IN THE HIGH COURT OF JUSTICE **Claim No.PT-2024-000893**

BUSINESS AND PROPERTY COURTS

OF ENGLAND AND WALES (ChD)

PROPERTY, TRUSTS AND PROBATE LIST

B E T W E E N:-

THE UNIVERSITY OF LONDON

Claimant/Applicant

-and-

(1) ABEL HARVIE-CLARK
(2) TARA MANN
(3) HAYA ADAM
(4) PERSONS UNKNOWN WHO, IN CONNECTION WITH BOYCOTT, DIVESTMENT, AND SANCTIONS PROTESTS BY THE 'SOAS LIBERATED ZONE FOR GAZA' AND/OR 'DEMOCRATISE EDUCATION' MOVEMENTS, ENTER OR REMAIN WITHOUT THE CONSENT OF THE CLAIMANT UPON ANY PART OF THE LAND (DEFINED IN SCHEDULE 1)
(5) PERSONS UNKNOWN WHO, IN CONNECTION WITH BOYCOTT, DIVESTMENT, AND SANCTIONS PROTESTS BY THE 'SOAS LIBERATED ZONE FOR GAZA' AND/OR 'DEMOCRATISE EDUCATION' MOVEMENTS, OBSTRUCT OR OTHERWISE INTERFERE WITH ACCESS TO AND FROM ANY PART OF THE LAND (DEFINED IN SCHEDULE 1)
(6) PERSONS UNKNOWN WHO, IN CONNECTION WITH BOYCOTT, DIVESTMENT, AND SANCTIONS PROTESTS BY THE 'SOAS LIBERATED ZONE FOR GAZA' AND/OR 'DEMOCRATISE EDUCATION' MOVEMENTS, ERECT ANY TENT OR OTHER STRUCTURE, WHETHER PERMANENT OR TEMPORARY, ON ANY PART OF THE LAND (DEFINED IN SCHEDULE 1)

Defendants/Respondents

AUTHORITIES BUNDLE
For hearing on 29 October 2024

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1. *Appleby v UK* [2003] 37 EHRR 38
2. *Boyd v Ineos Upstream Ltd* [2019] 4 WLR 100
3. *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802
4. *City of London Corp v Samede* [2012] PTSR 1627

5. *DPP v Cuciurean* [2022] 3 WLR 446
6. *DPP v Ziegler* [2021] 3 WLR 179
7. *High Speed Two (HS2) Ltd v Persons Unknown* [2024] EWHC 1277 (KB)
8. *Multiplex Construction Europe Limited v Persons Unknown* [2024] EWHC 239 (KB)
9. *Sun Street Property Ltd v Persons Unknown* [2011] EWHC 3432
10. *University of Birmingham v Persons Unknown* [2024] EWHC 1770 (KB)
11. *University of Nottingham v Persons Unknown* [2024] EWHC 1771 (KB)
12. *Valero Energy Ltd v Persons Unknown* [2024] EWHC 134 (KB)
13. *Wolverhampton CC v London Gypsies and Travellers and others* [2024] 2 WLR 45

APPLEBY v UNITED KINGDOM

(Environmental campaigners prevented from distributing leaflets in privately owned shopping centre)

BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

APPLICATION NO.44306/98

(The *President*, Judge Pellonpää; *Judges* Bratza, Palm, Stráznická, Maruste, Pavlovschi, Garlicki)

(2003) 37 E.H.R.R. 38

May 6, 2003

H1 The first three applicants had established an environmental group, Washington First Forum (the fourth applicant), to campaign against a plan to build on the only public playing field near Washington town centre. They set about collecting signatures for a petition to persuade the council to reject the project. They tried to set up stands in the Galleries, a privately owned shopping mall in Washington. However, they were prevented from doing so by security guards employed by the company which owned the Galleries. Although the manager of one of the shops in the mall allowed the applicants to set up stands in his store in March 1998, this permission was not granted the following month when they wished to collect signatures for a further petition. The manager of the Galleries informed the applicants that permission had been refused because the private owner took a strictly neutral stance on all political and religious issues. Relying on Arts 10 and 11 of the Convention, the applicants complained that they had been prevented from meeting in their town centre to share information and ideas about the proposed building plans. They also complained under Art.13 that they had no effective remedy under domestic law.

H2 **Held:**

(1) by six votes to one that there had been no violation of Art.10;

(2) by six votes to one that there had been no violation of Art.11;

(3) unanimously that there had been no violation of Art.13.

1. Freedom of assembly and association: positive obligation; fair balance; access to private property (Art.10).

H3 (a) The freedom of expression is one of the preconditions for a functioning democracy. Genuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere but may require positive measures of protection, even in the sphere of relations between individuals. [39]

H4 (b) In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the

community and the interests of the individual, the search for which is inherent throughout the Convention. The scope of this obligation will vary, having regard to the diversity of situations obtaining in Contracting States and the choices which must be made in terms of priorities and resources. Nor must such an obligation be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities. [40]

H5 (c) The Government do not bear any direct responsibility for the restriction of the applicants' freedom of expression. No element of State responsibility can be derived from the fact that a public development corporation transferred the property to Postel (a private company) or that this was done with ministerial permission. The issue is whether the Government have failed in any positive obligation to protect the exercise of Convention rights from interference by the private owner of the shopping centre. [41]

H6 (d) The nature of the Convention right at stake is an important consideration. The applicants wanted to draw the attention of fellow citizens to their opposition to the plans 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 the 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 [42]–[43].

H7 (e) Although United States cases illustrate an increasing trend in accommodating freedom of expression to privately owned property open to the public, the United States Supreme Court has refrained from holding that there is a federal constitutional right of free speech in a privately owned shopping mall. It cannot be said that there is as yet any emerging consensus that could assist the examination of the case under Art.10. [46]

H8 (f) Despite the importance of freedom of expression, Art.10 does not bestow any freedom of forum for the exercise of the right. While 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 to all publicly owned property. However, where the bar on access to property has the effect of preventing any effective exercise of freedom of expression or the essence of the right is destroyed, the State may have a positive obligation to protect the enjoyment of Convention rights by regulating property rights. [47]

H9 (g) The restriction on the applicants' ability to communicate their views was limited to the entrance areas and passageways of the new town centre. It did not prevent them from obtaining individual permission from businesses or from distributing their leaflets on the paths into the area. It also remained open to them to campaign in the old town centre and to employ alternative means. Consequently, they cannot claim that the private company's refusal effectively prevented them from communicating their views to their fellow citizens and therefore exercising their freedom of expression in a meaningful manner. [48]

H10 (h) Balancing the rights in issue and having regard to the nature and scope of the restriction, the Government did not fail in any positive obligation to protect the

applicants' freedom of expression. Accordingly, there was no violation of Art.10. [49]–[50]

2. Freedom of association (Art.11).

H11 Largely identical considerations arise under Art.11. For the same reasons, there was no failure to protect the applicants' freedom of assembly. [52]

3. Right to an effective remedy: Human Rights Act 1998 (Art.13).

H12 (a) Article 13 cannot be interpreted as requiring a remedy against the state of domestic law, as otherwise the Court would be imposing on Contracting States a requirement to incorporate the Convention. [56]

H13 (b) Since October 2, 2000 when the Human Rights Act 1998 took effect, the applicants could have raised their complaints before the domestic courts, which would have had a range of possible redress available to them. Accordingly, there is no breach of Art.13. [56]

H14 **The following cases are referred to in the Court's judgment:**

1. *Fuentes Bobo v Spain*: (2001) 31 E.H.R.R. 50.
2. *James v United Kingdom* (A/98): (1986) 8 E.H.R.R. 123.
3. *Osman v United Kingdom*: (2000) 29 E.H.R.R. 245.
4. *Özgür Gündem v Turkey*: (2001) 31 E.H.R.R. 49.
5. *Rees v United Kingdom* (A/106): (1987) 9 E.H.R.R. 56.

H15 **The following domestic cases are referred to in the Court's judgment:**

6. *Batchelder v Allied Stores Int'l N.E.* 2d 590 (Mass. 1983).
7. *Bock v Westminster Mall Co*, 819 P.2d 55 (Colo. 1991).
8. *Charleston Joint Venture v McPherson*, 417 S.E.2d 544 (SC 1992).
9. *Cin Properties Ltd v Rawlins* [1995] 2 E.G.L.R. 130.
10. *Citizens for Ethical Gov't v Gwinnet Place Assoc.*, 392 S.E.2d 8 (Ga. 1990).
11. *Cologne v Westfarms Assocs*, 469 1.2d 1201 (Conn. 1984).
12. *Committee for Cth of Canada v Canada* [1991] 1 SCR 139.
13. *Eastwood Mall v Slanco*, 626 N.E.2d 59 (Ohio 1994).
14. *Fiesta Mall Venture v Mecham Recall Comm.*, 767 P.2d 719 (Ariz. Ct. App. 1989).
15. *Hague v Committee for Industrial Organisation*, 307 US 496 (1939).
16. *Harrison v Carswell*, 62 D.L.R. (3d) 68.
17. *Hudgens v Nlrb*, 424 US 507 (1976).
18. *Jacobs v Major*, 407 N.W.2d 832 (Wis. 1987).
19. *Jamestown v Beneda*, 477 N.W. 2d (N.D. 1991).
20. *Lloyd Corp v Tanner*, 47 U.S. 551, 92 S. Ct. 2219, 33 L.Ed. 2d 131 (1972).
21. *Lloyd Corp v Whiffen*, 849 P.2d 446, 453–54 (Or. 1993).
22. *Marsh v Alabama*, 326 U.S. 501, 66 S. Ct. 276, 90 L.Ed. 265 (1946).

23. *Pruneyard Shopping Center v Robbins*, 447 US 74, 64 L.Ed. 2d 741, 100 S Ct. 2035 (1980).
24. *R. v Layton*, 38 CCC(3d) 550 (1986) (Provincial Court, Judicial District of York, Ontario).
25. *Southcenter Joint Venture v National Democratic Policy Comm.*, 780 P.2d 1282 (Wash. 1989).
26. *State v Schmit* (1980) N.J. 423A 2d 615
27. *State v Shack*, 277 1.2d 369 (N.J. 1971).
28. *State of Minnesota v Wicklund*, April 7, 1998 (Minnesota Court of Appeals).
29. *State of North Carolina v Felmet*, 273 S.E.2d 708 N.C. 1981).
30. *Streetwatch v National Railroad Passenger Corp*, 875 F. Supp. 1055 (S.D.N.Y. 1995).
31. *Uston v Resorts International*, 445 A.2d 370 (N.J. 1982).
32. *Western PA Socialist Workers 1982 Campaign v Connecticut Gen. Life Ins. Co*, 515 1.2d 1331 (Pa 1986).
33. *Woodland v Michigan Citizens Lobby*, 378 N.W.2d 337 (Mich. 1985).

THE FACTS

I. The circumstances of the case

10 The first, second and third applicants were born in 1952, 1966 and 1947 respectively and live in Washington in Tyne and Wear, where the fourth applicant, an environmental group set up by the applicants, is also based.

11 The new town centre of Washington is known as the Galleries and is located within an area now owned by Postel Properties Limited ("Postel"), a private company. This town centre was originally built by the Washington Development Corporation ("the Corporation"), a body set up by the government of the United Kingdom pursuant to an Act of Parliament to build the "new" centre. The centre was sold to Postel on December 30, 1987.

12 The Galleries, as owned by Postel at the relevant time, comprised a shopping mall (with two hypermarkets and major shops), the surrounding car parks with spaces for approximately 3,000 cars and walkways. Public services were also available in this vicinity. However, the freehold of the careers' office and the public library was owned by the Council, the social services office and health centre were leased to the Council by the Secretary of State and the freehold of the police station was held on behalf of Northumbria Police Authority. There was a post office and the offices of the housing department, leased to the Council by Postel, within the Galleries.

13 In about September 1997, the Council gave outline planning permission to the City of Sunderland College ("the College") to build on part of the Princess Anne Park in Washington, known as the Arena. The Arena is the only playing field in the vicinity of Washington town centre which is available for use by the local community. The first to third applicants, together with other concerned residents, formed the fourth applicant to campaign against the College's proposal and to persuade the Council not to grant the College permission to build on the field.

14 On or about March 14, 1998, the first applicant, together with her husband and son, set up two stands in the entrance of the shopping mall in the Galleries,

displaying posters alerting the public to the likely loss of the open space and seeking signatures to present to the Council on behalf of Washington First Forum. Security guards employed by Postel would not allow the first applicant or her assistants to continue to collect signatures on any land or premises owned by Postel. The applicants had to remove their stands and stop collecting signatures.

15 The manager of one of the hypermarkets gave the applicants permission to set up stands within that store in March 1998, allowing them to transmit their message and collect signatures, albeit from a reduced number of persons. However this permission was not granted in April 1998 when the applicants wished to collect signatures for a further petition.

16 On April 10, 1998 the third applicant, as acting chair of Washington First Forum, wrote to the manager of the Galleries to ask for permission to set up a stall and to canvass views from the public either in the mall or in the adjacent car parks and offered to make a payment to be able to do so. On April 14, 1998 the manager of the Galleries replied and refused access. The letter stated:

> ". . . the Galleries is unique in as much as although it is the Town Centre, it is also privately owned.
>
> The owner's stance on all political and religious issues, is one of strict neutrality and I am charged with applying this philosophy.
>
> I am therefore obliged to refuse permission for you to carry out a petition within the Galleries or the adjacent car parks".

17 On April 19, 1998, the third applicant wrote again to the manager of the Galleries asking him to reconsider his decision. The applicants have received no response to this letter.

18 The fourth applicant has continued to seek access to the public by setting up stalls by the side of the road on public footpaths and visiting the old town centre at Concord, which however is visited by a much smaller percentage of the residents of Washington.

19 The deadline for letters of representation to the Council regarding the building works was May 1, 1998. The applicants submitted the 3,200 letters of representation they had obtained on April 30, 1998.

20 The applicant has provided a list of organisations which have been allowed to carry out collections, set up stalls and displays within the Galleries, including the Salvation Army (collection before Christmas), local school choirs (carol singing and collection before Christmas), Stop Smoking Campaign (advertising display handing out nicotine patches), Blood Transfusion Service (blood collection), Royal British Legion (collection for Armistice Day), various photographers (advertising and taking photographs) and British Gas (staffed advertising display).

21 From January 31 to March 6, 2001, Sunderland Council ran a consultation campaign "Your Council, Your Choice" informing the local residents of three leadership choices for the future of the Council and were allowed to use the Galleries for this purpose. This was a statutory consultation exercise under s.25 of the Local Government Act 2000, which required local authorities to draw up proposals for the operation of "executive arrangements" and consult local electors before sending them to the Secretary of State. Some 8,500 people were reported as responding to the survey issued.

II. Relevant domestic law and practice

22 At common law, a private property owner may, in certain circumstances, be presumed to have extended an implied invitation to members of the public to come onto his land for lawful purposes. This covers commercial premises, such as shops, theatres and restaurants as well as private premises (for example there is a presumption that a house owner authorises people to come up the path to his front door to deliver letters or newspapers or for political canvassing). Any implied invitation may be revoked at will. A private person's ability to eject people from his land is generally unfettered and he does not have to justify his conduct or comply with any test of reasonableness.

23 In the case of *Cin Properties Ltd v Rawlins*,[1] where the applicants (young men) were barred from a shopping centre in Wellingborough as the private company owner CIN considered that their behaviour was a nuisance, the Court of Appeal held that CIN had the right to determine any licence which the applicants might have had to enter the Centre. In giving judgment, Lord Phillips found that the local authority had not entered into any walkways agreement with the company within the meaning of s.18(1) of the Highways Act 1971[2] which would have dedicated the walkways or footpaths as public rights of way and which would have given the local council the power to issue bye-laws regulating use of those rights of way. Nor was there any basis for finding an equitable licence. He also considered case law from North America concerning the applicants' arguments for the finding of some kind of public right:

> "Of more obvious relevance are two North American cases. In *Uston v Resorts International Inc* (1982) N.J. 445A.2D 370, the Supreme Court of New Jersey laid down as a general proposition that when property owners open their premises—in that case a gaming casino—to the general public in pursuit of their own property interests, they have no right to exclude people unreasonably but, on the contrary, have a duty not to act in an arbitrary or discriminatory manner towards persons who come on their premises. However, that decision was based upon a previous decision of the same court in *State v Schmid* (1980) N.J. 423A 2d 615, which clearly turned upon the constitutional freedoms of the First Amendment. The general proposition cited above has no application in English law.
>
> The case of *Harrison v Carswell* (1975) 62 D.L.R. (3d.) 68 in the Supreme Court of Canada, concerned the right of an employee of a tenant in a shopping centre to picket her employer in the centre, against the wishes of the owner of the centre. The majority of the Supreme Court held that she had no such right and that the owner of the centre had sufficient control or possession of the common areas to enable it to invoke the remedy of trespass. However, Laskin C.J.C., in a strong dissenting judgment held that since a shopping centre was freely accessible to the public, the public did not enter under a revocable licence subject only to the owner's whim. He said that the case involved a search for an appropriate legal framework for new social facts and:

[1] *Cin Properties Ltd v Rawlins* [1995] 2 E.G.L.R. 130.
[2] Later replaced by s.35 of the Highways Act 1980.

> 'If it was necessary to categorise the legal situation which, in my view, arises upon the opening of a shopping centre, with public areas of the kind I have mentioned (at least where the opening is not accompanied by an announced limitation on the classes of public entrants), I would say that the members of the public are privileged visitors whose privilege is revocable only upon misbehaviour (and I need not spell out here what this embraces) or by reason of unlawful activity. Such a view reconciles both the interests of the shopping centre owner and of members of the public, doing violence to neither and recognising the mutual or reciprocal commercial interests of shopping centre owner, business tenants and members of the public upon which the shopping centre is based'.
>
> I have already said that this was a dissenting judgment. Nevertheless counsel [for the applicants] submitted that we should apply it in the present case. I accept that courts may have to be ready to adapt the law to new social facts where necessary. However there is no such necessity where Parliament has already made adequate provision for the new social facts in question as it has here by s.18 of the Highways Act 1971 and s.35 of the Highways Act 1980. (*Harrison v Carswell* makes no mention of any similar legislation in Canada.) Where Parliament has legislated and the Council, as representing the public, chooses not to invoke the machinery which the statute provides, it is not for the courts to intervene.
>
> I would allow this appeal . . . on the basis that CIN, had the right, subject only to the issue under s.20 of the Race Relations Act 1976, to determine any licence the [applicants] may have had to enter the Centre".

III. Cases from other jurisdictions

24 The parties have referred to case law from the United States and Canada.

United States

25 The First Amendment to the Federal Constitution protects freedom of speech and peaceful assembly.

26 The United States Supreme Court has accepted a general right of access to certain types of public places, such as streets and parks, known as "public fora" for the exercise of free speech rights.[3] In *Marsh v Alabama*,[4] the Supreme Court also held that a privately owned corporate town (a company town) having all the characteristics of other municipalities was subject to the First Amendment rights of free speech and peaceable assembly. It has found that the First Amendment does not require access to privately owned properties, such as shopping centres, on the basis that there has to be "State action" (a degree of State involvement) for the amendment to apply.[5]

27 The US Supreme Court has taken the position that the First Amendment does not prevent a private shopping centre owner from prohibiting distribution on its

[3] *Hague v Committee for Industrial Organisation*, 307 US 496 (1939).
[4] *Marsh v Alabama*, 326 U.S. 501, 66 S. Ct. 276, 90 L.Ed. 265 (1946).
[5] *e.g. Hudgens v Nlrb*, 424 US 507 (1976).

premises of leaflets unrelated to its own operations.[6] This did not however prevent state constitutional provisions from adopting more expansive liberties than the Federal Constitution to permit individuals reasonably to exercise free speech and petition rights on the property of a privately owned shopping centre to which the public was invited and this did not violate the property rights of the shopping centre owner so long as any restriction did not amount to taking without compensation or contravene any other federal constitutional provisions.[7]

28 Some State courts have found that a right of access to shopping centres could be derived from provisions in their State constitutions according to which individuals could initiate legislation by gathering a certain number of signatures in a petition or individuals could stand for office by gathering a certain number of signatures.[8] Some cases found State obligations arising due to State involvement, for example, *Bock v Westminster Mall Co*[9] (the shopping centre was a State actor because of financial participation of public authorities in the development of the shopping centre and the active presence of government agencies in the common areas of the shopping centre) and *Jamestown v Beneda*[10] (where the shopping centre was owned by a public body, though leased to a private developer).

29 Other cases cited as indicating a right to reasonable access to property under State private law were *State v Shack*[11] where the court ruled that under New Jersey property law ownership of real property did not include the right to bar access to governmental services available to migrant workers, in this case a publicly funded non-profit lawyer attempting to advise migrant workers; *Uston v Resorts International*,[12] a New Jersey case concerning casinos where the court held that when property owners open their premises to the general public in pursuit of their own property interests they have no right to exclude people unreasonably (though it was acknowledged that the private law of most states did not require a right of reasonable access to privately owned property)[13]; *Streetwatch v National Railroad Passenger Corp*[14] concerning the ejection of homeless people from a railway station.

[6] *Lloyd Corp v Tanner*, 47 U.S. 551, 92 S. Ct. 2219, 33 L.Ed. 2d 131 (1972).
[7] *Pruneyard Shopping Center v Robbins*, 447 US 74, 64 L.Ed. 2d 741, 100 S Ct. 2035 (1980).
[8] *e.g. Batchelder v Allied Stores Int'l* N.E. 2d 590 (Mass. 1983), *Lloyd Corp v Whiffenl*, 849 P.2d 446, 453–54 (Or. 1993), *Southcenter Joint Venture v National Democratic Policy Comm.*, 780 P.2d 1282 (Wash. 1989).
[9] *Bock v Westminster Mall Co*, 819 P.2d 55 (Colo. 1991).
[10] *Jamestown v Beneda*, 477 N.W. 2d (N.D. 1991).
[11] *State v Shack*, 277 1.2d 369 (N.J. 1971).
[12] *Uston v Resorts International*, 445 A.2d 370 (N.J. 1982).
[13] *ibid.* p.374.
[14] *Streetwatch v National Railroad Passenger Corp*, 875 F. Supp. 1055 (S.D.N.Y. 1995).

30 State courts which ruled that free speech provisions in their State constitutions did not apply to privately owned shopping centre included Arizona[15]; Connecticut[16]; Georgia[17]; Michigan[18]; Minnesota[19]; North Carolina[20]; Ohio[21]; Pennsylvania[22]; South Carolina[23]; Washington[24]; Wisconsin.[25]

Canada

31 Prior to the entry into force of the Canadian Charter of Rights and Freedoms, the Canadian Supreme Court had taken the view that the owner of a shopping centre could exclude protesters.[26] After the Charter entered into force, a lower court held that the right to free speech applied in privately owned shopping centres.[27] However an individual judge of the Canadian Supreme Court has since expressed the opposite view, stating *obiter* that the Charter does not confer a right to use private property as a forum of expression.[28]

JUDGMENT

I. Alleged violation of Article 10 of the Convention

32 Article 10 of the Convention provides as relevant:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. . . .
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a 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".

A. The parties' submissions

1. The applicants

33 The applicants submitted that the State was directly responsible for the interference with their freedom of expression and assembly as it was a public entity

[15] *Fiesta Mall Venture v Mecham Recall Comm.*, 767 P.2d 719 (Ariz. Ct. App. 1989).
[16] *Cologne v Westfarms Assocs*, 469 1.2d 1201 (Conn. 1984).
[17] *Citizens for Ethical Gov't v Gwinnet Place Assoc*, 392 S.E.2d 8 (Ga. 1990).
[18] *Woodland v Michigan Citizens Lobby*, 378 N.W.2d 337 (Mich. 1985).
[19] *State of Minnesota v Wicklund*, April 7, 1998 (Minnesota Court of Appeals).
[20] *State of North Carolina v Felmet*, 273 S.E.2d 708 (N.C. 1981).
[21] *Eastwood Mall v Slanco*, 626 N.E.2d 59 (Ohio 1994).
[22] *Western PA Socialist Workers 1982 Campaign v Connecticut Gen. Life Ins Co*, 515 1.2d 1331 (Pa 1986).
[23] *Charleston Joint Venture v McPherson*, 417 S.E.2d 544 (SC 1992).
[24] *South Center Joint Venture v National Democratic Policy Comm*, 780 P.2d 1282 (Wash. 1989).
[25] *Jacobs v Major*, 407 N.W.2d 832 (Wis. 1987).
[26] *Harrison v Carswell*, 62 D.L.R. (3d) 68.
[27] *R. v Layton*, 38 CCC(3d) 550 (1986) (Provincial Court, Judicial District of York, Ontario).
[28] McLachlin J., *Committee for Cth of Canada v Canada* [1991] 1 SCR 139, p. 128.

that built the Galleries on public land and a minister who approved the transfer into private ownership. The local authority could have required that the purchaser enter into a walkways agreement which would have extended bye-law protection to access ways but did not do so.

