store. The terms of the court's order did not impose any requirement on the claimants to serve the claim form on the "persons unknown" but merely permitted service of the interim injunction by handing or attempting to hand it to "any person demonstrating at or in the vicinity of the store" or, alternatively, by e-mail service at two stated e-mail addresses, that of an activist group and that of an animal rights organisation which was subsequently added as second defendant to the claim at its own request. The claimants served 385 copies of the interim injunction, including on 121 identifiable individuals, 37 of whom were identified by name, but the claimants did not attempt to join any of those individuals as parties to the proceedings whether by serving them with the claim form or otherwise. The claim form was served only by e-mail to the two addresses specified for service of the interim injunction and to one other individual who had requested a copy. On the claimants' application for summary judgment on their claim the judge: (i) held that the claim form had not been validly served on any defendant in the proceedings and that it was not appropriate to make an order dispensing with service of the claim form pursuant to CPR r 6.16[1]; (ii) discharged the interim injunction; and (iii) refused to grant a final injunction.

On the claimants' appeal—

Held, dismissing the appeal, (1) that since service was the act by which a defendant was subjected to the court's jurisdiction, the court had to be satisfied that the method used for service either had put the defendant in a position to ascertain the contents of the proceedings or was reasonably likely to enable him to do so within any relevant period of time; that given that sending the claim form by e-mail to the

[1] CPR r 6.15: "(1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place. (2) On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service."

R 6.16: "(1) The court may dispense with service of a claim form in exceptional circumstances. (2) An application for an order to dispense with service may be made at any time and— (a) must be supported by evidence; and (b) may be made without notice."

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A activist group could not reasonably be expected to have brought the proceedings to the attention of the "persons unknown" defendants, the judge had been correct to refuse to order pursuant to CPR r 6.15(2) that such steps constituted good service; and that neither speculative estimates of the number of protestors who were likely to have learned of the proceedings without ever having been served with the interim injunction nor the fact that of the 121 persons served with the injunction none had applied to vary or discharge the injunction or be joined as a party, could provide a B warrant for dispensation from service under rule 6.16 (post, paras 45–52).

Cameron v Hussain (Motor Insurers' Bureau intervening) [2019] 1 WLR 1471, SC(E) applied.

(2) That since an interim injunction could be granted in appropriate circumstances against persons unknown who wished to join an ongoing protest, it was in principle open to the court in appropriate circumstances to limit even lawful activity where there was no other proportionate means of protecting the claimant's rights; that, C further, although it was better practice to formulate an injunction without reference to the defendant's intention if the prohibited tortious act could be described in ordinary language without doing so, it was permissible in principle to refer in an injunction to the defendant's intention provided that was done in non-technical language which a defendant was capable of understanding and the intention was capable of proof without undue complexity; that, however, in the present case the claim form was defective and the interim injunction was impermissible since (i) the D description of the "persons unknown" defendants in both was impermissibly wide, being capable of applying to a person who had never been to the store and had no intention of ever going there, (ii) the prohibited acts specified in the interim injunction were not inevitably confined to unlawful acts and (iii) the interim injunction failed to provide a method of alternative service that was likely to bring the order to the attention of persons unknown; and that, accordingly, the judge had been right to discharge the interim injunction (post, paras 78–81, 85–86, 97).

Ineos Upstream Ltd v Persons Unknown (Friends of the Earth intervening) E [2019] 4 WLR 100, CA and *Cameron v Hussain (Motor Insurers' Bureau intervening)* [2019] 1 WLR 1471, SC(E) applied.

Hubbard v Pitt [1976] QB 142, CA, *Burris v Azadani* [1995] 1 WLR 1372, CA and *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29, CA considered.

(3) That it was perfectly legitimate to make a final injunction against "persons unknown" provided they were anonymous defendants who were identifiable as having committed the relevant unlawful acts prior to the date of the final order and F had been served prior to that date; but that a final injunction could not be granted in a protestor case against persons unknown who were not parties at the date of the final order, in other words persons joining an ongoing protest who had not by that time committed the prohibited acts and so did not fall within the description of the persons unknown and who had not been served with the claim form; and that, accordingly, since the final injunction proposed by the claimants in the present case was not so limited and since it suffered from some of the same defects as the interim G injunction, the judge had been right to dismiss the claim for summary judgment (post, paras 89–91, 94, 95, 97).

Birmingham City Council v Afsar [2019] EWHC 3217 (QB) approved.

Vastint Leeds BV v Persons Unknown [2019] 4 WLR 2 distinguished.

Per curiam. (i) It would have been open to the claimants at any time since the commencement of proceedings to obtain an order under CPR r 6.15(1) for alternative service which would have a greater likelihood of bringing notice of the proceedings to H the attention of protestors at the shop premises, such as by posting the order, the claim form and the particulars of claim on social media to reach a wide audience of potential protestors and by attaching and otherwise exhibiting copies of the order and of the claim form at or nearby those premises. The court's power to dispense with service under CPR r 6.16 should not be used to overcome that failure (post, para 50).

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A (ii) Private law remedies are not well suited to the task of permanently controlling ongoing public demonstrations by a continually fluctuating body of protestors. What are appropriate permanent controls on such demonstrations involve complex considerations of private rights, civil liberties, public expectations and local authority policies. Powers conferred by Parliament on local authorities, for example, to make a public spaces protection order under the Anti-social Behaviour, Crime and Policing Act 2014, require the local authority to take into account various matters, including rights of freedom of assembly and expression and to carry out extensive consultation. B The civil justice process is a far blunter instrument intended to resolve disputes between parties to litigation, who have had a fair opportunity to participate in it (post, para 93).

Procedural guidelines for interim relief proceedings against "persons unknown" in cases concerning protestors (post, para 82).

Decision of Nicklin J [2019] EWHC 2459 (QB); [2020] 1 WLR 417 affirmed.

C

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

Attorney General v Times Newspapers Ltd (No 3) [1992] 1 AC 191; [1991] 2 WLR 994; [1991] 2 All ER 398, HL(E)
Birmingham City Council v Afsar [2019] EWHC 3217 (QB)
Bristol-Myers Squibb Co v Baker Norton Pharmaceuticals Inc (No 2) [2001] EWCA Civ 414; [2001] RPC 45, CA
D *Burris v Azadani* [1995] 1 WLR 1372; [1995] 4 All ER 802; [1996] 1 FLR 266, CA
Cameron v Hussain (Motor Insurers' Bureau intervening) [2019] UKSC 6; [2019] 1 WLR 1471; [2019] 3 All ER 1, SC(E)
Cuadrilla Bowland Ltd v Persons Unknown [2020] EWCA Civ 9; [2020] 4 WLR 29, CA
Dulgheriu v Ealing London Borough Council [2019] EWCA Civ 1490; [2020] 1 WLR 609; [2020] PTSR 79, CA
E *Hubbard v Pitt* [1976] QB 142; [1975] 3 WLR 201; [1975] ICR 308; [1975] 3 All ER 1, CA
Ineos Upstream Ltd v Persons Unknown (Friends of the Earth intervening) [2017] EWHC 2945 (Ch); [2019] EWCA Civ 515; [2019] 4 WLR 100; [2019] 4 All ER 699, CA
South Cambridgeshire District Council v Gammell [2005] EWCA Civ 1429; [2006] 1 WLR 658, CA
F *Vastint Leeds BV v Persons Unknown* [2018] EWHC 2456 (Ch); [2019] 4 WLR 2
Venables v News Group Newspapers Ltd [2001] Fam 430; [2001] 2 WLR 1038; [2001] 1 All ER 908

The following additional cases were cited in argument:

G *Astellas Pharma Ltd v Stop Huntingdon Animal Cruelty* [2011] EWCA Civ 752, CA
Attorney General v Punch Ltd [2001] EWCA Civ 403; [2001] QB 1028; [2001] 2 WLR 1713; [2001] 2 All ER 655, CA
Bloomsbury Publishing Group plc v News Group Newspapers Ltd [2003] EWHC 1205 (Ch); [2003] 1 WLR 1633; [2003] 3 All ER 736
Brett Wilson llp v Persons Unknown [2015] EWHC 2628 (QB); [2016] 4 WLR 69; [2016] 1 All ER 1006
H *Cartier International AG v British Sky Broadcasting Ltd (Open Rights Group intervening)* [2016] EWCA Civ 658; [2017] Bus LR 1; [2017] 1 All ER 700, CA
Jockey Club v Buffham [2002] EWHC 1866 (QB); [2003] QB 462; [2003] 2 WLR 178
Novartis AG v Hospira UK Ltd (Practice Note) [2013] EWCA Civ 583; [2014] 1 WLR 1264, CA

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A *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] UKSC 11; [2009] 1 WLR 2780; [2009] PTSR 547; [2010] PTSR 321; [2010] 1 All ER 855, SC(E)
Stone v WXY [2012] EWHC 3184 (QB)
UK Oil and Gas Investments plc v Persons Unknown [2018] EWHC 2252 (Ch); [2019] JPL 161

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

Anderton v Clwyd County Council (No 2) [2002] EWCA Civ 933; [2002] 1 WLR 3174; [2002] 3 All ER 813, CA
Arch Co Properties Ltd v Persons Unknown [2019] EWHC 2298 (QB)
Bloomsbury Publishing Group plc v News Group Newspapers Ltd [2003] EWHC 1205 (Ch); [2003] 1 WLR 1633; [2003] 3 All ER 736
C *Epsom and Ewell Borough Council v Persons Unknown* (unreported) 20 May 2019, Leigh-ann Mulcahy QC
Grant v Dawn Meats (UK) [2018] EWCA Civ 2212, CA
Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator Site [2003] EWHC 1738 (Ch); [2004] Env LR 9
Huntingdon Life Sciences Group plc v Stop Huntingdon Animal Cruelty [2007] EWHC 522 (QB)
D *Kingston upon Thames Royal London Borough Council v Persons Unknown* [2019] EWHC 1903 (QB)
Secretary of State for Transport v Persons Unknown [2019] EWHC 1437 (Ch)
South Bucks District Council v Porter [2003] UKHL 26; [2003] 2 AC 558; [2003] 2 WLR 1547; [2003] 3 All ER 1, HL(E)

APPEAL from Nicklin J
E By a claim form issued on 29 November 2017 the claimants, Canada Goose UK Retail Ltd, the United Kingdom trading arm of an international retail clothing company, and James Hayton, the manager of the first claimant's London store acting pursuant to CPR r 19.6 for and on behalf of employees, security personnel and customers and other visitors to the store, sought injunctions against the first defendants, persons unknown who were F protestors against the manufacture and sale of clothing made of or containing animal products and against the sale of such clothing at the first claimant's store, on the grounds that their actions amounted to, inter alia, harassment, trespass and/or nuisance. On the same date Teare J granted a without notice interim injunction. On 13 December 2017 Judge Moloney QC sitting as a judge of the Queen's Bench Division [2017] EWHC 3735 (QB) granted an G application by the People for the Ethical Treatment of Animals (PETA) Foundation, to be added as second defendant to the proceedings in order to represent its "employees and members" under CPR r 19. By order dated 15 December 2017 Judge Moloney QC granted the claimants' application for a continuation of the interim injunction but made limited modifications to its terms and stayed the proceedings, with the stay to continue unless a named party gave notice to re-activate the proceedings, in which event the claimants, H within 21 days thereafter, were to apply for summary judgment. By an application notice dated 30 November 2018 the claimants sought summary judgment on their claim, pursuant to CPR r 24.2, and a final injunction. By a judgment dated 20 September 2019 Nicklin J [2019] EWHC 2459 (QB); [2002] 1 WLR 417 refused the application for summary judgment and a final

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injunction and discharged the interim injunction, staying part of the order for discharge. A

By an appellant's notice filed on 18 October 2019 and with permission granted by Nicklin J the claimants appealed on the following grounds. (1) The judge had erred in refusing to amend the order of 29 November 2017, pursuant to CPR r 40.12 or the court's inherent jurisdiction, to provide that service by e-mail was permissible alternative service under CPR r 6.15; alternatively the judge had erred in failing to consider, alternatively in refusing to order, that the steps taken by the claimants in compliance with the undertaking given to Teare J on 29 November 2017 constituted alternative good service under CPR r 6.15(2); alternatively the judge had adopted a procedurally unfair practice in refusing to consider an application to dispense with service of the claim form under CPR r 6.16, alternatively had erred in law in refusing to exercise that power of dispensation. (2) The judge had erred in law in holding that the claimants' proposed reformulation of the description of the first defendants was impermissible. (3) In determining whether summary judgment should be granted for a final prohibitory quia timet injunction against the first defendants (as described in the proposed reformulation of persons unknown) the judge had erred in law in the approach he took. In particular, the judge had erred in concluding that the proper approach was to focus only on the individual evidence of wrongdoing in relation to each identified individual protestor (whether or not that individual was formally joined as a party); and/or had erred in concluding that the claimants were bound to differentiate, for the purposes of the description of the first defendants, between those individuals for whom there was evidence of prior wrongdoing (whether of specific acts or more generally) and those for whom there was not; and/or had erred in concluding that evidence of wrongdoing of some individuals within the potential class of the first defendants could not form the basis for a case for injunctive relief against the class as a whole. (4) The judge had erred in his approach to his assessment of the evidence before him, reaching conclusions which he was not permitted to reach. B C D E

The facts are stated in the judgment of the court, post, paras 5–8. F

Ranjit Bhose QC and *Michael Buckpitt* (instructed by *Lewis Silkin llp*) for the claimants.

Sarah Wilkinson as advocate to the court.

The defendants did not appear and were not represented.

The court took time for consideration. G

5 March 2020. **SIR TERENCE ETHERTON MR, DAVID RICHARDS** and **COULSON LJJ** delivered the following judgment of the court.

1 This appeal concerns the way in which, and the extent to which, civil proceedings for injunctive relief against "persons unknown" can be used to restrict public protests. H

2 The first appellant, Canada Goose UK Retail Ltd ("Canada Goose"), is the United Kingdom trading arm of Canada Goose, an international retail clothing company which sells products, mostly coats, which contain animal fur and down. In November 2017 it opened a store at 244 Regent Street in

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A London ("the store"). The second appellant is the manager of the store. The appellants are the claimants in these proceedings, in which they seek injunctive relief and damages in respect of what is described in the claim form as "a campaign of harassment and [the commission] of acts of trespass and/or nuisance against [them]".

3 The first respondents ("the Unknown Persons respondents"), who are the first defendants in the proceedings, were described in the claim form as: B "Persons unknown who are protestors against the manufacture and sale of clothing made of or containing animal products and against the sale of such clothing at [the store]." The second respondent, who was added as the second defendant in the course of the proceedings, is People for the Ethical Treatment of Animals (PETA) Foundation ("PETA").

4 This is an appeal from the order of Nicklin J of 20 September 2019 by C which he dismissed the application of the claimants for summary judgment for injunctive relief against the defendants and he discharged the interim injunctions which had been granted by Teare J on 29 November 2017 and continued, as varied, by Judge Moloney QC (sitting as a judge of the Queen's Bench Division) on 15 December 2017.

Factual background

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5 From the week before it opened on 9 November 2017, the store has been the site of many protests from animal rights activists, protesting against Canada Goose's use of animal fur and down, and in particular the way that the fur of coyotes is procured. For a detailed description of the evidence about the protests, reference should be made to Nicklin J's judgment at paras 132–134. The following is a brief summary.

E 6 A number of the protestors were members of PETA, which is a charitable company dedicated to establishing and protecting the rights of all animals. PETA organised four demonstrations outside the store. They were small-scale in nature, and PETA gave advance notice of them to the police. In addition, some protestors appear to have been co-ordinated by Surge Activism ("Surge"), an animal rights organisation. Other protestors have F joined the on-going protest as individuals who were not part of any wider group.

7 The demonstrations have been largely small in scale, with up to 20 people attending and generally peaceful in nature, with protestors holding signs or banners and handing out leaflets to those passing or entering the store. On some occasions more aggressive tactics have been used by the protestors, such as insulting members of the public or Canada Goose's G employees.

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

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The proceedings

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9 Canada Goose commenced these proceedings against the Unknown Persons respondents by a claim form issued on 29 November 2017. As mentioned above, they were described in the heading of the claim form and the particulars of claim as: "Persons unknown who are protestors against the manufacture and sale of clothing made of or containing animal products and against the sale of such clothing at Canada Goose, 244 Regent Street, London W1B 3BR."

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10 They are described in paragraph 6 of the particulars of claim as including "all persons who have since 5 November 2017 protested at the store in furtherance of the Campaign and/or who intend to further the Campaign". The "Campaign" was described in the particulars of claim as a campaign against the sale of animal products by Canada Goose, and included seeking to persuade members of the public to boycott the store until Canada Goose ceased the lawful activity of selling animal products.

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11 The particulars of claim stated that an injunction was claimed pursuant to the common law torts of trespass, watching and besetting, public and private nuisance and conspiracy to injure by unlawful means. The injunction was to restrain the Unknown Persons respondents from:

(1) Assaulting, molesting, or threatening the protected persons (defined in the particulars of claim as including Canada Goose's employees, security personnel working at the store and customers);

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(2) Behaving in a threatening and/or intimidating and/or abusive and/or insulting manner towards protected persons;

(3) Doing acts which they know or ought to know cause harassment, fear, alarm, distress and/or intimidation to the protected persons;

(4) Intentionally photographing or filming the protected persons with the purpose of identifying them and/or targeting them;

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(5) Making in any way whatsoever any abusive or threatening communication to the protected persons;

(6) Making or attempting to make repeated communications not in the ordinary course of the first claimant's retail business to or with employees by telephone, e-mail or letter;

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(7) Entering the Store;

(8) Blocking or otherwise obstructing the entrances to the Store;

(9) Demonstrating at the Stores within the inner exclusion zone;

(10) Demonstrating at the Stores within the outer exclusion zone save that no more than three protestors may at any one time demonstrate and hand out leaflets therein;

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(11) Using at any time a loudhailer within the inner exclusion zone and outer exclusion zone or otherwise within 50 metres of the building line of the Store.

12 On the same day as the claim form was issued Canada Goose applied to Teare J, without notice, for an interim injunction. He granted an interim injunction restraining the Unknown Persons respondents from doing the following:

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"(1) Assaulting, molesting, or threatening the protected persons [defined as including Canada Goose's employees, security personnel working at the store, customers and any other person visiting or seeking to visit the store];

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A "(2) Behaving in a threatening and/or intimidating and/or abusive and/or insulting manner directly at any individual or group of individuals within the definition of 'protected persons';

"(3) Intentionally photographing or filming the protected persons with the purpose of identifying them and/or targeting them in connection with protests against the manufacture and/or sale or supply of animal B products;

"(4) Making in any way whatsoever any abusive or threatening electronic communication to the protected persons;

"(5) Entering the Store;

"(6) Blocking or otherwise obstructing the entrance to the Store;

"(7) Banging on the windows of the Store;

C "(8) Painting, spraying and/or affixing things to the outside of the Store;

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

"(10) Demonstrating at the Store within the inner exclusion zone;

"(11) Demonstrating at the Store within the outer exclusion zone A, save that no more than three protestors may at any one time demonstrate and hand out leaflets within the outer exclusion zone A (but not within D the inner exclusion zone) provided that no obstruction occurs other than that which is implicit in handing out leaflets;

"(12) Demonstrating at the Store within the outer exclusion zone B [as defined in the order] save that no more than five protestors may at any one time demonstrate and hand out leaflets within outer exclusion zone B (but not within the inner exclusion zone) provided that no obstruction occurs E other than that which is implicit in handing out leaflets;

"(13) Using at any time a loudhailer [as defined] within the inner exclusion zone and outer exclusion zones or otherwise within ten metres of the building line of the Store;

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

F **13** A plan attached to the order showed the inner and outer exclusion zones. Essentially those zones (with a combined width of 7·5 metres) covered roughly a 180-degree radius around the entrance to the store. The inner exclusion zone extended out from the store front for 2·5 metres. The outer exclusion zone extended a further five metres outwards. The outer exclusion zone was divided into zone A (a section of pavement on Regent G Street) and zone B (a section of pavement in front of the store entrance and part of the carriageway on Regent Street extending to the pavement and the entire carriageway in Little Argyle Street). For all practical purposes, the combined exclusion zones covered the entire pavement outside the store on Regent Street and the pavement and entire carriageway of Little Argyle Street outside the entrance to the store.

H **14** The order permitted the claimant to serve the order on

"any person demonstrating at or in the vicinity of the store by handing or attempting to hand a copy of the same to such person and the order shall be deemed served whether or not such person has accepted a copy of this order."

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It provided for alternative service of the order, stating that "the claimants shall serve this order by the following alternative method namely by serving the same by e-mail to 'contact@surgeactivism.com' and 'info@peta.org.uk' ".

15 The order was expressed to continue in force unless varied or discharged by further order of the court but it also provided for a further hearing on 13 December 2017.

16 The order was sent on 29 November 2017 to the two e-mail addresses mentioned in the order, "contact@surgeactivism.com" and "info@peta.org.uk". The claim form and the particulars of claim were also sent to those e-mail addresses.

17 On 30 November 2017 Canada Goose issued an application notice for the continuation of Teare J's order.

18 On 12 December 2017 PETA applied to be joined to the proceedings. It also sought a variation of the interim injunction. On 13 December 2017 Judge Moloney sitting as a judge of the Queen's Bench Division added PETA to the proceedings as a defendant for and on behalf of its employees and members. He adjourned the hearing in relation to all other matters to 15 December 2017, when the issue of the continuation of the interim injunction came before him again.

19 At that hearing PETA challenged paragraphs (10) to (14) of the interim injunction concerning the exclusion zones and use of a loud-hailer on the basis that those prohibitions were a disproportionate interference with the right of the protestors to freedom of expression under article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the ECHR") and to freedom of assembly under article 12 of the ECHR.

20 Judge Moloney continued the interim injunction but varied it by amalgamating zones A and B in the outer exclusion zone and increasing the number of protestors permitted within the outer exclusion zone to 12 people. He also varied paragraph (14) of Teare J's order, substituting a prohibition on:

> "using at any time a loudhailer within the inner exclusion zone and outer exclusion zone . . . [and] using a loudhailer anywhere else in the vicinity of the Store (including Regent Street and Little Argyll Street) save that between the hours of 2 p m and 8 p m a single loudhailer may be used for the amplification of the human voice only for up to 15 minutes at a time with intervals of 15 minutes between each such use."

21 Judge Moloney's order stated that the order was to continue in force unless varied or discharged by further order of the court, and also provided that all further procedural directions in the claim be stayed, subject to a written notice by any of the parties to the others raising the stay. That was subject to a long-stop requirement that no later than 1 December 2018 Canada Goose was to apply for a case management conference or summary judgment. The order provided that, if neither application was made by that date, the proceedings would stand dismissed and the injunction discharged without further order.

The summary judgment application

22 Regular protests at the store have continued after the grant of the interim injunctions, although none has been on the large scale that occurred

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A before the original injunction was granted. Canada Goose alleges that there have been breaches of those orders.

23 On 29 November 2018 Canada Goose applied for summary judgment against the respondents for a final injunction pursuant to CPR Pt 24. The application came before Nicklin J on 29 January 2018. The injunction attached to the application differed in some respects from the interim injunctions. The prohibitions in paragraphs (1) to (9) were the same but the B restrictions applicable to the zones were different. Only Canada Goose was represented at the hearing. At the invitation of Nicklin J, Mr Michael Buckpitt, junior counsel for Canada Goose, delivered further written submissions after the hearing, including a new description of the Unknown Persons respondents, as follows:

C "Persons who are present at and in the vicinity of 244 Regent Street, London W1B 3BR and are protesting against the manufacture and/or supply and/or sale of clothing made of or containing animal products by Canada Goose UK Retail Ltd and are involved in any of the acts prohibited by the terms of this order ('Protestors')."

24 Canada Goose says that the further written submissions made clear D that it no longer pursued summary judgment against PETA.

25 Nicklin J handed down his judgment on 30 September 2019, the delay being principally due to the sensible decision to wait for the decisions in *Cameron v Hussain (Motor Insurers' Bureau intervening)* [2019] 1 WLR 1471, and *Ineos Upstream Ltd v Persons Unknown (Friends of the Earth intervening)* [2019] 4 WLR 100, which we consider in the Discussion section below, and no doubt also due to the need to consider the successive further E sets of written submissions on behalf of Canada Goose.

26 Bearing in mind that only one party was represented before him, Nicklin J's judgment is an impressive document. With no disrespect, we shall only give a very brief summary of the judgment, sufficient to understand the context for this appeal.

27 The judgment addressed two main issues: a procedural issue of whether there had been proper service of the proceedings, and a merits issue F as to the substance of the application for summary judgment.

28 Nicklin J held that the claim form had not been validly served on the respondents. There had been no service of the claim form by any method permitted by CPR r 6.5, and there had been no order permitting alternative service under CPR r 6.15. Teare J's order only permitted alternative service of his order. Nicklin J declined to amend Teare J's order under the "slip rule" G in CPR r 40.12 and he refused to dispense with service of the claim form on the Unknown Persons respondents under CPR r 6.16 without a proper application before him.

29 Nicklin J also considered that the description of the Unknown Persons respondents was too broad as, in its original form, it was capable of including protestors who might never even intend to visit the store. H Moreover, both in the interim injunctions and in its proposed final form, the injunction was capable of affecting persons who might not carry out any unlawful activity as some of the prohibited acts would not be or might not be unlawful.

30 He was critical of the failure of Canada Goose to join any individual protestors, bearing in mind that Canada Goose could have named 37

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protestors and had identified up to 121 individuals. He regarded as a fundamental difficulty that, as the Unknown Persons respondents were not a homogeneous unit, the court had no idea who in the broad class of Unknown Persons, as defined, had committed or threatened any civil wrong and, if they had, what it was.

31 Nicklin J also considered that the form of the proposed final injunction was defective in that it would capture new future protestors, who would not have been parties to the proceedings at the time of summary judgment and the grant of the injunction.

32 Nicklin J said the following (at para 163) in conclusion on the form of the proposed final injunction:

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

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

> "164. The second defendant (in its non-representative capacity) does have a real prospect of defending the claim. As I have set out above, the present evidence does not show that the second defendant has committed any civil wrong. As such, I am satisfied that it has a real prospect of defending the claim.
>
> "165. In relation to the first defendants, and those for whom the second defendant acts in a representative capacity, it is impossible to answer the question whether they have a real prospect of defending the claim because it is impossible to identify who they are, what they are alleged to have done (or threaten to do) and what defence they might advance. Whether any individual defendant in these classes was guilty of (or threatening) any civil wrong would require an analysis of the evidence of what s/he had done (or threatened) and whether s/he had any defence to resist any civil liability. On the evidence, therefore, I am not satisfied that the claimants have demonstrated that the defendants in each of these classes has no real prospect of defending the claim. On the contrary, on the evidence as it stands, it is clear that there are a large number of people caught by the definition of 'persons unknown' who have not even arguably committed (or threatened) any civil wrong. As there is no way of discriminating between the various defendants in these categories, it is impossible to identify those against whom summary judgment could be granted (even assuming that the evidence justified such a course) and those against whom summary judgment should be refused."

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A 34 For those reasons, Nicklin J refused the application for summary judgment. He also held that, in view of the failure of the interim injunction to comply with the relevant principles, and also in view of fundamental issues concerning the validity of the claim form and its service, the interim injunction then in force could not continue. He said (at para 167):

"I am also satisfied that, applying the principles from *Cameron* [2019] B 1 WLR 1471 and *Ineos* [2019] 4 WLR 100, the interim injunction that is currently in place cannot continue in its current form, if at all. There are fundamental issues that the claimants need to address regarding the validity of the claim form and its service on any defendant. Presently, no defendant has been validly served. Subject to further submissions, my present view is that if the proceedings are to continue, whether or not C a claim can be properly maintained against 'persons unknown' for particular civil wrongs (e g trespass), other civil claims will require individual defendants to be joined to the proceedings whether by name or description and the nature of the claims made against them identified. Any interim relief must be tailored to and justified by the threatened or actual wrongdoing identified in the particulars of claim and any interim injunction granted against 'persons unknown' must comply with the D requirements suggested in *Ineos*."

The grounds of appeal

35 The grounds of appeal are as follows.

"Ground 1 (Service of the Claim Form): In relation to the service of the E claim form, the judge:

"Erred in refusing to amend the order of 29 November 2017, pursuant to CPR r 40.12 or the court's inherent jurisdiction, to provide that service by e-mail was permissible alternative service under CPR r 6.15; alternatively

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

"Adopted a procedurally unfair practice in refusing to consider an application to dispense with service of the claim form under CPR r 6.16, alternatively erred in law in refusing to exercise that power of dispensation.

"Ground 2 (Description of First Respondents): The judge erred in law G in holding that the claimants' proposed reformulation of the description of the first respondents was an impermissible one.

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

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

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

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

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

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

Discussion

Appeal ground 1: service

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

38 Canada Goose submits that it is clear that there was an accidental oversight in the limitation of the provision for alternative service in Teare J's order to the service of the order itself. That is said to be clear from the fact that the order of Teare J records that Canada Goose, through its counsel, had undertaken to the court, on behalf of all the claimants, "to effect e-mail service as provided below of the order, the claim form and particulars of claim and application notice and evidence in support".

39 Canada Goose submits that in the circumstances Nicklin J was wrong not to order, pursuant to CPR r 40.12 or the inherent jurisdiction of the court, that Teare J's order should be corrected so as to provide for the same alternative service for the claim form and the particulars of claim as was specified for the order.

40 Canada Goose submits, alternatively, that Nicklin J should have ordered, pursuant to CPR r 6.15(2) that the steps already taken to bring the claim form to the attention of the defendants was good service.

41 In the further alternative, Canada Goose submits that Nicklin J should have dispensed with service of the claim form pursuant to CPR r 6.16.

42 We do not accept those submissions. Canada Goose can only succeed if Nicklin J, in refusing to exercise his discretionary management powers, made an error of principle or otherwise acted outside the bounds of a proper exercise of judicial discretion. We consider it is plain that he made no error of that kind.

43 CPR r 40.12 provides that the court may at any time correct an accidental slip or omission in a judgment or order. It is well established that

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A this slip rule enables an order to be amended to give effect to the intention of the court by correcting an accidental slip, but it does not enable a court to have second or additional thoughts: see, for example, *Bristol-Myers Squibb Co v Baker Norton Pharmaceuticals Inc (No 2)* [2001] RPC 45.

44 We do not have a transcript of the hearing before Teare J. From what we were told by Mr Bhose QC, for Canada Goose, it is clear that the order was in the form of the draft presented to Teare J by those acting for Canada B Goose and it would appear that the issue of service was not addressed orally at all before him. In the circumstances, it is impossible to say that Teare J ever brought his mind to bear upon the point of alternative service of the claim form and the particulars of claim. The most that can be said is that he intended to make an order in the terms of the draft presented to him. That is what he did. In those circumstances, Nicklin J was fully justified in refusing C to exercise his powers under the slip rule. The grounds of appeal refer to the inherent jurisdiction of the court but no argument was addressed to us on behalf of Canada Goose that any inherent jurisdiction of the court differed in any material respect from the principles applicable to CPR r 40.12.

45 Nicklin J was not merely acting within the scope of a proper exercise of discretion in refusing to order pursuant to CPR r 6.15(2) that the steps taken by Canada Goose in compliance with the undertaking of counsel D constituted good alternative service; he was, at least so far as the Unknown Persons respondents are concerned, plainly correct in his refusal. The legal context for considering this point is the importance of service of proceedings in the delivery of justice. As Lord Sumption, with whom the other justices of the Supreme Court agreed, said in *Cameron* [2019] 1 WLR 1471, para 14, the general rule is that service of the originating process is the act by which E the defendant is subjected to the court's jurisdiction; and (at para 17): "It is a fundamental principle of justice that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard."

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

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

47 Sending the claim form to Surge's e-mail address could not reasonably be expected to have brought the proceedings to the attention of the Unknown Persons respondents, whether as they were originally described in Teare J's order or as they were described in the latest form of the proposed H injunction placed before Nicklin J. Counsel were not even able to tell us whether Surge is a legal entity. There was no requirement in Teare J's order that Surge give wider notice of the proceedings to anyone.

48 The same acute problem for Canada Goose applies to its complaint that Nicklin J wrongly failed to exercise his power under CPR r 6.16 to

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dispense with service of the claim form. It is not necessary to focus on whether Nicklin J was right to raise the absence of a formal application as an obstacle. Looking at the substance of the matter, there was no proper basis for an order under CPR r 6.16.

49 Nicklin J referred in his judgment to the evidence that 385 copies of the interim injunction had been served between 29 November 2017 and 19 January 2019, and that they had been served on a total of 121 separate individuals who could be identified (for example, by body-camera footage). The claimants have been able to identify 37 of those by name, although Canada Goose believes that a number of the names are pseudonyms. None of those who can be individually identified or named have been joined to the action (whether by serving them with the claim form or otherwise) even though there was no obstacle to serving them with the claim form at the same time as the order. Moreover, Canada Goose is not just asking for dispensation from service on the 121 individuals who can be identified. It is asking for dispensation from service on any of the Persons Unknown respondents to the proceedings, even if they have never been served with the order and whether or not they know of the proceedings. There is simply no warrant for subjecting all those persons to the jurisdiction of the court.

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

51 Canada Goose says that, in view of the number of orders that have been served on individuals, it is reasonable to conclude that their existence, and likely their terms, will be well known to a far larger class of protestor than those served with the order. It also relies on the fact that no person served with the order has made any contact with Canada Goose's solicitors or made any application to the court to vary or discharge the order for to apply to be joined as a party.

52 We have already mentioned, by reference to Lord Sumption's comments in *Cameron* [2019] 1 WLR 1471, the importance of service in order to ensure justice is done. We do not consider that speculative estimates of the number of protestors who are likely to know of the proceedings, even though they have never been served with the interim injunction, or the fact that, of the 121 persons served with the order, none has applied to vary or discharge the order or to be joined as a party, can justify using the power under CPR r 6.16 in effect to exonerate Canada Goose from failing to obtain an order for alternative service that would have been likely to draw the attention of protestors to the proceedings and their content. Those are not the kind of "exceptional circumstances" that would justify an order under CPR r 6.16.

53 In its skeleton argument for this appeal Canada Goose seeks to make a distinction, as regards service, between the Unknown Persons respondents and PETA. Canada Goose points out that Nicklin J recognised, as was

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A plainly the case, that service of the claim form by sending it to PETA's e-mail address had drawn the proceedings to PETA's attention. Canada Goose submits that, in those circumstances, Nicklin J was bound to make an order pursuant to CPR r 6.15(2) that there had been good service on PETA or, alternatively, he ought to have made an order under CPR r 6.16 dispensing with service on PETA.

B **54** Bearing in mind that (1) PETA was joined as a party to the proceedings on its own application, (2) Canada Goose says that it informed Nicklin J before he handed down his judgment that judgment was no longer pursued against PETA (which was not mentioned in the proposed final injunction), and (3) Nicklin J reached the conclusion, which is not challenged on this appeal, that there was no evidence that PETA had committed any civil wrong, there would appear to be an air of unreality C about that submission. The reason why it has assumed any importance now is because, should the appeal fail as regards Nicklin J's decision on service on the Unknown Persons respondents and PETA, Canada Goose is concerned about the consequences of the requirement in CPR r 7.5 that the claim form must be served within four months of its issue. We were not shown anything indicating that the significance of this point was flagged up before Nicklin J D as regards PETA. It certainly is not made in the further written submissions dated 28 February 2019 sent on behalf of Canada Goose to Nicklin J on the issue of service. Those submissions concentrated on the question of service on the Unknown Persons respondents. It is not possible to say that in all the circumstances Nicklin J acted outside the limits of a proper exercise of judicial discretion in failing to order that there had been good service on PETA or that service on PETA should be waived.

E **55** For those reasons we dismiss appeal ground 1.

Appeal ground 2 and appeal ground 3: interim and final injunctions

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

G Interim relief against "persons unknown"

57 It is established that proceedings may be commenced, and an interim injunction granted, against "persons unknown" in certain circumstances. That was expressly acknowledged by the Supreme Court in *Cameron* [2019] 1 WLR 1471 and put into effect by the Court of Appeal in the context of protestors in *Ineos* [2019] 4 WLR 100 and *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29.

H **58** In *Cameron* the claimant was injured and her car was damaged in a collision with another vehicle. She issued proceedings against the owner of the other vehicle and his insurer. The owner had not in fact been driving the other vehicle at the time of the collision. The claimant applied to amend her claim form so as to substitute for the owner: "the person unknown driving

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vehicle registration number Y598 SPS who collided with vehicle registration number KG03 ZJZ on 26 May 2013." The Supreme Court, allowing the appeal from the Court of Appeal, held that the district judge had been right to refuse the application to amend and to give judgment for the insurer.

59 Lord Sumption, referred (at para 9) to the general rule that proceedings may not be brought against unnamed parties, and to the express exception under CPR r 55.3(4) for claims for possession against trespassers whose names are unknown, and other specific statutory exceptions. Having observed (at para 10) that English judges had allowed some exceptions to the general rule, he said (at para 11) that the jurisdiction to allow actions and orders against unnamed wrongdoers has been regularly invoked, particularly in the context of abuse of the internet, trespasses and other torts committed by protestors, demonstrators and paparazzi. He then referred to several reported cases, including *Ineos* at first instance [2017] EWHC 2945 (Ch).

60 Lord Sumption identified (at para 13) two categories of case to which different considerations apply. The first ("Category 1") comprises anonymous defendants who are identifiable but whose names are unknown, such as squatters occupying the property. The second ("Category 2") comprises defendants, such as most hit and run drivers, who are not only anonymous but cannot even be identified. The critical distinction, as Lord Sumption explained, is that a Category 1 defendant is described in a way that makes it possible in principle to locate or communicate with him and to know without further enquiry whether he is the same as the person described in the form, whereas that is not true of the Category 2 defendant.

61 That distinction is critical to the possibility of service. As we have said earlier, by reference to other statements of Lord Sumption in *Cameron*, it is the service of the claim form which subjects a defendant to the court's jurisdiction. Lord Sumption acknowledged that the court may grant interim relief before the proceedings have been served or even issued but he described that as an emergency jurisdiction which is both provisional and strictly conditional.

62 Lord Sumption said (at para 15) that, in the case of Category 1 defendants, who are anonymous but identifiable, and so can be served with the claim form or other originating process, if necessary by alternative service under CPR r 6.15 (such as, in the case of anonymous trespassers, attaching copies of the documents to the main door or placing them in some other prominent place on the land where the trespassers are to be found, and posting them if practical through the letterbox pursuant to CPR Pt 55), the procedures for service are well established and there is no reason to doubt their juridical basis. In the case of the Category 2 defendant, such as in *Cameron*, however, service is conceptually impossible and so, as Lord Sumption said (at para 26) such a person cannot be sued under a pseudonym or description.

63 It will be noted that *Cameron* did not concern, and Lord Sumption did not expressly address, a third category of anonymous defendants, who are particularly relevant in ongoing protests and demonstrations, namely people who will or are highly likely in the future to commit an unlawful civil wrong, against whom a quia timet injunction is sought. He did, however, refer (at para 15) with approval to *South Cambridgeshire District Council v Gammell* [2006] 1 WLR 658, in which the Court of Appeal held that persons who entered onto land and occupied it in breach of, and subsequent to the

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A grant of, an interim injunction became persons to whom the injunction was addressed and defendants to the proceedings. In that case, pursuant to an order permitting alternative service, the claim form and the order were served by placing a copy in prominent positions on the land.

64 Lord Sumption also referred (at para 11) to *Ineos*, in which the validity of an interim injunction against "persons unknown", described in terms capable of including future members of a fluctuating group of B protestors, was centrally in issue. Lord Sumption did not express disapproval of the case (then decided only at first instance).

65 The claimants in *Ineos* [2019] 4 WLR 100 were a group of companies and various individuals connected with the business of shale and gas exploration by hydraulic fracturing, or "fracking". They were concerned to limit the activities of protestors. Each of the first five defendants was a group C of persons described as "Persons unknown" followed by an unlawful activity, such as "Entering or remaining without the consent of the claimant(s) on [specified] land and buildings", or "interfering with the first and second claimants' rights to pass and repass . . . over private access roads", or "interfering with the right of way enjoyed by the claimants . . . over [specified] land". The fifth defendant was described as "Persons unknown combining together to commit the unlawful acts as specified in paragraph 11 D of the [relevant] order with the intention set out in paragraph 11 of the [relevant] order". The first instance judge made interim injunctions, as requested, apart from one relating to harassment.

66 One of the grounds for which permission to appeal was granted in *Ineos* was that the first instance judge was wrong to grant injunctions against persons unknown. Longmore LJ gave the lead and only reasoned judgment, E with which the other two members of the court (David Richards and Leggatt LJJ) agreed. He rejected the submission that Lord Sumption's Category 1 and Category 2 defendants were exhaustive categories of unnamed or unknown defendants. He said (at para 29) that it is too absolutist to say that a claimant can never sue persons unknown unless they are identifiable at the time the claim form is issued. He said that Lord Sumption was not considering persons who do not exist at all and will only F come into existence in the future. Longmore LJ concluded (at para 30) that there is no conceptual or legal prohibition on suing persons unknown who are not currently in existence but will come into existence when they commit the prohibited tort (who we call "Newcomers").

67 Longmore LJ said (at para 31) that a court should be inherently cautious about granting injunctions against unknown persons since the G reach of such an injunction is necessarily difficult to assess in advance. He also referred (para 33) to section 12(3) of the Human Rights Act 1998 ("the HRA") which provides, in the context of the grant of relief which might affect the exercise of the right to freedom of expression under article 10 of the ECHR, that no relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed. He said that there was considerable H force in the submission that the first instance judge had failed properly to apply section 12(3) in that the injunctions against the fifth defendants were neither framed to catch only those who were committing the tort of conspiring to cause damage to the claimant by unlawful means nor clear and precise in their scope. Having regard to those matters, Longmore LJ said (at

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para 34) that he would "tentatively frame [the] requirements" necessary for the grant of the injunction against unknown persons, as follows: A

"(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." B

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

69 Longmore LJ said (at para 40) that the subjective intention of a defendant, which is not necessarily known to the outside world (and in particular the claimants) and is susceptible of change, should not be incorporated into the order. He also criticised the concept of slow walking as too wide and insufficiently defined and said that the concept of "unreasonably" obstructing the highway was not susceptible to advance definition. He further held that it is wrong to build the concept of "without lawful authority or excuse" into an injunction since an ordinary person exercising legitimate right to protest is most unlikely to have any clear idea of what would constitute lawful authority or excuse: if he is not clear about what he can and cannot do, that may well have a chilling effect also. He said (at para 40) that it was unsatisfactory that the injunctions contained no temporal limit. E F

70 The result of the appeal was that the injunctions made against the third and fifth defendants were discharged and the claims against them dismissed but the injunctions against the first and second defendants were maintained pending remission to the first instance judge to reconsider whether interim relief should be granted in the light of section 12(3) of the HRA and, if so, what temporal limit was appropriate. G

71 *Cuadrilla* [2020] 4 WLR 29 was another case concerning injunctions restraining the unlawful actions of fracking protestors. The matter came before the Court of Appeal on appeal from an order committing the three appellants to prison for contempt of court in disobeying an earlier injunction aimed at preventing trespass on the claimants' land, unlawful interference with the claimants' rights of passage to and from their land and unlawful H

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A interference with the supply chain of the first claimant. One of the grounds of appeal was that the relevant terms of the injunction were insufficiently clear and certain to be enforced by committal because those terms made the question of whether conduct was prohibited depend on the intention of the person concerned.

72 The Court of Appeal dismissed the appeal. The significance of the case, for present purposes, is not simply that it followed *Ineos* in recognising B the jurisdiction to grant a quia timet interim injunction against Newcomers but also that it both qualified and amplified two of the requirements for such an injunction suggested by Longmore LJ ("the *Ineos* requirements"). Although both David Richards LJ and Leggatt LJ had been members of the Court of Appeal panel in *Ineos* and had given unqualified approval to the judgment of Longmore LJ, they agreed in *Cuadrilla* that the fourth and fifth C *Ineos* requirements required some qualification.

73 Leggatt LJ, who gave the lead judgment, with which David Richards LJ and Underhill LJ agreed, said with regard to the fourth requirement that it cannot be regarded as an absolute rule that the terms of an injunction should correspond to the threatened tort and not be so wide that they prohibit lawful conduct. He referred to *Hubbard v Pitt* [1976] QB D 142 and *Burris v Azadani* [1995] 1 WLR 1372, which had not been cited in *Ineos*, as demonstrating that, although the court must be careful not to impose an injunction in wider terms than are necessary to do justice, the court is entitled to restrain conduct that is not in itself tortious or otherwise unlawful if it is satisfied that such a restriction is necessary in order to afford effective protection to the rights of the claimant in the particular case.

74 Although the point did not arise for decision in *Cuadrilla*, the point E is relevant in the present case in relation to injunctions against persons unknown who are Newcomers because the injunction granted by Teare J and continued by Judge Moloney prohibited demonstrating within the inner exclusion zone and limited the number of protestors at any one time and their actions within the outer exclusion zone.

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

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

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I reject the argument that the court is not entitled, when satisfied that justice requires it, to impose an injunction which may for a limited time prevent the defendant from doing that which he would otherwise be at liberty to do."

76 In *Burris* [1995] 1 WLR 1372 the defendant had persistently threatened and harassed the plaintiff. The plaintiff obtained an interim injunction preventing the defendant from assaulting, harassing or threatening the claimant as well as remaining within 250 yards of her home. Committal proceedings were subsequently brought against the defendant. On the issue of the validity of the exclusion zone, Sir Thomas Bingham MR, with whom the other two members of the court agreed, said (at pp 1377 and 1380–1381):

"It would not seem to me to be a valid objection to the making of an 'exclusion zone' order that the conduct to be restrained is not in itself tortious or otherwise unlawful if such an order is reasonably regarded as necessary for protection of a plaintiff's legitimate interest.

"Ordinarily, the victim will be adequately protected by an injunction which restrains the tort which has been or is likely to be committed, whether trespass to the person or to land, interference with goods, harassment, intimidation or as the case may be. But it may be clear on the facts that if the defendant approaches the vicinity of the plaintiff's home he will succumb to the temptation to enter it, or to abuse or harass the plaintiff; or that he may loiter outside the house, watching and besetting it, in a manner which might be highly stressful and disturbing to a plaintiff. In such a situation the court may properly judge that in the plaintiff's interest—and also, but indirectly, the defendant's—a wider measure of restraint is called for."

77 Nicklin J, who was bound by *Ineos*, did not have the benefit of the views of the Court of Appeal in *Cuadrilla* and so, unsurprisingly, did not refer to *Hubbard v Pitt*. He distinguished *Burris* on the grounds that the defendant in that case had already been found to have committed acts of harassment against the plaintiff; an order imposing an exclusion zone around the plaintiff's home did not engage the defendant's rights of freedom of expression or freedom of assembly; it was a case of an order being made against an identified defendant, not "persons unknown", to protect the interests of an identified "victim", not a generic class. He said that the case was, therefore, very different from *Ineos* and the present case.

78 It is open to us, as suggested by the Court of Appeal in *Cuadrilla* [2020] 4 WLR 29, to qualify the fourth *Ineos* requirement in the light of *Hubbard* [1976] QB 142 and *Burris* [1995] 1 WLR 1372, as neither of those cases was cited in *Ineos* [2019] 4 WLR 100. Although neither of those cases concerned a claim against "persons unknown", or section 12(3) of the HRA or articles 10 and 11 of the ECHR, *Hubbard* did concern competing considerations of the right of the defendants to peaceful assembly and protest, on the one hand, and the private property rights of the plaintiffs, on the other hand. We consider that, since an interim injunction can be granted in appropriate circumstances against "persons unknown" who are Newcomers and wish to join an ongoing protest, it is in principle open to the court in appropriate circumstances to limit even lawful activity. We have had the benefit of submissions from Ms Wilkinson on this issue. She submits that a

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A potential gloss to the fourth *Ineos* requirement might be that the court may prohibit lawful conduct where there is no other proportionate means of protecting the claimant's rights. We agree with that submission, and hold that the fourth *Ineos* requirement should be qualified in that way.

79 The other *Ineos* requirement which received further consideration and qualification in *Cuadrilla* [2020] 4 WLR 29 was the fifth requirement—that the terms of the injunction must be sufficiently clear and precise as to
B enable persons potentially affected to know what they must not do. As mentioned above, Longmore LJ expressed the view in *Ineos* that it was wrong to include in the order any reference to the subjective intention of the defendant. In *Cuadrilla* Leggatt LJ held that the references to intention in the terms of the injunction he was considering did not have any special legal meaning or were difficult for a member of the public to understand. Such
C references included, for example, the provision in paragraph 4 of the injunction prohibiting "blocking any part of the bell-mouth at the Site Entrance . . . with a view to slowing down or stopping the traffic" "with the intention of causing inconvenience or delay to the claimants".

80 Leggatt LJ said (at para 65) that he could not accept that there is anything objectionable in principle about including a requirement of
D intention in an injunction. He acknowledged (at para 67) that in *Ineos* Longmore LJ had commented that an injunction should not contain any reference to the defendants' intention as subjective intention is not necessarily known to the outside world and is susceptible to change, and (at para 68) that he had agreed with the judgment of Longmore LJ and shared responsibility for those observations. He pointed out, however, correctly in our view, that those observations were not an essential part of the court's
E reasoning in *Ineos*. He said that he now considered the concern expressed about the reference to the defendants' intention to have been misplaced and (at para 74) that there was no reason in principle why references to intention should not be incorporated into an order or that the inclusion of such references in terms of the injunction in *Cuadrilla* provided a reason not to enforce it by committal.

81 We accept what Leggatt LJ has said about the permissibility in
F principle of referring to the defendant's intention when that is done in non-technical language which a defendant is capable of understanding and the intention is capable of proof without undue complexity. It is better practice, however, to formulate the injunction without reference to intention if the prohibited tortious act can be described in ordinary language without doing so. As Ms Wilkinson helpfully submitted, this can often be done by
G reference to the effect of an action of the defendant rather than the intention with which it was done. So, in the case of paragraph 4 of the injunction in *Cuadrilla*, it would have been possible to describe the prohibited acts as blocking or obstructing which caused or had the effect (rather than, with the intention) of slowing down traffic and causing inconvenience and delay to the claimants and their contractors.

82 Building on *Cameron* [2019] 1 WLR 1471 and the *Ineos*
H requirements, it is now possible to set out the following procedural guidelines applicable to proceedings for interim relief against "persons unknown" in protestor cases like the present one:

(1) The "persons unknown" defendants in the claim form are, by definition, people who have not been identified at the time of the commencement of the

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proceedings. If they are known and have been identified, they must be joined as individual defendants to the proceedings. The "persons unknown" defendants must be people who have not been identified but are capable of being identified and served with the proceedings, if necessary by alternative service such as can reasonably be expected to bring the proceedings to their attention. In principle, such persons include both anonymous defendants who are identifiable at the time the proceedings commence but whose names are unknown and also Newcomers, that is to say people who in the future will join the protest and fall within the description of the "persons unknown".

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

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

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

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

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

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

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

84 As we have said above, the claim form issued on 29 November 2017 described the "persons unknown" defendants as: "Persons unknown who are protestors against the manufacture and sale of clothing made of or containing animal products and against the sale of such clothing at Canada Goose, 244 Regent Street, London W1B 3BR."

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

86 The interim injunction granted by Teare J and that granted by Judge Moloney suffered from the same overly wide description of those bound by

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A the order. Furthermore, the specified prohibited acts were not confined, or not inevitably confined, to unlawful acts: for example, behaving in a threatening and/or intimidating and/or abusive and/or insulting manner at any of the protected persons, intentionally photographing or filming the protected persons, making in any way whatsoever any abusive or threatening electronic communication to the protected persons, projecting images on the outside of the store, demonstrating in the inner zone or the outer zone, using a B loud-hailer anywhere within the vicinity of the store otherwise than for the amplification of voice. Both injunctions were also defective in failing to provide a method of alternative service that was likely to bring the attention of the order to the "persons unknown" as that was unlikely to be achieved (as explained in relation to ground 1 above) by the specified method of e-mailing the order to the respective e-mail addresses of Surge and PETA. The order of C Teare J was also defective in that it was not time limited but rather was expressed to continue in force unless varied or discharged by further order of the court.

87 Although Judge Moloney's order was stated to continue unless varied or discharged by further order of the court, it was time limited to the extent that, unless Canada Goose made an application for a case management conference or for summary judgment by 1 December 2018, the D claim would stand dismissed and the injunction discharged without further order.

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

Final order against "persons unknown"

89 A final injunction cannot be granted in a protestor case against "persons unknown" who are not parties at the date of the final order, that is to say Newcomers who have not by that time committed the prohibited acts F and so do not fall within the description of the "persons unknown" and who have not been served with the claim form. There are some very limited circumstances, such as in *Venables v News Group Newspapers Ltd* [2001] Fam 430, in which a final injunction may be granted against the whole world. Protestor actions, like the present proceedings, do not fall within that exceptional category. The usual principle, which applies in the present case, is that a final injunction operates only between the parties to the G proceedings: *Attorney General v Times Newspapers Ltd (No 3)* [1992] 1 AC 191, 224. That is consistent with the fundamental principle in *Cameron* [2019] 1 WLR 1471, para 17 that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard.

90 In Canada Goose's written skeleton argument for the appeal, it was submitted that *Vastint Leeds BV v Persons Unknown* [2019] 4 WLR 2 H (Marcus Smith J) is authority to the contrary. Leaving aside that *Vastint* is a first instance decision, in which only the claimant was represented and which is not binding on us, that case was decided before, and so took no account of, the Court of Appeal's decision in *Ineos* [2019] 4 WLR 100 and the decision of the Supreme Court in *Cameron*. Furthermore, there was no

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reference in *Vastint* to the confirmation in *Attorney General v Times Newspapers (No 3)* of the usual principle that a final injunction operates only between the parties to the proceedings.

91 That does not mean to say that there is no scope for making "persons unknown" subject to a final injunction. That is perfectly legitimate provided the persons unknown are confined to those within Lord Sumption's Category 1 in *Cameron*, namely those anonymous defendants who are identifiable (for example, from CCTV or body cameras or otherwise) as having committed the relevant unlawful acts prior to the date of the final order and have been served (probably pursuant to an order for alternative service) prior to the date. The proposed final injunction which Canada Goose sought by way of summary judgment was not so limited. Nicklin J was correct (at para 159) to dismiss the summary judgment on that further ground (in addition to non-service of the proceedings). Similarly, Warby J was correct to take the same line in *Birmingham City Council v Afsar* [2019] EWHC 3217 (QB) at [132].

92 In written submissions following the conclusion of the oral hearing of the appeal Mr Bhose submitted that, if there is no power to make a final order against "persons unknown", it must follow that, contrary to *Ineos*, there is no power to make an interim order either. We do not agree. An interim injunction is temporary relief intended to hold the position until trial. In a case like the present, the time between the interim relief and trial will enable the claimant to identify wrongdoers, either by name or as anonymous persons within Lord Sumption's Category 1. Subject to any appeal, the trial determines the outcome of the litigation between the parties. Those parties include not only persons who have been joined as named parties but also "persons unknown" who have breached the interim injunction and are identifiable albeit anonymous. The trial is between the parties to the proceedings. Once the trial has taken place and the rights of the parties have been determined, the litigation is at an end. There is nothing anomalous about that.

93 As Nicklin J correctly identified, Canada Goose's problem is that it seeks to invoke the civil jurisdiction of the courts as a means of permanently controlling ongoing public demonstrations by a continually fluctuating body of protestors. It wishes to use remedies in private litigation in effect to prevent what is sees as public disorder. Private law remedies are not well suited to such a task. As the present case shows, what are appropriate permanent controls on such demonstrations involve complex considerations of private rights, civil liberties, public expectations and local authority policies. Those affected are not confined to Canada Goose, its customers and suppliers and protestors. They include, most graphically in the case of an exclusion zone, the impact on neighbouring properties and businesses, local residents, workers and shoppers. It is notable that the powers conferred by Parliament on local authorities, for example to make a public spaces protection order under the Anti-social Behaviour, Crime and Policing Act 2014, require the local authority to take into account various matters, including rights of freedom of assembly and expression, and to carry out extensive consultation: see, for example, *Dulgheriu v Ealing London Borough Council* [2020] 1 WLR 609. The civil justice process is a far blunter instrument intended to resolve disputes between parties to litigation, who have had a fair opportunity to participate in it.

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A **94** In addition to those matters, the order sought by Canada Goose on the summary judgment application before Nicklin J (the terms and form of which were not finalised until after the conclusion of the hearing before Nicklin J), suffered from some of the same defects as the interim injunction: in particular, as Nicklin J observed, the proposed order still defined the Unknown Persons respondents by reference to conduct which is or might be lawful.

B **95** In all those circumstances, Nicklin J having concluded (at paras 145 and 164) that, on the evidence before him, PETA had not committed any civil wrong (and, in any event, Canada Goose having abandoned its application for summary judgment against PETA, as mentioned above) he was correct to refuse the application for summary judgment.

C *Appeal Ground 4: Evidence*

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

Conclusion

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

Appeal dismissed.
No order as to costs.

SUSAN DENNY, Barrister

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Court of Appeal

*Birmingham City Council *v* Sharif

[2020] EWCA Civ 1488

2020 Nov 3; 10 Sir Terence Etherton MR, Bean, Holroyde LJJ

Local government — Powers — Action by local authority — Local authority obtaining injunction to control street cruising — Whether injunction appropriate remedy where local authority having power to make public spaces protection order — Local Government Act 1972 (c 70), s 222(1)(a) — Anti-social Behaviour, Crime and Policing Act 2014 (c 12), ss 22, 59

Acting pursuant to its powers under section 222(1)(a) of the Local Government Act 1972[1], the local authority applied for an injunction against persons unknown to prohibit "street cruising" throughout the authority's area. A street cruise was defined in the injunction sought as a congregation of drivers of motor vehicles which caused, among other things, excessive noise and danger to other road users by taking part in activities such as driving at excessive speed, driving in convoy or performing stunts. An injunction was granted with a power of arrest attached. Subsequently the local authority applied to commit the respondent for contempt of court for breach of the injunction. The judge dismissed the respondent's application for the injunction to be discharged, rejecting his submission that the injunction should not have been granted because the local authority had the alternative remedy of itself making a public spaces protection order under section 59 of the Anti-social Behaviour, Crime and Policing Act 2014[2]. The respondent appealed, contending additionally that another alternative remedy was for the local authority to seek to have individuals who took part in street cruising prosecuted for motoring offences, after which the prosecution could apply to the sentencing court for a criminal behaviour order under section 22 of the 2014 Act.

On the appeal—

Held, dismissing the appeal, that a public spaces protection order under section 59 of the Anti-social Behaviour, Crime and Policing Act 2014 might well be

[1] Local Government Act 1972, s 222(1): "Where a local authority consider it expedient for the promotion or protection of the interests of the inhabitants of their area— (a) they may prosecute or defend or appear in any legal proceedings and, in the case of civil proceedings, may institute them in their own name . . ."

[2] Anti-social Behaviour, Crime and Policing Act 2014, s 22: "(1) This section applies where a person ('the offender') is convicted of an offence. (2) The court may make a criminal behaviour order against the offender if two conditions are met. (3) The first condition is that the court is satisfied, beyond reasonable doubt, that the offender has engaged in behaviour that caused or was likely to cause harassment, alarm or distress to any person. (4) The second condition is that the court considers that making the order will help in preventing the offender from engaging in such behaviour. (5) A criminal behaviour order is an order which, for the purpose of preventing the offender from engaging in such behaviour— (a) prohibits the offender from doing anything described in the order; (b) requires the offender to do anything described in the order."

S 59: "(1) A local authority may make a public spaces protection order if satisfied on reasonable grounds that two conditions are met. (2) The first condition is that— (a) activities carried on in a public place within the authority's area have had a detrimental effect on the quality of life of those in the locality, or (b) it is likely that activities will be carried on in a public place within that area and that they will have such an effect. (3) The second condition is that the effect, or likely effect, of the activities— (a) is, or is likely to be, of a persistent or continuing nature, (b) is, or is likely to be, such as to make the activities unreasonable, and (c) justifies the restrictions imposed by the notice. (4) A public spaces protection order is an order that identifies the public place referred to in subsection (2) ('the restricted area') and— (a) prohibits specified things being done in the restricted area, (b) requires specified things to be done by persons carrying on specified activities in that area, or (c) does both of those things. (5) The only prohibitions or requirements that may be imposed are ones that are reasonable to impose in order— (a) to prevent the detrimental effect referred to in subsection (2) from continuing, occurring or recurring, or (b) to reduce that detrimental effect or to reduce the risk of its continuance, occurrence or recurrence."

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ineffective to prevent street cruising since breach of such an order was a non-arrestable offence carrying only a financial sanction and there might also be potential difficulties about what did or did not constitute a "public space", how large that public space could be and whether a public spaces protection order could properly cover the activities of those who organised or advertised street cruises; that, further, the alternative remedy of applying for a criminal behaviour order under section 22 of the 2014 Act following prosecution for a motoring offence was equally likely to be ineffective since it was unclear who, in practice, would initiate and conduct the necessary prosecution, who would be specified to supervise compliance with the criminal behaviour order and who would prosecute in the event of a breach of the criminal behaviour order; that, therefore, in the circumstances, the judge who granted the injunction and the judge who dismissed the respondent's application to discharge the injunction had been entitled to conclude that street cruising in the local authority's area would continue unless and until effectively restrained by the law and that nothing short of an injunction would be effective to restrain it; and that, accordingly, it had been appropriate for the former judge to exercise his discretion to grant the injunction sought by the local authority pursuant to section 222 of the Local Government Act 1972 (post, paras 39–42, 45, 46, 47).

Stoke-on-Trent City Council v B & Q (Retail) Ltd [1984] AC 754, HL(E) and *City of London Corporation v Bovis Construction Ltd (No 2)* [1992] 3 All ER 697, CA applied.

Birmingham City Council v Shafi [2009] 1 WLR 1961, CA distinguished.

Decision of Judge McKenna sitting as a judge of the Queen's Bench Division [2019] EWHC 1268 (QB); [2019] LLR 494 affirmed.

The following cases are referred to in the judgment of Bean LJ:

Birmingham City Council v Afsar [2019] EWHC 3217 (QB); [2020] 4 WLR 168; [2020] 3 All ER 756
Birmingham City Council v James [2013] EWCA Civ 552; [2014] 1 WLR 23, CA
Birmingham City Council v Shafi [2008] EWCA Civ 1186; [2009] 1 WLR 1961; [2009] PTSR 503; [2009] 3 All ER 127; [2009] LGR 367, CA
Canada Goose UK Retail Ltd v Persons Unknown [2020] EWCA Civ 303; [2020] 1 WLR 2802; [2020] 4 All ER 575, CA
Chief Constable of Leicestershire v M [1989] 1 WLR 20; [1988] 3 All ER 1015
City of London Corporation v Bovis Construction Ltd (No 2) [1992] 3 All ER 697, CA
Guildford Borough Council v Hein [2005] EWCA Civ 979; [2005] LGR 797, CA
Ineos Upstream Ltd v Persons Unknown (Friends of the Earth intervening) [2019] EWCA Civ 515; [2019] 4 WLR 100; [2019] 4 All ER 699, CA
Mayor of London (on behalf of the Greater London Authority) v Hall [2010] EWCA Civ 817; [2011] 1 WLR 504, CA
R (McCann) v Crown Court at Manchester [2002] UKHL 39; [2003] 1 AC 787; [2002] 3 WLR 1313; [2002] 4 All ER 593; [2003] LGR 57, HL(E)
Stoke-on-Trent City Council v B & Q (Retail) Ltd [1984] AC 754; [1984] 2 WLR 929; [1984] 2 All ER 332; 82 LGR 473, HL(E)
Swindon Borough Council v Redpath [2009] EWCA Civ 943; [2010] PTSR 904; [2010] 1 All ER 1003; [2010] LGR 28, CA

The following additional cases were cited in argument:

Dulgheriu v Ealing London Borough Council (National Council for Civil Liberties (trading as Liberty) intervening) [2018] EWHC 1667 (Admin); [2019] PTSR 706; [2019] EWCA Civ 1490; [2020] 1 WLR 609; [2020] PTSR 79; [2020] 3 All ER 545, CA
West Sussex County Council v Persons Unknown [2013] EWHC 4024 (QB)

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

Ali v Bradford Metropolitan District Council [2010] EWCA Civ 1282; [2012] 1 WLR 161; [2011] PTSR 1534; [2011] 3 All ER 348, CA
Birmingham City Council v Jones (Secretary of State for the Home Department intervening) [2018] EWCA Civ 1189; [2019] QB 521; [2018] 3 WLR 1695, CA
B *Summers v Richmond upon Thames London Borough Council* [2018] EWHC 782 (Admin); [2018] 1 WLR 4729

APPEAL from Judge McKenna sitting as a judge of the Queen's Bench Division

By an application notice served on 27 September 2018 the applicant local C authority, Birmingham City Council, applied to commit the respondent, Harun Mansoor Sharif, for contempt of court, alleging that on 16 September 2018 he had breached an injunction, which the local authority had obtained pursuant to section 222 of the Local Government Act 1972, prohibiting street cruising throughout the local authority's area, by participating in a street cruise within the area covered by the injunction, causing danger and/or nuisance to other road users by racing his motor car against another vehicle D dangerously and at an excessive speed. The respondent applied to have the injunction discharged on the basis that it was plainly wrong to have granted it and that there was an error of principle in the reasoning which led to its grant, contending that instead of applying for an injunction the local authority ought to have made a public spaces protection order under section 59 of the Anti-social Behaviour, Crime and Policing Act 2014. On 23 May 2019 Judge E McKenna sitting as a judge of the Queen's Bench Division [2019] EWHC 2168 (QB); [2019] LLR 494 dismissed the application to discharge the injunction.

By an appellant's notice filed on 10 June 2019 and with permission granted by the Court of Appeal (Floyd LJ) on 23 December 2019 the respondent appealed on the following grounds. (1) The judge had erred in F law in holding that an intention ought not to be imputed to Parliament that a public authority should be obliged to make public spaces protection orders and still less that the court should exercise its discretion to decline to deal with an application on the basis that the local authority should have made an order itself without coming to court. (2) The judge had erred in law in holding that the present case was nearer to *Swindon Borough Council v* G *Redpath* [2010] PTSR 904 than *Birmingham City Council v Shafi* [2009] 1 WLR 1961 and that a public spaces protection order was not identical or even remotely similar to the remedy provided by the High Court. (3) The judge had erred in law in holding that there was no general principle that only in exceptional circumstances should a court grant an injunction where an alternative, specific, statutory remedy was available or the court should not do so where breach could carry more severe sanctions than breach of a H public spaces protection order, nor was there any basis for arguing that local authorities could not seek a remedy with more serious consequences in the event of a breach or that the court could not grant such a remedy if it considered it justified and proportionate so to do.

The facts are stated in the judgment of Bean LJ, post, paras 1, 6–7.

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Ramby de Mello (instructed by *McGrath & Co, Birmingham*) for the respondent. A

Jonathan Manning and *Iulia Şaran* (instructed by *Legal and Democratic Services, Birmingham City Council, Birmingham*) for the local authority.

The court took time for consideration.

10 November 2020. The following judgments were handed down. B

BEAN LJ

1 Street cruising, or car cruising, is a term used to describe a form of anti-social behaviour which has apparently become a widespread problem in the West Midlands in particular. By a claim issued on 6 September 2016 against "persons unknown" Birmingham City Council sought an injunction C pursuant to section 222 of the Local Government Act 1972 to prohibit street cruising throughout their local authority area. On 3 October 2016 Judge Worster, sitting as a judge of the Queen's Bench Division, granted the injunction for a period of three years. On 24 May 2019 Judge McKenna, also sitting as a judge of the Queen's Bench Division, [2019] EWHC 1268 (QB); [2019] LLR 494 refused an application by the present appellant D Harun Mansoor Sharif to discharge the injunction. The question on this appeal from Judge McKenna's decision is whether the injunction was properly granted, given what is said to be the alternative remedy available to the council of itself making a public spaces protection order ("PSPO") under Part 4 of the Anti-Social Behaviour, Crime and Policing Act 2014.

2 Two witness statements of Mr David Bird of Birmingham's Housing Department were in evidence before Judge Worster and Judge McKenna. E They provided powerful evidence that street cruising was a widespread problem and that the council's attempts to deal with it by means short of an injunction had been unsuccessful.

3 Street cruising is not a statutory term. It was defined in a schedule to Judge Worster's order as follows:

> " 'Street cruise' F
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> "1. 'Street cruise' means a congregation of the drivers of two or more motor vehicles (including motor cycles) on the public highway or at any place to which the public have access within the claimant's local government area (known as the City of Birmingham) as shown delineated in blue on the map at Schedule 1, at which any person, whether or not a driver or rider, performs any of the activities set out at paragraph 2 below, G so as, by such conduct, to cause any of the following: (i) excessive noise; (ii) danger to other road users (including pedestrians); (iii) damage or the risk of damage to private property; (iv) litter; (v) any nuisance to another person not participating in the street cruise.
>
> "2. The activities referred to at paragraph 1, above, are: (i) driving or riding at excessive speed, or otherwise dangerously; (ii) driving or riding H in convoy; (iii) racing against other motor vehicles; (iv) performing stunts in or on motor vehicles; (v) sounding horns or playing radios; (vi) dropping litter; (vii) supplying or using illegal drugs; (viii) urinating in public; (ix) shouting or swearing at, or abusing, threatening or otherwise intimidating another person; (x) obstruction of any other road-user.

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A “ ‘Participating in a street cruise’

“3. A person participates in a street cruise whether or not he is the driver or rider of, or passenger in or on, a motor vehicle, if he is present and performs or encourages any other person to perform any activity to which paragraphs 1–2 above apply, and the term ‘participating in a street cruise’ shall be interpreted accordingly.”

B A power of arrest, pursuant to section 27 of the Police and Justice Act 2006, was attached to the injunction in relation to anyone participating in a street cruise as the driver or rider of, or passenger in, a vehicle to which paragraphs 1 and 2 applied.

4 The injunction came into force on 24 October 2016 and was to continue for three years. We are informed that it was renewed until 1 September 2022 by Judge Rawlings on 22 October 2019.

C **5** Paragraph 5 of Judge Worster’s order provided that any person served with a copy of the order could apply to the court to vary or discharge it on 48 hours’ written notice to the council. Schedule 3 to the order provided for service of the injunction to be effected by placing notices in newspapers, online and in prominent locations throughout Birmingham.

6 On 27 September 2018 the council served a notice of application to D commit for contempt of court on Mr Sharif. The application alleged that on 16 September 2018 he had breached the terms of the injunction by participating in a street cruise within the area covered by the injunction, causing danger and/or nuisance to other road users by racing his black Audi A5 motor car registration number RF63 HBJ against another vehicle dangerously and at an excessive speed. He was arrested and brought before the court.

E **7** He applied to have the injunction discharged on the basis that it was plainly wrong to have granted it and that there was an error of principle in the reasoning which led to its grant. Mr de Mello, who appeared for him below as well as before us, relied on the decision of this court in *Birmingham City Council v Shafi* [2009] 1 WLR 1961 (“*Shafi*”). In that case, as he put it, the Court of Appeal concluded that where a local authority sought an F injunction on terms that were identical or almost identical to the terms that could have been sought on an application for an anti-social behaviour order (“ASBO”), which latter order was Parliament’s preferred remedy for the type of conduct complained of and incorporated safeguards for defendants not available under the civil injunction regime, then while the court retained jurisdiction to grant an injunction, it would not, as a matter of discretion, grant one save in exceptional circumstances.

G **8** As in the case of *Shafi*, the argument runs, Parliament has provided a remedy and a specific procedure in the form of the PSPO to combat the very type of behaviour complained about and, therefore, the courts should give effect to Parliament’s intention and only in very rare circumstances would it be appropriate for the court to grant injunctive relief. It was pointed out that Gateshead Metropolitan Borough Council had apparently sought to deal with street cruising by making a PSPO for their area.

H **9** In further support of his argument, it was submitted on behalf of Mr Sharif that the sanctions under the Contempt of Court Act 1981, namely an unlimited fine and/or imprisonment for up to two years, are far more onerous than the sanctions provided for in respect of breaches of PSPOs pursuant to the 2014 Act, a result that Parliament could not have intended,

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and equally, it was said, that Parliament in the PSPO regime expressly provided that a person would not be guilty of an offence if there was a reasonable excuse, a safeguard lacking in respect of committal proceedings. A

10 Judge McKenna dismissed the application to discharge the injunction. The essence of his judgment can be found in paras 27–30 and 32–33:

"27. To my mind, the 16th respondent [Mr Sharif]'s reliance on the decision in *Shafi* is entirely misplaced. PSPOs are not a specific statutory remedy designed or introduced by Parliament to tackle the specific problem of car cruising. They replace, as I have already indicated, public space orders, restricting problem drinking, gating orders and dog control orders and give local authorities a general power to tackle activities that may cause a detrimental effect to quality of life of those living in their localities. The fact that Gateshead [Metropolitan Borough Council] may have made use of that power to deal with similar issues to those in respect of which the injunction was sought is neither here or there. B C

"28. Moreover, as counsel for the applicant submitted in respect of the argument based on the case of *Shafi*, here the choice is not between two different types of court orders but between a remedy which requires a judicial decision and is, therefore, made by an independent and impartial tribunal on the one hand and on the other, the PSPO which the local authority makes for itself. D

"29. In those circumstances it does not seem to me that an intention should be imputed to Parliament that a public authority should be obliged to make PSPOs which are orders made without recourse to the courts and still less that the courts should in the exercise of their discretion decline to deal with an application on the basis that the local authority should have made an order itself without coming to court. That would be a very surprising result—even more so when it is remembered that in the *Shafi* case the 'ASBO' regime provided specific safeguards which were lacking in the alternative approach and which made it more difficult for a local authority to obtain an 'ASBO'. E

"30. Moreover, *Shafi* has not been followed in other cases. It was expressly distinguished and indeed held to be irrelevant by the Court of Appeal in *Swindon Borough Council v Redpath* [2010] PTSR 904 where the court held that there was no reason why a local authority should not use the [anti-social behaviour injunction] 'ASBI' regime instead of the 'ASBO' regime and in respect of which a civil standard of proof would be applied. Likewise, in *Birmingham City Council v James* [2014] 1 WLR 23 the Court of Appeal held there was no doctrine requiring one statutory remedy to be used in preference to another." F G

"32. In short, it is clear from the decisions in *Redpath* and *James* that there has never been a doctrine requiring an authority to apply for the remedy representing the closest fit to the mischief aimed at and, in any event, the alternative remedy contended for on the 16th respondent's behalf, namely the PSPO, is not identical or even remotely similar. H

"33. There is no general principle that only in exceptional circumstances should a court grant an injunction where an alternative, specific statutory remedy is available or the court should not do so where breach can carry more severe sanctions than breach of a PSPO nor is there any basis for the argument that local authorities cannot seek a remedy

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A with more serious consequences in the event of a breach or that the court cannot grant such a remedy if it considers it justified and proportionate so to do. In this case, the court had ample evidence of the previous attempts made by the West Midlands Police to address car cruising and to the effect that those attempts have proved inadequate and therefore to conclude that the granting of the injunction was appropriate."

B **11** Mr Sharif applied for permission to appeal on three grounds.

(1) "The learned judge erred in law in holding that an intention should not be imputed to Parliament that a public authority should be obliged to make public spaces protection orders and still less that the court should in the exercise of their discretion decline to deal with an application on the basis that the local authority should have made an order itself without coming to court [para 29]."