34 The applicants also argued that the State owed a positive obligation to secure the exercise of their rights within the Galleries. As the information and ideas which they wished to communicate were of a political nature, their expression was entitled to the greatest level of protection. Access to the town centre was essential for the exercise of those rights as it was the most effective way of communicating their ideas to the population, as was shown by the fact that the local authority itself used the Galleries to advocate a political proposal regarding the reorganisation of local government. The applicants however had been refused permission to use the Galleries for expression opposing local government action, showing that the private owner was not neutral in its decisions as to who should be given permission. The finding of an obligation would impose no significant financial burden on the State as it was merely under a duty to put in place a legal framework which provided effective protection for their rights of freedom of expression and peaceful assembly by balancing those rights against the rights of the property owner as already existed in a number of areas. They considered that no proper balance has been struck as protection was given to property owners who wielded an absolute discretion as to access to their land and no regard was given to individuals seeking to exercise their individual rights.

35 The applicants submitted that it was for the State to decide how to remedy this shortcoming and that any purported definitional problems and difficulties of application could be resolved by carefully drafted legislation. A definition of "quasi-public" land could be proposed that excluded, for example, theatres. They also referred to case law from other jurisdictions (in particular the United States) where concepts of reasonable access or limitations on arbitrary exclusion powers of landowners were being developed, *inter alia*, in the context of shopping malls and university campuses, which gave an indication of how the State could approach the perceived problems.

2. The Government

36 The Government submitted that at the relevant time the town centre was owned by a private company Postel and that it was Postel, in the exercise of its rights as property owner, which refused the applicants' permission to use the Galleries for their activities. They argued that the Government in those circumstances could not be regarded as bearing direct responsibility for any interference with the applicants' exercise of their rights. The fact that the local authority had previously owned the land was irrelevant.

37 In so far as the applicants claimed that the State's positive obligation to secure their rights is engaged, the Government acknowledged that positive obligations were capable of arising under Arts 10 and 11. However, such obligations did not arise in the present case having regard to a number of factors. The alleged breach did not have a serious impact on the applicants who had many other opportunities to exercise their rights and used them to obtain thousands of signatures on their

petition as a result. The burden imposed on the State by finding a positive obligation would also be a heavy one. Local authorities when selling land were not under any duty to enter into walkways agreements to render access areas subject to regulation by bye-law. The State's ability to comply by entering into such agreements when selling State-owned land would depend entirely on obtaining the co-operation of the private sector purchaser who might reasonably not want to allow any form of canvassing on his land and might feel that customers to commercial services would be deterred by political canvassers, religious activists, animal rights campaigners and so on.

38 Furthermore a fair balance had been struck between the competing interests in this case. The applicants in their view only looked at one side of the balancing exercise, whereas legitimate objections could be taken by property owners if they were required to allow people to exercise their freedom of expression or assembly on their land, when means to exercise those rights were widely available on genuinely public land and in the media. As the facts of this case illustrated, the applicants could canvass support in public places, on the streets, in squares and on common land, they could canvass from door to door or by post, and they could write letters to the newspapers or appear on radio and television. The Government argued that it was not for the Court to prescribe the necessary content of domestic law by imposing some ill defined concept of "quasi-public" land to which a test of reasonable access should be applied. That no problems arose from the balance struck in this case was shown by the fact that no serious controversy had arisen to date. The cases from the United States and Canada referred to by the applicants were not relevant as they dealt with different legal provisions and different factual situations, and in any event, did not show any predominant trend in requiring special regimes to attach to "quasi-public" land.

B. The Court's assessment

1. General principles

39 The Court recalls the key importance of freedom of expression as one of the preconditions for a functioning democracy. Genuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals,[29] where the Turkish Government were found to be under a positive obligation to take investigative and protective measures where the "pro-PKK" newspaper and its journalists and staff had been victim to a campaign of violence and intimidation; also *Fuentes Bobo v Spain*,[30] concerning the obligation on the State to protect freedom of expression in the employment context.

40 In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which is inherent throughout the Convention. The scope of this obligation will inevitably vary, having regard to the

[29] See *Özgür Gündem v Turkey*: (2001) 31 E.H.R.R. 49, paras [42]–[46].
[30] *Fuentes Bobo v Spain*: (2001) 31 E.H.R.R. 50, para.[38].

diversity of situations obtaining in Contracting States and the choices which must be made in terms of priorities and resources. Nor must such an obligation be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities.[31]

2. Application in the present case

41 In this case, the applicants were stopped from setting up a stand and distributing leaflets in the Galleries by Postel, the private company, which owned the shopping centre. The Court does not find that the Government bear any direct responsibility for this restriction in the applicants' freedom of expression. It is not persuaded that any element of State responsibility can be derived from the fact that a public development corporation transferred the property to Postel or that this was done with ministerial permission. The issue to be determined is whether the Government have failed in any positive obligation to protect the exercise of the applicants' Art.10 rights from interference by others, in this case, the owner of the Galleries.

42 The nature of the Convention right at stake is an important consideration.

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.

44 The Court has noted the applicants' arguments and the references in the US cases, which draw attention to the way in which shopping centres, though their purpose is primarily the pursuit of private commercial interests, are designed increasingly to serve as gathering places and events centres, with multiple activities concentrated within their boundaries. Frequently, individuals are not merely invited to shop but encouraged to linger and participate in activities covering a broad spectrum from entertainment to community, educational and charitable events. Such shopping centres can assume the characteristics of the traditional town centre and indeed, in this case, the Galleries is labelled on maps as the town centre and either contains, or is in close proximity to, public services and facilities. As a result, the applicants argued that the shopping centre must be regarded as a "quasi-public" space in which individuals can claim the right to exercise freedom of expression in a reasonable manner.

45 The Government have disputed the usefulness or coherence of employing definitions of "quasi-public" spaces and pointed to the difficulties which would ensue if places open to the public, such as theatres or museums, were required to permit people freedom of access for purposes other than the cultural activities on offer.

[31] See, among other authorities, *Rees v United Kingdom* (A/106): (1987) 9 E.H.R.R. 56, and *Osman v United Kingdom*: (2000) 29 E.H.R.R. 245, para.[116].

46 The Court would observe that, though the cases from the United States in particular illustrate an interesting trend in accommodating freedom of expression to privately owned property open to the public, the US Supreme Court has refrained from holding that there is a federal constitutional right of free speech in a privately owned shopping mall. Authorities from the individual states show a variety of approaches to the public and private law issues that have arisen in widely differing factual situations. It cannot be said that there is as yet any emerging consensus that could assist the Court in its examination in this case concerning Art.10 of the Convention.

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.[32]

48 In the present case, the restriction on the applicants' ability to communicate their views was limited to the entrance areas and passageways of the Galleries. It did not prevent them from obtaining individual permission from businesses within the Galleries (the manager of a hypermarket granted permission for a stand within his store on one occasion) or from distributing their leaflets on the public access paths into the area. It also remained open to them to campaign in the old town centre and to employ alternative means, such as calling door to door or seeking exposure in the local press, radio and television. The applicants do not deny that these other methods were available to them. Their argument, essentially, is that the easiest and most effective method of reaching people was in using the Galleries, as shown by the local authority's own information campaign.[33] The Court does not consider however that the applicants can claim that they were, as a result of the refusal of the private company, Postel, effectively prevented from communicating their views to their fellow citizens. Some 3,200 people submitted letters in their support. Whether more would have done so if the stand had remained in the Galleries is speculation which is insufficient to support an argument that the applicants were unable otherwise to exercise their freedom of expression in a meaningful manner.

49 Balancing therefore the rights in issue and having regard to the nature and scope of the restriction in this case, the Court does not find that the Government failed in any positive obligation to protect the applicants' freedom of expression.

50 Consequently, there has been no violation of Art.10 of the Convention.

[32] See *Marsh v Alabama*, cited at para.[26] above.
[33] See para.[21].

II. Alleged violation of Article 11 of the Convention

51 Article 11 of the Convention provides as relevant:

> "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others . . .
>
> 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".

52 The Court finds largely identical considerations arise under this provision as examined above under Art.10 of the Convention. For the same reasons, it also finds no failure to protect the applicants' freedom of assembly and accordingly, no violation of Art.11 of the Convention.

III. Alleged violation of Article 13 of the Convention

53 Article 13 of the Convention provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".

54 The applicants submitted that they have no remedy for the complaints, which disclosed arguable claims of violations of provisions of the Convention. Domestic law provided at that time no remedy to test whether any interference with their rights was unlawful. The case law of the English courts indicated that the owner of a shopping centre can give a bad reason, or no reason at all, for the exclusion of individuals from its land. No judicial review would lie against the decision of such a private body.

55 The Government accepted that, if contrary to their arguments, the State's positive obligations were engaged and that there was an unjustified interference under Arts 10 or 11, there was no remedy available to the applicants under domestic law.

56 The case law of the Convention institutions indicates, however, that Art.13 cannot be interpreted as requiring a remedy against the state of domestic law, as otherwise the Court would be imposing on Contracting States a requirement to incorporate the Convention.[34] In so far therefore as no remedy existed in domestic law prior to October 2, 2000 when the Human Rights Act 1998 took effect, the applicants' complaints fall foul of this principle. Following that date, it would have been possible for the applicants to raise their complaints before the domestic courts, which would have had a range of possible redress available to them.

57 The Court finds in the circumstances no breach of Art.13 of the Convention in the present case.

[34] See the *James v United Kingdom* (A/98): (1986) 8 E.H.R.R. 123, para.[86].

For these reasons, THE COURT

1. *Holds* by six votes to one that there has been no violation of Art.10 of the Convention;
2. *Holds* by six votes to one that there has been no violation of Art.11 of the Convention;
3. *Holds* unanimously that there has been no violation of Art.13 of the Convention.

Partly Dissenting Opinion of Judge Maruste

O-I1[35] To my regret I am unable to share the finding of the majority of the Chamber that the applicants' rights under Arts 10 and 11 were not infringed. In my view, the property rights of the owners of the shopping mall were unnecessarily given priority over the applicants' freedom of expression and assembly.

O-I2 The case raises the important issue of the State's positive obligations in a modern liberal State where many traditionally state owned services like post, transport, energy, health and community services and others have been or could be privatised. In this situation should private owners' property rights prevail over other rights or does the State still have some responsibility to secure the right balance between private and public interests?

O-I3 The new town centre was planned and built originally by a body set up by the government.[36] At a later stage the shopping centre was privatised. The area was huge, with many shops and hypermarkets, and also included car parks and walkways. Because of its central nature several important public services like the public library, the social services office, the health centre and even the police station were also located in or adjacent to the centre. Through specific actions and decisions the public authorities and public money were involved and there was an active presence of public agencies in the vicinity. That means that the public authorities also bore some responsibility for decisions about the nature of the area and access to and use of it.

O-I4 There is no doubt that the area in its functional nature and essence is a forum publicum or "quasi-public" space, as argued by the applicants and clearly recognised also by the Chamber.[37] The place as such is not something which has belonged to the owners for ages. This was a new creation where public interests and money were and still are involved. That is why the situation is clearly distinguishable from the "my home is my castle" type of situation.

O-I5 Although the applicants were not complaining about unequal treatment, it is evident that they had justified expectations of being able to use the area as a public gathering area and to have access to the public and its services on an equal footing with other groups including local government[38] who had used the place for similar purposes without restrictions.

O-I6 The applicants sought access to the public to discuss with them a topic of a public, not private, nature and to contribute to the debate about the exercise of local

[35] Paragraph numbers added by publisher.
[36] See para.[11].
[37] See para.[44].
[38] See paras [20] and [34].

government powers; in other words, for entirely lawful purposes. They acted as others did, without disturbing the public peace or interfering with business by other unacceptable or disruptive methods.In these circumstances it is hard to agree with the Chamber's finding that the Government bear no direct responsibility for the restrictions applied to the applicants. In a strict and formal sense that is true. But it does not mean that there were no indirect responsibilities. It cannot be the case that through privatisation the public authorities can divest themselves of any responsibility to protect rights and freedoms other than property rights. They still bear responsibility for deciding how the forum created by them is to be used and for ensuring that public interests and individuals' rights are respected. It is in the public interest to permit reasonable exercise of individual rights and freedoms, including the freedoms of speech and assembly on the property of a privately owned shopping centre, and not to make some public services and institutions inaccessible to the public and participants in demonstrations. The Court has consistently held that if there is a conflict between rights and freedoms, the freedom of expression takes precedence. But in this case it appears to be the other way round—property rights prevailed over freedom of speech.

O-I7 Of course, it would clearly be too far reaching to say that no limitations can be put on the exercise of rights and freedoms on private grounds or premises. They should be exercised in a manner consistent with respect for owners' rights too. And that is exactly what the Chamber did not take into account in this case. The public authorities did not carry out a balancing exercise and did not regulate how the privately owned forum publicum was to be used in the public interest. The old traditional rule that the private owner has an unfettered right to eject people from his land and premises without giving any justification and without any test of reasonableness being applied is no longer fully adapted to contemporary conditions and society. Consequently, the State failed to discharge its positive obligations under Arts 10 and 11.

Court of Appeal

Ineos Upstream Ltd and others *v* Persons Unknown and others (Friends of the Earth intervening)

[2019] EWCA Civ 515

2019 March 5, 6; April 3 Longmore, David Richards, Leggatt LJJ

Practice — Parties — Persons unknown — Injunction — Claimants seeking injunctions on quia timet basis to prevent anticipated unlawful "fracking" protests against various classes of unknown defendants — Whether injunctions properly granted — Guidance as to granting of injunction as against persons unknown

The claimants were a group of companies and various individuals connected with the business of shale and gas exploration by the hydraulic fracturing of rock formations, a procedure colloquially known as "fracking". Concerned that anticipated protests against the fracking operations might cross the boundary between legitimate and illegitimate activity, the claimants sought, inter alia, injunctions on a quia timet basis to restrain potentially unlawful acts of protest before they occurred. The first to fifth defendants were described as groups of "persons unknown" with, in each case, further wording relating to identified locations and potential actions designed to provide a definition of the persons falling within the group. The judge granted injunctions against the first to third and the fifth defendants so identified. No order was made against the sixth and seventh defendants, identified individuals. Expressing concern as to the width of the orders granted against the unknown defendants, the sixth and seventh defendants appealed.

On the appeal—

Held, allowing the appeal in part, that, while there was no conceptual or legal prohibition on suing persons unknown who were not currently in existence but would come into existence when they committed the prohibited tort, the court should be inherently cautious about granting injunctions against unknown persons since the reach of such an injunction was necessarily difficult to assess in advance; that, although it was not easy to formulate the broad principles on which an injunction against unknown persons could properly be granted, the following requirements might be thought necessary before such an order could be made, namely (i) there had to have been shown a sufficiently real and imminent risk of a tort being committed to justify a quia timet injunction, (ii) it had to have been impossible to name the persons who were likely to commit the tort unless restrained, (iii) it had to be possible to give effective notice of the injunction and for the method of such notice to be set out in the order, (iv) the terms of the injunction had to correspond to the threatened tort and not be so wide that they prohibited lawful conduct, (v) the terms of the injunction had to be sufficiently clear and precise as to enable persons potentially affected to know what they had not to do, and (vi) the injunction ought to have clear geographical and temporal limits; that, on the facts, the first three requirements presented no difficulty, but the remaining requirements were more problematic where the injunctions made against the third and fifth defendants had been drafted too widely and lacked the necessary degree of certainty; and that, accordingly, those injunctions would be discharged, and the claims against the third and fifth defendants dismissed; but that the injunctions against the first and second defendants would be maintained pending remission to the judge to reconsider (i) whether interim relief ought to be granted in the light of section 12(3) of the Human Rights Act 1998, and (ii) if the injunctions were to be continued against the first and second defendants, what would be the appropriate temporal limit (post, paras 29–34, 35, 39–42, 43, 47–51, 52, 53).

Bloomsbury Publishing Group plc v News Group Newspapers Ltd [2003] EWHC 1205 (Ch); [2003] 1 WLR 1633; *Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator Site* [2003] EWHC 1738 (Ch); [2004] Env LR 9 and *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] UKSC 6; [2019] 1 WLR 1471, SC(E) considered.

Decision of Morgan J [2017] EWHC 2945 (Ch) reversed in part.

APPEAL from Morgan J

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The claimants, Ineos Upstream Ltd, Ineos 120 Exploration Ltd, Ineos Properties Ltd, Ineos Industries Ltd, John Barrie Palfreyman, Alan John Skepper, Janette Mary Skepper, Steven John Skepper, John Ambrose Hollingworth and Linda Katharina Hollingworth, were a group of companies and individuals connected with the business of shale and gas exploration by the hydraulic fracturing of rock formations, a procedure colloquially known as "fracking". Concerned that anticipated protests against the fracking operations might cross the boundary between legitimate and illegitimate activity, the claimants sought, inter alia, injunctions to restrain potentially unlawful conduct against the first to fifth defendants, each described as a group of persons unknown engaging in various defined activities, the sixth defendant, Joseph Boyd, and the seventh defendant, Joseph Corré. By a decision dated 23 November 2017 Morgan J, sitting in the Chancery Division (Property, Trusts and Probate), granted injunctions against the first to third and the fifth defendants so identified [2017] EWHC 2945 (Ch). No order was made against the sixth and seventh defendants.

By an appellant's notice and with the permission of the Court of Appeal the sixth and seventh defendants appealed on the grounds: (1) whether the judge had been right to grant injunctions against persons unknown; (2) whether the judge had failed adequately or at all to apply section 12(3) of the Human Rights Act 1998, which required a judge making an interim order in a case, in which article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms was engaged, to assess whether the claimants would be likely to obtain the relief sought at trial; and (3) whether the judge had been right to grant an injunction restraining conspiracy to harm the claimants by the commission of unlawful acts against contractors engaged by the claimants.

Friends of the Earth were given permission to intervene by written submissions only.

The facts are stated in the judgment of Longmore LJ, post, para 1–11.

Heather Williams QC, Blinne Ní Ghrálaigh and *Jennifer Robinson* (instructed by *Leigh Day*) for the sixth defendant.

Stephanie Harrison QC and *Stephen Simblet* (instructed by *Bhatt Murphy Solicitors*) for the seventh defendant.

Alan Maclean QC and *Jason Pobjoy* (instructed by *Fieldfisher llp*) for the claimants.

Henry Blaxland QC and *Stephen Clark* (instructed by *Bhatt Murphy*) for the intervener, by written submissions only.

The court took time for consideration.

3 April 2019. The following judgments were handed down.

LONGMORE LJ

Introduction

1 This is an appeal from Morgan J [2017] EWHC 2945 (Ch) who has granted injunctions to Ineos Upstream Ltd and various subsidiaries of the Ineos Group ("the Ineos companies") as well as certain individuals. The injunctions were granted against persons unknown who are thought to be likely to become protesters at sites selected by those companies for the purpose of exploration for shale gas by hydraulic fracturing of rock formations, a procedure more commonly known as "fracking".

2 Fracking, which is lawful in England but not in every country in the world, is a controversial process partly because it is said to give rise to (inter alia) seismic activity, water contamination and methane clouds, and to be liable to injure people and buildings, but also because shale gas, which is a fossil fuel considered by many to contribute to global warming and in due course unsustainable climate change. For these reasons (and no doubt others) people want to protest against any fracking activity both where it may be taking place and elsewhere. In the view of the Ineos companies these protests will often cross the boundary between legitimate and illegitimate activity as indeed they have in the past when other companies have sought to operate planning permissions which they have obtained for exploration for shale gas by fracking. The Ineos companies have therefore sought injunctions to restrain potentially unlawful acts of protest before they have occurred.

3 The judge's order extends to 8 relevant sites described in detail in paras 4–7 of his judgment [2017] EWHC 2945 (Ch); sites 1–4 and 7 consist of agricultural or other land where it is intended that fracking will take place; sites 5, 6 and 8 are office buildings from which the Ineos companies conduct their business.

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The claimants

4 There are ten claimants. The first claimant is a subsidiary company of the Ineos corporate group, a privately owned global manufacturer of chemicals, speciality chemicals and oil products. The first claimant's commercial activities include shale gas exploration in the United Kingdom. It is the lessee of four of the sites which are the subject of the claimants' application (sites 1, 2, 3 and 7). The lessors in relation to these four sites include the fifth to tenth claimants. The second to fourth claimants are companies within the Ineos corporate group. They are the proprietors of sites 4, 5 and 6 respectively. The fourth claimant is the lessee of site 8 and it has applied to the Land Registry to be registered as the leasehold owner of that site. I will refer to the first to fourth claimants as "Ineos" without distinguishing between them. The fifth to tenth claimants are all individuals. The fifth claimant is the freeholder of site 1. The sixth to eighth claimants are the freeholders of site 2. The ninth to tenth claimants are the freeholders of site 7.

The defendants

5 The first five defendants are described as groups of "Persons unknown" with, in each case, further wording designed to provide a definition of the persons falling within the group. The first defendant is described as: "Persons unknown entering or remaining without the consent of the claimant(s) on land and buildings shown shaded red on the plans annexed to the amended claim form."

6 The second defendant is described as:

> "Persons unknown interfering with the first and second claimants' rights to pass and repass with or without vehicles, materials and equipment over private access roads on land shown shaded orange on the plans annexed to the amended claim form without the consent of the claimant(s)."

7 The third defendant is described as:

> "Persons unknown interfering with the right of way enjoyed by the claimant(s) each of its and their agents, servants, contractors, sub-contractors, group companies, licensees, employees, partners, consultants, family members and friends over land shown shaded purple on the plans annexed to the amended claim form."

8 The fourth defendant is described as: "Persons unknown pursuing conduct amounting to harassment". The judge declined to make any order against this group which, accordingly, falls out of the picture.

9 The fifth defendant is described as: "Persons unknown combining together to commit the unlawful acts as specified in para 10 of the [relevant] order with the intention set out in para 10 of the [relevant] order."

10 The sixth defendant is Mr Boyd. He appeared through counsel at a hearing before the judge on 12 September 2017 and was joined as a defendant. The seventh defendant is Mr Corré. He also appeared through counsel at the hearing on 12 September 2017 and was joined as a defendant. The judge had originally granted ex parte relief on 28 July 2017 against the first five defendants until a return date fixed for 12 September 2017. On that date a new return date with a three-day estimate was then fixed for 31 October 2017 to enable Mr Boyd and Mr Corré to file evidence and instruct counsel to make submissions on their behalf.

11 As is to some extent evident from the descriptions of the respective defendants, the potentially unlawful activities which Ineos wishes to restrain are: (1) trespass to land; (2) private nuisance; (3) public nuisance; and (4) conspiracy to injure by unlawful means. This last group is included because protesters have in the past targeted companies which form part of the supply chain to the operators who carry on shale gas exploration. The protesters' aim has been to cause those companies to withdraw from supplying the operators with equipment or other items for the supply of which the operators have entered into contracts with such companies.

The judgment

12 The judge (to whose command of the voluminous documentation before him I would pay tribute) absorbed a considerable body of evidence contained in 28 lever arch files including at least 16 witness statements and their accompanying exhibits. He said of this evidence, at para 18 [2017] EWHC 2945 (Ch), which related largely to the experiences of fracking companies other than Ineos, which is a newcomer to the field:

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> "Much of the factual material in the evidence served by the claimants was not contradicted by the defendants, although the defendants did join issue with certain of the comments made or the conclusions drawn by the claimants and some of the detail of the factual material."

In the light of this comment and the limited grounds of appeal for which permission has been granted, we have been spared much of this voluminous documentation.

13 The judge then commented, at para 21:

> "The evidence shows clearly that the protestors object to the whole industry of shale gas exploration and they do not distinguish between some operators and other operators. This indicates to me that what has happened to other operators in the past will happen to Ineos at some point, in the absence of injunctions. Further, the evidence makes it clear that, before the commencement of these proceedings, the protestors were aware of Ineos as an active, or at least an intending, operator in the industry. There is absolutely no reason to think that the protestors will exempt Ineos from their protest activities. Before the commencement of these proceedings, the protestors were also aware of some or all of the sites which are the subject of these proceedings. In addition, the existence of these proceedings has drawn attention to the eight Sites described earlier."