C (2) "The learned judge erred in law in holding that this case was nearer the case of *Swindon Borough Council v Redpath* [2010] PTSR 904 than the case of *Birmingham City Council v Shafi* [2009] 1 WLR 1961 [para 30] and that the PPO [sic] is not identical or even remotely similar to the remedy provided by the High Court [para 32]."

(3) "The learned judge erred in law in holding 'There is no general D principle that only in exceptional circumstances should a court grant an injunction where an alternative, specific, statutory remedy is available or the court should not do so where breach can carry more severe sanctions than breach of a PSPO nor is there any basis for the argument that local authorities cannot seek a remedy without more serious consequences in the event of a breach or that the court cannot grant such remedies if it considers E it justified and proportionate so to do' [para 33]."

12 In his main skeleton argument Mr de Mello added a further point:

"Section 130 of the Highways Act 1980 was inapplicable. [That section] is concerned with the protection of the legal rights of the public at large to use the public highway and with legal rights of access, not with the safety of the condition of the public highway (*Ali v Bradford* F *Metropolitan District Council* [2012] 1 WLR 161, para 39) or for that matter car cruising on the highway. The court refused to impose liability through the law of private nuisance as it would amount to the use of a blunt instrument to interfere with a carefully regulated statutory scheme and would usurp the proper role of Parliament."

13 Permission to appeal to this court was granted by Floyd LJ in an G order sealed on 23 December 2019. He wrote:

"The grounds of appeal have a real prospect of success and, even if they did not, the legality of the practice of granting injunctions of this character is of sufficient general importance to amount to a compelling reason for the issue to be considered at this level."

H *Public spaces protection orders*

14 Part 4 of the Anti-social Behaviour, Crime and Policing Act 2014 ("the 2014 Act") introduced new powers for community protection, including PSPOs. PSPOs replaced designated public place orders, gating orders and dog control orders.

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15 Section 59(4) of the 2014 Act provides that a PSPO is an order which identifies a public place ("the restricted area") and: (a) prohibits specified things being done in the restricted area, (b) requires specified things to be done by persons carrying on specified activities in that area, or (c) does both of those things.

16 By section 59(1)–(2) of the 2014 Act, a local authority may make a PSPO if satisfied on reasonable grounds that: (a) activities carried on in a public place within the authority's area have had a detrimental effect to the quality of life of those in the locality, or (b) it is likely that activities will be carried on that will have such an effect.

17 The effect of the activities must be, or be likely to be: (a) of a persistent or continuing nature; and (b) such as to make the activities unreasonable; and (c) must justify the restrictions imposed by the notice (section 59(3)).

18 By section 59(5), the only prohibitions or requirements that may be imposed are ones that are reasonable to impose in order: "(a) to prevent the detrimental effect referred to in subsection (2) from continuing, occurring or recurring, or (b) to reduce that detrimental effect or to reduce the risk of its continuance, occurrence or recurrence."

19 Before a PSPO may be made, there are various consultation requirements that must be complied with (section 72). There are also restrictions on the orders that may be made in respect of highways (sections 64–65).

20 Parliament neither repealed nor amended section 130 of the Highways Act 1980, nor any of the other statutory provisions relied on by the council, when introducing PSPOs. The 2014 Act repealed and replaced the ASBO regime with, among other things, criminal behaviour orders ("CBOs").

21 Breach of a PSPO, without reasonable excuse, is a criminal offence (section 67(1)), punishable with a fixed penalty notice (of up to £100) (section 68) or a fine, on summary conviction, not exceeding level 3 (currently up to £1,000) (section 67(2)).

Section 222 of the Local Government Act 1972

22 The centrepiece of Mr de Mello's argument before us, as it was before Judge McKenna, was *Shafi* [2009] 1 WLR 1961, in which it was held that an injunction restraining gang-related activity by three named defendants should not have been granted under section 222 in terms identical or nearly identical to those which could have been included in an ASBO granted by a criminal court under the Crime and Disorder Act 1998.

23 Before examining *Shafi* I should begin with two previous authorities dealing with section 222 of the 1972 Act. The first is the decision of the House of Lords in *Stoke-on-Trent City Council v B & Q (Retail) Ltd* [1984] AC 754. That case was the culmination of an epic struggle between local authorities and DIY supermarkets and others which sought to open on Sundays in breach of the law as it then was (the Shops Act 1950) prior to the enactment of the Sunday Trading Act 1994. The maximum penalty under the Shops Act 1950 was £50 for a first offence and £200 for any subsequent offence.

24 The House of Lords held that an interlocutory injunction to restrain Sunday trading by B & Q had been properly granted. Lord Templeman said at p 776:

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"It was said that the council should not have taken civil proceedings until criminal proceedings had not persuaded the appellants to obey the law. As a general rule the local authority should try the effect of criminal proceedings before seeking the assistance of the civil courts. But the council were entitled to take the view that the appellants would not be deterred by a maximum fine which was substantially less than the profits which could be made from illegal Sunday trading."

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25 *City of London Corporation v Bovis Construction Ltd (No 2)* [1992] 3 All ER 697 was a decision of this court concerning an injunction under section 222 to tackle nuisance caused by noise. In a well-known passage, cited by Mr de Mello in argument, Bingham LJ said at p 714:

"The guiding principles must, I think, be—

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"(1) that the jurisdiction is to be invoked and exercised exceptionally and with great caution: see the authority already cited [*Gouriet v Union of Post Office Workers* [1978] AC 435];

"(2) that there must certainly be something more than mere infringement of the criminal law before the assistance of civil proceedings can be invoked and accorded for the protection or promotion of the interests of the inhabitants of the area: see the *Stoke-on-Trent* case at

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pp 767B, 776C, and *Wychavon District Council v Midland Enterprises (Special Events) Ltd* (1987) 86 LGR 83, 87;

"(3) that the essential foundation for the exercise of the court's discretion to grant an injunction is not that the offender is deliberately and flagrantly flouting the law but the need to draw the inference that the defendant's unlawful operations will continue unless and until effectively restrained by the law and that nothing short of an injunction will be

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effective to restrain them: see the *Wychavon* case at p 89."

26 Against that background I turn to *Shafi* [2009] 1 WLR 1961, in which I note that Mr Manning appeared for the council and Mr de Mello for one of the three defendants. In an attempt to mitigate the impact of a growing gang culture and accompanying serious crime in Birmingham the council applied for injunctions under section 222 restraining the defendants

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from entering the city centre, associating with named individuals or wearing green clothing, which was the colour of the gang of which they were alleged to be members. The injunctions sought were in identical or almost identical terms to ASBOs which the council had obtained in the magistrates' court against juvenile gang members. The council obtained interlocutory injunctions against the defendants but these were discharged following a

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trial in the county court before Judge MacDuff QC (as he then was). An appeal by the council to this court was dismissed.

27 In the principal judgment given jointly by Sir Anthony Clarke MR and Rix LJ they referred to the *B & Q* case and to *City of London Corporation v Bovis*. At para 33 they said:

"The principles summarised by Bingham LJ have been followed and to

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some extent broadened in later cases. For example, in *Barking and Dagenham London Borough Council v Jones* (unreported) 30 July 1999; CA Transcript No 1369. Brooke LJ, with whom May and Laws LJJ agreed, said this, with regard to Bingham LJ's principles: 'The application of those principles means that if the court is satisfied that nothing short of an injunction will be effective to restrain a defendant's unlawful

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operations it may grant an injunction even though he has not yet been subjected to the maximum penalty available under the criminal law.' "

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28 After referring to the decision of this court in *Guildford Borough Council v Hein* [2005] LGR 797 they said at para 36:

"Those cases suggest a somewhat broader approach than some of the earlier ones, although, in our judgment the essential principles remain those summarised by Bingham LJ, in so far as the injunction is sought in aid of the criminal law, if by that is meant or includes a case where the injunction is sought to prevent the defendant from committing criminal offences. As appears below, it is our view, first that these principles are subject to any legislation which is designed to deal with the very situation which an injunction is sought to control and secondly that the ASBO legislation is designed to do just that."

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29 At para 43 they turned to consideration of the ASBO legislation then in force and referred to a decision of Hoffmann J in *Chief Constable of Leicestershire v M* [1989] 1 WLR 20. That was a case in which the police sought an injunction restraining the defendant from dealing with assets which were alleged to represent profits from fraudulent activities. Hoffmann J said in the final paragraph of his judgment: "In my judgment there is no authority for the police having any 'right' in respect of such money which could found a claim for an injunction." He noted that the Drug Trafficking Offences Act 1986 had made what he described as "elaborate provision" for enabling the courts to restrain dispositions of assets suspected of being derived from dealings in drugs, and that even more recently Parliament had enacted similar provisions applicable to all indictable offences in the Criminal Justice Act 1988; but that the latter statute was not yet in force. That gives the context to the observation at the end of his judgment, cited by this court in *Shafi* at para 43, on which Mr de Mello strongly relies, that: "The recent and detailed interventions of Parliament in this field suggest that the court should not indulge in parallel creativity by the extension of general common law principles."

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30 Sir Anthony Clarke MR and Rix LJ continued:

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"44. The significance of the principle stated by Hoffmann J in this appeal is this. The terms of the injunction sought in this action are typical of an ASBO and, as already indicated, on the facts of this case they are identical or almost identical to the terms of an ASBO. We have already referred to what is in our view a striking feature of the council's approach in this case, namely that it seeks ASBOs against those under 18 and injunctions in identical terms against those over 18. Parliament has laid down a number of specific requirements which apply to ASBOs, some of which may not apply to injunctions granted at common law. In so far as it may be said that it is easier to obtain an injunction than an ASBO, the granting of an injunction in such circumstances would in our view be to infringe Hoffmann J's principle. In any event, it appears to us that where, as here, Parliament has legislated in detail to deal with a particular problem, the courts should in general leave the matter to be dealt with as Parliament intended and, save perhaps in exceptional circumstances, refuse to grant injunctive relief of the kind which can be obtained by an ASBO.

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"45. We recognise that there is a general principle that, where a claimant in a civil action has two available rights or remedies, he is in

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A general entitled to choose which to rely upon. However, the principle to which we have referred is an exception to that general principle and applies in the kind of case contemplated by Hoffmann J, of which this seems to us to be an example. We recognise that it may be said that in *Chief Constable of Leicestershire v M* Hoffmann J was considering what he regarded as an unprincipled extension of the common law in a field in which Parliament had already legislated and that in this case the B jurisdiction to grant an injunction in aid of the criminal law (and indeed to restrain a public nuisance) is already established. However, it seems to us that the thought which underlies Hoffmann J's principle applies here. Parliament has recently legislated to restrain anti-social behaviour in a particular way and subject to particular safeguards. In our view the court should have that fact well in mind in deciding how to exercise its C discretion whether or not to grant an injunction in a particular case."

31 They went on to refer to the terms of section 1 of the Crime and Disorder Act 1998 which first introduced ASBOs, and to the decision of the House of Lords in *R (McCann) v Crown Court at Manchester* [2003] 1 AC 787 that on applications for ASBOs magistrates' courts should apply the criminal standard of proof to the question of whether it had been shown that D the defendant had acted in an anti-social manner. Lord Steyn dealt with that point in particular and said that the application of the criminal standard of proof should ensure consistency and predictability in "this corner of the law". The Master of the Rolls and Rix LJ continued:

"51. The questions whether an injunction should be granted in this action on the one hand or whether an ASBO should be granted in identical or near identical terms on the other are surely questions which E arise in what Lord Steyn would regard as the same corner of the law. It would be bizarre, not to say irrational, if the standard of proof in answering the two questions were different.

"52. Suppose two identical cases in which A is under 18 and B is over 18. In one case an ASBO is sought against defendant A in the magistrates court and in the other defendant B is over 18 and an injunction is sought F against him in the High Court or a county court. The orders sought are in identical or near identical terms. It would again surely be bizarre, not to say irrational, if the standard of proof in the two cases were different. What then is the solution? In our view the natural solution is for the High Court or county court to decline to grant an injunction but to leave the council to seek an ASBO in both cases. That approach seems to us to be consistent with Hoffmann J's principle."

G 32 They added:

"59. The discretion of the court whether or not to grant an injunction derives from section 37 of the Supreme Court Act 1981. In this case, as already stated, the council seeks injunctions in aid of the criminal law (in the sense discussed above) or to prevent a public nuisance. However, the H principles upon which such an injunction is to be granted remain to be determined. As stated above, as we see it they have been worked out to a considerable extent in the first class of case and in the classic case of public nuisance, but they remain to be worked out in a case which has elements of both and they also remain to be worked out where what is sought is in effect an ASBO. The critical factor in the present case is in our

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opinion that, whether the council seeks an injunction in aid of the criminal law or on the basis of an alleged public nuisance, the essential remedy sought is an ASBO.

"60. It is in this context that Hoffmann J's principle—or something closely analogous to it—falls to be respected. Thus we conclude, for the reasons we have given, that the court should not indulge in parallel creativity by the extension of general common law principles. Hoffmann J did not of course have the ASBO in mind but it seems to us that, where—as here—a council seeks an injunction in circumstances in which an ASBO would be available, the court should not, save perhaps in an exceptional case, grant an injunction but leave the council to seek an ASBO so that the detailed checks and balances developed by Parliament and in the decided cases will apply."

33 *Shafi* was almost immediately reversed on its facts by statute: in sections 34–45 of the Policing and Crime Act 2009 Parliament created the "injunction to restrain gang-related violence". It has repeatedly been distinguished in later cases. In *Swindon Borough Council v Redpath* [2010] PTSR 904 this court held that there was no reason why a local authority should not apply for an anti-social behaviour injunction under sections 153A–153E of the Housing Act 1996 (the predecessor to the 2014 Act but in the context of housing) rather than seeking an ASBO in the criminal courts.

34 In *Birmingham City Council v James* [2014] 1 WLR 23 Jackson LJ observed that there are many situations in which, on the facts, two different pre-emptive orders are available and that there is no "closest fit" principle which cuts down the court's statutory powers to make pre-emptive orders. He advised at para 31 that "in future cases the Court of Appeal should not be invited to trawl through the legislation in some quest for the closest fit". In *Mayor of London (on behalf of the Greater London Authority) v Hall* [2011] 1 WLR 504 this court upheld the grant of an injunction restraining protestors from occupying Parliament Square, in aid of the enforcement of byelaws which provided for a modest financial penalty only and had proved ineffective: see per Lord Neuberger of Abbotsbury MR at paras 52–57.

35 In the recent High Court case of *Birmingham City Council v Afsar* [2020] 4 WLR 168 the council, again represented by Mr Manning, sought injunctions to restrain protests outside a maintained school by parents and others critical of the school's teaching of LGBT issues. The case raised issues under articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms which are not applicable to the present case. One of the arguments put forward by Mr de Mello for three of the defendants was that an injunction was inappropriate given that the council could have made a PSPO. Warby J said (at para 34):

"Mr de Mello had an alternative submission: that if the legislation allows the council scope to choose between a PSPO or an injunction as the means of combating anti-social behaviour, it should not be granted an injunction, thereby bypassing the statutory safeguards built into the PSPO regime. In support of that submission he cited *Birmingham City Council v Shafi* [2009] 1 WLR 1961, paras 36, 45 and 59. A similar argument was advanced by Mr de Mello in *Birmingham City Council v Sharif* [2019] EWHC 1268 (QB) and rejected by Judge McKenna (sitting as a deputy High Court judge). I share the view expressed by Judge McKenna at para 27 that the argument is entirely misplaced, for the reasons he gave at

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A paras 28–33. In short, *Shafi* is no authority for the proposition that an injunction under the 2014 Act cannot or should not be sought or granted if the authority could have imposed a PSPO, or other lesser remedy: see *Swindon Borough Council v Redpath* [2010] PTSR 904, *Birmingham City Council v James* [2014] 1 WLR 23 at para 22, 28, 31. A local authority's power to ask the court to determine whether an injunction is a B necessary and proportionate interference with Convention rights is not shackled by rigid rules of this kind. Nor can it be argued that the powers of the court should not be invoked or exercised, on the grounds that court procedures are inferior to the administrative procedures specified in the statute. That is manifestly not the case."

36 Mr Manning distinguishes *Shafi* [2009] 1 WLR 1961 on numerous C grounds. Firstly, he says, *Shafi* concerned two alternative judicial remedies, one (the ASBO) with greater safeguards than the other (the injunction), whereas in the present case the choice is between a judicial remedy (the injunction) and an administrative procedure which the council can operate itself without permission or even oversight from anyone else. Second, the ASBO available in *Shafi* was designed to address precisely the same mischief D as the injunction which the council sought, which is not the position here. Third, the intention of Parliament in creating the ASBO in the Crime and Disorder Act 1998, which is what the court considered in *Shafi*, is no longer relevant because the ASBO has been abolished. Fourth, the leading judgment in *Shafi* clearly envisages that local authorities will still be able to apply for injunctions under section 222 to restrain public nuisances (see paras 53 and 65). Fifth, subsequent decisions of this court have made it clear E that local authorities can seek injunctions in aid of the criminal law, and that there is no doctrine of the "closest fit".

37 The ratio of *Shafi*, in my view, is that it was wrong for the council to apply for a section 222 injunction to restrain anti-social behaviour rather than applying to a magistrates' court or the Crown Court for an ASBO because (1) (as the judgment repeatedly emphasises: see paras 51–53, 61 and F 65) the terms of the injunction sought were "identical or almost identical" to those which would be obtainable in an ASBO; (2) the criminal law could not be said to be ineffective (breach of an ASBO was punishable with imprisonment); and (3) it was unfair to circumvent the criminal standard of proof which the House of Lords had held in *McCann* [2003] 1 AC 787 was required on an application for an ASBO. This was why the court departed G from what they accepted to be the general principles laid down in *B & Q* [1984] AC 754 and *Bovis* [1992] 3 All ER 697. Like Judge McKenna in the present case and Warby J in *Afsar* [2020] 4 WLR 168, I do not regard it on its proper construction as being of any assistance in the present case.

38 The third written ground of appeal argues that the court below was wrong to grant, or to refuse to discharge, an injunction carrying the penalty of up to two years' imprisonment for contempt when the sanctions for H breach of a PSPO are so much less severe. But that seems to me to turn the *B & Q* case on its head, and it was not the way Mr de Mello put the point in oral argument. Rather he submitted that Parliament had created a specific scheme of PSPOs with provision for consultation with persons affected, and by doing so it intended to replace any alternative remedy the council might

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otherwise have invoked such as an injunction under section 222. He told us that PSPOs have been deployed against street cruising both in Gateshead (as Judge McKenna noted) and more recently in Milton Keynes. A

39 There was no evidence before Judge McKenna, and there is none before us, of the scope and terms of the Gateshead PSPO, nor how it was originally made, nor of how effective it has been to prevent street cruising. But Mr Bird's evidence in the present case was enough to indicate that a PSPO might well be ineffective. Breach of a PSPO is a non-arrestable offence carrying only a financial sanction (whether by prosecution or by service of a fixed penalty notice). As one item of evidence (among many) mentioned by Mr Bird records, "a caller complains that the vehicles go when police arrive and simply return when the police have moved on". There may also be potential difficulties about what does or does not constitute a "public space"; how large that public space can be; and whether a PSPO can properly cover the activities of those who organise or advertise street cruises. B C

40 Mr de Mello's case before Judge McKenna was that the council could and should have used a PSPO rather than applying for an injunction; and, as already noted, each of the three pleaded grounds of appeal was to the same effect. However, in a supplementary skeleton argument and oral submissions he sought to argue that another alternative provided by Parliament, which the council should have used rather than seeking an injunction, was to seek to have individuals such as his client prosecuted for an appropriate motoring offence. In the event of conviction, he submitted, the prosecution could apply to the court for a CBO to be made under section 22 of the 2014 Act to address any problems of public nuisance. D

41 I would reject that submission, not simply because it was not made in the court below. It seems to me to be as unrealistic as the suggestion of a PSPO, though for different reasons. No submissions were made as to who, in practice, would initiate and conduct such a prosecution; which individual or organisation would be specified under section 24 of the 2014 Act to supervise compliance with the requirements of the CBO; or who would prosecute for an offence contrary to section 30 of the Act in the event of a breach of the CBO. Even assuming (without deciding) that a CBO is an appropriate order to be made on conviction for a motoring offence such as dangerous driving or racing on the highway, it could only be made against an individual who had been prosecuted and convicted of an offence, a process which might well take several months. The purpose of the injunction was to prevent future nuisances, not to impose penalties for past ones. E F

42 Judge Worster and Judge McKenna were well entitled to conclude, in the words of Bingham LJ's third criterion in *Bovis*, that car cruising in the Birmingham area would continue unless and until effectively restrained by the law and that nothing short of an injunction would be effective to restrain them. I regard this as a classic case for the grant of an injunction. G

Section 130 of the Highways Act 1980 H

43 On the view which I take of the judge's discretion to grant the injunction under section 222 of the 1972 Act it is unnecessary to consider whether section 130 of the 1980 Act would have provided an alternative route to the same conclusion.

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A *The grant of the injunction against "persons unknown"*

44 No point was taken in the court below about whether the original grant of the injunction against persons unknown and the provision for service by advertisements and prominent local notices was open to challenge. Since the order was first made, this question has been considered (though not in relation to an injunction of the same type) in this court in *Ineos Upstream Ltd v Persons Unknown (Friends of the Earth intervening)* [2019] 4 WLR 100 and *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802. It may have to be considered again in any future case about injunctions to restrain anti-social behaviour by persons unknown. I simply record that we were told by Mr Manning that the "persons unknown" issue was the reason why Birmingham did not apply for an anti-social behaviour injunction under section 1 of the 2014 Act.

B

C

Conclusion

45 I would dismiss the appeal.

HOLROYDE LJ

46 I agree.

D

SIR TERENCE ETHERTON MR

47 I also agree.

Appeal dismissed.
Permission to appeal refused.

SUSAN DENNY, Barrister

E

F

Supreme Court

*Regina (Elan-Cane) *v* Secretary of State for the Home Department (Human Rights Watch intervening)

2020 Nov 10 — Lord Hodge DPSC, Lady Arden, Lord Sales JJSC

G

APPLICATION by the claimant for permission to appeal from the decision of the Court of Appeal [2020] EWCA Civ 363; [2020] QB 929; [2020] 3 WLR 386

Permission to appeal was given.

H

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Supreme Court A

Director of Public Prosecutions *v* Ziegler and others

[2021] UKSC 23

2021 Jan 12; June 25 — Lord Hodge DPSC, Lady Arden, Lord Sales, Lord Hamblen, Lord Stephens JJSC B

Human rights — Freedom of expression and assembly — Interference with — Defendants charged with obstructing highway during demonstration against arms fair — Whether defendants lawfully exercising Convention rights so as to have "lawful . . . excuse" — Whether interference with defendants' Convention rights proportionate — Proper approach to proportionality by appellate court on appeal by way of case stated — Magistrates' Courts Act 1980 (c 43), s 111 — Highways Act 1980 (c 66), s 137 — Human Rights Act 1998 (c 42), Sch 1, Pt I, arts 10, 11 C

The defendants were charged with obstructing the highway, contrary to section 137 of the Highways Act 1980[1], by causing a road to be closed during a protest against an arms fair that was taking place at a conference centre nearby. The defendants had obstructed the highway for approximately 90 minutes by lying in the middle of the approach road to the conference centre and attaching themselves to two lock boxes with pipes sticking out from either side, making it difficult for police to remove them from the highway. The defendants accepted that their actions had caused an obstruction on the highway, but contended that they had not acted "without lawful . . . excuse" within the meaning of section 137(1), particularly in the light of their rights to freedom of expression and peaceful assembly under articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms[2]. The district judge acquitted the defendants of all charges, finding that the prosecution had failed to prove that the defendants' actions had been unreasonable and therefore without lawful excuse. The prosecution appealed by way of case stated, pursuant to section 111 of the Magistrates' Courts Act 1980[3]. The Divisional Court of the Queen's Bench Division allowed the appeal, holding that the district judge's assessment of proportionality had been wrong. The defendants appealed. It was common ground on the appeal that the availability of the defence of lawful excuse depended on the proportionality of any interference with the defendants' rights under articles 10 or 11. D E F

On the appeal—

Held, allowing the appeal, (1) that it was clear from the jurisprudence of the European Court of Human Rights that intentional action by protesters to disrupt the activities of others, even with an effect that was more than de minimis, did not automatically lead to the conclusion that any interference with the protesters' rights was proportionate for the purposes of articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms; that, rather, there had to be an assessment of the facts in each individual case to determine whether the interference was "necessary in a democratic society" for the purposes of articles 10(2) and 11(2); that, therefore, deliberate physically obstructive conduct by protesters was capable of being something for which there was a "lawful . . . excuse" for the purposes of section 137(1) of the Highways Act 1980, even where the impact of the deliberate obstruction on other highway users was more than de minimis and G H

[1] Highways Act 1980, s 137: see post, para 8.
[2] Human Rights Act 1998, Sch 1, Pt I, art 10: see post, para 14.
Art 11: see post, para 15.
[3] Magistrates' Courts Act 1980, s 111(1): see post, para 36.

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A prevented them, or was capable of preventing them, from passing along the highway; and that whether or not the protesters had a lawful excuse would depend on (per Lady Arden, Lord Hamblen and Lord Stephens JJSC) whether the protesters' convictions for offences under section 137(1) were justified restrictions on their Convention rights or (per Lord Hodge DPSC and Lord Sales JSC) whether the police response in seeking to remove the obstruction involved the exercise of their powers in a proportionate manner (post, paras 63–70, 94, 99, 121, 154).

B (2) (Lord Hodge DPSC and Lord Sales JSC dissenting) that, on an appeal by way of case stated under section 111 of the Magistrates' Courts Act 1980, the test to be applied by the appellate court to an assessment of the decision of the trial court in respect of a defence of lawful excuse under section 137 of the Highways Act 1980 when Convention rights were engaged was the same as that applicable generally to appeals on questions of law in a case stated, namely that an appeal would be allowed where there was an error of law material to the decision reached which was C apparent on the face of the case stated or if the decision was one which no reasonable court, properly instructed as to the relevant law, could have reached on the facts found; that, in accordance with that test, where the defence of lawful excuse depended upon an assessment of proportionality, an appeal would lie if there had been an error or flaw in the court's reasoning on the face of the case stated which undermined the cogency of its conclusion on proportionality; that such assessment fell to be made on the basis of the primary and secondary findings set out D in the case stated, unless there was no evidence for them or they were findings which no reasonable tribunal could have reached; and that, therefore, the Divisional Court in the present case had applied an incorrect test by asking itself whether the district judge's assessment of proportionality had been wrong (post, paras 42–45, 49–54, 99, 106–108).

Edwards v Bairstow [1956] AC 14, HL(E) and *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911, SC(E) considered.

E (3) (Lord Hodge DPSC and Lord Sales JSC dissenting in part, but agreeing in allowing the appeal) that there had been no error or flaw in the district judge's reasoning on the face of the case stated such as as to undermine the cogency of his conclusion on proportionality; that, in particular, he had not erred in considering as relevant factors the facts that the defendants' actions (a) had been entirely peaceful, (b) had not given rise either directly or indirectly to any form of disorder, (c) had not involved the commission of any other criminal offence, (d) had been aimed only at F obstructing vehicles headed to the arms fair, (e) had related to a matter of general concern, namely the legitimacy of the arms fair, (f) had been limited in duration, (g) had not given rise to any complaint by anyone other than the police and (h) had stemmed from the defendants' long-standing commitment to opposing the arms trade; and that, accordingly, the convictions should be set aside and the dismissal of the charges against the defendants restored (post, paras 71–78, 80–88, 99, 109–113, 115–118).

G *Nagy v Weston* [1965] 1 WLR 280, DC and *City of London Corpn v Samede* [2012] PTSR 1624, CA considered.

Decision of the Divisional Court of the Queen's Bench Division [2019] EWHC 71 (Admin); [2020] QB 253; [2019] 2 WLR 1451 reversed.

The following cases are referred to in the judgments:

H *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68; [2005] 2 WLR 87; [2005] 3 All ER 169, HL(E)

Abdul v Director of Public Prosecutions [2011] EWHC 247 (Admin); [2011] HRLR 16, DC

Arrowsmith v Jenkins [1963] 2 QB 561; [1963] 2 WLR 856; [1963] 2 All ER 210, DC

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Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223; [1947] 2 All ER 680, CA
B (A Child) (Care Proceedings: Threshold Criteria), In re [2013] UKSC 33; [2013] 1 WLR 1911; [2013] 3 All ER 929, SC(E)
Balçik v Turkey (Application No 25/02) (unreported) 29 November 2007, ECtHR
Bracegirdle v Oxley [1947] KB 349; [1947] 1 All ER 126, DC
City of London Corpn v Samede [2012] EWCA Civ 160; [2012] PTSR 1624; [2012] 2 All ER 1039, CA
Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374; [1984] 3 WLR 1174; [1985] ICR 14; [1984] 3 All ER 935, HL(E)
DB v Chief Constable of Police Service of Northern Ireland [2017] UKSC 7; [2017] NI 301, SC(NI)
D'Souza v Director of Public Prosecutions [1992] 1 WLR 1073; [1992] 4 All ER 545; 96 Cr App R 278, HL(E)
Edwards v Bairstow [1956] AC 14; [1955] 3 WLR 410; [1955] 3 All ER 48, HL(E)
Garry v Crown Prosecution Service [2019] EWHC 636 (Admin); [2019] 1 WLR 3630; [2019] 2 Cr App R 4, DC
Google LLC v Oracle America Inc (2021) 141 S Ct 1183
Gough v Director of Public Prosecutions [2013] EWHC 3267 (Admin); 177 JP 669, DC
H v Director of Public Prosecutions [2007] EWHC 2192 (Admin), DC
Hammond v Director of Public Prosecutions [2004] EWHC 69 (Admin); 168 JP 601, DC
Hashman and Harrup v United Kingdom (Application No 25594/94) (1999) 30 EHRR 241, ECtHR (GC)
Hitch v Stone [2001] EWCA Civ 63; [2001] STC 214, CA
Huang v Secretary of State for the Home Department [2007] UKHL 11; [2007] 2 AC 167; [2007] 2 WLR 581; [2007] 4 All ER 15, HL(E)
Kudrevičius v Lithuania (Application No 37553/05) (2015) 62 EHRR 34, ECtHR (GC)
Kuznetsov v Russia (Application No 10877/04) (unreported) 23 October 2008, ECtHR
Lashmankin v Russia (Application No 57818/09) (unreported) 7 February 2017, ECtHR
Love v Government of the United States of America [2018] EWHC 172 (Admin); [2018] 1 WLR 2889; [2018] 2 All ER 911, DC
Mayor of London (on behalf of the Greater London Authority) v Hall [2010] EWCA Civ 817; [2011] 1 WLR 504, CA
Molnár v Hungary (Application No 10346/05) (unreported) 7 October 2008, ECtHR
Nagy v Weston [1965] 1 WLR 280; [1965] 1 All ER 78, DC
Navalnyy v Russia (Application Nos 29580/12, 36847/12, 11252/13, 12317/13, 43746/14) (2018) 68 EHRR 25, ECtHR (GC)
New Windsor Corpn v Mellor [1974] 1 WLR 1504; [1974] 2 All ER 510
Norwood v Director of Public Prosecutions [2003] EWHC 1564 (Admin); [2003] Crim LR 888, DC
Oladimeji v Director of Public Prosecutions [2006] EWHC 1199 (Admin)
Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) [1982] AC 724; [1981] 3 WLR 292; [1981] 2 All ER 1030, HL(E)
Primov v Russia (Application No 17391/06) (unreported) 12 June 2014, ECtHR
R v North West Suffolk (Mildenhall) Magistrates' Court, Ex p Forest Heath District Council [1998] Env LR 9, CA
R (Aguilar Quila) v Secretary of State for the Home Department [2011] UKSC 45; [2012] 1 AC 621; [2011] 3 WLR 836; [2012] 1 All ER 1011, SC(E)

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A *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532; [2001] 2 WLR 1622; [2001] 3 All ER 433, HL(E)
R (Laporte) v Chief Constable of Gloucestershire Constabulary [2006] UKHL 55; [2007] 2 AC 105; [2007] 2 WLR 46; [2007] 2 All ER 529, HL(E)
R (P) v Liverpool City Magistrates' Court [2006] EWHC 887 (Admin); 170 JP 453
R (R) v Chief Constable of Greater Manchester Police [2018] UKSC 47; [2018] 1 WLR 4079; [2019] 1 All ER 391, SC(E)
B *R (SB) v Governors of Denbigh High School* [2006] UKHL 15; [2007] 1 AC 100; [2006] 2 WLR 719; [2006] 2 All ER 487, HL(E)
R (Z) v Hackney London Borough Council [2019] EWCA Civ 1099; [2019] PTSR 2272, CA; [2020] UKSC 40; [2020] 1 WLR 4327; [2020] PTSR 1830; [2021] 2 All ER 539, SC(E)
Sáska v Hungary (Application No 58050/08) (unreported) 27 November 2012, ECtHR
C *Smith and Grady v United Kingdom* (Application Nos 33985/96, 33986/96) (1999) 29 EHRR 493, ECtHR
Steel v United Kingdom (Application No 24838/94) (1998) 28 EHRR 603, ECtHR
Vogt v Germany (Application No 17851/91) (1995) 21 EHRR 205, ECtHR (GC)

No additional cases were cited in argument.

D **APPEAL** from the Divisional Court of the Queen's Bench Division

On 7 February 2018, following a trial on 1 and 2 February 2018, District Judge Hamilton, sitting at Stratford Magistrates' Court, acquitted the defendants, Nora Ziegler, Henrietta Cullinan, Joanna Frew and Christopher Cole, of the charge of obstructing the highway, contrary to section 137 of the Highways Act 1980. By a case stated that was served on the defendants on E 20 March 2018, the prosecution appealed. By a judgment dated 22 January 2019 the Divisional Court of the Queen's Bench Division (Singh LJ and Farbey J) [2019] EWHC 71 (Admin); [2020] QB 253 allowed the appeal.

With permission of the Supreme Court (Lord Kerr of Tonaghmore, Lord Hodge and Lady Arden JJSC) granted on 3 December 2019, the defendants appealed.

The issues in the appeal, as stated in the parties' agreed statement of facts F and issues, were: (1) What was the test to be applied by an appellate court to an assessment of the decision of the trial court in respect of a statutory defence of "lawful excuse" when Convention rights were engaged in a criminal matter? (2) Was deliberate physically obstructive conduct by protesters capable of constituting a lawful excuse for the purposes of section 137 of the Highways Act 1980, where the impact of the deliberate G obstruction on other highway users was more than de minimis, and prevented them, or was capable of preventing them, from passing along the highway?

The facts are stated in the judgment of Lord Hamblen and Lord Stephens JJSC, post, paras 1–6.

H *Henry Blaxland QC*, *Blinne Ní Ghrálaigh* and *Owen Greenhall* (instructed by *Hodge Jones & Allen LLP*) for the defendants.

As far back as 1965 the courts explained "lawful authority or excuse" as encompassing the concept of "reasonableness": see *Nagy v Weston* [1965] 1 WLR 280. In respect of the offence of obstruction of the highway contrary to section 137 of the Highways Act 1980, reasonableness is a question of

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fact to be assessed having regard to all the prevailing circumstances, including the duration of the obstruction, its location and purpose and whether it did in fact cause an actual, as opposed to a potential, obstruction. A defendant will not be guilty of deliberately obstructing the highway unless it is proved that such obstruction was not reasonable.

Even before the coming into force of the Human Rights Act 1998, it was possible for protesters engaged in an obstructive protest on the highway to argue successfully that they were exercising a lawful right to protest and therefore had a "lawful" right to protest.

The Convention rights which are in issue in this appeal are the rights contained in article 10 (concerning the right to freedom of expression) and article 11 (concerning the right to freedom of peaceful assembly) of the Convention for the Protection of Human Rights and Fundamental Freedoms. Those two articles and the parallel rights and obligations arising under common law must be considered when assessing the reasonableness of any obstruction of the highway and the proportionality of any interference with a right to protest.

The assessment of whether an obstruction of the highway was reasonable in the context of articles 10 and 11 is inevitably a fact-sensitive one that will depend on factors including the extent to which the continuation of the protest would breach domestic law, the importance to protesters of the precise protest location, the duration of the protest, and the extent of the actual interference caused to the rights of others: see *City of London Corpn v Samede* [2012] PTSR 1624.

The actions of the defendants in the present case were no more than symbolic. They could not have prevented arms being delivered to the arms fair, nor could they have prevented the arms fair taking place. Their protest was aimed at raising awareness of their cause. There was no evidence led by the prosecution that the protest caused disruption to traffic, or to the venue where the arms fair was being held, or to other people. It was entirely speculative whether there was obstructive conduct on the part of the protesters. There was evidence of potential interference but not of actual interference. There was no material which showed to the criminal standard that traffic was disrupted.

[Reference was made to *Kudrevičius v Lithuania* (2015) 62 EHRR 34.]

Even deliberate interference with the activities of others can fall within the protection of article 11. It must be shown by the prosecution that there was interference with the rights of others. Article 11 must be construed in a way which does not limit free speech and peaceful assembly. The defendants' intention was to cause some disruption but it did not take them outside article 11.

The trial judge's decision was impeccable and contained no legal error. The Divisional Court failed to accord due weight to the trial judge's findings, contrary to the need for appellate caution in relation to both findings of fact and value judgments. The Divisional Court substituted its own view of the evidence for that of the trial judge despite the fact it had not seen the live evidence and the video footage of the protest which was the material on which the trial judge had assessed the nature of the protest and the disruption it caused.

Where a statutory defence such as that arising under section 137 of the Highways Act 1980 encompasses the engagement of one or more

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A Convention rights, the assessment of whether the prosecution has disproved that a defendant's use of the highway was reasonable constitutes an evaluative assessment within the province of the tribunal of fact. Therefore the approach to be taken by an appellate court is not simply to consider whether in its view the conclusion of the court below was "wrong", but rather whether that conclusion was reached either as a result of an identifiable flaw in the court's logic or reasoning or whether it was a B conclusion which no properly directed tribunal could have reached. The Divisional Court fell into error in determining otherwise.

John McGuinness QC (instructed by *Crown Prosecution Service, Appeals and Review Unit*) for the prosecution.

The Divisional Court did not conclude as a matter of law that, in a prosecution under section 137 of the Highways Act 1980, findings of fact of C a complete obstruction of the highway for a significant period of time can never constitute a "lawful . . . excuse" for wilful obstruction within the meaning of section 137(1) of the Highways Act 1980. The Divisional Court held that those facts were "highly relevant" and "highly significant" to the assessment of proportionality in this case and concluded that the trial judge had given insufficient consideration to them in striking a fair balance D between the defendants' Convention rights and the rights and interests of others.

The essential facts can be ascertained from the case stated. It was clear that there was a deliberate or "wilful" obstruction of the highway which was planned rather than spontaneous. Its specific purpose was disruption of the traffic to the venue at which the arms fair was being held. It was aimed at a particular type of traffic which was delivering material to the arms fair. E The disruption lasted 90 minutes, which was a period of some length in the circumstances. The defendants used apparatus which was hard to disassemble in order to lock themselves together. They refused to unlock themselves and it can be inferred that they knew there would be a delay in removing them from the highway because police removal experts and specialist cutting equipment were needed. The reality was that the defendants knew they would remain on the road until the police were able, F with difficulty, to remove them.

In essence the primary facts were not in issue. But whether the facts as found did or may have constituted a lawful excuse called for a value judgment by the trial judge: see *Norwood v Director of Public Prosecutions* [2003] EWHC 1564 (Admin). The tribunal of fact was dealing with the balancing act.

G The decision depended on the proportionality between the offence and the defendants' Convention rights. The Divisional Court concluded that the trial judge had erred in its assessment of proportionality and had not struck the fair balance necessary in that assessment.

On an appeal by way of case stated the High Court has a very wide discretion: see section 28A of the Senior Courts Act 1981. In the fact-specific circumstances of this case, the Divisional Court's review did accord due H weight to the assessment made by the trial judge, and correctly concluded that it was wrong.

Blaxland QC replied.

The court took time for consideration.

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25 June 2021. The following judgments were handed down. A

LORD HAMBLEN and **LORD STEPHENS JJSC**

1. Introduction

1 In September 2017, the biennial Defence and Security International ("DSEI") arms fair was held at the Excel Centre in East London. In the B days before the opening of the fair equipment and other items were being delivered to the Excel Centre. The appellants were strongly opposed to the arms trade and to the fair and on Tuesday, 5 September 2017 they took action which was intended both to draw attention to what was occurring at the fair and also to disrupt deliveries to the Excel Centre.

2 The action taken consisted of lying down in the middle of one side of C the dual carriageway of an approach road leading to the Excel Centre (the side for traffic heading to it). The appellants attached themselves to two lock boxes with pipes sticking out from either side. Each appellant inserted one arm into a pipe and locked themselves to a bar centred in the middle of one of the boxes.

3 There was a sizeable police presence at the location in anticipation of demonstrations. Police officers approached the appellants almost D immediately and went through the "five-stage process" to try and persuade them to remove themselves voluntarily from the road. When the appellants failed to respond to the process they were arrested. It took, however, approximately 90 minutes to remove them from the road. This was because the boxes were constructed in such a fashion that was intentionally designed to make them hard to disassemble. E

4 The appellants were charged with wilful obstruction of a highway contrary to section 137 of the Highways Act 1980 ("the 1980 Act"). On 1–2 February 2018, they were tried before District Judge Hamilton at Stratford Magistrates' Court. The district judge dismissed the charges, handing down his written judgment on 7 February 2018. Having regard to the appellants' right to freedom of expression under article 10 of the F European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") and their right to freedom of peaceful assembly under article 11 ECHR, the district judge found that "on the specific facts of these particular cases the prosecution failed to prove to the requisite standard that the defendants' limited, targeted and peaceful action, which involved an obstruction of the highway, was unreasonable".

5 The respondent appealed by way of case stated to the Divisional G Court, Singh LJ and Farbey J. Following a hearing on 29 November 2018, the Divisional Court handed down judgment on 22 January 2019, allowing the appeal and directing that convictions be entered and that the cases be remitted for sentencing: [2020] QB 253. On 21 February 2019, the appellants were sentenced to conditional discharges of 12 months.

6 On 8 March 2019, the Divisional Court dismissed the appellants' H application for permission to appeal to the Supreme Court, but certified two points of law of general public importance. On 3 December 2019, a panel of the Supreme Court (Lord Kerr of Tonaghmore, Lord Hodge and Lady Arden JJSC) granted permission to appeal.

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A 7 The parties agreed in the statement of facts and issues that the issues in the appeal, as certified by the Divisional Court as points of law of general public importance, are:

(1) What is the test to be applied by an appellate court to an assessment of the decision of the trial court in respect of a statutory defence of "lawful excuse" when Convention rights are engaged in a criminal matter?

B (2) Is deliberate physically obstructive conduct by protesters capable of constituting a lawful excuse for the purposes of section 137 of the 1980 Act, where the impact of the deliberate obstruction on other highway users is more than de minimis, and prevents them, or is capable of preventing them, from passing along the highway?

2. The legal background

C 8 Section 137 of the 1980 Act provides:

> "137 *Penalty for wilful obstruction*
>
> "(1) If a person, without lawful authority or excuse, in any way wilfully obstructs the free passage along a highway he is guilty of an offence and liable to a fine not exceeding level 3 on the standard scale."

D 9 In *Nagy v Weston* [1965] 1 WLR 280 it was held by the Divisional Court that "lawful excuse" encompasses "reasonableness". Lord Parker CJ said at p 284 that these are "really the same ground" and that:

> "there must be proof that the use in question was an unreasonable use. Whether or not the user amounting to an obstruction is or is not an unreasonable use of the highway is a question of fact. It depends upon all
> E the circumstances, including the length of time the obstruction continues, the place where it occurs, the purpose for which it is done, and of course whether it does in fact cause an actual obstruction as opposed to a potential obstruction."

10 In cases of obstruction where ECHR rights are engaged, the case law preceding the enactment of the Human Rights Act 1998 ("the HRA") needs to be read in the light of the HRA.

F 11 Section 3(1) of the HRA provides: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

12 Section 6 of the HRA makes it unlawful for a public authority to act in a way which is incompatible with Convention rights. The courts are public authorities for this purpose (section 6(3)(a)), as are the police.

G 13 The Convention rights are set out in Schedule 1 to the HRA 1998. The rights relevant to this appeal are those under article 10 ECHR, the right to freedom of expression, and article 11 ECHR, the right to freedom of peaceful assembly.

14 Article 10 ECHR materially provides:

> "1. Everyone has the right to freedom of expression. This right shall
> H include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers . . .
>
> "2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a

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democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

15 Article 11 ECHR materially provides:

"1. Everyone has the right to freedom of peaceful assembly . . .

"2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others."

16 In the present case the Divisional Court explained how section 137(1) of the 1980 Act can be interpreted compatibly with the rights in articles 10 and 11 ECHR in cases where, as was common ground in this case, the availability of the statutory defence depends on the proportionality assessment to be made. It stated as follows:

"62. The way in which the two provisions can be read together harmoniously is that, in circumstances where there would be a breach of articles 10 or 11, such that an interference would be unlawful under section 6(1) of the HRA, a person will by definition have 'lawful excuse'. Conversely, if on the facts there is or would be no violation of the Convention rights, the person will not have the relevant lawful excuse and will be guilty (subject to any other possible defences) of the offence in section 137(1).

63. That then calls for the usual enquiry which needs to be conducted under the HRA. It requires consideration of the following questions:

"(1) Is what the defendant did in exercise of one of the rights in articles 10 or 11?

"(2) If so, is there an interference by a public authority with that right?

"(3) If there is an interference, is it 'prescribed by law'?

"(4) If so, is the interference in pursuit of a legitimate aim as set out in paragraph 2 of article 10 or article 11, for example the protection of the rights of others?

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

"64. That last question will in turn require consideration of the well-known set of sub-questions which arise in order to assess whether an interference is proportionate:

"(1) Is the aim sufficiently important to justify interference with a fundamental right?

"(2) Is there a rational connection between the means chosen and the aim in view?

"(3) Are there less restrictive alternative means available to achieve that aim?

"(4) Is there a fair balance between the rights of the individual and the general interest of the community, including the rights of others?

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A “65. In practice, in cases of this kind, we anticipate that it will be the last of those questions which will be of crucial importance: a fair balance must be struck between the different rights and interests at stake. This is inherently a fact-specific enquiry.”

17 Guidance as to the limits to the right of lawful assembly and protest on the highway is provided in the Court of Appeal decision in *City of* B *London Corpn v Samede* [2012] PTSR 1624, a case involving a claim for possession and an injunction in relation to a protest camp set up in the churchyard of St Paul’s Cathedral. Lord Neuberger of Abbotsbury MR gave the judgment of the court, stating as follows at paras 39–41:

“39. As the judge recognised, the answer to the question which he identified at the start of his judgment [the limits to the right of lawful C assembly and protest on the highway] is inevitably fact sensitive, and will normally depend on a number of factors. In our view, those factors include (but are not limited to) the extent to which the continuation of the protest would breach domestic law, the importance of the precise location to the protesters, the duration of the protest, the degree to which the protesters occupy the land, and the extent of the actual interference the protest causes to the rights of others, including the property rights of D the owners of the land, and the rights of any members of the public.

“40. The defendants argue that the importance of the issues with which the Occupy Movement is concerned is also of considerable relevance. That raises a potentially controversial point, because as the judge said, at para 155: ‘it is not for the court to venture views of its own on the substance of the protest itself, or to gauge how effective it has been in E bringing the protestors’ views to the fore. The Convention rights in play are neither strengthened nor weakened by a subjective response to the aims of the protest itself or by the level of support it seems to command . . . the court cannot—indeed, must not—attempt to adjudicate on the merits of the protest. To do that would go against the very spirit of articles 10 and 11 of the Convention . . . the right to protest is the right to protest right or F wrong, misguidedly or obviously correctly, for morally dubious aims or for aims that are wholly virtuous.’

“41. Having said that, we accept that it can be appropriate to take into account the general character of the views whose expression the Convention is being invoked to protect. For instance, political and economic views are at the top end of the scale, and pornography and vapid tittle-tattle is towards the bottom. In this case the judge accepted that the G topics of concern to the Occupy Movement were ‘of very great political importance’: para 155. In our view, that was something which could fairly be taken into account. However, it cannot be a factor which trumps all others, and indeed it is unlikely to be a particularly weighty factor: otherwise judges would find themselves according greater protection to views which they think important, or with which they agree. As the Strasbourg court said in *Kuznetsov v Russia* (Application No 10877/04) H (unreported) 23 October 2008, para 45: ‘any measures interfering with the freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles—however shocking and unacceptable certain views or words used may appear to the authorities—do a disservice to democracy and often even endanger it. In a

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democratic society based on the rule of law, the ideas which challenge the existing order must be afforded a proper opportunity of expression through the exercise of the right of assembly as well as by other lawful means . . .' The judge took into account the fact that the defendants were expressing views on very important issues, views which many would see as being of considerable breadth, depth and relevance, and that the defendants strongly believed in the views they were expressing. Any further analysis of those views and issues would have been unhelpful, indeed inappropriate."

A

B

3. The case stated

18 The outline facts as found in the case stated have been set out in the Introduction. The district judge's findings followed a trial in which almost all of the prosecution case was in the form of admissions and agreed statements. Oral evidence about what occurred was given by one police officer and police body-worn video footage was also shown.

C

19 All the appellants gave evidence of their long-standing opposition to the arms trade and of their belief that there was evidence of illegal activity taking place at the DSEI arms fair, which the Government had failed to take any effective action to prevent. The district judge found at para 16 of the case stated that:

D

"All . . . defendants described their action as 'carefully targeted' and aimed at disrupting traffic headed for the DSEI arms fair. Most but not all of the defendants accepted that their actions may have caused disruption to traffic that was not headed to the DSEI arms fair. Conversely it was not in dispute that not all access routes to the DSEI arms fair were blocked by the defendants' actions and it would have been possible for a vehicle headed to the DSEI arms fair but blocked by the actions to have turned around and followed an alternative route."

E

20 The district judge identified the issue for decision at para 37 of the case stated, as being:

"whether the prosecution had proved that the demonstrations in these two particular cases were of a nature such that they lost the protections afforded by articles 10 and 11 and were consequently unreasonable obstructions of the highway."

F

21 He recognised that this required an assessment of the proportionality of the interference with the appellants' Convention rights, in relation to which he took into account the following points (at para 38 of the case stated):

G

"(a) The actions were entirely peaceful—they were the very epitome of a peaceful protests [sic].

"(b) The defendants' actions did not give rise either directly or indirectly to any form of disorder.

"(c) The defendants' behavior [sic] did not involve the commission of any criminal offence beyond the alleged offence of obstruction of the highway which was the very essence of the defendants' protest. There was no disorder, no obstruction of or assault on police officers and no abuse offered.

H

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A

"(d) The defendants' actions were carefully targeted and were aimed only at obstructing vehicles headed to the DSEI arms fair . . . I did hear some evidence that the road in question may have been used, at the time, by vehicles other than those heading to the arms fair, but that evidence was speculative and was not particularly clear or compelling. I did not find it necessary to make any finding of fact as to whether 'non-DSEI traffic' was or was not in fact obstructed since the authorities cited above appeared to envisage 'reasonable' obstructions causing some inconvenience to the 'general public' rather than only to the particular subject of a demonstration . . .

B

"(e) The action clearly related to a 'matter of general concern' . . . namely the legitimacy of the arms fair and whether it involved the marketing and sale of potentially unlawful items (e g those designed for torture or unlawful restraint) or the sale of weaponry to regimes that were then using them against civilian populations.

C

"(f) The action was limited in duration. I considered that it was arguable that the obstruction for which the defendants were responsible only occurred between the time of their arrival and the time of their arrests—which in both cases was a matter of minutes. I considered this since, at the point when they were arrested the defendants were no longer 'free agents' but were in the custody of their respective arresting officers and I thought that this may well have an impact on the issue of 'wilfulness' which is an essential element of this particular offence. The prosecution in both cases urged me to take the time of the obstruction as the time between arrival and the time when the police were able to move the defendants out of the road or from below the bridge. Ultimately, I did not find it necessary to make a clear determination on this point as even on the Crown's interpretation the obstruction in *Ziegler* lasted about 90–100 minutes . . .

D

E

"(g) I heard no evidence that anyone had actually submitted a complaint about the defendants' action or the blocking of the road. The police's response appears to have been entirely on their own initiative.

F

"(h) Lastly, although compared to the other points this is a relatively minor issue, I note the long-standing commitment to opposing the arms trade that all four defendants demonstrated. For most of them this stemmed, at least in part, from their Christian faith. They had also all been involved in other entirely peaceful activities aimed at trying to halt the DSEI arms fair. This was not a group of people who randomly chose to attend this event hoping to cause trouble."

G

22 The district judge's conclusion at para 40 of the case stated was that on these facts the prosecution had failed to prove to the requisite standard that the obstruction of the highway was unreasonable and he therefore dismissed the charges. The question for the High Court was expressed at para 41 of the case stated as follows:

H

"The question for the High Court therefore is whether I was correct to have dismissed the case against the defendants in these circumstances. The point of law for the decision of the High Court, is whether, as a matter of law, I was entitled to reach the conclusions I did in these particular cases."

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4. The decision of the Divisional Court A

23 It was common ground between the parties prior to the hearing of the appeal that the appropriate appellate test on an appeal by way of case stated was whether the district judge had reached a decision which it was not reasonably open to him to reach. That is the conventional test on an appeal by way of case stated, as applied in many Divisional Court decisions.

24 At the hearing of the appeal the court suggested that in cases involving an assessment of proportionality the applicable approach should be that set out by Lord Neuberger of Abbotsbury PSC in *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911, namely whether the judge's conclusion on proportionality was wrong. As Lord Neuberger PSC stated at paras 91–92: B

> "91. That conclusion leaves open the standard which an appellate court should apply when determining whether the trial judge was entitled to reach his conclusion on proportionality, once the appellate court is satisfied that the conclusion was based on justifiable primary facts and assessments. In my view, an appellate court should not interfere with the trial judge's conclusion on proportionality in such a case, unless it decides that that conclusion was wrong. I do not agree with the view that the appellate court has to consider that judge's conclusion was 'plainly' wrong on the issue of proportionality before it can be varied or reversed. As Lord Wilson JSC says in para 44, either 'plainly' adds nothing, in which case it should be abandoned as it will cause confusion, or it means that an appellate court cannot vary or reverse a judge's conclusion on proportionality of [sic] it considers it to have been 'merely' wrong. Whatever view the Strasbourg court may take of such a notion, I cannot accept it, as it appears to me to undermine the role of judges in the field of human rights. C D E
>
> "92. I appreciate that the attachment of adverbs to 'wrong' was impliedly approved by Lord Fraser in the passage cited from *G v G (Minors: Custody Appeal)* [1985] 1 WLR 647, 652, by Lord Wilson JSC at para 38, and has something of a pedigree: see e g per Ward LJ in *Assicurazioni* [2003] 1 WLR 577, para 195 (although aspects of his approach have been disapproved: see *Datec* [2007] 1 WLR 1325, para 46). However, at least where Convention questions such as proportionality are being considered on an appeal, I consider that, if after reviewing the trial judge's decision, an appeal court considers that he was wrong, then the appeal should be allowed. Thus, a finding that he was wrong is a sufficient condition for allowing an appeal against the trial judge's conclusion on proportionality, and, indeed, it is a necessary condition (save, conceivably, in very rare cases)." F G

25 *In re B* was a family law case but the Divisional Court noted that the test had been applied in other contexts, and in particular in extradition cases—see *Love v Government of the United States of America* [2018] 1 WLR 2889. It concluded that it should also be applied in the criminal law context, stating as follows at para 103: H

> "We can see no principled basis for confining the approach in *In re B* to family law cases or not applying it to the criminal context. This is because the issue of principle discussed by Lord Neuberger PSC in that case related to the approach to be taken by an appellate court to the

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A assessment by a lower court or tribunal of proportionality under the HRA. That is a general question of principle and does not arise only in a particular field of law."

26 Applying that test to the facts as found, the Divisional Court held that the district judge's assessment of proportionality was wrong "because (i) he took into account certain considerations which were irrelevant; B and (ii) the overall conclusion was one that was not sustainable on the undisputed facts before him, in particular that the carriageway to the Excel Centre was completely blocked and that this was so for significant periods of time, between approximately 80 and 100 minutes" (para 129).

27 Of the factors listed at paras 38(a) to (h) of the case stated as cited in para 21 above, the Divisional Court considered those set out at paras 38(a), C (b), (c), and (g) to be of little or no relevance and that at para 38(h) to be irrelevant. It disagreed with the district judge's conclusion at para 38(f) that an obstruction of the highway for 90–100 minutes was of "limited duration". The Divisional Court considered that to be a "significant period of time". Its core criticism was of para 38(d), in relation to which it stated as follows at para 112:

D "At para 38(d) the district judge said that the defendants' actions were carefully targeted and were aimed only at obstructing vehicles headed to the DSEI arms fair. However, the fact is that the ability of other members of the public to go about their lawful business, in particular by passing along the highway *to and from the Excel Centre* was completely obstructed. In our view, that is highly relevant in any assessment of E proportionality. This is not a case where, as commonly occurs, *some part of the highway* (which of course includes the pavement, where pedestrians may walk) is *temporarily obstructed* by virtue of the fact that protestors are located there. That is a common feature of life in a modern democratic society. For example, courts are well used to such protests taking place on the highway outside their own precincts. However, there is a fundamental difference between that situation, where it may be said F (depending on the facts) that a 'fair balance' is being struck between the different rights and interests at stake, and the present cases. In these two cases *the highway was completely obstructed and some members of the public were completely prevented from doing what they had the lawful right to do*, namely use the highway for passage to get *to the Excel Centre* and this occurred for *a significant period of time*." (Emphasis added.)

G **28** The Divisional Court explained at para 117 that the "fundamental reason" why it considered the district judge's assessment of proportionality to be wrong was that:

"there was no 'fair balance' struck in these cases between the rights of the individuals to protest and the general interest of the community, including the rights of other members of the public to pass along the H highway. Rather the ability of other members of the public to go about their lawful business was *completely prevented* by the physical conduct of these defendants for *a significant period of time*. That did not strike a fair balance between the different rights and interests at stake." (Emphasis added.)

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5 What is the test to be applied by an appellate court to an assessment of the decision of the trial court in respect of a statutory defence of 'lawful excuse' when Convention rights are engaged in a criminal matter? A

The conventional approach

29 As indicated above, the conventional approach of the Divisional Court to appeals by way of case stated in criminal proceedings is to apply an appellate test of whether the court's conclusion was one which was reasonably open to it—i e is not *Wednesbury* irrational or perverse (see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223). This is reflected in a number of decisions of the Divisional Court, including cases involving issues of proportionality. B

30 *Oladimeji v Director of Public Prosecutions* [2006] EWHC 1199 (Admin) concerned an appeal by way of case stated from the decision of magistrates to reject a "reasonable excuse" defence to an offence of failing to provide a specimen of breath when required to do so, contrary to section 7(6) of the Road Traffic Act 1988. In dismissing the appeal, Keene LJ at para 22 identified the relevant issue as being as follows: C

"the real issue is whether the justices were entitled on the evidence and the facts they found to conclude that the appellant had no reasonable excuse for his failure. It seems to me that they were. In the light of the facts to which I have referred, their conclusion was not perverse. It was within the range of conclusions properly open to them." D

31 *H v Director of Public Prosecutions* [2007] EWHC 2192 (Admin) concerned an appeal by way of case stated from a district judge's decision to admit identification evidence notwithstanding a breach of Code D of the Police and Criminal Evidence Act 1984 ("PACE"). At para 19 Auld LJ stated the proper approach on such an appeal to be as follows: E

"Finally, I should note the now well established approach of the Court of Appeal (Criminal Division) to section 78 cases, when invited to consider the trial judge's exercise of judgment as to fairness, only to interfere with the judge's ruling if it is *Wednesbury* irrational or perverse. In my view, this court should adopt the very same approach on appeals to it by way of case stated on a point of law, for on such a point, anything falling short of *Wednesbury* irrationality will not do." F

32 More recently, in *Garry v Crown Prosecution Service* [2019] 1 WLR 3630 the issue on the appeal was the operation of the "reasonable excuse" defence to the offence of carrying an offensive weapon contrary to section 1 of the Prevention of Crime Act 1953. Rafferty LJ followed the approach of Auld LJ in *H v Director of Public Prosecutions* as to the appropriate standard of review, stating at para 25 as follows: G

"On appeals by way of case stated on a point of law this court adopts the same approach as does the Court of Appeal to a trial judge's exercise of judgment, interfering with the judge's ruling only if it be *Wednesbury* irrational or perverse . . . : *H v Director of Public Prosecutions* [2007] EWHC 2192 (Admin). The ruling in this case was not *Wednesbury* irrational let alone perverse." H

33 There have been a number of examples of appeals by way of case stated in cases involving Convention rights and issues of proportionality in

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A which the Divisional Court has stated the applicable test to be whether the conclusion of the court below was one which was reasonably open to it—see, for example, *Norwood v Director of Public Prosecutions* [2003] EWHC 1564 (Admin) at [40] (Auld LJ) (article 10 ECHR); *Hammond v Director of Public Prosecutions* (2004) 168 JP 601, para 33 (May LJ) (articles 9 and 10 ECHR), and *Gough v Director of Public Prosecutions* (2013) 177 JP 669, para 21 (Sir Brian Leveson P) (article 10 ECHR).

B **34** *Abdul v Director of Public Prosecutions* [2011] HRLR 16 was an appeal by way of case stated from a district judge's decision that a prosecution for an offence under section 5 of the Public Order Act 1986 was a proportionate interference with the appellants' rights under article 10 ECHR. The alleged offences concerned slogans shouted by the appellants who were protesting in the vicinity of a local Royal Anglian Regiment C homecoming parade following its return from Afghanistan and Iraq. The slogans which the appellants shouted included "British soldiers murderers", "Rapists all of you" and "Baby killers". In giving the main judgment of the Divisional Court, Gross LJ said that "even if there is otherwise a prima facie case for contending that an offence has been committed under section 5, it is still for the Crown to establish that prosecution is a proportionate response, necessary for the preservation of public order" (para 49(vi)). He noted at D para 49(viii) that the legislature had entrusted that decision to magistrates or a district judge and stated the appellate test to be as follows:

> "The test for this court on an appeal of this nature is whether the decision to which the district judge has come was open to her or not. This court should not interfere unless, on well-known grounds, the appellants can establish that the decision to which the district judge has come is one E she could not properly have reached."

35 None of these cases were referred to by the Divisional Court in this case. Since the issue of the appropriate appellate test was not raised until the hearing the parties had not prepared to address that issue, nor did they apparently seek further time to do so. In the result, the Divisional Court reached its decision that the appropriate appellate test was that set out in F *In re B* without consideration of a number of relevant authorities.

Edwards v Bairstow

36 The conventional approach of the Divisional Court to apply a strict appellate test of irrationality or perversity reflects recognition of the fact that an appeal by way of case stated is an appeal from the tribunal of fact which G is only permissible on a question of law (or excess of jurisdiction). As stated in section 111(1) of the Magistrates' Courts Act 1980 ("MCA"):

> "(1) Any person who was a party to any proceeding before a magistrates' court or is aggrieved by the conviction, order, determination or other proceeding of the court may question the proceeding on the ground that it is *wrong in law* or is in excess of jurisdiction by applying to H the justices composing the court to state a case for the opinion of the High Court on *the question of law* or jurisdiction involved . . ." (Emphasis added.)

37 It has long been recognised that appellate restraint is required in cases involving appeals from tribunals of fact which are only allowed on

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questions of law. The leading authority as to the appropriate approach in such cases is the House of Lords decision in *Edwards v Bairstow* [1956] AC 14. That case concerned an appeal by way of case stated from a decision of the Commissioners for the General Purposes of the Income Tax. Such appeals are only allowable if the decision can be shown to be wrong in law. The case concerned whether a joint venture for the purchase and sale of a spinning plant was an "adventure . . . in the nature of trade". The commissioners had decided that it was not and before the courts below the appeal had been dismissed on the grounds that the question was purely one of fact. The House of Lords allowed the appeal. In a well-known and often cited passage, Lord Radcliffe explained the proper approach as follows (at p 36):

> "When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that, this has been responsible for the determination. So there, too, there has been error in point of law . . . the true and only reasonable conclusion contradicts the determination."

38 This approach has been followed for other case stated appeal procedures—see, for example, *New Windsor Corpn v Mellor* [1974] 1 WLR 1504 in relation to appeals from commons commissioners. It has also been applied in other related contexts, such as, for example, appeals from arbitration awards. Since the Arbitration Act 1979 appeals have only been allowed on questions of law arising out of an award. In *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* [1982] AC 724 the question arose as to the proper approach to an appeal against an arbitrator's decision that a charterparty had been frustrated by delay, a question of mixed fact and law. It was held that *Edwards v Bairstow* should be applied. As Lord Roskill stated at pp 752–753:

> "My Lords, in *Edwards v Bairstow* [1956] AC 14, 36, Lord Radcliffe made it plain that the court should only interfere with the conclusion of special commissioners if it were shown either that they had erred in law or that they had reached a conclusion on the facts which they had found which no reasonable person, applying the relevant law, could have reached. My Lords, when it is shown on the face of a reasoned award that the appointed tribunal has applied the right legal test, the court should in my view only interfere if on the facts found as applied to that right legal test, no reasonable person could have reached that conclusion. It ought not to interfere merely because the court thinks that upon those facts and applying that test, it would not or might not itself have reached the same conclusion, for to do that would be for the court to usurp what is the sole function of the tribunal of fact."

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A 39 The conventional approach of the Divisional Court to appeals by way of case stated in criminal proceedings is to similar effect. A conclusion will be one which is open to the court unless it is one which no reasonable court, properly directed as to the law, could have reached on the facts found. If on the face of the case stated, there is an error of law material to the decision reached, then it will be wrong in law and, as such, a conclusion which it was not reasonably open to the court to reach.

B 40 In the context of appeals by way of case stated in criminal proceedings (unlike in arbitration appeals), a conclusion will be open to challenge on the grounds that it is one which no reasonable court could have reached even if it categorised as a conclusion of fact. As stated by Lord Goddard CJ in *Bracegirdle v Oxley* [1947] KB 349, 353:

> "It is said that this court is bound by the findings of fact set out in the C cases by the magistrates. It is true that this court does not sit as a general court of appeal against magistrates' decisions in the same way as quarter sessions. In this court we only sit to review the magistrates' decisions on points of law, being bound by the facts which they have found, provided always that there is evidence on which they could come to the conclusions of fact at which they have arrived . . . if magistrates come to a decision to D which no reasonable bench of magistrates, applying their minds to proper considerations, and giving themselves proper directions, could come, then this court can interfere, because the position is exactly the same as if the magistrates had come to a decision of fact without evidence to support it."

In *R v North West Suffolk (Mildenhall) Magistrates' Court, Ex p Forest* E *Heath District Council* [1998] Env LR 9, 18–19 Lord Bingham CJ agreed with those observations, adding as follows:

> "It is obviously perverse and an error of law to make a finding of fact for which there is no evidential foundation. It is also perverse to say that black is white, which is essentially what the justices did in *Bracegirdle v Oxley*. But it is not perverse, even if it may be mistaken, to prefer the F evidence of A to that of B where they are in conflict. That gives rise, in the absence of special and unusual circumstances (absent here), to no error of law challengeable by case stated in the High Court. It gives rise to an error of fact properly to be pursued in the Crown Court."

41 In *D'Souza v Director of Public Prosecutions* [1992] 1 WLR 1073 the House of Lords applied the *Edwards v Bairstow* test to an appeal by way G of case stated in criminal proceedings concerning whether the appellant, who had absconded from a hospital where she was lawfully detained under the Mental Health Act 1983, was a person who was "unlawfully at large and whom [the police constables were] pursuing" under section 17(1)(d) of PACE so as to empower entry to her home without a warrant. Lord Lowry (with whose judgment all their lordships agreed) categorised this issue as "a question of fact" but one which "must be answered within the relevant H legal principles and paying regard to the meaning in their context of the relevant words" (at p 1082H). Lord Lowry's conclusion (at p 1086F), citing Lord Radcliffe's judgment in *Edwards v Bairstow*, was that:

> "I do not consider that it was open to the Crown Court to find that 'those seeking to retake the escaped patient' and in particular the

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constables concerned, were pursuing her, because there was in my view no material in the facts found on which (taking a proper view of the law) they could properly reach that conclusion."

In re B

42 In the light of the well-established appellate approach to appeals from tribunals of fact which are only permitted on questions of law, including in relation to cases stated under section 111 of the MCA, we do not consider that the Divisional Court was correct to decide that there is a different appellate test where the appeal raises an assessment of proportionality and, moreover, to do so without regard to any of the relevant authorities.

43 *In re B* [2013] 1 WLR 1911 was a family law case and involved the appellate test under CPR r 52.11(3) that an appeal will be allowed where the decision of the lower court is "wrong", whether in law or in fact. The Divisional Court placed reliance on the extradition case of *Love* [2018] 1 WLR 2889 but that too involves a wide right of appeal "on a question of law or fact" (sections 26(3)(a) and 103(4)(a) of the Extradition Act 2003). An appeal may be allowed if "the district judge ought to have decided a question before him differently" and "had he decided it as he ought to have done, he would have been required to discharge the appellant"—see sections 27(3) and 104(3). In argument, reliance was also placed on the application of *In re B* in judicial review appeals. There are, however, generally no disputed facts in judicial review cases, nor do they involve appeals from the only permissible fact finder. In the specific context of challenges to the decision of a magistrates' court, where an error of law is alleged, the appropriate remedy is normally by way of case stated rather than by seeking judicial review—see, for example, *R (P) v Liverpool City Magistrates' Court* (2006) 170 JP 453, para 5.

44 It would in any event be unsatisfactory, as a matter of both principle and practicality, for the appellate test in appeals by way of case stated to fluctuate according to the nature of the issue raised. That would mean that there were two applicable appellate tests and that it would be necessary to determine in each case which was applicable. That would be likely to depend upon whether or not the case turns on an assessment of proportionality, which may well give rise to difficult and marginal decisions as to how central the issue of proportionality is to the decision reached. On any view, having alternative appellate tests adds unnecessary and undesirable complexity and uncertainty.

45 A prosecution under section 137 of 1980 Act, for example, requires proof of a number of different elements. There must be an obstruction; the obstruction must be of a highway; it must be wilful, and it must be without lawful authority or excuse. Some cases stated in relation to section 137 prosecutions may involve no proportionality issues at all; some may involve proportionality issues and other issues; some may involve only proportionality issues. The appellate test should not vary according to the ingredients of the case stated.

46 Whilst we do not consider that *In re B* is the applicable appellate test it may, nevertheless, be very relevant to appeals by way of case stated that turn on issues of proportionality. The law as stated in *In re B* has been

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A developed in later cases. In *In re B* at para 88 Lord Neuberger PSC stated as follows:

> "If, after reviewing the judge's judgment and any relevant evidence, the appellate court considers that the judge approached the question of proportionality correctly as a matter of law and reached a decision which he was entitled to reach, then the appellate court will not interfere. If, on B the other hand, after such a review, the appellate court considers that the judge made a significant error of principle in reaching his conclusion or reached a conclusion he should not have reached, then, and only then, will the appellate court reconsider the issue for itself if it can properly do so (as remitting the issue results in expense and delay, and is often pointless)."

C **47** This approach was qualified by the Supreme Court in *R (R) v Chief Constable of Greater Manchester Police* [2018] 1 WLR 4079. In that case Lord Carnwath JSC (with whom the other justices agreed) said at para 64:

> "In conclusion, the references cited above show clearly in my view that to limit intervention to a 'significant error of principle' is too narrow an approach, at least if it is taken as implying that the appellate court has to D point to a specific principle—whether of law, policy or practice—which has been infringed by the judgment of the court below. The decision may be wrong, not because of some specific error of principle in that narrow sense, but because of an identifiable flaw in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion. However, it is equally clear that, for the decision to be 'wrong' under CPR E r 52.11(3), it is not enough that the appellate court might have arrived at a different evaluation. As Elias LJ said in *R (C) v Secretary of State for Work and Pensions* [2016] PTSR, para 34: 'the appeal court does not second guess the first instance judge. It does not carry out the balancing task afresh as though it were rehearing the case but must adopt a traditional function of review, asking whether the decision of the judge F below was wrong . . .' "

48 As Lewison LJ stated in *R (Z) v Hackney London Borough Council* [2019] PTSR 2272, para 66:

> "It is not enough simply to demonstrate an error or flaw in reasoning. It must be such as to undermine the cogency of the conclusion. G Accordingly, if there is no such error or flaw, the appeal court should not make its own assessment of proportionality."

Lewison LJ's observations as to the proper approach were endorsed by the Supreme Court [2020] 1 WLR 4327—see the judgment of Lord Sales JSC at para 74 and that of Lady Arden JSC at paras 118–120.

49 In cases stated which turn on an assessment of proportionality, the H factors which the court considers to be relevant to that assessment are likely to be the subject of findings set out in the case, as they were in the present case. If there is an error or flaw in the reasoning which undermines the cogency of the conclusion on proportionality that is, therefore, likely to be apparent on the face of the case. In accordance with *In re B*, as clarified by the later case law, such an error may be regarded as an error of law on the

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face of the case. It would, therefore, be open to challenge under the *Edwards v Bairstow* appellate test. As Lady Arden JSC observes, any such challenge would have to be made on the basis of the primary and secondary findings set out in the case stated, unless there was no evidence for them or they were findings which no reasonable tribunal could have reached. The review is of the judgment and any relevant findings, not "any relevant evidence".

50 In his judgment Lord Sales JSC sets out in detail the differences between rationality and proportionality and why he considers that the same approach should be adopted in all cases on appeal which concern whether an error of law has been made in relation to an issue of proportionality.

51 As Lady Arden JSC's analysis at para 101 of her judgment demonstrates, the nature and standard of appellate review will depend on a number of different factors. Different kinds of proceedings necessarily require different approaches to appellate review. For example, an appeal against conviction following a jury trial in the Crown Court, where the Court of Appeal Criminal Division must assess the safety of a conviction, is a very different exercise to that which is carried out by the Court of Appeal Civil Division in reviewing whether a decision of the High Court is wrong in judicial review proceedings, although both may involve proportionality assessments.

52 Whilst we agree that the approach to whether there is an error of law in relation to an issue of proportionality determined in a case stated is that set out in *In re B*, as clarified by the later case law, *Edwards v Bairstow* remains the overarching appellate test, and the alleged error of law has to be considered by reference to the primary and secondary factual findings which are set out in the case.

53 In the present case the Divisional Court considered that there were errors or flaws in the reasoning of the district judge taking into account a number of factors, which it considered to be irrelevant or inappropriate and that these undermined the cogency of the conclusion reached. Although the Divisional Court applied the wrong appellate test, it may therefore have reached a conclusion which was justifiable on the basis that there was an error of law on the face of the case. We shall address this question when considering the second issue on the appeal.

Conclusion in relation to the first certified question

54 For all these reasons, we consider that the test to be applied by an appellate court to an assessment of the decision of the trial court in respect of a statutory defence of "lawful excuse" when Convention rights are engaged in a criminal matter is the same as that applicable generally to appeals on questions of law in a case stated under section 111 of the MCA, namely that set out in *Edwards v Bairstow*. That means that an appeal will be allowed where there is an error of law material to the decision reached which is apparent on the face of the case, or if the decision is one which no reasonable court, properly instructed as to the relevant law, could have reached on the facts found. In accordance with that test and *In re B*, where the statutory defence depends upon an assessment of proportionality, an appeal will lie if there is an error or flaw in the reasoning on the face of the case which undermines the cogency of the conclusion on proportionality. That assessment falls to be made on the basis of the primary and secondary findings set out in the case stated, unless there was no evidence for them or they were findings which no reasonable tribunal could have reached.

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A *6. Is deliberate physically obstructive conduct by protesters capable of constituting a lawful excuse for the purposes of section 137 of the Highways Act 1980, where the impact of the deliberate obstruction on other highway users is more than de minimis, and prevents them, or is capable of preventing them, from passing along the highway?*

The second certified question

B **55** As the Divisional Court explained, (see para 28 above) a fundamental reason why it considered the district judge's assessment of proportionality to be wrong was that there was no fair balance struck between the different rights and interests at stake given that "the ability of other members of the public to go about their lawful business was completely prevented by the physical conduct of these defendants for a significant period of time". That fundamental reason led the Divisional C Court to certify the second question which the parties agreed as being in the terms set out in para 7(2) above ("the second certified question"). The implication of the second certified question is that deliberately obstructive conduct cannot constitute a lawful excuse for the purposes of section 137 of the Highways Act 1980, where the impact on other highway users is more than de minimis, so as to prevent users, or even so as to be *capable* of D preventing users, from passing along the highway. In those circumstances, the interference with the protesters' article 10 and article 11 ECHR rights would be considered proportionate, so that they would not be able to rely on those rights as the basis for a defence of lawful excuse pursuant to section 137 of the 1980 Act.

56 On behalf of the appellants it was submitted, to the contrary, that deliberate physically obstructive conduct by protesters is capable of E constituting a lawful excuse for the purposes of section 137 of the Highways Act 1980, even where the impact of the deliberate obstruction on other highway users is more than de minimis. In addition, it was submitted that the district judge's assessment of proportionality did not contain any error or flaw in reasoning on the face of the case such as to undermine the cogency of his conclusion. Accordingly, it was submitted that the Divisional Court's order directing convictions should be set aside and that this court should F issue a direction to restore the dismissal of the charges.

Articles 10 and 11 ECHR

57 The second certified question relates to both the right to freedom of expression in article 10 and the right to freedom of assembly in article 11. Both rights are qualified in the manner set out respectively in articles 10(2) G and 11(2): see paras 14–15 above. Article 11(2) states that "No restrictions shall be placed" except "such as are prescribed by law and are necessary in a democratic society". In *Kudrevičius v Lithuania* (2015) 62 EHRR 34, para 100 the European Court of Human Rights ("ECtHR") stated that "The term 'restrictions' in article 11(2) must be interpreted as including both measures taken before or during a gathering and those, such as punitive measures, taken afterwards" so that it accepted at para 101 H "that the applicants' conviction for their participation in the demonstrations at issue amounted to an interference with their right to freedom of peaceful assembly". Arrest, prosecution, conviction, and sentence are all "restrictions" within both articles. Different considerations may apply to the proportionality of each of those restrictions. The proportionality of arrest,

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which is typically the police action on the ground, depends on, amongst other matters, the constable's reasonable suspicion. The proportionality assessment at trial before an independent impartial tribunal depends on the relevant factors being proved beyond reasonable doubt and the court being sure that the interference with the rights under articles 10 and 11 was necessary. The police's perception and the police action are but two of the factors to be considered. It may have looked one way at the time to the police (on which basis their actions could be proportionate) but at trial the facts established may be different (and on that basis the interference involved in a conviction could be disproportionate). The district judge is a public authority, and it is his assessment of proportionality of the interference that is relevant, not to our mind his assessment of the proportionality of the interference by reference only to the intervention of the police that is relevant. In that respect we differ from Lord Sales JSC (see for instance para 120, 153 and 154) who considers that the defence of "lawful excuse" under section 137 depends on an assessment of the proportionality of the police response to the protest and agree with Lady Arden JSC at para 94 that "the more appropriate question is whether the convictions of the appellants for offences under section 137(1) of the Highways Act 1980 were justified *restrictions* on the right to freedom of assembly under article 11 or not" (emphasis added).

58 As the Divisional Court identified at para 63 the issues that arise under articles 10 and 11 require consideration of five questions: see para 16 above. In relation to those questions it is common ground that (i) what the appellants did was in the exercise of one of the rights in articles 10 and 11; (ii) the prosecution and conviction of the appellants was an interference with those rights; (iii) the interference was prescribed by law; and (iv) the interference was in pursuit of a legitimate aim which was the prevention of disorder and the protection of the rights of others to use the highway. That leaves the fifth question as to whether the interference with either right was "necessary in a democratic society" so that a fair balance was struck between the legitimate aims of the prevention of disorder and protection of the rights and freedoms of others and the requirements of freedom of expression and freedom of assembly.

59 Determination of the proportionality of an interference with ECHR rights is a fact-specific enquiry which requires the evaluation of the circumstances in the individual case.

60 In a criminal case the prosecution has the burden of proving to the criminal standard all the facts upon which it relies to establish to the same standard that the interference with the articles 10 and 11 rights of the protesters was proportionate. If the facts are established then a judge, as in this case, or a jury, should evaluate those facts to determine whether or not they are sure that the interference was proportionate.

61 In this case both articles 10 and 11 are invoked on the basis of the same facts. In the decisions of the ECtHR, whether a particular incident falls to be examined under article 10 or article 11, or both, depends on the particular circumstances of the case and the nature of a particular applicant's claim to the court. In *Kudrevičius v Lithuania*, para 85 and in *Lashmankin v Russia* (Application No 57818/09) (unreported) 7 February 2017, at para 364, both of which concerned interference with peaceful protest, the ECtHR stated that article 11 constitutes the lex specialis

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A pursuant to which the interference is to be examined. The same approach was taken by the ECtHR at para 91 of its judgment in *Primov v Russia* (Application No 17391/06) (unreported) 12 June 2014. However, given that article 11 is to be interpreted in the light of article 10, said to constitute the lex generalis, the distinction is largely immaterial. The outcome in this case will be the same under both articles.

B

Deliberate obstruction with more than a de minimis impact

62 The second certified question raises the issue as to how intentional action by protesters disrupting traffic impacts on an assessment of proportionality under articles 10 and 11 ECHR.

63 The issue of purposeful disruption of others was considered by the ECtHR in *Hashman and Harrup v United Kingdom* (1999) 30 EHRR 241, C paras 27–28 and *Steel v United Kingdom* (1998) 28 EHRR 603, para 142. It was also considered by the ECtHR in *Kudrevičius v Lithuania* in relation to the purposeful disruption of traffic and in *Primov v Russia* in relation to an attempted gathering which would have disrupted traffic.

64 The case of *Steel v United Kingdom* did not involve obstructive behaviour on a highway but rather involved an attempt by the first D applicant, with 60 others, to obstruct a grouse shoot. The first applicant was arrested for breach of the peace for impeding the progress of a member of the shoot by walking in front of him as he lifted his shotgun. She was detained for 44 hours before being released on conditional bail. She was charged with breach of the peace and using threatening words or behaviour, contrary to section 5 of the Public Order Act 1986. At trial she was convicted of both offences and the Crown Court upheld the convictions on appeal. She E complained to the European Commission of Human Rights ("the Commission") on the basis, in particular, of violations of articles 10 and 11, arising from the disproportionality of the restrictions on her freedom to protest. At para 142 of its judgment the Commission noted that "the first . . . applicant [was] demonstrating not only by verbal protest or holding up placards and distributing leaflets, but *by physically impeding the* F *activities against which [she was] protesting*" (emphasis added). In addressing this issue, the Commission recalled "that freedom of expression under article 10 goes beyond mere speech, and considers that the applicants' protests were expressions of [her] disagreement with certain activities, and as such fall within the ambit of article 10". Despite the protest physically impeding the activities of those participating in the grouse shoot the Commission found that "there was a clear interference with the applicants' G freedom under article 10 of the Convention". Thereafter the Commission considered whether the interference was prescribed by law, whether it pursued a legitimate aim and whether it was proportionate. In relation to proportionality it found that the removal of the applicant by the police from the protest and her detention for 44 hours, even though it interfered with her freedom to demonstrate, could, in itself, be seen as proportionate to the aim of preventing disorder. It reached similar findings in relation to the H proportionality of the convictions: see paras 154–158. However, the points of relevance to this appeal are: (a) that deliberate obstructive conduct which has a more than de minimis impact on others, still requires careful evaluation in determining proportionality; and, (b) that there is a separate evaluation of proportionality in respect of each restriction. In *Steel* those

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separate evaluations included the proportionality of the removal of the first applicant from the scene (para 155), the proportionality of the detention of the first applicant for 44 hours before being brought before a magistrate (para 156) and the proportionality of the penalties imposed on the first applicant (paras 157–158). A separate analysis was carried out in relation to the third, fourth and fifth applicants leading to the conclusion that their removal from the scene was not proportionate: see paras 168–170.

65 The case of *Hashman and Harrup v United Kingdom* similarly did not involve a protest obstructing a highway. Rather, the applicants had intentionally disrupted the activities of the Portman Hunt to protest against fox hunting. Proceedings were brought against the applicants in respect of their behaviour. They were bound over to keep the peace and be of good behaviour. They complained to the ECtHR that this was a breach of their article 10 rights. At para 28 the ECtHR noted that "the protest took the form of impeding the activities of which they disapproved" but considered "nonetheless that it constituted an expression of opinion within the meaning of article 10" and that "The measures taken against the applicants were, therefore, an interference with their right to freedom of expression". Again, the point of relevance to this appeal is that deliberate obstructive conduct which has a more than de minimis impact on others still requires careful evaluation in determining proportionality.

66 In *Kudrevičius v Lithuania* the applicants had been involved in a major protest by farmers against the Lithuanian government. The protests involved the complete obstruction of the three major roads in Lithuania. Subsequently the first and second applicants were convicted of inciting the farmers to blockade the roads and highway contrary to article 283(1) of the Criminal Code. The remaining applicants were convicted of a serious breach of public order during the riot by driving tractors onto the highway and refusing to obey requests by the police to move them. Before the ECtHR the applicants complained that their convictions had violated their rights to freedom of expression and freedom of peaceful assembly, guaranteed by articles 10 and 11 ECHR respectively. The extent of the significant obstruction intended and caused can be discerned from the facts. One of the highways which was obstructed was the main trunk road connecting the three biggest cities in the country. It was obstructed on 21 May 2003 at around 12.00 by a group of approximately 500 people who moved onto the highway and remained standing there, thus stopping the traffic. Another of the highways was a transitional trunk road used to enter and leave the country. It was obstructed on 21 May 2003 at 12.00 by a group of approximately 250 people who moved onto the highway and remained standing there, thus stopping the traffic until 12 noon on 23 May 2003. The third highway which was obstructed was also a transitional trunk road used to enter and leave the country. It was obstructed on 21 May 2003 at 11.50 by a group of 1,500 people who moved onto the highway and kept standing there, thus stopping the traffic. In addition, on the same day between 15.00 and 16.30 tractors were driven onto the highway and left standing there. Such blockage continued until 16.00 on 22 May 2003. According to the Lithuanian Government, all three roads were blocked at locations next to the customs post for approximately 48 hours. The Government alleged, in particular, that owing to the blocking rows of heavy goods vehicles and cars formed in Lithuania and Poland at the Kalvarija border crossing and that

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A heavy goods vehicles were forced to drive along other routes in order to avoid traffic jams. It was also alleged that as the functioning of the Kalvarija customs post was disturbed, the Kaunas Territorial Customs Authority was obliged to re-allocate human resources as well as to prepare for a possible re-organisation of activities with the State Border Guard Service and the Polish customs and that, as a consequence, the Kaunas Territorial Customs Authority incurred additional costs; however, the concrete material damage B had not been calculated.

67 The ECtHR in *Kudrevičius* at para 97 recognised that intentional disruption of traffic was "not an uncommon occurrence in the context of the exercise of freedom of assembly in modern societies". However, the court continued that "physical conduct purposely obstructing traffic and the ordinary course of life in order to *seriously disrupt the activities carried out* C *by others* is not at the core of that freedom as protected by article 11 of the Convention" (emphasis added). The court also added that "This state of affairs *might* have implications for any assessment of 'necessity' to be carried out under the second paragraph of article 11" (emphasis added). It is apparent from *Kudrevičius* that purposely obstructing traffic still engages article 11 but seriously disrupting the activities carried out by others is not at the core of that freedom so that it "*might*", not "*would*", have implications D for any assessment of proportionality. In this way, such disruption is not determinative of proportionality. On the facts of that case the Lithuanian authorities had struck a fair balance between the legitimate aims of the "prevention of disorder" and "protection of the rights and freedoms of others" and the requirement of freedom of assembly. On that basis the criminal convictions and the sanctions imposed were not disproportionate in E view of the serious disruption of public order provoked by the applicants. However, again, the point of relevance to this appeal is that deliberate obstructive conduct which has a more than de minimis impact on others still requires careful evaluation in determining proportionality.

68 The case of *Primov v Russia* involved a complaint to the ECtHR that the Russian authorities' refusal to allow a demonstration, the violent dispersal of that demonstration and the arrest of the three applicants F breached their right to freedom of expression and to peaceful assembly, guaranteed by articles 10 and 11 of the Convention respectively. The protesters wished to gather in the centre of the village of Usukhchay. To prevent them from doing so the police blocked all access to the village. One of the reasons for this blockade was that if allowed to demonstrate in the centre of the village the crowd would risk blocking the main road adjacent to G the village square. In conducting a proportionality assessment between paras 143–153 the ECtHR referred to the importance for the public authorities to show a certain degree of tolerance towards peaceful gatherings. At para 145 it stated:

> "The court reiterates in this respect that any large-scale gathering in a public place inevitably creates inconvenience for the population. H Although a demonstration in a public place may cause some disruption to ordinary life, including disruption of traffic, it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by article 11 of the Convention is not to be deprived of its substance (see *Galstyan* [*Galstyan v Armenia* (2007) 50 EHRR 25], paras 116–117, and *Bukta* [*Bukta v*

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> *Hungary* (2007) 51 EHRR 25], para 37). The appropriate 'degree of tolerance' cannot be defined in abstracto: the court must look at the particular circumstances of the case and particularly to the extent of the 'disruption of ordinary life'."

So, there should be a certain degree of tolerance to disruption to ordinary life, including disruption of traffic, caused by the exercise of the right to freedom of expression or freedom of peaceful assembly.

69 This is not to say that there cannot be circumstances in which the actions of protesters take them outside the protection of article 11 so that the question as to proportionality does not arise. Article 11 of the Convention only protects the right to "peaceful assembly". As the ECtHR stated at para 92 of *Kudrevičius*:

> "[the] notion [of peaceful assembly] does not cover a demonstration where the organisers and participants have violent intentions. The guarantees of article 11 therefore apply to all gatherings except those where the organisers and participants have such intentions, incite violence or otherwise reject the foundations of a democratic society."

There is a further reference to conduct undermining the foundations of a democratic society taking the actions of protesters outside the protection of article 11 at para 98 of *Kudrevičius*. At para 155 of its judgment in *Primov and v Russia* the ECtHR stated that "article 11 does not cover demonstrations where the organisers and participants have violent intentions . . . However, an individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration if the individual in question remains peaceful in his or her own intentions or behaviour". Moreover, a protest is peaceful even though it may annoy or cause offence to the persons opposed to the ideas or claims that the protest is seeking to promote.

70 It is clear from those authorities that intentional action by protesters to disrupt by obstructing others enjoys the guarantees of articles 10 and 11, but both disruption and whether it is intentional are relevant factors in relation to an evaluation of proportionality. Accordingly, intentional action even with an effect that is more than de minimis does not automatically lead to the conclusion that any interference with the protesters' articles 10 and 11 rights is proportionate. Rather, there must be an assessment of the facts in each individual case to determine whether the interference with article 10 or article 11 rights was "necessary in a democratic society".

Factors in the evaluation of proportionality

71 In setting out various factors applicable to the evaluation of proportionality it is important to recognise that not all of them will be relevant to every conceivable situation and that the examination of the factors must be open textured without being given any pre-ordained weight.

72 A non-exhaustive list of the factors normally to be taken into account in an evaluation of proportionality was set out at para 39 of the judgment of Lord Neuberger of Abbotsbury MR in *City of London Corpn v Samede* [2012] PTSR 1624 (see para 17 above). The factors included "the extent to which the continuation of the protest would breach domestic law, the importance of the precise location to the protesters, the duration of the protest, the degree to which the protesters occupy the land, and the extent of

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A the actual interference the protest causes to the rights of others, including the property rights of the owners of the land, and the rights of any members of the public". At paras 40–41 Lord Neuberger MR identified two further factors as being: (a) whether the views giving rise to the protest relate to "very important issues" and whether they are "views which many would see as being of considerable breadth, depth and relevance"; and, (b) whether the protesters "believed in the views they were expressing". In relation to (b) it is B hard to conceive of any situation in which it would be proportionate for protesters to interfere with the rights of others based on views in which the protesters did not believe.

73 In *Nagy v Weston* [1965] 1 WLR 280 (see para 9 above) one of the factors identified was "the place where [the obstruction] occurs". It is apparent, as in this case, that an obstruction can have different impacts C depending on the commercial or residential nature of the location of the highway.

74 A factor listed in *City of London Corpn v Samede* was "the extent of the actual interference the protest causes to the rights of others". Again, as in this case, in relation to protests on a highway the extent of the actual interference can depend on whether alternative routes were used or could have been used. In *Primov v Russia* at para 146 a factor taken into account in D relation to proportionality by the ECtHR was the availability of "alternative thoroughfares where the traffic could have been diverted by the police".

75 Another factor relevant to proportionality can be discerned from para 171 of the judgment of the ECtHR in *Kudrevičius* in that it took into account that "the actions of the demonstrators had not been directly aimed at an activity of which they disapproved, but at the physical blocking of E another activity (the use of highways by carriers of goods and private cars) which had no direct connection with the object of their protest, namely the government's alleged lack of action vis-à-vis the decrease in the prices of some agricultural products". So, a relevant factor in that case was whether the obstruction was targeted at the object of the protest.

76 Another factor identified in *City of London Corpn v Samede* was "the importance of the precise location to the protesters". In *Mayor of* F *London (on behalf of the Greater London Authority) v Hall* [2011] 1 WLR 504, para 37 it was acknowledged by Lord Neuberger MR, with whom Arden and Stanley Burnton LJJ agreed, that "The right to express views publicly . . . and the right of the defendants to assemble for the purpose of expressing and discussing those views, extends . . . to the location where they wish to express and exchange their views". In *Sáska v Hungary* G (Application No 58050/08) (unreported) 27 November 2012, at para 21 the ECtHR stated that "the right to freedom of assembly includes the right to choose the time, place and modalities of the assembly, within the limits established in paragraph 2 of article 11". This ability to choose, amongst other matters, the location of a protest was also considered by the ECtHR in *Lashmankin v Russia*, 7 February 2017. At para 405 it was stated that:

H "the organisers' autonomy *in determining the assembly's location*, time and manner of conduct, such as, for example, whether it is static or moving or whether its message is expressed by way of speeches, slogans, banners or by other ways, are important aspects of freedom of assembly. Thus, *the purpose of an assembly is often linked to a certain location and/or time, to allow it to take place within sight and sound of its target*

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object and at a time when the message may have the strongest impact." (Emphasis added.)

In this case the appellants ascribed a particular "symbolic force" to the location of their protest, in the road, leading to the Excel Centre.

77 It can also be seen from para 405 of *Lashmankin* that the organisers of a protest have autonomy in determining the manner of conduct of the protest. That bears on another factor set out in *City of London Corpn v Samede*, namely "the extent to which the continuation of the protest would breach domestic law". So, the manner and form of a protest on a highway will potentially involve the commission of an offence contrary to section 137 of the 1980 Act. However, if the protest is peaceful then no other offences will have been committed, such as resisting arrest or assaulting a police officer. In *Balçik v Turkey* (Application No 25/02) (unreported) 29 November 2007, at para 51 the ECtHR took into account that there was no evidence to suggest that the group in that case "presented a danger to public order, apart from possibly blocking the tram line". So, whilst there is autonomy to choose the manner and form of a protest an evaluation of proportionality will include the nature and extent of actual and potential breaches of domestic law.

78 Prior notification to and co-operation with the police may also be relevant factors in relation to an evaluation of proportionality, especially if the protest is likely to be contentious or to provoke disorder. If there is no notification of the exact nature of the protest, as in this case, then whether the authorities had prior knowledge that some form of protest would take place on that date and could have therefore taken general preventive measures would also be relevant: see *Balçik v Turkey* at para 51. However, the factors of prior notification and of co-operation with the police and the factor of any domestic legal requirement for prior notification, must not encroach on the essence of the rights: see *Molnár v Hungary* (Application No 10346/05) (unreported) 7 October 2008, paras 34–38 and *DB v Chief Constable of Police Service of Northern Ireland* [2017] NI 301, para 61.

Whether the district judge's assessment of proportionality contained any error or flaw in reasoning on the face of the case such as to undermine the cogency of his conclusion

79 A conventional balancing exercise involves individual assessment by the district judge conducted by reference to a concrete assessment of the primary facts, or any inferences from those facts, but excluding any facts or inferences which have not been established to the criminal standard. It is permissible within that factorial approach that some factors will weigh more heavily than others, so that the weight to be attached to the respective factors will vary according to the specific circumstances of the case. In this case the factual findings are set out in the case stated and it is on the basis of those facts that the district judge reached the balancing conclusion that the prosecution had not established to the requisite standard that the interference with the articles 10 and 11 rights of the appellants was proportionate. This raises the question on appeal as to whether there were errors or flaws in the reasoning on the face of the case which undermines the cogency of the conclusion on proportionality, insofar as the district judge is said to have taken into account a number of factors which were irrelevant or inappropriate.

80 The Divisional Court at paras 111–118 considered the assessment of proportionality carried out by the district judge (see para 21 above). The

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A Divisional Court considered that the factors at paras 38(a) to (c) were of little or no relevance. We disagree. In relation to the factor at para 38(a), article 11 protects peaceful assembly. The ECtHR requires "a certain degree of tolerance towards peaceful gatherings", see *Primov v Russia* at para 68 above. The fact that this was intended to be and was a peaceful gathering was relevant. Furthermore, the factor in para 38(b) that the appellants' actions did not give rise, directly or indirectly, to any form of disorder was also relevant. B There are some protests that are likely to provoke disorder. This was not such a protest. Rather it was a protest on an approach road in a commercial area where there was already a sizeable police presence in anticipation of demonstration without there being any counter-demonstrators or any risk of clashes with counter-demonstrators: (for the approach to the risk of clashes with counter-demonstrations see para 150 of *Primov v Russia*). The protest C was not intended to, nor was it likely to, nor did it in fact provoke disorder. There were no "clashes" with the police. The factor taken into account by the district judge at para 38(c) related to the commission of any other offences and this also was relevant, as set out in *City of London Corpn v Samede* (see para 17 above) in which one of the factors listed was "the extent to which the continuation of the protest would breach domestic law". The Divisional Court considered that none of these factors prevented the offence of D obstruction of the highway being committed in a case such as this. That reasoning is correct in that the offence can be committed even if those factors are present. However, the anterior question is proportionality, to which all those factors are relevant. There was no error or flaw in the reasoning of the district judge in taking these factors into account in his assessment of proportionality. That assessment was central to the question as to whether E the appellants should be convicted under section 137 of the 1980 Act.

81 The Divisional Court's core criticism related to the factor considered by the district judge at para 38(d). We have set out in para 27 above the reasoning of the Divisional Court. We differ in relation to those aspects to which we have added emphasis.

(i) We note that in para 112 the Divisional Court stated that the "highway *to and from* the Excel Centre was completely obstructed" but later stated F that "members of the public were *completely prevented* from" using "the highway for passage *to* get to the Excel Centre" (emphasis added). We also note that at para 114 the Divisional Court again stated that there was there was "*a complete obstruction of the highway*" (emphasis added). In fact, the highway *from* the Excel Centre was not obstructed, so throughout the duration of the protest this route *from* the Excel Centre was available to be G used. Moreover, whilst this approach road for vehicles *to* the Excel Centre was obstructed it was common ground that access could be gained by vehicles by another route. On that basis members of the public were not "completely prevented" from getting *to* the Excel Centre, though it is correct that for a period vehicles were obstructed from using this particular route.

(ii) The fact that "actions" were carefully targeted and were aimed only at obstructing vehicles headed to the DSEI arms fair was relevant: see para 75 H above. Furthermore, the district judge found that the targeting was effective, as the evidence as to the use of the road by vehicles other than those heading to the arms fair was speculative and was not particularly clear or compelling (see para 38(d) of the case stated set out at para 21 above). He made no finding as to whether "non-DSEI" traffic was or was not in fact obstructed

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since even if it had been this amounted to no more than reasonable obstruction causing some inconvenience to the general public. Targeting and whether it was effective are relevant matters to be evaluated in determining proportionality.

(iii) The choice of location was a relevant factor to be taken into account by the district judge: see para 76 above.

(iv) The Divisional Court considered that the obstruction was for a "significant period of time" whilst the district judge considered that the "action was limited in duration". As we explain in paras 83–84 below whether the period of 90 to 100 minutes of actual obstruction was "significant" or "limited" depends on the context. It was open to the district judge to conclude on the facts of this case that the duration was "limited" and it was also appropriate for him to take that into account in relation to his assessment of proportionality.

(v) The Divisional Court's conclusion referred to disruption to "members of the public". However, there were no findings by the district judge as to the number or even the approximate number of members of the public who were inconvenienced by this demonstration which took place on one side of an approach road to the Excel Centre in circumstances where there were other available routes for deliveries to the Centre (see para 19 above). Furthermore, there were no factual findings that the protest had any real adverse impact on the Excel Centre.

82 The Divisional Court agreed at para 113 with the factor taken into account by the district judge at para 38(e) of the case stated:

> "that the action clearly related to a matter of general concern, namely the legitimacy of the arms fair and whether it involved the marketing and sale of potentially unlawful items. That was relevant in so far as it emphasised that the subject matter of the protests in the present cases was a matter of legitimate public interest. As Mr Blaxland submitted before us, the content of the expression in this case was political and therefore falls at the end of the spectrum at which greatest weight is attached to the kind of expression involved."

That was an appropriate factor to be taken into account: see para 72 above. As in *Primov v Russia* at paras 132–136 the appellant's message "undeniably concerned a serious matter of public concern and related to the sphere of political debate". There was no error or flaw in the reasoning of the district judge in taking this factor into account in relation to the issue of proportionality.

83 The Divisional Court disagreed with the district judge's conclusion at para 38(f) of the case stated that an obstruction of the highway for 90–100 minutes was of limited duration. The Divisional Court at para 112 referred to the period of obstruction as having "occurred for a significant period of time". Then at para 114 the Divisional Court stated:

> "On any view, as was common ground, the duration of the obstruction of the highway was not de minimis. Accordingly, the fact is that there was *a complete obstruction of the highway for a not insignificant amount of time*. That is highly significant, in our view, to the proper evaluative assessment which is required when applying the principle of proportionality." (Emphasis added.)

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A As we have observed the district judge did not find that there was a *complete obstruction of the highway* but rather that the obstruction to vehicles was to that side of the approach road leading to the Excel Centre. It is correct that the district judge equivocated as to whether the duration of the obstruction was for a matter of minutes until the appellants were arrested, or whether it was for the 90 to 100 minutes when the police were able to move the appellants out of the road. It would arguably have been incorrect for the B district judge to have approached the duration of the obstruction on the basis that it was for a matter of minutes rather than by reference to what actually occurred. The district judge, however, did not do so and instead correctly approached his assessment based on the period of time during which that part of the highway was actually obstructed. Lord Sales JSC at para 144 states that the district judge ought to have taken into account any C longer period of time during which the appellants intended the highway to be obstructed. If it was open to the district judge to have done so, then we do not consider this to be a significant error or flaw in his reasoning. However, we agree with Lady Arden JSC at para 96 that the appellants "cannot . . . be convicted on the basis that had the police not intervened their protest would have been longer". We agree that the proportionality assessment which D potentially leads to a conviction can only take into account the obstruction of the highway that actually occurs.

84 It is agreed that the actual time during which this access route to the Excel Centre was obstructed was 90 to 100 minutes. The question then arises as to whether this was of limited or significant duration. The appraisal as to whether the period of time was of "limited duration" or was for "a not insignificant amount of time" or for "a significant period of time" was a E fact-sensitive determination for the district judge which depended on context including, for instance the number of people who were inconvenienced, the type of the highway and the availability of alternative routes. We can discern no error or flaw in his reasoning given that there was no evidence of any significant disruption caused by the obstruction. Rather, it was agreed that there were alternative routes available for vehicles making deliveries to the Excel Centre: see para 19 above.

F **85** The Divisional Court considered at para 115 that the factor taken into account by the district judge at para 38(g) of the case stated was "of little if any relevance to the assessment of proportionality". The factor was that he had "heard no evidence that anyone had actually submitted a complaint about the defendants' action or the blocking of the road. The police's response appears to have been entirely on their own initiative". In G relation to the lack of complaint, the Divisional Court stated that this did not alter the fact that the obstruction did take place and continued that "The fact that the police acted, as the district judge put it, 'on their own initiative' was only to be expected in the circumstances of a case such as this". We agree that for the police to act it was obvious that they did not need to receive a complaint. They were already at the Excel Centre in anticipation of H demonstrations and were immediately aware of this demonstration by the appellants. However, the matter to which the district judge was implicitly adverting was that the lack of complaint was indicative of a lack of substantial disruption to those in the Excel Centre. If there had been substantial disruption one might expect there to have been complaints. Rather, on the basis of the facts found by the district judge there was no

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substantial disruption. There was no error or flaw in the reasoning of the district judge in considering the matters set out at para 38(g).

86 The Divisional Court at para 116 considered that the factor at para 38(h) of the case stated was irrelevant. In this paragraph the district judge, although he regarded this as a "relatively minor issue", noted the long-standing commitment of the defendants to opposing the arms trade and that for most of them this stemmed, at least in part, from their Christian faith. He stated that they had also all been involved in other entirely peaceful activities aimed at trying to halt the DSEI arms fair. The district judge considered that "This was not a group of people who randomly chose to attend this event hoping to cause trouble". The Divisional Court held that this factor had "no relevance to the assessment which the court was required to carry out when applying the principle of proportionality" and that "It came perilously close to expressing approval of the viewpoint of the defendants, something which . . . is not appropriate for a neutral court to do in a democratic society". However, as set out at para 72 above, whether the appellants "believed in the views they were expressing" was relevant to proportionality. Furthermore, it is appropriate to take into account the general character of the views whose expression the Convention is being invoked to protect. Political views, unlike "vapid tittle-tattle" are particularly worthy of protection. Furthermore, at para 38(h) the district judge took into account that the appellants were not a group of people who randomly chose to attend this event hoping to cause trouble. We consider that the peaceful intentions of the appellants were appropriate matters to be considered in an evaluation of proportionality. There was no error or flaw in the reasoning of the district judge in taking into account the matters set out at para 38(h).

Conclusion in relation to the second certified question

87 We would answer the second certified question "yes". The issue before the district judge did not involve the proportionality of the police in arresting the appellants but rather proportionality in the context of the alleged commission of an offence under section 137 of the 1980 Act. The district judge determined that issue of proportionality in favour of the appellants. For the reasons which we have given there was no error or flaw in the district judge's reasoning on the face of the case such as to undermine the cogency of his conclusion on proportionality. Accordingly, we would allow the appeal on this ground.

7. Overall conclusion

88 For the reasons that we have given, we would allow the appeal by answering the certified question set out in para 7(1) as set out in para 54 above; answering the certified question set out in para 7(2) "yes"; setting aside the Divisional Court's order directing convictions; and issuing a direction to restore the dismissal of the charges.

LADY ARDEN JSC

The context in which the certified questions arise

89 This appeal from the order of the Divisional Court (Singh LJ and Farbey J), allowing the appeal of the Director of Public Prosecutions and entering convictions against the appellants, requires this court to answer two

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A certified questions set out in para 7 of this judgment. One of the matters which gives this appeal its importance is the context in which those questions have arisen. This appeal involves the right to freedom of peaceful assembly and association set out in article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 ("the Convention"), one of the rights now guaranteed in our domestic law by B the Human Rights Act 1998. The European Court of Human Rights ("the Strasbourg court") has described this important right as follows:

> "the right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression [which is also engaged in this case but raises no separate issue for the purposes of this judgment] is one of the foundations of such a society. Thus, it should not be interpreted C restrictively." (*Kudrevičius v Lithuania* (2015) 62 EHRR 34, para 91.)

90 The agreed statement of facts and issues filed on this appeal sets out the basic facts as follows:

> "1. The appellants took part in a protest against the arms trade on 5 September 2017 outside the Excel Centre in East London, protesting the biennial Defence and Security International ('DSEI') weapons fair taking D place at the centre.
>
> "2. Their protest consisted of them lying down on one side of one of the roads leading to the Excel Centre, and locking their arms onto a bar in the middle of a box ('lock box'), using a carabiner.
>
> "3. The police arrested the appellants within minutes of them beginning their protest, after initiating a procedure known as the 'five-stage process', E intended to persuade them to remove themselves voluntarily from the public highway.
>
> "4. The appellants were removed from the public highway by police removal experts approximately 90 minutes after their protest began (the delay being caused by the necessity for the police to use specialist cutting equipment safely to remove the appellants' arms from the boxes).
>
> "5. The left-hand dual lane carriageway of the public highway leading to F the Excel Centre was blocked for the duration of the appellants' protest; the right-hand dual lane carriageway, leading away from the Excel Centre remained open, as did other access routes to the Excel Centre. The evidence before the trial court of disruption caused by the appellants' protest was limited, and there was no direct evidence of disruption to non-DSEI traffic.
>
> "6. The appellants were charged with obstructing the highway contrary G to section 137 of the Highways Act 1980.
>
> "7. They were tried before District Judge (Magistrates' Court) ('DJ(MC)') Hamilton on 1 and 2 February 2018. The prosecution case was largely agreed and the appellants gave evidence.
>
> "8. DJ Hamilton delivered his reserved judgment on 7 February 2018. He acquitted the appellants on the basis that, having regard inter alia to the appellants' rights under articles 10 and 11, 'on the specific facts of these H particular cases the prosecution failed to prove to the requisite standard that the defendants' limited, targeted and peaceful action, which involved an obstruction of the highway, was unreasonable'." (Case stated, para 40.)

91 Section 137(1) of the Highways Act 1980 provides: "If a person, without lawful authority or excuse, in any way wilfully obstructs the free

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passage along a highway he is guilty of an offence and liable to a fine not exceeding [level 3 on the standard scale]."

92 As Lord Sales JSC, with whom Lord Hodge DPSC agrees, explains, this must now be interpreted so as to permit the proper exercise of the rights guaranteed by articles 10 and 11 of the Convention. Previously it was (for instance) no excuse that the obstruction occurred because the defendant was giving a speech (*Arrowsmith v Jenkins* [1963] 2 QB 561). The Human Rights Act 1998 has had a substantial effect on public order offences and made it important not to approach them with any preconception as to what is or is not lawful. As Lord Bingham of Cornhill observed in *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105, 127: "The Human Rights Act 1998, giving domestic effect to articles 10 and 11 of the European Convention, represented what Sedley LJ in *Redmond-Bate v Director of Public Prosecutions* (1999) 163 JP 789, 795, aptly called a 'constitutional shift'."

93 Article 11, which I set out in para 95 below, consists of two paragraphs. The first states the right and the second provides for restrictions on that right. For any exercise of the right to freedom of assembly to be Convention-compliant, a fair balance has to be struck between the exercise of those rights and the exercise of other rights by other persons. It is not necessary on this appeal to refer throughout to article 10 of the Convention (freedom of expression), as well as article 11, but its importance as a Convention right must also be acknowledged.

94 I pause here to address a point made by Lord Sales JSC and Lord Hodge DPSC that those restrictions occur when the police intervene and so the right to freedom of assembly is delimited by the proportionality of police action. In some circumstances it may be helpful to cross-check a conclusion as to whether conduct is article 11-compliant by reference to an analysis of the lawfulness of police intervention but that cannot be more than a cross-check and it may prove to be a misleading diversion. It may for instance be misleading if the police action has been precipitate, or based on some misunderstanding or for some other reasons not itself article 11-compliant. In addition, if the proportionality of the police had to be considered, it would be relevant to consider why there was apparently no system of prior notification or authorisation for protests around the DSEI fair—a high profile and controversial event—and also what the policy of the police was in relation to any demonstrations around that event and what the police knew about the protest and so on. Moreover, the question of whether any action was article 11-compliant may have to be answered in a situation in which the police were never called and therefore never intervened. Furthermore, the proportionality of police intervention is not an ingredient of the offence, and it is not the state of mind of the police but of the appellants that is relevant. In the present case, the more appropriate question is whether the convictions of the appellants for offences under section 137(1) of the Highways Act 1980 were justified restrictions on the right to freedom of assembly under article 11 or not.

95 Article 11 provides:

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

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A

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

B

96 Thus, the question becomes: was it necessary in a democratic society for the protection of the rights and freedoms of others for the rights of the appellants to be restricted by bringing their protest to an end and charging them with a criminal offence? The fact that their protest was brought to an end marks the end of the duration of any offence under section 137(1). They cannot, in my judgment, be convicted on the basis that had the police not intervened their protest would have been longer. They can under section 137(1) only be convicted for the obstruction of the highway that actually occurs. In fact, in respectful disagreement with the contrary suggestion made by Lord Sales JSC and Lord Hodge DPSC in Lord Sales JSC's judgment, the appellants did not in fact intend that their protest should be a long one. If their intentions had been relevant, or the prosecution had requested that such a finding be included in the case stated, the district judge is likely to have included his finding in his earlier ruling that the appellants only wanted to block the highway for a few hours (written ruling of DJ (MC) Hamilton, para 11.)

C

D

97 It follows from the structure of article 11 and the importance of the right that the trial judge, DJ (MC) Hamilton, was right to hold that the prosecution had to justify interference (and under domestic rules of evidence this had to be to the criminal standard). Justification for any interference with the Convention right has to be precisely proved: see *Navalnyy v Russia* (2018) 68 EHRR 25:

E

"137. The court has previously held that the exceptions to the right to freedom of assembly must be narrowly interpreted and the necessity for any restrictions must be convincingly established (see *Kudrevičius v Lithuania* (2015) 62 EHRR 34, para 142). In an ambiguous situation, such as the three examples at hand, it was all the more important to adopt measures based on the degree of disturbance caused by the impugned conduct and not on formal grounds, such as non-compliance with the notification procedure. An interference with freedom of assembly in the form of the disruption, dispersal or arrest of participants in a given event may only be justifiable on specific and averred substantive grounds, such as serious risks referred to in paragraph 1 of section 16 of the Public Events Act. This was not the case in the episodes at hand."

F

G

The certified questions

H

98 The issues of law in the appeal, as certified by the Divisional Court, are:

(1) What is the test to be applied by an appellate court to an assessment of the decision of the trial court in respect of a statutory defence of "lawful excuse" when Convention rights are engaged in a criminal matter and, in

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A particular the lower court's assessment of whether an interference with Convention rights was proportionate?

(2) Was deliberate physically obstructive conduct by protesters capable of constituting a lawful excuse for the purposes of section 137 of the Highways Act 1980, in circumstances where the impact of the deliberate obstruction on other highway users prevent them completely from passing along the highway for a significant period of time?

B

Overview of my answers to the two certified questions

99 For the reasons explained below, my answers to the two certified questions are in outline as follows:

(1) *Standard of appellate review applying to a proportionality assessment.* The standard of appellate review applicable to the evaluation of the compliance with the Convention requirement of proportionality is that laid C down in *R (R) v Chief Constable of Greater Manchester Police* [2018] 1 WLR 4079 ("*R (R)*"), at para 64, which refines the test in *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911 ("*In re B*"), which was relied on by the Divisional Court. *R (R)* establishes a nuanced correctness standard but in my judgment that standard is limited to the evaluative assessment of proportionality and does not extend to the underlying primary D and secondary facts to which (in this case) the test in *Edwards v Bairstow* [1956] AC 14 continues to apply. That test imposes an "unreasonableness" standard and so, unless it is shown that the findings were such that no reasonable tribunal could have made them, the primary and secondary factual findings of the trial judge will stand. Lord Hamblen and Lord Stephens JJSC agree with this: analysis of the standard applying to the findings of fact (judgment, para 49). E

(2) *Whether the exercise of articles 10 and 11 rights may involve legitimate levels of obstruction.* My answer is yes, this is possible, depending on the circumstances. I agree with what is said by Lord Hamblen and Lord Stephens JJSC on this issue and I would therefore allow this appeal. I consider that the district judge was entitled to come to the conclusions that he did.

F

Certified question 1: standard of appellate review applying to proportionality assessment

100 People do not always realise it but there are many different standards of appellate review for different types of appeal. The most familiar examples of different standards of appellate review are the G following. Where there is an appeal against a finding of primary fact, the appellate tribunal in the UK would in general give great weight to the fact that the trial judge saw all the witnesses. In making findings of fact it is very hard for the trial judge to provide a comprehensive statement of all the factors which he or she took into account. Where, however, there is an appeal on a point of law, the court asks whether the trial judge's conclusion was or was not correct in law. The reason for the distinction between these H types of appellate review is clear.

101 But there are many other standards. In appeals by case stated as in the present case, the grounds of appeal are limited to points of law or an excess of jurisdiction (Magistrates' Courts Act 1980, section 111). As Lord Hamblen and Lord Stephens JJSC have explained, the standard of review is

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A that laid down in *Edwards v Bairstow*. That means that the appellate court cannot set aside findings of fact unless there was no evidence on which the fact-finding tribunal could make the finding in question and no basis on which it could reasonably have come to its conclusion. In those circumstances the appellate tribunal can only substitute its finding if the fact-finding body could not reasonably have come to any other conclusion: see *Hitch v Stone* [2001] STC 214.

B **102** Standards of appellate review are not ordained by reference to prefigured criteria or similarity on technical grounds to some other case. In formulating them, the courts take into account a range of factors such as the appropriateness of a particular level of review to a particular type of case, the resources available and factors such as the need for finality in litigation and to remove incentives for litigation simply for litigation's sake. At one C end of the gamut of possibilities, there is the de novo hearing and the pure correctness standard and at the other end of the gamut there are types of cases where the approach in *Edwards v Bairstow* applies. In public law, there may be yet other factors such as the need to prevent litigation over harmless errors in administrative acts or where the result of an appeal would simply be inevitable. In some cases, appellate review is required because D there has been a failure to follow a fundamental rule, such as a requirement for a fair hearing. The appearance of justice is important. In yet other cases, if appellate courts interfere unnecessarily in the decisions of trial judges, they may reduce confidence in the judicial system which would itself be harmful to the rule of law. Over-liberality in appeals may lead to unnecessary litigation, and to the over-concentration of judicial power in the very few, which even though for well-intentioned reasons may also be inconsistent E with the idea of a common law and destructive of confidence in the lower courts. In many instances it is difficult to identify any great thirst for normative uniformity in our law, as opposed to the experiential evolution of judge-made law. In criminal cases there are further considerations, and the one that occurs to me in the present case is that these are appeals from acquittals where the trial judge (sitting without a jury) was satisfied on the F evidence before the court that no offence was committed. Courts must proceed cautiously in that situation unless there is a clear error of law which the appeal court has jurisdiction to address.

103 I would accept that it is important to have appellate review in the assessment of proportionality where this raises issues of principle. But in my judgment the assessment of proportionality does not lead to any need to G disturb the rules which apply to the primary and secondary facts on which such an appeal is based. To do so would create a divergence between the treatment of questions of fact when those facts are relied on for the purposes of a proportionality assessment and the treatment of facts relied on for disposing of all other issues in the appeal. Obviously, the same facts in the same matter must be determined in the same way. I would extend this to secondary facts drawn from the primary facts. To give an example, in the H recent case of *Google LLC v Oracle America Inc* (2021) 141 S Ct 1183 (US Supreme Court), a case involving alleged "fair use" of the declaring code of Java, a computer platform, the US Supreme Court (by a majority) treated "subsidiary facts" found by the jury as having the same effect for the purposes of appellate review as primary facts. Subsidiary facts included for

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example the jury's finding of market effects and the extent of copying, leaving the ultimate legal question of fair use for the court.

104 As to the standard of appellate review of proportionality assessments, no one has suggested that this is the subject of any Strasbourg jurisprudence. The Divisional Court relied on *In re B* [2013] 1 WLR 1911, a family case. However, in *R (R)* [2018] 1 WLR 4079 this court considered and refined that test in the context of judicial review and the essence of the matter is to be found in para 64 of the judgment of Lord Carnwath JSC with whom the other members of this court agreed:

> "In conclusion, the references cited above show clearly in my view that to limit intervention to a 'significant error of principle' is too narrow an approach, at least if it is taken as implying that the appellate court has to point to a specific principle—whether of law, policy or practice—which has been infringed by the judgment of the court below. The decision may be wrong, not because of some specific error of principle in that narrow sense, but because of an identifiable flaw in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion. However, it is equally clear that, for the decision to be 'wrong' under CPR r 52.11(3), it is not enough that the appellate court might have arrived at a different evaluation. As Elias LJ said in *R (C) v Secretary of State for Work and Pensions* [2016] PTSR 1344, para 34: 'the appeal court does not second guess the first instance judge. It does not carry out the balancing task afresh as though it were rehearing the case but must adopt a traditional function of review, asking whether the decision of the judge below was wrong'."

105 The refinement by this court of the *In re B* test in *R (R)* as I see it makes it clear that the appeal is only a review. The court does not automatically or because it would have decided the proportionality assessment differently initiate a review: the appellant still has to show that the trial judge was wrong, not necessarily that there was a specific error of principle, which would be the case only in a limited range of cases. It could be an error of law or a failure to take a material factor into consideration which undermines the cogency of the decision. Moreover, the error has to be material. Harmless errors by the trial judge are excluded. This restriction on appeals is perhaps particularly important when the court is dealing with appeals against acquittals. It is still a powerful form of review unlike a marginal review which makes appellate intervention possible only in marginal situations.

106 In short, I would hold that the standard of appellate review applicable in judicial review following *R (R)* should apply to appeals by way of case stated in relation to the proportionality assessment but not in relation to the fact-finding that leads to it.

107 Since circulating the first draft of this judgment I have had the privilege of reading paras 49–54 and 78 of the joint judgment of Lord Hamblen and Lord Stephens JJSC. I entirely agree with what they say in those paragraphs. It is easy to lose sight of the fact that a proportionality assessment is in part a factual assessment and in part a normative assessment. This is so even though there is a substantial interplay between both elements. The ultimate decision on proportionality is reached as an iterative process between the two. As I read the passage from *R (R)* which I have already set

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A out in para 104 of this judgment, Lord Carnwath JSC was there dealing with the normative aspects of a proportionality assessment. The assessment is normative for instance in relation to such matters as the legitimacy of placing restrictions on a protest impeding the exercise by others of their rights, and testing events by reference to hypothetical scenarios. But there is also substantial factual element to which the normative elements are applied: for example, what actually was the legitimate aim and how far was it furthered B by the action of the state and was there any less restrictive means of achieving the legitimate end.

108 In reality, no proportionality analysis can be conducted in splendid isolation from the facts of the case. In general, in discussions of proportionality, as this case demonstrates, the role of the facts, and the attributes of the fact-finding process, are under-recognised. It is necessary to C analyse the assessment in order to identify the correct standard of review on appeal applying to each separate element of the assessment, rather than treat a single test as applying to the whole. To take the latter course is detrimental to the coherence of standards of review (see para 102 above).

109 As I see it, the role of the facts is crucial in this case. The proportionality assessment is criticised by Lord Sales JSC and Lord Hodge DPSC for two reasons. First, they hold that the district judge was in D error because he failed to take into account that the relevant carriageway of the dual carriageway leading to the Centre was "completely blocked" by the appellants' actions (Lord Sales JSC's judgment, para 144). But, as para 5 of the statement of facts and issues set out in para 90 above makes clear, while the carriageway was blocked, there was no evidence that alternative routes into the Centre were not available and were not used. There was no dispute E that such routes were available. As the district judge said at para 16 of the case stated:

> "All eight defendants described their action as 'carefully targeted' and aimed at disrupting traffic headed for the DSEI arms fair. Most but not all of the defendants accepted that their actions may have caused disruption to traffic that was not headed to the DSEI arms fair. *Conversely it was not* F *in dispute that not all access routes to the DSEI arms fair were blocked by the defendants' actions and it would have been possible for a vehicle headed to the DSEI arms fair but blocked by the actions to have turned around and followed an alternative route*." (Emphasis added.)

110 The rights of other road users were to be balanced against the rights of the appellants. There was no basis, however, on which the district judge G could take into account that the carriageway was completely blocked when no member of the public complained about the blockage caused by the protest (which is of course consistent with there being convenient alternative routes) and the prosecution did not lead evidence to show that entry into the Excel Centre by alternative routes was prevented. It might even be said that if the district judge had treated the actions of the appellants as a complete impediment to other road-users that that conclusion could be challenged H under *Edwards v Bairstow*. (We are only concerned with mobile vehicular traffic: there is no reference in the case stated to any pedestrians being inconvenienced by having to find any alternative route.) Scholars have debated whether a judge dealing with a proportionality issue has a duty to investigate facts that she or he considers relevant to the proportionality

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assessment, but it was not suggested on this appeal that there was such a duty, and in my judgment correctly so.

111 The second point on which Lord Sales JSC and Lord Hodge DPSC hold that the proportionality assessment of the district judge was wrong was that he did not take into account the fact that, but for the police intervention, the protest would have been longer in duration. I have already explained in para 96 above that in my judgment, on a charge of obstruction of the highway, the only time relevant for the purposes of conviction for an offence under section 137 of the Highways Act 1980 was the time when the highway was obstructed. The time cannot depend on whether the appellants would have engaged in a longer protest if they had been able to do so or, per contra, whether they believed that the police would have been more quick-fingered and brought their protest to an end more quickly.

112 This second criticism of the district judge's proportionality assessment was wrong is based on para 38(f) of the case stated which reads:

> "The action was limited in duration. I considered that it was arguable that the obstruction for which the defendants were responsible only occurred between the time of their arrival and the time of their arrests—which in both cases was a matter of minutes. I considered this since, at the point when they were arrested the defendants were no longer 'free agents' but were in the custody of their respective arresting officers and I thought that this may well have an impact on the issue of 'wilfulness' which is an essential element of this particular offence. The prosecution urged me to take the time of the obstruction as the time between arrival and the time when the police were able to move the defendants out of the road or from the bridge. Ultimately, I did not find it necessary to make a clear determination on this point as even on the Crown's interpretation the obstruction in *Ziegler* lasted about 90–100 minutes."

113 As I read that sub-paragraph, the district judge was prepared to accept that the duration of the protest was *either* the few minutes that the appellants were free to make their protest before they were arrested *or* the entire time that they were on the highway until the police managed to remove them. There was a difficult point of law (or mixed fact and law) involved ("whether the defendants were 'free agents' [or] were in the custody of" the police after their arrest). The district judge held that that point did not have to be decided because, either way, in the judgment of the district judge, the duration of the protest was limited. That was the district judge's judgment on the length of time relative to the impeding of the highway. It was not a normative assessment, but an application of the Convention requirement to achieve a fair balance of the relevant rights and of the principle determined on the second issue on this appeal (on which this court is unanimous) to the facts found by the judge who heard all the evidence. It cannot be said that the finding contains some "identifiable flaw in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion" (see para 104 above). It was a judgment which the district judge was entitled to reach. In my judgment this court should not on established principles substitute its own judgment for that of the district judge on that evaluation of the facts. Therefore, it should not set aside his proportionality assessment on that point.

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A *Certified question 2: Convention-legitimacy of obstruction and concluding observations on the district judge's fact-finding in this case*

114 As I have already explained, before the Human Rights Act 1998 came into force an offence under section 137(1) of the Highway Act 1980 or its predecessor, section 121 of the Highway Act 1959, could be committed by any obstruction. Now that the Human Rights Act 1998 has been enacted B and brought into force, the courts interpret section 137 conformably with the Convention and the jurisprudence of the Strasbourg court. Under that jurisprudence, the state must show a certain degree of tolerance to protesters and it is accepted that in some circumstances protesters can obstruct the highway in the course of exercising their article 11 right. Thus, for example, the Strasbourg court held in *Kuznetsov v Russia* (Application No 10877/04) (unreported) 23 October 2008, at para 44:

C

> "Finally, as a general principle, the court reiterates that any demonstration in a public place inevitably causes a certain level of disruption to ordinary life, including disruption of traffic, and that it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by article 11 of the Convention is not to be deprived of all substance."

D

115 In the case stated, the trial judge noted that at trial the prosecution submitted that any demonstration that constituted a de facto obstruction of the highway lost the protection of articles 10 and 11 as it was unlawful. For the reasons he gave, the trial judge rejected that proposition and in my judgment he was correct to do so.

116 I agree with Lord Hamblen and Lord Stephens JJSC's thorough E review of the considerations relied on by the trial judge. I have in relation to the first certified question dealt with the two criticisms which Lord Sales JSC and Lord Hodge DPSC consider were rightly made. So, I make only some brief concluding points at this stage.

117 Overall, in my respectful view, the district judge made no error of law in not finding facts on which no evidence was led, or if he failed to make a finding of secondary fact which it was not suggested at any stage was F required to be made. Moreover, it appears that the prosecution made no representations about the content of the draft case as it was entitled to do under Crim PR r 35.3.6. Alternatively, if new facts are relevant to a proportionality assessment it would seem to me to be unfair to the appellants for an assessment now to be carried out in the manner proposed by Lord Sales JSC and Lord Hodge DPSC, which could enable the G prosecution to adduce new evidence or to seek additional findings of fact, which go beyond the case stated.

Conclusion

118 For the reasons given above, I would allow this appeal and make the same order as Lord Hamblen and Lord Stephens JJSC.

H

LORD SALES JSC (dissenting in part) (with whom **LORD HODGE DPSC** agreed)

119 This case concerns an appeal to the Divisional Court (Singh LJ and Farbey J) by way of case stated from the decision of District Judge Hamilton

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("the district judge") in the Stratford Magistrates' Court, in relation to the trial of four defendants (whom I will call the appellants) on charges of offences under section 137 of the Highways Act 1980 ("section 137"). The case stated procedure is governed by section 111 of the Magistrates' Courts Act 1980 and section 28A of the Senior Courts Act 1981. So far as relevant, section 111 only permits the appeal court to allow an appeal if the decision is "wrong in law": section 111(1).

120 I respectfully disagree with what Lord Hamblen and Lord Stephens JJSC say in relation to the first question of law certified by the Divisional Court, regarding the test to be applied by an appellate court to an assessment of the decision of the trial court in respect of a statutory defence of "lawful excuse" under section 137 in a case like this, where the issue on which the defence turns is the proportionality of the intervention by the police. I emphasise this last point, because there will be cases where the defence of "lawful excuse" does not depend on an assessment of what the police do.

121 The second question of law certified by the Divisional Court concerns whether, in principle, a "lawful excuse" defence under section 137 could ever exist in a case involving deliberate physically obstructive conduct by protesters designed to block a highway, where the obstruction is more than de minimis. As to that, I agree with what Lord Hamblen and Lord Stephens JJSC say at paras 62–70. In principle, a "lawful excuse" defence might exist in such a case. Whether it can be made out or not will depend on whether the intervention by police to clear the highway involves the exercise of their powers in a proportionate manner. In general terms, I agree with the discussion of Lord Hamblen and Lord Stephens JJSC at paras 71–78 regarding factors which are relevant to assessment of proportionality in this context.

122 I respectfully disagree with Lord Hamblen and Lord Stephens JJSC regarding important parts of their criticism of the judgment of the Divisional Court. In my opinion, the Divisional Court was right to identify errors by the district judge in his assessment of proportionality. However, in my view the Divisional Court's own assessment of proportionality was also flawed. I would, therefore, have allowed the appeal on a more limited basis than Lord Hamblen and Lord Stephens JJSC, to require that the case be remitted to the magistrates' court.

Human rights compliant interpretation of section 137 of the Highways Act

123 Section 3(1) of the Human Rights Act 1998 ("the HRA") requires a statutory provision to be read and given effect in a way which is compatible with the Convention Rights set out in Schedule 1 to the HRA, so far as it is possible to do so. Schedule 1 sets out relevant provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the ECHR"), including article 10 (the right to freedom of expression) and article 11 (the right to freedom of peaceful assembly). Subject to limits which are not material for this appeal, section 6(1) of the HRA makes it unlawful for a public authority to act in a way which is incompatible with the Convention rights. The police are a public authority for the purposes of application section 6. So is a court: section 6(3)(a).

124 The Divisional Court construed section 137 in light of the interpretive obligation in section 3(1) of the HRA and having regard to the

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A duties of public authorities under section 6 of that Act. No one has criticised their construction of section 137 and I would endorse it. As the Divisional Court held (paras 61–65), the way in which section 137 can be read so as to be compatible with the Convention rights in article 10 and article 11 is through the interpretation of the phrase "without lawful . . . excuse" in section 137. In circumstances where a public authority such as the police would violate the rights of protesters under article 10 or article 11 by B arresting or moving them, and hence would act unlawfully under section 6(1) of the HRA, the protesters will have lawful excuse for their activity. Conversely, if arrest or removal would be a lawful act by the police, the protesters will not have a lawful excuse.

125 This interpretation of section 137 means that the commission of an offence under it depends upon the application of what would otherwise be C an issue of public law regarding the duty of a public authority such as the police under section 6(1) of the HRA. Typically, as in this case, this will turn on whether the police were justified in interfering with the right of freedom of expression engaged under article 10(1) or the right to peaceful assembly under article 11(1), under article 10(2) or article 11(2) respectively. The applicable analysis is well-established. Importantly, for present purposes, D the interference must be "necessary in a democratic society" in pursuance of a specified legitimate aim, and this means that it must be proportionate to that aim. The four-stage test of proportionality applies: (i) Is the aim sufficiently important to justify interference with a fundamental right? (ii) Is there a rational connection between the means chosen and the aim in view? (iii) Was there a less intrusive measure which could have been used without compromising the achievement of that aim? (iv) Has a fair balance been E struck between the rights of the individual and the general interest of the community, including the rights of others? The last stage is sometimes called proportionality stricto sensu.

126 In this case the police acted to pursue a legitimate aim, namely the protection of the rights and freedoms of others in being able to use the slip road. The first three stages in the proportionality analysis are satisfied. As F will be typical in this sort of case, it is stage (iv) which is critical. Did the arrest and removal of the protesters strike a fair balance between the rights and interests at stake?

127 At a trial for an alleged offence under section 137 it will be for the prosecution to prove to the criminal standard that the defendant did not have a lawful excuse, meaning in a case like the present that the public authority did not act contrary to section 6(1) of the HRA in taking action G against him or her. But that does not change the conceptual basis on which the offence under section 137 depends, which involves importation of the test for breach of a public law duty on the part of the police.

128 It is also possible to envisage a public law claim being brought by protesters against the police in judicial review, say in advance of a protest which is about to be staged, asserting their rights under article 10 and H article 11, alleging that their arrest and removal by the police would be in breach of those rights and hence in breach of duty under section 6(1) of the HRA, and seeking declaratory or injunctive relief accordingly; or, after the intervention of the police, a claim might be brought pursuant to section 8 of the HRA for damages for breach of those rights. The issues arising in any such a claim would be the same as those arising in a criminal trial of an

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alleged offence under section 137 based on similar facts, although the burden and standard of proof would be different.

The role of the district judge and the role of the Divisional Court on appeal

129 The district judge was required to apply the law correctly. He found that the police action against the protesters was disproportionate, so that they had a good defence under section 137. If, on proper analysis, the police action was a proportionate response, this was an error of law; so also if the district judge's reasoning in support of his conclusion of disproportionality was flawed in a material respect. Conversely, in a case where the criminal court found that the police action was proportionate for the purposes of article 10 and article 11 and therefore held that a protester had no "lawful excuse" defence under section 137, but on proper analysis the action was disproportionate, that also would be an error of law open to correction on appeal.

130 It is well established that on the question of proportionality the court is the primary decision-maker and, although it will have regard to and may afford a measure of respect to the balance of rights and interests struck by a public authority such as the police in assessing whether the test at stage (iv) is satisfied, it will not treat itself as bound by the decision of the public authority subject only to review according to the rationality standard: see *A v Secretary of State for the Home Department* [2005] 2 AC 68 ("the *Belmarsh* case"), paras 40–42 and 44 (per Lord Bingham of Cornhill, with whom a majority of the nine-member Appellate Committee agreed); *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, para 11; *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100, paras 29–31 (Lord Bingham) and 68 (Lord Hoffmann); and *R (Aguilar Quila) v Secretary of State for the Home Department* [2012] 1 AC 621, paras 46 (Lord Wilson JSC), 61 (Baroness Hale of Richmond JSC) and 91 (Lord Brown of Eaton-under-Heywood JSC) (Lord Phillips of Worth Matravers PSC and Lord Clarke of Stone-cum-Ebony JSC agreed with Lord Wilson and Baroness Hale JJSC). This reflects the features that the Convention rights are free-standing rights enacted by Parliament to be policed by the courts, that they are in the form of rights which are enforced by the European Court of Human Rights on a substantive basis rather than purely as a matter of review according to a rationality standard, and that the question whether a measure is proportionate or not involves a more searching investigation than application of the rationality test. Thus, in relation to the test of proportionality stricto sensu, even if the relevant decision-maker has had regard to all relevant factors and has reached a decision which cannot be said to be irrational, it remains open to the court to conclude that the measure in question fails to strike a fair balance and is disproportionate.

131 Similarly, a lower court or tribunal will commit an error of law where, in a case involving application of the duty in section 6(1) of the HRA, it holds that a measure by a public authority is disproportionate where it is proportionate or that it is proportionate where it is disproportionate. Where the lower court or tribunal has directed itself correctly as to the approach to be adopted in applying a qualified Convention right such as article 10 or article 11, has had proper regard to relevant considerations and has sought to strike a fair balance between rights and interests at the fourth stage of the

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A proportionality analysis an appellate court will afford an appropriate degree of respect to its decision. However, a judgment as to proportionality is not the same as a decision made in the exercise of a discretion, and the appellate court is not limited to assessing whether the lower court or tribunal acted rationally or reached a conclusion which no reasonable court or tribunal could reach: see the *Belmarsh* case, para 44. There was a statutory right of appeal from the tribunal in that case only on a point of law. Lord Bingham B noted at para 40 that in the judgment of the European Court of Human Rights in *Smith and Grady v United Kingdom* (1999) 29 EHRR 493 "the traditional *Wednesbury* approach to judicial review . . . was held to afford inadequate protection" for Convention rights and that it was recognised that "domestic courts must themselves form a judgment whether a Convention right has been breached" and that "the intensity of review is somewhat C greater than under the rationality approach" (citing *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, paras 23 and 27). At para 44, Lord Bingham held that the finding of the tribunal on the question of proportionality in relation to the application of the ECHR could not be regarded as equivalent to an unappealable finding of fact. As he explained:

> "The European Court does not approach questions of proportionality D as questions of pure fact: see, for example, *Smith and Grady v United Kingdom* . . . Nor should domestic courts do so. The greater intensity of review now required in determining questions of proportionality, and the duty of the courts to protect Convention rights, would in my view be emasculated if a judgment at first instance on such a question were conclusively to preclude any further review [i e by an appellate court]."

E **132** Since that decision, this court has developed the principles to be applied to determine when an appellate court may conclude that a lower court or tribunal has erred in law in its proportionality analysis. So far as concerns cases involving a particular application of a Convention right in specific factual circumstances without wide normative significance, such as in the present case, it has done this by reference to and extrapolation from the test set out in CPR r 52.11 (now contained in rule 52.21). An appellate F court is entitled to find an error of law if the decision of the lower court or tribunal is "wrong", in the sense understood in that provision: see *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911, paras 88–92 (Lord Neuberger of Abbotsbury PSC, with whom Lord Wilson and Lord Clarke JJSC agreed); *R (R) v Chief Constable of Greater Manchester Police* [2018] 1 WLR 4079, paras 53–65 (Lord Carnwath JSC, G explaining that the appellate court is not restricted to intervening only if the lower court has made a significant error of principle); *R (Z) v Hackney London Borough Council* [2020] 1 WLR 4327, paras 56 and 74. In the latter case it was explained at para 74 that the arguments for a limited role for the appellate court in a case concerned with an assessment of proportionality in a case such as this are of general application and the same approach applies whether or not CPR Pt 52.21 applies. This is an approach H which limits the range of cases in which an appellate court will intervene to say that a proportionality assessment by a lower court or tribunal involved an error of law, but still leaves the appellate court with a greater degree of control in relation to the critical normative assessment of whether a measure was proportionate or not than an ordinary rationality approach would do.

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In determining whether the lower court or tribunal has erred in law in its assessment of proportionality, it may be relevant that it has had the advantage of assessing facts relevant to the assessment by means of oral evidence (as in *In re B (A Child)*); but this is not decisive and the relevant approach on appeal is the same in judicial review cases where all the evidence is in writing: see *R (R) v Chief Constable of Greater Manchester Police* and *R (Z) v Hackney London Borough Council*.

133 In my judgment, the approach established by those cases also applies in the present context of an appeal by way of case stated from the decision of a magistrates' court. Where, as here, the lower court has to make a proportionality assessment for the purposes of determining whether there has been compliance by a public authority with article 10 or article 11, an appellate court is entitled, indeed obliged, to find an error of law where it concludes that the proportionality assessment by the lower court was "wrong" according to the approach set out in those cases. The Divisional Court directed itself that it should follow that approach. In my view, it was right to do so.

134 I respectfully disagree with Lord Hamblen and Lord Stephens JJSC in their criticism of the Divisional Court in this regard. In my view, it is not coherent to say that an appellate court should apply a different approach in the context of an appeal by way of case stated as compared with other situations. The legal rule to be applied is the same in each case, so it is difficult to see why the test for error of law on appeal should vary. The fact that an appeal happens to proceed by one procedural route rather than another cannot, in my view, change the substantive law or the appellate approach to ensuring that the substantive law has been correctly applied.

135 By way of illustration of this point, as observed above, essentially the same proportionality issue could arise in judicial review proceedings against the police, to enforce their obligation under section 6(1) of the HRA directly rather than giving it indirect effect via the interpretation of section 137. The approach on an appeal in such judicial review proceedings would be that set out in *In re B (A Child)* and the cases which have followed it. To my mind, it makes little sense to say that this same issue regarding the lawfulness of the police's conduct should be subject to a different test on appeal. The scope for arbitrary outcomes and inconsistent rulings is obvious, and there is no justification for adopting different approaches.

136 To say, as the Divisional Court did, that the proper test of whether the district judge had reached a decision which was wrong in law on the issue of proportionality of the action by the police is that derived from *In re B (A Child)* is not inconsistent with the leading authority of *Edwards v Bairstow* [1956] AC 14. That case involved an appeal by way of case stated on a point of law from a decision of tax commissioners regarding application of a statutory rule which imposed a tax in respect of an adventure in the nature of trade. The application of such an open-textured rule depended on taking into account a number of factors of different kinds and weighing them together. As Lord Radcliffe said (p 33), it was a question of law what meaning was to be given to the words of the statute; but since the statute did not supply a precise definition of the word "trade" or a set of rules for its application in any particular set of circumstances, the effect was that the law laid down limits "within which it would be permissible to say that a 'trade' [within the meaning of the statutory rule] does or does not

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A exist". If a decision of the commissioners fell within those limits, it could not be said to involve an error of law. The decision to decide one way or the other would be a matter of degree which could, in context, best be described as a question of fact. Lord Radcliffe then stated the position as follows (p 36):

> "If the case [as stated] contains anything ex facie which is bad law and B which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that, this has been responsible for the determination. So there, too, C there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. D For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur."

137 In a well-known passage in *Council of Civil Service Unions v* E *Minister for the Civil Service* [1985] AC 374, 410–411, Lord Diplock explained that, as with *Wednesbury* unreasonableness (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223), Lord Radcliffe's explanation of an inferred error of law not appearing ex facie was now to be regarded as an instance of the application of a general principle of rationality as a ground of review or the basis for finding an error of law. However, as stated by Lord Bingham in the *Belmarsh* case and other F authorities referred to above, irrationality may be insufficient as a basis for determining whether there has been an error of law in a case involving an assessment of proportionality. It may be that in such an assessment a lower court or tribunal has had proper regard to all relevant considerations, has not taken irrelevant considerations into account, and has reached a conclusion as to proportionality which cannot be said to be irrational, yet it G may still be open to an appellate court to say that the assessment was wrong in the requisite sense. If it was wrong, that constitutes an error of law which appears on the face of the record. The difference between *Edwards v Bairstow* and a case involving an assessment of proportionality for the purposes of the ECHR and the HRA is that the legal standard being applied in the former is the standard of rationality and in the latter is the standard of proportionality.

H 138 Having said all this, however, the difference between application of the ordinary rationality standard on an appeal to identify an error of law by a lower court or tribunal and the application of the proportionality standard for that purpose in a context like the present should not be exaggerated. As Lord Carnwath JSC said in *R (R) v Chief Constable of Greater Manchester*

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Police [2018] 1 WLR 4079 at para 64 (in a judgment with which the other members of the court agreed) of the approach to a proportionality assessment to be adopted on appeal, in a passage to which Lord Hamblen and Lord Stephens JJSC also draw attention:

> "to limit intervention to a 'significant error of principle' is too narrow an approach, at least if it is taken as implying that the appellate court has to point to a specific principle—whether of law, policy or practice—which has been infringed by the judgment of the court below. The decision may be wrong, not because of some specific error of principle in that narrow sense, but because of an identifiable flaw in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion. However, it is equally clear that, for the decision to be 'wrong' under CPR r 52.11(3), it is not enough that the appellate court might have arrived at a different evaluation. As Elias LJ said in *R (C) v Secretary of State for Work and Pensions* [2016] PTSR 1344, para 34: 'the appeal court does not second guess the first instance judge. It does not carry out the balancing task afresh as though it were rehearing the case but must adopt a traditional function of review, asking whether the decision of the judge below was wrong . . .' "

However, this is not to say that the standard of rationality and the standard of proportionality are simply to be treated as the same.

139 I find myself in respectful disagreement with para 44 of the judgment of Lord Hamblen and Lord Stephens JJSC. It seems to me that the proper approach for an appellate court must inevitably be affected by the nature of the issue raised on the appeal. If the appeal is based on a pure point of law, the appellate court does not apply a rationality approach. The position is different if the appeal concerns a finding of fact. This is recognised in the speeches in *Edwards v Bairstow*. The effect of the rights-compatible interpretation of section 137 pursuant to section 3 of the HRA is that a public law proportionality analysis is introduced into the meaning of "lawful excuse" in that provision, and in my view the proper approach for an appellate court to apply in relation to that issue is the one established for good reason in the public law cases.

140 It is clearly right to say, as Lady Arden JSC emphasises, that an assessment of proportionality has to be made in the light of the facts found by the court, but in my opinion that does not mean that the assessment of proportionality is the same as a finding of fact nor that the same approach applies on an appeal for identifying an error of law. As the European Court of Human Rights explained in *Vogt v Germany* (1995) 21 EHRR 205, in setting out the principles applicable in relation to reviewing a proportionality assessment under article 10 (para 52(iii), omitting footnotes):

> "The court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent state exercised its discretion reasonably, carefully and in good faith; what the court has to do is to look at the interference complained of in the light of the case as a whole and

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A determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'. In so doing, the court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in article 10 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts."

B Lord Bingham explained in the *Belmarsh* case that a domestic court reviewing the proportionality of action by a public body should follow the same approach as the Strasbourg court.

The decision of the district judge

141 I turn, then, to the decision of the district judge in applying C section 137, in order to assess whether the case stated discloses any error of law.

142 Assessment of the proportionality of police action in a case like this is fact sensitive and depends on all the circumstances. In broad terms, the interest of protesters in expressing their ideas has to be weighed against the disruption they cause to others by their actions, with account also being taken of other options open to them to express their ideas in an effective D way: see *Kudrevičius v Lithuania* (2015) 62 EHRR 34, para 97. The district judge directed himself correctly as to the interpretation of section 137 and the significance of an assessment of the proportionality of the intervention by the police.

143 However, I consider that two of the criticisms of the decision of the district judge made by the Divisional Court were rightly made. First, at E para 38(d) of the statement of case, the district judge said that the appellants' actions were carefully targeted and thus, on the face of his assessment of proportionality, failed to bring into account in the way he should have done the fact that the relevant highway, even though just a sliproad leading to the Excel Centre, was completely obstructed by them as to that part of the dual carriageway (see para 112 of the judgment of the Divisional Court). I agree with the Divisional Court that, in the context of an assessment of the F proportionality of police action to clear the highway, this was a highly material feature of the case. Since it was not referred to by the district judge, he failed to take account of "a material factor" (in the words of Lord Carnwath JSC) or a relevant consideration (as it is usually referred to in the application of *Wednesbury* and *Edwards v Bairstow*), and accordingly his assessment of proportionality was flawed for that reason.

G **144** Secondly, at para 38(f) of the statement of case, the district judge said that the action was limited in duration and gave this feature of the case significant weight in his assessment of proportionality. At para 114 of its judgment, the Divisional Court said:

"In our view, that analysis displays an erroneous approach. The reason why the obstruction did not last longer was precisely because the H police intervened to make arrests and to remove the respondents from the site. If they were exercising lawful rights, they should not have been arrested or removed. They might well have remained at the site for much longer. On any view, as was common ground, the duration of the obstruction of the highway was not de minimis. Accordingly, the fact is that there was a complete obstruction of the highway for a not

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insignificant amount of time. That is highly significant, in our view, to the proper evaluative assessment which is required when applying the principle of proportionality." A

I agree. In my view, the district judge's assessment left out what was one of the most significant features of the action taken by the appellants. They went to the sliproad with special equipment (the specially constructed boxes to which they attached themselves) designed to make their action as B disruptive and difficult to counter as was possible. They intended to block the highway for as long as possible. The fact that their action only lasted for about 90–100 minutes was because of the swift action of the police to remove them, which is the very action the proportionality of which the district judge was supposed to assess. I find it difficult to see how the action of the police was made disproportionate because it had the effect of reducing the disruption which the appellants intended to produce. C

145 Therefore, the district judge left out of his assessment this further material factor or relevant consideration; alternatively, one could say that he took into account or gave improper weight to what was in context an immaterial factor, namely the short duration of the protest as produced by the very intervention by the police which was under review.

146 In my opinion, by reason of both these material errors by the D district judge, the proportionality assessment by him could not stand. The case as stated discloses errors of law. This is so whether one applies ordinary *Wednesbury* and *Edwards v Bairstow* principles according to the rationality standard or the enhanced standard of review required in relation to a proportionality assessment and the appellate approach in *In re B (A Child)* and the cases which follow it. In fact, the Divisional Court held both that the district judge had erred in a number of specific respects in his assessment of E proportionality and that his overall assessment was "wrong" in the requisite sense: paras 117 and 129.

The decision of the Divisional Court

147 Since the district judge had made the material errors to which I have referred, in my judgment the Divisional Court was right to allow the F appeal pursuant to section 111(1) of the Magistrates' Courts Act 1980 on the grounds that the decision disclosed errors of law.