14 The judge then proceeded to consider the evidence, expressed himself satisfied that there was a real and imminent threat of unlawful activity if he did not make an interim order pending trial and that a similar order would be made at that trial. He accordingly made the orders requested by the claimants apart from that relating to harassment. The orders were in summary that: (1) the first defendants were restrained from trespassing at any of the sites; (2) the second defendants were restrained from interfering with access to sites 3 and 4, which were accessed by identified private access roads; (3) the third defendants were restrained from interfering with access to public rights of way by road, path or bridleway to sites 1–4 and 7–8, such interference being defined as (a) blocking the highway; (b) slow walking; (c) climbing onto vehicles; (d) unreasonably preventing access to or egress from the Sites; and (e) unreasonably obstructing the highway; (4) the fifth defendants were restrained from combining together to (a) commit an offence under section 241(1) of the Trade Union and Labour Relations (Consultation) Act 1992; (b) commit an offence of criminal damage under section 1 of the Criminal Damage Act 1971 or of theft under section 1 of the Theft Act 1968; (c) obstruct free passage along a public highway, including "slow walking", blocking the highway, climbing onto vehicles and otherwise obstructing the highway with the intention of causing inconvenience and delay; and (d) cause anything to be done on a road or interfere with any motor vehicle or other traffic equipment "in such circumstances that it would or could be obvious to a reasonable person that to do so would or could be dangerous" all with the intention of damaging the claimants.

15 These separate orders related, therefore, to causes of action in trespass, private nuisance, public nuisance and causing loss by unlawful means.

16 It is a curiosity of the case that the judge made no order against either Mr Boyd or Mr Corré but they have each sought and obtained permission to appeal against the orders made in respect of the persons unknown and they have each instructed separate solicitors, junior counsel and leading counsel to challenge the orders. They profess to be concerned about the width of the orders and seek to be heard on behalf of the unknown persons who are the subject matters of the judge's order. Friends of the Earth are similarly concerned and have been permitted to intervene by way of written submissions. Any concern about the locus standi of Mr Boyd and Mr Corré to make submissions to the court has been dissipated by the assistance to the court which Ms Heather Williams QC and Ms Stephanie Harrison QC have been able to provide.

This appeal

17 Permission to appeal has been granted on three grounds:

(1) whether the judge was correct to grant injunctions against persons unknown;

(2) whether the judge failed adequately or at all to apply section 12(3) of the Human Rights Act 1998 ("HRA") which requires a judge making an interim order in a case, in which article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") is engaged, to assess whether the claimants would be likely to obtain the relief sought at trial; and

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(3) whether the judge was right to grant an injunction restraining conspiracy to harm the claimants by the commission of unlawful acts against contractors engaged by the claimants.

Persons unknown: the law

18 Under the Rules of the Supreme Court ("RSC"), a writ had to name a defendant: see *Friern Barnet Urban District Council v Adams* [1927] 2 Ch 25. Accordingly, Stamp J held in *In re Wykeham Terrace, Brighton, Sussex, Ex p Territorial Auxiliary and Volunteer Reserve Association for the South East* [1971] Ch 204 that no proceedings could take place for recovery of possession of land occupied by squatters unless they were named as defendants. RSC Ord 113 was then introduced to ensure that such relief could be granted: see *McPhail v Persons, Names Unknown* [1973] Ch 447, 458 per Lord Denning MR. There are also statutory provisions enabling local authorities to take enforcement proceedings against persons such as squatters or travellers contained in section 187B of the Town and Country Planning Act 1990 ("the 1990 Act").

19 Since the advent of the Civil Procedure Rules, there has been no requirement to name a defendant in a claim form and orders have been made against "Persons Unknown" in appropriate cases. The first such case seems to have been *Bloomsbury Publishing Group plc v News Group Newspapers Ltd* [2003] EWHC 1205 (Ch); [2003] 1 WLR 1633 in which unknown persons had illicitly obtained copies of the yet to be published book "Harry Potter and the Order of the Phoenix" and were trying to sell them (or parts of them) to various newspapers. Sir Andrew Morritt V-C made an order against the person or persons who had offered the publishers of the Sun, the Daily Mail and the Daily Mirror copies of the book or any part thereof and the person or persons who had physical possession of a copy of the book. The theft and touting of the copies had, of course, already happened and the injunction was therefore aimed at persons who had already obtained copies of the book illicitly.

20 Sir Andrew Morritt V-C followed his own decision in *Hampshire Waste Services Ltd v Intending Trespassers Upon Chineham Incinerator Site* [2003] EWHC 1738 (Ch); [2004] Env LR 9. In that case, similarly to this, there had been in the past a number of incidents of environmental protesters trespassing on waste incineration sites. There was to be a "Global Day of Action Against Incinerators" on 14 July 2003 and the claimants applied for an injunction restraining persons from entering or remaining at named waste incineration sites without the claimant's consent. Sir Andrew observed that it would be wrong for the defendants' description to include a legal conclusion such as was implicit in the use of a description with the word "trespass" and that it was likewise undesirable to use a description with the word "intending" since that depended on the subjective intention of the individual concerned which would not be known to the claimants and was susceptible of change. He therefore made an order against persons entering or remaining on the sites without the consent of the claimants in connection with the Global Day of Action.

21 Both these authorities were referred to without disapproval in *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] UKSC 11; [2009] 1 WLR 2780, para 2.

22 In the present case, the judge held, at para 121, that since *Bloomsbury* there had been many cases where injunctions had been granted against persons unknown and many of those injunctions had been granted against protesters. For understandable reasons, those cases (unidentified) do not appear to have been taken to an appellate court. Ms Harrison on behalf of Mr Corré submitted that the procedure sanctioned by Sir Andrew Morritt V-C without adverse argument was contrary to principle unless expressly permitted by statute, as by the 1990 Act (section 187B, as inserted by section 3 of the Planning and Compensation Act 1991 during the subsistence of the RSC which would otherwise have prohibited it) or by the Civil Procedure Rules (eg CPR r 19.6 dealing with representative actions or CPR r 55.3(4), the successor to the RSC Ord 113). The principles on which she relied for this purpose were that a court cannot bind a person who is not a party to the action in which such an order is made and that it was wrong that someone, who had to commit the tort (and thus be liable to proceedings for contempt) before he became a party to the action, should have no opportunity to submit the order should not have been made before he was in contempt of it.

23 She pointed out that when the statutory powers of the 1990 Act were invoked that was precisely the position and she submitted that that could only be explained by the existence of the statute. This was most clearly apparent from the South Cambridgeshire litigation in which the Court of Appeal in September 2004 granted an injunction against persons unknown restraining them from (inter alia) causing or permitting the deposit of hardcore or other materials at Smithy Fen, Cottenham or causing or permitting the entry of caravans or mobile accommodation on that land for residential or other non-agricultural purposes, see *South Cambridgeshire District Council v Persons Unknown* [2004] EWCA Civ 1280; [2004] 4 P LR 88. Brooke LJ cited both *Bloomsbury* and

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Hampshire Waste as illustrations of the way in which the power to grant relief against persons unknown had been used under the CPR.

24 On 20 April 2005 Ms Gammell stationed her caravan on the site; the injunction was served on her and its effect was explained to her on 21 April 2005; she did not leave and the council applied to commit her for contempt. Judge Plumstead on 11 July 2005 joined her as a defendant to the action and held that she was in contempt, refusing to consider Ms Gammell's rights under article 8 of the ECHR at that stage and adjourned sentence pending an appeal. On 31 October 2005 the Court of Appeal dismissed her appeal and upheld the finding of contempt, holding that the authority of *South Buckinghamshire District Council v Porter* [2003] UKHL 26; [2003] 2 AC 558, which required the court to consider the personal circumstances of the defendant under article 8 before an injunction was granted, only applied when the defendants were in occupation of a site and were named as defendants in the original proceedings: see *South Cambridgeshire District Council v Gammell* [2005] EWCA Civ 1429; [2006] 1 WLR 658. Sir Anthony Clarke MR (with whom Rix and Moore-Bick LJJ agreed) held, at para 32, that Ms Gammell became a party to the proceedings when she did an act which brought her within the definition of the defendant in the particular case and, at para 33, that, by the time of the committal proceedings she was a defendant, was in breach of the injunction and, given her state of knowledge, was in contempt of court. He then summarised the legal position:

> "(1) The principles in the *South Buckinghamshire* case set out above apply when the court is considering whether to grant an injunction against named defendants. (2) They do not apply in full when a court is considering whether or not to grant an injunction against persons unknown because the relevant personal information would, ex hypothesi, not be available. However this fact makes it important for courts only to grant such injunctions in cases where it is not possible for the applicant to identify the persons concerned or likely to be concerned. (3) The correct course for a person who learns that he is enjoined and who wishes to take further action, which is or would be in breach of the injunction, and thus in contempt of court, is not to take such action but to apply to the court for an order varying or setting aside the order. On such an application the court should apply the principles in the *South Buckinghamshire* case. (4) The correct course for a person who appreciates that he is infringing the injunction when he learns of it is to apply to the court forthwith for an order varying or setting aside the injunction. On such an application the court should again apply the principles in the *South Buckinghamshire* case. (5) A person who takes action in breach of the injunction in the knowledge that he is in breach may apply to the court to vary the injunction for the future. He should acknowledge that he is in breach and explain why he took the action knowing of the injunction. The court will then take account of all the circumstances of the case, including the reasons for the injunction, the reasons for the breach and the applicant's personal circumstances, in deciding whether to vary the injunction for the future and in deciding what, if any, penalty the court should impose for a contempt committed when he took the action in breach of the injunction. In the first case the court will apply the principles in the *South Buckinghamshire* case and in the *Mid Bedfordshire District Council v Brown* [2004] EWCA Civ 1709; [2005] 1 WLR 1460. (6) In cases where the injunction was granted at a without notice hearing a defendant can apply to set aside the injunction as well as to vary it for the future. Where, however, a defendant has acted in breach of the injunction in knowledge of its existence before the setting aside, he remains in breach of the injunction for the past and in contempt of court even if the injunction is subsequently set aside or varied. (7) The principles in the *South Buckinghamshire* case are irrelevant to the question whether or not a person is in breach of an injunction and/or whether he is in contempt of court, because the sole question in such a case is whether he is in breach and/or whether he is in contempt of court."

25 Ms Harrison said that this was unacceptable unless sanctioned by statute or rules of court contained in the CPR, because the persons unknown had no opportunity, before the injunction was granted, to submit that no order should be made on the grounds of possible infringements of the right to freedom of expression and the right peaceably to assemble granted by articles 10 and 11 of the ECHR or, indeed, any other grounds.

26 Ms Harrison further relied on the recent case of *Cameron v Hussain* [2019] UKSC 6; [2019] 1 WLR 1471 in which the Supreme Court held that it was not permissible to sue an unknown driver of a car which had collided with the claimant's car for the purpose of then suing that

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unknown driver's insurance company, pursuant to the provisions of the Road Traffic Act 1988 requiring the insurance company to satisfy a judgment against the driver once the driver's liability has been established in legal proceedings. Lord Sumption (with whom Lord Reed DPSC, Lord Carnwath, Lord Hodge and Lady Black JJSC agreed) began his judgment by saying that the question on the appeal was in what circumstances was it permissible to sue an unnamed defendant but added that it arose in a rather special context. He answered that question by concluding, at para 26, that a person, such as the driver of the Micra car in that case, "who is not just anonymous but cannot be identified with any particular person, cannot be sued under a pseudonym or description, unless the circumstances are such that the service of the claim form can be effected or properly dispensed with".

27 In the course of his judgment he said, at para 12, that the CPR neither expressly authorise nor expressly prohibit exceptions to the general rule that actions against unnamed parties are permissible only against trespassers; the critical question was what, as a matter of law, was the basis of the court's jurisdiction over parties and in what (if any) circumstances jurisdiction can be exercised on that basis against persons who cannot be named. He then said, at para 13, that it was necessary to distinguish two categories of cases to which different considerations applied: the first category being anonymous defendants who are identifiable but whose names are unknown; the second being anonymous defendants who cannot even be identified, such as most hit and run drivers.

> "The distinction is that in the first category the defendant is described in a way that makes it possible in principle to locate or communicate with him and to know without further inquiry whether he is the same as the person described in the claim form, whereas in the second category it is not."

Those in the second category could not therefore be sued because to do so would be contrary to the fundamental principle that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as would enable him to be heard: para 17.

28 Ms Harrison submitted that these categories were exclusive categories of unnamed or unknown defendants and that the defendants as described in the present case did not fall within the first category since they are not described in a way that makes it possible to locate or communicate with them, let alone to know whether they are the same as the persons described in the claim form, because until they committed the torts enjoined, they did not even exist. To the extent that they fell within the second category they cannot be sued as unknown or unnamed persons.

29 Despite the persuasive manner in which these arguments were advanced, I cannot accept them. In my judgment it is too absolutist to say that a claimant can never sue persons unknown unless they are identifiable at the time the claim form is issued. That was done in both the *Bloomsbury* and the *Hampshire Waste* cases and no one has hitherto suggested that they were wrongly decided. Ms Harrison shrank from submitting that *Bloomsbury* was wrongly decided since it so obviously met the justice of the case but she did submit that *Hampshire Waste* was wrongly decided. She submitted that there was a distinction between injunctions against persons who existed but could not be identified and injunctions against persons who did not exist and would only come into existence when they breached the injunction. But the supposedly absolute prohibition on suing unidentifiable persons is already being departed from. Lord Sumption's two categories apply to persons who do exist, some of whom are identifiable and some of whom are not. But he was not considering persons who do not exist at all and will only come into existence in the future. I do not consider that he was intending to say anything adverse about suing such persons. On the contrary, he referred (para 11) to one context of the invocation of the jurisdiction to sue unknown persons as being trespassers and other torts committed by protesters and demonstrators and observed that in some of those cases proceedings were allowed in support of an application for a quia timet injunction "where the defendant could be identified only as those persons who might in future commit the relevant acts". But he did not refer in terms to these cases again and they do not appear to fit into either of the categories he used for the purpose of deciding the *Cameron* case. He appeared rather to approve them provided that proper notice of the court order can be given and that the fundamental principle of justice on which he relied for the purpose of negating the ability to sue a "hit and run" driver (namely that a person cannot be made subject to the court's jurisdiction without having such notice as will enable him to be heard) was not infringed. That is because he said this, at para 15:

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> "Where an interim injunction is granted and can be specifically enforced against some property or by notice to third parties who would necessarily be involved in any contempt, the process of enforcing it will sometimes be enough to bring the proceedings to the defendant's attention. In *Bloomsbury Publishing Group*, for example, the unnamed defendants would have had to identify themselves as the persons in physical possession of copies of the book if they had sought to do the prohibited act, namely disclose it to people (such as newspapers) who had been notified of the injunction. The Court of Appeal has held that where proceedings were brought against unnamed persons and interim relief was granted to restrain specified acts, a person became both a defendant and a person to whom the injunction was addressed by doing one of those acts: *South Cambridgeshire District Council v Gammell*, para 32. In the case of anonymous but identifiable defendants, these procedures for service are now well established, and there is no reason to doubt their juridical basis."

30 This amounts at least to an express approval of *Bloomsbury* and no express disapproval of *Hampshire Waste*. I would, therefore, hold that there is no conceptual or legal prohibition on suing persons unknown who are not currently in existence but will come into existence when they commit the prohibited tort.

31 That is by no means to say that the injunctions granted by Morgan J should be upheld without more ado. A court should be inherently cautious about granting injunctions against unknown persons since the reach of such an injunction is necessarily difficult to assess in advance.

32 It is not easy to formulate the broad principles on which an injunction against unknown persons can properly be granted. Ms Harrison's fall-back position was that they should only be granted when it was necessary to do so and that it was never necessary to do so if an individual could be found who could be sued. In the present case notice and service of the injunction was ordered to be given to the potentially interested parties listed in Schedule 21 of the order. This listed Key Organisations, Local Action Groups and Frack Free Organisations all of whom could have been, according to her, named as defendants, rendering it unnecessary to sue persons unknown. This strikes me as hopelessly unrealistic. The judge was satisfied that unknown persons were likely to commit the relevant torts and that there was a real and imminent risk of their doing so; it is most unlikely that there was a real and imminent risk of the Schedule 21 organisations doing so and I cannot believe that, if it is possible to sue one or more such entities, it is wrong to sue persons unknown.

33 Ms Williams for Mr Boyd, in addition to submitting that the judge had failed to apply properly or at all section 12(3) of the HRA, submitted that the injunction should not, in any event, have been granted against the fifth defendants (conspiring to cause damage to the claimants by unlawful means) because the term of the injunctions were neither framed to catch only those who were committing the tort nor clear and precise in their scope. There is, to my mind, considerable force in this submission and the principles behind that submission can usefully be built into the requirements necessary for the grant of the injunction against unknown persons, whether in the context of the common law or in the context of the ECHR.

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

Application of the law to this case

35 In the present case there is no difficulty about the first three requirements. The judge held that there was a real and imminent risk of the commission of the relevant torts and permission has not been granted to challenge that on appeal. He also found that there were persons likely to commit the torts who could not be named and was right to do so; there are clear provisions in the order about service of the injunctions and there is no reason to suppose that these provisions will not constitute effective notice of the injunction. The remaining requirements are more problematic.

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Width and clarity of the injunctions granted by the judge

36 The right to freedom of peaceful assembly is guaranteed by both the common law and article 11 of the ECHR. It is against that background that the injunctions have to be assessed. But this right, important as it is, does not include any right to trespass on private property. Professor Dicey in his *Introduction to the Study of the Law of the Constitution*, 10th ed (1959) devoted an entire chapter of his seminal work to what he called the right of public meeting saying this at p 271:

> "No better instance can indeed be found of the way in which in England the constitution is built up upon individual rights than our rules as to public assemblies. The right of assembling is nothing more than a result of the view taken by the courts as to individual liberty of person and individual liberty of speech. There is no special law allowing A, B and C to meet together either in the open air or elsewhere for a lawful purpose, but the right of A to go where he pleases so that he does not commit a trespass, and to say what he likes to B so that his talk is not libellous or seditious, the right of B to do the like, and the existence of the same rights of C, D, E, and F, and so on ad infinitum, lead to the consequence that A, B, C, D, and a thousand or ten thousand other persons, may (as a general rule) meet together in any place where otherwise they each have a right to be for a lawful purpose and in a lawful manner."

37 This neatly states the common law as it was in 195: see Oxford Edition (2013), p 154, I do not think it has changed since. There is no difficulty about defining the tort of trespass and an injunction not to trespass can be framed in clear and precise terms, as indeed Morgan J has done. I would, therefore, uphold the injunction against trespass given against the first defendants subject to one possible drafting point and always subject to the point about section 12(3) of the HRA. I would likewise uphold the injunction against the second defendants described as interfering with private rights of way shaded orange on the plans of the relevant sites. It is of course the law that interference with a private right of way has to be substantial before it is actionable and the judge has built that qualification into his orders. He was not asked to include any definition of the word substantial and said, at para 149, that it was not appropriate to do so since the concept of substantial interference was simple enough and well established. I agree.

38 The one possible drafting point that arises is that it was said by Ms Harrison that, as drafted, the injunctions would catch an innocent dog-walker exercising a public right of way over the claimants' land whose dog escaped onto the land and had to be recovered by its owner trespassing on that land. It was accepted that this was not a particularly likely scenario in the context of a fracking protest but it was said that the injunction might well have a chilling effect so as to prevent dog-walkers exercising their rights in the first place. I regard this as fanciful. I can see that an ordinary dog-walker exercising a public right of way might be chilled by the existence of an anti-fracking protest and thus be deterred from exercising his normal rights but, if he is not deterred by that, he is not going to be deterred instead by thoughts of possible proceedings for contempt for an inadvertent trespass while he is recovering his wandering animal. If this were really considered an important point, it could, no doubt, be cured by adding some such words as "in connection with the activities of the claimants" to the order but like the judge (in para 146) I do not consider it necessary to deal with this minor problem. Overall, this case raises much more important points than wandering dogs.

39 Those important points about the width and the clarity of the injunctions are critical when it comes to considering the injunctions relating to public rights of way and the supply chain in connection with conspiracy to cause damage by unlawful means. They are perhaps most clearly seen in relation to the supply chain. The judge has made an immensely detailed order (in no doubt a highly laudable attempt to ensure that the terms of the injunction correspond to the threatened tort) but has produced an order that is, in my view, both too wide and insufficiently clear. In short, he has attempted to do the impossible. He has, for example, restrained the fifth defendants from combining together to commit the act or offence of obstructing free passage along a public highway (or to access to or from a public highway) by ((c)(ii)) slow walking in front of the vehicles with the object of slowing them down and with the intention of causing inconvenience and delay or ((c)(iv)) otherwise unreasonably and/or without lawful authority or excuse obstructing the highway with the intention of causing inconvenience and delay, all with the intention of damaging the claimants.

40 As Ms Williams pointed out in her submissions, supported in this respect by Friends of the Earth, there are several problems with a quia timet order in this form. First, it is of the essence of the tort that it must cause damage. While that cannot of itself be an objection to the grant of quia timet relief, the requirement that it cause damage can only be incorporated into the

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order by reference to the defendants' intention which, as Sir Andrew Morritt said in *Hampshire Waste*, depends on the subjective intention of the individual which is not necessarily known to the outside world (and in particular to the claimants) and is susceptible of change and, for that reason, should not be incorporated into the order. Secondly, the concept of slow walking in front of vehicles or, more generally, obstructing the highway may not result in any damage to the claimants at all. Thirdly, slow walking is not itself defined and is too wide: how slow is slow? Any speed slower than a normal walking speed of two miles per hour? One does not know. Fourthly, the concept of "unreasonably" obstructing the highway is not susceptible of advance definition. It is, of course, the law that for an obstruction of the highway to be unlawful it must be an unreasonable obstruction (see *Director of Public Prosecutions v Jones (Margaret)* [1999] 2 AC 240), but that is a question of fact and degree that can only be assessed in an actual situation and not in advance. A person faced with such an injunction may well be chilled into not obstructing the highway at all. Fifthly, it is wrong to build the concept of "without lawful authority or excuse" into an injunction since an ordinary person exercising legitimate rights of protest is most unlikely to have any clear idea of what would constitute lawful authority or excuse. If he is not clear about what he can and cannot do, that may well have a chilling effect also.

41 Many of the same objections apply to the injunction granted in relation to the exclusion zones shaded purple on the plans annexed to the order, which comprise public access ways to sites 1–4, 7 and 8 and public footpaths or bridleways over sites 2 and 7. The defendants are restrained from: (a) blocking the highway when done with a view to slowing down or stopping traffic; (b) slow walking; and (c) unreasonably; and/or without lawful authority or excuse preventing the claimants from access to or egress from any of the sites. These orders are likewise too wide and too uncertain in ambit to be properly the subject of quia timet relief.

42 Mr Alan Maclean QC for the claimants submitted that the court should grant advance relief of this kind in appropriate cases in order to save time and much energy later devoted to legal proceedings after the events have happened. But it is only when events have happened which can in retrospect be seen to have been illegal that, in my view, wide ranging injunctions of the kind granted against the third and fifth defendants should be granted. The citizen's right of protest is not to be diminished by advance fear of committal except in the clearest of cases, of which trespass is perhaps the best example.

Geographical and temporal limits

43 The injunctions granted by the judge against the first and second defendants have acceptable geographical limits but there is no temporal limit. That is unsatisfactory.

Section 12(3) of the Human Rights Act

44 Section 12 of the HRA 1998 provides:

> "(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
>
> "(2) If the person against whom the application for relief is made ('the respondent') is neither present nor represented, no such relief is to be granted unless the court is satisfied— (a) that the applicant has taken all practicable steps to notify the respondent; or (b) that there are compelling reasons why the respondent should not be notified.
>
> "(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed."

45 Ms Williams submitted that the judge had failed to apply section 12(3) because the claimants had failed to establish that they would be likely to establish at trial that publication should not be allowed. She relied in particular on the manner in which the judge had expressed himself [2017] EWHC 2945 (Ch), para 98:

> "I have considered above the test to be applied for the grant of an interim injunction ('more likely than not') and the test for a quia timet injunction at trial ('imminent and real risk of harm'). I will now address the question as to what a court would be likely to do if this were an application for a final injunction and the court accepted the evidence put forward by the claimants."