148 The question then arises as to what the Divisional Court should have done in these circumstances. Here, the fact that the appeal was by way of case stated is significant. The court hearing such an appeal may determine that there has been an error of law by the lower court but also find that the facts, as stated, do not permit the appeal court to determine the case for G itself. Section 28A(3) of the Senior Courts Act 1981 provides in relevant part that:

"The High Court shall hear and determine the question arising on the case . . . and shall— (a) reverse, affirm or amend the determination in respect of which the case has been stated; or (b) remit the matter to the magistrates' court . . . with the opinion of the High Court, and may make H such other order in relation to the matter (including as to costs) as it thinks fit."

149 The Divisional Court considered that, having allowed the appeal, it was in a position to reverse the determination regarding the application of

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A section 137 in respect of which the case had been stated. The Divisional Court made its own determination that the intervention of the police had been a proportionate interference with the appellants' rights under article 10(1) and article 11(1), with the result that the appellants had no "lawful excuse" for their activity for the purpose of section 137, and therefore substituted convictions of the appellants for offences under that provision.

B **150** In my judgment, this went too far. As I have said, the assessment of proportionality of police action against protesters in a case like this is highly fact-sensitive. In my view, the facts as set out in the stated case did not allow the Divisional Court simply to conclude that the police action was, in all the circumstances of the case, proportionate. The decision to be made called for a more thorough assessment of the disruption in fact achieved (and likely to C have been achieved, if the police did not intervene) by the protesters, the viability and availability of other access routes to the Excel Centre, and the availability to the protesters of other avenues to express their opinions (such as by way of slow marching, as it appears the police had facilitated for others at the location). The Divisional Court did not have available to it the full evidence heard by the district judge, only a summary as set out in the case stated which disclosed his error of law. Therefore, the proper course for the D Divisional Court should have been to allow the appeal but to remit the matter to the magistrates' court for further examination of the facts. If the case had been remitted to the district judge, he could have approached the case in relation to the issue of proportionality on a proper basis and set out further findings based on the evidence presented to him. With the passage of time, that might not now be feasible, in which case the effect E would have been that there was a mistrial and further examination of the facts would have to be by way of a retrial.

151 I would therefore have allowed the appeal against the order of the Divisional Court to this extent. The order I would have made is that the appeal against the determination by the Divisional Court, that the appeal against the district judge's decision be allowed, should be dismissed, but that an order for remittal to the magistrates' court should be substituted for the F convictions which the Divisional Court ordered should be entered.

152 In addition, I respectfully consider that the Divisional Court's own assessment of proportionality (on the basis of which it determined that the protesters had committed the offences under section 137 with which they were charged) was flawed in another respect. Unlike Lord Hamblen and Lord Stephens JJSC, I do not myself read the Divisional Court as saying that G points (a) to (c) in para 38 of the case stated were of little or no relevance; at para 111 of its judgment the court only said that none of those points "prevents the offence of obstruction of the highway being committed in a case such as this". The Divisional Court correctly identified point (e) as significant and made a correct evaluation of point (g). However, I agree with Lord Hamblen and Lord Stephens JJSC that the Divisional Court's assessment of point (h) at para 116 was flawed: para 80 above and *City of* H *London Corpn v Samede* [2012] PTSR 1624, paras 39–41. This court is not in a position to assess proportionality for itself, given the limited factual picture which emerges from the case stated. Again, the conclusion I would draw is that the appeal to this court should be allowed to the limited extent I have indicated.

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153 I would answer the first question certified by the Divisional Court (para 7(1) above) as follows: in a case like the present, where the defence of "lawful excuse" under section 137 depends on an assessment of the proportionality of the police response to the protest, the correct approach for the court on an appeal is that laid down in *In re B (A Child)* and the cases which follow and apply it.

154 I would answer the second question certified by the Divisional Court (para 7(2) above) in the affirmative: deliberate physically obstructive conduct by protesters, where the impact of the deliberate obstruction on other highway users is more than de minimis, and prevents them, or is capable of preventing them, from passing along the highway, is in principle capable of being something for which there is a "lawful excuse" for the purposes of section 137. Whether it does so or not will depend on an assessment of the proportionality of the police response in seeking to remove the obstruction.

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Appeal allowed.
Decision of Divisional Court set aside.
Decision of district judge restored.

SHIRANIKHA HERBERT, Barrister

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

Case No: QB-2022-BHM-000044

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

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

Date: 20/09/2022

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

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

- and –

FOUR CATEGORIES OF PERSONS UNKNOWN

-and-

ROSS MONAGHAN AND 58 OTHER NAMED DEFENDANTS — **Defendants**

- -
- -

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

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

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

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

- -

APPROVED JUDGMENT

Mr Justice Julian Knowles:

Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

Democracy and opposition to HS2

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Claimants' land rights

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

43. Ms Dilcock goes on to explain that:

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

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

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

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

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

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

The Claimants' case

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

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

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

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

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

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

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

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

The Defendants' cases

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Discussion

Legal principles

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

(i) Trespass and nuisance

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

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

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

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

in the High Speed Rail (London - West Midlands) Act 2017 (to which I shall refer as "the 2017 Act"). That land is coloured pink on the various plans and is referred to as "the pink land". Thirdly, there is land in the temporary possession of the Second Claimant by reason of the exercise of its powers pursuant to section 15 and Schedule 16 of the 2017 Act, that land is coloured green on the plans

….

30. The first cause of action is trespass. The Claimants are entitled, as a matter of law, to bring a claim in trespass in respect of all three categories of land and, as I have said, it was not seriously suggested that they could not. In particular, I was referred to section 15 and paragraphs 1, 3 and 4 of Schedule 16 to the 2017 Act …

31. Thus, the procedure is simply this: if the Second Claimant wishes to take temporary possession of land within a defined geographical limit, it serves 28 days' notice pursuant to paragraph 4. Thereafter, it is entitled to enter on the land and 'take possession'. That, to my mind, and it was not seriously argued otherwise, gives it a right to bring possession proceedings and trespass proceedings in respect of that land.

32. In paragraph 40 of his judgment in *Ineos* at first instance [*Ineos Upstream Ltd v Persons Unknown* [2017] EWHC 2945 (Ch)], Mr. Justice Morgan says this:

> "The cause of action for trespass on private land needs no further exposition in this case."

Exactly the same is the case here, it seems to me, and it is the First Defendant, the definition of which persons I have described above, who is, or are, subject to such a claim in trespass."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

…

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

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

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

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

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

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

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

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

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

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

> "13 The second type of wrong which the Injunction sought to prevent was unlawful interference with the claimants' freedom to come and go to and from their land. An owner of land adjoining a public highway has a right of access to the highway and a person who interferes with this right commits the tort of private nuisance. In addition, it is a public nuisance to obstruct or hinder free passage along a public highway and an owner of land specially affected by such a nuisance can sue in respect of it, if the obstruction of the highway causes them inconvenience, delay or other damage which is substantial and appreciably greater in degree than any suffered by the general public: see *Clerk & Lindsell on Torts*, 22nd ed (2017), para 20–181."

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

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

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

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

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

(ii) The test for the grant of an injunction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(iii) The Canada Goose *requirements*

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

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

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

unknown', must be capable of being identified and served with the order, if necessary by alternative service, the method of which must be set out in the order.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(iv) Geographical scope of the order sought

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

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

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

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

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

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

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

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

(v) European Convention on Human Rights

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

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

118. Articles 10 and 11 provide:

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

119. A1P1 provides:

> "*Article 1 Protection of property*

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

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

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

121. Section 12 provides:

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

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

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

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

124. The Claimants filed submissions in response.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(vi) Service

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

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

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

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

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

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

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

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

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

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

Merits

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

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

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

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

(i) Trespass and nuisance

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

just trying to do their jobs.

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

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

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

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

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

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

…

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(v) Scope

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(vi) Convention rights

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

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

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

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

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

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

If so, would there be an interference by a public authority with those rights?

199. Yes. The application for, and the grant of, an injunction to prevent the Defendants interfering with HS2's construction in the ways provided for in the injunction is an interference with their rights by a public authority so far as it touches on protest on public land, such as the highway, where Articles 10 and 11 are engaged.

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

200. Yes. The law in question is s 37 of the SCA 1981 and the cases which have decided how the court's discretion to grant an anticipatory injunction should be exercised: see *National Highways Ltd*, [31(2)] (Lavender J).

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

201. Yes. It would be for the protection the Claimants' rights and freedoms, and those of their contractors and others, to access and work upon HS2 Land unhindered, in accordance with the powers granted to them by Parliament which, as I have said already, determined HS2 to be in the public interest. The Claimants' have common law and A1P1 rights over the HS2 Land, as I have explained. The interference in question pursues the legitimate aims: of preventing violence and intimidation; reducing the large expenditure of public money on countering protests; reducing property damage; and reducing health and safety risks to protesters and others arising from the nature of some of the protests.

If so, is the interference 'necessary in a democratic society' to achieve that legitimate aim? This involves considering the following: Is the aim sufficiently important to justify interference with a fundamental right? Is there a rational connection between the means chosen and the aim in view? Are there less restrictive alternative means available to achieve that aim? Is there a fair balance between the rights of the individual and the general interest of the community, including the rights of others ?

202. These are the key questions on this aspect of the case, it seems to me.

203. The question whether an interference with a Convention right is 'necessary in a democratic society' can also be expressed as the question whether the interference is proportionate: *National Highways Limited,* [33] (Lavender J).

204. In *Ziegler*, Lords Hamblen and Stephens stated in [59] of their judgment that:

> "Determination of the proportionality of an interference with ECHR rights is a fact-specific enquiry which requires the evaluation of the circumstances in the individual case."

205. Lords Hamblen and Stephens also quoted, *inter alia*, [39] to [41] of Lord Neuberger MR's judgment in *Samede*

> "39. As the judge recognised, the answer to the question which he identified at the start of his judgment [the limits to the right of lawful assembly and protest on the highway] is inevitably fact sensitive, and will normally depend on a number of factors. In our view, those factors include (but are not limited to) the extent to which the continuation of the protest would breach domestic law, the importance of the precise location to the protesters, the duration of the protest, the degree to which the protesters occupy the land, and the extent of the actual interference the protest causes to the rights of others, including the property rights of the owners of the land, and the rights of any members of the public.
>
> 40. The defendants argue that the importance of the issues with which the Occupy Movement is concerned is also of considerable relevance. That raises a potentially controversial point, because as the judge said, at para 155: 'it is not for the court to venture views of its own on the substance of the protest itself, or to gauge how effective it has been in bringing the protestors' views to the fore. The Convention rights in play are neither strengthened nor weakened by a subjective response to the aims of the protest itself

> or by the level of support it seems to command … the court cannot—indeed, must not—attempt to adjudicate on the merits of the protest. To do that would go against the very spirit of articles 10 and 11 of the Convention … the right to protest is the right to protest right or wrong, misguidedly or obviously correctly, for morally dubious aims or for aims that are wholly virtuous.'
>
> 41. Having said that, we accept that it can be appropriate to take into account the general character of the views whose expression the Convention is being invoked to protect. For instance, political and economic views are at the top end of the scale, and pornography and vapid tittle-tattle is towards the bottom. In this case the judge accepted that the topics of concern to the Occupy Movement were 'of very great political importance': para 155. In our view, that was something which could fairly be taken into account. However, it cannot be a factor which trumps all others, and indeed it is unlikely to be a particularly weighty factor: otherwise judges would find themselves according greater protection to views which they think important, or with which they agree. As the Strasbourg court said in Kuznetsov v Russia, para 45: 'any measures interfering with the freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles - however shocking and unacceptable certain views or words used may appear to the authorities—do a disservice to democracy and often even endanger it. In a democratic society based on the rule of law, the ideas which challenge the existing order must be afforded a proper opportunity of expression through the exercise of the right of assembly as well as by other lawful means …' The judge took into account the fact that the defendants were expressing views on very important issues, views which many would see as being of considerable breadth, depth and relevance, and that the defendants strongly believed in the views they were expressing. Any further analysis of those views and issues would have been unhelpful, indeed inappropriate."

206. I have set out this passage, as Lavender J did in *National Highways Limited,* [35], because, given the nature of some of the submissions made to me, I want to underscore the point I made at the outset that I am not concerned with the merits of HS2, or whether it will or will not cause the environmental damage which the protesters fear it will. I readily acknowledge that many of them hold sincere and strongly held views on very important issues. However, it would be wrong for me to express either agreement or disagreement with those views, even if I had the institutional competence to do so, which I do not. Many of the submissions made to me consisted of an invitation to me to agree with the Defendants' views and to decide the case on that basis. But just like Lavender J said in relation to road protests, that is something which I cannot do, just as I could not decide this case on the basis of disagreement with protesters' views.

207. Lords Hamblen and Stephens reviewed in [71] to [86] of their judgment in *Ziegler* the factors which may be relevant to the assessment of the proportionality of an interference with the Article 10 and 11 rights of protestors blocking traffic on a road.

208. Disagreeing with the Divisional Court, they held that each of the eight factors relied on by the district judge in that case were relevant. Those factors were, in summary: (a) the peaceful nature of the protest; (b) the fact that the defendants' action did not give rise, either directly or indirectly, to any form of disorder; (c) the fact that the defendants did not commit any criminal offences other than obstructing the highway; (d) the fact that the defendants' actions were carefully targeted and were aimed only at obstructing vehicles heading to the arms fair; (e) the fact that the protest related to a 'matter of general concern'; (f) the limited duration of the protest; (g) the absence of any complaint about the defendants' conduct; and (h) the defendants' longstanding commitment to opposing the arms trade.

209. As Lavender J said in his case at [39], this list of factors is not definitive, but it serves as a useful checklist. I propose now to discuss how they should be answered in this case.

210. The HS2 protests have in significant measure not been peaceful. There have been episodes, for example, of violence, intimidation, criminal damage, and assault, as described by Mr Jordan. There have been many arrests. Even where injunctions have been obtained, protesters have resisted being removed (most recently at Cash's Pit, as described in Dilcock 4 and in other material). It follows that the protests have given rise to considerable disorder. The protesters are specifically targeting HS2, and in that sense are in a somewhat different position to the protesters in the *National Highways Ltd* case, whose protests were aimed at the public as a means of trying to influence government policy. But the HS2 protests do also affect others, such as contractors employed to work on the project (for example Balfour Beatty), those in HS2's supply chain, security staff, etc. I accept that the HS2 protests relate to a matter of general concern, but on the other hand, at the risk of repeating myself, the many and complicated issues involved – including in particular environmental concerns - have been debated in Parliament and the HS2 Acts were passed. The HS2 protests are many in number, continuing, and are threatened to be carried on in the future along the whole of the HS2 route without limit of time. The disruption, expense and inconvenience which they have caused is obvious from the evidence. I do not think that I am in any position to assess the public mood about HS2 protests. No doubt some members of the public are in favour and no doubt some are against. As I have already said, I accept that the defendants are expressing genuine and strongly held views.

211. Turning to the four questions into which the fifth *Ziegler* proportionality question breaks down, I conclude as follows.

212. Firstly, by committing trespass and nuisance, the Defendants are obstructing a large strategic infrastructure project which is important both for very many individuals and for the economy of the UK, and are causing the unnecessary expenditure of large sums of public money. In that context, I conclude that the aim pursued by the Claimants in making this application is sufficiently important to justify interference with the Defendants' rights under Articles 10 and 11, especially as that interference will be limited to what occurs on public land, where lawful protest will still be permitted. Even if the interference were more extensive, I would still reach the same conclusion. I base that

conclusion primarily on the considerable disruption caused by protests to date and the repeated need for injunctive relief for specific pockets of land.

213. Second, I also accept that there is a rational connection between the means chosen by the claimant and the aim in view. The aim is to allow for the unhindered completion of HS2 by the Claimants over land which they are in possession of by law (or have the right to be). Prohibiting activities which interfere with that work is directly connected to that aim.

214. Third, there are no less restrictive alternative means available to achieve that aim. As to this, an action for damages would not prevent the disruption caused by the protests. The protesters are unlikely to have the means to pay damages for losses caused by further years of disruption, given the sums which the Claimants have had to pay to date. Criminal prosecutions are unlikely to be a deterrent, and all the more so since many defendants are unknown. By contrast, there is some evidence that injunctions and allied committal proceedings have had some effect: see APOC, [7].

215. I have anxiously considered the geographical extent of the injunction along the whole of the HS2 route, and whether it should be more limited. I have concluded, however, given the plain evidence of the protesters' intentions to continue to protest and disrupt without limit – 'let's keep fucking up HS2's day and causing as much disruption and cost as possible. Coming to land near you' – such an extensive injunction is appropriate. The risks are real and imminent for the reasons I have already given. I accept that the Claimants have shown that the direct action protests are ongoing and simply move from one location to another, and that the protesters have been and will continue to cause maximum disruption across a large geographical extent. As the Claimants put it, once a particular protest 'hub' on one part of HS2 Land is moved on, the same individuals will invariably seek to set up a new hub from which to launch their protests elsewhere on HS2 Land. The HS2 Land is an area of sufficient size that it is not practicable to police the whole area with security personnel or to fence it, or make it otherwise inaccessible.

216. Fourth, taking account of all of the factors which I have identified in this judgment, I consider that the injunction sought strikes a fair balance between the rights of the individual protestors and the general right and interests of the Claimants and others who are being affected by the protests, including the national economy. As to this: (a) on the one hand, the injunction only prohibits the defendants from protesting in ways that are unlawful. Lawful protest is expressly not prohibited. They can protest in other ways, and the injunction expressly allows this. Moreover, unlike the protest in *Ziegler*, the HS2 protests are not directed at a specific location which is the subject of the protests. They have caused repeated, prolonged and significant disruption to the activities of many individuals and businesses and have done so on a project which is important to the economy of this country. Finally on this, the injunction is to be kept under review by the Court, it is not without limit of time, and can and no doubt will be discharged should the need for it disappear.

217. Finally, drawing matters together and looking at the same matters in terms of the general principles relating to injunctions:

a. I am satisfied that it is more likely than not that the Claimants would establish at trial that the Defendants' actions constitute trespass and nuisance and that they will continue to commit them unless restrained. There is an abundance of evidence that leads to the conclusion that there is a real and imminent risk of the tortious behaviour

continuing in the way it has done in recent years across the HS2 Land. I am satisfied the Claimants would obtain a final injunction.

b. Damages would not be an adequate remedy for the Claimants. They have given the usual undertakings as to damages.

c. The balance of convenience strongly favours the making of the injunction.

(vii) Service

218. Finally, I turn to the question of service and whether the service provisions in the injunction are sufficient.

219. The passages from [82] of *Canada Goose* I quoted earlier show that the method of alternative service against persons unknown must be such as can reasonably be expected to bring the proceedings (ie, the application) to their attention.

220. I considered service of the application at a directions hearing on 28 April 2022. At that hearing, I made certain suggestions recorded in my order at [2] as to how the application for the injunction was to be served:

> "Pursuant to CPR r. 6.27 and r. 81.4 as regards service of the Claimants' Application dated 25 March 2022:
>
> a. The Court is satisfied that at the date of the certificates of service, good and sufficient service of the Application has been effected on the named defendants and each of them and personal service is dispensed with subject to the Claimants' carrying out the following additional methods within 14 days of the date of this order:
>
> i. advertising the existence of these proceedings in the Times and Guardian newspapers, and in particular advertising the web address of the HS2 Proceedings website.
>
> ii. where permission is granted by the relevant authority, by placing an advertisement and/or a hard copy of the papers in the proceedings within 14 libraries approximately every 10 miles along the route of the HS2 Scheme. In the alternative, if permission is not granted, the Claimants shall use reasonable endeavours to place advertisements on local parish notice boards in the same approximate location.
>
> iii. making social media posts on the HS2 twitter and Facebook pages advertising the existence of these proceedings and the web address of the HS2 Proceedings website.
>
> b. Compliance with 2 (a)(i), (ii) and (iii) above will be good and sufficient service on "persons unknown"'

221. The injunction at [7]-[11] provides under the heading 'Service by Alternative Method – This Order'

> "7. The Court will provide sealed copies of this Order to the Claimant's solicitors for service (whose details are set out below).
>
> 8. Pursuant to CPR r.6.27 and r.81.4:
>
> a. The Claimant shall serve this Order upon the Cash's Pit Defendants by affixing 6 copies of this Order in prominent positions on the perimeter of the Cash's Pit Land.
>
> b. Further, the Claimant shall serve this Order upon the Second, Third and Fourth Defendants by:
>
> i. Affixing 6 copies in prominent positions on the perimeter each of the Cash's Pit Land (which may be the same copies identified in paragraph 8(a) above), the Harvil Road Land and the Cubbington and Crackley Land.
>
> ii. Advertising the existence of this Order in the Times and Guardian newspapers, and in particular advertising the web address of the HS2 Proceedings website, and direct link to this Order.
>
> iii. Where permission is granted by the relevant authority, by placing an advertisement and/or a hard copy of the Order within 14 libraries approximately every 10 miles along the route of the HS2 Scheme. In the alternative, if permission is not granted, the Claimants shall use reasonable endeavours to place advertisements on local parish council notice boards in the same approximate locations.
>
> iv. Publishing social media posts on the HS2 twitter and Facebook platforms advertising the existence of this Order and providing a link to the HS2 Proceedings website.
>
> c. Service of this Order on Named Defendants may be effected by personal service where practicable and/or posting a copy of this Order through the letterbox of each Named Defendant (or leaving in a separate mailbox), with a notice drawing the recipient's attention to the fact the package contains a court order. If the premises do not have a letterbox, or mailbox, a package containing this Order may be affixed to or left at the front door or other prominent feature marked with a notice drawing the recipient's attention to the fact that the package contains a court order and should be read urgently. The notices shall be given in prominent lettering in the form set out in Annex B. It is open to any Defendant to contact the Claimants to identify an alternative

place for service and, if they do so, it is not necessary for a notice or packages to be affixed to or left at the front door or other prominent feature.

d. The Claimants shall further advertise the existence of this Order in a prominent location on the HS2 Proceedings website, together with a link to download an electronic copy of this Order.

e. The Claimants shall email a copy of this Order to solicitors for D6 and any other party who has as at the date hereof provided an email address to the Claimants to the email address: HS2Injunction@governmentlegal.gov.uk

9. Service in accordance with paragraph 8 above shall:

a. be verified by certificates of service to be filed with Court;

b. be deemed effective as at the date of the certificates of service; and

c. be good and sufficient service of this Order on the Defendants and each of them and the need for personal service be dispensed with.

10. Although not expressed as a mandatory obligation due to the transient nature of the task, the Claimants will seek to maintain copies of this Order on areas of HS2 Land in proximity to potential Defendants, such as on the gates of construction compounds or areas of the HS2 Land known to be targeted by objectors to the HS2 Scheme.

11. Further, without prejudice to paragraph 9, while this Order is in force, the Claimants shall take all reasonably practicable steps to effect personal service of the Order upon any Defendant of whom they become aware is, or has been on, the HS2 Land without consent and shall verify any such service with further certificates of service (where possible if persons unknown can be identified) to be filed with Court."

222. Further evidence about service is contained in Dilcock 3, [7], et seq, and Dilcock 4, [7] et seq. I can summarise this as follows.

223. Before I made my order, Ms Dilcock explained that the methods of service used by the Claimants as at that date had been based on those which had been endorsed and approved by the High Court in other cases where injunctions were sought in similar terms to those in this application. She said the methods of service to that date had been effective in publicising the application.

224. She said that there had been 1,371 views (at 24 April 2022) of the Website: Dilcock 3, [11]; By 17 May 2022 (a week or so before the main hearing, and after my directions

had come into effect) there had been 2,315 page views, of which 1,469 were from unique users: Dilcock 4**,** [17]. So, in round terms, there were an additional 1,000 views after the directions hearing.

225. Twitter accounts have shared information about the injunction application and/or the fundraiser to their followers. The number of followers of those accounts is 265,268: Dilcock 3, [16].

226. A non-exhaustive review of Facebook shows that information about the injunction and/or the link to a fundraiser has been posted and shared extensively across pages with thousands of followers and public groups with thousands of followers. Membership of the groups on Facebook to which the information has been shared amounts to 564,028: Dilcock 3, [17].

227. Dilcock 4, [7] – [17], sets out how the Claimants complied with the additional service requirements pursuant to my directions of 28 April 2022. Those measures are not reliant on either notice via website or social media. The Claimants say that they complement and add to the very wide broadcasting of the fact of the proceedings.

228. The Claimants submitted that the totality of notice, publication and broadcasting had been very extensive and effective in relation to the application. They submitted that service of an order by the same means would be similarly effective, and that is what the First Claimant proposes to do should an injunction be granted.

229. I agree. The extensive and inventive methods of proposed service in the injunction, in my judgment, satisfy the *Canada Goose* test, [82(1)], that I set out earlier. That this is the test for the service an order, as well as proceedings, is clear from *Cuciurean v Secretary of State for Transport* [2021] EWCA Civ 357, [14]-[15], [24]-[26], [60], [75].

Final points

230. I reject the suggestion the injunction will have an unlawful chilling effect, as D6 in particular submitted. There are safeguards built-in, which I have referred to and do not need to mention again. It is of clear geographical and temporal scope. Injunctions against defined groups of persons unknown are now commonplace, in particular in relation to large scale disruptive protests by groups of people, and the courts have fashioned a body of law, much of which I have touched on, in order to address the issues which such injunctions can raise, and to make sure they operate fairly. I also reject the suggestion that the First Claimant lacks 'clean hands' so as to preclude injunctive relief.

Conclusion

231. I will therefore grant the injunction in the terms sought in the draft order of 6 May 2022 in Bundle B at B049 (subject to any necessary and consequential amendments to reflect post-hearing matters and in light of this judgment).

APPENDIX 1

UNNAMED DEFENDANTS
(TAKEN FROM THE AMENDED PARTICULARS OF CLAIM
DATED 28 APRIL 2022 – WITH TRACKED CHANGED REMOVED)

(1) PERSONS UNKNOWN ENTERING OR REMAINING WITHOUT THE CONSENT OF THE CLAIMANTS ON, IN OR UNDER LAND KNOWN AS LAND AT CASH'S PIT, STAFFORDSHIRE SHOWN COLOURED ORANGE ON PLAN A ANNEXED TO THE ORDER DATED 11 APRIL 2022 ("THE CASH'S PIT LAND")

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

(3) PERSONS UNKNOWN OBSTRUCTING AND/OR INTERFERING WITH ACCESS TO AND/OR EGRESS FROM THE HS2 LAND IN CONNECTION WITH THE HS2 SCHEME WITH OR WITHOUT VEHICLES, MATERIALS AND EQUIPMENT, WITH THE EFFECT OF DAMAGING AND/OR DELAYING AND/OR HINDERING THE CLAIMANTS, THEIR AGENTS, SERVANTS, CONTRACTORS, SUB-CONTRACTORS, GROUP COMPANIES, LICENSEES, INVITEES AND/OR EMPLOYEES WITHOUT THE CONSENT OF THE CLAIMANTS

(4) PERSONS UNKNOWN CUTTING, DAMAGING, MOVING, CLIMBING ON OR OVER, DIGGING BENEATH OR REMOVING ANY ITEMS AFFIXED TO ANY TEMPORARY OR PERMANENT FENCING OR GATES ON OR AT THE PERIMETER OF THE HS2 LAND, OR DAMAGING, APPLYING ANY SUBSTANCE TO OR INTERFERING WITH ANY LOCK OR ANY GATE AT THE PERIMETER OF THE HS2 LAND WITHOUT THE CONSENT OF THE CLAIMANTS

APPENDIX 2

SUMMARY OF DEFENDANTS' RESPONSES

Name	**Received and reference in the papers**	**Summary**
D6 – James Knaggs	SkA for initial hearing (05.04.22)	Definition of persons unknown is overly broad, contrary to Canada Goose. Service provisions inadequate. No foundation for relief based on trespass because not demonstrated immediate right to possession, and seeking to restrain lawful protest on highway. No imminent threat. Scope of order is large. Terms impose blanket disproportionate prohibitions on demonstrations on the highway. Chilling effect of the order.
	Defence (17.05.22)	C required to establish cause of action in trespass & nuisance across all of HS2 Land *and* existence of the power to take action to prevent such. No admission of legal rights of the C represented in maps. Denied that Cash's Pit land is illustrative of wider issues re entirety of HS2 Land. Denied there is a real and imminent risk of trespass & nuisance re HS2 Land to justify injunction. Impact and effect of injunction extends beyond the limited remit sought by HS2. Proportionality. Denial that D6 conduct re Cash's Pit has constituted trespass or public/private nuisance.
D7 – Leah Oldfield	Defence (16.05.22) **[D/3]**	D7s actions do not step beyond legal rights to protest, evidence does not show unlawful activity. Right to protest. Complaints about HS2 Scheme, complaints about conduct of HS2 security contractors. Asks to be removed from injunction on basis of lack of evidence
D8 – Tepcat Greycat	Email (16.05.22) **[D/4]**	Complaint that D8 was not identified properly in injunction application papers and that she would like name removed from schedule of Ds.
D9 – Hazel Ball	Email (13.05.22) **[D/7]**	Asks for name to be removed. Queries why she has been named in injunction application papers. Has only visited Cash's Pit twice, with no intention to return. Never visited Harvil Road.
D10 – IC Turner	Response (16.05.22) **[D/8]**	Inappropriateness of D10's inclusion as a named D (peaceful protester, no involvement with campaign this year, given proximity to route the injunction would restrict freedom of movement within vicinity). Inappropriateness of proceedings (abuse of process because of right to protest). Complaints about HS2 Scheme.
D11 – Tony Carne	Submission (13.05.22) **[D/10]**	Denies having ever been an occupier of Cash's Pit Land. Asks to be removed as named D.
D24 – Daniel Hooper	Email (16.05.22) **[D/12]**	Asks for name to be removed because already subject to wide ranging undertaking. Asks for assurance of the same by 20th May.

D29 – Jessica Maddison	Defence (16.05.22) **[D/14]**	Injunction would restrict ability to access Euston station and prevent access to GP surgery and hospital. Restriction on use of footpaths, would result from being named in injunction. Would lead to her being street homeless. Lack of evidence for naming within injunction. Criminal matters re lock on protests were discontinued before trial. Complaints about HS2 contractor conduct.
D35 – Terry Sandison	Email (07.04.22) **[D/15]**	Complaint about lack of time to prepare for initial hearing.
	Application for more time – N244 (04.04.22)	Says he wishes to challenge HS2 on various points of working practices, queries why he is on paperwork for court but feels he hasn't received proof of claims they have to use his conduct to secure injunction. Asks for a month to consider evidence and challenge the injunction and claims against himself.
D36 – Mark Kier	Large volume of material submitted (c.3k pages) **[D/36/179-D/37/2916]**	Mr Kier sets out four grounds: (1) the area of land subject to the Claim is incorrect in a number of respects; (2) the protest activity is proportionate and valid and necessary to stop crimes being committed by HS2; (3) the allegations of violence and intimidation are false. The violence and intimidation emanates from HS2; (4) the project is harmful and should not have been consented.
D39 – Iain Oliver	Response to application (16.05.22) **[D/16]**	Complaints about alleged water pollution, wildlife crimes and theft and intimidation on HS2's behalf. Considers that injunction is wrong and a gagging order.
D46 – Wiktoria Zieniuk	Not included in bundle	Brief email provided querying why she was included.
D47 – Tom Dalton	Email (05.04.22) **[D/17]**	Complaint about damage caused to door from gaffatape of papers to front door. Says he is happy to promise not to violate or contest injunction as is not involved in anti HS2 campaign and hasn't been for years. (Undertaking now signed)
D54 – Hayley Pitwell	Email (04.04.22) **[D/19]**	Request for adjournment and extension of time to submit arguments, for a hearing and for name to be removed as D. Queries whether injunction will require her to take massive diversions when driving to Wales. Complaint about incident of action at Harvil Road that led to D56 being named in this application – dispute over factual matters (esp Jordan 1 para 29.1.10). Complaint that HS2 security contractor broke coronavirus act and D54 is suing for damages. N.b. no subsequent representations received.
D55 – Jacob Harwood	17.05.22 **[D/20]**	Complaint about injunction restricting ability to use Euston station, public rights of way, canals etc. Complaint that there is lack of evidence against D55 so he should be removed as named D.
D56 – Elizbeth Farbrother	11.05.22 **[D/23**]	Correspondence and undertaking subsequently signed.
D62 – Leanne Swateridge	Email (14.05.22) **[D/23]**	Complaint about reliance on crane incident at Euston. Complaints about conduct of HS2 contractors and merits of HS2 Scheme.
Joe Rukin	First witness statement (04.04.22) **[D/24]**	Says Stop HS2 organisation is no longer operative in practice, so emailing their address does not constitute service, and the organisation is not coordinating or organising illegal activities. Failure of service of injunction application. Scope of injunction

		is disproportionately wide, and D2 definition would cover hundreds of thousands of people on a daily basis. Complaints about GDPR re service of papers for this application. Concerns about injunction restricting normal use of highways, PRoW, and private rights over land where it is held by HS2 temporarily but the original landowner has been permitted to continue to access and use it. Would criminalise people walking into their back garden.
	Second witness statement (26.04.22) **[D/25]**	Complains there is no active protest at Cubbington and Crackley now since clearance of natural habitats. Complains Dilcock 2 [8.11] is wrong about service of proceedings at Cubbington & Crackley Land.
Maren Strandevold	Email (04.04.22) **[D/26]**	Complaints about notice given for temporary possession land. Concern about temporary possession land and that there needs to be clear and unequivocal permission for those permitted to use their land subject to temporary possession to be able to continue to do so. Concerns the scope of the draft order is disproportionate.
Sally Brooks	Statement (04.04.22) [**D/27]**	Complaints about merits of HS2 Scheme, alleged wildlife crimes, and the need for members of the public to monitor the same
Caroline Thompson-Smith	Email (04.04.22) **[D/28]**	Objects to evidence of her, and that the injunction would prevent rights to freedom of expression, arts 10-11. Worry about adverse costs means she fears to engage with process.
Deborah Mallender	Statement (04.04.22) **[D/29]**	Complaints about merits of HS2 Scheme and conduct of HS2 Ltd and security contractors. Complaint that content of injunction has not been provided to all relevant persons.
Haydn Chick	Email (05.04.22) **[D/30]**	Email attachment of statement which will not open, plus article by Lord Berkeley, plus news story
Swynnerton Estates	Email (05.05.22) **[D/31]**	Email re whether Cash's Pit objectors had licence to occupy.
Steve and Ros Colclough	Letter (04.05.22) **[D/32]**	Consider themselves "persons unknown" by living nearby and using nearby PRoW. Complaint that HS2 should have written to everyone on the route informing them.
Timothy Chantler	Letter (14.05.22) **[D/33]**	Complaints about conduct of HS2 security contractors (NET re treatment of other protesters). Objection to the injunction on the basis of right to protest etc.
Chiltern Society	Letter (16.05.22) **[D/34]**	Concerns about public access to PRoW re HS2 Land. Concern of no adequate method to ensure a person using a footpath across HS2 Land would be aware of potential infringement. Concern that maintenance work on footpaths often requires accessing adjacent land which may constitute infringement.
Nicola Woodhouse	Email (16.05.22) **[D/35]**	Not lawful or practical to stop anyone accessing all land acquired by HS2. Maps provided are impossible to decipher, with land ownership not well defined. Excessive geographical scope. Notification of all relevant landowners is impossible. Residents of houses purchased by HS2 cannot move freely around their own homes, and members of the public cannot visit them.
The below statements are contained within the submission of D36 (Mark Keir)		

Val Saunders "statement in support of the defence against the Claim QB-2022-BHM-00044"	Undated **[D/37/2493]** (bundle D, vol F)	Merits of Scheme. Complaints about HS2 contractor conduct and alleged wildlife crimes. Protest important to hold HS2 to account.
Leo Smith "Witness statement" "statement in support of the defence…"	14.05.22 **[D/37/2509-2520]** (bundle D, vol F)	Merits of scheme/process of consultation. Necessity of protest to hold Scheme to account. HS2 use of NDAs re CPO. Photographs of rubbish left behind by protestors is misleading since they have been forcibly evicted. Protest mostly peaceful. Complaints about HS2 security contractor conduct. Alleged wildlife crimes. Negative impact on communities.
Misc statement – "statement in support of the defence…"	Undated **[D/37/2674-2691]** (bundle D, vol G)	Complaints about merits of scheme and conduct of HS2 security contractors against protesters.
Misc statement – "Seven arguments against HS2"	Undated **2692-2697**	Merits of scheme. Argues for scrapping.
Brenda Bateman – "statement in support of the defence…"	Undated **2698-2699**	Confusion caused by what HS2 previously said about which footpaths would be closed. Complaints about ecological impacts of Scheme, and other impacts. Complaints about use of CPO process. Right to peaceful protest should be upheld: injunction would curtail this.
Cllr Carolyne Culver – "statement in support of the Defence…"	Undated **2700-2701**	Complaints about conduct of Jones Hill Wood eviction. Issues over perceived delayed compensation for CPO. Need for nature protectors and right to protest.
Denise Baker – "Defence against the claim…"	Undated **2702-2703**	Photojournalist – concerns that injunction would limit abilities to report fairly on issues related to environment impact of HS2. Risk of arrest of journalists. Detrimental to accountability of project and govt. Concerns over conduct of HS2 security contractors.
Gary Welch – "Statement in support of the Defence…"	Undated **2704**	Criticism of merits of Scheme, and environmental impacts. Concern over closure of public foot paths recently.
Sally Brooks – "Statement in support of the Defence…"	Undated **2705-2710**	Alleged wildlife crimes. Need for members of public to monitor HS2 activities. Injunction would prevent this.
Lord Tony Berkeley – "Witness Statement"; "Statement in support of the Defence…"	12.05.22 **2711-2714**	Doubts HS2 has sufficient land to complete the project without further Parliamentary authorisation. Doubts HS2's land ownership position generally given alteration to maps included with injunction application. Injunction is an abuse of rights, and an abuse of the laws of the country and HS2 Bill which brought it into being.
Jessica Upton – "statement in support of the Defence…"	Undated **2715-2716**	Criticism of merits of scheme, ecological impact etc. Concern that public need to be able to hold HS2 to account without being criminalised for it.
Kevin Hand – "statement in support of the Defence…"	9.05.22 **2717-2718**	Ecologist who provides environmental training courses to activists and protesters against HS2. Emphasises importance of public/protesters being

		able to monitor works taking place to prevent alleged wildlife crimes.
Mark Browning – "Statement in support of the Defence…"	Undated **2719**	Partners brother is renting a property HS2 has compulsorily purchased near Hopwas in Tamworth area. Concern that the management of the pasture will be criminalised if injunction granted. Therefore requests exemption from the injunction.
Talia Woodin – "statement in support of the Defence…"	Undated **2724-2731**	Photographer and filmmaker. Concerns about alleged wildlife crimes and assaults on activists. Injunction would disable right to protest.
Victoria Tindall – "statement in support of the Defence…"	Undated **2735**	Complaint about Buckinghamshire HS2 security van monitoring ramblers near HS2 site. Concerns about privacy.
Mr & Mrs Phil Wall – "Statement"	Undated **2737-2740**	Complaints about conduct of HS2 contractors regarding works in Buckinghamshire. Complaints about CPO/blight compensation issues for their property.
Susan Arnott – "In support of the Defence…"	15.5.22 **2742**	Merits of scheme. Protests are therefore valid.
Ann Hayward – Letter regarding RWI	6.05.22 **2743-2744**	Resident of Wendover. Difficulty of reading HS2 maps, so difficult to know whether trespassing or not. Complaints about HS2 contractor conduct. RWI too broad, and service would be difficult and may be insufficient meaning everyone in vicinity of HS2 works could be at risk of arrest – risk of criminalising communities. People need to know whether injunction exists and where it is, but HS2 maps are not well defined. Would be difficult to apply the order, abide by it and police it. Important for independent ecologists to monitor HS2 works.
Annie Thurgarland – "statement in support of the Defence"	15.05.22 **2745-2746**	Criticism of merits of scheme, especially re environmental impact. Need for public to monitor works re ecology and alleged wildlife crimes. People have a right to peaceful direct action.
Anonymous	16.05.22 **2747-2751**	Anonymity because concerned about intimidation. RWI would have direct impact on tenancy contractual agreement for home, as it lies within the Act Boundary and is owned by HS2. Would be entirely at the mercy of HS2 and subcontractors to interpret the contractual agreement as they chose. Concerned that they were not notified of the RWI given the enormity of impact on residents who are lessees of HS2. Vague term un-named defendants could extend to anyone deemed as trespassing on land part of homes and gardens. Concern therefore that all land within boundary could become subject to constant surveillance, undermining right to privacy. No clarity on terms of injunction regarding tenants and when they would and would not be trespassing. Complaints about ecological impact of Scheme. Complaints about conduct of HS2 security contractors.

Anonymous (near Cash's Pit occupant)	Undated **2752-2753**	Complaints about impact of scheme on ability to use local area for recreation. Concerns that injunction would curtail protest right. Complaints about HS2 security contractors. Complaint that HS2 did not provide local residents with details of the injunction or proceedings.
Anonymous – "statement in support of the Defence…"	Undated **2754-2755**	Criticism of merits of Scheme, argument re right to protest.

A

Queen's Bench Division

Director of Public Prosecutions *v* Cuciurean

[2022] EWHC 736 (Admin)

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

B

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

C

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

D

E

On the appeal—

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

F

G

H

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

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

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

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

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

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

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

Animal Defenders International v United Kingdom (Application No 48876/08) (2013) 57 EHRR 21, ECtHR (GC)
Annenkov v Russia (Application No 31475/10) (unreported) 25 July 2017, ECtHR
F *Appleby v United Kingdom* (Application No 44306/98) (2003) 37 EHRR 38, ECtHR
Barraco v France (Application No 31684/05) (unreported) 5 March 2009, ECtHR
Bauer v Director of Public Prosecutions [2013] EWHC 634 (Admin); [2013] 1 WLR 3617, DC
Blumberga v Latvia (Application No 70930/01) (unreported) 14 October 2008, ECtHR
Canada Goose UK Retail Ltd v Persons Unknown [2020] EWCA Civ 303; [2020] G 1 WLR 2802; [2020] 4 All ER 575, CA
City of London Corpn v Samede [2012] EWHC 34 (QB); [2012] EWCA Civ 160; [2012] PTSR 1624; [2012] 2 All ER 1039, CA
Dehal v Crown Prosecution Service [2005] EWHC 2154 (Admin); 169 JP 581
Director of Public Prosecutions v Ziegler [2019] EWHC 71 (Admin); [2020] QB 253; [2019] 2 WLR 1451; [2019] 1 Cr App R 32, DC; [2021] UKSC 23; [2022] AC 408; [2021] 3 WLR 179; [2021] 4 All ER 985; [2021] 2 Cr App R 19, SC(E)
H *Ezelin v France* (Application No 11800/85) (1991) 14 EHRR 362, ECtHR (GC)
Food Standards Agency v Bakers of Nailsea Ltd [2020] EWHC 3632 (Admin); [2020] CTLC 324, DC
Gifford v HM Advocate [2011] HCJAC 11; 2011 SCCR 751
Hammond v Director of Public Prosecutions [2004] EWHC 69 (Admin); 168 JP 601, DC

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Hashman and Harrup v United Kingdom (Application No 25594/94) (1999) 30 EHRR 241, ECtHR (GC)
James v Director of Public Prosecutions [2015] EWHC 3296 (Admin); [2016] 1 WLR 2118, DC
Kudrevičius v Lithuania (Application No 37553/05) (2015) 62 EHRR 34, ECtHR (GC)
Kuznetsov v Russia (Application No 10877/04) (unreported) 23 October 2008, ECtHR
Lambeth London Borough Council v Grant [2021] EWHC 1962 (QB)
Norwood v Director of Public Prosecutions [2003] EWHC 1564 (Admin); [2003] Crim LR 888, DC
R v Brown (James Hugh) [2022] EWCA Crim 6; [2022] 1 Cr App R 18, CA
R v E [2018] EWCA Crim 2426; [2019] Crim LR 151, CA
R v R [2015] EWCA Crim 1941; [2016] 1 WLR 1872; [2016] 1 Cr App R 20, CA
R (AB) v Secretary of State for Justice [2021] UKSC 28; [2022] AC 487; [2021] 3 WLR 494; [2021] 4 All ER 777, SC(E)
R (Leigh) v Comr of Police of the Metropolis [2022] EWHC 527 (Admin); [2022] 1 WLR 3141
R (Ullah) v Special Adjudicator [2004] UKHL 26; [2004] 2 AC 323; [2004] 3 WLR 23; [2004] 3 All ER 785, HL(E)
Richardson v Director of Public Prosecutions [2014] UKSC 8; [2014] AC 635; [2014] 2 WLR 288; [2014] 2 All ER 20; [2014] 1 Cr App R 415, SC(E)
Taranenko v Russia (Application No 19554/05) (unreported) 15 May 2014, ECtHR

The following additional cases were cited in argument or referred to in the skeleton arguments:

Connolly v Director of Public Prosecutions [2007] EWHC 237 (Admin); [2008] 1 WLR 276; [2007] 2 All ER 1012; [2007] 2 Cr App R 43, DC
Cuadrilla Bowland Ltd v Persons Unknown [2020] EWCA Civ 9; [2020] 4 WLR 29, CA
Director of Public Prosecutions v Barnard [2000] Crim LR 371
Director of Public Prosecutions v Jones (Margaret) [1999] 2 AC 240; [1999] 2 WLR 625; [1999] 2 All ER 257; [1999] 2 Cr App R 348, HL(E)
Lashmankin v Russia (Application Nos 57818/09, 51169/10, 4618/11, 19700/11, 31040/11, 47609/11, 55306/11, 59410/11, 7189/12, 16128/12, 16134/12, 20273/12, 51540/12, 64243/12, 37038/13) (2017) 68 EHRR 1, ECtHR
Manchester City Council v Pinnock (Nos 1 and 2) [2010] UKSC 45; [2011] 2 AC 104; [2010] 3 WLR 1441; [2011] PTSR 61; [2011] 1 All ER 285, SC(E)
Manchester Ship Canal Developments Ltd v Persons Unknown [2014] EWHC 645 (Ch)
National Highways Ltd v Persons Unknown [2021] EWHC 3081 (QB)
R (Laporte) v Chief Constable of Gloucestershire Constabulary [2006] UKHL 55; [2007] 2 AC 105; [2007] 2 WLR 46; [2007] 2 All ER 529, HL(E)
RMC LH Co Ltd v Persons Unknown [2015] EWHC 4274 (Ch)
Secretary of State for Transport v Cuciurean [2021] EWCA Civ 357, CA
Steel v United Kingdom (Application No 24838/94) (1998) 28 EHRR 603, ECtHR
Whitehead v Haines [1965] 1 QB 200; [1964] 3 WLR 197; [1964] 2 All ER 530, DC
UK Oil and Gas Investments plc v Persons Unknown [2018] EWHC 2252 (Ch); [2019] JPL 161

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

On 21 September 2021, after a trial before Deputy District Judge Evans in the City of London Magistrates' Court, the defendant, Elliott Cuciurean,

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A was acquitted of the offence of aggravated trespass contrary to section 68(1) of the Criminal Justice and Public Order Act 1994. The prosecution appealed by way of case stated. The questions for the opinion of the High Court are set out in the judgment of the court, post, para 3.

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

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

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

The court took time for consideration.

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

Introduction

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

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

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

> "1. Was is it open to me, having decided that the defendant's article 10 G and 11 rights were engaged, to acquit the defendant on the basis that, on the facts found, the claimant had not made me sure that a conviction for the offence under section 68 was a reasonable restriction and a necessary and proportionate interference with the defendant's article 10 and 11 rights applying the principles in *Ziegler*?
>
> "2. In reaching the decision in (1) above, was I entitled to take into H 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;

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(2) If the defendant's prosecution did engage those rights, a conviction for the offence of aggravated trespass is—intrinsically and without the need for a separate consideration of proportionality in individual cases—a justified and proportionate interference with those rights. The decision in *Ziegler* did not compel the judge to take a contrary view and undertake a *Ziegler*-type fact-sensitive assessment of proportionality; and

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

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

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

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

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

9 Applying well-established principles set out in *R v R* [2016] 1 WLR 1872, paras 53–54, *R v E* [2019] Crim LR 151, paras 17–27 and *Food Standards Agency v Bakers of Nailsea Ltd* [2020] CTLC 324, paras 25–31, we are prepared to deal with ground 2. It involves a pure point of law arising from the decision of the Supreme Court in *Ziegler* which, according to the defendant, would require a proportionality test to be made an ingredient of any offence which impinges on the exercise of rights under articles 10 and 11 of the Convention, including, for example, theft. There are many public protest cases awaiting determination in both the magistrates' and Crown Courts which are affected by this issue. It is desirable that the questions which arise from *Ziegler* are determined as soon as possible.

Section 68 of the Criminal Justice and Public Order Act 1994

10 Section 68 of the 1994 Act as amended reads:

> "(1) A person commits the offence of aggravated trespass if he trespasses on land and, in relation to any lawful activity which persons are engaging in or are about to engage in on that or adjoining land, does

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A there anything which is intended by him to have the effect— (a) of intimidating those persons or any of them so as to deter them or any of them from engaging in that activity, (b) of obstructing that activity, or (c) of disrupting that activity."

"(2) Activity on any occasion on the part of a person or persons on land is 'lawful' for the purposes of this section if he or they may engage in the B 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.]

C "(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 D 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, para 4):

"(i) the defendant must be a trespasser on the land; (ii) there must be a E 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 F 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

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

H 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.

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A

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.

B

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

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

C

D

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

E

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

F

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

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

G

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

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

H

(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 para 12). Accordingly, in determining a criminal charge where issues under articles 10 and 11 of the Convention are raised, the court is obliged to take account of those rights;

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

B (iii) Accordingly, before the court could find the defendant guilty of the offence charged under section 68, it would have to be satisfied by the prosecution so that it was sure that a conviction would be a proportionate interference with his rights under articles 10 and 11. Whether a conviction would be proportionate should be assessed with regard to factors derived from *Ziegler* (at paras 71–78, 80–83 and 85–86). This required a fact-sensitive assessment.

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

25 The judge made the following findings:

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

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

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

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

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

"6. He did not act violently.

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

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

G "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.

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

"13. Taking into account the above, even though there was a delay of 2.5 days and total cost of £195,000, I found that the [prosecution] had not made me sure to the required standard that a conviction for this

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offence was a necessary and proportionate interference with the defendant's article 10 and 11 rights." A

Convention rights

26 Article 10 of the Convention provides:

"*Freedom of expression* B

"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, C 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 D 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 E 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 F 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* G

"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 H 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

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A 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)).

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

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

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

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

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

36 The defendant relied on decisions where a protest intentionally disrupting the activity of another party has been held to fall within G articles 10 and 11 (e g *Hashman and Harrup v United Kingdom* (1999) 30 EHRR 241, para 28). However, conduct deliberately obstructing traffic or seriously disrupting the activities of others is not at the core of these Convention rights (*Kudrevičius*, para 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 H right of peaceful assembly *in a public place*, may be considered to be a "reprehensible act" within the meaning of Strasbourg jurisprudence, so as to justify a criminal sanction (*Kudrevičius* at paras 149 and 172–174; *Ezelin* at para 53; *Barraco v France* (Application No 31684/05) (unreported) 5 March 2009 at paras 43–44 and 47–48).

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

40 Instead, we gain much assistance from *Appleby v United Kingdom* (2003) 37 EHRR 38. There the applicants had sought to protest in a privately owned shopping mall about the local authority's planning policies. There does not appear to have been any formal public right of access to the centre. But, given the nature of the land use, the public did, of course, have access to the premises for shopping and incidental purposes. The Strasbourg court decided that the landowner's A1P1 rights were engaged (para 43). It also observed that a shopping centre of this kind may assume the characteristics of a traditional town centre (para 44). None the less, the court did not adopt the applicants' suggestion that the centre be regarded as a "quasi-public space".

41 Instead, the court stated at para 47:

> "[Article 10], notwithstanding the acknowledged importance of freedom of expression, does not bestow any freedom of forum for the exercise of that right. While it is true that demographic, social, economic 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. The corporate town where the entire

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A municipality is controlled by a private body, might be an example (see *Marsh v Alabama* [(1946) 326 US 501], cited at para 26 above)."

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

42 The example given by the court at the end of that passage in para 47 shows the rather unusual or even extreme circumstances in which it *might* be possible to show that the protection of a landowner's property rights has the B 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 (para 48).

43 Likewise, *Taranenko v Russia* (Application No 19554/05) (unreported) 15 May 2014 does not assist the defendant. At para 78 the C court restated the principles laid down in *Appleby* at para 47. The protest in that case took place in the Administration Building of the President of the Russian Federation. That was a public building to which members of the public had access for the purposes of making complaints, presenting petitions and meeting officials, subject to security checks (paras 25, 61 and 79). The qualified public access was an important factor.

D **44** The defendant also relied upon *Annenkov v Russia* (Application No 31475/10) (unreported) 25 July 2017. There, a public body transferred a town market to a private company which proposed to demolish the market and build a shopping centre. A group of business-people protested by occupying the market at night. The Strasbourg court referred to inadequacies in the findings of the domestic courts on various points. We note that any entitlement of the entrepreneurs, and certain parties who E 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.

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

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are subject to limitations or restrictions which are prescribed by law and necessary in a democratic society. Those limitations and restrictions include the law of trespass, the object of which is to protect property rights in accordance with A1P1. On the other hand, property rights might have to yield to articles 10 and 11 if, for example, a law governing the exercise of those rights and use of land were to destroy the essence of the freedom to protest. That would be an extreme situation. It has never been suggested that it arises in the circumstances of the present case, nor more generally in relation to section 68 of the 1994 Act. It would be fallacious to suggest that, unless a person is free to enter upon private land to stop or impede the carrying on of a lawful activity on that land by the landowner or occupier, the essence of the freedoms of expression and assembly would be destroyed. Legitimate protest can take many other forms.

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

> "By definition, trespass is unlawful independently of the 1994 Act. It is a tort and committing it exposes the trespasser to a civil action for an 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 for the Protection of Human Rights and Fundamental Freedoms were misplaced. Of course a person minded to protest about something has such rights. But the ordinary civil law of trespass constitutes a limitation on the 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 JSC (see para 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 JSC. The dictum should be accorded very great respect. In our judgment it is consistent with the law on articles 10 and 11 and A1P1 as summarised above.

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

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A 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

B 51 The defendant's case falls into two parts. First, Mr Tim Moloney QC submits that the Supreme Court in *Ziegler* [2022] AC 408 had decided that in any criminal trial involving an offence which has the effect of restricting the 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 C *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 defendant submits that the court cannot allow the appeal under ground 2 without going on to D 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 E 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 Tom 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 F any interference with those rights. Before turning to *Ziegler,* we consider the case law on this subject, for section 68 and other offences.

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

55 Liberty did not suggest that section 68 involved a disproportionate interference with rights under articles 10 and 11 (para 37). But Moses LJ

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accepted that it was necessary to ensure that criminal liability is not imposed on those taking part in a peaceful protest because others commit offences under section 68 (referring to *Ezelin*). Accordingly, he held that the prosecution must prove that those present at and participating in a demonstration are themselves guilty of the conduct element of the crime of aggravated trespass (para 38). It was in this context that he said at para 39:

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

56 Moses LJ then went on to say that his earlier judgment in *Dehal v Crown Prosecution Service* (2005) 169 JP 581 should not be read as requiring the prosecution to prove more than the ingredients of section 68 set out in the legislation. If the prosecution succeeds in doing that, there is nothing more to prove, including proportionality, to convict of that offence (para 40).

57 In *James v Director of Public Prosecutions* [2016] 1 WLR 2118, the Divisional Court held that public order offences may be divided into two categories. First, there are offences the ingredients of which include a requirement for the prosecution to prove that the conduct of the defendant was not reasonable (if there is sufficient evidence to raise that issue). Any restrictions on the exercise of rights under articles 10 and 11 and the proportionality of those restrictions are relevant to whether that ingredient is proved. In such cases the prosecution must prove that any such restriction was proportionate (paras 31–34). Offences falling into that first category were the subject of the decisions in *Norwood v Director of Public Prosecutions* [2003] Crim LR 888, *Hammond v Director of Public Prosecutions* (2004) 168 JP 601 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 para 35).

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

60 *James* concerned an offence of failing to comply with a condition 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

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A (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 B 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 (paras 38–43). C *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 of the Convention. D For example, in Scotland a breach of the peace is an offence involving conduct which is likely to cause fear, alarm, upset or annoyance to any reasonable person or may threaten public safety or serious disturbance to the community. In *Gifford v HM Advocate* 2011 SCCR 751, the High Court of Justiciary held that "the Convention rights to freedom of expression and freedom of assembly do not entitle protestors to commit a breach of the E peace" (para 15). Lord Reed added at para 17:

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

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

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

64 The second question certified for the Supreme Court in *Ziegler* [2022] AC 408 related to the "lawful excuse" defence in section 137 of the Highways Act (paras 7, 55–56 and 98–99). Lord Hamblen and Lord Stephens JJSC referred at para 16 to the explanation by the Divisional Court

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about how section 137 should be interpreted compatibly with articles 10 and 11 in cases where, as was common ground, the availability of the "lawful excuse" defence "depends on the proportionality assessment to be made".

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

66 Likewise, *Ziegler* was only concerned with protests obstructing a highway where it is well-established that articles 10 and 11 are engaged. The Supreme Court had no need to consider, and did not address in their judgments, the issue of whether articles 10 and 11 are engaged where a person trespasses on private land, or on publicly owned land to which the public has no access. Accordingly, no consideration was given to the statement in *Richardson* [2014] AC 635, para 3 or to cases such as *Appleby* 37 EHRR 38.

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

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

69 We are unable to accept the defendant's submission that section 6 of the 1998 Act requires a court to be satisfied that a conviction for an offence would be proportionate whenever articles 10 and 11 are engaged. Section 6 applies if both (a) Convention rights such as articles 10 and 11 are engaged and (b) proportionality is an ingredient of the offence and therefore something which the prosecution has to prove. That second point depends 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

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A 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, B 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 the 1998 Act would arise. If granted, it would remain a matter for Parliament to decide whether, and if so how, the C 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 D 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) 57 EHRR 21).

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 E 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 F 11 rights that may be engaged.

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

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

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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. A

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. B

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. C

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

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

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* [2022] AC 408 nor section 3 of the 1998 Act requires a new ingredient to be inserted into section 68 which entails the prosecution proving that a conviction would be proportionate in Convention terms. The appeal must be allowed on ground 2. F

Ground 3

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

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 H

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A national interest. One object of section 68 is to discourage disruption of the kind committed by the defendant, which, according to the will of Parliament, is against the public interest. The defendant (and others who hold similar views) have other methods available to them for protesting against the HS2 project which do not involve committing any offence under section 68, or indeed any offence. The Strasbourg court has often observed that the Convention is concerned with the fair balance of competing rights. B 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.

C **85** The judge accepted arguments advanced by the defendant which, in our respectful view led her into further error. She concluded that there was no inconvenience to the general public or "interference with the rights of anyone other than HS2". She added that the Secretary of State was aware of the presence of the protesters on the Land before he acquired it (in the sense of before completion of the purchase). This last observation does not D 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 defendant did not act violently. But if the defendant had been violent, his E 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 F 20 years and cost billions of pounds. That argument could be repeated endlessly along the route of a major project such as this. It has no regard to the damage to the project and the public interest that would be caused by encouraging protesters to believe that with impunity they can wage a campaign of attrition. Indeed, we would go so far as to suggest that such an interpretation of a Human Rights instrument would bring it into disrespect.

G **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 H which have been made about the decision in *Ziegler* [2022] AC 408:

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

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

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

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

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

JO MOORE, Barrister

A B C D E F G H

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Neutral Citation Number: [2023] EWHC 2013 (KB)

Case No: CLAIM NO. QB-2022-002577

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/08/2023

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

ESSO PETROLEUM COMPANY LIMITED	**Claimant**
- and -	
(1) SCOTT BREEN **(2) THE PERSONS UNKNOWN WHO ARE DESCRIBED IN ANNEX 1 TO THE CLAIM FORM DATED 10 AUGUST 2022**	**Defendants**

- -
- -

Timothy Morshead KC and Yaaser Vanderman (instructed by **Eversheds Sutherland (International) LLP**) for the **Claimant**
The Defendants did not appear and were not represented

Hearing date: 13 February 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 31 August 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Julian Knowles:

Introduction

1. This is an application by the Claimant for a permanent injunction to restrain unlawful protests by the Defendants in relation to its Southampton to London Oil Pipeline Project. When it is completed, the Pipeline will stretch for over 100 km across southern England and terminate at the West London Terminal storage facility in Hounslow. It is referred to in places in the evidence as the SLP/SLPP (Southampton – London Pipeline (Project)). I will simply call it 'the Pipeline'.

2. It is being built pursuant to the Southampton to London Pipeline Development Consent Order 2020 (SI 2020/1099) (the DCO). The Explanatory Note to the Order says:

> "This Order grants development consent to Esso Petroleum Company, Limited to construct and maintain an underground pipeline commencing at Boorley Green, Hampshire and terminating at West London Terminal storage facility in the London Borough of Hounslow.
>
> The Order also includes provisions in connection with the maintenance of the authorised development."

3. On 15 August 2022, on the Claimant's without notice application, Eyre J granted an interim injunction against one named individual and persons unknown. This prevented various types of protest, including damaging anything which is being used to construct the Pipeline, within the geographical limits set by the DCO (which I will call the Order Limits); traversing fences, etc, in order to enter such land; digging excavations; and protesters locking themselves to anything or any person, etc. The injunction was later amended by Ritchie J under the slip rule to correct a minor error.

4. On the return date, two interested parties (Jane Everest and Hannah Shelley) who oppose the Pipeline and who have taken part in protests, attended by counsel. They opposed the continuation of the injunction.

5. In a reserved judgment handed down on 21 October 2022, HHJ Lickley KC, sitting as a judge of the High Court, ruled in favour of the Claimant and ordered that the injunction should continue, with directions for a trial to be heard in February 2023. His decision is reported at [2022] EWHC 2664 (KB).

6. The trial came on for hearing before me. I heard from Mr Morshead KC for the Claimant. The Defendants did not appear and were not represented, and nor were the Interested Parties. There was accordingly no opposition to the order sought. I reserved judgment and continued the interim injunction until further order.

Factual background

7. This is gratefully adapted from the judgment of HHJ Lickley KC. Like him, I make clear at the outset that I am not concerned with the rights and wrongs of the Pipeline, nor the wider issue of fossil fuels. Parliament has approved construction of the

Pipeline, and my task is solely to determine whether the Claimant is entitled to the injunction it seeks, based upon the evidence and submissions I have read and heard.

8. There are in evidence various witness statements from those involved in constructing the Pipeline. The history is principally set out in the first witness statement of Jon Anstee De Mas of 10 August 2022 and was not challenged before the judge on the last occasion, nor before me. Mr Anstee De Mas is the Claimant's Land and Pipeline Technical Lead.

9. In summary, the Claimant owns and operates a network of oil pipelines from its refinery in Fawley, Southampton, to fuel terminals across England. One such pipeline conveys aviation jet fuel to the Claimant's West London Terminal at Heathrow Airport. The old pipeline was installed and operated from 1972. The Pipeline runs for 105 km. The initial 10 km of the old pipeline was replaced in 2001. The remaining 95 km has been determined to be in need of replacement. The new section of Pipeline comprises 90 km of underground pipeline.

10. The works are designated as a Nationally Significant Infrastructure Project under the Planning Act 2008. The DCO was preceded by a wide ranging consultation exercise from 2017 which involved local authorities and the public. The public consultation exercise included asking for views on a preferred route within the corridor of the existing pipeline. Part of that exercise included indications of potential environmental impacts. Other consultations and assessments were carried out.

11. In June 2019 the Claimant's application for a DCO was accepted by the Planning Inspectorate for examination. The DCO was granted on 7 October 2020. The DCO authorises the Pipeline to be laid within the limits of deviation shown on the works plans. The area in which works are authorised, including the Pipeline itself, are geographically confined by the terms of the DCO to a strip of land of varying width (often 30m wide) (ie, the Order Limits). The area concerned is wider than the Pipeline itself, in order to accommodate the space needed along the route for working and for storage compounds etc.

12. Mr Anstee De Mas provided the detail of the operational parameters and how the majority of the works are undertaken on third party land, some of which is subject to public and private rights of way, whilst the remainder are street works on the public highway.

13. When operating on the land of third parties, the Claimant is doing so by way of Option Agreements with landowners, Deeds of Easement or under Compulsory Acquisition Powers contained in the DCO. Some Crown land is also included.

14. The ownership of machinery, plant and other materials including sections of pipe belongs to third parties, such as contractors, until ownership is transferred to the Claimant. The Claimant also owns some items. The works are expected to be completed in late 2023.

15. Part of the pipe laying process requires that segments of the pipe are left above ground; this is described as 'stringing out'. Segments are welded together above ground and lowered into a trench. Other techniques are also used. The effect is that large amounts

of pipeline are on display to the public, together with heavy plant and machinery, at multiple sites along the length of the works within the Order Limits . The DCO requires the Claimant to erect temporary fencing to mark construction sites in order to keep the public away from dangerous operations. The type of fencing used varies, and is not designed to be fully secure.

16. In his evidence Mr Anstee De Mas described some incidents that have affected the construction of the Pipeline. In total he described 15 incidents at various sites from 19 December 2021 to 1 August 2022. The following is a summary:

    a. 19 December 2021, Alton compound. Protestors cut through the compound fence, damaged vehicles and attempted to damage the security system. A message was sent indicating an intention to stop the Pipeline on 1 January 2022 from a Twitter account for a group called 'Stop Exxon SLP'. The message referred back to the events of the 19 December 2021 at the compound. The government's failure to act to avert the climate crisis was said to be a reason to, 'please halt all new fossil fuel infrastructure'. Photographs of the damage have been produced.

    b. 2 February 2022, Queen Elizabeth Park, Farnborough. A number of protesters, with banners, attended the car park within the Order Limits and formed a blockade across the entrance. Work was stopped for the day that was intended to involve surveys and the clearing of trees. Messages claiming responsibility from the 'XR Group' were posted later with photographs. 'XR' is the group Extinction Rebellion.

    c. 15 February 2022, Queen Elizabeth Park, Farnborough. This was similar to the event on 2 February 2022, however the works were not disrupted.

    d. 4 May 2022, Hartland Lodge, Farnborough. Overnight protestors tampered with security fences. Barbed wire was removed from the top of a fence and a hole was cut in a second fence.

    e. 17 June 2022, Halebourne Lane compound. Damage was caused by protestors to plant belonging to Flannery Plant hire with repair costs of £11,000. A protest group 'Pipe Busters' claimed responsibility on 22 June 2022.

    f. 17 June 2022, Blind Lane, Surrey Heath. Protestors gained access to the site and damaged a section of pipe that was above ground including spraying it with slogans including 'No SLP'. The repairs necessary cost £8000. 'Pipe Busters' claimed responsibility on 22 June 2022 with a message and photographs showing someone using an angle grinder to damage the pipe. The message was that peaceful action was taken to halt expansion of the pipeline.

    g. 25 June 2022, Naishes Lane, Church Crookham. Protestors gained access, said to be unlawful, by unbolting Heras fencing panels and conducting a staged funeral with a child sized coffin that was laid into a pipeline trench. The protest was within the Order Limits. A local XR group later claimed responsibility.

    h. 4 July 2022, Flannery Plant hire. Contractors engaged in the works were visited by protestors at their head office in Wembley. Posters were put up and the main entrance door locks were glued. Messages were posted by 'Pipe Busters' warning

the company to stop working on the SLP or ‘we will find you complicit in ecocide and will take steps to ensure your equipment cannot cause any further harm’.

i. 9 July 2022. Excavators belonging to Flannery Plant hire were damaged at sites near Fleet, Hampshire, within the Order Limits. The repair costs were estimated to be £5000.

j. 31 July 2022, a protestor Scott Breen (the First Defendant) dug a pit at land east of Pannells Farm. The land is owned by Runnymede Borough Council and is within the Order Limits. On 1 August 2022 Mr Breen released a press statement through Facebook and later a video stating his purpose was to disrupt the Pipeline and to stop the expansion of the pipe by direct action. The police attended the site and maintained contact with Mr Breen. The police told the Claimant’s staff that it was a civil matter and that they would not consider the offence of aggravated trespass. Mr Breen was subsequently committed to prison for contempt on 6 September 2022 by Ritchie J, having breached the earlier order. An appeal was allowed in part but the prison sentence was maintained: [2022] EWCA Civ 1405.

k. 1 August 2022, Sandgates Encampment. This encampment was set up to support Scott Breen. Despite the order being made on the 15 August 2022, Scott Breen remained within the pit and the DCO Order Limits .

17. At [13] of his judgment HHJ Lickley KC said this:

> “Jon Anstee de Mars has set out why the injunction is still required namely to prevent further action and disruption. He says an unknown number of individuals have taken part in the protests who were supported by known organisations, the campaign against the SLP is longstanding and is designed to stop the pipeline construction, protests against the fossil fuel industry remain active across the UK and the Interested Persons themselves have said they wish to continue protesting. It has been said in argument that the injunction has worked as no other disruptive protest action has been reported since the order was made.”

18. In his fifth witness statement of 30 January 2023, prepared for the hearing before me, Mr Anstee De Mas provided updating evidence and set out a number of reasons why a permanent injunction is necessary. He said that whilst XR announced at the end of 2022 that it was stopping its campaign of civil disobedience, Just Stop Oil had made public pronouncements that it would continue with such activities. During 2022 there were hundreds of arrests of Just Stop Oil protesters, in particular in relation to the Kingsbury oil terminal in Staffordshire.

Submissions

19. On behalf of the Claimant, Mr Morshead submitted as follows.

20. As the evidence, and current affairs reports of the disruption of events by Just Stop Oil in particular make clear, there is a continuing need to restrain unlawful protests in relation to the Pipeline. The Claimant adopts and relies on the judgment of HHJ Lickley KC and the updating evidence of Mr Anstee De Mas in his fifth witness statement. He said that it is plain that the Pipeline has, for some time now, been the target of unlawful protests, and that the protesters have not gone away.

21. The First Defendant is a known tunneller who was committed to prison in September 2022 for 112 days for contempt by breaching Eyre J's injunction. The Second Defendants are 'Persons Unknown' and are described in Annex 1 to the Claim Form by reference to the types of activity there specified.

22. Further committal applications were made against an individual named Anthony Green and an individual known as Roz Aroo. Mr Green eventually admitted that he had breached the order of Eyre J in providing assistance to the First Defendant and apologised to the Court. In light of various undertakings he gave, including not to breach the interim injunction and any further orders made against the Second Defendant, the Claimant agreed not to pursue the committal application against him. An order dismissing the application, by consent, was made by Bourne J following a hearing on 14 November 2022. Roz Aroo's whereabouts and address have never been definitively determined, and accordingly the committal application against her remains undetermined.

23. The Claimant's underlying cause of action is conspiracy to injure its business by unlawful means. The unlawful means in question consist of the actual and threatened private nuisances and trespasses to goods and to land which the Claimant has experienced. The subject of the unlawful acts that took place in August and September 2022 is substantially the property of third parties (eg, those persons who for the time being have legal ownership of the pipe segments and other 'Items' mentioned in the Particulars of Claim; and those persons who have ownership of the land where the works are taking place). But the protest activities have been primarily aimed at harming or disrupting Claimant's business and they have been coordinated. In the result, the activities/threatened activities also constitute a tort/threat of tort against the Claimant, namely, the tort of conspiracy to injure by unlawful means.

24. The interim application was essential because the actions of protesters demonstrated, and persuaded the Claimant, that their actions had (and have) the capacity to disturb the works in a way which might have serious implications.

25. That state of affairs has not abated. Details of the activities targeting the Pipeline are set out in in various places including: Mr Anstee De Mas, first witness statement, [6.2]-[6.72]; his affirmation dated 25 August 2022, [12]-[18]; Lynn Gardner affirmation of 5 September 2022 (Ms Gardner works for one of the Claimant's security contractors); Lynn Gardner affirmation dated 16 September 2022; Ghulam Rabbani affirmation dated 16 September 2022 (he also works for a security contractor), Mark Edward Ions affirmation dated 16 September 2022, [32]-[44] (he also works for a security contractor); and Mr Anstee De Mas' fourth witness statement of 29 September 2022, [13]. The most recent evidence, including evidence demonstrating the continuing threat posed by the Defendants, is set out in Mr Anstee De Mas' fifth witness statement, to which I have already referred.

26. Mr Morshead said that the activities carried out by some protesters have gone far beyond what might reasonably be regarded as lawful and peaceful protest and have given rise to serious health and safety concerns. The risk of repetition is obvious and 'imminent' in the legally-relevant sense.

The legal test

27. In the next sections of the judgment I have lent on Mr Morshead's thorough Skeleton Argument and his oral submissions.

28. Developing his case, Mr Morshead said there is little difference between an injunction made on an interim basis and one made on a final basis and, in particular, both should have clear temporal limits. An interim order (and indeed a final order, at least if it is otherwise expressed to continue indefinitely) should include provision for periodic review: *London Borough of Barking and Dagenham and others v Persons Unknown* [2023] QB 295, [108] (currently under appeal to the Supreme Court). The application before me is for an injunction until 31 December 2023 (by which time the Claimant hopes that the Pipeline will be completed).

29. For a final order, the claimant must satisfy the Court of the following:

    a. Firstly, the claimant must establish a specific cause of action.

    b. Second, because the application is, in part, brought against persons unknown, the claimant must satisfy the guidance in *Canada Goose UK Retail Ltd v. Persons Unknown* [2020] 1 WLR 2802, [82], insofar as it applies to final relief. I will come to this in a moment.

    c. Third, the claimant must satisfy s 12(2) of the Human Rights Act 1998 as to service. Sections 12(1) and (2) provide:

    > "(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."

    d. Fourth, because the application affects the protesters' rights under Articles 10 and 11 of the European Convention on Human Rights (the Convention), the claimant must show that any interference with those rights is justified.

30. The guidance in [82] of *Canada Goose* is as follows:

> "Building on *Cameron* [2019] 1 WLR 1471 and the *Ineos* requirements, it is now possible to set out the following procedural guidelines applicable to proceedings for interim relief against 'persons unknown' in protestor cases like the present one:
>
> (1) The 'persons unknown' defendants in the claim form are, by definition, people who have not been identified at the time of the commencement of the proceedings. If they are known and have been identified, they must be joined as individual defendants to the proceedings. The 'persons unknown' defendants must be people who have not been identified but are capable of being identified and served with the proceedings, if necessary by alternative service such as can reasonably be expected to bring the proceedings to their attention. In principle, such persons include both anonymous defendants who are identifiable at the time the proceedings commence but whose names are unknown and also Newcomers, that is to say people who in the future will join the protest and fall within the description of the 'persons unknown'.
>
> (2) The 'persons unknown' must be defined in the originating process by reference to their conduct which is alleged to be unlawful.
>
> (3) Interim injunctive relief may only be granted if there is a sufficiently real and imminent risk of a tort being committed to justify *quia timet* relief [now generally referred to as an anticipatory injunction].
>
> (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."

31. I would also (diffidently) draw the reader's attention to my judgment in *High Speed Two (HS2) Limited and another v Four Categories of Persons Unknown and others* [2022] EWHC 2360 (KB), in which I granted an injunction to restrain unlawful protest along the whole of the route of HS2. I conducted an extensive review of domestic and Convention case law, and an application for permission to appeal by the protesters against my judgment was refused by the Court of Appeal.