She submitted that it was not correct to ask what a trial judge would be likely to do "if the court accepted the evidence put forward by the claimants". The whole point of the subsection is that it was the duty of the court to test the claimants' evidence, not to assume that it would be accepted.

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46 Ms Williams then suggested many things which the judge failed (according to her) to take into account and submitted that it was not enough for Mr Maclean to point to the earlier passage (para 18) in the judgment where the judge had said that the factual evidence of the claimants was not contradicted by the defendants because he had added: "although the defendants did join issue with certain of the comments made or the conclusions drawn by the claimants and some of the detail of the factual material." There was, she said, no assessment of Mr Boyd's or Mr Corré's challenges to the inferences which the claimants invited the judge to draw or to the conclusions drawn by them, let alone analysis of the (admittedly small) amount of factual contradiction.

47 This submission has to be assessed on the basis (if my Lords agree) that the injunctions relating to public nuisance and the supply chain will be discharged. The only injunctions left are those restraining trespass and interfering with the claimants' rights of way and it will be rather easier therefore for the claimants to establish that at trial publication of views by trespassers on the claimants' property should not be allowed.

48 Nevertheless, I consider that there is force in Ms Williams's submission. It is not just the trespass that has to be shown to be likely to be established; by way of example, it is also the nature of the threat. For the purposes of interim relief, the judge has held that the threat of trespass is imminent and real but he has given little or no consideration (at any rate expressly) to the question whether that is likely to be established at trial. This is particularly striking in relation to site 7 where it is said that planning permission for fracking has twice been refused and sites 3 and 4 where planning permission has not yet been sought.

49 A number of other matters are identified in para 8 of Ms Williams's skeleton argument. We did not permit Ms Williams to advance any argument on the facts which contravened the judge's findings on the matters relevant to the grant of interim relief, apart from section 12(3) HRA considerations, and those findings will stand. Nevertheless, some of those matters may in addition be relevant to the likelihood of the trial court granting final relief. It is accepted that this court is in no position to apply the section 12(3) HRA test and that, if Ms Williams's submissions of principle are accepted, the matter will have to be remitted to the judge for him to re-consider, in the light of our judgments, whether the court at trial is likely to establish that publication should not be allowed.

Disposal

50 I would therefore discharge the injunctions made against the third and fifth defendants and dismiss the claims against those defendants. I would maintain the injunctions against the first and second defendants pending remission to the judge to reconsider: (1) whether interim relief should be granted in the light of section 12(3) HRA; and (2) if the injunctions are to be continued against the first and second defendants what temporal limit is appropriate.

Conclusion

51 To the extent indicated above, I would allow this appeal.

DAVID RICHARDS LJ

52 I agree.

LEGGATT LJ

53 I also agree.

Appeal allowed in part.

MATTHEW BROTHERTON, Barrister

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Court of Appeal

*Canada Goose UK Retail Ltd and another *v* Persons Unknown and another

[2020] EWCA Civ 303

2020 Feb 4, 5; March 5

Sir Terence Etherton MR, David Richards, Coulson LJJ

Practice — Parties — Unnamed defendant — Claimants applying for injunction against protestors to restrain harassment and other wrongdoing — Without notice interim injunction granted against "persons unknown" — Numerous protestors served with injunction but none served with claim form — Whether service defective — Guidance on proper formulation of interim injunctions — Limitations on grant of final injunction against persons unknown — Whether claimants entitled to summary judgment — CPR rr 6.15, 6.16

The claimants, a retail clothing company and the manager of its London store, brought a claim seeking injunctions against people demonstrating outside the store on the grounds that their actions amounted to harassment, trespass and/or nuisance. A without notice interim injunction was granted against the first defendants, described in the claim form and the injunction as persons unknown who were protestors against the manufacture and sale of clothing made of or containing animal products and against the sale of such clothing at the store. The terms of the court's order did not impose any requirement on the claimants to serve the claim form on the "persons unknown" but merely permitted service of the interim injunction by handing or attempting to hand it to "any person demonstrating at or in the vicinity of the store" or, alternatively, by e-mail service at two stated e-mail addresses, that of an activist group and that of an animal rights organisation which was subsequently added as second defendant to the claim at its own request. The claimants served 385 copies of the interim injunction, including on 121 identifiable individuals, 37 of whom were identified by name, but the claimants did not attempt to join any of those individuals as parties to the proceedings whether by serving them with the claim form or otherwise. The claim form was served only by e-mail to the two addresses specified for service of the interim injunction and to one other individual who had requested a copy. On the claimants' application for summary judgment on their claim the judge: (i) held that the claim form had not been validly served on any defendant in the proceedings and that it was not appropriate to make an order dispensing with service of the claim form pursuant to CPR r 6.16[1]; (ii) discharged the interim injunction; and (iii) refused to grant a final injunction.

On the claimants' appeal—

Held, dismissing the appeal, (1) that since service was the act by which a defendant was subjected to the court's jurisdiction, the court had to be satisfied that the method used for service either had put the defendant in a position to ascertain the contents of the proceedings or was reasonably likely to enable him to do so within any relevant period of time; that given that sending the claim form by e-mail to the

[1] CPR r 6.15: "(1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place. (2) On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service."

R 6.16: "(1) The court may dispense with service of a claim form in exceptional circumstances. (2) An application for an order to dispense with service may be made at any time and— (a) must be supported by evidence; and (b) may be made without notice."

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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).

E *Ineos Upstream Ltd v Persons Unknown (Friends of the Earth intervening)* [2019] 4 WLR 100, CA and *Cameron v Hussain (Motor Insurers' Bureau intervening)* [2019] 1 WLR 1471, SC(E) applied.

Hubbard v Pitt [1976] QB 142, CA, *Burris v Azadani* [1995] 1 WLR 1372, CA and *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29, CA considered.

(3) That it was perfectly legitimate to make a final injunction against "persons unknown" provided they were anonymous defendants who were identifiable as having committed the relevant unlawful acts prior to the date of the final order and F had been served prior to that date; but that a final injunction could not be granted in a protestor case against persons unknown who were not parties at the date of the final order, in other words persons joining an ongoing protest who had not by that time committed the prohibited acts and so did not fall within the description of the persons unknown and who had not been served with the claim form; and that, accordingly, since the final injunction proposed by the claimants in the present case was not so limited and since it suffered from some of the same defects as the interim G injunction, the judge had been right to dismiss the claim for summary judgment (post, paras 89–91, 94, 95, 97).

Birmingham City Council v Afsar [2019] EWHC 3217 (QB) approved.

Vastint Leeds BV v Persons Unknown [2019] 4 WLR 2 distinguished.

Per curiam. (i) It would have been open to the claimants at any time since the commencement of proceedings to obtain an order under CPR r 6.15(1) for alternative service which would have a greater likelihood of bringing notice of the proceedings to H the attention of protestors at the shop premises, such as by posting the order, the claim form and the particulars of claim on social media to reach a wide audience of potential protestors and by attaching and otherwise exhibiting copies of the order and of the claim form at or nearby those premises. The court's power to dispense with service under CPR r 6.16 should not be used to overcome that failure (post, para 50).

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(ii) Private law remedies are not well suited to the task of permanently controlling ongoing public demonstrations by a continually fluctuating body of protestors. What are appropriate permanent controls on such demonstrations involve complex considerations of private rights, civil liberties, public expectations and local authority policies. Powers conferred by Parliament on local authorities, for example, to make a public spaces protection order under the Anti-social Behaviour, Crime and Policing Act 2014, require the local authority to take into account various matters, including rights of freedom of assembly and expression and to carry out extensive consultation. The civil justice process is a far blunter instrument intended to resolve disputes between parties to litigation, who have had a fair opportunity to participate in it (post, para 93).

Procedural guidelines for interim relief proceedings against "persons unknown" in cases concerning protestors (post, para 82).

Decision of Nicklin J [2019] EWHC 2459 (QB); [2020] 1 WLR 417 affirmed.

The following cases are referred to in the judgment of the court:

Attorney General v Times Newspapers Ltd (No 3) [1992] 1 AC 191; [1991] 2 WLR 994; [1991] 2 All ER 398, HL(E)

Birmingham City Council v Afsar [2019] EWHC 3217 (QB)

Bristol-Myers Squibb Co v Baker Norton Pharmaceuticals Inc (No 2) [2001] EWCA Civ 414; [2001] RPC 45, CA

Burris v Azadani [1995] 1 WLR 1372; [1995] 4 All ER 802; [1996] 1 FLR 266, CA

Cameron v Hussain (Motor Insurers' Bureau intervening) [2019] UKSC 6; [2019] 1 WLR 1471; [2019] 3 All ER 1, SC(E)

Cuadrilla Bowland Ltd v Persons Unknown [2020] EWCA Civ 9; [2020] 4 WLR 29, CA

Dulgheriu v Ealing London Borough Council [2019] EWCA Civ 1490; [2020] 1 WLR 609; [2020] PTSR 79, CA

Hubbard v Pitt [1976] QB 142; [1975] 3 WLR 201; [1975] ICR 308; [1975] 3 All ER 1, CA

Ineos Upstream Ltd v Persons Unknown (Friends of the Earth intervening) [2017] EWHC 2945 (Ch); [2019] EWCA Civ 515; [2019] 4 WLR 100; [2019] 4 All ER 699, CA

South Cambridgeshire District Council v Gammell [2005] EWCA Civ 1429; [2006] 1 WLR 658, CA

Vastint Leeds BV v Persons Unknown [2018] EWHC 2456 (Ch); [2019] 4 WLR 2

Venables v News Group Newspapers Ltd [2001] Fam 430; [2001] 2 WLR 1038; [2001] 1 All ER 908

The following additional cases were cited in argument:

Astellas Pharma Ltd v Stop Huntingdon Animal Cruelty [2011] EWCA Civ 752, CA

Attorney General v Punch Ltd [2001] EWCA Civ 403; [2001] QB 1028; [2001] 2 WLR 1713; [2001] 2 All ER 655, CA

Bloomsbury Publishing Group plc v News Group Newspapers Ltd [2003] EWHC 1205 (Ch); [2003] 1 WLR 1633; [2003] 3 All ER 736

Brett Wilson llp v Persons Unknown [2015] EWHC 2628 (QB); [2016] 4 WLR 69; [2016] 1 All ER 1006

Cartier International AG v British Sky Broadcasting Ltd (Open Rights Group intervening) [2016] EWCA Civ 658; [2017] Bus LR 1; [2017] 1 All ER 700, CA

Jockey Club v Buffham [2002] EWHC 1866 (QB); [2003] QB 462; [2003] 2 WLR 178

Novartis AG v Hospira UK Ltd (Practice Note) [2013] EWCA Civ 583; [2014] 1 WLR 1264, CA

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Secretary of State for the Environment, Food and Rural Affairs v Meier [2009] UKSC 11; [2009] 1 WLR 2780; [2009] PTSR 547; [2010] PTSR 321; [2010] 1 All ER 855, SC(E)
Stone v WXY [2012] EWHC 3184 (QB)
UK Oil and Gas Investments plc v Persons Unknown [2018] EWHC 2252 (Ch); [2019] JPL 161

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

Anderton v Clwyd County Council (No 2) [2002] EWCA Civ 933; [2002] 1 WLR 3174; [2002] 3 All ER 813, CA
Arch Co Properties Ltd v Persons Unknown [2019] EWHC 2298 (QB)
Bloomsbury Publishing Group plc v News Group Newspapers Ltd [2003] EWHC 1205 (Ch); [2003] 1 WLR 1633; [2003] 3 All ER 736
Epsom and Ewell Borough Council v Persons Unknown (unreported) 20 May 2019, Leigh-ann Mulcahy QC
Grant v Dawn Meats (UK) [2018] EWCA Civ 2212, CA
Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator Site [2003] EWHC 1738 (Ch); [2004] Env LR 9
Huntingdon Life Sciences Group plc v Stop Huntingdon Animal Cruelty [2007] EWHC 522 (QB)
Kingston upon Thames Royal London Borough Council v Persons Unknown [2019] EWHC 1903 (QB)
Secretary of State for Transport v Persons Unknown [2019] EWHC 1437 (Ch)
South Bucks District Council v Porter [2003] UKHL 26; [2003] 2 AC 558; [2003] 2 WLR 1547; [2003] 3 All ER 1, HL(E)

APPEAL from Nicklin J

By a claim form issued on 29 November 2017 the claimants, Canada Goose UK Retail Ltd, the United Kingdom trading arm of an international retail clothing company, and James Hayton, the manager of the first claimant's London store acting pursuant to CPR r 19.6 for and on behalf of employees, security personnel and customers and other visitors to the store, sought injunctions against the first defendants, persons unknown who were protestors against the manufacture and sale of clothing made of or containing animal products and against the sale of such clothing at the first claimant's store, on the grounds that their actions amounted to, inter alia, harassment, trespass and/or nuisance. On the same date Teare J granted a without notice interim injunction. On 13 December 2017 Judge Moloney QC sitting as a judge of the Queen's Bench Division [2017] EWHC 3735 (QB) granted an application by the People for the Ethical Treatment of Animals (PETA) Foundation, to be added as second defendant to the proceedings in order to represent its "employees and members" under CPR r 19. By order dated 15 December 2017 Judge Moloney QC granted the claimants' application for a continuation of the interim injunction but made limited modifications to its terms and stayed the proceedings, with the stay to continue unless a named party gave notice to re-activate the proceedings, in which event the claimants, within 21 days thereafter, were to apply for summary judgment. By an application notice dated 30 November 2018 the claimants sought summary judgment on their claim, pursuant to CPR r 24.2, and a final injunction. By a judgment dated 20 September 2019 Nicklin J [2019] EWHC 2459 (QB); [2002] 1 WLR 417 refused the application for summary judgment and a final

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injunction and discharged the interim injunction, staying part of the order for discharge.

By an appellant's notice filed on 18 October 2019 and with permission granted by Nicklin J the claimants appealed on the following grounds. (1) The judge had erred in refusing to amend the order of 29 November 2017, pursuant to CPR r 40.12 or the court's inherent jurisdiction, to provide that service by e-mail was permissible alternative service under CPR r 6.15; alternatively the judge had erred in failing to consider, alternatively in refusing to order, that the steps taken by the claimants in compliance with the undertaking given to Teare J on 29 November 2017 constituted alternative good service under CPR r 6.15(2); alternatively the judge had adopted a procedurally unfair practice in refusing to consider an application to dispense with service of the claim form under CPR r 6.16, alternatively had erred in law in refusing to exercise that power of dispensation. (2) The judge had erred in law in holding that the claimants' proposed reformulation of the description of the first defendants was impermissible. (3) In determining whether summary judgment should be granted for a final prohibitory quia timet injunction against the first defendants (as described in the proposed reformulation of persons unknown) the judge had erred in law in the approach he took. In particular, the judge had erred in concluding that the proper approach was to focus only on the individual evidence of wrongdoing in relation to each identified individual protestor (whether or not that individual was formally joined as a party); and/or had erred in concluding that the claimants were bound to differentiate, for the purposes of the description of the first defendants, between those individuals for whom there was evidence of prior wrongdoing (whether of specific acts or more generally) and those for whom there was not; and/or had erred in concluding that evidence of wrongdoing of some individuals within the potential class of the first defendants could not form the basis for a case for injunctive relief against the class as a whole. (4) The judge had erred in his approach to his assessment of the evidence before him, reaching conclusions which he was not permitted to reach.

The facts are stated in the judgment of the court, post, paras 5–8.

Ranjit Bhose QC and *Michael Buckpitt* (instructed by *Lewis Silkin llp*) for the claimants.

Sarah Wilkinson as advocate to the court.

The defendants did not appear and were not represented.

The court took time for consideration.

5 March 2020. **SIR TERENCE ETHERTON MR, DAVID RICHARDS** and **COULSON LJJ** delivered the following judgment of the court.

1 This appeal concerns the way in which, and the extent to which, civil proceedings for injunctive relief against "persons unknown" can be used to restrict public protests.

2 The first appellant, Canada Goose UK Retail Ltd ("Canada Goose"), is the United Kingdom trading arm of Canada Goose, an international retail clothing company which sells products, mostly coats, which contain animal fur and down. In November 2017 it opened a store at 244 Regent Street in

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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

D

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, 300, and 100, respectively) had a serious impact on the operation of the H 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

9 Canada Goose commenced these proceedings against the Unknown Persons respondents by a claim form issued on 29 November 2017. As mentioned above, they were described in the heading of the claim form and the particulars of claim as: "Persons unknown who are protestors against the manufacture and sale of clothing made of or containing animal products and against the sale of such clothing at Canada Goose, 244 Regent Street, London W1B 3BR."

10 They are described in paragraph 6 of the particulars of claim as including "all persons who have since 5 November 2017 protested at the store in furtherance of the Campaign and/or who intend to further the Campaign". The "Campaign" was described in the particulars of claim as a campaign against the sale of animal products by Canada Goose, and included seeking to persuade members of the public to boycott the store until Canada Goose ceased the lawful activity of selling animal products.

11 The particulars of claim stated that an injunction was claimed pursuant to the common law torts of trespass, watching and besetting, public and private nuisance and conspiracy to injure by unlawful means. The injunction was to restrain the Unknown Persons respondents from:

(1) Assaulting, molesting, or threatening the protected persons (defined in the particulars of claim as including Canada Goose's employees, security personnel working at the store and customers);

(2) Behaving in a threatening and/or intimidating and/or abusive and/or insulting manner towards protected persons;

(3) Doing acts which they know or ought to know cause harassment, fear, alarm, distress and/or intimidation to the protected persons;

(4) Intentionally photographing or filming the protected persons with the purpose of identifying them and/or targeting them;

(5) Making in any way whatsoever any abusive or threatening communication to the protected persons;

(6) Making or attempting to make repeated communications not in the ordinary course of the first claimant's retail business to or with employees by telephone, e-mail or letter;

(7) Entering the Store;

(8) Blocking or otherwise obstructing the entrances to the Store;

(9) Demonstrating at the Stores within the inner exclusion zone;

(10) Demonstrating at the Stores within the outer exclusion zone save that no more than three protestors may at any one time demonstrate and hand out leaflets therein;

(11) Using at any time a loudhailer within the inner exclusion zone and outer exclusion zone or otherwise within 50 metres of the building line of the Store.

12 On the same day as the claim form was issued Canada Goose applied to Teare J, without notice, for an interim injunction. He granted an interim injunction restraining the Unknown Persons respondents from doing the following:

> "(1) Assaulting, molesting, or threatening the protected persons [defined as including Canada Goose's employees, security personnel working at the store, customers and any other person visiting or seeking to visit the store];

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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;

"(8) Painting, spraying and/or affixing things to the outside of the
C Store;

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

"(10) Demonstrating at the Store within the inner exclusion zone;

"(11) Demonstrating at the Store within the outer exclusion zone A, save that no more than three protestors may at any one time demonstrate and hand out leaflets within the outer exclusion zone A (but not within
D the inner exclusion zone) provided that no obstruction occurs other than that which is implicit in handing out leaflets;

"(12) Demonstrating at the Store within the outer exclusion zone B [as defined in the order] save that no more than five protestors may at any one time demonstrate and hand out leaflets within outer exclusion zone B (but not within the inner exclusion zone) provided that no obstruction occurs
E other than that which is implicit in handing out leaflets;

"(13) Using at any time a loudhailer [as defined] within the inner exclusion zone and outer exclusion zones or otherwise within ten metres of the building line of the Store;

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

F **13** A plan attached to the order showed the inner and outer exclusion zones. Essentially those zones (with a combined width of 7·5 metres) covered roughly a 180-degree radius around the entrance to the store. The inner exclusion zone extended out from the store front for 2·5 metres. The outer exclusion zone extended a further five metres outwards. The outer exclusion zone was divided into zone A (a section of pavement on Regent
G Street) and zone B (a section of pavement in front of the store entrance and part of the carriageway on Regent Street extending to the pavement and the entire carriageway in Little Argyle Street). For all practical purposes, the combined exclusion zones covered the entire pavement outside the store on Regent Street and the pavement and entire carriageway of Little Argyle Street outside the entrance to the store.

H **14** The order permitted the claimant to serve the order on

"any person demonstrating at or in the vicinity of the store by handing or attempting to hand a copy of the same to such person and the order shall be deemed served whether or not such person has accepted a copy of this order."

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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 that it no longer pursued summary judgment against PETA.

D **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. Moreover, both in the interim injunctions and in its proposed final form, the H injunction was capable of affecting persons who might not carry out any unlawful activity as some of the prohibited acts would not be or might not be unlawful.

30 He was critical of the failure of Canada Goose to join any individual protestors, bearing in mind that Canada Goose could have named 37

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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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this slip rule enables an order to be amended to give effect to the intention of the court by correcting an accidental slip, but it does not enable a court to have second or additional thoughts: see, for example, *Bristol-Myers Squibb Co v Baker Norton Pharmaceuticals Inc (No 2)* [2001] RPC 45.

44 We do not have a transcript of the hearing before Teare J. From what we were told by Mr Bhose QC, for Canada Goose, it is clear that the order was in the form of the draft presented to Teare J by those acting for Canada Goose and it would appear that the issue of service was not addressed orally at all before him. In the circumstances, it is impossible to say that Teare J ever brought his mind to bear upon the point of alternative service of the claim form and the particulars of claim. The most that can be said is that he intended to make an order in the terms of the draft presented to him. That is what he did. In those circumstances, Nicklin J was fully justified in refusing to exercise his powers under the slip rule. The grounds of appeal refer to the inherent jurisdiction of the court but no argument was addressed to us on behalf of Canada Goose that any inherent jurisdiction of the court differed in any material respect from the principles applicable to CPR r 40.12.

45 Nicklin J was not merely acting within the scope of a proper exercise of discretion in refusing to order pursuant to CPR r 6.15(2) that the steps taken by Canada Goose in compliance with the undertaking of counsel constituted good alternative service; he was, at least so far as the Unknown Persons respondents are concerned, plainly correct in his refusal. The legal context for considering this point is the importance of service of proceedings in the delivery of justice. As Lord Sumption, with whom the other justices of the Supreme Court agreed, said in *Cameron* [2019] 1 WLR 1471, para 14, the general rule is that service of the originating process is the act by which the defendant is subjected to the court's jurisdiction; and (at para 17): "It is a fundamental principle of justice that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard."

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

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

47 Sending the claim form to Surge's e-mail address could not reasonably be expected to have brought the proceedings to the attention of the Unknown Persons respondents, whether as they were originally described in Teare J's order or as they were described in the latest form of the proposed injunction placed before Nicklin J. Counsel were not even able to tell us whether Surge is a legal entity. There was no requirement in Teare J's order that Surge give wider notice of the proceedings to anyone.

48 The same acute problem for Canada Goose applies to its complaint that Nicklin J wrongly failed to exercise his power under CPR r 6.16 to

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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:

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

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

69 Longmore LJ said (at para 40) that the subjective intention of a defendant, which is not necessarily known to the outside world (and in particular the claimants) and is susceptible of change, should not be incorporated into the order. He also criticised the concept of slow walking as too wide and insufficiently defined and said that the concept of "unreasonably" obstructing the highway was not susceptible to advance definition. He further held that it is wrong to build the concept of "without lawful authority or excuse" into an injunction since an ordinary person exercising legitimate right to protest is most unlikely to have any clear idea of what would constitute lawful authority or excuse: if he is not clear about what he can and cannot do, that may well have a chilling effect also. He said (at para 40) that it was unsatisfactory that the injunctions contained no temporal limit.

70 The result of the appeal was that the injunctions made against the third and fifth defendants were discharged and the claims against them dismissed but the injunctions against the first and second defendants were maintained pending remission to the first instance judge to reconsider whether interim relief should be granted in the light of section 12(3) of the HRA and, if so, what temporal limit was appropriate.

71 *Cuadrilla* [2020] 4 WLR 29 was another case concerning injunctions restraining the unlawful actions of fracking protestors. The matter came before the Court of Appeal on appeal from an order committing the three appellants to prison for contempt of court in disobeying an earlier injunction aimed at preventing trespass on the claimants' land, unlawful interference with the claimants' rights of passage to and from their land and unlawful

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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—
B that the terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do. As mentioned above, Longmore LJ expressed the view in *Ineos* that it was wrong to include in the order any reference to the subjective intention of the defendant. In *Cuadrilla* Leggatt LJ held that the references to intention in the terms of the injunction he was considering did not have any special legal meaning or were difficult for a member of the public to understand. Such
C references included, for example, the provision in paragraph 4 of the injunction prohibiting "blocking any part of the bell-mouth at the Site Entrance . . . with a view to slowing down or stopping the traffic" "with the intention of causing inconvenience or delay to the claimants".