32. The judgment of Johnson J in *Shell UK Oil Products Limited v Persons Unknown* [2022] EWHC 1215 (QB), [17], also contains a helpful summary of the principles, cast in slightly different terms from Mr Morshead's formulation (this was an application for an interim and not final injunction):

> "(1) There is a serious question to be tried: *American Cyanamid v Ethicon* [1975] AC 396 per Lord Diplock at 407G.
>
> (2) Damages would not be an adequate remedy for the Claimant, but a cross undertaking in damages would adequately protect the defendants; or
>
> (3) The balance of convenience otherwise lies in favour of the grant of the order: *American Cyanamid* per Lord Diplock at 408C-F.
>
> (4) There is a sufficiently real and imminent risk of damage so as to justify the grant of what is a precautionary injunction: *Islington London Borough Council v Elliott* [2012] EWCA Civ 56 per Patten LJ at [28], *Ineos Upstream Ltd v Persons Unknown* [2019] EWCA Civ 515 [2019] 4 WLR 100 per Longmore LJ at [34], *Canada Goose UK Retail Limited v Persons Unknown* [2020] EWCA Civ 303 [2020] 1 WLR 2802 per Sir Terence Etherton MR at [82(3)].

> (5) The prohibited acts correspond to the threatened tort and only include lawful conduct if there is no other proportionate means of protecting the Claimant's rights: *Canada Goose* at [78] and [82(5)].
>
> (6) The terms of the injunction are sufficiently clear and precise: *Canada Goose* at [82(6)].
>
> (7) The injunction has clear geographical and temporal limits: *Canada Goose* at [82(7)] (as refined and explained in *Barking and Dagenham LBC v Persons Unknown* [2022] EWCA Civ 13 per Sir Geoffrey Vos MR at [79] - [92]).
>
> (8) The defendants have not been identified but are, in principle, capable of being identified and served with the order: *Canada Goose* at [82(1)] and [82(4)].
>
> (9) The defendants are identified in the Claim Form (and the injunction) by reference to their conduct: *Canada Goose* at [82(2)].
>
> (10) The interferences with the defendants' rights of free assembly and expression are necessary for and proportionate to the need to protect the Claimant's rights: articles 10(2) and 11(2) of the European Convention on Human Rights (ECHR), read with section 6(1) of the Human Rights Act 1998.
>
> (11) All practical steps have been taken to notify the defendants: section 12(2) of the Human Rights Act 1998.
>
> (12) The order does not restrain 'publication', or, if it does, the Claimant is likely to establish at trial that publication should not be allowed: section 12(3) of the Human Rights Act 1998."

Application in this case

33. Taking those matters in turn, Mr Morshead submitted as follows.

(i) Cause of action

34. The Claimant relies on the tort of conspiracy to injure by unlawful means. The elements of this tort are as follows: see *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29, [18]: (a) an unlawful act by the defendant; (b) done with the intention of injuring the claimant; (c) pursuant to an agreement (whether express or tacit) with one or more other persons; (d) which actually injures the claimant

35. The Claimant frames its cause of action in this way because it does not have a sufficient

degree of possession or control of the whole of the land over which the Pipeline works are taking place to be entitled to plead trespass to land/nuisance directly against trespassers/ causers of nuisance (unlike the claimant in *High Speed Two (HS2) Limited*). Neither does it have sufficient ownership of the various Items targeted by the persons unknown, to be entitled to plead trespass to goods.

36. There are exceptions to this: for example, the Claimant is the freeholder of at least two of the parcels of land affected by the Pipeline project; and on analysis it might turn out that the terms of some, at least, of its licences in relation to other areas are sufficient for those purposes. But it says the picture when viewing the Pipeline project as a whole is a complex tapestry and, further, one which changes over time (for example, as particular Items become integrated into the Pipeline). Mr Morshead said it would be 'excessively granular and impractical' (or, at all events, disproportionate), as well as confusing to potential Defendants, to attempt to identify the multitude of different cases separately, let alone to customise separate forms of relief in relation to different parcels of land. The conspiracy cause of action overcomes this difficulty.

37. On the other hand, compared with a direct cause of action such as trespass, the conspiracy cause of action has the disadvantage (from the point of view of the Claimant) that there might in theory be individuals who commit unlawful acts as genuinely independent actors outside of any conspiracy. The Claimant accepts that such persons would not be captured by the proposed definitions of 'Persons Unknown' in Annex 1 to the Claim Form. But for these reasons, the Claimant has no real alternative that is practical or proportionate in relation to the route of the Pipeline taken as a whole.

38. Taking the four elements of the tort in turn:

    a. *Unlawful act*: subject to one point of nuance mentioned below in relation to the fifth *Canada Goose* factor, the Claimant seeks to restrain only such acts as, by their nature, are themselves necessarily unlawful, whether or not the unlawfulness would be actionable by the Claimant directly (as distinct from the persons who own the Items and/or land in question), apart from the other elements of the tort of conspiracy. Subject to that one point, the unlawfulness consists of one or more of: trespass to land, trespass to goods, or private nuisance. All of the acts in question would be actionable in tort by the person in possession of the particular land where the activity occurs, or by the owner of the relevant Item. (Certain of the restrained acts would also constitute criminal offences (such as criminal damage under s 1(1) of the Criminal Damage Act 1971).

       Mr Morshead said it appears not yet to have been determined judicially that unlawful means conspiracy is available to a claimant who relies on torts committed against another person, as distinct from a breach of contract committed against another person, or a crime. HHJ Lickley KC said at [20]-[27] of his judgment:

       > "20. The claim is brought alleging 'the tort of conspiracy by unlawful means' [Particulars of Claim p.19]. The Claimant has chosen to allege this tort because it does not have a sufficient degree of control or possession of the whole of the land where works are taking place to enable them to plead trespass to land or nuisance against the

individuals concerned. Neither does it have necessary ownership of all of the items targeted and damaged to allege trespass to goods. There are however areas of land and items of property that the Claimant does own. A 'tapestry' of varying owners and rights over property is said to feature over the 90km of the pipeline. To avoid attempting a very detailed and complex exercise in identifying all possible cases, a conspiracy is alleged. The downside for the Claimant is that the actions of an individual acting alone who commits unlawful acts would not be caught. It is said the chosen tort is practical and proportionate.

21. The essential ingredients of the tort are set out in *Cuadrilla Bowland Ltd and others v Person Unknown and others* [2020] EWCA Civ 9 per Leggatt LJ at [18]. The ingredients to be proved to establish liability are (i) an unlawful act by the defendant (ii) done with the intention of injuring the Claimant (iii) pursuant to an agreement (whether express or tacit) with one or more persons and (iv) which actually does injure the Claimant. See also Johnson J in *Shell UK Oil Products Limited v Persons unknown* [2022] EWHC 1215 (QB) at [26].

22. The Interested Persons challenge the availability of the tort selected. An issue arises concerning whether the Claimant can pursue such a cause of action if the unlawful act (this may take many different forms) is not actionable by the Claimant itself. It is important to remember however the need for an intention to injure the Claimant is a key ingredient of the tort. In passing one can envisage a number of factual scenarios where there is a conspiracy to commit a tort or to damage the property of a person that will have a direct and intended consequence to injure and damage another. Johnson J in *Shell* considered this point and concluded that '..it is not necessary to show that the underlying unlawful conduct (to satisfy limb (a)) is actionable by the Claimant. Criminal conduct which is not actionable in tort can suffice (so long as it is directed at the Claimant)' [27] and at [32].

23. In *Revenue and Customs Commissioners v Total Network SL* [2008] 1 AC 1174 the issue was considered. Lord Hope and Lord Walker saw no requirement for an actionable tort at the hands of the claimant to be necessary. Lord Hope at [44] said:

> ‘The situation that is contemplated is that of loss caused by an unlawful act directed at the Claimants themselves. The conspirators cannot, on the

> commissioners' primary contention, be sued as joint tortfeasors because there was no independent tort actionable by the commissioners. This is a gap which needs to be filled. For reasons that I have already explained, I do not accept that the commissioners suffered economic harm in this case.
>
> But assuming that they did, they suffered that harm as a result of a conspiracy which was entered into with an intention of injuring them by the means that were deliberately selected by the conspirators. If, as Lord Wright said in *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435, 462, it is in the fact of the conspiracy that the unlawfulness resides, why should that principle not apply here? As a subspecies of the tort of unlawful means conspiracy, the case is virtually indistinguishable from the tort of conspiracy to injure. The fact that the unlawful means were not in themselves actionable does not seem, in this context at least, to be significant. ….These factors indicate that a conspiracy is tortious if an intention of the conspirators was to harm the Claimant by using unlawful means to persuade him to act to his own detriment, even if those means were not in themselves tortious.'

24. Lord Walker at [94] said:

> 'From these and other authorities I derive a general assumption, too obvious to need discussion, that criminal conduct engaged in by conspirators as a means of inflicting harm on the Claimant is actionable as the tort of conspiracy, whether or not that conduct, on the part of a single individual, would be actionable as some other tort. To hold otherwise would, as has often been pointed out, deprive the tort of conspiracy of any real content, since the conspirators would be joint tortfeasors in any event (and there are cases discussing the notion of conspiracy emerging into some other tort, but I need not go far into those.'

25. Finally, in *Ineos Upstream Limited v Persons Unknown* [2017] EWHC 2945 (Ch), a case concerning protests at sites used for shale gas extraction (fracking), Morgan J did not disapprove of the Claimant's choice of unlawful act conspiracy given the facts at [59]. He said:

> ‘The tort of conspiracy allows a victim of a conspiracy to sue where the acts are aimed at that victim even where the unlawful behaviour has its most direct impact on a third party. The other value of the tort of conspiracy from the Claimant's point of view is that it enables them to claim a remedy on a civil court for breach of a criminal statutes where the conduct in question does not, absent a conspiracy, lead to civil liability.’

26. On the facts set out in the witness statements, the Claimant has a strong case given the incidents that have occurred which included and involved trespass to land and trespass to goods including causing significant damage to property. Criminal offences have been committed in some instances. The intention of those participating can thus be demonstrated from the facts themselves to be to stop or interrupt the work and thereby cause damage to the Claimant. In addition, if more proof of intention were needed, the social media messages and photos that follow the events demonstrate not only who is responsible but the aims and thereby the intentions of those taking such action.

27. The weight of authority strongly supports the proposition that the unlawful means need not be actionable at the suit of the Claimant. Accordingly, the chosen cause of action is available to the Claimant. Given the facts, in my judgment, they are likely to succeed. On any view, there is a serious issue to be tried. I deal with S.12.(3) Human Rights Act 1998 below.”

In addition to the points made by the judge, the Supreme Court has held that a contempt of court consisting of a breach of an injunction counts as ‘unlawful means’ sufficient to support this cause of action, whether or not contempt of court is also an actionable tort in its own right. The rationale is that what makes conduct by a defendant actionable, is the absence of lawfulness in what the defendant has done, combined with the conspiracy element: as distinct from the question of whether or not the claimant would otherwise have had an independent cause of action against the defendant for the conduct in question. For this, see *JSC BTA Bank v. Ablyazov* [2020] AC 727, [10]-[11] *per* Lord Sumption and Lord Lloyd-Jones. In a nutshell: means are unlawful for the purposes of this tort, if the defendant had no legal right to use them.

That rationale applies universally within the conspiracy tort on which the Claimant relies. Therefore, it is unsustainable in point of law (and logic) to suggest that the commission of a tort is incapable of comprising the ‘unlawful means’ element of an actionable conspiracy.

Further, recognising that the conspiracy tort is available in the present circumstances enables the law to provide an effective, practical solution to a genuine problem. It is the policy of the law to favour such outcomes, where they are available within the law: eg, *per* Lord Neuberger in *DEFRA v. Meier* [2009] 1 WLR 2780, [59]. Under such circumstances, it would require compelling reasons of principle or precedent to justify defeating that outcome. None is apparent.

b. *Done with the intention of injuring the claimant*: in the case of an unlawful means conspiracy, the authorities do not suggest that it is necessary for the intention of injuring the claimant to be the predominant purpose of a defendant. By contrast, a requirement of such 'predominance' is the distinctive feature of a *lawful* means conspiracy (*per* Popplewell J in *FSDEA v Dos Santos* [2018] EWHC 2199, [31]) – but this is not the tort on which the Claimant in this case relies.
In the present case, the proposed order only applies to acts done 'with the intention of preventing or impeding construction of the Southampton to London Pipeline Project'. This formulation is appropriate for present purposes: see eg *Cuadrilla*, [30].

c. *Pursuant to an agreement with one or more other persons*: the proposed order applies only to acts done 'by express or implied agreement with any other person'.

d. *Which actually injures the claimant*: it appears from the evidence that the conscious aim of those engaging in these protests is to disrupt the construction of the Pipeline. It really goes without saying that activity which succeeds in this objective will injure the Claimant, but nevertheless Mr Anstee De Mas confirmed this in his first witness statement of 10 August 2022, [9.2]-[9.7].

39. Accordingly, Mr Morshead said that the Claimant has proved a cause of action sufficient to found this injunction application.

(ii) The Canada Goose guidance

40. *Canada Goose* involved protests outside a shop selling clothing products which use fur. Taking the *Canada Goose* requirements in turn (from [82] of the judgment), and Mr Morshead's submissions in relation to each:

> "(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'.'

With the exception of the First Defendant, Anthony Green and Roz Aroo, the Claimant has not identified any persons who can properly be named as defendants to the claim on the basis that there is a real risk of them carrying out any of the acts proscribed by the injunction.

As to the First Defendant: the facts are in Mr Anstee De Mas first witness statement at [6.54.1] to [6.54.12]; his affirmation of 25 August 2022 at [12]-18]; and in Lynn Gardner's affirmation of 5 September 2022.

As to Anthony Green: the facts are in the affirmations of Mark Edward Ions; Lynn Gardner; and Ghulam Rabbani. There is also a statement from Mr Green admitting breaches of Eyre J's order and undertakings from him.

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

This has been achieved in the headers to the relevant court documents: see Annex 1 to the Particulars of Claim.

"(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."

Although expressed by reference to interim relief, the Claimant accepts that for all practical purposes the like requirement applies in the case of a final injunction.
In the present case, the threat of the tort is demonstrated by:

a. The incidents of actual disruption which have already taken place and which are described in Mr Anstee De Mas' first witness statement [6.2]–[6.72]; his affirmation at [12]-[18]; the two affirmations of Lynn Gardner from September 2022; the affirmation of Mark Edward Ions; the affirmation of Lynn Gardner; and the affirmation of Ghulam Rabbani.

b. The explicit and continuing threats of disruption made by protest groups/organisers, as identified by Mr Anstee De Masat [7.4]–[7.28] of his first witness statement; and [21]-[36] of his fifth witness statement.
In relation to the geographical extent of the final order sought, the Claimant adopts the reasoning of HHJ Lickley

KC at [55]; and of myself in *HS2*. On behalf of the protesters, it was suggested that the shape/size of the area in question meant that 'imminent danger of very substantial damage' had not been demonstrated. I rejected that argument in *HS2* at [175–177] and [215]:

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

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

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

177. In other words, adopting the *Hooper v Rogers* approach that the degree of probability of future injury is not an absolute standard, and that what is to be aimed at is justice between the parties, having regard to all the relevant circumstances, I am satisfied that (all other things being equal) a precautionary injunction is appropriate given the protesters' expressed intentions. To accede to

D6's submission would, it seems to me, be to licence the sort of 'guerrilla tactics' which the Lord Chief Justice deprecated in *DPP v Cucicirean*.

…

215. I have anxiously considered the geographical extent of the injunction along the whole of the HS2 route, and whether it should be more limited. I have concluded, however, given the plain evidence of the protesters' intentions to continue to protest and disrupt without limit – 'let's keep fucking up HS2's day and causing as much disruption and cost as possible. Coming to land near you' – such an extensive injunction is appropriate. The risks are real and imminent for the reasons I have already given. I accept that the Claimants have shown that the direct action protests are ongoing and simply move from one location to another, and that the protesters have been and will continue to cause maximum disruption across a large geographical extent. As the Claimants put it, once a particular protest 'hub' on one part of HS2 Land is moved on, the same individuals will invariably seek to set up a new hub from which to launch their protests elsewhere on HS2 Land. The HS2 Land is an area of sufficient size that it is not practicable to police the whole area with security personnel or to fence it, or make it otherwise inaccessible."

"(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."

The proposed order sets out the proposed means of service of the order (eg, via social media; see draft order at [9]) and of the proceedings. Mr Anstee De Mas explained the rationale in his first witness statement at [14.4]. The proposed method is reasonably likely to bring the proceedings and the order to the notice of potential 'Persons Unknown'" defendants. Such service provisions have been included in the order of Eyre J and the order of HHJ Lickley KC without any issues arising.

"(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."

The proposed order tracks the threatened torts and subject to what is said in the next paragraph does not seek to prohibit lawful conduct.

The possible exception (which the Claimant assumes for present purposes, though it is not conceded) is that in theory there might be no actionable wrong done by a person who, on public land, merely climbs over a compound fence and does nothing more; or by a person whose mere presence on public land is enough to obstruct the construction works. There may be other examples but they are not easy to think of.

In the case of private land, there is no relevant complication, because such persons entering without permission are trespassers whether or not the activities they undertake on the land are otherwise actionable. It is a problem specific to highways and other public land.

I come back to the point of nuance I mentioned earlier.

This nuance arises because the Order Limits include some highways, as well as some other areas of land to which the public has access. For reasons stated by Mr Anstee De Mas in his first witness statement at [5.12]–[5.15] and which are really self-evident from the scale of the project, the Claimant says it would be wholly impractical to attempt to identify the different parcels of land and apply different controls to them. Instead, the relief proposed by the order is in all cases the minimum means of protecting the Claimant's rights that is proportionate.

So, in particular, the proposed order does not seek to restrain protesters from entering the Order Limits: this would be the simplest solution, but the Claimant considers that it is too broad to adopt as a general measure. Instead, the proposed injunction seeks to control what people *do within* the Order Limits, and the controls which it imposes on public land would not amount to any interference with any right exercised by any member of the public on such land who was not part of the alleged conspiracy.

For example, the Claimant says that it is proportionate that fence-climbing and obstruction of the construction works on public land should be prohibited, even if those acts would not otherwise be unlawful in and of themselves (for example, because of an exercise by protesters of their rights to use the highway). The particular activity might not be unlawful in and of itself. But significant protection

is built into the proposed order because a person will only become a defendant (and breach the proposed order) if the conspiracy elements are present in his or her case. Nothing less than this can vindicate the Claimant's rights.

Further, the DCO process (in which none of the protest movements made any representation) was conclusive that the Pipeline is in the public interest and indeed a matter of strategic national importance. In such circumstances, creating a bespoke 'carve out' from the effect of the proposed order in relation to private land, to deal with the peculiarities of public land, can hardly be said to be proportionate: it would be tantamount to an invitation to protesters to focus their activities in areas of land to which the public has access.

Overall, to the extent that *some* lawful activity on the highway might be captured and rendered unlawful by the injunction, it is no more than the least which is required to give effective protection to the Claimant's rights. The correct prism for this balancing exercise is explained in the authorities mentioned below. On highway land (unlike private land) Articles 10 and 11 are engaged (eg *per DPP v. Cuciurean* [63]–[69]). This means that any interference with those rights on the highway must be proportionate having regard to the circumstances. But those circumstances include in particular the need to vindicate the Claimant's own rights, including its own Convention rights. Any interference with Articles 10 or 11 on the highway which might emerge from the order is minor and (this, ultimately, the Claimant says is what counts) certainly proportionate given what is at stake in this case - where a strategically national important project has been explicitly threatened by persons who mean to stop it.

The Claimant also points to the terms of the order I made in *HS2* (see [188]–[193]) and notes the fact that the injunction sought by the Claimant in this case is much more narrowly tailored.

For reasons given, therefore, this is a proportionate intervention given the unusual facts of the case.

"(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."

The proposed order respects all of this guidance. As in *Cuadrilla*, the drafting refers to 'intention'. But this is unavoidable in a conspiracy case. Non-technical language is used, as required.

"(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. …"

So far as concerns temporal limits: the Claimant does not seek an indefinite order with provision for review. Instead, it seeks a final order to last until 31 December 2022. Assuming the expected timetable is achieved, this will allow the project to complete without the need for repeated, costly, reviews in the meantime. If the timetable slips then the Claimant (like anyone else affected by the order) may apply for an extension. The temporal limits are therefore clear.

So far as concerns geographical limits, the relevant circumstances are:

a. The scale of the project which requires the Court's protection, is unusually large. The works are programmed to follow a careful structure which respects site-specific constraints (eg, optimum timeframe for working on environmentally-sensitive land, to minimise risk of harm to flora/fauna) (*per* Mr Anstee De Mas first witness statement at [9.2.2]-[9.2.4]).

b. The works involve the Claimant's contractors in maintaining works compounds surrounded by fences at various locations (demobilized as and when no longer required). Segments of unlaid pipe as well as equipment and other items/material required for the project – the Items – are often stored in such compounds.

c. Such Items are also situated within works sites at the locations where the pipe is actually to be laid. Works sites are fenced or otherwise physically demarcated from the surrounding land.

d. The fences/physical demarcation are not suitable to deter motivated persons from obtaining access.

It can thus be seen that there are four matters to be taken into account when applying the requirement of 'clear geographical limits' to the particular facts of the present case:

a. areas where the Items are situated, are physically demarcated with a fence or otherwise;

b. in some cases, the demarcation will move as and when the works move elsewhere;

c. even where demarcation takes the form of a fence, this is not of a kind which can deter a determined protester from obtaining entry - as experience has shown; and

d. the route of the Pipeline within which these areas are situated is unusually long. It is straightforward to give the order clear geographical limits: the proposed order refers to the DCO Order Limits ". But it is impractical to identify the DCO Order Limits otherwise than by reference to the DCO itself; and equally impractical to identify the areas within the DCO Order Limits where Items are located from time to time.

The proposed order reflects those considerations.

(iii) Section 12(2) of the Human Rights Act 1998 as to service

41. I set out s 12(1) and (2) of the Human Rights Act 1998 earlier.

42. Mr Morshead said that the Claimant has taken all practicable steps to notify the Defendants of these proceedings. In particular:

a. Eyre J's order was served pursuant to paragraphs [10]-[13] of the order in relation to the Defendants: see the second witness statement of Nawaaz Allybokus.

b. The order of Ritchie J, following the hearing on 7 September 2022, which set out the date of this hearing at [5] and was served on the Defendants according to the methods set out in the order of Eyre J: see the third witness statement of Mr Allybokus.

c. The order of HHJ Lickley KC was served on the Defendants according to the methods set out in that order: see the fourth witness statement of Nawaaz Allybokus.

d. The bundle for this hearing was served on the Defendants according to the methods set out in the order of HHJ Lickley KC.

(iv) Articles 10 and 11

43. Mr Morshead said that the Court next had to consider, in the round, whether appropriate weight has been given to the Defendants' qualified rights under Article 10 (freedom of expression) and Article 11 (freedom of assembly) of the Convention. In protest cases, Articles 10 and 11 are linked. The right to freedom of assembly is recognised as a core tenet of a democracy.

44. There exist Strasbourg decisions where protest which disrupted the activity of another party has been held to fall within Articles 10 and 11. But 'deliberately obstructing traffic or seriously disrupting the activities of others is not at the core of these Convention Rights'*: DPP v. Cuciurean* [2022] EWHC 736, [36], and *Attorney General's Reference (No. 1 of 2022)* [2022] EWCA Crim 1259, [86], both per Lord Burnett of Maldon CJ.

45. It is material to have in mind the distinction between protest and persuasion on the one hand, which are proper subjects for protection under Articles 10 and 11; and coercion and compulsion on the other hand, which do not engage those Articles, or do not strongly engage them: see *Cuadrilla,* [94]. Indeed, coercion and compulsion are the antithesis of what a free democratic society can or should tolerate.

46. Further, Articles 10 and 11 do not bestow any 'freedom of forum'*,* and do not include any ancillary right to trespass on private property: *Ineos* (CA) per Longmore LJ at [36]; *Cuciurean* at [40]–[46]. Neither could they reasonably be argued to include an ancillary right to damage private property or to injure others. I considered the relevant Strasbourg principles in *HS2*, [131] et seq.

47. HHJ Lickley KC considered these issues at [43]-[49] of his judgment.

48. Mr Morshead said that, at least in theory, it is possible to imagine a scenario in which the inability to enter unlawfully upon particular property had the effect of preventing the effective exercise of an individual's freedom of expression or assembly. In such a case, barring entry to that property could be said to have the effect of 'destroying the essence of those [Article 10 and 11] rights'. If that were the case, then the State might well be obliged (in the form of the Court) to regulate (ie, interfere with/ sanction interference with) another party's rights in order to vindicate effective exercise of the protester's rights under Articles 10 and 11: see *Cuciurean* at [45]. But that would involve a very unusual situation, which cannot immediately be foreseen, at least in this country, where there are plentiful outlets for lawful protest. And this is plainly not such a case. As Lord Burnett CJ said in *Cuciurean* at [46]:

> "… [i]t 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."

49. In *HS2* I said at [81]:

> "81. A protestor's rights under Articles 10 and 11 of the ECHR, even if engaged in a case like this, will not justify continued trespass onto private land or public land to which the public generally does not have a right of access: see the passage from Warby LJ's judgment in *Cuciurean* I quoted earlier, *Harvil Road*, [136]; and *DPP v Cuciurean* at [45]-[49] and [73]-[77]. There is no right to undertake direct action protest on private land: *Crackley and Cubbington*, [35], [42]. In the most recent of these decisions, *DPP v Cuciurean*, the Lord Chief Justice said:
>
>> '45. We conclude that there is no basis in the Strasbourg jurisprudence to support the respondent's proposition that the freedom of expression linked to the freedom of assembly and association includes a right to protest on privately owned land or upon publicly owned land from which the public are generally excluded. The Strasbourg Court has not made any statement to that effect. Instead, it has consistently said that articles 10 and 11 do not "bestow any freedom of forum" in the specific context of interference with property rights (see *Appleby* at [47] and [52]). There is no right of entry to private property or to any publicly owned property. The furthest that the Strasbourg Court has been prepared to go is that where a bar on access to property has the effect of preventing any effective exercise of rights under articles 10 and 11, or of *destroying* the *essence* of those rights, then it would not exclude the possibility of a State being obliged to protect them by regulating property rights.
>>
>> 46. The approach taken by the Strasbourg Court should not come as any surprise. articles 10, 11 and A1P1 are all qualified rights. The Convention does not give priority to any one of those provisions. We would expect the Convention to be read as a whole and harmoniously. Articles 10 and 11 are subject to limitations or restrictions which are prescribed by law and necessary in a democratic society. Those limitations and restrictions include the law of trespass, the object of which is to protect property rights in accordance with A1P1. On the other hand, property rights might have to yield to articles 10 and 11 if, for example, a law governing the exercise of those rights and use of land were to destroy the essence of the freedom to protest. That would be an

extreme situation. It has never been suggested that it arises in the circumstances of the present case, nor more generally in relation to section 68 of the 1994 Act. It would be fallacious to suggest that, unless a person is free to enter upon private land to stop or impede the carrying on of a lawful activity on that land by the landowner or occupier, the essence of the freedoms of expression and assembly would be destroyed. Legitimate protest can take many other forms.

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

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

48. *Richardson* was a case concerned with the meaning of 'lawful activity', the second of the four ingredients of section 68 identified by Lord Hughes (see [12] above). Accordingly, it is common ground between the parties (and we accept) that the statement was *obiter*. Nonetheless, all members of

the Supreme Court agreed with the judgment of Lord Hughes. The *dictum* should be accorded very great respect. In our judgment it is consistent with the law on articles 10 and 11 and A1P1 as summarised above.

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

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

…

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

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

75. Secondly, section 68 goes beyond simply protecting a landowner's right to possession of land. It only applies where a defendant not merely trespasses on the land, but also carries out an additional act with the intention of intimidating someone performing, or about to perform, a lawful

> activity from carrying on with, or obstructing or disrupting, that activity. Section 68 protects the use of land by a landowner or occupier for lawful activities.
>
> 76. Thirdly, a protest which is carried out for the purposes of disrupting or obstructing the lawful activities of other parties, does not lie at the core of articles 10 and 11, even if carried out on a highway or other publicly accessible land. Furthermore, it is established that serious disruption may amount to reprehensible conduct, so that articles 10 and 11 are not violated. The intimidation, obstruction or disruption to which section 68 applies is not criminalised unless it also involves a trespass and interference with A1P1. On this ground alone, any reliance upon articles 10 and 11 (assuming they are engaged) must be towards the periphery of those freedoms.
>
> 77. Fourthly, articles 10 and 11 do not bestow any "freedom of forum" to justify trespass on private land or publicly owned land which is not accessible by the public. There is no basis for supposing that section 68 has had the effect of preventing the effective exercise of freedoms of expression and assembly."

50. The main nuance in this connection has already been considered. The only other acts within the terms of the order which might at least potentially occur without a trespass to land or goods are the blocking or impeding of access by the Claimant's contractors from the highway (or other land to which the public has a right of access) to the land within the Order Limits. But such activity would still constitute a private nuisance (see *Cuadrilla* at [13]). Furthermore, even in relation to the highway, the right of protest does not extend to the right to conduct coercive activities.

51. The Claimant accepts that protest on the public highway and, accordingly, other public land, will not always be unlawful, or constitute either a trespass (actionable by the highway owner) or a nuisance, merely because it results in some disruption. The Supreme Court held in *DPP v Ziegler* [2021] 3 WLR 179 that the issues which may arise under Articles 10 and 11 require consideration of five questions (at [16]) and see *HS2* at [132] et seq:

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

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

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

    d. If so, is the interference in pursuit of a legitimate aim as set out in article 10

or article 11, for example the protection of the rights of others ?

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

52. Those restrained by the terms of an injunction from obstructing access to the land within the Order Limits from the public highway (or other land to which the public has a right of access) would otherwise at least arguably be exercising their Article 10 and 11 rights, and the grant of an injunction would constitute some interference with those rights – even if not within ‘the core’ of those rights.

53. However, such an interference is prescribed by the law because it is a vindication of the Claimant’s rights (and indeed the private law rights and the rights of others under Article 1 of Protocol 1) and take place pursuant to a Court order. The vindication of those rights of the Claimant is itself a legitimate aim. The vindication of third party rights, and the protection of the wider public from interference with access to fuels are two more. HHJ Lickley KC considered these issues at para 50 of his judgment and C adopts his analysis.

54. Accordingly, Mr Morshead said the issue in this case is whether such interference as the injunction might comprise is ‘necessary’ in a democratic society” to achieve that aim, in other words, proportionate, as to which there are four questions to be considered (see *HS2*, [137]):

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

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

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

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

55. In *Ziegler* the Supreme Court suggested that proportionality involved ‘a fact-specific inquiry which requires the evaluation of the circumstances in the individual case’ ([59]). Mr Morshead said that that might no longer reliable as a statement of universal application, as explained in *In re Abortion Services (Safe Access Zones) (NI) Bill* [2023] 2 WLR 33, [29]–[35], where the Supreme Court has held that it may rather involve:

> “… the application, in a factual context (often not in material dispute), of the series of legal tests set out … above together with a sophisticated body of case law and may also involve the application of statutory provisions such as sections 3 and 6 of the Human Rights Act, or the development of the common law”.

56. However, he said that it is unlikely that the present case calls for a resolution of the possible differences in practice between these approaches. That is because any

interference with any Convention right occasioned by the order will be minimal, especially when set against the national importance of the Pipeline.

57. In the similar context of the Insulate Britain protests, in *National Highways Ltd v. Persons Unknown* [2021] EWHC 3081, Lavender J (at [38]) set out the factors which Lords Hamblen and Stephens JSC had identified in *City of London Corporation v Samede* [2012] PTSR 1624 as being potentially relevant to the issue of proportionality, and consequently how the four proportionality sub-questions might be answered:

> "Lords Hamblen and Stephens JSC reviewed in paragraphs 71 to 86 of their judgment the factors which may be relevant to the assessment of the proportionality of an interference with the article 10 and 11 rights of protestors blocking traffic on a road. Disagreeing with the Divisional Court, they held that each of the eight factors relied on by the district judge in that case were relevant. Those factors were, in summary:
>
> (1) The peaceful nature of the protest.
>
> (2) The fact that the defendants' action did not give rise, either directly or indirectly, to any form of disorder.
>
> (3) The fact that the defendants did not commit any criminal offences other than obstructing the highway.
>
> (4) The fact that the defendants' actions were carefully targeted and were aimed only at obstructing vehicles heading to the arms fair.
>
> (5) The fact that the protest related to a "matter of general concern".
>
> (6) The limited duration of the protest.
>
> (7) The absence of any complaint about the defendants' conduct.
>
> (8) The defendants' longstanding commitment to opposing the arms trade."

58. For similar reasons to those expressed by Lavender J in *National Highways*, Mr Morshead submitted that the four sub-questions relevant to the 'proportionality' test can be answered as follows - thus satisfying the requirements for obtaining that part of the relief which might potentially affect the rights of those on the highway (and other land to which the public has a right of access).

59. The aims of restraining the Defendants' activities are the vindication of the Claimant's own private law rights, the avoidance of harm to others including its own contractors/staff, the emergency services and the general public (both of which also

have consequent harmful effects upon the Claimant), as well as the avoidance of harm to the protesters themselves - and the avoidance of disruption to the provision of fuel to the public.

60. There is an obviously rational connection between the means chosen in this case and the aim in view: the means narrowly focus on the prevention of interference with the Claimant's rights and with the construction of its pipeline.

61. There is no less restrictive alternative means available to achieve the aim. An action in damages would not prevent the disruption which the Defendants seek to cause. There is little reason to suspect that any identifiable defendant would be capable of satisfying any claim anyway. Further, the harms in question are (so to speak) larger than money can compensate for.

62. The grant of an injunction strikes a fair balance between the Defendants' rights, the Claimant's rights, and the general interests of the community. The observations of Leggatt LJ in *Cuadrilla* at [94]–[95] are apt. He said:

> "94. The common feature of these cases, as the court observed in the *Kudrevicius* case, is that the disruption caused was not a side-effect of a protest held in a public place but was an intended aim of the protest. As foreshadowed earlier, this is an important distinction. It was recently underlined by a Divisional Court (Singh LJ and Farbey J) in *Director of Public Prosecutions v Ziegler* [2019] EWHC 71 (Admin); [2019] 2 WLR 1451, a case – like the *Kudrevicius* case [*Kudrevicius v Lithuania* (2016) 62 EHRR 34] – involving deliberate obstruction of a highway. After quoting the statement that intentional disruption of activities of others is not 'at the core' of the freedom protected by article 11 of the Convention (see paragraph 44 above), the Divisional Court identified one reason for this as being that the essence of the rights of peaceful assembly and freedom of expression is the opportunity to persuade others (see para 53 of the judgment). The court pointed out that persuasion is very different from attempting (through physical obstruction or similar conduct) to <u>compel</u> others to act in a way you desire.
>
> 95. Where, as in the present case, individuals not only resort to compulsion to hinder or try to stop lawful activities of others of which they disapprove, but do so in deliberate defiance of a court order, they have no reason to expect that their conscientious motives will insulate them from the sanction of imprisonment."

63. The proposed order demonstrates a careful and moderate striking of the balance, which preserves the right to lawful protest.

64. Any interference with anyone's Article 10 and 11 rights caused by a court order preventing that person's deliberate disruption of the Claimant's business, and not mere protest, is outweighed by:

    a. the Defendants' interference with the ability of the Claimant (and third parties) to carry out their lawful business;

    b. the wider interests in protecting the Defendants, and those in the vicinity of the Pipeline works, from injury, and the potential harm to the Claimant which would eventuate if such an injury were to eventuate (tunnelling and protesting at height carry particular risks);

    c. the interest of the public in continuing access to the fruits of the Claimant's undertaking.

65. HHJ Lickley KC agreed with this analysis at [52]–[53] of his judgment.

66. Consequently, Mr Morshead said that the degree to which the injunctions sought might interfere at all with any individual's Article 10 and 11 rights, any such interference is proportionate, and does not require the Court to modify the approach which it would take (ie, before consideration of the Convention) to the threatened interference with the Claimant's rights.

Discussion

67. For the substance of the reasons advanced by Mr Morshead (which I have fully set out, and adopt); those given by HHJ Lickley KC in his judgment of 21 October 2022; and the following reasons, I am satisfied that the Claimant is entitled to the injunction it seeks.

68. Firstly, I am satisfied that the Claimant has established, on the evidence, the tort of conspiracy to injure by unlawful means such that it is entitled (all other things being equal) to a permanent injunction. I understand and accept why the Claimant has framed its case in the way that it has given the complexities of the right to possession and ownership of the land involved. The campaign of protest which the Pipeline has attracted is plainly intended to impede the Claimant's ability to construct the Pipeline and to harm it economically. The fact that some of the overt acts pursuant to the conspiracy may be aimed at third parties and not directly actionable by the Claimant (eg the owners of the Items) does not impair the Claimant's ability to rely upon this tort: see HHJ Lickley KC at [22]; *Shell* at [27] and [32]; *Ineos*, [59]; and *Total Network SL,* [44] and [94]. Third parties are merely collateral damage. I agree with HHJ Lickley KC, [27]:

> "On the facts set out in the witness statements, the Claimant has a strong case [now in fact proved following the uncontested trial] given the incidents that have occurred which included and involved trespass to land and trespass to goods including causing significant damage to property. Criminal offences have been committed in some instances. The intention of those participating can thus be

> demonstrated from the facts themselves to be to stop or interrupt the work and thereby cause damage to the Claimant. In addition, if more proof of intention were needed, the social media messages and photos that follow the events demonstrate not only who is responsible but the aims and thereby the intentions of those taking such action."

69. Next, I consider that the *Canada Goose* requirements are made out and in particular: (a) that there has been effective service; (b) there are clear geographical and temporal limits to the injunction. Although the order affects a significant area of land measured on a linear basis across about 100km, the land in question is sometimes quite narrow, as I have explained. It is certainly less extensive than the affected land in *HS2* and the roads network that were the subjection of injunctions in in the Insulate Britain*/National Highways* injunction cases which in some cases stretched for thousands of miles. The order is clear. No-one subject to the injunction can be in any doubt as to what they can and cannot do. The Claimant has plainly thought carefully about the terms of the order sought and has taken a responsible and balanced approach.

70. On the question of the Convention and proportionality, I adopt without repeating my analysis in *HS2*, [194]-[277], which applies *mutatis mutandis* to the facts before me, although as Mr Morshead rightly said, the order in this case is much more limited in its scope than the order sought in *HS2*. I also adopt the proportionality analysis of HHJ Lickley KC at [43]-[53]. He dealt with the four relevant questions at [53], in terms with which I agree:

> "53. The questions are:
>
> (i) *Sufficiently important to justify interference with a fundamental right?* The pipeline works are a major piece of engineering infrastructure that will serve the UK for many years. The Claimant submits that the aim of restricting the activities of protesters permits the Claimant to conduct its lawful business, prevents harm to others and permits aviation fuel to be transported to London Heathrow airport and thereby the airport can operate. Disruption has a potential significance to UK trade and the transportation of people and goods. The aim is therefore sufficiently important to justify interference with the rights of protestors in my judgement.
>
> (ii) *A rational connection between means and aim?* The connection between the means chosen and the aim is rational because it is limited to the area where the pipeline is to be constructed and prevents disruption. The means chosen allow the Claimant to fulfil its contractual obligations. The terms are worded to prohibit activity that would amount to the conspiracy alleged. There is a rational connection.

(iii) *Is there less restrictive alternative means to achieve the aim?* A claim for damages will not prevent disruption. Damages may be impossible to calculate or an award impossible to satisfy by the protestors. The terms of the order are specifically limited to the DCO Order Limits which is, in many areas, a strip of land approximately 30m wide. The injunction is and will be limited in time. An application may be made to vary or discharge the order. In my judgement there is no less restrictive means to permit the construction of the pipeline.

(iv) *Is there a fair balance between the rights of the individual and the general interest of the community, including the rights of others?* In my judgement taking into account all of the factors which I have identified, the injunction granted by Eyre J strikes a fair balance between the rights of the protestors, the Claimant, the contractors and the general public. Importantly, in my judgement, the order does not prohibit protesters from entering the DCO Order Limits as it might because the Claimant has accepted that is too broad. What the order does is control what they do within the DCO Order Limits. In addition, there are areas very close to the DCO Order Limits, for example paths and rights of way, where protest is not restricted by the order. As a consequence, there is no need to climb fences and get close to potentially hazardous machinery, tools and deep trenches to demonstrate. Having considered the issues and the evidence, the balancing exercise I have performed comes down very clearly in the Claimant's favour given the importance of the works and the threat posed by the protestors to disrupt and cause damage against the protesters' rights under Articles 10 and
11."

Conclusion

71. For these reasons, I grant the application sought.

A

Supreme Court

Wolverhampton City Council and others *v* London Gypsies and Travellers and others

[On appeal from *Barking and Dagenham London Borough Council v Persons Unknown*]

B

[2023] UKSC 47

2023 Feb 8, 9; Nov 29 — Lord Reed PSC, Lord Hodge DPSC, Lord Lloyd-Jones, Lord Briggs JJSC, Lord Kitchin

C

Injunction — Trespass — Persons unknown — Local authorities obtaining injunctions against persons unknown to restrain unauthorised encampments on land — Whether court having power to grant final injunctions against persons unknown — Whether limits on court's power to grant injunctions against world — Senior Courts Act 1981 (c 54), s 37

D

With the intent of preventing unauthorised encampments by Gypsies or Travellers within their administrative areas, a number of local authorities issued proceedings under CPR Pt 8 seeking injunctions under section 37 of the Senior Courts Act 1981[1] prohibiting "persons unknown" from setting up such camps in the future. Injunctions of varying length were granted to some 38 local authorities, or groups of local authorities, on varying terms by way of both interim and permanent injunctions. After the hearing of an application to extend one of the injunctions which was coming to an end, a judge ordered a review of all such injunctions as remained in force and which the local authority in question wished to maintain. The judge discharged the injunctions which were final and directed at unknown persons, holding that final injunctions could only be made against parties who had been identified and had had an opportunity to contest the order sought. The Court of Appeal allowed appeals by some of the local authorities and restored those final injunctions which were the subject of appeal, holding that final injunctions against persons unknown were valid since any person who breached one would as a consequence become a party to it and so be entitled to contest it.

E

F

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

Held, dismissing the appeal, (1) that although now enshrined in statute, the court's power to grant an injunction was, and continued to be, a type of equitable remedy; that although the power was, subject to any relevant statutory restrictions, unlimited, the principles and practice which the court had developed governing the proper exercise of that power did not allow judges to grant or withhold injunctions purely on their own subjective perception of the justice and convenience of doing so in a particular case but required the power to be exercised in accordance with those equitable principles from which injunctions were derived; that, in particular, equity (i) sought to provide an effective remedy where other remedies available under the law were inadequate to protect or enforce the rights in issue, (ii) looked to the substance rather than to the form, (iii) took an essentially flexible approach to the formulation of a remedy and (iv) was not constrained by any limiting rule or principle, other than justice and convenience, when fashioning a remedy to suit new circumstances; and that the application of those principles had not only allowed the general limits or conditions within which injunctions were granted to be adjusted over time as circumstances changed, but had allowed new kinds of injunction to be formulated in response to the emergence of particular problems, including

G

H

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

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

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

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

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

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

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

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

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

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

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A in direct action. Such activity may, depending on all the circumstances, justify the grant of an injunction against persons unknown, including newcomers (post, para 235).

Decision of the Court of Appeal sub nom *Barking and Dagenham London Borough Council v Persons Unknown* [2022] EWCA Civ 13; [2023] QB 295; [2022] 2 WLR 946; [2022] 4 All ER 51 affirmed on different grounds.

B The following cases are referred to in the judgment of Lord Reed PSC, Lord Briggs JSC and Lord Kitchin:

A (A Protected Party) v Persons Unknown [2016] EWHC 3295 (Ch); [2017] EMLR 11
Abela v Baadarani [2013] UKSC 44; [2013] 1 WLR 2043; [2013] 4 All ER 119, SC(E)
Adair v New River Co (1805) 11 Ves 429
C *Anton Piller KG v Manufacturing Processes Ltd* [1975] EWCA Civ 12; [1976] Ch 55; [1976] 2 WLR 162; [1976] 1 All ER 779, CA
Ashworth Hospital Authority v MGN Ltd [2002] UKHL 29; [2002] 1 WLR 2033; [2002] 4 All ER 193, HL(E)
Attorney General v Chaudry [1971] 1 WLR 1614; [1971] 3 All ER 938, CA
Attorney General v Crosland [2021] UKSC 15; [2021] 4 WLR 103; [2021] UKSC 58; [2022] 1 WLR 367; [2022] 2 All ER 401, SC(E)
D *Attorney General v Harris* [1961] 1 QB 74; [1960] 3 WLR 532; [1960] 3 All ER 207, CA
Attorney General v Leveller Magazine Ltd [1979] AC 440; [1979] 2 WLR 247; [1979] 1 All ER 745; 68 Cr App R 342, HL(E)
Attorney General v Newspaper Publishing plc [1988] Ch 333; [1987] 3 WLR 942; [1987] 3 All ER 276, CA
Attorney General v Punch Ltd [2002] UKHL 50; [2003] 1 AC 1046; [2003] 2 WLR 49; [2003] 1 All ER 289, HL(E)
E *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191; [1991] 2 WLR 994; [1991] 2 All ER 398, HL(E)
Baden's Deed Trusts, In re [1971] AC 424; [1970] 2 WLR 1110; [1970] 2 All ER 228, HL(E)
Bankers Trust Co v Shapira [1980] 1 WLR 1274; [1980] 3 All ER 353, CA
Barton v Wright Hassall LLP [2018] UKSC 12; [2018] 1 WLR 1119; [2018] 3 All ER 487, SC(E)
F *Birmingham City Council v Afsar* [2019] EWHC 1619 (QB)
Blain (Tony) Pty Ltd v Splain [1993] 3 NZLR 185
Bloomsbury Publishing Group plc v News Group Newspapers Ltd [2003] EWHC 1205 (Ch); [2003] 1 WLR 1633; [2003] 3 All ER 736
Brett Wilson LLP v Persons Unknown [2015] EWHC 2628 (QB); [2016] 4 WLR 69; [2016] 1 All ER 1006
British Airways Board v Laker Airways Ltd [1985] AC 58; [1984] 3 WLR 413;
G [1984] 3 All ER 39, HL(E)
Broadmoor Special Hospital Authority v Robinson [2000] QB 775; [2000] 1 WLR 1590; [2000] 2 All ER 727, CA
Bromley London Borough Council v Persons Unknown [2020] EWCA Civ 12; [2020] PTSR 1043; [2020] 4 All ER 114, CA
Burris v Azadani [1995] 1 WLR 1372; [1995] 4 All ER 802, CA
CMOC Sales and Marketing Ltd v Person Unknown [2018] EWHC 2230 (Comm);
H [2019] Lloyd's Rep FC 62
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C *R v Lincolnshire County Council, Ex p Atkinson* (1995) 8 Admin LR 529, DC
R (Wardship: Restrictions on Publication), In re [1994] Fam 254; [1994] 3 WLR 36; [1994] 3 All ER 658, CA
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D *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] UKSC 11; [2009] 1 WLR 2780; [2010] PTSR 321; [2010] 1 All ER 855, SC(E)
Siskina (Owners of cargo lately laden on board) v Distos Cia Naviera SA [1979] AC 210; [1977] 3 WLR 818; [1977] 3 All ER 803; [1978] 1 Lloyd's Rep 1, HL(E)
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E *South Cambridgeshire District Council v Gammell* [2005] EWCA Civ 1429; [2006] 1 WLR 658, CA
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F *Stoke-on-Trent City Council v B & Q (Retail) Ltd* [1984] AC 754; [1984] 2 WLR 929; [1984] 2 All ER 332, HL(E)
TSB Private Bank International SA v Chabra [1992] 1 WLR 231; [1992] 2 All ER 245
UK Oil and Gas Investments plc v Persons Unknown [2018] EWHC 2252 (Ch); [2019] JPL 161
G *United Kingdom Nirex Ltd v Barton* The Times, 14 October 1986
Venables v News Group Newspapers Ltd [2001] Fam 430; [2001] 2 WLR 1038; [2001] 1 All ER 908
Wykeham Terrace, Brighton, Sussex, In re, Ex p Territorial Auxiliary and Volunteer Reserve Association for the South East [1971] Ch 204; [1970] 3 WLR 649
X (A Minor) (Wardship: Injunction), In re [1984] 1 WLR 1422; [1985] 1 All ER 53
X (formerly Bell) v O'Brien [2003] EWHC 1101 (QB); [2003] EMLR 37
H *Z Ltd v A-Z and AA-LL* [1982] QB 558; [1982] 2 WLR 288; [1982] 1 All ER 556; [1982] 1 Lloyd's Rep 240, CA

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A v British Broadcasting Corpn [2014] UKSC 25; [2015] AC 588; [2014] 2 WLR 1243; [2014] 2 All ER 1037, SC(Sc)

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Abortion Services (Safe Access Zones) (Northern Ireland) Bill, In re [2022] UKSC 32; [2023] AC 505; [2023] 2 WLR 33; [2023] 2 All ER 209, SC(NI)
Astellas Pharma Ltd v Stop Huntingdon Animal Cruelty [2011] EWCA Civ 752, CA
Birmingham City Council v Nagmadin [2023] EWHC 56 (KB)
Birmingham City Council v Sharif [2020] EWCA Civ 1488; [2021] 1 WLR 685; [2021] 3 All ER 176; [2021] RTR 15, CA
Cambridge City Council v Traditional Cambridge Tours Ltd [2018] EWHC 1304 (QB); [2018] LLR 458
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High Speed Two (HS2) Ltd v Persons Unknown [2022] EWHC 2360 (KB)
Hillingdon London Borough Council v Persons Unknown [2020] EWHC 2153 (QB); [2020] PTSR 2179
Kudrevičius v Lithuania (Application No 37553/05) (2015) 62 EHRR 34, ECtHR (GC)
MBR Acres Ltd v McGivern [2022] EWHC 2072 (QB)
Mid-Bedfordshire District Council v Brown [2004] EWCA Civ 1709; [2005] 1 WLR 1460, CA
Porter v Freudenberg [1915] 1 KB 857, CA
Redbridge London Borough Council v Stokes [2018] EWHC 4076 (QB)
Secretary of State for Transport v Cuciurean [2021] EWCA Civ 357, CA
Winterstein v France (Application No 27013/07) (unreported) 17 October 2013, ECtHR

APPEAL from the Court of Appeal

On 16 October 2020 Nicklin J, with the concurrence of Dame Victoria Sharp P and Stewart J (Judge in Charge of the Queen's Bench Civil List), ordered a number of local authorities which had been involved in 38 sets of proceedings each obtaining injunctions prohibiting "persons unknown" from making unauthorised encampments within their administrative areas, or on specified areas of land within those areas, to complete a questionnaire with a view to identifying those local authorities who wished to maintain such injunctions and those who wished to discontinue them. On 12 May 2021, after receipt of the questionnaires and a subsequent hearing to review the injunctions, Nicklin J [2021] EWHC 1201 (QB); [2022] JPL 43 held that the court could not grant final injunctions which prevented persons who were unknown and unidentified at the date of the order from occupying and trespassing on local authority land and, by further order dated 24 May 2021, discharged a number of the injunctions on that ground.

By appellant's notices filed on or about 7 June 2021 and with permission of the judge, the following local authorities appealed: Barking and Dagenham London Borough Council; Havering London Borough Council; Redbridge London Borough Council; Basingstoke and Deane Borough Council and Hampshire County Council; Nuneaton and Bedworth Borough Council and Warwickshire County Council; Rochdale Metropolitan Borough Council; Test Valley Borough Council; Thurrock Council; Hillingdon London Borough Council; Richmond upon Thames London Borough Council; Walsall Metropolitan Borough Council and Wolverhampton City Council. The following bodies were granted permission to intervene in the appeal: London Gypsies and Travellers; Friends, Families and Travellers; Derbyshire Gypsy Liaison Group; High Speed Two (HS2) Ltd and Basildon Borough Council. On 13 January 2022 the Court of Appeal (Sir Geoffrey Vos MR,

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A Lewison and Elisabeth Laing LJJ) [2022] EWCA Civ 13; [2023] QB 295 allowed the appeals.

With permission granted by the Supreme Court on 25 October 2022 (Lord Hodge DPSC, Lord Hamblen and Lord Stephens JJSC) London Gypsies and Travellers, Friends, Families and Travellers and Derbyshire Gypsy Liaison Group appealed against the Court of Appeal's orders. The following local authorities participated in the appeal as respondents: B (i) Wolverhampton City Council; (ii) Walsall Metropolitan Borough Council; (iii) Barking and Dagenham London Borough Council; (iv) Basingstoke and Deane Borough Council and Hampshire County Council; (v) Redbridge London Borough Council; (vi) Havering London Borough Council; (vii) Nuneaton and Bedworth Borough Council and Warwickshire County Council; (viii) Rochdale Metropolitan Borough C Council; (ix) Test Valley Borough Council and Hampshire County Council and (x) Thurrock Council. The following bodies were granted permission to intervene in the appeal: Friends of the Earth; Liberty, High Speed Two (HS2) Ltd and the Secretary of State for Transport.

The facts and the agreed issues for the court are stated in the judgment of Lord Reed PSC, Lord Briggs JSC and Lord Kitchin, post, paras 6–13.

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

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

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

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

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

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

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

The court took time for consideration.

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

1. Introduction

(1) The problem

H 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

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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

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

B 7 The claim forms fell into two broad categories. First, there were claims directed against defendants described simply as "persons unknown", either alone or together with named defendants. Secondly, there were claims against unnamed defendants who were described, in almost all cases, by reference to the future activities which the claimant sought to prevent, either alone or together with named defendants. Examples included "persons C 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 D domestic paraphernalia".

8 In most cases, the local authorities obtained an order for service of the claim forms by alternative means under CPR r 6.15, usually by fixing copies in a prominent location at each site, or by fixing there a copy of the injunction with a notice that the claim form could be obtained from the claimant's offices. Injunctions were obtained, invariably on without notice applications where the defendants were unnamed, and were similarly E 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.

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

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

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

12 Twelve of the claimants appealed to the Court of Appeal. In its decision, set out in a judgment given by Sir Geoffrey Vos MR with which Lewison and Elisabeth Laing 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* [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 (i e 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

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

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

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

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

15 This is not the stage at which to consider these questions, but it may be helpful to explain the legal context in which they arise, before turning to the authorities through which the law relating to newcomer injunctions has developed in recent times. We will explain at this stage the legal background, prior to the recent authorities, in relation to (1) the jurisdiction to grant injunctions, (2) injunctions against non-parties, (3) injunctions in D 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] E 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 F 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 G 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* H *International AG v British Sky Broadcasting Ltd* [2017] Bus LR 1, para 47 (both citing the equivalent passage in the 5th ed (1997)), and *Convoy Collateral Ltd v Broad Idea International Ltd* [2023] AC 389 ("*Broad Idea*"), para 57. The breadth of the court's power is reflected in the terms of section 37(1) of the 1981 Act, which states that: "The High Court may by

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order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so." As Lord Scott explained in *Fourie v Le Roux* (ibid), that provision, like its statutory predecessors, merely confirms and restates the power of the courts to grant injunctions which existed before the Supreme Court of Judicature Act 1873 (36 & 37 Vict c 66) ("the 1873 Act") and still exists. That power was transferred to the High Court by section 16 of the 1873 Act and has been preserved by section 18(2) of the Supreme Court of Judicature (Consolidation) Act 1925 and section 19(2)(b) of the 1981 Act.

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

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

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

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

20 The point is illustrated by the development in recent times of several new kinds of injunction in response to the emergence of particular problems: for example, the *Mareva* or freezing injunction, named after one of the early cases in which such an order was made (*Mareva Cia Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509); the search order or *Anton Piller* order, again named after one of the early cases in which such an order was made (*Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55); the *Norwich Pharmacal* order, also known as the third party disclosure order, which takes its name from the case in which the basis for such an order was authoritatively established (*Norwich Pharmacal Co v Customs and Excise Comrs* [1974] AC 133); the *Bankers Trust* order, which is an injunction of the kind granted in *Bankers Trust Co v Shapira* [1980] 1 WLR 1274; the internet blocking order, upheld in *Cartier International AG v British Sky Broadcasting Ltd* [2017] Bus LR 1 (para 17 above), and approved by this court in the same case, on an appeal on the question of costs: *Cartier International AG v British Telecommunications plc* [2018] 1 WLR 3259, para 15; the anti-suit injunction (and its offspring, the anti-anti-suit injunction), which has become an important remedy as globalisation has resulted in parties seeking tactical advantages in different jurisdictions; and the related injunction to restrain the presentation or advertisement of a winding-up petition.

21 It has often been recognised that the width and flexibility of the equitable jurisdiction to issue injunctions are not to be cut down by categorisations based on previous practice. In *Castanho v Brown & Root*

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A *(UK) Ltd* [1981] AC 557, for example, Lord Scarman stated at p 573, in a speech with which the other Law Lords agreed, that "the width and flexibility of equity are not to be undermined by categorisation". To similar effect, in *South Carolina Insurance Co v Assurantie Maatschappij "De Zeven Provincien" NV* [1987] AC 24, Lord Goff of Chieveley, with whom Lord Mackay of Clashfern agreed, stated at p 44:

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

In *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC C 334 (para 19 above), Lord Browne-Wilkinson, with whose speech Lord Keith of Kinkel and Lord Goff agreed, expressed his agreement at p 343 with Lord Goff's observations in the *South Carolina* case. In *Mercedes Benz AG v Leiduck* [1996] AC 284, 308, Lord Nicholls of Birkenhead referred to these dicta in the course of his illuminating albeit dissenting judgment, and stated:

D "As circumstances in the world change, so must the situations in which the courts may properly exercise their jurisdiction to grant injunctions. The exercise of the jurisdiction must be principled, but the criterion is injustice. Injustice is to be viewed and decided in the light of today's conditions and standards, not those of yester-year."

22 These dicta are borne out by the recent developments in the law of E 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 F categories of injunction are unimportant. But the developments which have taken place over the past half-century demonstrate the continuing flexibility of equitable powers, and are a reminder that injunctions may be issued in new circumstances when the principles underlying the existing law so require.

G *(2) Injunctions against non-parties*

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

24 Where the defendants are described in a claim form, or an injunction H 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

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

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

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

(i) Representative proceedings

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

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

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

D 29 A representative action may in some circumstances be a suitable means of restraining wrongdoing by individuals who cannot be identified. It can therefore, in such circumstances, provide an alternative remedy to an injunction against "persons unknown": see, for example, *M Michaels (Furriers) Ltd v Askew* (1983) 127 SJ 597, concerned with picketing; *EMI Records Ltd v Kudhail* [1985] FSR 36, concerned with copyright E 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 F 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, G since those represented are not party to the proceedings, an injunction cannot be enforced against them without the permission of the court (CPR r 19.8(4)(b)): something which, it has been held, cannot be granted before the individuals in question have been identified and have had an opportunity to make representations: see, for example, *RWE Npower plc v Carrol* [2007] EWHC 947 (QB).

H (ii) Wardship proceedings

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

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

(iii) Injunctions to protect human rights

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

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

(iv) Reporting restrictions

34 Reporting restrictions are prohibitions on the publication of information about court proceedings, directed at the world at large. They are not injunctions in the same sense as the orders which are our primary concern, but they are relevant as further examples of orders granted by courts restraining conduct by the world at large. Such orders may be made under common law powers or may have a statutory basis. They generally prohibit the publication of information about the proceedings in which they are made (e g as to the identity of a witness). A person will commit a contempt of court if, knowing of the order, he frustrates its purpose by

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A 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 B judgments to the parties' legal representatives, subject to a prohibition on further, unauthorised, disclosure. The order therefore applies directly to non-parties to the proceedings: see, for example, *Attorney General v Crosland* [2021] 4 WLR 103 and [2022] 1 WLR 367. Like reporting restrictions, such orders are not equitable injunctions, but they are relevant as further examples of orders directed against non-parties.

C (vi) The effect of injunctions on non-parties

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

37 If non-parties are not enjoined by the order, it follows that they are D 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 E 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 F effect, to make the order operate in rem or contra mundum. That, it was argued, was a purpose which the court could not legitimately achieve, since its orders were only properly made inter partes.

39 The argument was rejected. Lord Oliver acknowledged at p 224 that "Equity, in general, acts in personam and there are respectable authorities for the proposition that injunctions, whether mandatory or prohibitory, operate inter partes and should be so expressed (see *Iveson v Harris*; G *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* H *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

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

> " '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 B does, apply to the court for directions as to the disposition of assets in his hands which may or may not be subject to the terms of the order."

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

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

42 Prior to the developments discussed below, it can therefore be seen that while the courts had generally affirmed the position that only parties to an action were bound by an injunction, a number of exceptions to that F 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.

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(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 H take or taken any steps towards doing so. That might be thought to conflict with the principle that an injunction must be founded on an existing cause of action against the person enjoined, as stated, for example, by Lord Diplock in *Siskina (Owners of cargo lately laden on board) v Distos Cia Naviera SA* [1979] AC 210 ("*The Siskina*"), at p 256. There has been a gradual but

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A growing reaction against that reasoning (which Lord Diplock himself recognised was too narrowly stated: *British Airways Board v Laker Airways Ltd* [1985] AC 58, 81) over the past 40 years, culminating in the recent decision in *Broad Idea* [2023] AC 389, cited in para 17 above, where the Judicial Committee of the Privy Council rejected such a rigid doctrine and asserted the court's governance of its own practice. It is now well established that the grant of injunctive relief is not always conditional on the B 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 C 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 D 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 E 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 F 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 G 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 H 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

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

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

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

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

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

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

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

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

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 F examples—representative defendants, the wardship jurisdiction, and the principle established in the *Venables* case [2001] Fam 430—might however be said to be special in some way, and to depend on a principle which is not of broader application.

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

55 Service of the claim form is a matter of greater significance. Although the court may exceptionally dispense with service, as explained below, and may if necessary grant interlocutory relief, such as interim injunctions, before service, as a general rule service of originating process is the act by which the defendant is subjected to the court's jurisdiction, in the

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

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

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

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

(1) Bloomsbury

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

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

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> "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:

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> "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."

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(2) Hampshire Waste Services

60 Later that same year, Sir Andrew Morritt V-C made another order against persons unknown, this time in a protester case, *Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator Site* [2004] Env LR 9 ("*Hampshire Waste Services*"). The claimants, operators of a number of waste incinerator sites which fed power to the national grid, sought an injunction to restrain protesters from entering any of various named sites in connection with a "Global Day of Action against Incinerators" some six days later. Previous actions of this kind presented a danger to the protesters and to others and had resulted in the plants having to be shut down. The police were, it seemed, largely powerless to prevent these threatened activities. The Vice-Chancellor, having referred to *Bloomsbury*, had no doubt the order was justified save for one important matter: the claimants were unable to identify any of the protesters to whom the order would be directed or upon whom proceedings could be served. Nevertheless, the Vice-Chancellor was satisfied that, in circumstances such as these, joinder by description was permissible, that the intended defendants should be described as "persons entering or remaining without the consent of the claimants, or any of them, on any of the incinerator sites at [specified addresses] in connection with the 'Global Day of Action Against Incinerators' (or similarly described event) on or around 14 July 2003", and that posting notices around the sites would amount to effective substituted service. The court should not refuse an application simply because difficulties in enforcement were envisaged. It was, however, necessary that any person who wished to do so should be able promptly to apply for the order to be discharged, and that was allowed for. That being so, there was no need for a formal return date.

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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.

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(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* [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 Cambridgeshire District Council v Persons Unknown* [2004] 4 PLR 88 ("*South Cambs*"). The order restrained the persons so described from behaving in the manner set out in that description. Service of the claim form and the injunction was effected by placing them in clear plastic envelopes in a prominent position on the relevant land.

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

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.

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A Ms Gammell had therefore already become a defendant when she stationed her caravan on the site. Her proper course (and that of any newcomer in the same situation) was to make a prompt application to vary or discharge the injunction as against her (which she had not done) and, in the meantime, to comply with the injunction. The individualised proportionality exercise could then be carried out with regard to her particular circumstances on the hearing of the application to vary or discharge, and might in any event be B relevant to sanction. This reasoning, and in particular the notion that a newcomer becomes a defendant by committing a breach of the injunction, has been subject to detailed and sustained criticism by the appellants in the course of this appeal, and this is a matter to which we will return.

(4) Meier

C **67** We should also mention a decision of this court from about the same time concerning Travellers who had set up an unauthorised encampment in wooded areas managed by the Forestry Commission and owned by the Secretary of State for the Environment, Food and Rural Affairs: *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] 1 WLR 2780 ("*Meier*"). This was in one sense a conventional case: the Secretary of D 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 E 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 F occupied. Since it was not argued that the injunction was defective, we do not attach great significance to Lord Neuberger MR's conclusion at para 84 that it had not been established that there was an error of principle which led to its grant. Nevertheless, it is notable that Lord Rodger of Earlsferry JSC expressed the view that the injunction had been rightly granted, and cited the decisions of Sir Andrew Morritt V-C in *Bloomsbury* and *Hampshire Waste Services*, and the grant of the injunction in the *South Cambs* case, without G 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 H 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".

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69 A further important development was the grant of Traveller injunctions, not just against those who were in unauthorised occupation of the land, whether they could be identified or not, but against persons on the basis only of their potential rather than actual occupation. Typically, these injunctions were granted for three years, sometimes more. In this way Traveller injunctions were transformed from injunctions against wrongdoers and those who at the date of the injunction were threatening to commit a wrong, to injunctions primarily or at least significantly directed against newcomers, that is to say persons who were not parties to the claim when the injunction was granted, who were not at that time doing anything unlawful in relation to the land of that authority, or even intending or overtly threatening to do so, but who might in the future form that intention.

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

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

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

73 All of these injunctions had features of relevance to the issues raised by this appeal. Sometimes the order identified the persons to whom it was directed by reference to a particular activity, such as "persons unknown occupying land" or "persons unknown depositing waste". In many of the cases, injunctions were granted against persons identified only as those who

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A might in future commit the acts which the injunction prohibited (e g *UK Oil and Gas Investments plc v Persons Unknown* [2019] JPL 161). In other cases, the defendants were referred to only as "persons unknown". The injunctions remained in place for a considerable period of time and, on occasion, for years. Further, the geographical reach of the injunctions was extensive, indeed often borough-wide. They were usually granted without the court hearing any adversarial argument, and without provision for an B 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 C 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 D 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 E 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 F which made it difficult for them to access conventional sources of housing provision; their attempts to obtain planning permission almost always met with failure; and at least historically, the capacity of sites authorised for their occupation had fallen well short of that needed to accommodate those seeking space on which to station their caravans. The sobering statistics were referred to by Lord Bingham of Cornhill in *South Bucks District Council v Porter* [2003] 2 AC 558 (para 65 above), para 13.

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

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

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

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

(6) Cameron

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

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A The claimant then brought an action for damages against the registered keeper, but it transpired that that person had not been driving the vehicle at the time of the accident. In addition, although there was an insurance policy in force in respect of the vehicle, the insured person was fictitious. The claimant could not sue the insurers, as the relevant legislation required that the driver was a person insured under the policy. The claimant could have sought compensation from the Motor Insurers' Bureau, which compensates B 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.

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

82 A further appeal by the insurer to the Supreme Court was allowed D 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 E 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 F 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 G 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 H 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

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

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

(7) Ineos

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

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

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

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

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A 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* B *Borough Council v Persons Unknown* [2020] PTSR 1043. This was an appeal against the refusal by the High Court to grant a five-year de facto borough-wide prohibition of encampment and entry or occupation of accessible public spaces in Bromley except cemeteries and highways. The final injunction sought was directed at "persons unknown" but it was common ground that it was aimed squarely at the Gypsy and Traveller communities.

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

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

94 The Court of Appeal was also satisfied that in assessing proportionality the judge had properly taken into account seven factors: (a) the wide extent of the relief sought; (b) the fact that the injunction was not aimed specifically at prohibiting anti-social or criminal behaviour, but just entry and occupation; (c) the lack of availability of alternative sites; (d) the cumulative effect of other injunctions; (e) various specific failures on the part of the authority in respect of its duties under the Human Rights Act and the public sector equality duty; (f) the length of time, that is to say five years, the proposed injunction would be in force; and (g) whether the order sought took proper account of permitted development rights arising by operation of the Town and Country Planning (General Permitted Development) (England) Order 2015 (SI 2015/596), that is to say the grant of "deemed planning permission" for, by way of example, the stationing of a single caravan on land for not more than two nights, which had not been addressed in a satisfactory way. Overall, the authority had failed to satisfy the judge that it was appropriate to grant the injunction sought, and the Court of Appeal decided there was no basis for interfering with the conclusion to which she had come.

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

(9) Cuadrilla

96 The third of these appeals, *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29, concerned an injunction to restrain four named persons and "persons unknown" from trespassing on the claimants' land, unlawfully interfering with their rights of passage to and from that land, and unlawfully interfering with the supply chain of the first claimant, which was involved, like *Ineos*, in the business of shale and gas exploration by fracking. The Court of Appeal was specifically concerned here with a challenge to an order for the committal of a number of persons for breach of this injunction, but, at para 48 and subject to two points, summarised the effect of *Ineos* as being that there was no conceptual or legal prohibition

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A against suing persons unknown who were not currently in existence but would come into existence if and when they committed a threatened tort. Nonetheless, it continued, a court should be inherently cautious about granting such an injunction against unknown persons since the reach of such an injunction was necessarily difficult to assess in advance.

B *(10) Canada Goose*

97 Only a few months later, in *Canada Goose* [2020] 1 WLR 2802 (para 11 above), the Court of Appeal was called upon to consider once again the way in which, and the extent to which, civil proceedings for injunctive relief against persons unknown could be used to restrict public protests. The first claimant, Canada Goose, was the UK trading arm of an international retailing business selling clothing containing animal fur and down. It C 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 D 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 E 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 F 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 G requested a copy.

100 In these circumstances, an application by the claimants for summary judgment and a final injunction was unsuccessful. The judge held that the claim form had not been served on any defendant to the proceedings; that it was not appropriate to permit service by alternative means (under CPR r 6.15) or to dispense with service (under CPR r 6.16); H 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

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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 r 6.15 and there was never any proper basis for an order under CPR r 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* [1992] 1 AC 191 per Lord Oliver at p 224 (quoted at para 39 above). That, the court said, was consistent with the fundamental principle in *Cameron* [2019] 1 WLR 1471 that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard. It followed, in the court's view, that a final injunction could not be granted against newcomers who had not by that time committed the prohibited acts, since they did not fall within the description of "persons unknown" and had not been served with the claim form. This was not one of the very limited cases, such as *Venables* [2001] Fam 430, in which a final injunction could be granted against the whole world. Nor was it a case where there was scope for making persons unknown subject to a final order. That was only possible (and perfectly legitimate) provided the persons unknown were confined to those in the first category of unknown persons in *Cameron*—that is to say anonymous defendants who were nonetheless identifiable in some other way (para 91). In the Court of Appeal's view, the claimants' problem was that they were seeking to invoke the civil

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A 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 B which we referred at the outset. Indeed, the correctness and potential breadth of the reasoning of the Court of Appeal in *Canada Goose*, and how that reasoning differs from the approach taken by the Court of Appeal in these proceedings, lie at the heart of these appeals.

(11) The present case

C 105 The circumstances of the present appeals were summarised at paras 6–12 above. In the light of the foregoing discussion, it will be apparent that, in holding that interim injunctions could be granted against persons unknown, but that final injunctions could be granted only against parties who had been identified and had had an opportunity to contest the final order sought, Nicklin J applied the reasoning of the Court of Appeal in *Canada Goose* [2020] 1 WLR 2802. The Court of Appeal, however, D departed from that reasoning, on the basis that it had failed to have proper regard to *Gammell* [2006] 1 WLR 658, which was binding on it.

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 E can be described by reference to the behaviour prohibited by the injunction, and that those persons will then become parties to the action in the event that they breach the injunction. As we will explain, we do not regard that as a satisfactory approach, essentially because it is based on the premise that the injunction will be breached and leaves out of account the persons affected by the injunction who decide to obey it. It also involves the logical F paradox that a person becomes bound by an injunction only as a result of infringing it. However, even leaving *Gammell* to one side, the Court of Appeal subjected the reasoning in *Canada Goose* to cogent criticism.

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

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

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

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

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

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

D

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

> 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 E 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 F 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 G 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 H 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.

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

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

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

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A Sumption's second category. But the fact that the unnamed defendants would have had to identify themselves as the persons in possession of the book if (but only if) they disobeyed the injunction seems to have moved the case into the first category. This implies that it is too absolutist to say that a claimant can never sue persons unknown unless they are identifiable at the time the claim form is issued. For these reasons also, it seems to us that the classification of cases as falling into one or other of Lord Sumption's B 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 C *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 D 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 E 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 F Sumption's focus was particularly on the practice of the common law courts and on cases concerned with common law remedies (e g at paras 8 and 18–19). Proceedings in which injunctive relief is sought raise different considerations, partly because an injunction has to be brought to the notice of the defendant before it can be enforced against him or her. In some cases, furthermore, the real target of the injunctive relief is not the unidentified G defendant, but the "no cause of action defendants" against whom freezing injunctions, *Norwich Pharmacal* orders, *Bankers Trust* orders and internet blocking orders may be obtained. The result of the orders made against those defendants may be to enable the unnamed defendant then to be identified and served, and effective relief obtained: see, for example, *CMOC Sales and Marketing Ltd v Person Unknown* [2019] Lloyd's Rep FC 62. In other words, the identification of the unknown defendant can depend H upon the availability of injunctions which are granted at a stage when that defendant remains unidentifiable. Furthermore, injunctions and other orders which operate contra mundum, to which (as we have already observed) newcomer injunctions can be regarded as analogous, raise issues lying beyond the scope of Lord Sumption's judgment in *Cameron*.

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A **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 B 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 C 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 D 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 E injunctions against) unnamed persons, namely that it is too vague a way of doing so: see para 7. But it does not seek directly to address the potential for injustice in restraining persons who are not just unnamed, but genuine newcomers: e g in the present context persons who have not at the time when the injunction was granted formed any desire or intention to camp at the prohibited site. The facts of the *Bloomsbury* case make that unsurprising. The unnamed defendants had already stolen copies of the book at the time F 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.

G **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 H 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

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

125 We turn next to the supposed *Gammell* [2006] 1 WLR 658 solution, and its apparent approval in *Cameron* as a juridically sound means of joining unnamed defendants by their self-identification in the course of disobeying the relevant injunction. It has the merit of being specifically B 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 C 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 D 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 E 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 F 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 G 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 H para 15 and secondly by Sir Geoffrey Vos MR in great detail in the present case, at paras 28, 30–31, 37, 39, 82, 85, 91–92, 94 and 96 and concluding at 99 of the judgment. It may fairly be described as lying at the heart of his reasoning for allowing the appeals, and departing from the reasoning of the Court of Appeal in *Canada Goose*.

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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.

B

129 The *Gammell* solution, as we have called it, suffers from a number of problems. The most fundamental is that the effect of an injunction against newcomers should be addressed by reference to the paradigm example of the newcomer who can be expected to obey it rather than to act in disobedience to it. As Lord Bingham observed in *South Bucks District Council v Porter* [2003] 2 AC 558 (cited at para 65 above) at para 32, in connection with a possible injunction against Gypsies living in caravans in breach of planning controls, "When granting an injunction the court does not contemplate that it will be disobeyed". Lord Rodger JSC cited this with approval (at para 17) in the *Meier* case [2009] 1 WLR 2780 (para 67 above). Similarly, Baroness Hale of Richmond JSC stated in the same case at para 39, in relation to an injunction against trespass by persons unknown, "We should assume that people will obey the law, and in particular the targeted orders of the court, rather than that they will not."