80 Leggatt LJ said (at para 65) that he could not accept that there is anything objectionable in principle about including a requirement of
D intention in an injunction. He acknowledged (at para 67) that in *Ineos* Longmore LJ had commented that an injunction should not contain any reference to the defendants' intention as subjective intention is not necessarily known to the outside world and is susceptible to change, and (at para 68) that he had agreed with the judgment of Longmore LJ and shared responsibility for those observations. He pointed out, however, correctly in our view, that those observations were not an essential part of the court's
E reasoning in *Ineos*. He said that he now considered the concern expressed about the reference to the defendants' intention to have been misplaced and (at para 74) that there was no reason in principle why references to intention should not be incorporated into an order or that the inclusion of such references in terms of the injunction in *Cuadrilla* provided a reason not to enforce it by committal.

F 81 We accept what Leggatt LJ has said about the permissibility in principle of referring to the defendant's intention when that is done in non-technical language which a defendant is capable of understanding and the intention is capable of proof without undue complexity. It is better practice, however, to formulate the injunction without reference to intention if the prohibited tortious act can be described in ordinary language without doing so. As Ms Wilkinson helpfully submitted, this can often be done by
G reference to the effect of an action of the defendant rather than the intention with which it was done. So, in the case of paragraph 4 of the injunction in *Cuadrilla*, it would have been possible to describe the prohibited acts as blocking or obstructing which caused or had the effect (rather than, with the intention) of slowing down traffic and causing inconvenience and delay to the claimants and their contractors.

H 82 Building on *Cameron* [2019] 1 WLR 1471 and the *Ineos* requirements, it is now possible to set out the following procedural guidelines applicable to proceedings for interim relief against "persons unknown" in protestor cases like the present one:

(1) The "persons unknown" defendants in the claim form are, by definition, people who have not been identified at the time of the commencement of the

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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 and so do not fall within the description of the "persons unknown" and who F have not been served with the claim form. There are some very limited circumstances, such as in *Venables v News Group Newspapers Ltd* [2001] Fam 430, in which a final injunction may be granted against the whole world. Protestor actions, like the present proceedings, do not fall within that exceptional category. The usual principle, which applies in the present case, is that a final injunction operates only between the parties to the G proceedings: *Attorney General v Times Newspapers Ltd (No 3)* [1992] 1 AC 191, 224. That is consistent with the fundamental principle in *Cameron* [2019] 1 WLR 1471, para 17 that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard.

90 In Canada Goose's written skeleton argument for the appeal, it was submitted that *Vastint Leeds BV v Persons Unknown* [2019] 4 WLR 2 H (Marcus Smith J) is authority to the contrary. Leaving aside that *Vastint* is a first instance decision, in which only the claimant was represented and which is not binding on us, that case was decided before, and so took no account of, the Court of Appeal's decision in *Ineos* [2019] 4 WLR 100 and the decision of the Supreme Court in *Cameron*. Furthermore, there was no

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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

City of London Corpn *v* Samede and others

[2012] EWCA Civ 160

2012 Feb 13; 22

Lord Neuberger of Abbotsbury MR, Stanley Burnton, McFarlane LJJ

Human rights — Freedom of expression — Freedom of assembly — Interference with — Demonstrators setting up camp in St Paul's Cathedral churchyard obstructing highway and in breach of planning control — Majority of occupied land owned by local authority having planning control over portion of occupied land owned by Church — Judge granting local authority's claims for possession and injunction requiring removal of all tents — Whether unjust interference with demonstrators' Convention rights — Human Rights Act 1998 (c 42), Sch 1, Pt I, arts 10, 11

In the middle of October 2011 the defendants and others set up in the churchyard of St Paul's Cathedral a protest camp consisting of a large number of tents, which were used for overnight accommodation, meetings and other activities and services. Many of the occupants of the tents designated their organisation the "Occupy Movement" or "Occupy London" whose concerns were mainly centred on the perceived crisis of capitalism and the banking industry and the inability of democratic institutions to deal with many of the world's most pressing problems. The greater part of the occupied land was open land owned by and under the responsibility of the claimant local authority as planning or highway authority, while a portion was owned by the Church over which the claimant had planning control. The local authority brought proceedings for possession of the occupied land, for an injunction requiring the defendants to remove the tents from all the occupied land and not to erect tents on that land thereafter, and for declarations that the claimant was entitled to remove the tents. The judge found that the defendants had no defence to the claim for possession, that the camp was a clear and unreasonable obstruction of the highway and a breach of planning control, and concluded that the defendants' rights of freedom of expression and freedom of assembly under, respectively, articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms[1] were undoubtedly engaged, but that the factors for granting the claimant relief easily outweighed the factors against. The judge considered that the claimant had convincingly established a pressing social need not to permit the camp to remain, that the orders sought represented the least intrusive way to meet that need, and that it would not be disproportionate to grant the relief claimed, and he granted the orders in the claimant's favour.

On the defendants' applications for permission to appeal—

Held, dismissing the applications, that the case raised the question as to the limits to the right of lawful assembly and protest on the highway; that the answer was inevitably fact-sensitive, and would normally depend on a number of factors

[1] 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 . . . 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 . . ."

Sch 1, Pt I, art 11: "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others . . . 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 . . . 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 . . ."

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A including but 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 occupied the land, and the extent of the actual interference the protest caused to the rights of others as well as the property rights of the owners of the land and the rights of any members of the public; that articles 10 and 11 of the Convention were undoubtedly engaged in that the defendants were entitled to invoke their rights under those provisions in relation B to the maintenance of the camp; that it could be appropriate and fair to take into account the general character of the views whose expression the Convention was being invoked to protect, but that could not be a factor which trumped all others and was unlikely to be particularly weighty; that the judge had taken into account the fact the defendants were expressing strongly held views on very important issues but further analysis of those views and issues would have been unhelpful and inappropriate; that by the time the judge came to give his judgment the camp had C been for three months trespassing in the churchyard, substantially interfering with the public right of way and the rights of those who wished to worship in the cathedral, in breach not just of the owner's property rights and of planning control but significantly causing other problems connected with health, nuisance and the like and some damage to local businesses, and was likely to continue, so that it was very difficult to see how the defendants' Convention rights could ever prevail against the will and rights of the landowner and the rights of others by their continuous and exclusive occupation of public land; that, furthermore, whether a court should make D orders which were less intrusive would require a defendant to propose a specific arrangement which would be workable in practice and would not give rise to such breaches of statutory provisions and the rights of others as in the present case; that no such proposal had been put forward nor realistically could any have been; that, therefore, there was no basis for saying that any of the defendants' criticisms, even taken together, could persuade an appellate court that the judge's decision was wrong; and that, accordingly, the judge had been entitled to reach the conclusion that E he had (post, paras 23, 28, 38, 39, 41, 44, 49, 53–55, 60).

Per curiam. In future cases of this nature, where the facts involve a demonstration which involves not merely occupying public land, but doing so for more than a short period and in a way which not only is in breach of statute but substantially interferes with the rights of others, it should be possible for the hearing to be disposed of at first instance more quickly than in the present case. Little if any court time need be taken up with evidence of the defendant protesters explaining to F the court the views they were seeking to promote. The contents of those views should not be in dispute, and they are very unlikely to be of much significance to the legal issues involved. While it would be wrong to suggest that in every case such evidence should be excluded, a judge should be ready to exercise available case management powers to ensure that hearings in this sort of case did not take up a disproportionate amount of court time (post, paras 62, 63).

Mayor of London (on behalf of the Greater London Authority) v Hall [2011] G 1 WLR 504, CA applied.

Decision of Lindblom J [2012] EWHC 34 (QB) affirmed.

The following cases are referred to in the judgment of the court:

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)

Appleby v United Kingdom (2003) 37 EHRR 783

H *Director of Public Prosecutions v Jones (Margaret)* [1999] 2 AC 240; [1999] 2 WLR 625; [1999] 2 All ER 257, HL(E)

G v Federal Republic of Germany (1989) 60 DR 256

G v Norway (1984) 6 EHRR SE 357, EComHR

Kuznetsov v Russia (Application No 10877/04) (unreported) 23 October 2008, ECtHR

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London (Mayor of) (on behalf of the Greater London Authority) v Hall [2010] EWHC 1613 (QB); [2010] HRLR 723; [2010] EWCA Civ 817; [2011] 1 WLR 504, CA

Lucas v United Kingdom (Application No 39013/02) (unreported) 18 March 2003, ECtHR

Manchester City Council v Pinnock (Secretary of State for Communities and Local Government intervening) [2010] UKSC 45; [2011] PTSR 61; [2011] 2 AC 104; [2010] 3 WLR 1441; [2011] 1 All ER 285, SC(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)

Tabernacle v Secretary of State for Defence [2009] EWCA Civ 23; The Times, 25 February 2009, CA

The following additional cases were cited in argument:

R (British Broadcasting Corpn) v Secretary of State for Justice [2012] EWHC 13 (Admin); [2012] 2 All ER 1069, DC

Steel v United Kingdom (2005) 41 EHRR 403

Sunday Times v United Kingdom (1979) 2 EHRR 245

APPLICATIONS for permission to appeal

On 15 and 16 October 2011 a protest camp was set up in the churchyard of St Paul's Cathedral consisting of a large number of tents. Notice was served by the claimant, the City of London Corpn, on the camp on 16 November requiring the removal of the tents by the next day. The tents not having been removed, on 18 November the claimant issued proceedings against persons unknown for possession of the highway and other open land in the churchyard and injunctions requiring the removal of the tents and other structures in the camp. On 25 November at a directions hearing Wilkie J appointed Tammy Samede as the representative defendant of those taking part in the protest, and George Barda and Daniel Ashman were added as litigants in person as second and third defendants. After a five-day hearing in December 2011, Lindblom J on 18 January 2012 [2012] EWHC 34 (QB) granted orders for possession in favour of the claimant, an injunction and declarations that the claimant was entitled to remove the tents from all areas, and he refused permission to appeal.

The defendants applied for permission to appeal on the ground that the judge's decision was wrong because it was not the least intrusive interference with the defendants' engaged rights that could be justified under articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms as scheduled to the Human Rights Act 1998. On 30 January 2012, the Court of Appeal (Stanley Burnton LJ) directed that all applications for permission to appeal be listed before a three-judge Court of Appeal to include the Master of the Rolls and two Lords Justices of Appeal on 13 February 2012. The fourth and fifth defendants, Paul Randle-Jolliffe and Stephen Moore were added as parties before the hearing of the permission to appeal.

The facts are stated in the judgment of the court.

John Cooper QC and *Michael Paget* (instructed by *Kaim Todner Solicitors Ltd*) acting pro bono for the first defendant.

Felicity Williams (instructed directly) acting pro bono for the second defendant.

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A The third to fifth defendants, with assistants, in person.

David Forsdick and *Zoe Leventhal* (instructed by *Comptroller and City Solicitor, City of London Corpn*) for the claimant local authority.

The court took time for consideration.

22 February 2012. **LORD NEUBERGER OF ABBOTSBURY MR** B handed down the following judgment of the court to which all members had contributed.

1 On 18 January 2012 Lindblom J handed down a very full and careful judgment, following a five-day hearing the previous month. Having heard consequential arguments, he then made orders in favour of the Mayor Commonalty and Citizens of the City of London ("the City"), against three C named defendants Tammy Samede (who had been appointed by the court as a representative defendant), George Barda, and Daniel Ashman and "persons unknown". If implemented, the effect of these orders would be to put an end to the camp which has been located in the St Paul's Cathedral churchyard in London since 15 October 2011, and has received much publicity.

D *The factual background*

2 The camp was described by the judge in his judgment [2012] EWHC 34 (QB) at [4] in these terms:

> "It consists of a large number of tents, between 150 and 200 at the time of the hearing, many of them used by protestors, either regularly or from E time to time, as overnight accommodation, and several larger tents used for other activities and services including the holding of meetings and the provision of a 'university' (called 'Tent City University'), a library, a first aid facility, a place for women and children, a place where food and drink are served, and a 'welfare' facility. The size and extent of the camp has varied over time. Shortly before the hearing its footprint receded in some F places. At an earlier stage some adjustments had been made to it in an effort to keep fire lanes open."

3 Many of the occupiers of the camp have designated their organisation the "Occupy Movement". The concerns of the Occupy Movement were summarised by the judge, at para 155 as:

> "largely [centring] on, but . . . far from being confined to, the G crisis—or perceived crisis—of capitalism, and of the banking industry, and the inability— or perceived inability—of traditional democratic institutions to cope with many of the world's most pressing problems. They encompass climate change, social and economic injustice, the iniquitous use of tax havens, the culpability of western governments in a number of conflicts, and many more issues besides. All of these topics, H clearly, are of very great political importance."

4 The concerns of those in the camp are well summarised in that passage, and they were well articulated before us. In particular, Mr Barda, Mr Ashman and the Mr Randle-Jolliffe, in powerful, eloquent and concise submissions, advanced the causes which the Occupy Movement and the

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camp stand for, with a passion which was all the more impressive given the restraint and humour with which their arguments were presented.

5 The majority of the area occupied by the camp consists of a piece of highway land owned by the City, but the occupied area also includes other open land which is owned by the Church. The City's claim was for orders for (i) possession of the highway land which it owns and which is occupied by the camp, (ii) an injunction requiring the removal of the tents from that land, and restraining the erection of tents thereon in the future, (iii) an injunction requiring the removal of the tents from the land owned by the Church, and restraining the erection of tents thereon in the future, (iv) possession of adjoining highway land and open space land owned by the City and onto which it was feared that the camp would move, and (v) an injunction restraining the erection of tents on the adjoining land in the future. Apart from its right to possession of the land referred to in (i) and (iv), the City principally relied on its power to seek injunctive relief under section 130(5) of the Highways Act 1980, as the camp obstructs the highway, and under section 187B of the Town and Country Planning Act 1990, as the camp breaches planning control and an enforcement notice has been served.

The judgment of Lindblom J

6 At [2012] EWHC 34 (QB) at [1] the judge identified the general issue which these proceedings involved as being "the limits to the right of lawful assembly and protest on the highway", which, as he said, "[in] a democratic society [is] a question of fundamental importance." More specifically, the judge said that these proceedings raised the question whether the limits on the rights of assembly and protest:

> "extend to the indefinite occupation of highway land by an encampment of protestors who say this form of protest is essential to the exercise of their rights under articles 10 and 11 of the . . . Convention on Human Rights, when the land they have chosen to occupy is in a prominent place in the heart of the metropolis, beside a cathedral of national and international importance, which is visited each year by many thousands of people and where many thousands more come to exercise their right, under article 9 of the Convention, to worship as they choose?"

7 At para 13, the judge correctly identified the three main issues for him as being:

> "first, whether the City has established that it is entitled to possession of [the areas it owns], so that, subject to the court's consideration of the interference with the defendants' rights under articles 10 and 11 of the Convention, an order for possession ought to be granted; second, whether, again subject to the court's consideration of the interference with the defendants' rights, the City should succeed in its claim . . . and third, whether the interference with the defendants' rights entailed in granting relief would be lawful, necessary and proportionate."

8 In the following two paragraphs, he recorded that the City did not dispute that the defendants' rights under articles 10 (freedom of expression)

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A and 11 (freedom of assembly) of the Convention were engaged. He then stated that the City contended that the orders it was seeking did not prevent the defendants from exercising those rights, and that they would amount to a "justified interference" with those rights. He also mentioned that the City's case, in summary terms, was that the defendants could not rely on articles 10 and 11 of the Convention to justify occupying land as "a semi-
B permanent campsite", particularly bearing in mind that such occupation was in breach of a number of statutory provisions, infringed the property rights of the City and the Church, and also impeded other members of the public from enjoying their rights, most notably the right of access to the cathedral to worship, which engages article 9 of the Convention (freedom of religion), and obstructed the use of the highway by members of the public generally.

C **9** The judge then explained, at paras 17–100, in some detail the evidence which he had heard from witnesses called on behalf of the City and on behalf of the defendants, and some of the distinguished people who had provided written evidence in support of the views supported and propagated by the Occupy Movement. In the next 13 paragraphs he summarised the arguments which had been advanced to him. At paras 114–152, the judge then discussed the various issues which had been raised under three
D headings, which reflected the three main issues which he had identified.

10 Under "Possession", at paras 114–126, the judge concluded that the defendants were in occupation of the areas of land owned by the City and had no domestic law defence to the City's possession claim. Under the heading "Injunctive and declaratory relief", in the next 17 paragraphs (paras 127–143), the judge concluded that the camp was "undoubtedly" an
E "unreasonable obstruction of the highway" and a breach of planning control, both of which the City had a duty to enforce, and which applied to the area of land owned by the Church.

11 In those circumstances, as the judge said, the only basis upon which the defendants could hope to succeed in resisting the relief sought by the City was under the third heading "Human rights", which he dealt with at paras 144–164. We shall describe his analysis in those paragraphs in a little
F more detail.

12 He began by discussing the arguments raised by the defendants. They relied on "the fundamental importance in a democratic society of the rights under articles 10 and 11 of the Convention" (para 154), which was, as the judge accepted, a good point—as far as it went. The defendants also relied on the fundamental importance of the concerns which motivated
G them. As to that the judge said, at para 155: "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." However, he accepted that he should:

> "give due weight not only to the defendants' conviction that their protest is profoundly important but also to their belief that it is essential
H to the protest and to its success that it is conducted in the manner and form they have chosen for it—by a protest camp on the land they have occupied in St Paul's Churchyard."

13 It was next contended by the defendants, at para 156, that "some inconvenience to other members of the public would be likely to result even

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from a lawful protest on this part of the highway." The judge said that, in his view: A

> "the harm caused by this protest camp, in this place, is materially greater than the harm that would be likely if the protest were conducted by the same protestors, assembling every day but without the tents and all the other impedimenta they have brought to the land."

B

He went on to reject the "suggestion that the City's main concerns could be met by an injunction stipulating that no tents were to be occupied between certain hours" on the ground that it was "wholly unconvincing". He doubted that it could be enforced. Anyway, he said, "it would not serve to remove the obstruction of the highway" or "overcome the problems attributable to the presence of the camp, including the damage being done to the work of, and worship in, the cathedral, to the amenity of the cathedral's surroundings, and to local businesses". C

14 The defendants also relied on the fact that they had been prepared to negotiate after the City resorted to litigation. The judge was unimpressed with that, not least because the defendants and their representatives had not come up with any clear proposals. Finally, the defendants submitted (para 158) that "many of the protestors have done everything they can to limit the impacts of the protest camp." However, the judge said, even accepting that was true, "the defendants have not been able to prevent the camp causing substantial harm", namely obstruction of the highway, nuisance by noise, and "[disruption to] the exercise by others of their Convention rights, including the article 9 rights of those who wish to worship in St Paul's Cathedral". D

15 The judge then turned to the five arguments raised by the City which he described as being, in his view, "very strong" (para 159). First, he thought he should give (para 160): E

> "considerable weight to the fact that Parliament has legislated to give highway authorities powers and duties to protect public rights over the highway land vested in them, and local planning authorities powers to enforce planning control in the public interest." F

He then referred to section 2 of the Local Government Act 2000, section 137 of the Highways Act 1980, section 179 of the Town and Country Planning Act 1990, section 269 of the Public Health Act 1936, and section 2 of the Ecclesiastical Courts Jurisdiction Act 1860 (23 & 24 Vict c 32). He said that the significant point was that: G

> "the continued presence of the protest camp on this land is plainly at odds with the intent and purpose of [those] statutory schemes . . . The corollary is this. For Parliament's intention in enacting those statutory schemes to be given effect it is necessary for the relief sought by the City to be granted."

16 Secondly, as the judge accepted (para 161), "it would be impossible . . . to reconcile the presence of the protest camp with the lawful function and character of this land as highway". He drew support from what was said in this court in *Mayor of London (on behalf of the Greater London Authority) v Hall* [2011] 1 WLR 504, para 48. H

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A **17** Thirdly, the judge (para 162) was "convinced that the effects of [the] protest camp . . . have been such as to interfere seriously with the rights, under article 9 of the Convention, of those who desire to worship in the cathedral". He explained that:

> "During the camp's presence, and, in my view, largely if not totally as a result of its presence, there has been a drop of about two fifths in the
B numbers of those worshipping in the cathedral. About the same fraction has been lost in the number of visitors, an important source of funds for the upkeep of the building and for its ministry".

He also took into account "the effects of the presence of the protest camp on the work and morale of the cathedral staff as a significant factor in the balancing exercise", referring to the fact that "noise from the camp has been
C a persistent problem", that "members of the cathedral's staff have been verbally abused", and that "[graffiti have] been scrawled on the Chapter House and on the cathedral itself".

18 Fourthly, at para 163, the judge explained that the camp caused other problems. By interfering with the public right of way, and reducing pedestrian traffic, the camp had, he thought, "damaged the trade of local
D businesses". Also, as the judge found, it had resulted in a "loss of open space that the public can get to", "has strained the local drainage system beyond capacity", "has caused nuisance by the generation of noise and smell", and "has made a material change in the use of the land for which planning permission would not be granted". The judge also thought that, albeit perhaps only indirectly, the camp had resulted in "an increase in crime and
E disorder around the cathedral". Fifthly, the judge said, at para 164, "the length of time for which the camp has been present is relevant", citing the *Hall* case, at para 49.

19 The judge therefore concluded, at paras 165–166, that "when the balance is struck, the factors for granting relief in this case easily outweigh the factors against", that the City had "undoubtedly" "convincingly established a pressing social need not to permit the defendants' protest camp
F to remain in St Paul's Churchyard, and to prevent it being located elsewhere on any of the land to which these proceedings relate", and that it would "undoubtedly" not be "disproportionate to grant the relief the City has claimed". He was clear that the orders the City was seeking represented "the least intrusive way in which to meet the pressing social need, and strikes a fair balance between the needs of the community and the individuals
G concerned so as not to impose an excessive burden on them", and that to withhold relief would simply be "wrong".

These applications

20 After hearing argument as to the form of order which he should make, Lindblom J concluded that he should make: (1) orders for possession
H in respect of the two areas of land owned by the City at St Paul's Churchyard and occupied by the defendants; (2) an injunction requiring the defendants (a) to remove forthwith all tents in the area currently occupied by the camp, (b) not to impede the City's agents from removing such tents, and (c) not to erect tents on the other areas around the cathedral the subject of the

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proceedings; and (3) declarations that the City could remove tents from all those areas.

21 Lindblom J refused permission to appeal, but the three named defendants, Ms Samede, Mr Barda, and Mr Ashman, then applied for permission to appeal from this court. Their written applications came before Stanley Burnton LJ, who ordered that the applications be heard in court with the appeals to follow if permission to appeal is granted.

22 The hearing of those applications took place on 13 February and lasted a full day. Ms Samede and Mr Barda were respectively represented by Mr Cooper QC and Mr Paget and by Ms Williams (who were acting pro bono, and should be commended for that), and Mr Ashman represented himself. Many other members of the Occupy Movement attended (and unfortunately the court room was not big enough to accommodate all of them). Two of them, Mr Randle-Jolliffe and Mr Moore, made submissions in support of an appeal, and they were added as parties.

23 Having heard the arguments we decided to reserve judgment on the question of whether to allow the projected appeals to proceed, and if so, on what points. We have decided that permission to appeal should be refused, for the reasons which follow.

Are articles 10 and 11 engaged?

24 Stanley Burnton LJ raised the question whether it was clear that the City was right to concede that articles 10 and 11 of the Convention were engaged. The European Court of Human Rights ("the Strasbourg court") jurisprudence establishes that it was. In that connection it is worth referring to *Kuznetsov v Russia* (Application No 10877/04) (unreported) 23 October 2008 where the Strasbourg court considered the case of an applicant who took part in a small demonstration which, for a short time, obstructed access to a public court building. The court, at para 35,

> "[reiterated] at the outset that the right to freedom of assembly covers both private meetings and meetings on public thoroughfares, as well as static meetings and public processions; this right can be exercised both by individual participants and by those organising the assembly . . ."

25 As for article 10, it is clear from the Strasbourg court's decision in *Lucas v United Kingdom* (Application No 39013/02) (unreported) 18 March 2003, "that protests can constitute expressions of opinion within the meaning of article 10 and that the arrest and detention of protesters can constitute interference with the right to freedom of expression".

26 In *Appleby v United Kingdom* (2003) 37 EHRR 783 the Strasbourg court held that article 10 and article 11 raised the same issues in a case where a group of people were banned from seeking to collect signatures for a petition from shoppers in a privately owned shopping centre. It was held that there was no infringement of the Convention because the ban did not have "the effect of preventing any effective exercise of freedom of expression or [of destroying] the essence of the right", not least because they could carry out their activities elsewhere: paras 47 and 48.

27 Domestic law is consistent with this view. 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

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positive duty to take steps to ensure that lawful public demonstrations can take place, and the same view was taken by this court in the *Hall* case [2011] 1 WLR 504. *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23; The Times, 25 February 2009 is also worth mentioning. In that case bylaws preventing the maintenance of the long-standing, one weekend a month, Aldermaston Women's Peace Camp, protesting on government owned open land against nuclear weapons, were held to breach the protesters' Convention rights. As Laws LJ said, at para 37: "the camp has borne consistent, long-standing, and peaceful witness to the convictions of the women who have belonged to it', and, to the protesters, " 'the manner and form' *is* the protest itself".

28 It is clear from the judge's findings, and from what was said by the defendants who addressed us, that the Occupy Movement seeks to propagate the views summarised by Lindblom J in the passage, set out in para 3 above, to educate members of the public about those views, and to engage in dialogue with others about those views. It is also clear that this aim is sought to be achieved through the activities, leaflets, books, newspapers and speeches at the camp, reinforced by its attendant publicity, which is partly attributable to its large size and prominent location, not merely in the City of London (the heart of the financial world), but in the churchyard of St Paul's Cathedral. In those circumstances it seems clear that articles 10 and 11 of the Convention are engaged—i e the defendants can invoke their rights under those provisions of the Convention in relation to the maintenance of the camp. (During the hearing it was suggested that at least some of the defendants might also be entitled to invoke article 9; it is unnecessary to decide the point, as it can take matters no further in the same way as article 11 took matters no further over article 10 in the *Appleby* case 37 EHRR 783, para 52.)

The argument that the judge should have dismissed the City's claim

29 With the exception of Ms Samede, the defendants making the present applications are seeking to set aside all the orders made by Lindblom J, on the basis that they contend that the judge ought not to have found for the City at all, but should have dismissed the claim and allowed the camp to continue in place. It is convenient to deal first with one or two rather esoteric arguments raised by Mr Randle-Jolliffe.

30 First, he challenged the judgment on the ground that it did not apply to him, as a "Magna Carta heir". But that is a concept unknown to the law. He also says that his "Magna Carta rights" would be breached by execution of the orders. But only chapters 1, 9 and 29 of Magna Carta (1297 version) survive. Chapter 29, with its requirement that the state proceeds according to the law, and its prohibition on the selling or delaying of justice, is seen by many as the historical foundation for the rule of law in England, but it has no bearing on the arguments in this case. Somewhat ironically, the other two chapters concern the rights of the Church and the City of London, and cannot help the defendants. Mr Randle-Jolliffe also invokes "constitutional and superior law issues" which, he alleges, prevail over statutory, common law, and human rights law. Again that is simply wrong—at least in a court of law.

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31 Another ground he raised was the contention that the City had no locus standi to bring the proceedings "as the current mayoral position has been previously usurped by the guilds and aldermen in contravention of the City of London's 1215 Royal Charter". We do not understand that point, not least because both the Lord Mayor and the aldermen and guilds (through the Commonalty and Citizens) are included in the claimants.

32 Three arguments raised by Ms Williams on behalf of Mr Barda, and supported by Mr Ashman, can also be taken shortly. First, it was said that the City's arguments based on the breach of the various statutes identified in the judgment, and the public rights and the City's powers and duties under the statutes referred to, are not of themselves enough to render the judge's decision proportionate. Even if that is right (and we rather doubt whether it is) these concerns were only the subject of the first of the five reasons which, when combined, persuaded the judge to reach the conclusion that he reached.

33 Secondly, it was said that the judge was wrong to take into account the increase in crime: [2012] EWHC 34 (QB) at [163]. It is true that the evidence showed that the police considered that those responsible for the camp had done their best to minimise the risk of criminal activity, but there was evidence that crime had increased in the area, so there was evidence which justified the judge's view. But the point can be said to cut both ways: there is no guarantee that the admirable care to ensure that criminal activity is kept to a minimum would continue. Anyway, it is fanciful to suggest that the judge would not have reached the conclusion that he did if he had thought that the evidence or arguments did not satisfy him that he should take this factor into account.

34 Thirdly, it was said that the judge ought not to have found as he did, at para 162, that there was any interference with the rights of those who wished to worship at St Paul's Cathedral, given that (a) no worshipper gave evidence, and (b) the Occupy Movement stands for the same values as the Church of England. As to (a), the judge was plainly entitled to reach the conclusion that he arrived at. He had figures which showed a very significant reduction in worshippers at, and visitors to, the cathedral since the camp had arrived, and evidence of opinion from the cathedral registrar that the reduction was caused by the camp. While there were some other possible explanations for the reduction, the judge was, to put it at its lowest, entitled to reach the view that he did. As to point (b), it is true that some prominent members of the Church of England have expressed support for the camp, but that is no answer to the judge's concern about the interference by the camp with the access of people who wish to worship in the cathedral.

35 Mr Ashman had two further criticisms of the judgment. First, he complained that the judge wrongly referred to the camp as a "protest" camp. We accept that the aims of Occupy London are not by any means limited to protesting in the familiar sense of, say, a protest march. The aims of the movement, as implemented in the camp, include education, heightening awareness and fostering debate. However, the judge was plainly aware of this, as the passages in his judgment quoted in paras 2 and 3 above demonstrate. Further those activities do include protesting; indeed they may be said to be based on protesting, in the sense that the Occupy Movement's raison d'être is, at least to a substantial extent, based on its opposition to

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A many of the policies, especially economic, financial, and environmental policies, adopted by the United Kingdom Government.

36 Secondly, it is said that the defendants intend to strike the camp, possibly by the end of this month. It is by no means clear that this would happen voluntarily. Indeed, the impression given by Mr Ashman, when he was asked about this, was that the camp would only be struck when the
B Occupy Movement believed that it had had a definite effect in the form of some sort of change of government policy. All in all it appears improbable that the camp will cease voluntarily within the next few months. If the judge was otherwise right to make the orders which were made, it would have required a very clear commitment by the defendants to vacate the churchyard in the very near future before there could even have been any possibility of justifying the judge not making the orders.

C **37** The broadest argument in support of the contention that the orders made by Lindblom J should simply be set aside is rather more fundamental. That argument is that, assuming the correctness of all the findings of fact made, and the relevant factors identified, by the judge in his judgment, it was an unjustified interference with the defendants' Convention rights to make any order which closed down the camp. This argument amounts to saying
D that articles 10 and 11 effectively mandated the judge to hold that the camp should be allowed to continue in its current form, presumably for the foreseeable future. The basis of this argument is that, on the facts of this case, there was an insufficiently "pressing social need in a democratic society" to justify the orders which the judge made, bearing in mind the defendants' article 10 and 11 rights.

E **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 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 of Lairg
F LC in *Director of Public Prosecutions v Margaret Jones* [1999] 2 AC 240, 259. However, as the judge also went on to say, at para 145:

> "To camp on the highway as a means of protest was not held lawful in *Director of Public Prosecutions 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 LC at p 259A–G, Lord Slynn
G of Hadley at p 265C–G, Lord Hope of Craighead at p 277D–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
H 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

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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.

42 In *Appleby v United Kingdom* 37 EHRR 783 the Strasbourg court accepted that the applicants' article 10 and 11 rights were engaged, but held, at para 43, that there was no infringement of those rights because "[regard] must also be had to the property rights of the owner of the [privately owned] shopping centre", and there were other places where the applicants could exercise their article 10 and 11 rights. While St Paul's Churchyard is a particularly attractive location for the movement, in view of its prominence

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A in the City of London, the judge's orders clearly do not prevent the movement protesting anywhere other than the churchyard. And there are many "rights" with which the camp interferes adversely.

43 The level of public disruption which a protest on public land may legitimately cause before interference with article 10 and 11 rights is justified was discussed by the Strasbourg court in the *Kuznetsov* case, para 44. After B explaining that the demonstration in that case had lasted about half an hour, and had blocked the public passage giving access to a court house, the court emphasised that a degree of tolerance is required from the state, and then said this:

> "The court considers the following elements important for the assessment of this situation. Firstly, it is undisputed that there were no C complaints by anyone, whether individual visitors, judges or court employees, about the alleged obstruction of entry to the court house by the picket participants. Secondly, even assuming that the presence of several individuals on top of the staircase did restrict access to the entrance door, it is creditable that the applicant diligently complied with the officials' request and without further argument descended the stairs onto the pavement. Thirdly, it is notable that the alleged hindrance was D of an extremely short duration. 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 E substance . . . Accordingly, the court is not satisfied that the alleged obstruction of passage, especially in the circumstances where the applicant gave evidence of his flexibility and readiness to cooperate with the authorities, was a relevant and sufficient reason for the interference."

44 In that case, the demonstration amounted to a trespass and blocked a public right of way, but it not only lasted only 30 minutes, but it appeared to F interfere with no public rights in practice, and ended as soon as the police requested it to end. In this case, by the time that Lindblom J came to give his judgment, the camp was, and had been for three months, (i) trespassing in St Paul's Churchyard, (ii) substantially interfering with the public right of way and the rights of those who wished to worship in the cathedral, (iii) in breach of planning control, and (iv) causing strain on public health facilities, and G some damage to local businesses. In those circumstances, far from it not being open to the judge to make the orders that he made, it seems to us that there is a very powerful case indeed for saying that, if he had refused to make any order in the City's favour, this court would have reversed him.

45 The facts of this case are a long way from those in the *Tabernacle* case [2009] EWCA Civ 23 where (i) members of the public (and therefore, at least prima facie the protesters) had the right to pitch tents where the protest H was camped, (ii) the protest camp was in place only one weekend a month, (iii) there was no interference with any third party rights, (iv) the very object of their protest was on adjoining land owned by the same public landowner, and (v) the protest had continued for 20 years with no complaint. On the other hand, in one respect the defendants' case is stronger than that of the

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applicants in *Appleby v United Kingdom* in that the land involved here is publicly owned; against that, the activities of the applicants in the *Appleby* case, unlike those of the defendants here, did not involve possessing the land concerned, or interfering with its use by other people, or with the enjoyment of other peoples' Convention rights.

46 The contrast between the facts of this case and those in the *Kuznetsov* case is very marked. In that case the period of occupation of the public passage way by the protesters was less than an hour, during which the protesters accommodated the requests of the authorities, there was no evidence of any actual obstruction of anyone else's rights, and there was no suggestion of the breach of any statutory provisions or of any nuisance or public health implications. It is true that the Convention rights of the protesters in the *Kuznetsov* case were held to be infringed, but the way in which the Strasbourg court expressed itself (as quoted at para 43 above) is not helpful to the defendants in this case, to put it mildly. That point is reinforced by the fact, pointed out by the judge [2012] EWHC 34 (QB) at [145], that "complaints brought against evictions in cases where a protest on a far smaller scale than [the camp] has blocked a public road or occupied a public space have been held inadmissible [by the Commission]": see *G v Federal Republic of Germany* (1989) 60 DR 256 and *G v Norway* (1984) 6 EHRR SE 357.

47 It is worth referring in a little more detail to the Commission's decision in *G v Germany*, not least because it was cited with approval by the Strasbourg court in its judgment in *Lucas v United Kingdom* 18 March 2003. *G v Germany* 60 DR 256 concerned a sit-in, which was a protest against nuclear arms and which obstructed a highway, which gave access to a United States army barracks in Germany, for 12 minutes every hour. Consistently with all the relevant authorities, the Commission said that it considered that "the right to freedom of peaceful assembly is secured to everyone who organises or participates in a peaceful demonstration." However, it went on to say:

> "the applicant's conviction for having participated in a sit-in can reasonably be considered as necessary in a democratic society for the prevention of disorder and crime. In this respect, the Commission considers especially that the applicant had not been punished for his participation in the demonstration . . . as such, but for particular behaviour in the course of the demonstration, namely the blocking of a public road, thereby causing more obstruction than would normally arise from the exercise of the right of peaceful assembly. The applicant and the other demonstrators had thereby intended to attract broader public attention to their political opinions concerning nuclear armament. However, balancing the public interest in the prevention of disorder and the interest of the applicant and the other demonstrators in choosing the particular form of a sit-in, the applicant's conviction for the criminal offence of unlawful coercion does not appear disproportionate to the aims pursued."

48 The domestic case with the greatest similarity to this case is the *Hall* case [2011] 1 WLR 504, which was concerned with a protest camp, known as the Democracy Village, on Parliament Square Gardens ("PSG") opposite

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A the Houses of Parliament in London. In that case, at paras 46–47, this court held that it was "to put it at its lowest . . . open to the judge" to conclude 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 PSG and to demonstrate with authorisation but also importantly for the
B protection of health . . . and the prevention of crime"

as well as to enable "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".

49 It would be unhelpful to attempt to determine whether in these proceedings the City had a stronger or weaker case than the Mayor of
C London in the *Hall* case. Indeed, if the court entered into such a debate, it would risk trespassing into the forbidden territory discussed by the judge in the passages referred to in para 12 above. The essential point in the *Hall* case and in this case is that, while the protesters' article 10 and 11 rights are undoubtedly engaged, it is very difficult to see how they could ever prevail against the will of the landowner when they are continuously and
D exclusively occupying public land, breaching not just the owner's property rights and certain statutory provisions, but significantly interfering with the public and Convention rights of others, and causing other problems (connected with health, nuisance, and the like), particularly in circumstances where the occupation has already continued for months, and is likely to continue indefinitely.

50 During the hearing of the applications, reliance was placed on the
E fact that the camp was also used as a place where the homeless could be accommodated. That is a new argument, not raised below. Further, although it may add article 8 of the Convention into the issues, in that it might be said that the orders made below would involve evicting the formerly homeless from their homes, we do not think that the point can possibly assist the defendants. It must be doubtful whether the very
F temporary sleeping facilities at the camp afforded to some homeless people results in their article 8 rights being engaged. Even if it does, the defendants' article 10 and 11 (and possibly article 9) rights are not nearly close enough to balancing the factors in favour of making Lindblom J's orders, for the relatively weak article 8 rights in play to have any possibility of tipping the balance the other way.

G *The argument that the judge should have made more limited orders*

51 In reliance on the principle that, even where it concludes that it is appropriate to make an order which interferes with an individual's Convention rights, the court should ensure that it identifies the least intrusive way of effecting such interference, Mr Cooper contends that the orders made
H by the judge were too extreme. The judge could, and should, he argues, have made an order which was less intrusive of the defendants' Convention rights than the orders which he made.

52 The first problem with that argument is that only one possible alternative to maintaining the camp in its current state was put to the judge, namely that which he discussed in para 13 above. The judge rejected that

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possibility for reasons which appear to us to be plainly good, and which were not challenged by Mr Cooper. However, says Mr Cooper, the judge was none the less under a duty to investigate, effectively it would appear on his own initiative, whether there was an order which he could make which would be less intrusive than those that he did make. Furthermore, says Mr Cooper, in reliance on what Lord Bingham said in *A v Secretary of State for the Home Department* [2005] 2 AC 68, para 44, if the judge did not perform that duty, the Court of Appeal should do so.

53 We are prepared to assume that in some cases a court may have a duty to investigate whether there is a less intrusive order which could be made, even though this would involve the court taking the point itself (although that assumption seems arguably inconsistent with what the Supreme Court said, albeit on a slightly different point in *Manchester City Council v Pinnock (Secretary of State for Communities and Local Government intervening* [2011] PTSR 61; [2011] 2 AC 104, para 61). However, as already mentioned, the point was in fact taken by the defendants, and justifiably rejected by the judge. Assuming that the judge's duty none the less required him to consider the question further, it seems to us that it cannot have required him to do more than to raise the issue with the defendants. If they were then to persuade him to make any less intrusive order than he did, they would have had to come up with a specific arrangement which (i) would be workable in practice, (ii) would not give rise, at least to anything like the same degree, as the breaches of statutory provisions and other peoples' rights, as the current state of affairs, and (iii) would be less intrusive of the defendants' Convention rights as the orders made by the judge.

54 The defendants did not put forward a proposal which satisfied any of those criteria to the judge; nor did they put forward any such proposal to the Court of Appeal. In our view, therefore, it was not open to the judge, and it would not be open to the Court of Appeal to make any such less intrusive order. If we had been presented with a proposal which was said to satisfy the three requirements referred to at the end of the previous paragraph, then we would have had to consider whether it was arguably capable of doing so, and if it had been, we would have considered allowing permission to appeal on the basis that the case would be sent back to Lindblom J.

55 However, it is only right to add that we are very sceptical as to whether any such proposal could realistically have been put forward in this case (which may well explain why it has not happened). It is not merely that the tents appear to be an integral part of the message (to use a compendious word) which the Occupy Movement is seeking to maintain through the medium of the camp, and it is impossible to see how they could remain in St Paul's Churchyard. It is also that we think it unlikely that any scheme which satisfied the second and third of the three requirements would have much prospect of satisfying the first.

Mr Moore's application

56 Mr Moore's position is rather different. Although he occupies one of the tents in the churchyard, he is not a member of the Occupy Movement and is a member of a different, smaller group, albeit one whose principles are similar to those of the movement. His case is simply that, although bound by

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A the orders as one of the "Persons Unknown" or as a result of Ms Samede representing all those in occupation of the churchyard, he should be allowed to appeal as neither he nor his tent was served with the City's claim form.

57 There is telling evidence to support the view that his tent was served, but the issue is sufficiently debatable for this court to accept that it cannot be decided without proper evidence. However, despite that, we do not consider B that Mr Moore has a good argument for setting the orders made aside, at least so far as they relate to him.

58 First, he saw all the papers relating to the proceedings, and clearly must have appreciated that the City was claiming possession of the land occupied by his tent, and was seeking removal of his tent. That is because, as he fairly told us, he is not unfamiliar with legal proceedings, and had advised the Occupy Movement about the City's claims for possession orders and C injunctive relief, for which purpose he was supplied with all the court papers.

59 Secondly, essentially for the reasons contained in this judgment as to why permission to appeal should be refused to the other defendants, it seems to us that he would have no reasonable prospect of persuading the Court of Appeal that he could possibly succeed in defending the proceedings if they D were re-heard as against him.

Concluding remarks

60 For these reasons, we would refuse all the defendants permission to appeal against the orders made by Lindblom J. There is no chance that any of the criticisms raised by each of the defendants, or even all of those E criticisms taken together, could persuade an appellate court that his decision was wrong. Like Griffith-Williams J at first instance in the *Hall* case [2010] HRLR 723, in a very clear and careful judgment Lindblom J reached a conclusion which, to put it at its very lowest, he was plainly entitled to reach. Indeed, as Mr Forsdick put it on behalf of the City, this was, on the judge's findings of fact and analysis of the issues, not a marginal case.

61 The hearing of this case took up five days and resulted in a F conspicuously full and careful judgment. The hearing at first instance in the *Hall* case took eight days and also resulted in a detailed and clear judgment. Each case has now also resulted in a full judgment on the application for permission to appeal. There is now, therefore, guidance available for first instance judges faced with cases of a similar nature; indeed, that is part of the purpose of this judgment.

G **62** Of course, each case turns on its facts, and where Convention rights are engaged, case law indicates that the court must examine the facts under a particularly sharp focus. None the less, in future cases of this nature (where the facts involve a demonstration which involves not merely occupying public land, but doing so for more than a short period and in a way which not only is in breach of statute but substantially interferes with the rights of H others), it should be possible for the hearing to be disposed of at first instance more quickly than in the present case or in the *Hall* case.

63 For instance, in each case a significant amount of court time was taken up by the defendant protesters explaining to the court the views they were seeking to promote. In strict principle, little if any court time need be taken up with such evidence. The contents of those views should not be in

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dispute, and, as we have sought to explain, they are very unlikely to be of much significance to the legal issues involved. Of course, any judge hearing such a case will not want to be thought to be muzzling defendants, who want to explain their passionately held views in order to justify their demonstration (and, at least where the defendants are as they are in this case, it is informative and thought provoking to hear those views). Accordingly, while it would be wrong to suggest that in every case such evidence should be excluded, a judge should be ready to exercise available case management powers to ensure that hearings in this sort of case do not take up a disproportionate amount of court time.

64 We recognise, of course, that it is one thing for the Court of Appeal to make that sort of observation about a hypothetical future claim, and that it can be quite another thing for a trial judge, faced with a difficult actual claim, to comply with it. None the less, with the benefit of the guidance given in two first instance judgments and two judgments of the Court of Appeal (and the Strasbourg and domestic decisions referred to above), it is not unreasonable to hope that future cases of this sort will be capable of being disposed of more expeditiously.

65 Not least for that reason, this judgment, like that in the *Hall* case [2011] 1 WLR 504, may be cited as an authority, notwithstanding that it is a decision refusing permission to appeal.

Applications refused.

ROBERT RAJARATNAM, Barrister

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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

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

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.

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

[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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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 activity on the land on that occasion without committing an offence or trespassing on the land.

"(3) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding level 4 on the standard scale, or both.

"(4) [Repealed.]

"(5) In this section 'land' does not include— (a) the highways and roads excluded from the application of section 61 by paragraph (b) of the definition of land in subsection (9) of that section; or (b) a road within the meaning of the Roads (Northern Ireland) Order 1993."

11 Parliament has revisited section 68 since it was first enacted. Originally the offence only applied to trespass on land in the open air. But the words "in the open air" were repealed by the Anti-Social Behaviour Act 2003 to widen section 68 to cover trespass in buildings.

12 The offence has four ingredients, all of which the prosecution must prove (see *Richardson v Director of Public Prosecutions* [2014] AC 635, para 4):

"(i) the defendant must be a trespasser on the land; (ii) there must be a person or persons lawfully on the land (that is to say not themselves trespassing), who are either engaged in or about to engage in some lawful activity; (iii) the defendant must do an act on the land; (iv) which is intended by him to intimidate all or some of the persons on the land out of that activity, or to obstruct or disrupt it."

13 Accordingly, section 68 is not concerned simply with the protection of a landowner's right to possession of his land. Instead, it only applies where, in addition, a trespasser does an act on the land to deter by intimidation, or to obstruct or disrupt, the carrying on of a lawful activity by one or more persons on the land.

Factual background

14 The 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.

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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16 The Land was an area of farmland. It is adjacent to, and fenced off from, the West Coast line. The Land was bounded in part by hedgerow and so it was necessary to install further fencing to secure the site. The Secretary of State had previously acquired a site immediately adjacent to the Land. HS2 contractors were already on that site and ready to use the Land for storage purposes once it had been cleared.

17 Protesters against the HS2 project had occupied the Land and the 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.

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.

20 The cost of these teams to remove the three protesters over this period of three days was about £195,000.

21 HS2 contractors were unable to go onto the Land until it was completely free of all protesters because it was unsafe to begin any substantial work while they were still present.

The proceedings in the magistrates' court

22 On 18 March 2021 the 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:

(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;

(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 not prevent the imposition of lawful restrictions on the exercise of these F 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 C foundations of such a society. Accordingly, it should not be interpreted 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 eg *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 articles 10 and 11 (eg *Hashman and Harrup v United Kingdom* (1999) 30 G 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 B held that where the prosecution satisfies those statutory tests, that is proof that the making of the direction and the imposition of the condition was proportionate. As in *Bauer*, proof of the ingredients of the offence laid down by Parliament is sufficient to be compatible with the Convention rights. There was no justification for adding a further ingredient that a conviction must be proportionate, or for reading in additional language to that effect, to render the legislation compatible with articles 10 and 11 (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". A

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. B C

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. D

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. E

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. F G

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 H

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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 eg *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 if a court were to be satisfied that proof of the existing ingredients of that E 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.

77 Fourthly, articles 10 and 11 do not bestow any "freedom of forum" to justify trespass on private land or publicly owned land which is not accessible by the public. There is no basis for supposing that section 68 has had the effect of preventing the effective exercise of freedoms of expression and assembly.

78 Fifthly, one of the aims of section 68 is to help preserve public order and prevent breaches of the peace in circumstances where those objectives are put at risk by trespass linked with intimidation or disruption of lawful activities.