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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.

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131 Nevertheless, a satisfactory solution, which respects the procedural rights of all those whose behaviour is constrained by newcomer injunctions, including those who obey them, should if possible be found. The practical need for such injunctions has been demonstrated both in this jurisdiction and elsewhere: see, for example, the Canadian case of *MacMillan Bloedel Ltd v Simpson* [1996] 2 SCR 1048 (where reliance was placed at para 26 on *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191 as establishing the contra mundum effect even of injunctions inter partes), American cases such as *Joel v Various John Does* (1980) 499 F Supp 791, New Zealand cases such as *Tony Blain Pty Ltd v Splain* (para 130 above), *Earthquake Commission v Unknown Defendants* [2013] NZHC 708 and *Commerce Commission v Unknown Defendants* [2019] NZHC 2609, the Cayman Islands case of *Ernst & Young Ltd v Department of Immigration* 2015 (1) CILR 151, and Indian cases such as *ESPN Software India Private Ltd v Tudu Enterprise* (unreported) 18 February 2011.

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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

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

D 133 As we have explained, the *Gammell* solution was adopted by the Court of Appeal in the present case as a means of overcoming the difficulties arising in relation to final injunctions against newcomers which had been identified in *Canada Goose* [2020] 1 WLR 2802. Where, then, does our rejection of the *Gammell* solution leave the reasoning in *Canada Goose*?

134 Although we do not doubt the correctness of the decision in E *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 F final injunction could be granted contra mundum, but that protester actions did not fall within "that exceptional category". Accordingly, "The usual principle, which applies in the present case, is that a final injunction operates only between the parties to the proceedings: *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191, 224" (para 89). The problem with that approach is that it assumes that the availability of a final injunction against newcomers depends on fitting such injunctions within an existing exclusive G category. Such an approach is mistaken in principle, as explained in para 21 above.

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 H heard" (ibid). As we have explained, however, there are means of enabling a person who is affected by a final injunction to be heard after the order has been made, as was discussed in *Bromley* and recognised by the Master of the Rolls in the present case.

137 The court also observed at para 92 that "An interim injunction is temporary relief intended to hold the position until trial", and that "Once

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the trial has taken place and the rights of the parties have been determined, the litigation is at an end". That is an unrealistic view of proceedings of the kind in which newcomer injunctions are generally sought, and an unduly narrow view of the scope of interlocutory injunctions in the modern law, as explained at paras 43–49 above. As we have explained (e g at paras 60 and 73 above), there is scarcely ever a trial in proceedings of the present kind, or even adversarial argument; injunctions, even if expressed as being interim or until further order, remain in place for considerable periods of time, sometimes for years; and the proceedings are not at an end until the injunction is discharged.

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

139 The developing arguments about the propriety of granting injunctions against newcomers, set against the established principles re-emphasised in *Fourie v Le Roux* and *Cameron*, and then applied in *Canada Goose*, have displayed a tendency to place such injunctions in one or other of two silos: interim and final. This has followed through into the framing of the issues for determination in this appeal and has, perhaps in consequence, permeated the parties' submissions. Thus, it is said by the appellants that the long-established principle that an injunction should be confined to defendants served with the proceedings applies only to final injunctions, which should not therefore be granted against newcomers. Then it is said that since an interim injunction is designed only to hold the ring, pending trial between the parties who have by then been served with the proceedings, its use against newcomers for any other purpose would fall outside the principles which regulate the grant of interim injunctions. Then the respondents (like the Court of Appeal) rely upon the *Gammell* solution (that a newcomer becomes a defendant by acting in breach of the interim injunction) as solving both problems, because it makes them parties to the proceedings leading to the final injunction (even if they then take no part in them) and justifies the interim injunction against newcomers as a way of smoking them out before trial. In sympathy with the Court of Appeal on this point we consider that this constant focus upon the duality of interim and final injunctions is ultimately unhelpful as an analytical tool for solving the problem of injunctions against newcomers. In our view the injunction, in its operation upon newcomers, is typically neither interim nor final, at least in substance. Rather it is, against newcomers, what is now called a without notice (i e in the old jargon ex parte) injunction, that is an injunction which,

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A at the time when it is ordered, operates against a person who has not been served in due time with the application so as to be able to oppose it, who may have had no notice (even informal) of the intended application to court for the grant of it, and who may not at that stage even be a defendant served with the proceedings in which the injunction is sought. This is so regardless of whether the injunction is in form interim or final.

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

141 In considering whether injunctions of this type comply with the standards of procedural and substantive fairness and justice by which the courts direct themselves, it is the compliant (law-abiding) newcomer, not the contemptuous breaker of the injunction, who ought to be regarded as the paradigm in any process of evaluation. Courts grant injunctions on the F assumption that they will generally be obeyed, not as stage one in a process intended to lead to committal for contempt: see para 129 above, and the cases there cited, with which we agree. Furthermore the evaluation of potential injustice inherent in the process of granting injunctions against newcomers is more likely to be reliable if there is no assumption that the newcomer affected by the injunction is a person so regardless of the law that G they will commit a breach of it, even if the grant necessarily assumes a real risk that they (or a significant number of them) would, but for the injunction, invade the claimant's rights, or the rights (including the planning regime) of those for whose protection the claimant local authority seeks the injunction. That is the essence of the justification for such an injunction.

142 Recognition that injunctions against newcomers are in substance always a type of without notice injunction, whether in form interim or final, H 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

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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

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A related process of the court. Its purpose, and no doubt the reason for its recent popularity, is simply to provide a more effective, possibly the only effective, means of vindication or protection of relevant rights than any other sanction currently available to the claimant local authorities.

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 B evolutionary offspring, although analogies can be drawn, as will appear, with some established forms of order. It is in some respects just as novel as were the new types of injunction listed in para 143(viii) above, and it does not even share their family likeness of being developed to protect the integrity and effectiveness of some related process of the courts. As Mr Drabble KC for the appellants tellingly submitted, it is not even that C closely related to the established quia timet injunction, which depends upon proof that a named defendant has threatened to invade the claimant's rights. Why, he asked, should it be assumed that, just because one group of Travellers have misbehaved on the subject site while camping there temporarily, the next group to camp there will be other than model campers?

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 D about whether there is any jurisdiction or principled basis for granting it, it behoves this court to go back to first principles about the means by which the court navigates such uncharted water. Much emphasis was placed in this context upon the wide generality of the words of section 37 of the 1981 Act. This was cited in para 17 above, but it is convenient to recall its terms:

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

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 F tells you all you need to know proves both too much and too little. Too much because, as we have already observed, it is certainly not the case that judges can grant or withhold injunctions purely on their own subjective perception of the justice and convenience of doing so in a particular case. Too little because the statutory formula tells you nothing about the principles which the courts have developed over many years, even centuries, G to inform the judge and the parties as to what is likely to be just or convenient.

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 H withheld) have remained equitable: see *Fourie v Le Roux* [2007] 1 WLR 320 (paras 16 and 17 above) per Lord Scott of Foscote at para 25. Those principles continue to tell the judge what is just and convenient in any particular case. Furthermore, equitable principles generally provide the answer to the question whether settled principles or practice about the

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general limits or conditions within which injunctions are granted may properly be adjusted over time. The equitable origin of these principles is beyond doubt, and their continuing vitality as an analytical tool may be seen at work from time to time when changes or developments in the scope of injunctive relief are reviewed: see e g *Castanho v Brown & Root (UK) Ltd* [1981] AC 557 (para 21 above).

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

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

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

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

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

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

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

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

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

> "Courts of Equity make a distinction in all cases between that which is D 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 E 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 F 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 G development of the search order, from its original form in *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55 to the much more sophisticated current form annexed to Practice Direction 25A supplementing CPR Pt 25 and which may be modified as necessary. To a lesser extent a similar process of careful, incremental design accompanied the development of the freezing injunction. The standard form now sanctioned by the CPR is a much more sophisticated version than the original used in *Mareva Cia Naviera SA v* H *International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509. Of course, this flexibility enables not merely incremental development of a new type of injunction over time in the light of experience, but also the detailed moulding of any standard form to suit the justice and convenience of any particular case.

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

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

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

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

F **160** Protection of the court's process from abuse, or preservation of the utility of its future orders, may fairly be said to be the bedrock of many of equity's forays into new forms of injunction. Thus freezing injunctions are designed to make more effective the enforcement of any ultimate money judgment: see *Broad Idea* [2023] AC 389 at paras 11–21. This is what Lord Leggatt JSC there called the enforcement principle. Search orders are G 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.

H **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

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

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

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

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

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

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A merely squatters present when the order was made, but also squatters who arrived on the relevant land thereafter, unless they apply to be joined as defendants to assert a right of their own to remain.

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 B creature of the common law rather than equity, being a modern form of the old action in ejectment which is at its heart an action in rem rather than in personam: see *Manchester Corpn v Connolly* [1970] Ch 420, 428–9 per Lord Diplock, *McPhail v Persons, Names Unknown* [1973] Ch 447, 457 per Lord Denning MR and more recently *Meier* [2009] 1 WLR 2780, paras 33–36 per Baroness Hale JSC. Secondly, possession orders of this kind are not truly injunctions. They authorise a court official to remove persons C 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 D 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 E 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 F 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 G rights) of the affected newcomers, sufficient to overcome the strong prima facie objection of subjecting them to a without notice injunction otherwise than as an emergency measure to hold the ring. This will need to include an obligation to take all reasonable steps to draw the application and any order made to the attention of all those likely to be affected by it (see paras 226–231 below); and the most generous provision for liberty (i e permission) to apply to have the injunction varied or set aside, and on H 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

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to research for and then present to the court everything that might have been said by the targeted newcomers against the grant of injunctive relief. A

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

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

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

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

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

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 H

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A instructions quickly taken by telephone during the short adjournment) that, in summary, byelaws took too long to obtain (requiring two stages of negotiation with central government), would need to be separately made in relation to each site, would be too inflexible to address changes in the use of the relevant sites (particularly if subject to development) and would unduly criminalise the process of enforcing civil rights. The appellants did not engage with the detail of any of these points, their objection being more a B 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 C 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 D 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 E 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 F 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 G well-recognised way of minimising the potential for procedural unfairness inherent in such applications. But sometimes even the most informal notice is self-defeating, as in the case of a freezing injunction, where notice may provoke the respondent into doing exactly that which the injunction is designed to prohibit, and a search order, where notice of any kind is feared to be likely to trigger the bonfire of documents (or disposal of laptops) the prevention of which is the very reason for the application.

H

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

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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

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A 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, B 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 C camping as trespassers, as when Travellers buy a site for camping on, and are then proceeded against for breach of planning control rather than for trespass: see e g the *Gammell* case and the appeal in *Bromley London Borough Council v Maughan* heard at the same time. In such a case the potential procedural injustice of a without notice injunction might well be sufficient to require the local authority to proceed against the owners of the D 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 E appeal) is that an injunction of this type made on the application of a local authority doing its duty in the public interest is not generally accompanied by a cross-undertaking in damages. There is of course a principled reason why public bodies doing their public duty are relieved of this burden (see *Financial Services Authority v Sinaloa Gold plc* [2013] 2 AC 28), and that reasoning has generally been applied in newcomer injunction cases against Travellers where the applicant is a local authority. We address this issue F further in the next section of this judgment (at para 234) and it would be wrong for us to express more definite views on it, in the absence of any submissions about it. In any event, if this were otherwise a decisive reason why an injunction of this type should never be granted, it may be assumed that local authorities, or some of them, would prefer to offer a cross undertaking rather than be deprived of the injunction.

G 183 The appellants' final main point was that it would always be impossible when considering the grant of an injunction against newcomers to conduct an individualised proportionality analysis, because each potential target Traveller would have their own particular circumstances relevant to a balancing of their article 8 rights against the applicant's claim for an injunction. If no injunction could ever be granted in the absence of an individualised proportionality analysis of the circumstances of every H 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

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

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

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

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

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

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

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

(1) Compelling justification for the remedy

188 Any applicant for the grant of an injunction against newcomers in a C 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) D 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 E 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.

F

(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 G 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 H 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

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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.

B **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.

C **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* D to exercise its powers to meet those needs under section 103 of the H(W)A 2014.

(ii) General "needs" assessments

E **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 F 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

G **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 H 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

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

199 The system for local development planning in England is now established by the Planning and Compulsory Purchase Act 2004 ("PCPA B 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, C 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 D 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 E aspect of PPTS 2015 amounts to indirect discrimination and has no proper justification: *Smith v Secretary of State for Housing, Communities and Local Government* [2023] PTSR 312. But for present purposes it is sufficient to say (and it remains the case) that there is in these policy documents clear advice that LPAs should, when producing their local plans, identify and update annually a supply of specific deliverable sites sufficient to provide five years' worth of sites against their locally set targets to address the needs of F 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 G 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 H 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

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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

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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 B 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.

C 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 D 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.

E (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. F 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 G 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 H 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.

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

213 Appropriate authorities are also given powers to make byelaws in relation to nature reserves by the National Parks and Access to the 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

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

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

218 We now turn to more general matters and safeguards. As we have C foreshadowed, any local authority applying for an injunction against persons unknown, including newcomers, in Gypsy and Traveller cases must satisfy the court by full and detailed evidence that there is a compelling justification for the order sought (see para 167(i) above). There must be a strong probability that a tort or breach of planning control or other aspect of public law is to be committed and that this will cause real harm. Further, the D 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 E relies but also and importantly, full disclosure of all facts, matters and arguments of which, after reasonable research, it is aware or could with reasonable diligence ascertain and which might affect the decision of the court whether to grant, maintain or discharge the order in issue, or the terms of the order it is prepared to make or maintain. This is a continuing obligation on any local authority seeking or securing such an order, and it is F 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.

G

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

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

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permissible to seek or maintain an order directed to newcomers or other persons unknown where it is impossible to name or identify them in some other and more precise way. Even where the persons sought to be subjected to the injunction are newcomers, the possibility of identifying them as a class by reference to conduct prior to what would be a breach (and, if necessary, by reference to intention) should be explored and adopted if possible.

(4) The prohibited acts

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

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

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

(5) Geographical and temporal limits

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

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A whether there is any proper justification for its continuance; and whether and on what basis a further order ought to be made.

(6) Advertising the application in advance

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 B 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 C 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 D 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 E 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.

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

(7) Effective notice of the order

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

H **231** Any applicant for such an order must in our view make full and complete disclosure of all the steps it proposes to take (i) to notify all persons likely to be affected by its terms; and (ii) to ascertain the names and addresses of all such persons who are known only by way of description. This will no doubt include placing notices in and around the relevant sites where this

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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.

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A **236** Counsel for the Secretary of State for Transport has submitted and we accept that each of these cases has called for a full and careful assessment of the justification for the order sought, the rights which are or may be interfered with by the grant of the order, and the proportionality of that interference. Again, in so far as the applicant seeks an injunction against newcomers, the judge must be satisfied there is a compelling need for the order. Often the circumstances of these cases vary significantly one from B 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 C 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 D 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 E 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 F 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 G 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 H 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.

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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.

Appeal dismissed.

COLIN BERESFORD, Barrister

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

Claim no: QB-2022-000904

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

Date: 26th January 2024

Before:
MR JUSTICE RITCHIE

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

BETWEEN

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

Claimants

-and-

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

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

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

(3) MRS ALICE BRENCHER AND 16 OTHERS

Defendants

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

Hearing date: 17th January 2024

- -

Approved Judgment

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

Mr Justice Ritchie:

The Parties

1. The Claimants are three companies who are part of a large petrochemical group called the Valero Group and own or have a right to possession of the 8 Sites defined out below.

2. The "4 Organisations" relevant to this judgment are:
   - 2.1 Just Stop Oil.
   - 2.2 Extinction Rebellion.
   - 2.3 Insulate Britain.
   - 2.4 Youth Climate Swarm.

   I have been provided with a little information about the persons who set up and run some of these 4 Organisations. They appear to be crowdfunded partly by donations. A man called Richard Hallam appears to be a co-founder of 3 of them.

3. The Defendants are firstly, persons unknown (PUs) connected with 4 Organisations who trespass or stay on the 8 Sites defined below. Secondly, they are PUs who block access to the 8 Sites defined below or otherwise interfere with the access to the 8 Sites by the Claimants, their servants, agents, licensees or invitees. Thirdly, they are named persons who have been involved in suspected tortious behaviour or whom the Claimants fear will be involved in tortious behaviour at the 8 Sites and the relevant access roads.

The 8 Sites

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

4.7 the second Claimant's Avonmouth oil terminal at Holesmouth Road, Royal E dward dock, Avonmouth BS11 9BT (shown outlined red on the plan G in Schedule 1 to the Order made by Bourne J on 28.7.2023);

4.8 the third Claimant's Pembrokeshire terminal at Main Road, Waterston, Milford Haven SA73 1DR (shown outlined red on plan H in Schedule 1 to the Order made by Bourne J on 28.7.2023).

Bundles

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

Summary

6. The 4 Organisations and members of the public connected with them seek to disrupt the petrochemical industry in England and Wales in furtherance of their political objectives and demands. After various public threats and protests and on police intelligence the Claimants issued a Claim Form on the 18th of March 2022 alleging that they feared tortious trespass and nuisance by persons unknown connected with the 4 Organisations at their 8 Sites and their access roads and seeking an interim injunction prohibiting that tortious behaviour.

7. Various interim prohibitions were granted by Mr Justice Butcher on the 21st of March 2022 in an ex-parte interim injunction protecting the 8 Sites and access thereto. However, protests involving tortious action took place at the Claimant's and other companies' Kingsbury site between the 1st and the 15th of April 2022 leading to not less than 86 protesters being arrested. The Claimants applied to continue their injunction and it was renewed by various High Court judges and eventually replaced by a similar interim injunction made by Mr Justice Bourne on the 28th of July 2023.

8. On the 12th of December 2023 the Claimants applied for summary judgment and for a final injunction to last five years with annual reviews. This judgment deals with the final hearing of that application which took place before me.

9. Despite valid service of the application, evidence and notice of hearing, none of the named Defendants attended at the hearing which was in open Court and no UPs attended at the hearing, nor did any member of the public as far as I could see in Court. The Claimants' counsel informed me that no communication took place between any named Defendant and the Claimants' solicitors in relation to the hearing other than by way of negotiations for undertakings for 43 of the named Defendants who all promised not to commit the feared torts in future.

The Issues

10. The issues before me were as follows:

10.1 Are the elements of CPR Part 24 satisfied so that summary judgment can be entered?

10.2 Should a final injunction against unknown persons and named Defendants be granted on the evidence presented by the Claimants?

10.3 What should the terms of any such injunction be?

The ancillary applications

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

Pleadings and chronology of the action

12. In the Claim Form the details of the claims were set out. The Claimants sought a *quia timet* (since he fears) injunction, fearing that persons would trespass into the 8 Sites and cause danger or damage therein and disrupt the processes carried out therein, or block access to the 8 Sites thereby committing a private nuisance on private roads or a public nuisance on public highways. The Claimants relied on the letter sent by Just Stop Oil dated 14th February 2022 to Her Majesty's Government threatening intervention unless various demands were met. Just Stop Oil asserted they planned to commence action from the 22nd of March 2022. Police intelligence briefings supported the risk of trespass and nuisance at the Claimants' 8 Sites. 3 unidentified groups of persons in connection with the 4 Organisations were categorised as Defendants in the claim as follows: (1) those trespassing onto the 8 Sites; (2) those blockading or obstructing access to the 8 Sites; (3) those carrying out a miscellany of other feared torts such as locking on, tunnelling or encouraging others to commit torts at the 8 Sites or on the access roads thereto. The Claim Form was amended by order of Bennathan J. in April 2022; Re amended by order of Cotter J. in September 2022 and re re amended in July 2023 by order of Bourne J.

13. In late March 2022 Mr Justice Butcher issued an interim ex parte injunction on a quia timet basis until trial, expressly stating it was not intended to prohibit lawful protest. He prohibited the Defendants from entering or staying on the 8 sites; impeding access to the 8 sites; damaging the Claimants' land; locking on or causing or encouraging others to breach the injunction. The Order provided for various alternative methods of service for the unknown persons by fixing hard copies of the injunction at the entrances and on access road at the 8 Sites, publishing digital copies online at a specific website and sending emails to the 4 Organisations.

14. Despite the interim injunction, between the 1st and the 7th of April 2022 protesters attended at the Claimants' Kingsbury site and 48 were arrested. Between the 9th and 15th of April 2022 further protesters attended at the Kingsbury site and 38 were arrested. No application to commit any person to prison for contempt was made. The protests were not just at the Claimants' parts of the Kingsbury site. They targeted other owners' sites there too.

15. On the return date, the original interim injunction was replaced by an Order dated 11th of April 2022 made by Bennathan J. which was in similar terms and provided for alternative service in a similar way and gave directions for varying or discharging the interim injunction on the application by any unknown person who was required provide their name and address if they wished to do so (none ever did). Geographical plans were attached to the original injunction and the replacement injunction setting out clearly which access roads were covered and delineating each of the 8 Sites. Undertakings were given by the Claimants and directions were given for various Chief Constables to disclose lists and names of persons arrested at the 8 Sites on dates up to the 1st of June 2022.

16. The Chief Constables duly obliged and on the 20th of September 2022 Mr Justice Cotter added named Defendants to the proceedings, extended the term of the interim injunction, provided retrospective permission for service and gave directions allowing variation or discharge of the injunction on application by any Defendant. Unknown persons who wished to apply were required to self-name and provide an address for service (none ever did). Then, on the 16th of December 2022 Mr Justice Cotter gave further retrospective permission for service of various documents. On the 20th of January 2023 Mr Justice Soole reviewed the interim injunction, gave permission for retrospective service of various documents and replaced the interim injunction with a similar further interim injunction. Alternative service was again permitted in a similar fashion by: (1) publication on a specified website, (2) e-mail to the 4 Organisations, (3) personal service on the named Defendants where that was possible because they had provided addresses. At that time no acknowledgement of service or defence from any Defendant was required.

17. In April 2023 the Claimants changed their solicitors and in June 2023 Master Cook gave prospective alternative service directions for future service of all Court documents by: (1) publication on the named website, (2) e-mail to the 4 Organisations, (3) fixing a notification to signs at the front entrances and the access roads of the 8 Sites. Normal service applied for the named Defendants who had provided addresses.

18. On the 28th of July 2023, before Bourne J., the Claimants agreed not to pursue contempt applications for breaches of the orders of Mr Justice Butcher and Mr Justice Bennathan for any activities before the date of the hearing. Present at that hearing were counsel for Defendants 31 and 53. Directions were given permitting a redefinition of "Unknown

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

19. On the 30th November 2023 Master Eastman ordered that service of exhibits to witness statements and hearing bundles was to be by: (1) uploading them onto the specific website, (2) emailing a notification to the 4 Organisations, (3) placing a notice at the 8 Sites entrances and access roads, (4) postal service to of a covering letter named Defendants who had provided addresses informing them where the exhibits could be read.

20. The Claimants applied for summary judgment on the 12th of December 2023.

21. By the time of the hearing before me, 43 named Defendants had provided undertakings in accordance with the Order of Mr Justice Bourne. Defendants 14 and 44 were wrongly added and so 17 named Defendants remained who had refused to provide undertakings. None of these attended the hearing or communicated with the Court.

The lay witness evidence

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

Service evidence

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

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

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

Substantive evidence

25. **David Blackhouse.** Mr. Blackhouse is employed by Valero International Security as European regional security manager. In his earlier statements he evidenced his fears that there were real and imminent threats to the Claimants' 8 Sites and in his later statements set out the direct action suffered at the Claimants' sites which fully matched his earlier fears.

26. In his first witness statement he set out evidence from the police and from the Just Stop Oil website evidencing their commitment to action and their plans to participate in protests. The website set out an action plan asking members of the public to sign up to the group's mailing list so that the group could send out information about their proposed activities and provide training. Intervention was planned from the 22nd of March 2022 if the Government did not back down to the group's demands. Newspaper reports from anonymous spokespersons for the group threatened activity that would lead to arrests involving blocking oil sites and paralysing the country. A Just Stop Oil spokesperson asserted they would go beyond the activities of Extinction Rebellion and Insulate Britain through civil resistance, taking inspiration from the old fuel protests 22 years before when lorries blockaded oil refineries and fuel depots. Mr. Blackhouse also summarised various podcasts made by alleged members of the group in which the group asserted it would train up members of the public to cause disruption together with Youth Climate Swarm and Extinction Rebellion to focus on the oil industry in April 2022 with the aim of causing disruption in the oil industry. Mr. Blackhouse also provided evidence of press releases and statements by Extinction Rebellion planning to block major UK oil refineries in April 2022 but refusing to name the actual sites which they would block. They asserted their protests would *"continue indefinitely*" until the Government backed down. Insulate Britain's press releases and podcasts included statements that persons aligned with the group intended to carry out "*extreme protests"* matching the protests 22 years before which allegedly brought the country to a "*standstill*". They stated they needed to cause an "*intolerable level of disruption".* Blocking oil refineries and different actions disrupting oil infrastructure was specifically stated as their objective.

27. In his second witness statement David Blackhouse summarised the protest events at Kingsbury terminal on the 1st of April 2022 (which were carried out in conjunction with similar protests at Esso Purfleet, Navigator at Thurrock and Exolum in Grays). He was present at the Site and was an eye-witness. The protesters blocked the access roads which were public and then moved onto private access roads. More than 30 protesters

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

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

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

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

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

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

> "***September 2019***
> 6.5 The Refinery was the target of protest activity in 2019, albeit this was on a smaller scale to that which took place in 2022 at the Kingsbury Terminal. The activity at the Refinery involved the blocking of access roads whereby the protestors used concrete "Lock Ons" i.e. the protestors locked arms, within the concrete blocks placed on the road, whilst sitting on the road to prevent removal. Although it was a non-violent protest it did impact upon employees at the Refinery who were prevented from attending and leaving work. Day to day operations and deliveries were negatively impacted as a result.
> 6.6…
> ***Friday 1st April 2022***
> Protestors obstructed the crossroads junction of Trinity Road, Piccadilly Way, and the entrance to the private access road by sitting in the road. They also climbed onto two stationary road tanker wagons on Piccadilly Way, about thirty metres from the same junction, preventing the vehicles from moving, causing a partial obstruction of the road in the direction of the terminal. They also climbed onto one road tanker wagon that had stopped on Trinity Road on the approach to the private access road to the terminal. Fuel supplies from the Valero terminal were seriously disrupted due to the continued obstruction of the highway and the entrance to the private access road throughout the day. Valero staff had to stop the movement of road tanker wagons to or from the site between the hours of 07:40 hrs and 20:30 hrs. My understanding is that up to twenty two persons were arrested by the Police before Valero were able to receive road tanker traffic and resume normal supplies of fuel.
> ***Sunday 3rd April 2022***

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

Tuesday 5th April 2022

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

Thursday 7th April 2022

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

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

Saturday 9th April 2022

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

Sunday 10th April 2022

6.6.6 A caravan was left parked on the side of the road on Piccadilly way, between the roundabout junction with the A51 and the entrance to the Shell fuel terminal. Police detained a small group of protestors with the caravan including one who remained within a tunnel that had been excavated under the road. It appeared to be an attempt to cause a closure of one of the two routes leading to the oil terminals.
6.6.7 By 16:00 hrs police responded to two road tankers that were stranded on Trinity Road, approximately 900 metres north of the entrance to the private access road. Protestors had climbed onto the tankers preventing them from being driven any further, causing an obstruction on the second access route into the oil terminals.
6.6.8 The Police managed to remove the protestors on top of the road tankers but 18:00 hrs and I understand that the individual within the tunnel on Piccadilly Way was removed shortly after.
6.6.9 I understand that the Police made twenty-two arrests on the approach roads to the fuel terminals throughout the day. The road tanker wagons still managed to enter and leave the Valero site during the day taking whichever route was open at the time. This inevitably meant that some vehicles could not take their preferred route but could at least collect fuel as required. I was subsequently informed that a structural survey was quickly completed on the road tunnel and deemed safe to backfill without the need for further road closure.
Friday 15th April 2022
6.6.10 This was another day of major disruption. At 04:25 hrs the Valero operator initiated an emergency shutdown. The events were captured on seventeen video files recording imagery from two CCTV cameras within the site between 04:20 hrs and 15:45 hrs that day.
6.6.11 At 04:25 a group of about ten protestors approached the emergency access gate which is located on the northern corner of the site, opening out onto Trinity Road, 600 metres north of the entrance to the shared private access road. They were all on foot and could be seen carrying ladders. Two ladders were used to climb up the outside of the emergency gate and then another two ladders were passed over to provide a means of climbing down inside the Valero site. Seven persons managed to climb over before a police vehicle pulled up alongside the gate. The seven then dispersed into the Kingsbury Terminal.
6.6.12 The video footage captures the group of four males and three females sitting for several hours on the pipe rack, with two of them (one male and one female) making their way up onto the roof of the loading bay area nearby. The two on the roof sat closely together whilst the male undressed and sat naked for a considerable time sunbathing. The video footage concludes with footage of Police and the Fire and Rescue service working together to remove the two individuals.

6.6.13 The Valero terminal remained closed between 04:30 hrs and 16:00 hrs that day causing major disruption to fuel collections. The protestors breached the site's safety rules and the emergency services needed to use a 'Cherry Picker' (hydraulic platform) during their removal. There were also concerns that the roof panels would not withstand the weight of the two persons sitting on it.
6.6.14 I understand that Police made thirteen arrests in or around Valero and the other fuel terminals that day and had to request 'mutual aid' from neighbouring police forces.

Tuesday 26th April 2022

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

Wednesday 27th April 2022

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

Thursday 28th April 2022

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

Wednesday 4th May 2022

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

Thursday 12th May 2022

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

Monday 22nd August 2022

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

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

Tuesday 23rd August 2022

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

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

Wednesday 14th September 2022

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

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

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

30. In his 5th witness statement the main threats identified by Mr Blackhouse were; (1) protesters directly entering the 8 Sites. He stated there had been serious incidents in the

past in which protestors forcibly gained access by cutting through mesh border fencing or climbing over fencing and then carrying out dangerous activities such as climbing and sitting on top of storage tanks containing highly flammable fuel and vapour. He warned that the risk of fire for explosion at the 8 Sites is high due to the millions of litres of flammable liquid and gas stored at each. Mobile phones and lighters are heavily controlled or prohibited. (2) He warned that any activity which blocked or restricted access roads would be likely to create a situation where the Claimants were forced to take action to reduce the health and safety risks relating to emergency access which might include evacuating the sites or shutting some activity on the sites.

31. Mr. Blackhouse warned of the knock-on effects of the Claimants having to manage protester activity to mitigate potential health and safety risks which would impact on the general public. If activity on the 8 Sites is reduced or prevented due to protester activity this would reduce the level of fuel produced, stored and transported, which would ultimately result in shortages at filling station forecourts, potentially panic buying and the adverse effects thereof. He referred to the panic buying that occurred in September 2021. Mr Blackhouse described the various refineries and terminals and the businesses carried on there. He also described the access roads to the sites. He described the substantial number of staff accessing the sites and the substantial number of tanker movements per day accessing refineries. He also described the substantial number of ship movements to and from the jetties per annum. He warned of the dangers of blocking emergency services getting access to the 8 Sites. He stated that if access roads at the 8 Sites were blocked the Claimants would have no option but to cease operations and shut down the refineries to ensure compliance with health and safety risk assessments. He informed the Court that one of the most hazardous times at the refineries was when restarting the processes after a shut down. The temperatures and pressures in the refinery are high and during restarting there is a higher probability of a leak and resultant explosions. Accordingly, the Claimants seek to limit shutdown and restart activity as much as possible. Generally, these only happen every four or five years under strictly controlled conditions.

32. Mr. Blackhouse referred to an incident in 2019 when Extinction Rebellion targeted the Pembroke oil refinery and jetties by blocking the access roads. He warned that slow walking and blocking access roads remained a real risk and a health and safety concern. He also informed the Court that local police at this refinery took a substantial time to deal with protesters due to locking on and climbing in, resulting in significant delay. He further evidenced this by reference to the Kingsbury terminal protest in 2022.

33. Mr. Blackhouse asserted that all of the 8 Sites are classified as "Critical National Infrastructure". The Claimants liaise closely with the National Protective Security Authority and the National Crime Agency and the Counter Terrorism Security Advisor Service of the police. Secret reports received from those agencies evidenced continuing potential activity by the 4 Organisations. In addition, on the 8th of July 2023 Extinction Rebellion stickers were placed on a sign at the refinery.

34. Overall Mr. Blackhouse asserted that the deterrent effect of the injunctions granted has diminished the protest activity at the 8 Sites but warned that it was clear that at least some of the 4 Organisations maintained an ongoing campaign of protest activity throughout the UK. He asserted it was critical that the injunctive relief remained in place for the protection of the Claimants' employees, visitors to the sites, the public in surrounding areas and the protesters themselves.

35. **David McLoughlin.** Mr McLoughlin is a director employed by the Valero group responsible for pipeline and terminals. His responsibilities include directing operations and logistics across all of the 8 Sites.

36. He warned the Court that blocking access to the 8 Sites would have potentially very serious health and safety and environmental consequences and would cause significant business disruption. He described how under the *Control of Major Accidents Hazards Involving Dangerous Substances Regulations 2015* the 8 Sites are categorised according to the risks they present which relate directly to the quantity of dangerous substances held on each site. Heavy responsibilities are placed upon the Claimants to manage their activities in a way so as to minimise the risk to employees, visitors and the general public and to prevent major accidents. The Claimants are required to carry out health and safety executive guided risk assessments which involve ensuring emergency services can quickly access the 8 Sites and to ensure appropriate manning. He warned that there were known safety risks of causing fires and explosions from lighters, mobile phones, key fobs and acrylic clothing. The risks are higher around the storage tanks and loading gantries which seemed to be favoured by protestors. He warned that the Plymouth and Manchester sites were within easy reach of large populations which created a risk to the public. He warned that blocking access roads to the 8 Sites would give rise to a potential risk of breaching the 2015 Regulations which would be both dangerous and a criminal offence. Additionally blocking access would lead to a build-up of tankers containing fuel which themselves posed a risk. He warned of the potential knock-on effects of an access road blockade on the supply chain for in excess of 700 filling stations and to the inward supply chain from tankers. He warned of the 1-2 day filling station tank capacity which needed constant and regular supply from the Claimants' sites. He also warned about the disruption to commercial contracts which would be caused by disruption to the 8 Sites. He set out details of the various sites and their access roads. He referred to the July 2022 protest at the Plymouth terminal site and pointed out the deterrent effect of the injunction, which was in place at that time, had been real and had reduced the risk.

37. **Emma Pinkerton.** Miss Pinkerton has provided 5 witness statements in these proceedings, the last one dated December 2023. She is a partner at CMS Cameron McKenna Nabarro Olswang LLP.

38. In her 3rd statement she set out details relating to the interlocutory course of the proceedings and service and necessary changes to various interim orders made.

39. In her last witness statement she gave evidence that the Claimants do not seek to prevent protesters from undertaking peaceful lawful protests. She asserted that the Defendants had no real prospect of successfully defending the claim and pointed out that no Acknowledgments of Service or Defences had been served. She set out the chronology of the action and service of proceedings. She dealt with various errors in the orders made. She summarised that 43 undertakings had been taken from Defendants. She pointed out that there were errors in the naming of some Defendants. Miss Pinkerton summarised the continuing threat pointing out that the Just Stop Oil Twitter feed contained a statement dated 9th June 2023 setting out that the writer explained to Just Stop Oil connected readers that the injunctions banned people from taking action at refineries, distribution hubs and petrol stations and that the punishments for breaking injunctions ranged from unlimited fines to imprisonment. She asserted that the Claimants' interim injunctions in combination with those obtained by Warwickshire Borough Council had significantly reduced protest activity at the Kingsbury site.

40. Miss Pinkerton provided a helpful summary of incidents since June 2023. On the 26th of June 2023 Just Stop Oil protesters carried out four separate slow marches across London impacting access on King's College Hospital. On the 3rd of July 2023 protesters connected with Extinction Rebellion protested outside the offices of Wood Group in Aberdeen and Surrey letting off flares and spraying fake oil across the entrance in Surrey. On 10th July 2023 several marches took place across London. On the 20th of July 2023 supporters of Just Stop Oil threw orange paint over the headquarters of Exxon Mobile. On the 1st of August 2023 protesters connected with Just Stop Oil marched through Cambridge City centre. On the 13th of August 2023 protesters connected with Money Rebellion (which may be associated with Extinction Rebellion) set off flares at the AIG Women's Open in Tadworth. On the 18th of August 2023 protesters associated with Just Stop Oil carried out a slow march in Wells, Somerset and the next day a similar march took place in Exeter City centre. On the 26th of August 2023 a similar march took place in Leeds. On the 2nd of September 2023 protesters associated with Extinction Rebellion protested outside the London headquarters of Perenco, an oil and gas company. On the 9th of September 2023 there was a slow march by protesters connected with Just Stop Oil in Portsmouth City centre. On the 18th of September 2023 protesters connected with Extinction Rebellion poured fake oil over the steps of the Labour Party headquarters and climbed the building letting off smoke grenades and one protester locked on to a handrail. On the 1st of October 2023 protesters connected with Extinction Rebellion protested in Durham. On the 10th of October 2023 protesters connected with Just Stop Oil sprayed orange paint over the Radcliffe Camera library building in Oxford and the facade of the forum at Exeter University. On the 11th of October 2023 protesters connected with Just Stop Oil sprayed orange paint over parts of Falmouth University. On the 17th of October 2023 various protesters were arrested in connection with the Energy Intelligence forum in London. On the 19th of October

2023 protests took place in Canary Wharf targeting financial businesses allegedly supporting fossil fuels and insurance companies in the City of London. On the 30th of October 2023 60 protesters were arrested for slow marching outside Parliament. On the 10th of November 2023 protesters connected with Extinction Rebellion occupied the offices of the Daily Telegraph. On the 12th of November 2023 protesters connected with Just Stop Oil marched in Holloway Road in London. On the 13th of November 2023 protesters connected with Just Stop Oil marched from Hendon Way leading to a number of arrests. On the 14th of November 2023 protesters connected with Just Stop Oil marched from Kennington Park Rd. On the same day the Metropolitan Police warned that the costs of policing such daily marches was becoming unsustainable to the public purse. On the 15th of November 2023 protesters connected with Just Stop Oil marched down the Cromwell Road and 66 were arrested. On the 18th of November 2023 protestors connected with Just Stop Oil and Extinction Rebellion protested outside the headquarters of Shell in London and some arrests were made. On the 20th of November 2023 protesters connected with Just Stop Oil gathered in Trafalgar Square and started to march and some arrests were made. On the 30th of November 2023 protesters connected with Just Stop Oil gathered in Kensington in London and 16 were arrested.

41. Miss Pinkerton extracted some quotes from the Just Stop Oil press releases including assertions that their campaign would be "*indefinite*" until the Government agreed to stop new fossil fuel projects in the UK and mentioning their supporters storming the pitch at Twickenham during the Gallagher Premiership Rugby final. Further press releases in June and July 2023 encouraging civil resistance against oil, gas and coal were published. In an open letter to the police unions dated 13th September 2023 Just Stop Oil stated they would be back on the streets from October the 29th for a resumption after their 13 week campaign between April and July 2023 which they asserted had already cost the Metropolitan Police more than £7.7 million and required the equivalent of an extra 23,500 officer shifts.

42. Miss Pinkerton also examined the Extinction Rebellion press statements which included advice to members of the public to picket, organise locally, disobey and asserted that civil disobedience works. On the 30th of October 2023 a spokesperson for Just Stop Oil told the Guardian newspaper that the organisation supporters were willing to slow march to the point of arrest every day until the police took action to prosecute the real criminals who were facilitating new oil and gas extraction.

43. Miss Pinkerton summarised the various applications for injunctions made by Esso Oil, Stanlow Terminals Limited, Infranorth Limited, North Warwickshire Borough Council, Esso Petroleum, Exxon Mobile Chemical Limited, Thurrock Council, Essex Council, Shell International, Shell UK, UK Oil Pipelines, West London Pipeline and Storage, Exolum Pipeline Systems, Exolum Storage, Exolum Seal Sands and Navigator Terminals.

44. Miss Pinkerton asserted that the Claimants had given full and frank disclosure as required by the Supreme Court in *Wolverhampton v London Gypsies* (citation below). In summary she asserted that the Claimants remained very concerned that protest groups including the 4 Organisations would undertake disruptive, direct action by trespass or blocking access to the 8 Sites and that a final injunction was necessary to prevent future tortious behaviour.

Previous decision on the relevant facts

45. In *North Warwickshire v Baldwin and 158 others and PUs* [2023] EWHC 1719, Sweeting J gave judgment in relation to a claim brought by North Warwickshire council against 159 named defendants relating to the Kingsbury terminal which is operated by Shell, Oil Pipelines Limited, Warwickshire Oil Storage Limited and Valero Energy Ltd. Findings of fact were made in that judgment about the events in March and April 2022 which are relevant to my judgment. Sweeting J. found that protests began at Kingsbury during March 2022 and were characterised by protesters glueing themselves to roads accessing the terminal; breaking into the terminal compounds by cutting through gates and trespassing; climbing onto storage tanks containing unleaded petrol, diesel and fuel additives; using mobile phones within the terminal to take video films of their activities while standing on top of oil tankers and storage tanks and next to fuel transfer equipment; interfering with oil tankers by climbing onto them and fixing themselves to the roofs thereof; letting air out of the tyres of tankers; obstructing the highways accessing the terminal generally and climbing equipment and abseiling from a road bridge into the terminal. In relation to the 7th of April Sweeting J found that at 12:30 (past midnight) a group of protesters approached one of the main terminal entrances and attempted to glue themselves to the road. When the police were deployed a group of protesters approached the same enclosure from the fields to the rear and used a saw to break through an exterior gate and scaled fences to gain access. Once inside they locked themselves onto a number of different fixtures including the top of three large fuel storage tanks containing petrol diesel and fuel additives and the tops of two fuel tankers and the floating roof of a large fuel storage tank. The floating roof floated on the surface of stored liquid hydrocarbons. Sweeting J found that the ignition of liquid fuel or vapour in such a storage tank was an obvious source of risk to life. On the 9th of April 2022 protesters placed a caravan at the side of the road called Piccadilly Way which is an access road to the terminal and protesters glued themselves to the sides and top of the caravan whilst others attempted to dig a tunnel under the road through a false floor in the caravan. That was a road used by heavily laden oil tankers to and from the terminal and the collapse of the road due to a tunnel caused by a tanker passing over it was identified by Sweeting J as including the risk of injury and road damage and the escape of fuel fluid into the soil of the environment.

Assessment of lay witnesses

46. I decide all facts in this hearing on the balance of probabilities. I have not seen any witness give live evidence. None were required for cross-examination by the Defendants. None were challenged. I take that into account.

47. Having carefully read the statements I accept the evidence put before me from the Claimants' witnesses. I have not found sloppiness, internal inconsistency or exaggeration in the way they were written or any reason to doubt the evidence provided.

The Law

Summary Judgment

48. Under CPR part 24 it is the first task of this Court to determine whether the Defendants have a realistic prospect of success in defending the claim. Realistic is distinguished from a fanciful prospect of success, see *Swain v Hillman* [2001] 1 ALL ER 91. The threshold for what is a realistic prospect was examined in *ED and F Man Liquid Products v Patel* [2003] EWCA Civ. 472. It is higher than a merely arguable prospect of success. Whilst it is clear that on a summary judgement application the Court is not required to effect a mini trial, it does need to analyse the evidence put before it to determine whether it is worthless, contradictory, unimpressive or incredible and overall to determine whether it is credible and worthy of acceptance. The Court is also required to take into account, in a claim against PUs, not only the evidence put before it on the application but also the evidence which could reasonably be expected to be available at trial both on behalf of the Claimants and the Defendants, see *Royal Brompton Hospitals v Hammond (#5)* [2001] EWCA Civ. 550. Where reasonable grounds exist for believing that a fuller investigation of the facts of the case at trial would affect the outcome of the decision then summary judgement should be refused, see *Doncaster Pharmaceuticals v Bolton Pharmaceutical Co* [2007] F.S.R 3. I take into account that the burden of proof rests in the first place on the applicant and also the guidance given in *Sainsbury's Supermarkets v Condek Holdings* [2014] EWHC 2016, at paragraph 13, that if the applicant has produced credible evidence in support of the assertion that the applicant has a realistic prospect of success on the claim, then the respondent is required to prove some real prospect of success in defending the claim or some other substantial reason for the claim going to trial. I also take into account the guidance given at paragraph 40 of the judgment of Sir Julian Flaux in the Court of Appeal in *National Highways Limited v Persons Unknown* [2023] EWCA Civ. 182, that the test to be applied when a final anticipatory injunction is sought through a summary judgment application is the same as in all other cases.

49. CPR part 24 r.24.5 states that if a respondent to a summary judgment application wishes to put in evidence he "must" file and serve written evidence 7 days before the hearing. Of course, this cannot apply to PUs who will have no knowledge of the hearing. It does apply to named and served Defendants.

50. But what approach should the Court take where named Defendant served nothing and PUs are also Defendants? In *King v Stiefel* [2021] EWHC 1045 (Comm) Cockerill J. ruled as follows on what to do in relation to evidence:

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

51. In my judgment, in a case such as this, where named Defendants have taken no part and where other Defendants are PUs, the safest course is to follow the guidance of the Supreme Court and treat the hearing as ex-parte and to consider the defences which the PUs could run.

Final Injunctions

52. The power of this Court to grant an injunction is set out in S.37 of *the Senior Courts Act 1981*. The relevant sections follow:

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

53. An injunction is a discretionary remedy which can be enforced through contempt proceedings. There are two types, mandatory and prohibitory. I am only dealing with an application for the latter type and only on the basis of quia timet – which is the fear of the Claimants that an actionable wrong will be committed against them. Whilst the balance of convenience test was initially developed for interim injunctions it developed such that it is generally used in the granting of final relief. I shall refer below to how it is refined in PU cases.

54. In law a landowner whose title is not disputed is prima facie entitled to an injunction to restrain a threatened or apprehended trespass on his land: see Snell's Equity (34th ed) at para 18-012. In relation to quia timet injunctions, like the one sought in this case, the Claimants must prove that there is a real and imminent risk of the Defendant causing the torts feared, not that the torts have already been committed, per Longmore LJ in *Ineos Upstream v Boyd* [2019] 4 WLR 100, para 34(1). I also take account of the

judgment of Sir Julian Flaux in *National Highways v PUs* [2023] 1 WLR 2088, in which at paras. 37-40 the following ruling was provided:

> "37. Although the judge did correctly identify the test for the grant of an anticipatory injunction, in para 38 of his judgment, unfortunately he fell into error in considering the question whether the injunction granted should be final or interim. His error was in making the assumption that before summary judgment for a final anticipatory injunction could be granted NHL had to demonstrate, in relation to each defendant, that that defendant had committed the tort of trespass or nuisance and that there was no defence to a claim that such a tort had been committed. That error infected both his approach as to whether a final anticipatory injunction should be granted and as to whether summary judgment should be granted.
> 38. As regards the former, it is not a necessary criterion for the grant of an anticipatory injunction, whether final or interim, that the defendant should have already committed the relevant tort which is threatened. *Vastint* [2019] 4 WLR 2 was a case where a final injunction was sought and no distinction is drawn in the authorities between a final prohibitory anticipatory injunction and an interim prohibitory anticipatory injunction in terms of the test to be satisfied. Marcus Smith J summarises at para 31(1) the effect of authorities which do draw a distinction between final prohibitory injunctions and final mandatory injunctions, but that distinction is of no relevance in the present case, which is only concerned with prohibitory injunctions.
> 39. There is certainly no requirement for the grant of a final anticipatory injunction that the claimant prove that the relevant tort has already been committed. The essence of this form of injunction, whether interim or final, is that the tort is threatened and, as the passage from *Vastint* at para 31(2) quoted at para 27 above makes clear, for some reason the claimant's cause of action is not complete. It follows that the judge fell into error in concluding, at para 35 of the judgment, that he could not grant summary judgment for a final anticipatory injunction against any named defendant unless he was satisfied that particular defendant had committed the relevant tort of trespass or nuisance.
> 40. The test which the judge should have applied in determining whether to grant summary judgment for a final anticipatory injunction was the standard test under CPR r 24.2, namely, whether the defendants had no real prospect of successfully defending the claim. In applying that test, the fact that (apart from the three named defendants to whom we have referred) none of the defendants served a defence or any evidence or otherwise engaged with the proceedings, despite being given ample opportunity to do so, was not, as the judge thought, irrelevant, but of considerable relevance, since it supported NHL's case

that the defendants had no real prospect of successfully defending the claim for an injunction at trial."

55. In relation to the substantive and procedural requirements for the granting of an injunction against persons unknown, guidance was given in *Canada Goose v Persons Unknown* [2021] WLR 2802, by the Court of Appeal. In a joint judgment Sir Terence Etherton and Lord Justices Richards and Coulson ruled as follows:

> "82 Building on *Cameron* [2019] 1 WLR 1471 and the *Ineos* requirements, it is now possible to set out the following procedural guidelines applicable to proceedings for interim relief against "persons unknown" in protestor cases like the present one:
> (1) The "persons unknown" defendants in the claim form are, by definition, people who have not been identified at the time of the commencement of the proceedings. If they are known and have been identified, they must be joined as individual defendants to the proceedings. The "persons unknown" defendants must be people who have not been identified but are capable of being identified and served with the proceedings, if necessary by alternative service such as can reasonably be expected to bring the proceedings to their attention. In principle, such persons include both anonymous defendants who are identifiable at the time the proceedings commence but whose names are unknown and also Newcomers, that is to say people who in the future will join the protest and fall within the description of the "persons unknown".
> (2) The "persons unknown" must be defined in the originating process by reference to their conduct which is alleged to be unlawful.
> (3) Interim injunctive relief may only be granted if there is a sufficiently real and imminent risk of a tort being committed to justify quia timet relief.
> (4) As in the case of the originating process itself, the defendants subject to the interim injunction must be individually named if known and identified or, if not and described as "persons unknown", must be capable of being identified and served with the order, if necessary by alternative service, the method of which must be set out in the order.
> (5) The prohibited acts must correspond to the threatened tort. They may include lawful conduct if, and only to the extent that, there is no other proportionate means of protecting the claimant's rights.
> (6) The terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do. The prohibited acts must not, therefore, be described in terms of a legal cause of action, such as trespass or harassment or nuisance. They may be defined by reference to the defendant's intention if that is strictly necessary to correspond to the threatened tort and done in non-technical

language which a defendant is capable of understanding and the intention is capable of proof without undue complexity. It is better practice, however, to formulate the injunction without reference to intention if the prohibited tortious act can be described in ordinary language without doing so.
(7) The interim injunction should have clear geographical and temporal limits. It must be time limited because it is an interim and not a final injunction. We shall elaborate this point when addressing Canada Goose's application for a final injunction on its summary judgment application."

56. I also take into account the guidance and the rulings made by the Supreme Court in *Wolverhampton City Council v London Gypsies* [2023] UKSC 47; [2024] 2 WLR 45 on final injunctions against PUs. This was a case involving a final injunction against unknown gypsies and travellers. The circumstances were different from protester cases because Local Authorities have duties in relation to travellers. In their joint judgment the Supreme Court ruled as follows:

"167. These considerations lead us to the conclusion that, although the attempts thus far to justify them are in many respects unsatisfactory, there is no immoveable obstacle in the way of granting injunctions against newcomer Travellers, on an essentially without notice basis, regardless of whether in form interim or final, either in terms of jurisdiction or principle. But this by no means leads straight to the conclusion that they ought to be granted, either generally or on the facts of any particular case. They are only likely to be justified as a novel exercise of an equitable discretionary power if:
(i) There is a compelling need, sufficiently demonstrated by the evidence, for the protection of civil rights (or, as the case may be, the enforcement of planning control, the prevention of anti-social behaviour, or such other statutory objective as may be relied upon) in the locality which is not adequately met by any other measures available to the applicant local authorities (including the making of byelaws). This is a condition which would need to be met on the particular facts about unlawful Traveller activity within the applicant local authority's boundaries.
(ii) There is procedural protection for the rights (including Convention rights) of the affected newcomers, sufficient to overcome the strong prima facie objection of subjecting them to a without notice injunction otherwise than as an emergency measure to hold the ring. This will need to include an obligation to take all reasonable steps to draw the application and any order made to the attention of all those likely to be affected by it (see paras 226—231 below); and the most generous provision for liberty (ie permission) to apply to have the injunction

varied or set aside, and on terms that the grant of the injunction in the meantime does not foreclose any objection of law, practice, justice or convenience which the newcomer so applying might wish to raise.
(iii) Applicant local authorities can be seen and trusted to comply with the most stringent form of disclosure duty on making an application, so as both to research for and then present to the court everything that might have been said by the targeted newcomers against the grant of injunctive relief.
(iv) The injunctions are constrained by both territorial and temporal limitations so as to ensure, as far as practicable, that they neither outflank nor outlast the compelling circumstances relied upon.
(v) It is, on the particular facts, just and convenient that such an injunction be granted. …"
…
"5. The process of application for, grant and monitoring of newcomer injunctions and protection for newcomers' rights
187. We turn now to consider the practical application of the principles affecting an application for a newcomer injunction against Gypsies and Travellers, and the safeguards that should accompany the making of such an order. As we have mentioned, these are matters to which judges hearing such applications have given a good deal of attention, as has the Court of Appeal in considering appeals against the orders they have made. Further, the relevant principles and safeguards will inevitably evolve in these and other cases in the light of experience. Nevertheless, they do have a bearing on the issues of principle we have to decide, in that we must be satisfied that the points raised by the appellants do not, individually or collectively, preclude the grant of what are in some ways final (but regularly reviewable) injunctions that prevent persons who are unknown and unidentifiable at the date of the order from trespassing on and occupying local authority land. We have also been invited to give guidance on these matters so far as we feel able to do so having regard to our conclusions as to the nature of newcomer injunctions and the principles applicable to their grant.
Compelling justification for the remedy
188. Any applicant for the grant of an injunction against newcomers in a Gypsy and Traveller case must satisfy the court by detailed evidence that there is a compelling justification for the order sought. This is an overarching principle that must guide the court at all stages of its consideration (see para 167(i))."
…
"(viii) *A need for review*
(2) Evidence of threat of abusive trespass or planning breach
218. We now turn to more general matters and safeguards. As we have foreshadowed, any local authority applying for an injunction against

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

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

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

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

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

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

(4) The prohibited acts

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

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

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

(5) *Geographical and temporal limits*

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

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

(6) Advertising the application in advance

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

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

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

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

(7) *Effective notice of the order*

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

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

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

(8) *Liberty to apply to discharge or vary*

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

(9) *Costs protection*

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

(10) *Cross-undertaking*

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

(11) *Protest cases*

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

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

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

58. **<u>(A) Substantive Requirements</u>**

Cause of action

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

Full and frank disclosure by the Claimant

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

Sufficient evidence to prove the claim

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

No realistic defence

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

Balance of convenience – compelling justification

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

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

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

Damages not an adequate remedy

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

(B) Procedural Requirements

Identifying PUs

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

The terms of injunction

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

The prohibitions must match the claim

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

Geographic boundaries

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

Temporal limits - duration

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

Service

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

The right to set aside or vary

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

Review

(15) Even a final injunction involving PUs is not totally final. Provision must be made for reviewing the injunction in the future. The regularity of the reviews depends on the circumstances. Thus such injunctions are "Quasi-final" not wholly final.

59. Costs and undertakings may be relevant in final injunction cases but the Supreme Court did not give guidance upon these matters.

60. I have read and take into account the cases setting out the historical growth of PU injunctions including *Ineos Upstream v PUs* [2019] EWCA Civ. 515, per Longmore LJ at paras. 18-34. I do not consider that extracts from the judgment are necessary here.

Applying the law to the facts

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

(A) Substantive Requirements

Cause of action

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

Full and frank disclosure

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

Sufficient evidence to prove the claim

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

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

No realistic defence

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

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

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

Balance of convenience – compelling justification

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

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

68. I also take into account the dangers involved in shutting down any refinery site. I take into account that a temporary emergency shutdown had to be put in place at Kingsbury on 7th April 2022 and the dangers that such safety measures cause on restart.

69. I take into account that no spokesperson for any of the 4 Organisations has agreed to sign undertakings and that 17 Defendants have refused to sign undertakings. I take into account the dark and ominous threats made by Roger Hallam, the asserted co-founder of Just Stop Oil and the statements of those who assert that they speak for the Just Stop Oil and the other organisations, that some will continue action using methods towards a more excessive limit.

Damages not an adequate remedy

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

(B) Procedural Requirements

Identifying PUs

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

The terms of the injunction

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

The prohibitions must match the claim

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

Geographic boundaries

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

Temporal limits - duration

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

Service

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

The right to set aside or vary

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

Review

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

Conclusions

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

END

Neutral Citation Number: [2024] EWHC 1277 (KB)

Case No: QB-2022-BHM-000044

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

Date: 24th May 2024

Before :

MR JUSTICE RITCHIE

- -

Between :

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

- and –

(1) NOT USED **Defendants**

(2) PERSONS UNKNOWN ENTERING OR REMAINING WITHOUT THE CONSENT OF THE CLAIMANTS ON, IN OR UNDER THE HS2 LAND WITH THE EFFECT OF DAMAGING AND/OR DELAYING AND/OR HINDERING THE CLAIMANTS, THEIR AGENTS, SERVANTS, CONTRACTORS, SUBCONTRACTORS, GROUP COMPANIES, LICENSEES, INVITEES AND/OR EMPLOYEES

(3) PERSONS UNKNOWN OBSTRUCTING AND/OR INTERFERING WITH ACCESS TO AND/OR EGRESS FROM THE HS2 LAND IN CONNECTION WITH THE HS2 SCHEME WITH OR WITHOUT VEHICLES, MATERIALS AND EQUIPMENT, WITH THE EFFECT OF DAMAGING AND/OR DELAYING AND/OR HINDERING THE CLAIMANTS, THEIR AGENTS, SERVANTS, CONTRACTORS, SUBCONTRACTORS, GROUP COMPANIES, LICENSEES, INVITEES AND/OR EMPLOYEES WITHOUT THE CONSENT OF THE CLAIMANTS

(4) PERSONS UNKNOWN CUTTING, DAMAGING, MOVING, CLIMBING ON OR OVER, DIGGING BENEATH OR REMOVING ANY ITEMS AFFIXED TO ANY TEMPORARY OR PERMANENT FENCING OR GATES ON OR AT THE PERIMETER OF THE HS2 LAND, OR DAMAGING, APPLYING ANY SUBSTANCE TO OR INTERFERING WITH ANY LOCK

OR ANY GATE AT THE PERIMETER OF THE HS2 LAND WITHOUT THE CONSENT OF THE CLAIMANTS

(5) MR ROSS MONAGHAN (AKA SQUIRREL / ASH TREE)

(6) MR JAMES ANDREW TAYLOR (AKA JIMMY KNAGGS / JAMES KNAGGS / RUN AWAY JIM)

(7-65) THE OTHER NAMED DEFENDANTS AS SET OUT IN ANNEX A HERETO

- -
- -

Michael Fry & **Jonathan Welch** of Counsel (instructed by **DLA Piper Solicitors**) for the **Claimant**
Stephen Simblet KC (instructed by **Robert Lizar Solicitors**) for the **6th Defendant**

Hearing dates: 15th May 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30pm on Friday 24th May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

....

Mr Justice Ritchie:

The Parties

1. The first Claimant is constructing the high speed railway from London to Crewe and was then planning to construct onwards to Manchester and Leeds. The second Claimant is the Secretary of State for Transport.

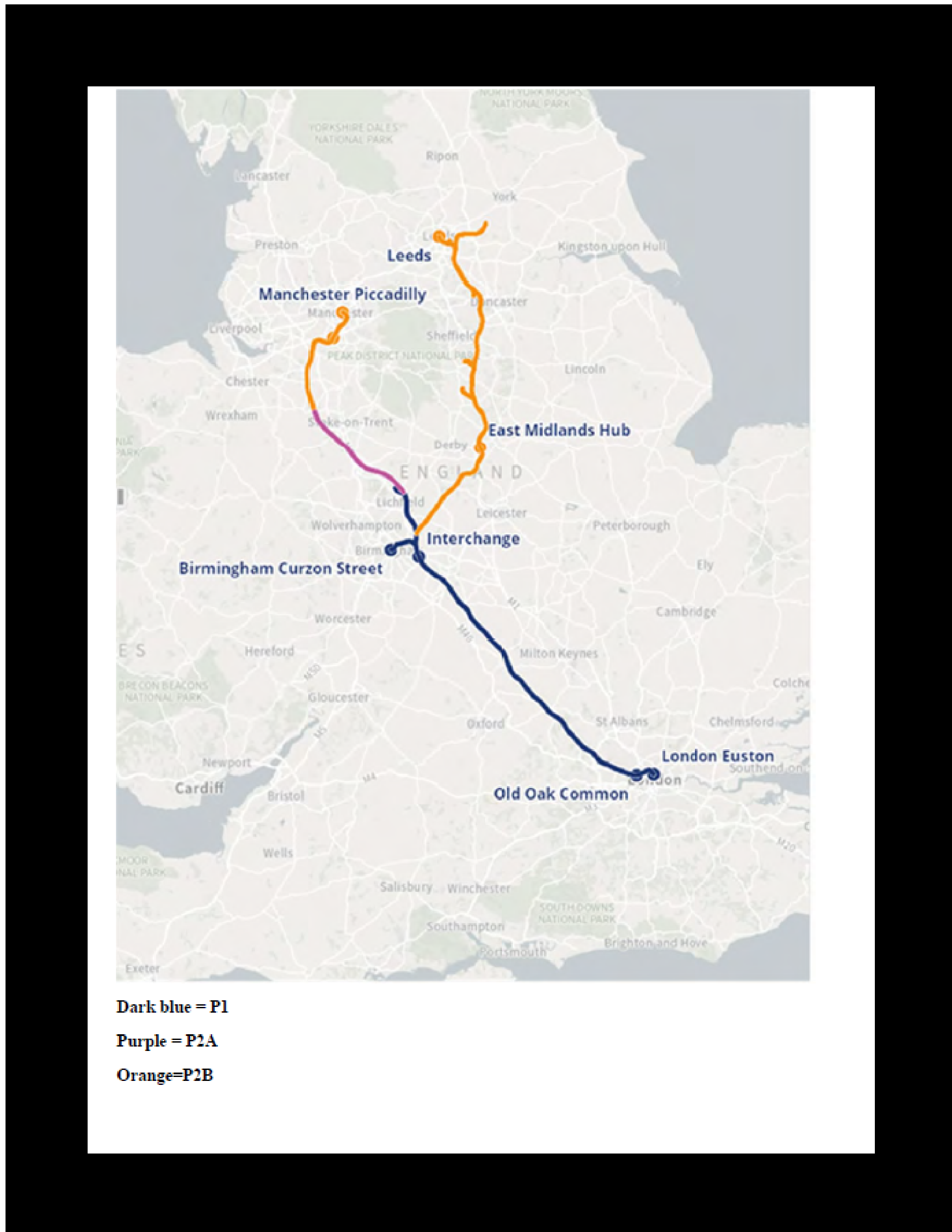
2. There are two types of Defendant. Persons Unknown (PUs) and named Defendants. The 6th Defendant (D6) attended the hearing. Many of the other named Defendants have been removed as parties to the proceedings as the claim has progressed. Most have been removed because they provided undertakings in similar format to the prohibitory interim injunctions granted to the Claimants. Some have been found in contempt of the CPL (Cotter J.) injunction and imprisoned.

Bundles

3. For the hearing I was provided with hard copy and digital bundles, beautifully prepared as follows: core bundles: A and B; supplementary bundles: A, B1 and 2, C; authorities bundles: main and supplementary. I was also provided with a skeleton argument by the Claimants and by D6 and a "Written Reasons" from D6 to amend the draft Order proposed by the Claimants.

The hearing

4. This was a review hearing of a routewide interim injunction granted to prohibit unlawful interference by known Defendants and PUs with the work being carried out by the Claimants to build the HS2 railway from London to Manchester and Leeds on land in HS2 possession. To understand the project as it stood when the claim was issued, it may help to see a simple map of it provided in evidence by the Claimants, which I set out below. There are three parts. Phase 1 is from London to the West Midlands and is shown in blue. Phase 2A was from West Midlands to Crewe and is shown in purple. Phase 2B is in orange, which takes the Western line from Crewe to Manchester and the Eastern line from West Midlands to Leeds. I shall refer to these phases both by colour and by the phase numbers.



The chronology

5. The HS2 project was authorised by Parliament through Acts dated 2017 and 2021. There were supporters of this project and there were objectors to it. Some of the objectors decided to take what they called direct action. Some of those taking direct action chose to break criminal and/or civil law as part of their direct action. Their publicly stated purposes included: causing huge expense to the Claimants by unlawful direct action on HS2 land through incurring security costs to deal with the direct action; delaying the construction of HS2 and thereby increasing the costs; persuading

Government to cease to build each and all of the phases set out above and saving the environments affected by the project. All such increased costs have been funded by UK taxpayers. It is not the role of this Courts to make any comment on any of those matters. In relation to civil unlawfulness, the Courts deal with applications and claims made by parties.

6. On 19 February 2018 Baring J. (PT 2018 000098) made an interim injunction protecting the Claimants' HS2 Harvil Road site from unlawful actions by PUs and named Defendants. Those included D28, 33, 36, and 39 in the action before me. I do not know how the claim progressed. This was renewed on 18 September 2020 by David Holland QC sitting as a Deputy High Court Judge.

7. On 23 March 2022 (QB 2022 BHM 000016) Linden J. made an interim injunction protecting the Claimants' HS2's contractor's land leased at Swynnerton, which was being used by Balfour Beatty (the contractor), which is very near to Cash's Pit Land (CPL) which the protesters called Bluebell Woods Camp. The interim injunction was to remain in force until further order and expired after 12 months. D6 in the action before me was a Defendant and appeared at that hearing. Directions were given for the claim to be pleaded out and for evidence to be filed and protection was given to PUs by the right to vary or set aside the order. I do not know how that claim progressed.

8. On 10 February 2021 (CO/361/2021) Steyn J. made an interim injunction order protecting the Claimants' HS2 land at Euston Square, London." On 28.3.2022 (QB 2021 004465) Linden J. made an interim injunction order protecting the Claimants' HS2 land at Euston Square, London. This was against Larch Maxey; Daniel Hooper (one of the Defendants in the case before me); Isla Sandford; J Stephenson-Clarke and B Croarkin. I do not know how that claim progressed.

9. The claim before me started by the issuing of the Claim Form on 28.3.2022. The Claimants sought possession of land at CPL and sought an injunction prohibiting PUs and named Defendants from trespassing and interfering with the construction of the project. They sought delivery up of possession of CPL, declaratory relief relating to possession of CPL, an injunction and costs.

10. The Claimants issued an application for urgent interim injunctions relating to CPL and routewide at the same time. D6 was represented at the hearing. Cotter J. made: (1) an order for possession of CPL against D6 and all the other Defendants, and (2) an interim injunction order against PUs and certain named Defendants who were believed to be occupying CPL (D5-20, 22, 31 and 63). The numbers and remaining Defendants' names (many have since been released from the claim) are set out in the Annex to this judgment. The original interim injunction was to last until trial or further order and expired on 24.10.2022 in any event.

11. On 20.9.2022 Julian Knowles J. handed down judgment on the Claimants' application in this action for a routewide interim injunction covering all HS2 land. At the hearing the Claimants had sought a final injunction. Julian Knowles J. noted that he was dealing not just with PUs but also with named Defendants and some of them might wish to dispute the claims against them, and indeed D6 objected to there being a final injunction. Thus, Knowles J. refused to make a final injunction and dealt with the application as one for an interim injunction (see para. 9 of his judgment). Knowles J. dealt with a wealth of evidence but no witness was cross-examined. I refer to and incorporate the chronology of events set out in the judgment. At para. 24 he set out the bit by bit litigation put in evidence before him which had preceded the routewide injunction application. He set out the Claimants' rights to the HS2 land; the Claimants' action for trespass and nuisance; the Defendants' clearly publicised intention to continue direct action protests against the construction of HS2 across the whole of the HS2 land; D6's submissions in opposition (lawful protest, no right to possession, lack of real and imminent risk, inadequate definition of PUs, inadequate constraint terms in the draft order, discretionary relief should not be granted, disproportionate exercise of power, breach of Art. 10 and 11 of the ECHR, challenges to service methods and other complaints). Julian Knowles J. set out the legal principles relating to trespass and nuisance and then covered the law relating to interim injunctions at paras. 91-102. In summary, he considered such injunctions were to "hold the ring pending the final hearing"; the Court was to apply the just and convenient test; adequacy of damages was to be considered; where wrongs had already been committed by the Defendant/s the quia timet threshold was lower and the evidential inference was that such infringements would continue until trial unless restrained; the Claimants had to show more than a real issue to be tried, he followed the principle in *Ineos v PUs* [2019] 4 WLR 100, at paras. 44-48, that the Court must be satisfied that the Claimants will likely obtain an injunction (preventing trespass) at the final hearing; and, for precautionary relief (what we fear, or quia timet), whether there was a sufficiently real and imminent risk of torts being committed which would cause harm sufficient to justify the relief. Knowles J. then set out the *Canada Goose* structural requirements for PU injunctions and considered the Defendants' ECHR rights. He then applied the law and made findings. He found that the Claimants had sufficient title to the HS2 land to make the claims. He accepted the Claimants' evidence of trespass and damage at CPL by PUs and Defendants "to the requisite standard at this stage" (para. 159). He found significant violence and criminality. He found that there was a real and imminent risk of continuing unlawfulness (para. 168). He rejected D6's submission that he had to find a risk of actual damage occurring on HS2 land and that there was no such risk. Knowles J. took account of the many past unlawful acts and the clearly expressed intention of many protesters to continue direct action by unlawful means. He found, at para. 177, that a precautionary interim injunction was appropriate and that to fail to grant one would be a licence for guerrilla tactics. These findings were not made on the "real issue to be tried" basis, but instead on the "likely to obtain the relief sought at trial" basis (para. 217); damages would not be an adequate remedy and the balance of convenience strongly favoured protecting the Claimants' HS2 land until trial. A helpful schedule of

the Defendants' responses was appended to the judgment. Some Defendants had put in defences; others had emailed or put in responses, submissions or witness statements.

12. D6 appealed the judgment of Knowles J. but permission was refused on 9.12.2022 by Coulson LJ.

13. The routewide interim injunction made by Julian Knowles J. in September 2022 was extended by me in May 2023 for another year. In para. 16 of that order and Schedule D to that order I made provision for any Defendant to apply to bring the proceedings to a final trial. This provided PUs and all named Defendants with the right to end being a party to the proceedings by that route. It provided each with the right to force the Claimants to prove their allegations on the balance of probabilities at trial, under cross-examination and after disclosure of relevant evidence and documentation. No Defendant has done so. Provisions were made for review of the interim injunction by May this year.

14. The Cotter J. version of the CPL interim injunction was breached by various Defendants back in 2022, who stayed at CPL despite the prohibitions therein. Committal proceedings were commenced and heard by me in July and September 2022. Two protestors who had been occupying CPL in treehouses gave undertakings and walked free: D62, (Leanne Swateridge, aka Flowery Zebra) and D31, (Rory Hooper). Five Defendants who had occupied tunnels were sentenced to imprisonment for contempt of Court, two of the sentences were suspended: D18, (William Harewood, aka Satchel/Satchel Baggins); D33 (Elliot Cuciurean, aka Jellytot); D61 (David Buchan, aka David Holliday); D64 (Stefan Wright); D65 (Liam Walters). One of these (Wright) never attended and is still at large.

The applications

15. Pursuant to the order I made in May 2023 the Claimants have faithfully applied for review of the interim injunction. By a notice of application dated 1.3.2024 they seek a 12 month extension of the routewide interim injunction, redefinition of the HS2 land plans; permission to update the definition of HS2 land and an extension of the prohibited acts to cover drone flying over their works on HS2 land.

16. The evidence in support of the application is set out in the following witness statements: James Dobson dated 28.2.2024; John Groves dated 28.2.2024; Julie Dilcock dated 28.2.2024 and Robert Shaw dated 27.2.2024.

17. The opposition to the application comes only from D6. Interestingly, now he submits that the Claimants should be required to progress the claim to a final hearing against all other Defendants, having submitted to Knowles J. that a final injunction should not be granted at that hearing. He wishes to be released from the claim himself. His counsel informed me at the hearing that he is crowd funded, that explains why he attends so

many of these HS2 hearings. The Claimants have never sought to enforce their costs against the crowd funding bank accounts or trustees.

The Issues

18. There were 5 substantive matters to be determined:
    18.1 Should the Claimants be required to take the claim to a final hearing?
    18.2 Should the duration of the routewide interim injunction be extended?
    18.3 Should the routewide injunction relating to the purple land be ended?
    18.4 Should the amendments to the details of the routewide injunction be permitted?
    18.5 Should D6 and 13 other Defendants be removed as parties to the claim?

The lay witness evidence

19. I have read the evidence from the Claimants' witnesses and from D6.

20. **James Dobson** is a security consultant and advisor to HS2. He reviewed the internal computer and documentary sources. He set out the Claimants' evidence. He asserted that the Claimants no longer considered 13 of the named Defendants to be a sufficient risk to the HS2 project for them to remain parties to the claim. These were D5, 6, 7, 22, 27, 28, 33, 36, 39, 48, 57, 58 and 59. After the removal of these Defendants, only 5 named Defendants would remain.

21. Mr Dobson informed the Court that since 17th March 2023 there had been no major direct action activist events or incidents targeting the HS2 project that had resulted in a delay of works by more than an hour. He considered there was direct evidence from activists that the reason the disruption to the HS2 project had stopped was the deterrent effect of the injunction and gave evidence by way of a few examples. However, he set out what he described as "minor incidences" of random trespasses to land which had not impacted on the works of the project. He asserted there were *increasing* incidences of unlawful occupation of phase 2 property and set these out. There were 24 events set out in a five column table. I summarise them below. Unfortunately he did not specify which was on phase 1 land and which was on phase 2 land. I have done my best to identify which is which in brackets below. In March 2023 urban explorers broke into the Grimstock Hotel in Birmingham (phase 1). The same month 10 caravans trespassed upon a business park in Saltley in Birmingham (phase 1) and, when challenged, left after about 10 hours. In May and June 2023 a group called Universal Law Community Trust occupied a building at Whitmore Heath, which is part of the phase 2A land. The description of the group paints them as debt buyers who control the debtors' behaviour after taking over their debt, for anarchic purposes. In May 2023 in Old Oak Common Road, London (phase 1), a man, who had previously trespassed on HS2 land, assaulted a security officer on a closed road. In July 2023 graffiti and some criminal damage had been done in Westbury Viaduct near Brackley (phase 1 land). In August 2023 three children set up a small campsite on HS2 land in Buckinghamshire (phase 1 land) and, when their parents were asked to remove them, they left. In the same month two people trespassed on land in Greatworth, Oxfordshire (phase 1) and interfered with some

machinery. In the same month a naked rambler walked onto an HS2 site in Western Cutting near Brackley (phase 1) and was escorted off. In the same month a local resident blocked access to an HS2 site at Washwood Heath in Birmingham (phase 1) but left when shown the injunction. In September 2023 D16 and another person entered HS2 land in Warwickshire (phase 1) and two other areas and took photographs which were posted on social media. The next day they went to two further HS2 sites in Warwickshire. The next day they went to one or two sites in Staffordshire (phase 2). In October 2023, at Addison Road, Calvert, (phase 1) fire extinguishers were discharged overnight. In the same month a group of urban explorers entered property at Drayton Lane, Tamworth (phase 1) and posted images. In the same month a group of urban explorers trespassed at Whitmore Heath, Whitmore (phase 2A) and shared photos with other urban explorers online. In the same month fireworks were fired towards security officers on HS2 land at Leather Lane, Great Missenden (phase 1). In November 2023 five members of a group called Unite The Union attended Old Oak Common Road, London (phase 1) with a megaphone but left when informed of the injunction. Later in November, a farm property at Swynnerton in Staffordshire (phase 2A) was entered by urban explorers. Later in November, 13 Unite The Union activists blocked access to HS2 logistics hubs at Channel Gate Road in London (phase 1). In December through to January 2024, D69 flew drones over multiple HS2 sites. However, he has given an undertaking which is satisfactory to the Claimants and so he is not being joined to the claim. In December 2023 vandalization occurred to a site in Aylesbury (phase 1). In January 2024 urban explorers entered an HS2 building at Birmingham Interchange (phase 1) and were escorted off site. Later that month urban explorers trespassed at Drayton Lane, Tamworth (phase 1). Finally, in February 2024 a person asserting to be a social media auditor flew drones over HS2 land at Victoria Road in London (phase 1) and caused a nuisance.