79 Sixthly, the Supreme Court in *Richardson* [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.

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.

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.

Ground 3

82 In view of our decision on ground 2, we will give our conclusions on ground 3 briefly.

83 In our judgment the prosecution also succeeds under ground 3.

84 The judge was not given the assistance she might have been with the result that a few important factors were overlooked. She did not address A1P1 and its significance. Articles 10 and 11 were not the only Convention rights involved. A1P1 pulled in the opposite direction to articles 10 and 11. At the heart of A1P1 and section 68 is protection of the owner and occupier of the Land against interference with the right to possession and to make use of that land for lawful activities without disruption or obstruction. Those lawful activities in this case had been authorised by Parliament through the 2017 Act after lengthy consideration of both the merits of the project and objections to it. The legislature has accepted that the HS2 project is in the

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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
B 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.

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 $2\frac{1}{2}$ 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

H **89** We summarise certain key conclusions arising from arguments 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

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A Supreme Court

Director of Public Prosecutions *v* Ziegler and others

[2021] UKSC 23

2021 Jan 12; June 25

Lord Hodge DPSC, Lady Arden, Lord Sales, Lord Hamblen, Lord Stephens JJSC

Human rights — Freedom of expression and assembly — Interference with — Defendants 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 in appeal by way of case stated — Magistrates' Courts Act 1980 (c 43), s 111 — Highways Act 1980 (c 66), s 137 — Human Rights Act 1998 (c 42), Sch 1, Pt I, arts 10, 11

The defendants were charged with obstructing the highway, contrary to section 137 of the Highways Act 1980[1], by causing a road to be closed during a protest against an arms fair that was taking place in 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 action had caused an obstruction on the highway, but contended that they had not acted "without lawful . . . excuse" within the meaning of section 137(1) of the 1980 Act, 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 article 10 or 11.

On the appeal—

Held, allowing the appeal, (1) that it was clear from the jurisprudence of the European Court of Human Rights that intentional action by protesters to disrupt the activities of others, even with an effect that was more than de minimis, did not automatically lead to the conclusion that any interference with such 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 constituting 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 prevented them, or was capable of preventing them, from passing along the highway; and that whether or not it did so would depend on (per Lady Arden, Lord Hamblen and Lord Stephens JJSC) whether

[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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the defendants' convictions for offences under section 137(1) of the 1980 Act 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).

(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 1980 Act 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 apparent on the face of the case 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 statutory defence depended upon an assessment of proportionality, an appeal would lie if there was an error or flaw in the reasoning on the face of the case stated which undermined the cogency of the conclusion on proportionality; that such assessment fell 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; 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.

(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 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' longstanding 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).

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:

A v Secretary of State for the Home Department [2004] UKHL 56; [2005] 2 AC 68; [2005] 2 WLR 87; [2005] 3 All ER 169, HL(E)

Abdul v Director of Public Prosecutions [2011] EWHC 247 (Admin); [2011] HRLR 16, DC

Arrowsmith v Jenkins [1963] 2 QB 561; [1963] 2 WLR 856; [1963] 2 All ER 210, DC

Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223; [1947] 2 All ER 680, CA

B (A Child) (Care Proceedings: Threshold Criteria), In re [2013] UKSC 33; [2013] 1 WLR 1911; [2013] 3 All ER 929, SC(E)

Balçik v Turkey (Application No 25/02) (unreported) 29 November 2007, ECtHR

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A *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; [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)
B *D'Souza v Director of Public Prosecutions* [1992] 1 WLR 1073; [1992] 4 All ER 545, 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, DC
Google LLC v Oracle America Inc (Docket No 1856-96) (unreported) 5 April 2021, US Sup Ct
Gough v Director of Public Prosecutions [2013] EWHC 3267 (Admin); 177 JP 669, DC
C *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 v United Kingdom (Application No 25594/94) (1999) 30 EHRR 241, 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)
D *Kudrevicius v Lithuania* (Application No 3755/05) (2015) 62 EHRR 34, 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 (Liberty intervening) [2018] EWHC 172 (Admin); [2018] 1 WLR 2889; [2018] 2 All ER 911, DC
E *Mayor of London (on behalf of the Greater London Authority) v Hall* [2010] EWCA Civ 817; [2011] 1 WLR 504, CA
Molnar 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 No 29580/12) (unreported) 15 November 2018, ECtHR
F *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 Magistrates' Court [1998] Env LR 9, CA
G *R (Aguilar Quila) v Secretary of State for the Home Department (AIRE Centre intervening)* [2011] UKSC 45; [2012] 1 AC 621; [2011] 3 WLR 836; [2012] 1 All ER 1011, SC(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)
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)
H *R (P) v Liverpool City Magistrates' Court* [2006] EWHC 887 (Admin); [2006] ACD 73
R (R) v Chief Constable of Greater Manchester Police [2018] UKSC 47; [2018] 1 WLR 4079; [2019] 1 All ER 391, SC(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)

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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
Smith and Grady v United Kingdom (Application No 33985/96) (1999) 29 EHRR 493
Steel v United Kingdom (Application No 24838/94) (1998) 28 EHRR 603
Vogt v Germany (Application No 17851/91) (1995) 21 EHRR 205

No additional cases were cited in argument.

APPEAL from the Divisional Court of the Queen's Bench

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 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; [2019] 2 WLR 1451 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 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 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.

Henry Blaxland QC, Blinne Ní Ghrálaigh and *Owen Greenhall* (instructed by *Hodge Jones & Allen LLP*) for the defendants.

John McGuinness QC (instructed by *Crown Prosecution Service, Appeals and Review Unit*) for the prosecution.

The court took time for consideration.

25 June 2021. The following judgments were handed down.

LORD HAMBLEN and **LORD STEPHENS JJSC**

1. Introduction

1 In September 2017, the biennial Defence and Security International ("DSEI") arms fair was held at the Excel Centre in East London. In the days before the opening of the fair equipment and other items were being

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A delivered to the Excel Centre. The appellants were strongly opposed to the arms trade and to the fair and on Tuesday, 5 September 2017 they took action which was intended both to draw attention to what was occurring at the fair and also to disrupt deliveries to the Excel Centre.

2 The action taken consisted of lying down in the middle of one side of the dual carriageway of an approach road leading to the Excel Centre (the B side for traffic heading to it). The appellants attached themselves to two lock boxes with pipes sticking out from either side. Each appellant inserted one arm into a pipe and locked themselves to a bar centred in the middle of one of the boxes.

3 There was a sizeable police presence at the location in anticipation of demonstrations. Police officers approached the appellants almost immediately and went through the "five-stage process" to try and persuade C them to remove themselves voluntarily from the road. When the appellants failed to respond to the process they were arrested. It took, however, approximately 90 minutes to remove them from the road. This was because the boxes were constructed in such a fashion that was intentionally designed to make them hard to disassemble.

4 The appellants were charged with wilful obstruction of a highway D contrary to section 137 of the Highways Act 1980 ("the 1980 Act"). On 1–2 February 2018, they were tried before District Judge Hamilton at Stratford Magistrates' Court. The district judge dismissed the charges, handing down his written judgment on 7 February 2018. Having regard to the appellants' right to freedom of expression under article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") and their right to freedom of peaceful assembly under E article 11 ECHR, the district judge found that "on the specific facts of these particular cases the prosecution failed to prove to the requisite standard that the defendants' limited, targeted and peaceful action, which involved an obstruction of the highway, was unreasonable".

5 The respondent appealed by way of case stated to the Divisional Court, Singh LJ and Farbey J. Following a hearing on 29 November 2019, F the Divisional Court handed down judgment on 22 January 2019, allowing the appeal and directing that convictions be entered and that the cases be remitted for sentencing: [2020] QB 253. On 21 February 2019, the appellants were sentenced to conditional discharges of 12 months.

6 On 8 March 2019, the Divisional Court dismissed the appellants' application for permission to appeal to the Supreme Court, but certified two G 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.

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:

H (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?

(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

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more than de minimis, and prevents them, or is capable of preventing them, from passing along the highway?

2. The legal background

8 Section 137 of the 1980 Act provides:

"*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."

9 In *Nagy v Weston* [1965] 1 WLR 280 it was held by the Divisional Court that "lawful excuse" encompasses "reasonableness". Lord Parker CJ said at p 284 that these are "really the same ground" and that:

"there must be proof that the use in question was an unreasonable use. Whether or not the user amounting to an obstruction is or is not an unreasonable use of the highway is a question of fact. It depends upon all the circumstances, including the length of time the obstruction continues, the place where it occurs, the purpose for which it is done, and of course whether it does in fact cause an actual obstruction as opposed to a potential obstruction."

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.

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.

13 The Convention rights are set out in Schedule 1 to the HRA 1998. The rights relevant to this appeal are those under article 10 ECHR, the right to freedom of expression, and article 11 ECHR, the right to freedom of peaceful assembly.

14 Article 10 ECHR materially provides:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers . . .

"2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a 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 . . .

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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."

16 In the present case the Divisional Court explained how
B 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
C 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).

D 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'?

E "(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
F 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
G that aim?

"(4) Is there a fair balance between the rights of the individual and the general interest of the community, including the rights of others?

"65. In practice, in cases of this kind, we anticipate that it will be the last of those questions which will be of crucial importance: a fair balance must be struck between the different rights and interests at stake. This is
H 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 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

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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 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."

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A *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.

B **19** All the appellants gave evidence of their long-standing opposition to the arms trade and of their belief that there was evidence of illegal activity taking place at the DSEI arms fair, which the Government had failed to take any effective action to prevent. The district judge found at para 16 of the case stated that:

> "All . . . defendants described their action as 'carefully targeted' and
C 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."

D

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
E obstructions of the highway."

21 He recognised that this required an assessment of the proportionality of the interference with the appellants' Convention rights, in relation to which he took into account the following points (at para 38 of the case stated):

F > "(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
G was no disorder, no obstruction of or assault on police officers and no abuse offered.
>
> "(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
H 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 . . .

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"(e) The action clearly related to a 'matter of general concern' . . . namely the legitimacy of the arms fair and whether it involved the marketing and sale of potentially unlawful items (e g those designed for torture or unlawful restraint) or the sale of weaponry to regimes that were then using them against civilian populations.

"(f) The action was limited in duration. I considered that it was arguable that the obstruction for which the defendants were responsible only occurred between the time of their arrival and the time of their arrests—which in both cases was a matter of minutes. I considered this since, at the point when they were arrested the defendants were no longer 'free agents' but were in the custody of their respective arresting officers and I thought that this may well have an impact on the issue of 'wilfulness' which is an essential element of this particular offence. The prosecution in both cases urged me to take the time of the obstruction as the time between arrival and the time when the police were able to move the defendants out of the road or from below the bridge. Ultimately, I did not find it necessary to make a clear determination on this point as even on the Crown's interpretation the obstruction in *Ziegler* lasted about 90–100 minutes . . .

"(g) I heard no evidence that anyone had actually submitted a complaint about the defendants' action or the blocking of the road. The police's response appears to have been entirely on their own initiative.

"(h) Lastly, although compared to the other points this is a relatively minor issue, I note the longstanding commitment to opposing the arms trade that all four defendants demonstrated. For most of them this stemmed, at least in part, from their Christian faith. They had also all been involved in other entirely peaceful activities aimed at trying to halt the DSEI arms fair. This was not a group of people who randomly chose to attend this event hoping to cause trouble."

22 The district judge's conclusion at para 40 of the case stated was that on these facts the prosecution had failed to prove to the requisite standard that the obstruction of the highway was unreasonable and he therefore dismissed the charges. The question for the High Court was expressed at para 41 of the case stated as follows:

"The question for the High Court therefore is whether I was correct to have dismissed the case against the defendants in these circumstances. The point of law for the decision of the High Court, is whether, as a matter of law, I was entitled to reach the conclusions I did in these particular cases."

4. The decision of the Divisional Court

23 It was common ground between the parties prior to the hearing of the appeal that the appropriate appellate test on an appeal by way of case stated was whether the district judge had reached a decision which it was not reasonably open to him to reach. That is the conventional test on an appeal by way of case stated, as applied in many Divisional Court decisions.

24 At the hearing of the appeal the court suggested that in cases involving an assessment of proportionality the applicable approach should be that set out by Lord Neuberger of Abbotsbury PSC in *In re B (A Child)*

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(Care Proceedings: Threshold Criteria) [2013] 1 WLR 1911, namely whether the judge's conclusion on proportionality was wrong. As Lord Neuberger PSC stated at paras 91–92:

> "91. That conclusion leaves open the standard which an appellate court should apply when determining whether the trial judge was entitled to reach his conclusion on proportionality, once the appellate court is satisfied that the conclusion was based on justifiable primary facts and assessments. In my view, an appellate court should not interfere with the trial judge's conclusion on proportionality in such a case, unless it decides that that conclusion was wrong. I do not agree with the view that the appellate court has to consider that judge's conclusion was 'plainly' wrong on the issue of proportionality before it can be varied or reversed. As Lord Wilson JSC says in para 44, either 'plainly' adds nothing, in which case it should be abandoned as it will cause confusion, or it means that an appellate court cannot vary or reverse a judge's conclusion on proportionality of [sic] it considers it to have been 'merely' wrong. Whatever view the Strasbourg court may take of such a notion, I cannot accept it, as it appears to me to undermine the role of judges in the field of human rights.
>
> "92. I appreciate that the attachment of adverbs to 'wrong' was impliedly approved by Lord Fraser in the passage cited from *G v G (Minors: Custody Appeal)* [1985] 1 WLR 647, 652, by Lord Wilson JSC at para 38, and has something of a pedigree: see eg per Ward LJ in *Assicurazioni* [2003] 1 WLR 577, para 195 (although aspects of his approach have been disapproved: see *Datec* [2007] 1 WLR 1325, para 46). However, at least where convention questions such as proportionality are being considered on an appeal, I consider that, if after reviewing the trial judge's decision, an appeal court considers that he was wrong, then the appeal should be allowed. Thus, a finding that he was wrong is a sufficient condition for allowing an appeal against the trial judge's conclusion on proportionality, and, indeed, it is a necessary condition (save, conceivably, in very rare cases)."

25 *In re B* was a family law case but the Divisional Court noted that the test had been applied in other contexts, and in particular in extradition cases—see *Love v Government of the United States (Liberty intervening)* [2018] 1 WLR 2889. It concluded that it should also be applied in the criminal law context, stating as follows at para 103:

> "We can see no principled basis for confining the approach in *In re B* to family law cases or not applying it to the criminal context. This is because the issue of principle discussed by Lord Neuberger PSC in that case related to the approach to be taken by an appellate court to the 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; and (ii) the overall conclusion was one that was not sustainable on the

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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), (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:

> "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 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 (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.)

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 highway. Rather the ability of other members of the public to go about their lawful business was *completely prevented* by the physical conduct of these defendants for *a significant period of time*. That did not strike a fair balance between the different rights and interests at stake." (Emphasis added.)

5 What is the test to be applied by an appellate court to an assessment of the decision of the trial court in respect of a statutory defence of 'lawful excuse' when Convention rights are engaged in a criminal matter?

The conventional approach

29 As indicated above, the conventional approach of the Divisional Court to appeals by way of case stated in criminal proceedings is to apply

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A an appellate test of whether the court's conclusion was one which was reasonably open to it—i e is not *Wednesbury* irrational or perverse (see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223). This is reflected in a number of decisions of the Divisional Court, including cases involving issues of proportionality.

30 *Oladimeji v Director of Public Prosecutions* [2006] EWHC 1199
B (Admin) concerned an appeal by way of case stated from the decision of magistrates to reject a "reasonable excuse" defence to an offence of failing to provide a specimen of breath when required to do so, contrary to section 7(6) of the Road Traffic Act 1988. In dismissing the appeal, Keene LJ at para 22 identified the relevant issue as being as follows:

> "the real issue is whether the justices were entitled on the evidence and
C the facts they found to conclude that the appellant had no reasonable excuse for his failure. It seems to me that they were. In the light of the facts to which I have referred, their conclusion was not perverse. It was within the range of conclusions properly open to them."

31 *H v Director of Public Prosecutions* [2007] EWHC 2192 (Admin) concerned an appeal by way of case stated from a district judge's decision to
D admit identification evidence notwithstanding a breach of Code D of the Police and Criminal Evidence Act 1984 ("PACE"). At para 19 Auld LJ stated the proper approach on such an appeal to be as follows:

> "Finally, I should note the now well established approach of the Court of Appeal (Criminal Division) to section 78 cases, when invited to consider the trial judge's exercise of judgment as to fairness, only to
E interfere with the judge's ruling if it is *Wednesbury* irrational or perverse. In my view, this court should adopt the very same approach on appeals to it by way of case stated on a point of law, for on such a point, anything falling short of *Wednesbury* irrationality will not do."

32 More recently, in *Garry v Crown Prosecution Service* [2019] 1 WLR 3630 the issue on the appeal was the operation of the "reasonable excuse"
F defence to the offence of carrying an offensive weapon contrary to section 1 of the Prevention of Crime Act 1953. Rafferty LJ followed the approach of Auld LJ in *H v Director of Public Prosecutions* as to the appropriate standard of review, stating at para 25 as follows:

> "On appeals by way of case stated on a point of law this court adopts the same approach as does the Court of Appeal to a trial judge's exercise
G of judgment, interfering with the judge's ruling only if it be *Wednesbury* irrational or perverse: *H v Director of Public Prosecutions* [2007] EWHC 2192 (Admin). The ruling in this case was not *Wednesbury* irrational let alone perverse."

33 There have been a number of examples of appeals by way of case stated in cases involving Convention rights and issues of proportionality in
H 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)

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(articles 9 and 10 ECHR), and *Gough v Director of Public Prosecutions* (2013) 177 JP 669, para 21 (Sir Brian Leveson P) (article 10 ECHR).

34 *Abdul v Director of Public Prosecutions* [2011] HRLR 16 was an appeal by way of case stated from a district judge's decision that a prosecution for an offence under section 5 of the Public Order Act 1986 was a proportionate interference with the appellants' rights under article 10 ECHR. The alleged offences concerned slogans shouted by the appellants who were protesting in the vicinity of a local Royal Anglian Regiment homecoming parade following its return from Afghanistan and Iraq. The slogans which the appellants shouted included "British soldiers murderers", "Rapists all of you" and "Baby killers". In giving the main judgment of the Divisional Court, Gross LJ said that "even if there is otherwise a prima facie case for contending that an offence has been committed under section 5, it is still for the Crown to establish that prosecution is a proportionate response, necessary for the preservation of public order" (para 49(vi)). He noted at para 49(viii) that the legislature had entrusted that decision to magistrates or a district judge and stated the appellate test to be as follows:

> "The test for this court on an appeal of this nature is whether the decision to which the district judge has come was open to her or not. This court should not interfere unless, on well-known grounds, the appellants can establish that the decision to which the district judge has come is one she could not properly have reached."

35 None of these cases were referred to by the Divisional Court in this case. Since the issue of the appropriate appellate test was not raised until the hearing the parties had not prepared to address that issue, nor did they apparently seek further time to do so. In the result, the Divisional Court reached its decision that the appropriate appellate test was that set out in *In re B* without consideration of a number of relevant authorities.

Edwards v Bairstow

36 The conventional approach of the Divisional Court to apply a strict appellate test of irrationality or perversity reflects recognition of the fact that an appeal by way of case stated is an appeal from the tribunal of fact which is only permissible on a question of law (or excess of jurisdiction). As stated in section 111(1) of the Magistrates' Courts Act 1980 ("MCA"):

> "Any person who was a party to any proceeding before a magistrates' court or is aggrieved by the conviction, order, determination or other proceeding of the court may question the proceeding on the ground that it is *wrong in law* or is in excess of jurisdiction by applying to the justices composing the court to state a case for the opinion of the High Court on *the question of law* or jurisdiction involved . . ." (Emphasis added.)

37 It has long been recognised that appellate restraint is required in cases involving appeals from tribunals of fact which are only allowed on questions of law. The leading authority as to the appropriate approach in such cases is the House of Lords decision in *Edwards v Bairstow* [1956] AC 14. That case concerned an appeal by way of case stated from a decision of the Commissioners for the General Purposes of the Income Tax. Such appeals are only allowable if the decision can be shown to be wrong in law.

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A 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 B 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 C 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 D 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 E 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:

F "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 G 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 H function of the tribunal of fact."

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.

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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.

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 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 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 Magistrates' Court* [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 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 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 legal principles and paying regard to the meaning in their context of the relevant words" (at p 1082H). Lord Lowry's conclusion (at p 1086F), citing Lord Radcliffe's judgment in *Edwards v Bairstow*, was that:

> "I do not consider that it was open to the Crown Court to find that 'those seeking to retake the escaped patient' and in particular the constables concerned, were pursuing her, because there was in my view no material in the facts found on which (taking a proper view of the law) they could properly reach that conclusion."

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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 52.21(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* 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] EWHC 887 (Admin) at [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 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

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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 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)."

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 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, 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 . . .' "

48 As Lewison LJ stated in *R (Z) v Hackney London Borough Council* [2019] PTSR 2272, para 66:

"It is not enough simply to demonstrate an error or flaw in reasoning. It must be such as to undermine the cogency of the conclusion. Accordingly, if there is no such error or flaw, the appeal court should not make its own assessment of proportionality."

Lewison LJ's observations as to the proper approach were endorsed by the Supreme Court [2020] 1 WLR 4327—see the judgment of Lord Sales JSC at para 74 and that of Lady Arden JSC at paras 118–120.

49 In cases stated which turn on an assessment of proportionality, the factors which the court considers to be relevant to that assessment are likely to be the subject of findings set out in the case, as they were in the present case. If there is an error or flaw in the reasoning which undermines the cogency of the conclusion on proportionality that is, therefore, likely to be apparent on the face of the case. In accordance with *In re B*, as clarified by the later case law, such an error may be regarded as an error of law on the face of the case. It would, therefore, be open to challenge under the *Edwards v Bairstow* appellate test. As Lady Arden JSC observes, any such challenge would have to be made on the basis of the primary and secondary findings

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A 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
B 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
C 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
D 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
E 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.

F *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
G 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
H 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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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

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 respondents for a significant period of time". That fundamental reason led the Divisional 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 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 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 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) 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 *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. Different considerations may apply to the proportionality of each

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A of those restrictions. The proportionality of arrest, which is typically the police action on the ground, depends on, amongst other matters, the constable's reasonable suspicion. The proportionality assessment at trial before an independent impartial tribunal depends on the relevant factors being proved beyond reasonable doubt and the court being sure that the interference with the rights under articles 10 and 11 was necessary. The
B 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
C 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
D 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
E 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
F 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.

G **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.

H **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 *Kudrevicius v Lithuania*, para 85 and in *Lashmankin v Russia* (Application No 57818/09) (unreported) 7 February 2017, at

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para 364, both of which concerned interference with peaceful protest, the ECtHR stated that article 11 constitutes the lex specialis pursuant to which the interference is to be examined. The same approach was taken by the ECtHR at para 91 of its judgment in *Primov v Russia* (Application No 17391/06) (unreported) 12 June 2014. However, given that article 11 is to be interpreted in the light of article 10, said to constitute the lex generalis, the distinction is largely immaterial. The outcome in this case will be the same under both articles.

Deliberate obstruction with more than a de minimis impact

62 The second certified question raises the issue as to how intentional action by protesters disrupting traffic impacts on an assessment of proportionality under articles 10 and 11 ECHR.

63 The issue of purposeful disruption of others was considered by the ECtHR in *Hashman v United Kingdom* (1999) 30 EHRR 241, paras 27–28 and *Steel v United Kingdom* (1998) 28 EHRR 603, para 142. It was also considered by the ECtHR in *Kudrevicius v Lithuania* in relation to the purposeful disruption of traffic and in *Primov v Russia* in relation to an attempted gathering which would have disrupted traffic.