22. In his evidence Mr Dobson set out records of what he described as the displacement of activists to other causes and unlawful direct actions by them for other causes. He asserts that direct action protesters have transferred their interest to other causes including Palestine Action and Just Stop Oil. Mr Dobson asserts that activists will look for loopholes in injunction orders, relying on evidence that D6 made such a pronouncement in relation to Balfour Beatty and the injunction they obtained, which I have set out above, asserting that protesters would attack Balfour Beatty elsewhere, outside the scope of the injunction. Mr Dobson also sought to raise his concern that the group: Universal Law Community Trust had ties with protesters wishing to Stop HS2 because their occupation of a property owned by HS2 was mentioned on some anti HS2 websites. Mr Dobson also raised his concern about urban explorers.

23. Mr Dobson summarised an announcement by the Prime Minister on the 4th of October 2023 that phase two of the HS2 project had been abandoned but he did not set out the Prime Minister's words. Mr Dobson summarised various pronouncements about hit and run tactics published by Lousy Badger, social media threats to re-enter CPL and vague threats to “be back”. Overall, Mr Dobson asserted that the Claimants reasonably fear a

return to the levels of unlawful activity experienced prior to the interim injunction if it is allowed to lapse and asserts that the interim injunction has been remarkably successful in reducing direct unlawful action against HS2 land and saving taxpayers money.

24. John Groves is the chief security officer for HS2 and gave evidence that the costs of the unlawful direct action to date to the taxpayer, through HS2, have totalled £121,000,000. He asserted that the September 2022 interim routewide injunction had had a dramatic effect by reducing direct action, which diminished the quarterly security expenditure from over half a million down to just £100,000. He produced a forecast of the costs of future unlawful direct action of £7 million for phase two, ending in 2024, due to increased security. He said that activists had started campaigning for other causes but they may believe they can cancel the whole of the HS2 scheme. He asserted that unhappy land owners, whose land was taken away in phase 2, may get involved. He asserted that the Claimants need the deterrence of the injunction or the Claimants might need to spend another £12 million on protection. He was concerned about attacks on bridges over motorways as a potential weak spot in the project. He asserted that activity was still continuing despite the injunction but relied solely on the evidence of Mr Dobson.

25. Julie Dilcock, the in house lawyer for HS2, set out a history of the claims and then the rationale for the various alterations needed to the draft order. Robert Shaw gave evidence which assisted in various tidying up operations that are going to be needed.

26. I take into account what D6 set out in his written reasons. He was content to take no further part in the claim and agreed that the Claimants could no longer maintain an injunction against him. He asserted that, according to the Civil Procedure Rules, the Claimants had to issue notice of discontinuance, obtain the Court's permission and, by implication, pay his costs under CPR part 38, if they wished to discontinue against him. However, in my judgment, this was wanting his cake and to eat it. He asserted that, because he would still be bound by the injunction under the umbrella of the term "PU", he could still make submissions at the hearing and I permitted him to do so. His submissions were that the terms of the injunction should be modified so that it no longer covers the land relating to phase 2A of the project because the Prime Minister has announced that the project is not going ahead on phase 2 and therefore the protesters have achieved what they wanted. He suggested that the geographic scope of the injunction should be reduced so that it does not cover the purple land set out in the 2021 Act. He also raised the point that this is an interim injunction binding the world and that the Claimants were under a continuing, onerous, responsibility to disclose relevant matters to the Court as they arose. He asserted that the Claimants had failed, in a timely way, to inform the Court of the Prime Minister's announcement in October 2023 that phase 2 was being abandoned and therefore had failed in their responsibilities and that the sanction for this should be the discharge of the whole interim injunction.

27. I asked the Claimants' counsel to point the Court to the evidence, after the Prime Minister's announcement, that protesters were still going to take direct action against the HS2 land involved in phase 2A, the purple land, on which no construction work will be carried out in future because the project had been cancelled. The Claimants identified Core Bundle pages 152-155. This amounted to little more than announcements on social media of self-congratulation by a few campaigners (for instance Lousy Badger), a desire for a party at Bluebell Wood (CPL) and a call to continue to fight to persuade the Government to scrap phase 1 of the project.

The Law

28. I will set out the key points from the relevant case law put before me below. In *National Highways v PUs, Rodger and 132 Ors* [2023] EWCA Civ. 182, the claimant applied for summary judgment and final (quia timet, what we fear) injunctions, having obtained interim injunctions. The trial Judge granted summary judgment against various defendants found in contempt but not against 109 defendants who had not entered defences and were not individually identified as past tortfeasors. This was overturned on appeal. For an anticipatory injunction, whether interim or final, proof of a past tort by the individual Defendant is not a pre-requisite. The normal rules apply. So, for summary judgment, the normal application of CPR r.24.2 applied and for the quia timet (what we fear) injunction, the normal thresholds applied. The President of the KBD ruled thus:

> "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."

29. In *TfL v Lee & PUs & Ors* [2023] EWHC 402, Cavanagh J. was considering renewal of a PU injunction about roads and Just Stop Oil protesters. He ordered an expedited trial. He then considered the extension of the interim injunction. He accepted and adopted Freeman J.'s judgment on the earlier review and asked himself this question:

> "20. … 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."

30. Since the extension of the HS2 interim injunction in May 2023 the Supreme Court has passed judgment in *Wolverhampton City Council v London Gypsies* [2023] UKSC 47. This clarified that PU or newcomer injunctions can be granted on an interim or final basis subject to clear conditions and restraints. I summarised the guidance recently in *Valero Energy v PUs & Bencher & Ors* [2024] EWHC 134. I was considering both a summary judgment application and a final PU/named Defendants injunction. At paras. 57 – 60 I ruled thus:

> "57. I conclude from the rulings in Wolverhampton that the 7 rulings in *Canada Goose* remain good law and that other factors have been added. To summarise, in summary judgment applications for a final injunction against unknown persons ("PUs") or newcomers, who are protesters of some sort, the following 13 guidelines and rules must be met for the injunction to be granted. These have been imposed because a final injunction against PUs is a nuclear option in civil law akin to a temporary piece of legislation affecting all citizens in England and Wales for the future so must be used only with due safeguards in place.
> 58. **(A) Substantive Requirements**
> **Cause of action**
> (1) There must be a civil cause of action identified in the claim form and particulars of claim. The usual quia timet (since he fears) action relates to the fear of torts such as trespass, damage to property, private or public nuisance, tortious interference with trade contracts, conspiracy with consequential damage and on-site criminal activity.

Full and frank disclosure by the Claimant
(2) There must be full and frank disclosure by the Claimant (applicant) seeking the injunction against the PUs.
Sufficient evidence to prove the claim
(3) There must be sufficient and detailed evidence before the Court on the summary judgment application to justify the Court finding that the immediate fear is proven on the balance of probabilities and that no trial is needed to determine that issue. The way this is done is by two steps. Firstly stage (1), the claimant has to prove that the claim has a realistic prospect of success, then the burden shifts to the defendant. At stage (2) to prove that any defence has no realistic prospect of success. In PU cases where there is no defendant present, the matter is considered ex-parte by the Court. If there is no evidence served and no foreseeable realistic defence, the claimant is left with an open field for the evidence submitted by him and his realistic prospect found at stage (1) of the hearing may be upgraded to a balance of probabilities decision by the Judge. The Court does not carry out a mini trial but does carry out an analysis of the evidence to determine if it the claimant's evidence is credible and acceptable. The case law on this process is set out in more detail under the section headed "The Law" above.
No realistic defence
(4) The defendant must be found unable to raise a defence to the claim which has a realistic prospect of success, taking into account not only the evidence put before the Court (if any), but also, evidence that a putative PU defendant might reasonably be foreseen as able to put before the Court (for instance in relation to the PU s civil rights to freedom of speech, freedom to associate, freedom to protest and freedom to pass and repass on the highway). Whilst in *National Highways* the absence of any defence from the PUs was relevant to this determination, the Supreme Court's ruling in *Wolverhampton* enjoins this Court not to put much weight on the lack of any served defence or defence evidence in a PU case. The nature of the proceedings are "ex-parte" in PU cases and so the Court must be alive to any potential defences and the Claimants must set them out and make submissions upon them. In my judgment this is not a "Micawber" point, it is a just approach point.
Balance of convenience - compelling justification
(5) In interim injunction hearings, pursuant to *American Cyanamid v Ethicon* [1975] AC 396, for the Court to grant an interim injunction against a defendant the balance of convenience and/or justice must weigh in favour of granting the injunction. However, in PU cases, pursuant to *Wolverhampton*, this balance is angled against the applicant to a greater extent than is required usually, so that there must

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

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

Damages not an adequate remedy

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

(B) Procedural Requirements - Identifying PUs

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

The terms of the injunction

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

The prohibitions must match the claim

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

Geographic boundaries

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

Temporal limits - duration

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

Service

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

The right to set aside or vary

> (14) The PUs must be given the right to apply to set aside or vary the injunction on shortish notice.
> **Review**
> (15) Even a final injunction involving PUs is not totally final. Provision must be made for reviewing the injunction in the future. The regularity of the reviews depends on the circumstances. Thus such injunctions are "Quasi-final" not wholly final.
> 59. Costs and undertakings may be relevant in final injunction cases but the Supreme Court did not give guidance upon these matters."

31. Before me is a quia timet interim injunction. The Claimants had to and still have to prove a real and imminent risk of serious harm caused by tortious or criminal activity on their land, see *Canada Goose v PUs* [2020] EWCA Civ. 303, per Sir Terence Etherton MR at para. 82(3) (approved in *Wolverhampton*).

32. Drawing these authorities together, on a review of an interim injunction against PUs and named Defendants, this Court is not starting de novo. The Judges who have previously made the interim injunctions have made findings justifying the interim injunctions. It is not the task of the Court on review to query or undermine those. However, it is vital to understand why they were made, to read and assimilate the findings, to understand the sub-strata of the quia timet, the reasons for the fear of unlawful direct action. Then it is necessary to determine, on the evidence, whether anything material has changed. If nothing material has changed, if the risk still exists as before and the claimant remains rightly and justifiably fearful of unlawful attacks, the extension may be granted so long as procedural and legal rigour has been observed and fulfilled.

33. On the other hand, if material matters have changed, the Court is required to analyse the changes, based on the evidence before it, and in the full light of the past decisions, to determine anew, whether the scope, details and need for the full interim injunction should be altered. To do so, the original thresholds for granting the interim injunction still apply.

34. In relation to the issue of whether final quia timet injunctions can be granted against PUs, the Court of Appeal in *Canda Goose* ruled that they could not be granted (para. 89) 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. The Supreme Court in *Wolverhampton* overruled this decision. At para. 134 they together stated:

> "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."

At para 143 they ruled as follows:

> "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." (My emboldening).

Furthermore at para. 167 they ruled that:

> "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."

35. It is clear from this passage that quia timet injunctions against PUs, relating to private land owned or possessed by a claimant, are different beasts from old fashion injunctions against known defendants which need to be taken to trial. They do not "hold the ring pending trial". They are an end in themselves for the short or the medium term and may

never lead to service of defences from the PUs, whether or not the PUs become crystallised as Defendants.

Changes in the law

36. Just before and since the interim injunction was extended, new offences relating to protesters and others were created as follows. They are in the *Public Order Act 2023.*

> **"6. Obstruction etc of major transport works**
>
> (1) A person commits an offence if the person—
>
> (a) obstructs the undertaker or a person acting under the authority of the undertaker—
>
> (i) in setting out the lines of any major transport works,
>
> (ii) in constructing or maintaining any major transport works, or
>
> (iii) in taking any steps that are reasonably necessary for the purposes of facilitating, or in connection with, the construction or maintenance of any major transport works, or
>
> (b) interferes with, moves or removes any apparatus which—
>
> (i) relates to the construction or maintenance of any major transport works, and
>
> (ii) belongs to a person within subsection (5).
>
> (2) It is a defence for a person charged with an offence under subsection (1) to prove that—
>
> (a) they had a reasonable excuse for the act mentioned in paragraph (a) or (b) of that subsection, or
>
> (b) the act mentioned in paragraph (a) or (b) of that subsection was done wholly or mainly in contemplation or furtherance of a trade dispute.
>
> (3) A person who commits an offence under subsection (1) is liable on summary conviction to imprisonment for a term not exceeding the maximum term for summary offences, to a fine or to both.
>
> (4) In subsection (3) "the maximum term for summary offences" means—
>
> (a) if the offence is committed before the time when section 281(5) of the Criminal Justice Act 2003 (alteration of penalties for certain summary offences: England and Wales) comes into force, six months;
>
> (b) if the offence is committed after that time, 51 weeks.
>
> (5) The following persons are within this subsection—
>
> (a) the undertaker;
>
> (b) a person acting under the authority of the undertaker;
>
> (c) a statutory undertaker;
>
> (d) a person acting under the authority of a statutory undertaker.

(6) In this section "major transport works" means—
(a) works in England and Wales—
(i) relating to transport infrastructure, and
(ii) the construction of which is authorised directly by an Act of Parliament, or
(b) works the construction of which comprises development within subsection (7) that has been granted development consent by an order under section 114 of the Planning Act 2008.
(7) Development is within this subsection if—
(a) it is or forms part of a nationally significant infrastructure project within any of paragraphs (h) to (l) of section 14(1) of the Planning Act 2008,
(b) it is or forms part of a project (or proposed project) in the field of transport in relation to which a direction has been given under section 35(1) of that Act (directions in relation to projects of national significance) by the Secretary of State, or
(c) it is associated development in relation to development within paragraph (a) or (b)."
…
"7. Interference with use or operation of key national infrastructure
(1) A person commits an offence if—
(a) they do an act which interferes with the use or operation of any key national infrastructure in England and Wales, and
(b) they intend that act to interfere with the use or operation of such infrastructure or are reckless as to whether it will do so.
(2) It is a defence for a person charged with an offence under subsection (1) to prove that—
(a) they had a reasonable excuse for the act mentioned in paragraph (a) of that subsection, or
(b) the act mentioned in paragraph (a) of that subsection was done wholly or mainly in contemplation or furtherance of a trade dispute.
(3) A person who commits an offence under subsection (1) is liable—
(a) on summary conviction, to imprisonment for a term not exceeding the general limit in a magistrates' court, to a fine or to both;
(b) on conviction on indictment, to imprisonment for a term not exceeding 12 months, to a fine or to both.
(4) For the purposes of subsection (1) a person's act interferes with the use or operation of key national infrastructure if it prevents the infrastructure from being used or operated to any extent for any of its intended purposes.

> (5) The cases in which infrastructure is prevented from being used or operated for any of its intended purposes include where its use or operation for any of those purposes is significantly delayed.
>
> (6) In this section "key national infrastructure" means—
>
> (a) road transport infrastructure,
> (b) rail infrastructure,
> (c) air transport infrastructure,
> (d) harbour infrastructure,
> (e) downstream oil infrastructure,
> (f) downstream gas infrastructure,
> (g) onshore oil and gas exploration and production infrastructure,
> (h) onshore electricity generation infrastructure, or
> (i) newspaper printing infrastructure.
>
> Section 8 makes further provision about these kinds of infrastructure."

Submissions

37. The Claimants submitted that the Act of 2021 (phase 2A) remains in force, despite the Government announcement on the 4th of October 2023 that construction would not go ahead on phase 2. In addition, the high speed rail link between Crewe and Manchester was covered by a bill that was still in the Parliamentary process. The second Claimant had acquired 60% of the phase 2A land and had not announced what it was going to do with it. The Claimants relied on the evidence from Mr Groves and Mr Dobson and asserted that the routewide injunction had reduced unlawful protests and reduced the wasted costs paid by the taxpayer from spending of around £100 million to spending of around £100,000. The Claimants accepted there had been no major direct action since the 17th of March 2023, there had only been isolated incidents, but they submitted this showed that the injunction was working not that it should be terminated. There were individual protests by urban explorers, drone flyers and some "freeman of the land" groups. It was submitted that the Claimants should not lose the protection of the injunction on the purple land just because the injunction had been effective, that would be self defeating.

38. In response, D6 submitted that circumstances had changed since the granting and renewal of the routewide injunction. Firstly, the Government announcement took away the very sub strata for the injunction covering the purple land of phase 2A. It was submitted that the campaigners had "won", that they had no continued interest in phase 2A and therefore the injunction should no longer cover it. No written evidence or submission was made that the injunction should not be renewed for the blue part of the track, phase 1, which is currently under construction, although an en-passant verbal attempt was so made in the hearing. Furthermore, D6 submitted that new criminal offences had been created in the *Public Order Act,* in sections 7 and 6, which meant

that there was no need for the continuation of the civil injunction. It was submitted that the Claimants had an alternative remedy through the *Public Order Act*. Thirdly, it was submitted that the Claimants had substantially broken their duty to the Court of full and frank disclosure, which is required during the life of an injunction which is anticipatory and against newcomers/PUs, because the Claimants had failed to inform the Court of the Prime Minister's announcement until finally making the application in March 2023. That failure, it was submitted, should lead the Court to refuse to deploy its equitable power to continue the injunction. Further, it was submitted that it was inappropriate for the Claimants to "warehouse" the action against the named Defendants and the PUs and to fail to seek a final hearing. It was submitted that warehousing is contrary to the Civil Procedure Rules and is an abuse of process. In addition, D6 submitted that the claim against D6 should be struck out because the Claimants now admitted that the Claimants had no continuing cause of action against D6 or any good reason to pursue the injunction any further. Alternatively, D6 submitted that the Claimants should have issued a notice of discontinuance under CPR Part 38 which would have led to a liability for costs under CPR rule 38.6, unless the Court ordered otherwise. No notice of discontinuance having been issued D6 submitted that the claim against D6 should be struck out.

Changes to material matters

39. In my judgment, there have been clear and obvious changes which are material to the interim injunction. Firstly, phase 2A to Crewe is no longer going ahead. Nor is 2B to Manchester and Leeds. This means that no construction will take place on the purple and the orange land. This takes away the primary objective of the anti-HS2 protesters in relation to that land. Secondly, there are new criminal offences which will deter and punish protesters taking direct action, with penalties including imprisonment. Thirdly, some HS2 protesters have been imprisoned for breaching the injunction. Fourthly, no protester has applied for a final hearing.

Applying the law to the facts

40. I shall consider each of the requirements for granting and, where necessary, continuing an interim injunction in turn.

(A) Substantive Requirements -

Cause of action

41. In this case there is a civil cause of action identified in the claim form and particulars of claim. A quia timet (since he fears) action is pleaded and relates to the fear of torts such as trespass, damage to property, private and public nuisance, potential tortious interference with trade contracts and on-site criminal activity. The Claimants have proven, to the satisfaction of previous judges, under the enhanced test for injunctive remedies against PUs, that previous torts (and potentially crimes) have been committed on HS2 land and proven that their fears were justified. Previous interim injunctions have been granted routewide. This condition is satisfied.

Full and frank disclosure by the Claimants

42. There has mostly been full and frank disclosure by the Claimants seeking the injunction renewal against the PUs, save that there has been delay informing the Court about the Prime Minister's announcement. That delay amounts to about 4 months. I must ask: what would the Court have done if informed in November or December about the announcement, alongside an application for a review hearing? It is likely that, taking into account the alternative service requirements necessary for PUs and Defendants, the hearing would have been listed before a High Court judge at some time in the late Winter of 2023 or Spring of 2024. In the event the application was made in March 2024 and listed in May 2024. Whilst not as serious as the default in *Ineos v PUs* [2022] EWHC 684 (Ch), this delay was inappropriate and I shall take it into account when considering the equitable remedy below.

No realistic defence

43. The Defendants have not yet been required to enter any formal defence, although some did before Knowles J. for the hearing of the application for the routewide interim injunction and many emailed their case to the Court. None have put forwards a defence to any of the past tortious or criminal actions. This, as anticipated or summarised by the Supreme Court in *Wolverhampton* is not unusual in protester PU injunction cases.

Sufficient evidence to prove the claim/likely to succeed at trial and compelling justification

44. The Claimants provided sufficient evidence to prove their claim before Knowles J. The test which I must apply when considering continuing the injunction is more than whether there is a serious issue to be tried. This is a contra mundum (against the world) PU injunction. So the test is whether the Claimants are likely to succeed at trial against the PUs and the Defendants and that there is a compelling reason for granting or continuing the interim injunction. I am aware, of course, that Julian Knowles J. has already made that finding on the evidence before him and that I renewed it in May 2023 using the same test, but that was then and this is now. This is a review. Circumstances have changed. I am not at all convinced that the Claimants will succeed at trial in relation to the purple land on the evidence before me. If the evidence had been sufficient, on the balance of probabilities, to find that the Claimants are likely to be awarded an injunction at trial over the purple land, this Court must then take into account the balancing exercise required by the Supreme Court in *DPP v Ziegler* [2021] UK.SC 23. The PUs' rights under the *European Convention on Human Rights* (for instance under Articles 10(2) and 11(2)) are engaged and may be restricted by the extension of the injunction. Julian Knowles J. has also considered and ruled on that point. It is crucial to remember that I am dealing mainly but not wholly with private land. I take into account that the injunction must be necessary and proportionate to the need to protect the Claimants' rights. I take into account that the Government is no longer pursuing the purple route. I take into account that there are now specific criminal offences in S.s 6 and 7 of the *Public Order Act 2023* to punish and deter protesters

from interfering with national infrastructure, only one of which was in force when I last renewed the injunctions. Whether or not a protestor in future, entering phase 2A land on which no HS2 project construction is taking place or will ever again take place, but intent on causing loss by interfering with the effort to rewild or restore the land or to sell it, would be sufficient to justify a renewed injunction, will be a matter for another Judge dependent on the facts. I have no sufficient evidence before me which goes to show that the remaining 5 Defendants or any anti HS2 PUs wish to interfere with: rewilding or restoration, deconstruction of any HS2 construction, HS2 selling land back to previous or new owners or otherwise disposing of the purple or orange land. Quite the opposite. As the Claimants assert, many of the anti HS2 phase 2 protesters, who themselves consider that they have won, are engaged in supporting other causes. The situation is quite different for phase 1. There has been no question of any win for the anti HS2 protesters there.

45. I have carefully considered the evidence put before the Court by the Claimants. I summarised much of it, but not all, above. I also take into account the evidence accepted and found by Knowles J. Standing back, the current evidence consists of a recognition that the protestors feel that they have won in relation to stopping the construction on the purple land of phase 2A. Their motivation for using direct action against that has gone. Such future action will not delay any construction works. It is no longer a construction project on the purple land. In addition, the evidence of quia timet (what we fear) is watery, thin, scattered geographically (some of the relied on events were in London) and un-compelling. Naked ramblers, children setting up tented camps for a few hours, some graffiti and some anti-law/establishment groups are included, but these are hardly enough, in my judgment, to prove a substantial and real fear of imminent and serious harm through direct action on the purple land. I do not accept, even from experienced security experts, that the mere assertion of fear is enough. It must be logically based and it must be sufficiently evidenced. Nor do I consider that the postings of crowing or gloating by some protesters about their perceived success on phase 2A and the need to continue vaguely against HS2 generally, bites on the purple land sufficiently. The past and the recent evidence does however support the continued injunction covering the construction works in phase 1.

Damages not an adequate remedy

46. In my judgment the Claimants continue to show that damages would not be an adequate remedy in relation to their phase 1 construction work on the blue land. They have not shown that this threshold is still justified for the purple land upon which no construction is being carried out.

(B) Procedural Requirements -

Identifying PUs

47. In my judgment, in the draft injunction, the PUs are clearly and plainly identified by reference to: (a) the tortious conduct to be prohibited (and that conduct mirrors the

torts claimed in the particulars of claim (as re-amended) and (b) clearly defined geographical boundaries. Subject to the purple land being excluded from the extended interim injunction this requirement is satisfied.

The terms of the injunction

48. In my judgment, the prohibitions remain set out in clear words and are not framed in legal technical terms. Further, they do not seek to prohibit conduct which viewed on its own is lawful. In my judgment they should be extended to cover drone flying which is likely to interfere with any construction work or operations carried out by the first Claimant and is dangerously close to such works.

The prohibitions must match the claim

49. In my judgment the prohibitions in the extended injunction mirror the torts claimed (or feared) in the re-amended particulars of claim. The pleading will need re amendment to cover drones.

Geographic boundaries

50. The prohibitions in the injunctions to be extended are defined by clear geographic boundaries, but shall be altered to cover only the phase 1 blue land, not the phase 2 purple land.

Temporal limits - duration

51. The duration of the injunction is to be extended by 12 months. In the light of the continued HS2 construction of phase 1, I am satisfied that it is proven to be compellingly necessary to protect the Claimants' legal rights in the light of the evidence of past hugely extensive tortious activity and the future feared (quia timet) tortious activity for the HS2 construction work on phase 1.

Service

52. Because PUs are, by their nature, not identified, the proceedings, the evidence, this judgment and the order will be served by the alternative means which have been previously considered and sanctioned by this Court. I consider that under the *Human Rights Act 1998* S.12(2), the Claimants have previously shown that they have taken all practicable steps to notify the Defendants.

The right to set aside or vary

53. The PUs are given the right to apply to set aside or vary the injunction on shortish notice by the existing interim injunction and this will continue.

Review

54. In the extended order I shall make provision for reviewing the injunction in the future. The regularity of the reviews depends on the circumstances and I consider that 12 months is the right length of time.

Conclusion on the extension application and balance of convenience

55. I do not consider that there are compelling reasons to continue the injunction over the purple land or that the balance of convenience test is satisfied for the purple land. For the reasons set out above I do not consider that the injunction should be extended in future in relation to the purple HS2 land acquired or possessed for the purposed of phase 2A. In summary, the reasons are that this part of the project has been abandoned; there are alternative remedies because the new *Public Order Act* provisions are in place; the evidence provided to the Court did not reach the required level to show a real and imminent need, in part because the protesters' motivation to take direct action against the purple land has gone and in part because taking direct action against purple land would not cause disruption to the construction works for the HS2 project, it would cause peripheral nuisance. In addition, the Claimants have failed fully to comply with their clear duty to inform the Court of material change which occurred when the Prime Minister announced phase 2A would not be built.

Removing various Defendants as parties.

56. Because none of the 13 Defendants to be released has made any submissions to this Court, despite due alternative service of the application and because the Claimants are content on their own information to release them and no further costs orders are sought against them, I give permission for the above listed 13 Defendants to be removed as parties to the proceedings, save in relation to D6 who I shall consider below. I dispense with the need for the Claimants to file a Notice of Discontinuance pursuant to CPR 38.3(1)(a) for the 13 Defendants and make an order under CPR 6.28 dispensing with service of a Notice of Discontinuance. I note that Morris J. took a different route in *Tfl v PUs & Ors* [2023] EWHC 1038, and took that into account.

Removing D6 as a party

57. Whilst in actions in which there are only a few Defendants the procedure in Part 38 should clearly be followed. In PU injunction claims with multiple defendants, different and more flexible procedures are being developed by the Courts to bind and yet to safeguard PUs, add and then release defendants and to streamline costs. So far, many Defendants have been deleted from this claim. Some have been added. Another 13 have just been deleted with my permission in the previous paragraph. D6, wishes to be different. He has objected to any more simple method. He requires the Claimants to serve a formal Notice of Discontinuance. His rationale was nothing more than the desire for his own costs of the claim to be paid. I suspect also a desire to increase the Claimants' costs. I dealt with the costs of the hearing at the hearing so, because D6 had succeeded on the purple land point, I awarded some costs to D6 against the Claimants. Inter alia I reduced counsel's brief fee (which included the skeleton) from £18,000 to £5,000. There was no need for a Notice of Discontinuance to enable this Court to award costs for succeeding on that issue. So, the rationale for the submission was without weight in relation to costs. CPR r.38.2 requires a claimant to seek the permission of the Court to discontinue where the Court has granted an interim injunction. This the Claimants did, via their witness statements and skeleton, a formal method but not in

accordance with CPR r.38.3, which sets out the procedure and is mandatory for discontinuance. A form N279 notice is required. In this case I do not consider that such formality assists. Of the 65 named Defendants, 60 have now been removed. It has been efficient to remove and add Defendants at the various reviews. So, to the extent that it is necessary, I grant the Claimants relief from sanctions and expressly permit the Claimants to delete D6 as a Defendant to the claim and the injunction without the need for a notice. D6 had notice in the application notice anyway. No other Defendant has objected. I also bear in mind that this Court could have removed D6 as a party at the start of the hearing and then heard argument on whether he should have been heard at all on the substantive issues, but I considered that it was helpful and just to have a voice for the Defendants and the PUs at the hearing. I therefore dispense with the need for the Claimants to file a Notice of Discontinuance pursuant to CPR 38.3(1)(a) in respect of D6 and make an order under CPR 6.28 dispensing with service of any Notice of Discontinuance.

Should the claim be brought to a final hearing?

58. There is no summary judgment application made by the Claimants. I set out the law above and in particular highlighted in bold passages from the Supreme Court on the nature of these injunctions concerning private land against PUs. I have carefully considered whether D6 was right, in submissions, to assert that such claims, against named Defendants (as distinct from PUs only claim) should be brought to trial with reasonable expedition. It was submitted that claims against named Defendants should not be left on the shelf or in the warehouse. However, no Defendant has made use of the power granted to them in the May 2023 Order I made to bring the case to trial. I take into account that it is normally the Claimants' responsibility to follow through to trial with the claim which they issued. However, in claims for possession of land where a final order for possession has been granted and the trespassers have been removed, there is no longer a need for another order. What then should be done about the interim injunction? Should it be brought to a final hearing? This would usually be answered: "yes". But in claims against PUs only and claims against named defendants and PUs, different factors apply. The Claimants have been and are required to keep the list of Defendants under review. When some have been (1) evicted, or (2) proven in contempt and imprisoned, or (3) have withdrawn or truthfully disavowed their previous intention to engage in unlawful direct action, the Claimants have properly released them from the action with this Court's permission. Others have given undertakings. Procedurally, it would be a nonsense to take the actions to a final hearing for a final injunction, based on the past tortious actions of the evicted ex-Defendants and proven contemnors, who have already been released as parties. As for the claims against the 5 remaining Defendants, if they had wished to be released from the action, they could have applied to bring the action to final determination, or asked the Claimants to be released, but have not. I see little point in requiring the Claimants to go to trial against them when the basis remains quia timet, only to have them submit at trial, that the released ex-Defendants were the tortfeasors, not them. The real mischief being addressed is the Claimants' need for protection from the PUs. That is fully satisfied on a continuing

basis already by the interim injunction. I would see the merit of requiring a final hearing if the test for the interim injunction was merely a "serious issue to be tried", but in these PU claims the test is higher. It is "likely to succeed at trial". So, in relation to the burden of proof, there is no injustice in the absence of a final injunction, so long as each Defendant has the right to apply for a final hearing. In addition, the reviews give each the opportunity to gain release from the action by applying for that.

59. I shall not be making a direction requiring the Claimants to bring the claim to trial or to finality through a summary judgment application or directing defences to be filed and served, disclosure and evidence. I do not see the need for it to achieve justice in this claim. I do not seek to lay down any general rule by this decision.

Variations to the terms of the injunction

60. Certain variations were requested to the terms of the injunction for the extension. I give permission for those which were not in dispute and are necessary.

61. The potential Defendant, D69, had been identified and there was a request to add him to the claim but he signed an undertaking so I do not have to consider that application.

62. There was a typing error in the May 2023 injunction relating to service of the review papers, which should be corrected.

Conclusion

63. I shall extend the interim injunction for 12 months. It will be limited to the phase 1 works and land. I do not consider that the Claimants should be required to bring the action to finality. D6 is released from the claim and the injunction. I invite the Claimants to draft the necessary orders and directions and to submit them before 31.5.2024.

ANNEX A

SCHEDULE OF DEFENDANTS 7-65

DEFENDANT NUMBER	NAMED DEFENDANTS
(7)	**Ms Leah Oldfield**
(8)	Not Used
(9)	Not Used
(10)	Not Used
(11)	Not Used
(12)	Not Used
(13)	Not Used
(14)	Not Used
(15)	Not Used

(16)	**Ms Karen Wildin (aka Karen Wilding / Karen Wilden / Karen Wilder)**
(17)	**Mr Andrew McMaster (aka Drew Robson)**
(18)	Not Used
(19)	Not Used
(20)	**Mr George Keeler (aka C Russ T Chav / Flem)**
(21)	Not Used
(22)	**Mr Tristan Dixon (aka Tristan Dyson)**
(23)	Not Used
(24)	Not Used
(25)	Not Used
(26)	Not Used
(27)	**Mr Lachlan Sandford (aka Laser / Lazer)**
(28)	**Mr Scott Breen (aka Scotty / Digger Down)**
(29)	Not Used
(30)	Not Used
(31)	Not Used
(32)	Not Used
(33)	**Mr Elliot Cuciurean (aka Jellytot)**
(34)	Not Used
(35)	Not Used
(36)	**Mr Mark Keir**
(37)	Not Used
(38)	Not Used
(39)	**Mr Iain Oliver (aka Pirate)**
(40)	Not Used
(41)	Not Used
(42)	Not Used
(43)	Not Used
(44)	Not Used
(45)	Not Used
(46)	Not Used
(47)	Not Used
(48)	**Mr Conner Nichols**
(49)	Not Used
(50)	Not Used
(51)	Not Used
(52)	Not Used
(53)	Not Used

(54)	Not Used
(55)	Not Used
(56)	Not Used
(57)	**Ms Samantha Smithson (aka Swan / Swan Lake)**
(58)	**Mr Jack Charles Oliver**
(59)	**Ms Charlie Inskip**
(60)	Not Used
(61)	Not Used
(62)	Not Used
(63)	**Mr Dino Misina (aka Hedge Hog)**
(64)	**Stefan Wright (aka Albert Urtubia)**
(65)	Not Used

END

Neutral Citation Number: [2023] EWHC 1837 (KB)

Case No: QB-2022-001098

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/07/2023

Before :

THE HONOURABLE MR JUSTICE LINDEN

- -

Between :

(1) ESSO PETROLEUM COMPANY, LIMITED	**Claimant**
(2) EXXONMOBIL CHEMICAL LIMITED	
- and –	
(1) PERSONS UNKNOWN WHO, IN CONNECTION WITH THE 'EXTINCTION REBELLION' CAMPAIGN OR THE 'JUST STOP OIL' CAMPAIGN, ENTER OR REMAIN (WITHOUT THE CONSENT OF THE FIRST CLAIMANT) UPON ANY OF THE FOLLOWING SITES ("THE SITES")	**Defendants**

(A) THE OIL REFINERY AND JETTY AT THE PETROCHEMICAL PLANT, MARSH LANE, SOUTHAMPTON SO45 1TH (AS SHOWN FOR IDENTIFICATION EDGED RED AND GREEN BUT EXCLUDING THOSE AREAS EDGED BLUE ON THE ATTACHED 'FAWLEY PLAN')
(B) HYTHE OIL TERMINAL, NEW ROAD, HARDLEY SO45 3NR (AS SHOWN FOR IDENTIFICATION EDGED RED ON THE ATTACHED 'HYTHE PLAN')
(C) AVONMOUTH OIL TERMINAL, ST ANDREWS ROAD, BRISTOL BS11 9BN (AS SHOWN FOR IDENTIFICATION EDGED RED ON THE ATTACHED 'AVONMOUTH PLAN')
(D) BIRMINGHAM OIL TERMINAL, WOOD LANE, BIRMINGHAM B24 8DN (AS SHOWN FOR IDENTIFICATION EDGED RED ON THE ATTACHED 'BIRMINGHAM PLAN')
(E) PURFLEET OIL TERMINAL, LONDON ROAD, PURFLEET, ESSEX RM19 1RS (AS SHOWN FOR IDENTIFICATION EDGED RED AND BROWN ON THE ATTACHED 'PURFLEET PLAN')

(F) WEST LONDON OIL TERMINAL, BEDFONT ROAD, STANWELL, MIDDLESEX TW19 7LZ (AS SHOWN FOR IDENTIFICATION EDGED RED ON THE ATTACHED 'WEST LONDON PLAN')
(G) HARTLAND PARK LOGISTICS HUB, IVELY ROAD, FARNBOROUGH (AS SHOWN FOR IDENTIFICATION EDGED RED ON THE ATTACHED 'HARTLAND PARK PLAN')
(H) ALTON COMPOUND, PUMPING STATION, A31, HOLLYBOURNE (AS SHOWN FOR IDENTIFICATION EDGED RED ON THE ATTACHED 'ALTON COMPOUND PLAN')

(2) PERSONS UNKNOWN WHO, IN CONNECTION WITH THE 'EXTINCTION REBELLION' CAMPAIGN OR THE 'JUST STOP OIL' CAMPAIGN, ENTER OR REMAIN (WITHOUT THE CONSENT OF THE FIRST CLAIMANT OR THE SECOND CLAIMANT) UPON THE CHEMICAL PLANT, MARSH LANE, SOUTHAMPTON SO45 1TH (AS SHOWN FOR IDENTIFICATION EDGED PURPLE ON THE ATTACHED 'FAWLEY PLAN')
(3) PERSONS UNKNOWN WHO, IN CONNECTION WITH THE 'EXTINCTION REBELLION' CAMPAIGN OR THE 'JUST STOP OIL' CAMPAIGN, ENTER ONTO ANY OF THE CLAIMANTS' PROPERTY AND OBSTRUCT ANY OF THE VEHICULAR ENTRANCES OR EXITS TO ANY OF THE SITES (WHERE "SITES" FOR THIS PURPOSE DOES NOT INCLUDE THE AREA EDGED BROWN ON THE PURFLEET PLAN)
(4) PAUL BARNES
(5) DIANA HEKT

- -
- -

Timothy Morshead KC and **Yaaser Vanderman** (instructed by **Eversheds Sutherland (International) LLP**) for the **Claimant**
No appearance or representation by the **Defendants**

Hearing date: 10 July 2023
- -

Approved Judgment

This judgment was handed down remotely at 2pm on 18 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

....

THE HONOURABLE MR JUSTICE LINDEN

Mr Justice Linden :

Introduction

1. This was the trial of the Claimants' claim for an injunction to restrain certain forms of trespass by Extinction Rebellion and Just Stop Oil protesters at specified sites around the country ("the Sites").

Procedural matters

2. An interim injunction was first granted in these proceedings by Ellenbogen J at a without notice hearing on 6 April 2022, and that injunction was extended by Bennathan J on the return date, which was 27 April 2022. That hearing was not attended by any of the Defendants, and they were not represented, but Counsel instructed by a person involved in the environmental movement attended and made submissions to the court with a particular focus on whether the Claimants had sufficient proprietary interests in the Sites which they sought to protect, to be entitled to bring a claim in trespass.

3. The injunction was then extended again by Collins Rice J at a hearing on 27 March 2023. However, she was unwilling to do so on an interim basis for a period of a year, as proposed by the Claimants, and she therefore gave directions for trial. Again, there was no attendance or representation on the Defendants' side. But four individuals who had been identified as actual or potential Defendants gave assurances that they did not intend to act inconsistently with the terms of the injunction. On that basis Collins Rice J directed that they were not subject to its terms.

4. Similarly, no Defendants attended the trial before me or were represented or submitted evidence. However, the Fourth and Fifth Defendants gave undertakings which were satisfactory to the Claimants, and these will be embodied in an Order which applies to their cases.

5. In the course of Mr Morshead KC's submissions, however, it became apparent that a person in the public gallery wished to address the court. She told me she was Ms Sarah Pemberton, that she was qualified as a barrister (though not practising) and that she was informally representing her friend, Mr Martin Marston-Paterson, because he would not have been able to attend the hearing until the afternoon. I allowed her to address the court and she drew to my attention the fact that there had been correspondence between Bindmans LLP, who were acting for Mr Marston-Paterson, and Eversheds Sutherland (International) LLP who were instructed by the Claimants. Bindmans had proposed that the hearing be adjourned pending the decision of the Supreme Court in the appeal from the decision in *London Borough of Barking & Dagenham & Others v Persons Unknown* [2022] EWCA Civ 13; [2023] QB 295 (now *Wolverhampton City Council & Others v London Gypsies and Travellers & Others* UKSC 2022/0046).

6. Ms Pemberton stressed that she was not making an application to adjourn the trial but she pointed out that if the Supreme Court were to overturn the decision of the Court of Appeal in the *Barking & Dagenham* case, any final injunction which I granted would likely be unlawful. She also told me that submissions had been made to the Supreme Court to the effect that the risk of an adverse order for costs was having a chilling effect on climate change protesters who might otherwise have contested this type of application for injunctive relief. She said that provision for a review of any injunction which I granted

would not adequately safeguard the position of the Defendants given that I would have made findings of fact which it would be problematic to reopen in circumstances in which, at least possibly, Defendants had been prevented from putting in evidence by the risk of an order for costs.

7. The correspondence was handed up to me by Mr Morshead. This showed that the matter had been raised by Bindmans on 30 June 2023. In a phone call and an email dated 3 July, Eversheds Sutherland said that their clients would be unwilling to consent to an adjournment, pointing out that Collins Rice J had directed that the trial take place. No threat of an application for costs in the event of an adjournment was made. On 7 July, Bindmans confirmed that they were not instructed to apply to adjourn or to intervene in the matter.

8. I decided not to adjourn the trial. It had been listed, by Order of Collins Rice J, since 5 May 2023. There had expressly not been any application to adjourn. Nor had I been shown any evidence that submissions or evidence would have been put before the court by any Defendant or interested party were it not for the fear of an adverse costs order, still less given an indication of what those submissions or that evidence might be. The appropriate course was, in my view, to decide the Claim on the law as it currently stands but to make provision in any Order for a review shortly after the judgment of the Supreme Court is handed down. This, in my judgment, fairly addressed any risk of injustice caused by proceeding with the trial.

9. As far as service and notice of the trial are concerned, I had regard to section 12(2) of the Human Rights Act 1998 which, so far as is relevant for present purposes, provides that in cases where the court is considering whether to grant any relief which might affect the exercise by the respondent of the right to freedom of expression under Article 10 of the European Convention on Human Rights ("ECHR"), and the respondent is not present or represented, such relief must be refused unless the court is satisfied *"(a) that the applicant has taken all practicable steps to notify the respondent"*. Each of the judges who has dealt with this matter has considered this question and, in the case of Bennathan J and Collins Rice J, whether the alternative directions for service in the preceding order had been complied with. Each has been satisfied that they had been and that, accordingly, all practicable steps had been taken for the purposes of section 12(2)(a).

10. As far as the trial is concerned, Collins Rice J directed that service of her Order and any further documents would be effected on the First to Third Defendants by fixing copies in clear transparent containers at a minimum of 2 locations on the perimeter of each of the Sites, together with notices which stated that they could be obtained from the Claimants' solicitors and viewed at a specified company website. Service was also to be effected by posting the documents on that company website and by sending an email to specified email addresses for Extinction Rebellion and Just Stop Oil, notifying them of the availability of the documents on that website.

11. Mr Nawaz Allybokus, who is one of the solicitors acting for the Claimants in these proceedings, gave evidence, in his 6th witness statement dated 24 May 2023, that the Order of Collins Rice J and the Notice of Trial were served in accordance with the directions of the Court on 12 May 2023. In his 8th witness statement, dated 4 July 2023, he gives evidence that the directions as to service of the evidence relied on by the Claimants for

the purposes of the trial were complied with in the third week in June 2023 and therefore in good time before the trial.

12. I was therefore satisfied that sufficient notice of the hearing had been given to the Defendants. They had also been provided with access to the materials on which the Claimants rely, and all practical steps had been taken to notify them for the purposes of section 12(2)(a) of the 1998 Act. I decided to proceed notwithstanding the absence of any Defendant but, bearing this in mind, to probe the Claimants' case appropriately.

13. Mr Morshead answered questions from the court about the identity of the parties and the scope of the relief which he was seeking. He had put in a skeleton argument dated 4 July 2023, and he developed some of the points in that document orally. At the invitation of the court there was a particular focus on the question whether it was appropriate to impose a final injunction in the light of the evidence about the risk of acts of trespass by protesters at the sites in question and the likelihood of harm as a result in the event that the injunction was refused.

14. I also gave Ms Pemberton an opportunity to make any points in reply which she wished to make. She did not specifically challenge what Mr Morshead had submitted about the risk of trespass in the future, or the potential risks if this were to happen, but she drew attention to the distinction between the official positions of Extinction Rebellion and Just Stop Oil in relation to direct action, the former having said in January 2023 that it was stepping back from direct action. She also emphasised the risk that a lack of clarity in any Order which I might make could have a chilling effect on the rights to freedom of expression and association. I have taken these points into account in coming to my decision.

15. Ms Pemberton also raised a concern that Mr Marston-Paterson had not received the full trial bundle. She told me that she had checked and had received a message from him during the hearing which confirmed this point. Whereas Mr Morshead was referring to a 708-page bundle, the bundle which had been forwarded to Mr Marston-Paterson by Extinction Rebellion by email dated 16 June 2023 ran to 413 pages. Mr Morshead said, in response, that his instructions were that the full bundle had been sent to Extinction Rebellion. At her request, I gave permission for Mr Marston-Paterson to put in evidence on this matter if he wished, and permission to the Claimants to reply within 24 hours.

16. I then reserved judgment and extended the interim injunction pending the handing down of my decision.

17. On the day after the trial, I received statements made by Ms Pemberton and Mr Allybokus, both dated 11 July 2023. Her statement covered new matters, reprised what had happened at the trial and provided more detail on points which she made to me. No doubt inadvertently, some aspects of her account of what happened at the trial were not accurate but, in any event, I was not prepared to admit further evidence other than in relation to the question of service of the trial bundles. Ms Pemberton had an opportunity to put in any evidence on which she wished to rely before the trial and, other than the extent which I had indicated, it was not in the interests of justice for her to be permitted to do so after it had concluded.

18. There was then a 10th witness statement submitted by Mr Allybokus on 12 July 2023 but, with respect to him, this did not add anything material.

19. The evidence shows that Mr Allybokus sent the correct trial bundles to the three email addresses identified in the Order of Collins Rice J on 16 June 2023. They were enclosed via Mimecast. The email said that copies of the trial bundles would be uploaded shortly onto the company website. Ms Pemberton says in her statement that she manages the relevant email address for Extinction Rebellion and therefore read Mr Allybokus' email on 16 June 2023. She did not access the documents via Mimecast for reasons which she does not explain in her statement. Instead, she went on the company website and downloaded the bundles from there on 16 and 18 June. The final versions had not yet been uploaded at this point: that took place on 20 June 2023.

20. I do not consider that this issue means that the trial was unfair and Ms Pemberton does not suggest that it does. The concern which she raised with me about Mr Marston-Paterson not having the full bundle, and him messaging her during the trial to confirm this, is not referred to in her statement. What she says is that she read the trial bundles which she had downloaded and that the purpose of her attendance at the hearing was to observe and take a note. She does not suggest that she is a party. She then became concerned because her version of volume 2 to the trial bundle did not contain documents to which Mr Morshead referred in his oral submissions.

21. From the section of volume 2 of the trial bundle which Ms Pemberton says she did not see, Mr Morshead referred me to the undertakings which were given by the Fourth and Fifth Defendants and two press reports in which Just Stop Oil made statements about their intention to carry on protesting until they achieved their objectives. The material parts of these statements were read out by him in open court and they are referred to by me below. This point was also covered in the witness statements, and the press statements were two examples amongst many. I have not taken any other document in volume 2 into account in coming to my conclusion. Nothing in Ms Pemberton's statement therefore causes me to think that it would be in accordance with the overriding objective for me to revisit my decision to proceed with the trial.

Factual background

22. The detail of the factual background is set out in the witness statements relied on by the Claimants for the purposes of the trial, in particular the witness statements of Mr Anthony Milne (Global Security Adviser at the First Claimant) dated 3 April 2022; Mr Stuart Wortley (Partner at Eversheds Sutherland) dated 4 April 2022; Mr Allybokus dated 22 April 2022, 20 March 2023 and 13 June 2023; and Mr Martin Pullman (European Midstream Manager at the First Claimant) dated 27 February and 6 June 2023. The facts which led to the interim injunctions are also helpfully summarised by Ellenbogen J in her judgment of 6 April 2022, neutral citation number [2022] EWHC 966 (QB) and therefore need not be rehearsed by me in detail.

23. In outline, the Claimants are well known oil, petroleum and petrochemical companies. The injunction which they seek would restrain certain forms of trespass on their sites at the Fawley Petrochemical Complex in Southampton, the Hythe Terminal in Hardley, the Avonmouth Terminal near Bristol, the Birmingham Terminal, the Purfleet Terminal, the

West London Terminal, the Hartland Park Logistics Hub near Farnborough and the Alton compound at Holybourne.

24. Ellenbogen J carefully considered whether the Claimants had a sufficient proprietary rights in each of these sites to bring a claim in trespass and concluded that they did: see [21] of her judgment. At [6]-[8] she found that the Fawley Petrochemical Complex comprises an oil refinery, a chemical plant, and a jetty. The First Claimant is the freehold owner of the refinery and the chemical plant, and the registered lessee of the jetty. The Second Claimant is the lessee of the chemical plant. This is the explanation for a separate category of persons unknown: the Second Defendant in the proceedings.

25. Fawley is the largest oil refinery in the United Kingdom. It provides twenty per cent of the country's refinery capacity and is classed as Tier 1 Critical National Infrastructure. The chemical plant has an annual capacity of 800,000 tonnes, is highly integrated with the operations of the refinery, and produces key components for a large number of finished products here and elsewhere in Europe.

26. Ellenbogen J found that the First Claimant is also the freehold owner of the oil terminals at Hythe (primarily serving the South and West of England); that part of Birmingham which is material to the application (primarily serving the Midlands); Purfleet (primarily serving London and the South East of England); and West London (serving a range of customers in Southern and Central England and supplying aviation fuel to Heathrow Airport). It is also the registered lessee of the Avonmouth Terminal (primarily serving the South West of England). Title to the Purfleet jetty is unregistered, although the First Claimant has occupied the jetty for approximately 100 years. These Terminals are large and they play an important role in supplying the national economy.

27. The First Claimant has an unregistered leasehold interest in Hartland Park which is a temporary logistics hub comprising project offices, welfare facilities and car parking for staff and contractors, together with storage for construction plant materials, machinery and equipment in connection with the construction of a replacement fuel pipeline between the Fawley Petrochemical Complex and the West London oil terminal. It is also the freehold owner of the Alton compound, comprising a pumping station and another compound at Holybourne used in connection with the replacement fuel pipe line.

28. Submissions on this subject were addressed to Bennathan J on 27 April 2022 by Counsel for the interested person but he rejected them: see his judgment at [2022] EWHC 1477 (QB) [27]. He said that he was fully satisfied that the Claimants had the necessary proprietary interests. No evidence has been put before me to question the decisions of Ellenbogen and Bennathan JJ on this point and I therefore accept and adopt their findings.

29. Extinction Rebellion and Just Stop Oil are well known campaigns on the issue of climate change. The latter is focussed on the fossil fuel sector, and the former on climate change more generally.

30. The evidence before Ellenbogen and Bennathan JJ was that Just Stop Oil and Extinction Rebellion were organising action against the fossil fuel industry in March and April 2022. The intention was that groups or teams would block or disrupt oil networks including refineries, storage units and adjacent roads. Individuals were also being encouraged to sign up to direct action which would lead to their arrest.

31. Ellenbogen J summarised the evidence before her that, between 1 and 4 April 2022, four of the Sites - West London, Hythe, Purfleet and Birmingham - were subject to direct action as part the wider campaign which was disrupting various oil terminals in the United Kingdom. The evidence was that both Extinction Rebellion and Just Stop Oil were claiming involvement in that action on social media and through logos and banners which were displayed during some of the incidents.

32. On 1st April 2022, the operations of each of these four sites had been disrupted. At Birmingham approximately 20 people blocked the entrance in the small hours of the morning, preventing the collection of fuel from the site. A tanker was stopped at the entrance and two individuals climbed onto it. Others sat in front of it. One person glued himself to the path outside the Terminal. Police attended and around six arrests were made. The protest was dispersed and the site reopened at 5.30 p.m. that day.

33. At around the same time, approximately 24 people blocked the entrance to the West London Terminal by attaching barrels to the gates to the entrance used by vehicles so as to weigh them down and prevent them from lifting. Tripods were also erected immediately outside the access gate so as to block access. At approximately 6.45 a.m., four people cut a hole in the access fence and scaled one of the fuel storage tanks. The First Claimant was obliged to initiate its emergency site procedures, including the temporary shutdown of the pumping of aviation and ground fuels from Fawley to the West London Terminal. The four, and approximately eight others, were arrested a few hours later. As a result, by around 3:00 p.m., those responsible for the direct action had left the site and it was reopened.

34. At around 5:00 a.m. on the same day, seven people blocked the access to the Hythe Terminal, using the Extinction Rebellion “pink boat” and preventing access to the site. The police attended, the boat was removed at around 11.45 a.m. and the protesters were moved away. The site reopened an hour later.

35. Also on 1 April 2022, at around 6:30 a.m., 20 people blocked the access road to the Purfleet Terminal. Six people climbed onto a lorry which was delivering additives to the site. The police attended. By 3:00 p.m., some individuals remained on the lorry, but others in attendance had been arrested, or had dispersed. The site opened to customers at approximately 5:00 p.m.

36. On 2 April 2022, at around 09:45 a.m., approximately 20 people blocked access to and from the Purfleet Terminal. Some locked themselves to the access gates, and others sat in the access road. The police made a number of arrests and removed the protestors. The site opened to customers at approximately 5:30 p.m. There were other protests at other terminals across the country, albeit not terminals owned by the First Claimant and it was reported in the Press that around 80 arrests had been made.

37. At around 5:00 a.m., on 3 April 2022, approximately 20 protestors blocked access to the Birmingham Terminal by sitting in the road. Some also climbed on to a Sainsbury's fuel tanker. One protestor cut through the security fence around the Terminal, scaled one of the fuel storage tanks and displayed a Just Stop Oil banner. The First Claimant therefore initiated its emergency site procedures, including the temporary shutdown of the pumping

of ground fuel from Fawley to the Terminal. The police attended and made a number of arrests. The site was reopened to customers at around 4:00 p.m.

38. At around 4.30 a.m. on 4 April 2022, approximately 20 protestors arrived at the West London Terminal and used a structure to obstruct access to and egress from the Site. That evening, a number of individuals were arrested whilst they were on their way to the Purfleet site.

39. At [14] Ellenbogen J also noted a number of earlier incidents, going back to August 2020, which she accepted were evidence of the risk of the disruption continuing. These incidents were similar in nature to the incidents at the beginning of April 2022, although they varied in seriousness. At least four of the incidents had included displaying Extinction Rebellion banners or other insignia, and Extinction Rebellion had also associated itself with a number of these activities in the Press and on social media. In an incident in October 2021 protesters had broken into the Fawley Petrochemical Complex using bolt cutters and had climbed to the top of two storage tanks. In December 2021 they had used the same method to break into the site at Alton and had caused extensive damage to buildings, plant, and equipment there.

40. According to the evidence of Mr Allybokus there were further incidents around the time of the Order made by Ellenbogen J which included the following:

    a. On 6 April 2022, a group blocked a roundabout on the main route from the M25 to the Purfleet Terminal by jumping onto a tanker and gluing themselves onto the road. Another group blocked a roundabout on the main route to the West London Terminal by jumping onto lorries.

    b. On 8 April 2022, around 30 individuals blocked a main route from the M25 to the Purfleet Terminal.

    c. On 13 April 2022, a group blocked an access road near the Purfleet Terminal, and 3 people climbed on top of a tanker.

41. Mr Wortley also gives evidence of more than 500 arrests in March/April 2022 at the Kingsbury Terminal operated by Valero Energy Limited in Staffordshire, and of injunctions being granted in that case.

42. However, the evidence is that the interim injunctions which were granted in the present case have been complied with.

43. In relation to the risk of trespass should the claim for a final injunction be refused, Mr Morshead also relied on the evidence of Mr Pullman that Just Stop Oil protesters have targeted the First Claimant's Southampton to London pipeline (which does not comprise one of the Sites). This included digging and occupying a pit so as to obstruct specialist construction equipment, and it led to injunctions being granted by Eyre J on 16 August 2022 and then HHJ Lickley KC on 21 October 2022. There was also a committal of one person to prison for breach of Eyre J's Order. Another admitted that he had breached that Order but the Court accepted his undertaking not to do so again.

44. Protesters have organised a number of events in order to carry out direct action against various targets, all with some connection to the energy industry. They have also targeted the offices of the Claimants' solicitors including by a sit-down protest in November 2022 which obstructed the entrance and by throwing purple paint over the glass structure of the building.

45. Although, in January 2023, Extinction Rebellion announced that it was changing its tactics and moving away from public disruption as a primary tactic, Just Stop Oil has made clear its intention to continue with this approach. Mr Morshead showed me public statements by Just Stop Oil along the lines that the public should "expect us every day and anywhere" and that its supporters "will be returning – today, tomorrow and the next day – and the next day after that – and every day until our demand is met: no new oil and gas in the UK". This includes asking people to "Sign up for arrestable direct action…".

46. Mr Morshead also relied on evidence that, more generally, there has been no let-up in the activities of climate change protesters. For example, there was disruption of the Grand National and the World Snooker Championship in April 2023, as well as a sit-down protest at the Global Headquarters of Shell following a weekend of protest in central London organised by Extinction Rebellion. Since 24 April 2023 there has been a campaign of "slow marching" in London and Just Stop Oil protesters were arrested in or around Whitehall and Parliament in May 2023. There was also disruption of the Chelsea Flower Show and other sporting events including the Ashes test match and Wimbledon. Mr Pullman also gave evidence about extensive litigation in the civil and criminal courts arising out of protest activities with a number of injunctions being granted and/or extended, and various prosecutions and convictions in the Magistrates Court for public order offences.

47. As for the harm which would result from the acts of trespass which are sought to be restrained, disruption of the Claimants' operations is in itself harmful to their interests. The evidence is that such disruption has potential financial consequences for them, but it also has consequence for the wider economy given the impact on the businesses of wholesale and retail suppliers of fuel, and the effect on access to fuel for purposes including road, rail and air transport as well as heating. Indeed, in March/April 2022 Just Stop Oil and Extinction Rebellion were open about the fact that they were seeking to emulate the 2000 protests by haulage drivers, which disrupted supplies of oil to the country with severe economic consequences.

48. There is also evidence of the risk of serious physical harm resulting from acts of trespass by protesters. This refers not merely to the damage to property which results from them cutting through security fences and vandalising the Sites, but also to the risk of very serious accidents. The Claimants' sites are used for the production and storage of highly flammable and otherwise hazardous substances. As is obvious, this is a highly dangerous activity and for this reason there are stringent security and health and safety measures in operation at the Sites. Access is strictly controlled, and all of the Claimants' employees and contractors are trained in relation to the hazards which they might encounter and, where appropriate, provided with protective clothing and equipment.

49. Mr Milne and Mr Pulman give written evidence on this subject. The Petrochemical Complex at Fawley and each of the oil Terminals are regulated by the Health & Safety Executive under the Control of Major Accident Hazards Regulations 2015 (COMAH).

All of the Sites have fully licensed security personnel, security barriers at the point of vehicular access, closed circuit television infrastructure linked to an Access Control system and fenced areas where active operations are undertaken. The operational area of the Petrochemical Complex at Fawley is protected by 2 fences, one of which is electrified.

50. All authorised visitors to the Sites are required to watch an induction safety video which highlights both the hazards and the emergency safety procedures. Most of the Sites include higher risk areas which require additional safety precautions. Within these areas, authorised personnel are required to wear fire retardant clothing and the appropriate personal protective equipment (hard hats, safety glasses, fire retardant gloves, safety shoes).

51. In some areas, devices which measure hydrocarbon vapour levels in the air must be carried. One of the potential hazards inside these facilities is a vapour cloud, which can result from an unplanned release of hydrocarbon or biofuels. Such a release can be extremely hazardous. Potential ignition risks such as smoking, using mobile phones or cameras and wearing clothes which accumulate static electricity (e.g. nylon) are strictly prohibited within the higher risk areas.

52. Protesters will not be trained in relation to the risks on these sites, nor familiar with which areas are the more dangerous ones, and nor are they likely to be wearing appropriate protective clothing. As I have noted, in previous incidents in 2021 and 2022 protesters have used bolt cutters to cut through both security fences at the Fawley Petrochemical Complex, the security fence at the First Claimant's compound in Alton and the security fences at the West London and Birmingham Terminals. During the protests in 2022 some protesters broke into higher risk areas and were carrying iPhones, cameras, cigarette lighters and/or nylon sleeping bags, thus exposing themselves and others to the risk of death or serious injury.

53. Apart from the risk of an explosion or a fire, there are obvious risks in protesters climbing onto fuel tanks 20 metres above the ground without the necessary safety equipment, and in climbing onto fuel tankers as they have been. Moreover, blocking access to the Sites prevents evacuation and access for emergency vehicles in the event of an incident.

<u>Jurisdiction</u>

54. In *London Borough of Barking and Dagenham & Others v Persons Unknown* (supra) the Court of Appeal confirmed that the jurisdiction to grant both interim and final injunctions in this context is provided by section 37 Senior Courts Act 1981. This states, so far as material:

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

    (2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just."

55. The Court of Appeal held that there is, therefore, jurisdiction to grant a final injunction against persons unknown who are "newcomers" i.e., persons who have not committed or

threatened to commit any tortious act against the applicant for the injunction and therefore have not been served with the proceedings and made subject to the jurisdiction of the court before the order was made. Provided such a person has been served with the order they will become a party to the proceedings if they knowingly breach the terms of the injunction. Any risk of injustice which arises from this position is mitigated by the fact that such a person may apply to vary the injunction or set it aside, and by the fact that the duration of the injunction can be limited by the court, and it can be subject to periodic review. As I have noted, an appeal was heard by the Supreme Court in February this year and judgment is awaited. However, at the time of writing the law is as stated by the Court of Appeal.

The Claimants' cause of action

56. The cause of action relied on by the Claimants is now limited to trespass, and the relief which they seek is limited to restraining protesters from entering the Sites in order to carry out their activities. This point is important because of the effect which it has on the balancing of rights under the ECHR.

57. As a general proposition *"seriously disrupting the activities of others is not at the core of"* the right to freedom of assembly and this is relevant to the assessment of proportionality: see Lords Hamblen and Stephens in *DPP v Ziegler* [2021] UKSC 23; [2022] AC 408 at [67]. As Leggatt LJ (as he then was) put it in *Cuadrilla Bowland Ltd & Others v Persons Unknown* [2020] EWCA Civ 9; [2020] 4 WLR 29 at [94]:

> *"... the disruption caused was not a side-effect of protest held in a public place but was an intended aim of the protest…this is an important distinction. …intentional disruption of activities of others is not "at the core" of the freedom protected by Article 11 of the Convention …. one reason for this [is] that the essence of the rights of peaceful assembly and freedom of expression is the opportunity to persuade others… …persuasion is very different from attempting (through physical obstruction or similar conduct) to compel others to act in a way you desire….;"*

58. But, in addition to this, in *DPP v Cuciurean* [2022] EWHC 736 (Admin); [2022] 3 WLR 446 at [45] the Divisional Court held that there is no basis in the caselaw of the European Court of Human Rights:

> *"to support the ... proposition that the freedom of expression linked to the freedom of assembly and association includes a right to protest on privately owned land or upon publicly owned land from which the public are generally excluded. The Strasbourg court has ... consistently said that Articles 10 and 11 do not "bestow any freedom of forum" in the specific context of interference with property rights ... There is no right of entry to private property or to any publicly owned property. The furthest that the Strasbourg court has been prepared to go is that where a bar on access to property has the effect of preventing any effective exercise of rights under Articles 10 and 11, or of destroying the essence of those rights, then it would not exclude the possibility of a state being obliged to protect them by regulating property rights."*

59. This means that in the present case the injunction sought by the Claimants does not engage Articles 10 and 11 ECHR or, if they are engaged, it would be compatible with these provisions for it to be granted because restraining trespass would obviously be

proportionate. Section 12(3) of the Human Rights Act 1998 is not engaged because it applies to interim injunctions.

60. The tort of trespass to land consists of any unjustified intrusion, whether by a person or an object, by one person upon land in the possession of another. It may also include intrusion into the airspace above land. There is no requirement that the intrusion be intentional or negligent provided it was voluntary. Trespass is actionable without proof of damage and by a person who is in possession i.e., who occupies or has physical control of the land. Proof of ownership is prima facie proof of possession but tenants and licensees will have rights of possession and be entitled to claim in trespass in order to secure those rights. In broad terms, entry onto another's land may be justified by proving a legal or equitable right to do so, or necessity to do so in order to preserve life or property. Justification therefore does not arise in the present case. (Clerk & Lindsell on Torts 23rd Edition, chapter 18).

<u>Is relief just and convenient in principle?</u>

61. In *Vastint Leeds BV v Persons Unknown* [2018] EWHC 2456 (Ch); [2019] 1 WLR 2 Marcus Smith J said this at [31(3)] in relation to final anticipatory injunctions:

> *"(3) When considering whether to grant a quia timet injunction, the court follows a two-stage test: (a) First, is there a strong probability that, unless restrained by injunction, the defendant will act in breach of the claimant's rights? (b) Secondly, if the defendant did an act in contravention of the claimant's rights, would the harm resulting be so grave and irreparable that, notwithstanding the grant of an immediate interlocutory injunction (at the time of actual infringement of the claimant's rights) to restrain further occurrence of the acts complained of, a remedy of damages would be inadequate?"*

62. He then went on to give guidance as to what may be relevant to the application of this approach in a given case.

63. With respect, I confess to some doubts about whether the two questions which he identified are part of a *"test"* or a *"two stage"* test. To my mind they are questions which the Court should consider in applying the test under section 37 Senior Courts Act 1981, namely what is *"just and convenient"* but they are not threshold tests. I also note that, even taking into account *Vastint*, the editors of Gee on Commercial Injunctions (7th Edition) say at 2-045:

> *"There is no fixed or 'absolute' standard for measuring the degree of apprehension of a wrong which must be shown in order to justify quia timet relief. The graver the likely consequences, and the risk of wrongdoing the more the court will be reluctant to consider the application as 'premature'. But there must be at least some real risk of an actionable wrong."*

64. Where the court is being asked to grant an injunction in circumstances where no tort has been committed or completed it will naturally need to be persuaded that the risks and consequences of not making such an order are sufficiently compelling to grant relief. Where, as in the present case, tortious conduct has taken place but the identity of the tortfeasors is unknown, and relief is sought on a final basis against future tortfeasors who

are not a parties and are identified only by description, again the court will be cautious. But it would be surprising if, for example, a court which considered that there was a significant risk of further tortious conduct, but not a strong probability of such conduct, was compelled to refuse the injunction no matter how serious the damage if that conduct then took place.

65. However, Marcus Smith J analysed the authorities carefully, successive cases have adopted his test and the matter was hardly argued before me. I therefore do not propose to depart from what he said. Nor do I need to. Bennathan J was satisfied that the *Vastint* test was satisfied in this case, and so am I in the light of the evidence before me: I am also satisfied that, having regard to the risks in the event that relief is refused, it is just and convenient to grant relief.

66. As noted above, this was the issue on which I pressed Mr Morshead bearing in mind that only some of the incidents in 2021/2022 involved trespass and only on some of the Sites. There has been compliance with the injunctions ordered by Ellenbogen and Bennathan JJ. Extinction Rebellion announced a change of tactics in January 2023 and a good deal of the evidence about protest activities since April 2022 is about activities of a different nature to those which led to the injunctions in this case. Where protesters have been identified in these proceedings, they have been prepared to give undertakings not to trespass on the Sites. All of these considerations could be argued to show something less than a strong probability of further trespassing on the Sites.

67. Having considered the evidence in the round, however, I was satisfied that the first limb of the *Vastint* test is satisfied. It would have been very easy for Extinction Rebellion or Just Stop Oil to give assurances or evidence to the court that there was no intention to return to their activities of 2021/2022, and no risk of trespass on the Sites or damage to property by protesters in the foreseeable future, but they did not do so. One is therefore left with the evidence relied on by the Claimants. This shows that they intend to continue to challenge the oil industry vigorously, including by causing disruption. As to the form that that disruption will take, it appears that the effect of the various injunctions which have been granted in this case and others has been to prevent or deter them from taking the steps prohibited by the orders of the court although, of course, not invariably so. If, therefore, an injunction is refused in the present case the overwhelming likelihood is that protests of the sort which were seen in 2021/2022 will resume, and that they will include acts of trespass of the sort to which I have referred.

68. As to the second limb of the *Vastint* test, I had little hesitation in holding that it is satisfied. Whatever the merits of the protesters' cause, and I make no comment on this, their activities in breaking into the Sites are highly disruptive and dangerous. These activities have significant financial and wider economic consequences which are unquantifiable in damages, and any award of damages would likely be unenforceable in any event. They also risk very serious damage to property and endanger the protesters and others.

69. I have considered Ms Pemberton's suggestion of a distinction between Extinction Rebellion and Just Stop Oil protesters but found this unconvincing in the absence of any assurance from Extinction Rebellion. As Mr Morshead pointed out, their strategy could change at any time. Given the risk posed by Just Stop Oil protesters, relief is appropriate and it would be naïve of the court to leave open the possibility of trespass on the Sites by protesters who said that they were acting under the Extinction Rebellion banner. If there

is no intention on the part of Extinction Rebellion protesters to trespass on the Sites, the injunction will not affect them anyway.

70. I have also considered whether relief should be limited to certain Sites and not others given that some had not been subjected to trespass but I agree with Ellenbogen J that the essence of anticipatory relief, where it is justified, is that the claimant need not wait until harm is suffered before claiming protection: see her judgment in these proceedings at [2022] EWHC 966 (KB) [29].

Canada Goose

71. Turning to the other considerations identified by the Court of Appeal in *Canada Goose UK Retail Limited v Persons Unknown* [2020] EWCA Civ 303; [2020] 1 WLR 2802 at [82], albeit in relation to interim injunctions:

    a. Those "persons unknown" (as defined) who can be identified have been and they have given assurances or undertakings. There were six of them. The four who gave assurances are therefore not named defendants. The Fourth and Fifth Defendants were joined to the proceedings by Order of Collins Rice J and have given separate undertakings and will be subject to a separate order ([82(1)] *Canada Goose)*.

    b. The "persons unknown" are defined in the originating process and the Order by reference to their conduct which is alleged to be unlawful i.e. they are people who enter or remain on the Sites without the consent of the Claimants for the purposes of the Extinction Rebellion and the Just Stop Oil campaigns ([82(2) and (4)]). People who have not entered the Sites will not be parties to the proceedings or subject to the Order.

    c. I have addressed the question of anticipatory relief, above, in relation to final injunctions ([83(3)]);

    d. The acts prohibited by the injunction correspond to the threatened torts and do not include lawful conduct given that they are all acts which take place in the context of trespass i.e., on the Sites delineated in the plans attached to the Order ([82(5)]).

    e. The terms of the injunction are clear and precise so as to ensure that those affected know what they can and cannot do. ([82(6)]).

    f. The injunction has clear geographical and temporal limits. The geographical limits are indicated on the plans attached to the Order and the duration of the injunction will be five years subject to a review following the handing down of the judgement of the Supreme Court in the *Wolverhampton* case and annually in any event ([82(7)]). I note that a five year term with annual reviews was ordered, for example, by Eyre J in *Transport for London v Lee* [2023] EWHC 1201 (KB) at [57]. There is also provision for applications on notice to vary or discharge the Order.

Service of the Order

72. I approve the terms of the draft Order as to service. There is good reason to permit alternative methods of service (see CPR rules 6.15 and 6.27), namely that standard methods of service in accordance with CPR rule 6 are not practicable. The arrangements in the draft Order are those which have been approved by Ellenbogen, Bennathan and Collins Rice JJ.

Conclusion

73. For all of these reasons I am satisfied that it is just and convenient to grant the Order which I have made.

CONVENTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS

done at Aarhus, Denmark,
on 25 June 1998

The Parties to this Convention,

Recalling principle l of the Stockholm Declaration on the Human Environment,

Recalling also principle 10 of the Rio Declaration on Environment and Development,

Recalling further General Assembly resolutions 37/7 of 28 October 1982 on the World Charter for Nature and 45/94 of 14 December 1990 on the need to ensure a healthy environment for the well-being of individuals,

Recalling the European Charter on Environment and Health adopted at the First European Conference on Environment and Health of the World Health Organization in Frankfurt-am-Main, Germany, on 8 December 1989,

Affirming the need to protect, preserve and improve the state of the environment and to ensure sustainable and environmentally sound development,

Recognizing that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself,

Recognizing also that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations,

Considering that, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights,

Recognizing that, in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns,

Aiming thereby to further the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment,

Recognizing the desirability of transparency in all branches of government and inviting legislative bodies to implement the principles of this Convention in their proceedings,

Recognizing also that the public needs to be aware of the procedures for participation in environmental decision-making, have free access to them and know how to use them,

Recognizing further the importance of the respective roles that individual citizens, non-governmental organizations and the private sector can play in environmental protection,

Desiring to promote environmental education to further the understanding of the environment and sustainable development and to encourage widespread public awareness of, and participation in, decisions affecting the environment and sustainable development,

Noting, in this context, the importance of making use of the media and of electronic or other, future forms of communication,

Recognizing the importance of fully integrating environmental considerations in governmental decision-making and the consequent need for public authorities to be in possession of accurate, comprehensive and up-to-date environmental information,

Acknowledging that public authorities hold environmental information in the public interest,

Concerned that effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced,

Noting the importance of adequate product information being provided to consumers to enable them to make informed environmental choices,

Recognizing the concern of the public about the deliberate release of genetically modified organisms into the environment and the need for increased transparency and greater public participation in decision-making in this field,

Convinced that the implementation of this Convention will contribute to strengthening democracy in the region of the United Nations Economic Commission for Europe (ECE),

Conscious of the role played in this respect by ECE and recalling, *inter alia*, the ECE Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-making endorsed in the Ministerial Declaration adopted at the Third Ministerial Conference "Environment for Europe" in Sofia, Bulgaria, on 25 October 1995,

Bearing in mind the relevant provisions in the Convention on Environmental Impact Assessment in a Transboundary Context, done at Espoo, Finland, on 25 February 1991, and the Convention on the Transboundary Effects of Industrial Accidents and the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, both done at Helsinki on 17 March 1992, and other regional conventions,

Conscious that the adoption of this Convention will have contributed to the further strengthening of the "Environment for Europe" process and to the results of the Fourth Ministerial Conference in Aarhus, Denmark, in June 1998,

Have agreed as follows:

Article 1

OBJECTIVE

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.

Article 2

DEFINITIONS

For the purposes of this Convention,

1. "Party" means, unless the text otherwise indicates, a Contracting Party to this Convention;

2. "Public authority" means:

(a) Government at national, regional and other level;

(b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;

(c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above;

(d) The institutions of any regional economic integration organization referred to in article 17 which is a Party to this Convention.

This definition does not include bodies or institutions acting in a judicial or legislative capacity;

3. "Environmental information" means any information in written, visual, aural, electronic or any other material form on:

(a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;

(c) The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above;

4. "The public" means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups;

5. "The public concerned" means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.

Article 3

GENERAL PROVISIONS

1. Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.

2. Each Party shall endeavour to ensure that officials and authorities assist and provide guidance to the public in seeking access to information, in facilitating participation in decision-making and in seeking access to justice in environmental matters.

3. Each Party shall promote environmental education and environmental awareness among the public, especially on how to obtain access to information, to participate in decision-making and to obtain access to justice in environmental matters.

4. Each Party shall provide for appropriate recognition of and support to associations, organizations or groups promoting environmental protection and ensure that its national legal system is consistent with this obligation.

5. The provisions of this Convention shall not affect the right of a Party to maintain or introduce measures providing for broader access to information, more extensive public participation in decision-making and wider access to justice in environmental matters than required by this Convention.

6. This Convention shall not require any derogation from existing rights of access to information, public participation in decision-making and access to justice in environmental matters.

7. Each Party shall promote the application of the principles of this Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment.

8. Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement. This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings.

9. Within the scope of the relevant provisions of this Convention, the public shall have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.

Article 4

ACCESS TO ENVIRONMENTAL INFORMATION

1. Each Party shall ensure that, subject to the following paragraphs of this article, public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation, including, where requested and subject to subparagraph (b) below, copies of the actual documentation containing or comprising such information:

(a) Without an interest having to be stated;

(b) In the form requested unless:

(i) It is reasonable for the public authority to make it available in another form, in which case reasons shall be given for making it available in that form; or

(ii) The information is already publicly available in another form.

2. The environmental information referred to in paragraph 1 above shall be made available as soon as possible and at the latest within one month after the request has been submitted, unless the volume and the complexity of the information justify an extension of this period up to two months after the request. The applicant shall be informed of any extension and of the reasons justifying it.

3. A request for environmental information may be refused if:

(a) The public authority to which the request is addressed does not hold the environmental information requested;

(b) The request is manifestly unreasonable or formulated in too general a manner; or

(c) The request concerns material in the course of completion or concerns internal communications of public authorities where such an exemption is provided for in national law or customary practice, taking into account the public interest served by disclosure.

4. A request for environmental information may be refused if the disclosure would adversely affect:

(a) The confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law;

(b) International relations, national defence or public security;

(c) The course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature;

(d) The confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed;

(e) Intellectual property rights;

(f) The confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for in national law;

(g) The interests of a third party which has supplied the information

requested without that party being under or capable of being put under a legal obligation to do so, and where that party does not consent to the release of the material; or

(h) The environment to which the information relates, such as the breeding sites of rare species.

The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment.

5. Where a public authority does not hold the environmental information requested, this public authority shall, as promptly as possible, inform the applicant of the public authority to which it believes it is possible to apply for the information requested or transfer the request to that authority and inform the applicant accordingly.

6. Each Party shall ensure that, if information exempted from disclosure under paragraphs 3 (c) and 4 above can be separated out without prejudice to the confidentiality of the information exempted, public authorities make available the remainder of the environmental information that has been requested.

7. A refusal of a request shall be in writing if the request was in writing or the applicant so requests. A refusal shall state the reasons for the refusal and give information on access to the review procedure provided for in accordance with article 9. The refusal shall be made as soon as possible and at the latest within one month, unless the complexity of the information justifies an extension of this period up to two months after the request. The applicant shall be informed of any extension and of the reasons justifying it.

8. Each Party may allow its public authorities to make a charge for supplying information, but such charge shall not exceed a reasonable amount. Public authorities intending to make such a charge for supplying information shall make available to applicants a schedule of charges which may be levied, indicating the circumstances in which they may be levied or waived and when the supply of information is conditional on the advance payment of such a charge.

Article 5

COLLECTION AND DISSEMINATION OF ENVIRONMENTAL INFORMATION

1. Each Party shall ensure that:

(a) Public authorities possess and update environmental information which is relevant to their functions;

(b) Mandatory systems are established so that there is an adequate flow of information to public authorities about proposed and existing activities which may significantly affect the environment;

(c) In the event of any imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all information which could enable the public to take measures to prevent or mitigate harm arising from the threat and is held by a public authority is disseminated immediately and without delay to members of the public who may be affected.

2. Each Party shall ensure that, within the framework of national legislation, the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible, inter alia, by:

(a) Providing sufficient information to the public about the type and scope of environmental information held by the relevant public authorities, the basic terms and conditions under which such information is made available and accessible, and the process by which it can be obtained;

(b) Establishing and maintaining practical arrangements, such as:

(i) Publicly accessible lists, registers or files;

(ii) Requiring officials to support the public in seeking access to information under this Convention; and

(iii) The identification of points of contact; and

(c) Providing access to the environmental information contained in lists, registers or files as referred to in subparagraph (b) (i) above free of charge.

3. Each Party shall ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunications networks. Information accessible in this form should include:

(a) Reports on the state of the environment, as referred to in paragraph 4 below;

(b) Texts of legislation on or relating to the environment;

(c) As appropriate, policies, plans and programmes on or relating to the environment, and environmental agreements; and

(d) Other information, to the extent that the availability of such information in this form would facilitate the application of national law implementing this Convention,

provided that such information is already available in electronic form.

4. Each Party shall, at regular intervals not exceeding three or four years, publish and disseminate a national report on the state of the environment, including information on the quality of the environment and information on pressures on the environment.

5. Each Party shall take measures within the framework of its legislation for the purpose of disseminating, inter alia:

(a) Legislation and policy documents such as documents on strategies, policies, programmes and action plans relating to the environment, and progress reports on their implementation, prepared at various levels of government;

(b) International treaties, conventions and agreements on environmental issues; and

(c) Other significant international documents on environmental issues, as appropriate.

6. Each Party shall encourage operators whose activities have a significant impact on the environment to inform the public regularly of the environmental impact of their activities and products, where appropriate within the framework of voluntary eco-labelling or eco-auditing schemes or by other means.

7. Each Party shall:

(a) Publish the facts and analyses of facts which it considers relevant and important in framing major environmental policy proposals;

(b) Publish, or otherwise make accessible, available explanatory material on its dealings with the public in matters falling within the scope of this Convention; and

(c) Provide in an appropriate form information on the performance of public functions or the provision of public services relating to the environment by government at all levels.

8. Each Party shall develop mechanisms with a view to ensuring that sufficient product information is made available to the public in a manner which enables consumers to make informed environmental choices.

9. Each Party shall take steps to establish progressively, taking into account international processes where appropriate, a coherent, nationwide system of pollution inventories or registers on a structured, computerized and publicly accessible database compiled through standardized reporting. Such a system may include inputs, releases and transfers of a specified range of substances and products, including water, energy and resource use, from a specified range of activities to environmental media and to on-site and off-site treatment and disposal sites.

10. Nothing in this article may prejudice the right of Parties to refuse to disclose certain environmental information in accordance with article 4, paragraphs 3 and 4.

Article 6

PUBLIC PARTICIPATION IN DECISIONS ON SPECIFIC ACTIVITIES

1. Each Party:

(a) Shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex I;

(b) Shall, in accordance with its national law, also apply the provisions of this article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions; and

(c) May decide, on a case-by-case basis if so provided under national law, not to apply the provisions of this article to proposed activities serving national defence purposes, if that Party deems that such application would have an adverse effect on these purposes.

2. The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner, inter alia, of:

(a) The proposed activity and the application on which a decision will be taken;

(b) The nature of possible decisions or the draft decision;

(c) The public authority responsible for making the decision;

(d) The envisaged procedure, including, as and when this information can be provided:

(i) The commencement of the procedure;

(ii) The opportunities for the public to participate;

(iii) The time and venue of any envisaged public hearing;

(iv) An indication of the public authority from which relevant information can be obtained and where the relevant information has been deposited for examination by the public;

(v) An indication of the relevant public authority or any other official body to which comments or questions can be submitted and of the time schedule for transmittal of comments or questions; and

(vi) An indication of what environmental information relevant to the proposed activity is available; and

(e) The fact that the activity is subject to a national or transboundary environmental impact assessment procedure.

3. The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during the environmental decision-making.

4. Each Party shall provide for early public participation, when all options are open and effective public participation can take place.

5. Each Party should, where appropriate, encourage prospective applicants to identify the public concerned, to enter into discussions, and to provide information regarding the objectives of their application before applying for a permit.

6. Each Party shall require the competent public authorities to give the public concerned access for examination, upon request where so required under national law, free of charge and as soon as it becomes available, to all information relevant to the decision-making referred to in this article that is available at the time of the public participation procedure, without prejudice to the right of Parties to refuse to disclose certain information in accordance with article 4, paragraphs 3 and 4. The relevant information shall include at least, and without prejudice to the provisions of article 4:

(a) A description of the site and the physical and technical characteristics of the proposed activity, including an estimate of the expected residues and emissions;

(b) A description of the significant effects of the proposed activity on the environment;

(c) A description of the measures envisaged to prevent and/or reduce the effects, including emissions;

(d) A non-technical summary of the above;

(e) An outline of the main alternatives studied by the applicant; and

(f) In accordance with national legislation, the main reports and advice issued to the public authority at the time when the public concerned shall be informed in accordance with paragraph 2 above.

7. Procedures for public participation shall allow the public to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity.

8. Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.

9. Each Party shall ensure that, when the decision has been taken by the public authority, the public is promptly informed of the decision in accordance with the appropriate procedures. Each Party shall make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based.

10. Each Party shall ensure that, when a public authority reconsiders or updates the operating conditions for an activity referred to in paragraph 1, the provisions of paragraphs 2 to 9 of this article are applied mutatis mutandis, and where appropriate.

11. Each Party shall, within the framework of its national law, apply, to the extent feasible and appropriate, provisions of this article to decisions on whether to permit the deliberate release of genetically modified organisms into the environment.

Article 7

PUBLIC PARTICIPATION CONCERNING PLANS, PROGRAMMES AND POLICIES RELATING TO THE ENVIRONMENT

Each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. Within this framework, article 6, paragraphs 3, 4 and 8, shall be applied. The public which may participate shall be identified by the relevant public authority, taking into account the objectives of this Convention. To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.

Article 8

PUBLIC PARTICIPATION DURING THE PREPARATION OF EXECUTIVE REGULATIONS AND/OR GENERALLY APPLICABLE LEGALLY BINDING NORMATIVE INSTRUMENTS

Each Party shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment. To this end, the following steps should be taken:

(a) Time-frames sufficient for effective participation should be

fixed;

(b) Draft rules should be published or otherwise made publicly available; and

(c) The public should be given the opportunity to comment, directly or through representative consultative bodies.

The result of the public participation shall be taken into account as far as possible.

Article 9

ACCESS TO JUSTICE

1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.

In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.

Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

(a) Having a sufficient interest

or, alternatively,

(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

The provisions of this paragraph 2 shall not exclude the possibility of

a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair,

equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

Article 10

MEETING OF THE PARTIES

1. The first meeting of the Parties shall be convened no later than one year after the date of the entry into force of this Convention. Thereafter, an ordinary meeting of the Parties shall be held at least once every two years, unless otherwise decided by the Parties, or at the written request of any Party, provided that, within six months of the request being communicated to all Parties by the Executive Secretary of the Economic Commission for Europe, the said request is supported by at least one third of the Parties.

2. At their meetings, the Parties shall keep under continuous review the implementation of this Convention on the basis of regular reporting by the Parties, and, with this purpose in mind, shall:

(a) Review the policies for and legal and methodological approaches to access to information, public participation in decision-making and access to justice in environmental matters, with a view to further improving them;

(b) Exchange information regarding experience gained in concluding and implementing bilateral and multilateral agreements or other arrangements having relevance to the purposes of this Convention and to which one or more of the Parties are a party;

(c) Seek, where appropriate, the services of relevant ECE bodies and other competent international bodies and specific committees in all aspects pertinent to the achievement of the purposes of this Convention;

(d) Establish any subsidiary bodies as they deem necessary;

(e) Prepare, where appropriate, protocols to this Convention;

(f) Consider and adopt proposals for amendments to this Convention in accordance with the provisions of article 14;

(g) Consider and undertake any additional action that may be required for the achievement of the purposes of this Convention;

(h) At their first meeting, consider and by consensus adopt rules of procedure for their meetings and the meetings of subsidiary bodies;

(i) At their first meeting, review their experience in implementing the provisions of article 5, paragraph 9, and consider what steps are necessary to develop further the system referred to in that paragraph, taking into account international processes and developments, including the elaboration of an appropriate instrument concerning pollution release and transfer registers or inventories which could be annexed to this Convention.

3. The Meeting of the Parties may, as necessary, consider establishing financial arrangements on a consensus basis.

4. The United Nations, its specialized agencies and the International Atomic Energy Agency, as well as any State or regional economic integration organization entitled under article 17 to sign this Convention but which is not a Party to this Convention, and any intergovernmental organization qualified in the fields to which this Convention relates, shall be entitled to participate as observers in the meetings of the Parties.

5. Any non-governmental organization, qualified in the fields to which this Convention relates, which has informed the Executive Secretary of the Economic Commission for Europe of its wish to be represented at a meeting of the Parties shall be entitled to participate as an observer unless at least one third of the Parties present in the meeting raise objections.

6. For the purposes of paragraphs 4 and 5 above, the rules of procedure referred to in paragraph 2 (h) above shall provide for practical arrangements for the admittance procedure and other relevant terms.

Article 11

RIGHT TO VOTE

1. Except as provided for in paragraph 2 below, each Party to this Convention shall have one vote.

2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote with a number of votes equal to the number of their member States which are Parties to this Convention. Such organizations shall not exercise their right to vote if their member States exercise theirs, and vice versa.

Article 12

SECRETARIAT

The Executive Secretary of the Economic Commission for Europe shall carry out the following secretariat functions:

(a) The convening and preparing of meetings of the Parties;

(b) The transmission to the Parties of reports and other information received in accordance with the provisions of this Convention; and

(c) Such other functions as may be determined by the Parties.

Article 13

ANNEXES

The annexes to this Convention shall constitute an integral part thereof.

Article 14

AMENDMENTS TO THE CONVENTION

1. Any Party may propose amendments to this Convention.

2. The text of any proposed amendment to this Convention shall be submitted in writing to the Executive Secretary of the Economic Commission for Europe, who shall communicate it to all Parties at least ninety days before the meeting of the Parties at which it is proposed for adoption.

3. The Parties shall make every effort to reach agreement on any proposed amendment to this Convention by consensus. If all efforts at consensus have been exhausted, and no agreement reached, the amendment shall as a last resort be adopted by a three-fourths majority vote of the Parties present and voting at the meeting.

4. Amendments to this Convention adopted in accordance with paragraph 3 above shall be communicated by the Depositary to all Parties for ratification, approval or acceptance. Amendments to this Convention other than those to an annex shall enter into force for Parties having ratified, approved or accepted them on the ninetieth day after the receipt by the Depositary of notification of their ratification, approval or acceptance by at least three fourths of these Parties. Thereafter they shall enter into force for any other Party on the ninetieth day after that Party deposits its instrument of ratification, approval or acceptance of the amendments.

5. Any Party that is unable to approve an amendment to an annex to this Convention shall so notify the Depositary in writing within twelve months from the date of the communication of the adoption. The Depositary shall without delay notify all Parties of any such notification received. A Party may at any time substitute an acceptance for its previous notification and, upon deposit of an instrument of acceptance with the Depositary, the amendments to such an annex shall become effective for that Party.

6. On the expiry of twelve months from the date of its communication by the Depositary as provided for in paragraph 4 above an amendment to an annex shall become effective for those Parties which have not submitted a notification to the Depositary in accordance with the provisions of paragraph 5 above, provided that not more than one third of the Parties have submitted such a notification.

7. For the purposes of this article, "Parties present and voting" means Parties present and casting an affirmative or negative vote.

Article 15

REVIEW OF COMPLIANCE

The Meeting of the Parties shall establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention. These arrangements shall allow for appropriate public involvement and may include the option of considering communications from members of the public on matters related to this Convention.

Article 16

SETTLEMENT OF DISPUTES

1. If a dispute arises between two or more Parties about the interpretation or application of this Convention, they shall seek a solution by negotiation or by any other means of dispute settlement acceptable to the parties to the dispute.

2. When signing, ratifying, accepting, approving or acceding to this Convention, or at any time thereafter, a Party may declare in writing to the Depositary that, for a dispute not resolved in accordance with paragraph 1 above, it accepts one or both of the following means of dispute settlement as compulsory in relation to any Party accepting the same obligation:

(a) Submission of the dispute to the International Court of Justice;

(b) Arbitration in accordance with the procedure set out in annex II.

3. If the parties to the dispute have accepted both means of dispute settlement referred to in paragraph 2 above, the dispute may be submitted only to the International Court of Justice, unless the parties agree otherwise.

Article 17

SIGNATURE

This Convention shall be open for signature at Aarhus (Denmark) on 25 June 1998, and thereafter at United Nations Headquarters in New York until 21 December 1998, by States members of the Economic Commission for Europe as well as States having consultative status with the Economic Commission for Europe pursuant to paragraphs 8 and 11 of Economic and Social Council resolution 36 (IV) of 28 March 1947, and by regional economic integration organizations constituted by sovereign States members of the Economic Commission for Europe to which their member States have transferred competence over matters governed by this Convention, including the competence to enter into treaties in respect of these matters.

Article 18

DEPOSITARY

The Secretary-General of the United Nations shall act as the Depositary of this Convention.

Article 19

RATIFICATION, ACCEPTANCE, APPROVAL AND ACCESSION

1. This Convention shall be subject to ratification, acceptance or approval by signatory States and regional economic integration organizations.

2. This Convention shall be open for accession as from 22 December 1998 by the States and regional economic integration organizations referred to in article 17.

3. Any other State, not referred to in paragraph 2 above, that is a Member of the United Nations may accede to the Convention upon approval by the Meeting of the Parties.

4. Any organization referred to in article 17 which becomes a Party to this Convention without any of its member States being a Party shall be bound by all the obligations under this Convention. If one or more of such an organization's member States is a Party to this Convention, the organization and its member States shall decide on their respective responsibilities for the performance of their obligations under this Convention. In such cases, the organization and the member States shall not be entitled to exercise rights under this Convention concurrently.

5. In their instruments of ratification, acceptance, approval or accession, the regional economic integration organizations referred to in article 17 shall declare the extent of their competence with respect to the matters

governed by this Convention. These organizations shall also inform the Depositary of any substantial modification to the extent of their competence.

Article 20

ENTRY INTO FORCE

1. This Convention shall enter into force on the ninetieth day after the date of deposit of the sixteenth instrument of ratification, acceptance, approval or accession.

2. For the purposes of paragraph 1 above, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by States members of such an organization.

3. For each State or organization referred to in article 17 which ratifies, accepts or approves this Convention or accedes thereto after the deposit of the sixteenth instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the ninetieth day after the date of deposit by such State or organization of its instrument of ratification, acceptance, approval or accession.

Article 21

WITHDRAWAL

At any time after three years from the date on which this Convention has come into force with respect to a Party, that Party may withdraw from the Convention by giving written notification to the Depositary. Any such withdrawal shall take effect on the ninetieth day after the date of its receipt by the Depositary.

Article 22

AUTHENTIC TEXTS

The original of this Convention, of which the English, French and Russian texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto, have signed this Convention.

DONE at Aarhus (Denmark), this twenty-fifth day of June, one thousand nine hundred and ninety-eight.

Annex I

LIST OF ACTIVITIES REFERRED TO IN ARTICLE 6, PARAGRAPH 1 (a)

1. Energy sector:

- Mineral oil and gas refineries;
- Installations for gasification and liquefaction;
- Thermal power stations and other combustion installations with a heat input of 50 megawatts (MW)or more;
- Coke ovens;
- Nuclear power stations and other nuclear reactors including the dismantling or decommissioning of such power stations or reactors 1/ (except research installations for the production and conversion of fissionable and fertile materials whose maximum power does not exceed 1 kW continuous thermal load);
- Installations for the reprocessing of irradiated nuclear fuel;
- Installations designed:
  - For the production or enrichment of nuclear fuel;
  - For the processing of irradiated nuclear fuel or high-level radioactive waste;
  - For the final disposal of irradiated nuclear fuel;
  - Solely for the final disposal of radioactive waste;
  - Solely for the storage (planned for more than 10 years) of irradiated nuclear fuels or radioactive waste in a different site than the production site.

2. Production and processing of metals:

- Metal ore (including sulphide ore) roasting or sintering installations;
- Installations for the production of pig-iron or steel (primary or secondary fusion) including continuous casting, with a capacity exceeding 2.5 tons per hour;
- Installations for the processing of ferrous metals:
  - (i) Hot-rolling mills with a capacity exceeding 20 tons of crude steel per hour;
  - (ii) Smitheries with hammers the energy of which exceeds 50 kilojoules per hammer, where the calorific power used exceeds 20 MW;
  - (iii) Application of protective fused metal coats with an input exceeding 2 tons of crude steel per hour;
- Ferrous metal foundries with a production capacity exceeding 20 tons per day;
- Installations:
  - (i) For the production of non-ferrous crude metals from ore, concentrates or secondary raw materials by metallurgical, chemical or electrolytic processes;
  - (ii) For the smelting, including the alloying, of non-ferrous metals, including recovered products (refining, foundry casting, etc.), with a melting capacity exceeding 4 tons per day for lead and cadmium or 20 tons per day for all other metals;
- Installations for surface treatment of metals and plastic materials using an electrolytic or chemical process where the volume of the treatment vats exceeds 30 m^3.

3. Mineral industry:

- Installations for the production of cement clinker in rotary kilns with a production capacity exceeding 500 tons per day or lime in rotary kilns with a production capacity exceeding 50 tons per day or in other furnaces with a production capacity exceeding 50 tons per day;
- Installations for the production of asbestos and the manufacture of asbestos-based products;
- Installations for the manufacture of glass including glass fibre with a melting capacity exceeding 20 tons per day;
- Installations for melting mineral substances including the production of mineral fibres with a melting capacity exceeding 20 tons per day;
- Installations for the manufacture of ceramic products by firing, in particular roofing tiles, bricks, refractory bricks, tiles, stoneware or porcelain, with a production capacity exceeding 75 tons per day, and/or with a kiln capacity exceeding 4 m^3 and with a setting density per kiln exceeding 300 kg/m^3.

4. Chemical industry: Production within the meaning of the categories of activities contained in this paragraph means the production on an industrial scale by chemical processing of substances or groups of substances listed in subparagraphs (a) to (g):

(a) Chemical installations for the production of basic organic chemicals, such as:

(i) Simple hydrocarbons (linear or cyclic, saturated or unsaturated, aliphatic or aromatic);
(ii) Oxygen-containing hydrocarbons such as alcohols, aldehydes, ketones, carboxylic acids, esters, acetates, ethers, peroxides, epoxy resins;
(iii) Sulphurous hydrocarbons;
(iv) Nitrogenous hydrocarbons such as amines, amides, nitrous compounds, nitro compounds or nitrate compounds, nitriles, cyanates, isocyanates;

(v) Phosphorus-containing hydrocarbons;
(vi) Halogenic hydrocarbons;
(vii) Organometallic compounds;
(viii) Basic plastic materials (polymers, synthetic fibres and cellulose-based fibres);
(ix) Synthetic rubbers;
(x) Dyes and pigments;
(xi) Surface-active agents and surfactants;

(b) Chemical installations for the production of basic inorganic chemicals, such as:

(i) Gases, such as ammonia, chlorine or hydrogen chloride, fluorine or hydrogen fluoride, carbon oxides, sulphur compounds, nitrogen oxides, hydrogen, sulphur dioxide, carbonyl chloride;
(ii) Acids, such as chromic acid, hydrofluoric acid, phosphoric acid, nitric acid, hydrochloric acid, sulphuric acid, oleum, sulphurous acids;
(iii) Bases, such as ammonium hydroxide, potassium hydroxide, sodium hydroxide;
(iv) Salts, such as ammonium chloride, potassium chlorate, potassium carbonate, sodium carbonate, perborate, silver nitrate;

(v) Non-metals, metal oxides or other inorganic compounds such as calcium carbide, silicon, silicon carbide;

(c) Chemical installations for the production of phosphorous-, nitrogen- or potassium-based fertilizers (simple or compound fertilizers);

(d) Chemical installations for the production of basic plant health products and of biocides;

(e) Installations using a chemical or biological process for the production of basic pharmaceutical products;

(f) Chemical installations for the production of explosives;

(g) Chemical installations in which chemical or biological processing is used for the production of protein feed additives, ferments and other protein substances.

5. Waste management:

- Installations for the incineration, recovery, chemical treatment or landfill of hazardous waste;
- Installations for the incineration of municipal waste with a capacity exceeding 3 tons per hour;
- Installations for the disposal of non-hazardous waste with a capacity exceeding 50 tons per day;
- Landfills receiving more than 10 tons per day or with a total capacity exceeding 25 000 tons, excluding landfills of inert waste.

6. Waste-water treatment plants with a capacity exceeding 150 000 population equivalent.

7. Industrial plants for the:

(a) Production of pulp from timber or similar fibrous materials;

(b) Production of paper and board with a production capacity exceeding 20 tons per day.

8. (a) Construction of lines for long-distance railway traffic and of airports 2/ with a basic runway length of 2 100 m or more;

(b) Construction of motorways and express roads; 3/

(c) Construction of a new road of four or more lanes, or realignment and/or widening of an existing road of two lanes or less so as to provide four or more lanes, where such new road, or realigned and/or widened section of road, would be 10 km or more in a continuous length.

9. (a) Inland waterways and ports for inland-waterway traffic which permit the passage of vessels of over 1 350 tons;

(b) Trading ports, piers for loading and unloading connected to land and outside ports (excluding ferry piers) which can take vessels of over 1 350 tons.

10. Groundwater abstraction or artificial groundwater recharge schemes where the annual volume of water abstracted or recharged is equivalent to or exceeds 10 million cubic metres.

11. (a) Works for the transfer of water resources between river basins where this transfer aims at preventing possible shortages of water and where the amount of water transferred exceeds 100 million cubic metres/year;

(b) In all other cases, works for the transfer of water resources between river basins where the multiannual average flow of the basin of abstraction exceeds 2 000 million cubic metres/year and where the amount of water transferred exceeds 5% of this flow.

In both cases transfers of piped drinking water are excluded.

12. Extraction of petroleum and natural gas for commercial purposes where the amount extracted exceeds 500 tons/day in the case of petroleum and 500 000 cubic metres/day in the case of gas.

13. Dams and other installations designed for the holding back or permanent storage of water, where a new or additional amount of water held back or stored exceeds 10 million cubic metres.

14. Pipelines for the transport of gas, oil or chemicals with a diameter of more than 800 mm and a length of more than 40 km.

15. Installations for the intensive rearing of poultry or pigs with more than:

(a) 40 000 places for poultry;

(b) 2 000 places for production pigs (over 30 kg); or

(c) 750 places for sows.

16. Quarries and opencast mining where the surface of the site exceeds 25 hectares, or peat extraction, where the surface of the site exceeds 150 hectares.

17. Construction of overhead electrical power lines with a voltage of 220 kV or more and a length of more than 15 km.

18. Installations for the storage of petroleum, petrochemical, or chemical products with a capacity of 200 000 tons or more.

19. Other activities:

- Plants for the pretreatment (operations such as washing, bleaching, mercerization) or dyeing of fibres or textiles where the treatment capacity exceeds 10 tons per day;
- Plants for the tanning of hides and skins where the treatment capacity exceeds 12 tons of finished products per day;
- (a) Slaughterhouses with a carcass production capacity greater than 50 tons per day;

  (b) Treatment and processing intended for the production of food products from:

    (i) Animal raw materials (other than milk) with a finished product production capacity greater than 75 tons per day;

    (ii) Vegetable raw materials with a finished product production capacity greater than 300 tons per day (average value on a quarterly basis);

(c) Treatment and processing of milk, the quantity of milk received being greater than 200 tons per day (average value on an annual basis);

- Installations for the disposal or recycling of animal carcasses and animal waste with a treatment capacity exceeding 10 tons per day;
- Installations for the surface treatment of substances, objects or products using organic solvents, in particular for dressing, printing, coating, degreasing, waterproofing, sizing, painting, cleaning or impregnating, with a consumption capacity of more than 150 kg per hour or more than 200 tons per year;
- Installations for the production of carbon (hard-burnt coal) or electrographite by means of incineration or graphitization.

20. Any activity not covered by paragraphs 1-19 above where public participation is provided for under an environmental impact assessment procedure in accordance with national legislation.

21. The provision of article 6, paragraph 1 (a) of this Convention, does not apply to any of the above projects undertaken exclusively or mainly for research, development and testing of new methods or products for less than two years unless they would be likely to cause a significant adverse effect on environment or health.

22. Any change to or extension of activities, where such a change or extension in itself meets the criteria/thresholds set out in this annex, shall be subject to article 6, paragraph 1 (a) of this Convention. Any other change or extension of activities shall be subject to article 6, paragraph 1 (b) of this Convention.

Notes

1/ Nuclear power stations and other nuclear reactors cease to be such an installation when all nuclear fuel and other radioactively contaminated elements have been removed permanently from the installation site.

2/ For the purposes of this Convention, "airport" means an airport which complies with the definition in the 1944 Chicago Convention setting up the International Civil Aviation Organization (Annex 14).

3/ For the purposes of this Convention, "express road" means a road which complies with the definition in the European Agreement on Main International Traffic Arteries of 15 November 1975.

Annex II

ARBITRATION

1. In the event of a dispute being submitted for arbitration pursuant to article 16, paragraph 2, of this Convention, a party or parties shall notify the secretariat of the subject matter of arbitration and indicate, in particular, the articles of this Convention whose interpretation or application is at issue. The secretariat shall forward the information received to all Parties to this Convention.

2. The arbitral tribunal shall consist of three members. Both the claimant party or parties and the other party or parties to the dispute shall appoint an arbitrator, and the two arbitrators so appointed shall designate by common agreement the third arbitrator, who shall be the president of the arbitral tribunal. The latter shall not be a national of one of the parties to the dispute, nor have his or her usual place of residence in the territory of one of these parties, nor be employed by any of them, nor have dealt with the case in any other capacity.

3. If the president of the arbitral tribunal has not been designated within two months of the appointment of the second arbitrator, the Executive Secretary of the Economic Commission for Europe shall, at the request of either party to the dispute, designate the president within a further two-month period.

4. If one of the parties to the dispute does not appoint an arbitrator within two months of the receipt of the request, the other party may so inform the Executive Secretary of the Economic Commission for Europe, who shall designate the president of the arbitral tribunal within a further two-month period. Upon designation, the president of the arbitral tribunal shall request the party which has not appointed an arbitrator to do so within two months. If it fails to do so within that period, the president shall so inform the Executive Secretary of the Economic Commission for Europe, who shall make this appointment within a further two-month period.

5. The arbitral tribunal shall render its decision in accordance with international law and the provisions of this Convention.

6. Any arbitral tribunal constituted under the provisions set out in this annex shall draw up its own rules of procedure.

7. The decisions of the arbitral tribunal, both on procedure and on substance, shall be taken by majority vote of its members.

8. The tribunal may take all appropriate measures to establish the facts.

9. The parties to the dispute shall facilitate the work of the arbitral tribunal and, in particular, using all means at their disposal, shall:

(a) Provide it with all relevant documents, facilities and information;

(b) Enable it, where necessary, to call witnesses or experts and receive their evidence.

10. The parties and the arbitrators shall protect the confidentiality of any information that they receive in confidence during the proceedings of the arbitral tribunal.

11. The arbitral tribunal may, at the request of one of the parties, recommend interim measures of protection.

12. If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to render its final decision. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings.

13. The arbitral tribunal may hear and determine counter-claims arising directly out of the subject matter of the dispute.

14. Unless the arbitral tribunal determines otherwise because of the particular circumstances of the case, the expenses of the tribunal, including the remuneration of its members, shall be borne by the parties to the dispute in equal shares. The tribunal shall keep a record of all its expenses, and shall furnish a final statement thereof to the parties.

15. Any Party to this Convention which has an interest of a legal nature in the subject matter of the dispute, and which may be affected by a decision in the case, may intervene in the proceedings with the consent of the tribunal.

16. The arbitral tribunal shall render its award within five months of the date on which it is established, unless it finds it necessary to extend the time limit for a period which should not exceed five months.

17. The award of the arbitral tribunal shall be accompanied by a statement of reasons. It shall be final and binding upon all parties to the dispute. The award will be transmitted by the arbitral tribunal to the parties to the dispute and to the secretariat. The secretariat will forward the information received to all Parties to this Convention.

18. Any dispute which may arise between the parties concerning the interpretation or execution of the award may be submitted by either party to the arbitral tribunal which made the award or, if the latter cannot be seized thereof, to another tribunal constituted for this purpose in the same manner as the first.

Public Order Act 2023 c. 15
s. 1 Offence of locking on

Version 1 of 1

3 May 2023 - Present

Subjects
Criminal law

Keywords
Interpretation; Locking on; Reasonable excuse; Sentencing

1 Offence of locking on

(1) A person commits an offence if—

(a) they—

(i) attach themselves to another person, to an object or to land,

(ii) attach a person to another person, to an object or to land, or

(iii) attach an object to another object or to land,

(b) that act causes, or is capable of causing, serious disruption to—

(i) two or more individuals, or

(ii) an organisation,

in a place other than a dwelling, and

(c) they intend that act to have a consequence mentioned in paragraph (b) or are reckless as to whether it will have such a consequence.

(2) It is a defence for a person charged with an offence under subsection (1) to prove that they had a reasonable excuse for the act mentioned in paragraph (a) of that subsection.

(3) A person who commits an offence under subsection (1) is liable on summary conviction to imprisonment for a term not exceeding the maximum term for summary offences, to a fine or to both.

(4) In subsection (3), *"the maximum term for summary offences"* means—

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(a) if the offence is committed before the time when section 281(5) of the Criminal Justice Act 2003 (alteration of penalties for certain summary offences: England and Wales) comes into force, six months;

(b) if the offence is committed after that time, 51 weeks.

(5) In this section *"dwelling"* means—

(a) a building or structure which is used as a dwelling, or

(b) a part of a building or structure, if the part is used as a dwelling,

and includes any yard, garden, grounds, garage or outhouse belonging to and used with a dwelling.

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s. 2 Offence of being equipped for locking on

Law In Force

Version 1 of 1

3 May 2023 - Present

Subjects
Criminal law

Keywords
Equipment; Fines; Locking on

2 Offence of being equipped for locking on

(1) A person commits an offence if they have an object with them in a place other than a dwelling with the intention that it may be used in the course of or in connection with the commission by any person of an offence under section 1(1) (offence of locking on).

(2) A person who commits an offence under subsection (1) is liable on summary conviction to a fine.

(3) In this section *"dwelling"* has the same meaning as in section 1.

Part 1 PUBLIC ORDER > Offences relating to locking on > s. 2 Offence of being equipped for locking on

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s. 3 Offence of causing serious disruption by tunnelling

Version 1 of 1

2 July 2023 - Present

Subjects
Criminal law; Penology and criminology

Keywords
Interpretation; Reasonable excuse; Sentencing; Tunnelling

3 Offence of causing serious disruption by tunnelling

(1) A person commits an offence if—

(a) they create, or participate in the creation of, a tunnel,

(b) the creation or existence of the tunnel causes, or is capable of causing, serious disruption to—

(i) two or more individuals, or

(ii) an organisation,

in a place other than a dwelling, and

(c) they intend the creation or existence of the tunnel to have a consequence mentioned in paragraph (b) or are reckless as to whether its creation or existence will have such a consequence.

(2) It is a defence for a person charged with an offence under subsection (1) to prove that they had a reasonable excuse for creating, or participating in the creation of, the tunnel.

(3) Without prejudice to the generality of subsection (2), a person is to be treated as having a reasonable excuse for the purposes of that subsection if the creation of the tunnel was authorised by a person with an interest in land which entitled them to authorise its creation.

(4) A person who commits an offence under subsection (1) is liable—

(a) on summary conviction, to imprisonment for a term not exceeding the general limit in a magistrates' court, to a fine or to both;

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(b) on conviction on indictment, to imprisonment for a term not exceeding 3 years, to a fine or to both.

(5) For the purposes of this section—

(a) *"tunnel"* means an excavation that extends beneath land, whether or not—

(i) it is big enough to permit the entry or passage of an individual, or

(ii) it leads to a particular destination;

(b) an excavation which is created with the intention that it will become or connect with a tunnel is to be treated as a tunnel, whether or not—

(i) any tunnel with which it is intended to connect has already been created, or

(ii) it is big enough to permit the entry or passage of an individual.

(6) References in this section to the creation of an excavation include—

(a) the extension or enlargement of an excavation, and

(b) the alteration of a natural or artificial underground feature.

(7) This section does not apply in relation to a tunnel if or to the extent that it is in or under a dwelling.

(8) In this section *"dwelling"* has the same meaning as in section 1 (offence of locking on).

Part 1 PUBLIC ORDER > Offences relating to tunnelling > s. 3 Offence of causing serious disruption by tunnelling

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s. 4 Offence of causing serious disruption by being present in a tunnel

Version 1 of 1

2 July 2023 - Present

Subjects
Criminal law; Penology and criminology

Keywords
Interpretation; Presence; Reasonable excuse; Sentencing; Tunnelling

4 Offence of causing serious disruption by being present in a tunnel

(1) A person commits an offence if—

(a) they are present in a relevant tunnel having entered it after the coming into force of this section,

(b) their presence in the tunnel causes, or is capable of causing, serious disruption to—

(i) two or more individuals, or

(ii) an organisation,

in a place other than a dwelling, and

(c) they intend their presence in the tunnel to have a consequence mentioned in paragraph (b) or are reckless as to whether their presence there will have such a consequence.

(2) It is a defence for a person charged with an offence under subsection (1) to prove that they had a reasonable excuse for their presence in the tunnel.

(3) Without prejudice to the generality of subsection (2), a person ("P") is to be treated as having a reasonable excuse for the purposes of that subsection if P's presence in the tunnel was authorised by a person with an interest in land which entitled them to authorise P's presence there.

(4) A person who commits an offence under subsection (1) is liable—

(a) on summary conviction, to imprisonment for a term not exceeding the general limit in a magistrates' court, to a fine or to both;

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(b) on conviction on indictment, to imprisonment for a term not exceeding 3 years, to a fine or to both.

(5) For the purposes of this section—

(a) *"tunnel"* means an excavation that extends beneath land, whether or not it leads to a particular destination;

(b) an excavation which is created with the intention that it will become or connect with a tunnel is to be treated as a tunnel, whether or not any tunnel with which it is intended to connect has already been created.

(6) In this section *"relevant tunnel"* means a tunnel that was created for the purposes of, or in connection with, a protest (and it does not matter whether an offence has been committed under section 3 in relation to the creation of the tunnel).

(7) References in this section to the creation of an excavation include—

(a) the extension or enlargement of an excavation, and

(b) the alteration of a natural or artificial underground feature.

(8) This section does not apply in relation to a tunnel if or to the extent that it is in or under a dwelling.

(9) In this section *"dwelling"* has the same meaning as in section 1 (offence of locking on).

Part 1 PUBLIC ORDER > Offences relating to tunnelling > s. 4
Offence of causing serious disruption by being present in a tunnel

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s. 5 Offence of being equipped for tunnelling etc

Version 1 of 1

2 July 2023 - Present

Subjects
Criminal law; Penology and criminology

Keywords
Equipment; Interpretation; Sentencing; Tunnelling

5 Offence of being equipped for tunnelling etc

(1) A person commits an offence if they have an object with them in a place other than a dwelling with the intention that it may be used in the course of or in connection with the commission by any person of an offence under section 3(1) or 4(1) (offences relating to tunnelling).

(2) A person who commits an offence under subsection (1) is liable on summary conviction to imprisonment for a term not exceeding the maximum term for summary offences, to a fine or to both.

(3) In subsection (2), *"the maximum term for summary offences"* means—

(a) if the offence is committed before the time when section 281(5) of the Criminal Justice Act 2003 (alteration of penalties for certain summary offences: England and Wales) comes into force, six months;

(b) if the offence is committed after that time, 51 weeks.

(4) In this section *"dwelling"* has the same meaning as in section 1 (offence of locking on).

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s. 6 Obstruction etc of major transport works

Version 1 of 1

2 July 2023 - Present

Subjects
Criminal law; Penology and criminology

Keywords
Defences; Interpretation; Obstruction of major transport works; Sentencing

6 Obstruction etc of major transport works

(1) A person commits an offence if the person—

(a) obstructs the undertaker or a person acting under the authority of the undertaker—

(i) in setting out the lines of any major transport works,

(ii) in constructing or maintaining any major transport works, or

(iii) in taking any steps that are reasonably necessary for the purposes of facilitating, or in connection with, the construction or maintenance of any major transport works, or

(b) interferes with, moves or removes any apparatus which—

(i) relates to the construction or maintenance of any major transport works, and

(ii) belongs to a person within subsection (5).

(2) It is a defence for a person charged with an offence under subsection (1) to prove that—

(a) they had a reasonable excuse for the act mentioned in paragraph (a) or (b) of that subsection, or

(b) the act mentioned in paragraph (a) or (b) of that subsection was done wholly or mainly in contemplation or furtherance of a trade dispute.

(3) A person who commits an offence under subsection (1) is liable on summary conviction to imprisonment for a term not exceeding the maximum term for summary offences, to a fine or to both.

(4) In subsection (3) *"the maximum term for summary offences"* means—

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(a) if the offence is committed before the time when section 281(5) of the Criminal Justice Act 2003 (alteration of penalties for certain summary offences: England and Wales) comes into force, six months;

(b) if the offence is committed after that time, 51 weeks.

(5) The following persons are within this subsection—

(a) the undertaker;

(b) a person acting under the authority of the undertaker;

(c) a statutory undertaker;

(d) a person acting under the authority of a statutory undertaker.

(6) In this section *"major transport works"* means—

(a) works in England and Wales—

(i) relating to transport infrastructure, and

(ii) the construction of which is authorised directly by an Act of Parliament, or

(b) works the construction of which comprises development within subsection (7) that has been granted development consent by an order under section 114 of the Planning Act 2008.

(7) Development is within this subsection if—

(a) it is or forms part of a nationally significant infrastructure project within any of paragraphs (h) to (l) of section 14(1) of the Planning Act 2008,

(b) it is or forms part of a project (or proposed project) in the field of transport in relation to which a direction has been given under section 35(1) of that Act (directions in relation to projects of national significance) by the Secretary of State, or

(c) it is associated development in relation to development within paragraph (a) or (b).

(8) In this section *"undertaker"* —

(a) in relation to major transport works within subsection (6)(a), means a person who is authorised by or under the Act (whether as a result of being appointed the nominated undertaker for the purposes of the Act or otherwise) to construct or maintain any of the works;

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(b) in relation to major transport works within subsection (6)(b), means a person who is constructing or maintaining any of the works (whether as a result of being the undertaker for the purposes of the order granting development consent or otherwise).

(9) In this section—

"associated development" has the same meaning as in the Planning Act 2008 (see section 115 of that Act);

"development" has the same meaning as in the Planning Act 2008 (see section 32 of that Act);

"development consent" has the same meaning as in the Planning Act 2008 (see section 31 of that Act);

"England" includes the English inshore region within the meaning of the Marine and Coastal Access Act 2009 (see section 322 of that Act);

"maintain" includes inspect, repair, adjust, alter, remove, reconstruct and replace, and *"maintenance"* is to be construed accordingly;

"nationally significant infrastructure project" has the same meaning as in the Planning Act 2008 (see section 14(1) of that Act);

"statutory undertaker" means a person who is, or who is deemed to be, a statutory undertaker for the purposes of any provision of Part 11 of the Town and Country Planning Act 1990;

"trade dispute" has the same meaning as in Part 4 of the Trade Union and Labour Relations (Consolidation) Act 1992, except that section 218 of that Act is to be read as if—

(a) it made provision corresponding to section 244(4) of that Act, and

(b) in subsection (5), the definition of worker included any person falling within paragraph (b) of the definition of worker in section 244(5) of that Act;

"Wales" includes the Welsh inshore region within the meaning of the Marine and Coastal Access Act 2009 (see section 322 of that Act).

(10) In section 14 of the Planning Act 2008 (nationally significant infrastructure projects), after subsection (3) insert—

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"(3A) An order under subsection (3)(a) may also amend section 6(7)(a) of the Public Order Act 2023 (obstruction etc of major transport works)."

Part 1 PUBLIC ORDER > Offences involving works and infrastructure > s. 6 Obstruction etc of major transport works

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s. 7 Interference with use or operation of key national infrastructure

Version 1 of 1

2 May 2023 - Present

Subjects
Criminal law; Penology and criminology

Keywords
Defences; Interference with key national infrastructure; Interpretation; Regulations; Sentencing

7 Interference with use or operation of key national infrastructure

(1) A person commits an offence if—

(a) they do an act which interferes with the use or operation of any key national infrastructure in England and Wales, and

(b) they intend that act to interfere with the use or operation of such infrastructure or are reckless as to whether it will do so.

(2) It is a defence for a person charged with an offence under subsection (1) to prove that—

(a) they had a reasonable excuse for the act mentioned in paragraph (a) of that subsection, or

(b) the act mentioned in paragraph (a) of that subsection was done wholly or mainly in contemplation or furtherance of a trade dispute.

(3) A person who commits an offence under subsection (1) is liable—

(a) on summary conviction, to imprisonment for a term not exceeding the general limit in a magistrates' court, to a fine or to both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 12 months, to a fine or to both.

(4) For the purposes of subsection (1) a person's act interferes with the use or operation of key national infrastructure if it prevents the infrastructure from being used or operated to any extent for any of its intended purposes.

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(5) The cases in which infrastructure is prevented from being used or operated for any of its intended purposes include where its use or operation for any of those purposes is significantly delayed.

(6) In this section *"key national infrastructure"* means—

(a) road transport infrastructure,

(b) rail infrastructure,

(c) air transport infrastructure,

(d) harbour infrastructure,

(e) downstream oil infrastructure,

(f) downstream gas infrastructure,

(g) onshore oil and gas exploration and production infrastructure,

(h) onshore electricity generation infrastructure, or

(i) newspaper printing infrastructure.

Section 8 makes further provision about these kinds of infrastructure.

(7) The Secretary of State may by regulations made by statutory instrument—

(a) amend subsection (6) to add a kind of infrastructure or to vary or remove a kind of infrastructure;

(b) amend section 8 to add, amend or remove provision about a kind of infrastructure which is in, or is to be added to, subsection (6) or is to be removed from that subsection.

(8) Regulations under subsection (7)—

(a) may make different provision for different purposes;

(b) may make consequential, supplementary, incidental, transitional, transitory or saving provision.

(9) A statutory instrument containing regulations under subsection (7) may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament.

(10) In this section—

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"England" includes the English inshore region within the meaning of the Marine and Coastal Access Act 2009 (see section 322 of that Act);

"trade dispute" has the same meaning as in Part 4 of the Trade Union and Labour Relations (Consolidation) Act 1992, except that section 218 of that Act is to be read as if—

(a) it made provision corresponding to section 244(4) of that Act, and

(b) in subsection (5), the definition of worker included any person falling within paragraph (b) of the definition of worker in section 244(5) of that Act;

"Wales" includes the Welsh inshore region within the meaning of the Marine and Coastal Access Act 2009 (see section 322 of that Act).

Part 1 PUBLIC ORDER > Offences involving works and infrastructure > s. 7 Interference with use or operation of key national infrastructure

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s. 8 Key national infrastructure

Law In Force

Version 1 of 1

3 May 2023 - Present

Subjects
Criminal law; Penology and criminology

Keywords
Gas; Interference with key national infrastructure; Interpretation; Newspapers; Petroleum; Pipelines; Statutory definition

8 Key national infrastructure

(1) This section has effect for the purposes of section 7.

(2) *"Road transport infrastructure"* means—

(a) a special road within the meaning of the Highways Act 1980 (see section 329(1) of that Act), or

(b) a road which, under the system for assigning identification numbers to roads administered by the Secretary of State or the Welsh Ministers, has for the time being been assigned a number prefixed by A or B.

(3) *"Rail infrastructure"* means infrastructure used for the purposes of railway services within the meaning of Part 1 of the Railways Act 1993 (see section 82 of that Act).

(4) In the application of section 82 of the Railways Act 1993 for the purposes of subsection (3) *"railway"* has the wider meaning given in section 81(2) of that Act.

(5) *"Air transport infrastructure"* means—

(a) an airport within the meaning of the Airports Act 1986 (see section 82(1) of that Act), or

(b) any infrastructure which—

(i) does not form part of an airport within the meaning of that Act, and

(ii) is used for the provision of air traffic services within the meaning of Part 1 of the Transport Act 2000 (see section 98 of that Act).

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(6) *"Harbour infrastructure"* means a harbour within the meaning of the Harbours Act 1964 (see section 57(1) of that Act) which provides facilities for or in connection with—

(a) the embarking or disembarking of passengers who are carried in the course of a business, or

(b) the loading or unloading of cargo which is carried in the course of a business.

(7) *"Downstream oil infrastructure"* means infrastructure used for or in connection with any of the following activities—

(a) the refinement or other processing of crude oil or oil feedstocks;

(b) the storage of crude oil or crude oil-based fuel for onward distribution, other than storage by a person who supplies crude oil-based fuel to the public where the storage is for the purposes of such supply;

(c) the loading or unloading of crude oil or crude oil-based fuel for onward distribution, other than unloading to a person who supplies crude oil-based fuel to the public where the unloading is for the purposes of such supply;

(d) the carriage, by road, rail, sea or inland waterway, of crude oil or crude oil-based fuel for the purposes of onward distribution;

(e) the conveyance of crude oil or crude oil-based fuel by means of a pipe-line within the meaning of the Pipe-lines Act 1962 (see section 65 of that Act).

(8) *"Downstream gas infrastructure"* means infrastructure used for or in connection with any of the following activities—

(a) the processing of gas;

(b) the storage of gas for onward conveyance, other than storage by a person who supplies gas to the public otherwise than by means of a pipe-line where the storage is for the purposes of such supply;

(c) the import or export of liquid gas;

(d) the carriage, by road or rail, of gas for the purposes of onward distribution;

(e) the conveyance of gas by means of a pipe-line.

(9) In subsection (8)—

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"gas" has the same meaning as in section 12 of the Gas Act 1995;

"pipe-line" has the same meaning as in the Pipe-lines Act 1962 (see section 65 of that Act).

(10) *"Onshore oil and gas exploration and production infrastructure"* means onshore infrastructure used for or in connection with—

(a) searching or boring for petroleum, or

(b) getting petroleum.

(11) In subsection (10)—

"onshore infrastructure" means infrastructure situated on land (excluding land covered by the sea or any tidal waters);

"petroleum" has the same meaning as in Part 1 of the Petroleum Act 1998 (see section 1 of that Act).

(12) *"Onshore electricity generation infrastructure"* means onshore infrastructure—

(a) used for or in connection with the generation of electricity for the purpose of giving a supply to any premises or enabling a supply to be so given, and

(b) which has a total installed capacity equal to or greater than 100 megawatts.

(13) In subsection (12)—

"onshore infrastructure" means infrastructure situated on land (excluding land covered by the sea or any tidal waters);

"supply" , in relation to electricity, has the same meaning as in Part 1 of the Electricity Act 1989 (see section 4(4) of that Act).

(14) *"Newspaper printing infrastructure"* means infrastructure the primary purpose of which is the printing of one or more national or local newspapers.

(15) In subsection (14)—

"local newspaper" means a newspaper which is published at least fortnightly and is in circulation in a part of England and Wales;

"national newspaper" means a newspaper which is published at least fortnightly and is in circulation in England, in Wales or in both;

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"newspaper" includes a periodical or magazine.

Part 1 PUBLIC ORDER > Offences involving works and infrastructure > s. 8 Key national infrastructure

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s. 9 Offence of interference with access to or provision of abortion services

Version 1 of 1

Date to be appointed - Date to be appointed

Subjects
Criminal law; Penology and criminology

Keywords
Exemptions; Fines; Interference with access to or provision of abortion services; Interpretation; Safe access zones

9 Offence of interference with access to or provision of abortion services

(1) It is an offence for a person who is within a safe access zone to do an act with the intent of, or reckless as to whether it has the effect of—

(a) influencing any person's decision to access, provide or facilitate the provision of abortion services at an abortion clinic,

(b) obstructing or impeding any person accessing, providing, or facilitating the provision of abortion services at an abortion clinic, or

(c) causing harassment, alarm or distress to any person in connection with a decision to access, provide, or facilitate the provision of abortion services at an abortion clinic,

where the person mentioned in paragraph (a), (b) or (c) is within the safe access zone for the abortion clinic.

(2) A *"safe access zone"* means an area which is within a boundary which is 150 metres from any part of an abortion clinic or any access point to any building or site that contains an abortion clinic and is—

(a) on or adjacent to a public highway or public right of way,

(b) in an open space to which the public has access,

(c) within the curtilage of an abortion clinic, or building or site which contains an abortion clinic, or

(d) in any location that is visible from a public highway, public right of way, open space to which the public have access, or the curtilage of an abortion clinic.

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(3) No offence is committed under subsection (1) by—

(a) a person inside a dwelling where the person affected is also in that or another dwelling, or

(b) a person inside a building or site used as a place of worship where the person affected is also in that building or site.

(4) A person guilty of an offence under subsection (1) is liable on summary conviction to a fine.

(5) Nothing in this section applies to—

(a) anything done in the course of providing, or facilitating the provision of, abortion services in an abortion clinic,

(b) anything done in the course of providing medical care within a regulated healthcare facility,

(c) any person or persons accompanying, with consent, a person or persons accessing, providing or facilitating the provision of, or attempting to access, provide or facilitate the provision of, abortion services, or

(d) the operation of a camera if its coverage of persons accessing or attempting to access an abortion clinic is incidental.

(6) In this section—

"abortion clinic" means—

(a) a place approved for the purposes of section 1 of the Abortion Act 1967 by the Secretary of State under subsection (3) of that section, or

(b) a hospital identified in a notification to the Chief Medical Officer under section 2(1) of the Abortion Act 1967 in the current or previous calendar year, and published identifying it as such, where "current" or "previous" are references to the time at which an alleged offence under subsection (1) of this section takes place;

"abortion services" means any treatment for the termination of pregnancy;

"dwelling" has the same meaning as in section 1 of this Act (offence of locking on).

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s. 10 Powers to stop and search on suspicion

Version 1 of 1

20 December 2023 - Present

Subjects
Criminal law; Penology and criminology; Police; Sentencing

10 Powers to stop and search on suspicion

In section 1(8) of the Police and Criminal Evidence Act 1984 (offences in relation to which stop and search power applies)—

(a) omit the "and" at the end of paragraph (d), and

(b) after paragraph (e) insert—

"(f) an offence under section 137 of the Highways Act 1980 (wilful obstruction) involving activity which causes or is capable of causing serious disruption to two or more individuals or to an organisation;

(g) an offence under section 78 of the Police, Crime, Sentencing and Courts Act 2022 (intentionally or recklessly causing public nuisance);

(h) an offence under section 1 of the Public Order Act 2023 (offence of locking on);

(i) an offence under section 3 of that Act (offence of causing serious disruption by tunnelling);

(j) an offence under section 4 of that Act (offence of causing serious disruption by being present in a tunnel);

(k) an offence under section 6 of that Act (obstruction etc of major transport works); and

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(l) an offence under section 7 of that Act (interference with use or operation of key national infrastructure)."

Part 1 PUBLIC ORDER > Powers to stop and search > s. 10 Powers to stop and search on suspicion

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s. 11 Powers to stop and search without suspicion

Version 1 of 1

20 December 2023 - Present

Subjects
Penology and criminology; Police

Keywords
Authorisations; Powers of seizure; Public order; Reasonable belief; Stop and search

11 Powers to stop and search without suspicion

(1) This section applies if a police officer of or above the rank of inspector reasonably believes—

(a) that any of the following offences may be committed in any locality within the officer's police area—

(i) an offence under section 137 of the Highways Act 1980 (wilful obstruction) involving activity which causes or is capable of causing serious disruption to two or more individuals or to an organisation;

(ii) an offence under section 78 of the Police, Crime, Sentencing and Courts Act 2022 (intentionally or recklessly causing public nuisance);

(iii) an offence under section 1 (offence of locking on);

(iv) an offence under section 3 (offence of causing serious disruption by tunnelling);

(v) an offence under section 4 (offence of causing serious disruption by being present in a tunnel);

(vi) an offence under section 6 (obstruction etc of major transport works);

(vii) an offence under section 7 (interference with use or operation of key national infrastructure), or

(b) that persons are carrying prohibited objects in any locality within the officer's police area.

(2) In this section *"prohibited object"* means an object which—

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(a) is made or adapted for use in the course of or in connection with an offence within subsection (1)(a), or

(b) is intended by the person having it with them for such use by them or by some other person,

and for the purposes of this section a person carries a prohibited object if they have it in their possession.

(3) If the further condition in subsection (4) is met, the police officer may give an authorisation that the powers conferred by this section are to be exercisable—

(a) anywhere within a specified locality within the officer's police area, and

(b) for a specified period not exceeding 24 hours.

(4) The further condition is that the police officer reasonably believes that—

(a) the authorisation is necessary to prevent the commission of offences within subsection (1)(a) or the carrying of prohibited objects (as the case may be),

(b) the specified locality is no greater than is necessary to prevent such activity, and

(c) the specified period is no longer than is necessary to prevent such activity.

(5) If it appears to a police officer of or above the rank of superintendent that it is necessary to do so to prevent the commission of offences within subsection (1)(a) or the carrying of prohibited objects, the officer may direct that the authorisation is to continue in force for a further period not exceeding 24 hours.

(6) This section confers on any constable in uniform power—

(a) to stop any person and search them or anything carried by them for a prohibited object;

(b) to stop any vehicle and search the vehicle, its driver and any passenger for a prohibited object.

(7) A constable may, in the exercise of the powers conferred by subsection (6), stop any person or vehicle and make any search the constable thinks fit whether or not the constable has any grounds for suspecting that the person or vehicle is carrying a prohibited object.

(8) If in the course of a search under this section a constable discovers an object which the constable has reasonable grounds for suspecting to be a prohibited object, the constable may seize it.

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(9) This section and sections 12 (further provisions about authorisations and directions under this section), 13 (further provisions about searches under this section) and 14 (offence relating to this section) apply (with the necessary modifications) to ships, aircraft and hovercraft as they apply to vehicles.

(10) In this section and the sections mentioned in subsection (9)—

"specified" means specified in an authorisation under this section;

"vehicle" includes a caravan as defined in section 29(1) of the Caravan Sites and Control of Development Act 1960.

(11) The powers conferred by this section and the sections mentioned in subsection (9) do not affect any power conferred otherwise than by this section or those sections.

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s. 12 Further provisions about authorisations and directions under section 11

Version 1 of 1

20 December 2023 - Present

Subjects
Penology and criminology; Police

Keywords
Authorisations; Chief police officers; Notification; Public order; Reasonable belief; Stop and search

12 Further provisions about authorisations and directions under section 11

(1) If an inspector gives an authorisation under section 11, the inspector must, as soon as it is practicable to do so, cause an officer of or above the rank of superintendent to be informed.

(2) An authorisation under section 11 must—

(a) be given in writing signed by the officer giving it,

(b) specify the grounds on which it is given, and

(c) specify the locality in which and the period during which the powers conferred by that section are exercisable.

(3) A direction under section 11(5) must—

(a) be given in writing, or

(b) where it is not practicable to comply with paragraph (a), be recorded in writing as soon as it is practicable to do so.

(4) References (however expressed) in section 11 or this section to a police officer of or above a particular rank include references to a member of the British Transport Police Force of or above that rank.

(5) In the application of section 11 to a member of the British Transport Police Force by virtue of subsection (4), references to a locality within the officer's police area are to be read as references to a place in England and Wales of a kind mentioned in section 31(1)(a) to (f) of the Railways and Transport Safety Act 2003.

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s. 13 Further provisions about searches under section 11

Version 1 of 1

2 May 2023 - Present

Subjects
Penology and criminology; Police

Keywords
Applications; Authority; Destruction of evidence; Public order; Reasonable belief; Regulations; Retention; Seized property; Stop and search; Time limits

13 Further provisions about searches under section 11

(1) A person who is searched by a constable under section 11 is entitled to obtain a written statement that the person was searched under the powers conferred by that section.

(2) Subsection (1) applies only if the person applies for the statement within the period of 12 months beginning with the day on which the person was searched.

(3) Where a vehicle is stopped by a constable under section 11, the driver is entitled to obtain a written statement that the vehicle was stopped under the powers conferred by that section.

(4) Subsection (3) applies only if the driver applies for the statement within the period of 12 months beginning with the day on which the vehicle was stopped.

(5) Any object seized by a constable under section 11 may be retained in accordance with regulations made by the Secretary of State.

(6) The Secretary of State may make regulations regulating the retention and safe keeping, and the disposal or destruction in circumstances prescribed in the regulations, of such an object.

(7) Regulations under this section are to be made by statutory instrument.

(8) Regulations under this section—

(a) may make different provision for different purposes;

(b) may make consequential, supplementary, incidental, transitional, transitory or saving provision.

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(9) A statutory instrument containing regulations under this section is subject to annulment in pursuance of a resolution of either House of Parliament.

Part 1 PUBLIC ORDER > Powers to stop and search > s. 13 Further provisions about searches under section 11

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s. 14 Offence relating to section 11

Version 1 of 1

20 December 2023 - Present

Subjects
Penology and criminology; Police

Keywords
Obstructing police; Public order; Reasonable belief; Sentencing; Stop and search

14 Offence relating to section 11

(1) A person commits an offence if the person intentionally obstructs a constable in the exercise of the constable's powers under section 11.

(2) A person who commits an offence under subsection (1) is liable on summary conviction to imprisonment for a term not exceeding 51 weeks, to a fine not exceeding level 3 on the standard scale or to both.

(3) In relation to an offence committed before the coming into force of section 281(5) of the Criminal Justice Act 2003 (alteration of penalties for certain summary offences: England and Wales), the reference in subsection (2) to 51 weeks is to be read as a reference to 1 month.

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s. 15 Processions, assemblies and one-person protests: delegation of functions

Law In Force

Version 1 of 1

3 May 2023 - Present

Subjects
Criminal law; Penology and criminology; Police; Sentencing

15 Processions, assemblies and one-person protests: delegation of functions

In section 15 of the Public Order Act 1986 (processions, assemblies and one-person protests: delegation of functions), for subsection (2) substitute—

"(2) Subsection (1) has effect—

(a) in the City of London as if "an assistant chief constable" read "an assistant commissioner of police or a commander", and

(b) in the metropolitan police district as if "an assistant chief constable" read "an assistant commissioner of police, a deputy assistant commissioner of police or a commander"."

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s. 16 Assemblies and one-person protests: British Transport Police and MoD Police

Version 1 of 1

3 July 2023 - Present

Subjects
Criminal law; Penology and criminology; Police; Sentencing

16 Assemblies and one-person protests: British Transport Police and MoD Police

(1) The Public Order Act 1986 is amended as follows.

(2) In section 14 (imposing conditions on public assemblies)—

(a) in subsection (2), after paragraph (b) (and on a new line) insert "This is subject to subsections (2ZA) and (2ZB).",

(b) after subsection (2) insert—

"(2ZA) The reference in subsection (2)(a) to a police officer includes —

(a) a constable of the British Transport Police Force, in relation to a place within section 31(1)(a) to (f) of the Railways and Transport Safety Act 2003;

(b) a member of the Ministry of Defence Police, in relation to a place to which section 2(2) of the Ministry of Defence Police Act 1987 applies.

(2ZB) The reference in subsection (2)(b) to a chief officer of police includes—

(a) the chief constable of the British Transport Police Force, in relation to a place within section 31(1)(a) to (f) of the Railways and Transport Safety Act 2003;

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(b) the chief constable of the Ministry of Defence Police, in relation to a place to which section 2(2) of the Ministry of Defence Police Act 1987 applies.", and

(c) in subsection (3)—

(i) omit "by a chief officer of police", and

(ii) after "(2)(b)" insert "or (2ZB)".

(3) In section 14ZA (imposing conditions on one-person protests)—

(a) in subsection (5), after paragraph (b) (and on a new line) insert "This is subject to subsections (5A) and (5B).",

(b) after subsection (5) insert—

"(5A) The reference in subsection (5)(a) to a police officer includes—

(a) a constable of the British Transport Police Force, in relation to a one-person protest—

(i) being held at a place within section 31(1)(a) to (f) of the Railways and Transport Safety Act 2003, or

(ii) intended to be held at a place within sub-paragraph (i) in a case where a person is in that place with a view to carrying on such a protest;

(b) a member of the Ministry of Defence Police, in relation to a one-person protest—

(i) being held at a place to which section 2(2) of the Ministry of Defence Police Act 1987 applies, or

(ii) intended to be held at a place within sub-paragraph (i) in a case where a person is in that place with a view to carrying on such a protest.

(5B) The reference in subsection (5)(b) to a chief officer of police includes—

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(a) the chief constable of the British Transport Police Force, in relation to a one-person protest intended to be held at a place within section 31(1)(a) to (f) of the Railways and Transport Safety Act 2003, other than a one-person protest within subsection (5A)(a)(ii);

(b) the chief constable of the Ministry of Defence Police, in relation to a one-person protest intended to be held at a place to which section 2(2) of the Ministry of Defence Police Act 1987 applies, other than a one-person protest within subsection (5A)(b)(ii).", and

(c) in subsection (9)—

(i) omit "by a chief officer of police", and

(ii) after "(5)(b)" insert "or (5B)".

(4) In section 14A (prohibiting trespassory assemblies)—

(a) after subsection (4) insert—

"(4A) Subsection (4D) applies if at any time the chief constable of the British Transport Police Force reasonably believes that—

(a) an assembly is intended to be held at a place—

(i) within section 31(1)(a) to (f) of the Railways and Transport Safety Act 2003, and

(ii) on land to which the public has no right of access or only a limited right of access, and

(b) the conditions in subsections (4B) and (4C) are met.

(4B) The condition in this subsection is that the assembly is likely—

(a) to be held without the permission of the occupier of the land, or

(b) to conduct itself in such a way as to exceed—

(i) the limits of any permission of the occupier, or

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(ii) the limits of the public's right of access.

(4C) The condition in this subsection is that the assembly may result —

(a) in serious disruption to the provision of railway services (within the meaning of Part 3 of the Railways and Transport Safety Act 2003),

(b) in serious disruption to the life of the community, or

(c) where the land, or a building or monument on it, is of historical, architectural, archaeological or scientific importance, in significant damage to the land, building or monument.

(4D) Where this subsection applies, the chief constable of the British Transport Police Force may with the consent of the relevant national authority make an order prohibiting for a specified period the holding of all trespassory assemblies in a specified area.

(4E) An area specified in an order under subsection (4D) must comprise only—

(a) the place mentioned in subsection (4A)(a), or

(b) that place together with any place—

(i) within section 31(1)(a) to (f) of the Railways and Transport Safety Act 2003, or

(ii) where an assembly could affect a railway within the meaning of Part 3 of that Act or anything occurring on or in relation to such a railway.

(4F) In subsection (4D) *"the relevant national authority"* means—

(a) in relation to an area in England and Wales, the Secretary of State;

(b) in relation to an area in Scotland, the Scottish Ministers.

(4G) Subsection (4J) applies if at any time the chief constable of the Ministry of Defence Police reasonably believes that—

(a) an assembly is intended to be held at a place—

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(i) to which section 2(2) of the Ministry of Defence Police Act 1987 applies, and

(ii) on land to which the public has no right of access or only a limited right of access, and

(b) the conditions in subsections (4H) and (4I) are met.

(4H) The condition in this subsection is that the assembly is likely—

(a) to be held without the permission of the occupier of the land, or

(b) to conduct itself in such a way as to exceed—

(i) the limits of any permission of the occupier, or

(ii) the limits of the public's right of access.

(4I) The condition in this subsection is that the assembly may result—

(a) in serious disruption to the use for a defence purpose of—

(i) a place within section 2(2)(a) to (c) of the Ministry of Defence Police Act 1987,

(ii) a place within section 4(1) of the Atomic Weapons Establishment Act 1991, or

(iii) in relation to a time after the coming into force of section 5 of the Defence Reform Act 2014, a place within subsection (1) of that section,

(b) in serious disruption to the life of the community, or

(c) where the land, or a building or monument on it, is of historical, architectural, archaeological or scientific importance, in significant damage to the land, building or monument.

(4J) Where this subsection applies, the chief constable of the Ministry of Defence Police may with the consent of the Secretary of State make an order prohibiting for a specified period the holding of all trespassory assemblies in a specified area.

(4K) An area specified in an order under subsection (4J) which is not made in reliance on subsection (4I)(a) must comprise only one or

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more places to which section 2(2) of the Ministry of Defence Police Act 1987 applies.",

(b) in subsection (7), for "or subsection (4)" substitute ", subsection (4), subsection (4D) or subsection (4J)", and

(c) in subsection (9), in the definition of "occupier", for "and (4)" substitute ", (4), (4B) and (4H)".

(5) In section 15 (delegation), after subsection (2) insert—

"(3) The chief constable of the British Transport Police Force may delegate, to such extent and subject to such conditions as the chief constable may specify, any of the chief constable's functions under sections 14 to 14A to an assistant chief constable of that Force; and references in those sections to the person delegating shall be construed accordingly.

(4) The chief constable of the Ministry of Defence Police may delegate, to such extent and subject to such conditions as the chief constable may specify, any of the chief constable's functions under sections 14 to 14A to a deputy chief constable or assistant chief constable of that force; and references in those sections to the person delegating shall be construed accordingly."

Part 1 PUBLIC ORDER > Processions, assemblies and one-person protests > s. 16 Assemblies and one-person protests: British Transport Police and MoD Police

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s. 17 Exercise of police powers in relation to journalists etc

Law In Force

Version 1 of 1

2 July 2023 - Present

Subjects
Penology and criminology; Police

Keywords
Journalists; Police powers and duties; Protests; Public order; Restrictions

17 Exercise of police powers in relation to journalists etc

(1) A constable may not exercise a police power for the sole purpose of preventing a person from observing or reporting on a protest.

(2) A constable may not exercise a police power for the sole purpose of preventing a person from observing or reporting on the exercise of a police power in relation to—

(a) a protest-related offence,

(b) a protest-related breach of an injunction, or

(c) activities related to a protest.

(3) This section does not affect the exercise by a constable of a police power for any purpose for which it may be exercised apart from this section.

(4) In this section—

"injunction" means an injunction granted by the High Court, the county court or a youth court;

"police power" means a power which is conferred on a constable by or by virtue of an enactment or by a rule of law;

"protest-related breach" , in relation to an injunction, means a breach which is directly related to a protest;

"protest-related offence" means an offence which is directly related to a protest.

Part 1 PUBLIC ORDER > Exercise of police powers in relation to journalists etc > s. 17 Exercise of police powers in relation to journalists etc

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s. 18 Power of Secretary of State to bring proceedings

Not Yet In Force

Version 1 of 1

Date to be appointed - Date to be appointed

Subjects
Civil procedure; Penology and criminology

Keywords
Civil proceedings; Infrastructure; Ministers' powers and duties; Protests; Public safety; Public services; Reasonable belief

18 Power of Secretary of State to bring proceedings

(1) Subsection (4) applies where—

(a) the Secretary of State reasonably believes that one or more persons are carrying out, or are likely to carry out, activities related to a protest, and

(b) the condition in subsection (2) or (3) is met.

(2) The condition in this subsection is that the Secretary of State reasonably believes that the activities are causing, or are likely to cause, serious disruption to—

(a) the use or operation of any key national infrastructure in England and Wales, or

(b) access to any essential goods, or to any essential service, in England and Wales.

(3) The condition in this subsection is that the Secretary of State reasonably believes that the activities are having, or are likely to have, a serious adverse effect on public safety in England and Wales.

(4) Where this subsection applies and the Secretary of State considers that it is expedient in the public interest to do so, the Secretary of State may bring civil proceedings relating to the activities in the name of the Secretary of State.

(5) Before bringing proceedings under subsection (4) in relation to any activities the Secretary of State must consult such persons (if any) as the Secretary of State considers appropriate, having regard to any persons who may also bring civil proceedings in relation to those activities.

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(6) The bringing of proceedings by the Secretary of State under subsection (4) in relation to any activities does not affect the ability of any other person to bring civil proceedings in relation to those activities.

(7) The reference in subsection (1)(a) to *"activities"* does not include a reference to activities carried out or likely to be carried out wholly or mainly in contemplation or furtherance of a trade dispute.

(8) In this section—

"key national infrastructure" has the same meaning as in section 7 (key national infrastructure);

"trade dispute" has the same meaning as in Part 4 of the Trade Union and Labour Relations (Consolidation) Act 1992, except that section 218 of that Act is to be read as if—

(a) it made provision corresponding to section 244(4) of that Act, and

(b) in subsection (5), the definition of worker included any person falling within paragraph (b) of the definition of worker in section 244(5) of that Act.

Part 1 PUBLIC ORDER > Proceedings by the Secretary of State > s. 18 Power of Secretary of State to bring proceedings

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s. 19 Injunctions in Secretary of State proceedings: power of arrest and remand

Not Yet In Force

Version 1 of 1

Date to be appointed - Date to be appointed

Subjects
Civil procedure; Criminal procedure; Penology and criminology; Police

Keywords
Annoyance; Arrest without warrant; Civil proceedings; Injunctions; Jurisdiction; Ministers' powers and duties; Nuisance; Powers of arrest; Protests; Public safety; Remand; Time limits

19 Injunctions in Secretary of State proceedings: power of arrest and remand

(1) This section applies to proceedings brought by the Secretary of State under section 18 (power of Secretary of State to bring proceedings).

(2) If the court grants an injunction which prohibits conduct which—

(a) is capable of causing nuisance or annoyance to a person, or

(b) is capable of having a serious adverse effect on public safety,

it may, if subsection (3) applies, attach a power of arrest to any provision of the injunction.

(3) This subsection applies if the Secretary of State applies to the court to attach the power of arrest and the court thinks that—

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

(b) there is a significant risk of harm to—

(i) in the case of conduct mentioned in subsection (2)(a), the person mentioned in that provision, and

(ii) in the case of conduct mentioned in subsection (2)(b), the public or a section of the public.

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

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

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

(a) the person must appear before the court within the period of 24 hours beginning at the time of arrest, and

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

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

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

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

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

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

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

(11) If there is reason to suspect that a person who has been arrested under subsection (4) is suffering from mental disorder within the meaning of the Mental Health Act 1983 the court is to have the same power to make an order under section 35 of that Act (remand for report on accused's mental condition) as the Crown Court has under that section in the case of an accused person within the meaning of that section.

(12) In this section—

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

"the court" means the High Court or the county court and includes—

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

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

Part 1 PUBLIC ORDER > Proceedings by the Secretary of State > s. 19 Injunctions in Secretary of State proceedings: power of arrest and remand

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