64 The case of *Steel v United Kingdom* did not involve obstructive behaviour on a highway but rather involved an attempt by the first applicant, with 60 others, to obstruct a grouse shoot. The first applicant was arrested for breach of the peace for impeding the progress of a member of the shoot by walking in front of him as he lifted his shotgun. She was detained for 44 hours before being released on conditional bail. She was charged with breach of the peace and using threatening words or behaviour, contrary to section 5 of the Public Order Act 1986. At trial she was convicted of both offences and the Crown Court upheld the convictions on appeal. She complained to the European Commission of Human Rights ("the Commission") on the basis, in particular, of violations of articles 10 and 11, arising from the disproportionality of the restrictions on her freedom to protest. At para 142 of its judgment the Commission noted that "the first . . . applicant [was] demonstrating not only by verbal protest or holding up placards and distributing leaflets, but *by physically impeding the activities against which [she was] protesting*" (emphasis added). In addressing this issue, the Commission recalled "that freedom of expression under article 10 goes beyond mere speech, and considers that the applicants' protests were expressions of [her] disagreement with certain activities, and as such fall within the ambit of article 10". Despite the protest physically impeding the activities of those participating in the grouse shoot the Commission found that "there was a clear interference with the applicants' freedom under article 10 of the Convention". Thereafter the Commission considered whether the interference was prescribed by law, whether it pursued a legitimate aim and whether it was proportionate. In relation to proportionality it found that the removal of the applicant by the police from the protest and her detention for 44 hours, even though it interfered with her freedom to demonstrate, could, in itself, be seen as proportionate to the aim of preventing disorder. It reached similar findings in relation to the proportionality of the convictions: see paras 154–158. However, the points of relevance to this appeal are: (a) that deliberate obstructive conduct which

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A has a more than de minimis impact on others, still requires careful evaluation in determining proportionality; and, (b) that there is a separate evaluation of proportionality in respect of each restriction. In *Steel* those separate evaluations included the proportionality of the removal of the first applicant from the scene (para 155), the proportionality of the detention of the first applicant for 44 hours before being brought before a magistrate B (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 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. C 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 D 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 *Kudrevicius v Lithuania* the applicants had been involved in a major protest by farmers against the Lithuanian government. The protests E 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 F 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 G 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 H 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

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Lithuanian Government, all three roads were blocked at locations next to the customs post for approximately 48 hours. The Government alleged, in particular, that owing to the blocking rows of heavy goods vehicles and cars formed in Lithuania and Poland at the Kalvarija border crossing and that heavy goods vehicles were forced to drive along other routes in order to avoid traffic jams. It was also alleged that as the functioning of the Kalvarija customs post was disturbed, the Kaunas Territorial Customs Authority was obliged to re-allocate human resources as well as to prepare for a possible re-organisation of activities with the State Border Guard Service and the Polish customs and that, as a consequence, the Kaunas Territorial Customs Authority incurred additional costs; however, the concrete material damage had not been calculated.

67 The ECtHR in *Kudrevicius* at para 97 recognised that intentional disruption of traffic was "not an uncommon occurrence in the context of the exercise of freedom of assembly in modern societies". However, the court continued that "physical conduct purposely obstructing traffic and the ordinary course of life in order to *seriously disrupt the activities carried out by others* is not at the core of that freedom as protected by article 11 of the Convention" (emphasis added). The court also added that "This state of affairs *might* have implications for any assessment of 'necessity' to be carried out under the second paragraph of article 11" (emphasis added). It is apparent from *Kudrevicius* that purposely obstructing traffic still engages article 11 but seriously disrupting the activities carried out by others is not at the core of that freedom so that it "*might*", not "*would*", have implications for any assessment of proportionality. In this way, such disruption is not determinative of proportionality. On the facts of that case the Lithuanian authorities had struck a fair balance between the legitimate aims of the "prevention of disorder" and "protection of the rights and freedoms of others" and the requirement of freedom of assembly. On that basis the criminal convictions and the sanctions imposed were not disproportionate in view of the serious disruption of public order provoked by the applicants. However, again, the point of relevance to this appeal is that deliberate obstructive conduct which has a more than de minimis impact on others still requires careful evaluation in determining proportionality.

68 The case of *Primov v Russia* involved a complaint to the ECtHR that the Russian authorities' refusal to allow a demonstration, the violent dispersal of that demonstration and the arrest of the three applicants breached their right to freedom of expression and to peaceful assembly, guaranteed by articles 10 and 11 of the Convention respectively. The protesters wished to gather in the centre of the village of Usuklchay. To prevent them from doing so the police blocked all access to the village. One of the reasons for this blockade was that if allowed to demonstrate in the centre of the village the crowd would risk blocking the main road adjacent to the village square. In conducting a proportionality assessment between paras 143–153 the ECtHR referred to the importance for the public authorities to show a certain degree of tolerance towards peaceful gatherings. At para 145 it stated:

> "The court reiterates in this respect that any large-scale gathering in a public place inevitably creates inconvenience for the population. Although a demonstration in a public place may cause some disruption to

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A 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 *Galystan* [*Galstyan v Armenia* (Application No 26986/03) (unreported) 15 November 2007], paras 116–117, and *Bukta* [*Bukta v Hungary* Reports of Judgments and Decisions 2007-III, p 341], para 37). The appropriate 'degree of B 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 C 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 *Kudrevicius*:

D "[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 E democratic society taking the actions of protesters outside the protection of article 11 at para 98 of *Kudrevicius*. 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 F 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, G 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 H 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

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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 the actual interference the protest causes to the rights of others, including the property rights of the owners of the land, and the rights of any members of the public". At paras 40–41 Lord Neuberger MR identified two further factors as being: (a) whether the views giving rise to the protest relate to "very important issues" and whether they are "views which many would see as being of considerable breadth, depth and relevance"; and, (b) whether the protesters "believed in the views they were expressing". In relation to (b) it is hard to conceive of any situation in which it would be proportionate for protesters to interfere with the rights of others based on views in which the protesters did not believe.

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 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 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 *Kudrevicius* 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 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 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* (Application No 58050/08) (unreported) 27 November 2012, at para 21 the

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A 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* (Application No 5781809) (unreported) 7 February 2017. At para 405 it was stated that:

B "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* C *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 D 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) E 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.

F 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, G 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 *Molnar 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.

H *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

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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 Divisional Court considered that the factors at 38(a)–(c) were of little or no relevance. We disagree. In relation to the factor at 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 38(b) that the appellants' actions did not give rise, directly or indirectly, to any form of disorder was also relevant. There are some protests that are likely to provoke disorder. This was not such a protest. Rather it was a protest on an approach road in a commercial area where there was already a sizeable police presence in anticipation of demonstration without there being any counter-demonstrators or any risk of clashes with counter-demonstrators: (for the approach to the risk of clashes with counter-demonstrations see para 150 of *Primov v Russia*). The protest 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 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 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 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 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 that "members of the public were *completely prevented* from" using "the

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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 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 above. Furthermore, the district judge found that the targeting was effective, as the evidence as to the use of the road by vehicles other than those heading to the arms fair was speculative and was not particularly clear or compelling (see para 38(d) of the case stated set out at para 21 above). He made no finding as to whether "non-DSEI" traffic was or was not in fact obstructed since even if it had been this amounted to no more than reasonable obstruction causing some inconvenience to the general public. Targeting and whether it was effective are relevant matters to be evaluated in determining proportionality.

(iii) The choice of location was a relevant factor to be taken into account by the district judge: see para 76 above.

(iv) The Divisional Court considered that the obstruction was for a "significant period of time" whilst the district judge considered that the "action was limited in duration". As we explain in paras 83–84 below whether the period of 90 to 100 minutes of actual obstruction was "significant" or "limited" depends on the context. It was open to the district judge to conclude on the facts of this case that the duration was "limited" and it was also appropriate for him to take that into account in relation to his assessment of proportionality.

(v) The Divisional Court's conclusion referred to disruption to "members of the public". However, there were no findings by the district judge as to the number or even the approximate number of members of the public who were inconvenienced by this demonstration which took place on one side of an approach road to the Excel Centre in circumstances where there were other available routes for deliveries to the Centre (see para 19 above). Furthermore, there were no factual findings that the protest had any real adverse impact on the Excel Centre.

82 The Divisional Court agreed at para 113 with the factor taken into account by the district judge at para 38(e) of the case stated:

> "that the action clearly related to a matter of general concern, namely the legitimacy of the arms fair and whether it involved the marketing and sale of potentially unlawful items. That was relevant in so far as it emphasised that the subject matter of the protests in the present cases was a matter of legitimate public interest. As Mr Blaxland submitted before us, the content of the expression in this case was political and therefore falls at the end of the spectrum at which greatest weight is attached to the kind of expression involved."

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That was an appropriate factor to be taken into account: see para 72 above. As in *Primov v Russia* at paras 132–136 the appellant's message "undeniably concerned a serious matter of public concern and related to the sphere of political debate". There was no error or flaw in the reasoning of the district judge in taking this factor into account in relation to the issue of proportionality.

83 The Divisional Court disagreed with the district judge's conclusion at para 38(f) of the case stated that an obstruction of the highway for 90–100 minutes was of limited duration. The Divisional Court at para 112 referred to the period of obstruction as having "occurred for a significant period of time". Then at para 114 the Divisional Court stated:

> "On any view, as was common ground, the duration of the obstruction of the highway was not de minimis. Accordingly, the fact is that there was *a complete obstruction of the highway for a not insignificant amount of time*. That is highly significant, in our view, to the proper evaluative assessment which is required when applying the principle of proportionality." (Emphasis added.)

As we have observed the district judge did not find that there was a *complete obstruction of the highway* but rather that the obstruction to vehicles was to that side of the approach road leading to the Excel Centre. It is correct that the district judge equivocated as to whether the duration of the obstruction was for a matter of minutes until the appellants were arrested, or whether it was for the 90 to 100 minutes when the police were able to move the appellants out of the road. It would arguably have been incorrect for the district judge to have approached the duration of the obstruction on the basis that it was for a matter of minutes rather than by reference to what actually occurred. The district judge, however, did not do so and instead correctly approached his assessment based on the period of time during which that part of the highway was actually obstructed. Lord Sales JSC at para 144 states that the district judge ought to have taken into account any longer period of time during which the appellants intended the highway to be obstructed. If it was open to the district judge to have done so, then we do not consider this to be a significant error or flaw in his reasoning. However, we agree with Lady Arden JSC at para 96 that the appellants "cannot be convicted on the basis that had the police not intervened their protest would have been longer". We agree that the proportionality assessment which potentially leads to a conviction can only take into account the obstruction of the highway that actually occurs.

84 It is agreed that the actual time during which this access route to the Excel Centre was obstructed was 90 to 100 minutes. The question then arises as to whether this was of limited or significant duration. The appraisal as to whether the period of time was of "limited duration" or was for "a not insignificant amount of time" or for "a significant period of time" was a fact-sensitive determination for the district judge which depended on context including, for instance the number of people who were inconvenienced, the type of the highway and the availability of alternative routes. We can discern no error or flaw in his reasoning given that there was no evidence of

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A any significant disruption caused by the obstruction. Rather, it was agreed that there were alternative routes available for vehicles making deliveries to the Excel Centre: see para 19 above.

85 The Divisional Court considered at para 115 that the factor taken into account by the district judge at para 38(g) of the case stated "was of little if any relevance to the assessment of proportionality". The factor was
B that he had "heard no evidence that anyone had actually submitted a complaint about the defendants' action or the blocking of the road. The police's response appears to have been entirely on their own initiative". In relation to the lack of complaint, the Divisional Court stated that this did not alter the fact that the obstruction did take place and continued that "The fact that the police acted, as the district judge put it, 'on their own initiative'
C was only to be expected in the circumstances of a case such as this". We agree that for the police to act it was obvious that they did not need to receive a complaint. They were already at the Excel Centre in anticipation of demonstrations and were immediately aware of this demonstration by the appellants. However, the matter to which the district judge was implicitly adverting was that the lack of complaint was indicative of a lack of
D substantial disruption to those in the Excel Centre. If there had been substantial disruption one might expect there to have been complaints. Rather, on the basis of the facts found by the district judge there was no substantial disruption. There was no error or flaw in the reasoning of the district judge in considering the matters set out at para 38(g).

86 The Divisional Court at para 116 considered that the factor at
E 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
F 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 67 above whether the
G 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
H 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).

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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 certified questions set out in para 8 of this judgment. One of the matters which gives this appeal its importance is the context in which those questions have arisen. This appeal involves the right to freedom of peaceful assembly and association set out in article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 ("the Convention"), one of the rights now guaranteed in our domestic law by the Human Rights Act 1998. The European Court of Human Rights ("the Strasbourg court") has described this important right as follows:

> "the right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression [which is also engaged in this case but raises no separate issue for the purposes of this judgment] is one of the foundations of such a society. Thus, it should not be interpreted restrictively." (*Kudrevicius 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 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.

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A "3. The police arrested the appellants within minutes of them beginning their protest, after initiating a procedure known as the 'five-stage process', intended to persuade them to remove themselves voluntarily from the public highway.

"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 B equipment safely to remove the appellants' arms from the boxes).

"5. The left-hand dual lane carriageway of the public highway leading to the Excel Centre was blocked for the duration of the appellants' protest; the right-hand dual lane carriageway, leading away from the Excel Centre remained open, as did other access routes to the Excel Centre. The evidence before the trial court of disruption caused by the C 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 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 D 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 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 E 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 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, F 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 G 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 H 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

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(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.
>
> "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."

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

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A prosecution had requested that such a finding be included in the case stated, the district judge is likely to have included his finding in his earlier ruling that the appellants only wanted to block the highway for a few hours (written ruling of DJ (MC) Hamilton, para 11.)

97 It follows from the structure of article 11 and the importance of the right that the trial judge, DJ (MC) Hamilton, was right to hold that the B 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* (Application No 29580/12) (unreported) 15 November 2018:

> "137. The court has previously held that the exceptions to the right to freedom of assembly must be narrowly interpreted and the necessity C for any restrictions must be convincingly established (see *Kudrevicius*, 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 D averred substantive grounds, such as serious risks referred to in paragraph 1 of section 16 of the Public Events Act. This was not the case in the episodes at hand."

The certified questions

98 The issues of law in the appeal, as certified by the Divisional Court, E are:

(1) What is the test to be applied by an appellate court to an assessment of the decision of the trial court in respect of a statutory defence of "lawful excuse" when Convention rights are engaged in a criminal matter and, in particular the lower court's assessment of whether an interference with Convention rights was proportionate?

F (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?

G *Overview of my answers to the two certified questions*

99 For the reasons explained below, my answers to the two certified questions are in outline as follows:

(1) *Standard of appellate review applying to a proportionality assessment.* The standard of appellate review applicable to the evaluation of the compliance with the Convention requirement of proportionality is that laid down in *R (R) v Chief Constable of Greater Manchester Police* [2018] H 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

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underlying primary and secondary facts to which (in this case) the test in *Edwards v Bairstow* [1956] AC 14 continues to apply. That test imposes an "unreasonableness" standard and so, unless it is shown that the findings were such that no reasonable tribunal could have made them, the primary and secondary factual findings of the trial judge will stand. Lord Hamblen and Lord Stephens JJSC agree with this: analysis of the standard applying to the findings of fact (judgment, para 49).

(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.

Certified question 1: standard of appellate review applying to proportionality assessment

100 People do not always realise it but there are many different standards of appellate review for different types of appeal. The most familiar examples of different standards of appellate review are the following. Where there is an appeal against a finding of primary fact, the appellate tribunal in the UK would in general give great weight to the fact that the trial judge saw all the witnesses. In making findings of fact it is very hard for the trial judge to provide a comprehensive statement of all the factors which he or she took into account. Where, however, there is an appeal on a point of law, the court asks whether the trial judge's conclusion was or was not correct in law. The reason for the distinction between these types of appellate review is clear.

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 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.

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 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

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A 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 B 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 C 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 D 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 E recent case of *Google LLC v Oracle America Inc* (Docket No 18-956) (unreported) 5 April 2021 (US Supreme Court), a case involving alleged "fair use" of the declaring code of Java, a computer platform, the US Supreme Court (by a majority) treated "subsidiary facts" found by the jury as having the same effect for the purposes of appellate review as primary facts. Subsidiary facts included for example the jury's finding of market effects and F 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*, a family case. However, in *R (R)* 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 G 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 H 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.

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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 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 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 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).

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A **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 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 142). But, as para 5 of
B 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 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
C 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*
D *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 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
E 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 under *Edwards v Bairstow*. (We are only concerned with mobile vehicular traffic: there is no reference in the case stated to any pedestrians being
F inconvenienced by having to find any alternative route.) Scholars have debated whether a judge dealing with a proportionality issue has a duty to investigate facts that she or he considers relevant to the proportionality assessment, but it was not suggested on this appeal that there was such a duty, and in my judgment correctly so.

111 The second point on which Lord Sales JSC and Lord Hodge DPSC
G 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
H 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:

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"The action was limited in duration. I considered that it was arguable that the obstruction for which the defendants were responsible only occurred between the time of their arrival and the time of their arrests—which in both cases was a matter of minutes. I considered this since, at the point when they were arrested the defendants were no longer 'free agents' but were in the custody of their respective arresting officers and I thought that this may well have an impact on the issue of 'wilfulness' which is an essential element of this particular offence. The prosecution urged me to take the time of the obstruction as the time between arrival and the time when the police were able to move the defendants out of the road or from the bridge. Ultimately, I did not find it necessary to make a clear determination on this point as even on the Crown's interpretation the obstruction in *Ziegler* lasted about 90–100 minutes."

113 As I read that sub-paragraph, the district judge was prepared to accept that the duration of the protest was *either* the few minutes that the appellants were free to make their protest before they were arrested *or* the entire time that they were on the highway until the police managed to remove them. There was a difficult point of law (or mixed fact and law) involved ("whether the defendants were 'free agents' [or] were in the custody of" the police after their arrest). The district judge held that that point did not have to be decided because, either way, in the judgment of the district judge, the duration of the protest was limited. That was the district judge's judgment on the length of time relative to the impeding of the highway. It was not a normative assessment, but an application of the Convention requirement to achieve a fair balance of the relevant rights and of the principle determined on the second issue on this appeal (on which this court is unanimous) to the facts found by the judge who heard all the evidence. It cannot be said that the finding contains some "identifiable flaw in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion" (see para 104 above). It was a judgment which the district judge was entitled to reach. In my judgment this court should not on established principles substitute its own judgment for that of the district judge on that evaluation of the facts. Therefore, it should not set aside his proportionality assessment on that point.

Certified question 2: Convention-legitimacy of obstruction and concluding observations on the district judge's fact-finding in this case

114 As I have already explained, before the Human Rights Act 1998 came into force an offence under section 137(1) of the Highway Act 1980 or its predecessor, section 121 of the Highway Act 1959, could be committed by any obstruction. Now that the Human Rights Act 1998 has been enacted and brought into force, the courts interpret section 137 conformably with the Convention and the jurisprudence of the Strasbourg court. Under that jurisprudence, the state must show a certain degree of tolerance to protesters and it is accepted that in some circumstances protesters can obstruct the highway in the course of exercising their article 11 right. Thus, for example, the Strasbourg court held in *Kuznetsov v Russia* (Application No 10877/04) (unreported) 23 October 2008, at para 44:

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A "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."

B **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 C 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 D 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 E 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.

F **LORD SALES JSC** (dissenting in part) (with whom **LORD HODGE DPSC** agreed)

119 This case concerns an appeal to the Divisional Court (Singh LJ and Farbey J) by way of case stated from the decision of District Judge Hamilton ("the district judge") in the Stratford Magistrates' Court, in relation to the G 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 H 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

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police. I emphasise this last point, because there will be cases where the defence of "lawful excuse" does not depend on an assessment of what the police do.

121 The second question of law certified by the Divisional Court concerns whether, in principle, a "lawful excuse" defence under section 137 could ever exist in a case involving deliberate physically obstructive conduct by protesters designed to block a highway, where the obstruction is more than de minimis. As to that, I agree with what Lord Hamblen and Lord Stephens JJSC say at paras 62–70. In principle, a "lawful excuse" defence might exist in such a case. Whether it can be made out or not will depend on whether the intervention by police to clear the highway involves the exercise of their powers in a proportionate manner. In general terms, I agree with the discussion of Lord Hamblen and Lord Stephens JJSC at paras 71–78 regarding factors which are relevant to assessment of proportionality in this context.

122 I respectfully disagree with Lord Hamblen and Lord Stephens JJSC regarding important parts of their criticism of the judgment of the Divisional Court. In my opinion, the Divisional Court was right to identify errors by the district judge in his assessment of proportionality. However, in my view the Divisional Court's own assessment of proportionality was also flawed. I would, therefore, have allowed the appeal on a more limited basis than Lord Hamblen and Lord Stephens JJSC, to require that the case be remitted to the magistrates' court.

Human rights compliant interpretation of section 137 of the Highways Act

123 Section 3(1) of the Human Rights Act 1998 ("the HRA") requires a statutory provision to be read and given effect in a way which is compatible with the Convention Rights set out in Schedule 1 to the HRA, so far as it is possible to do so. Schedule 1 sets out relevant provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the ECHR"), including article 10 (the right to freedom of expression) and article 11 (the right to freedom of peaceful assembly). Subject to limits which are not material for this appeal, section 6(1) of the HRA makes it unlawful for a public authority to act in a way which is incompatible with the Convention rights. The police are a public authority for the purposes of application section 6. So is a court: section 6(3)(a).

124 The Divisional Court construed section 137 in light of the interpretive obligation in section 3(1) of the HRA and having regard to the duties of public authorities under section 6 of that Act. No one has criticised their construction of section 137 and I would endorse it. As the Divisional Court held (paras 61–65), the way in which section 137 can be read so as to be compatible with the Convention rights in article 10 and article 11 is through the interpretation of the phrase "without lawful . . . excuse" in section 137. In circumstances where a public authority such as the police would violate the rights of protesters under article 10 or article 11 by arresting or moving them, and hence would act unlawfully under section 6(1) of the HRA, the protesters will have lawful excuse for their activity. Conversely, if arrest or removal would be a lawful act by the police, the protesters will not have a lawful excuse.

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A **125** This interpretation of section 137 means that the commission of an offence under it depends upon the application of what would otherwise be an issue of public law regarding the duty of a public authority such as the police under section 6(1) of the HRA. Typically, as in this case, this will turn on whether the police were justified in interfering with the right of freedom of expression engaged under article 10(1) or the right to peaceful assembly under article 11(1), under article 10(2) or article 11(2) respectively. The B applicable analysis is well-established. Importantly, for present purposes, the interference must be "necessary in a democratic society" in pursuance of a specified legitimate aim, and this means that it must be proportionate to that aim. The four-stage test of proportionality applies: (i) Is the aim sufficiently important to justify interference with a fundamental right? (ii) Is there a rational connection between the means chosen and the aim in view? C (iii) Was there a less intrusive measure which could have been used without compromising the achievement of that aim? (iv) Has a fair balance been struck between the rights of the individual and the general interest of the community, including the rights of others? The last stage is sometimes called proportionality stricto sensu.

126 In this case the police acted to pursue a legitimate aim, namely the D protection of the rights and freedoms of others in being able to use the slip road. The first three stages in the proportionality analysis are satisfied. As will be typical in this sort of case, it is stage (iv) which is critical. Did the arrest and removal of the protesters strike a fair balance between the rights and interests at stake?

127 At a trial for an alleged offence under section 137 it will be for the prosecution to prove to the criminal standard that the defendant did not E have a lawful excuse, meaning in a case like the present that the public authority did not act contrary to section 6(1) of the HRA in taking action against him or her. But that does not change the conceptual basis on which the offence under section 137 depends, which involves importation of the test for breach of a public law duty on the part of the police.

128 It is also possible to envisage a public law claim being brought by F protesters against the police in judicial review, say in advance of a protest which is about to be staged, asserting their rights under article 10 and article 11, alleging that their arrest and removal by the police would be in breach of those rights and hence in breach of duty under section 6(1) of the HRA, and seeking declaratory or injunctive relief accordingly; or, after the intervention of the police, a claim might be brought pursuant to section 8 of the HRA for damages for breach of those rights. The issues arising in any G such a claim would be the same as those arising in a criminal trial of an alleged offence under section 137 based on similar facts, although the burden and standard of proof would be different.

The role of the district judge and the role of the Divisional Court on appeal

H **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

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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 (AIRE Centre intervening)* [2012] 1 AC 621, paras 46 (Lord Wilson JSC), 61 (Baroness Hale of Richmond JSC) and 91 (Lord Brown of Eaton-under-Heywood JSC) (Lord Phillips of Worth Matravers PSC and Lord Clarke of Stone-cum-Ebony JSC agreed with Lord Wilson and Baroness Hale JJSC). This reflects the features that the Convention rights are free-standing rights enacted by Parliament to be policed by the courts, that they are in the form of rights which are enforced by the European Court of Human Rights on a substantive basis rather than purely as a matter of review according to a rationality standard, and that the question whether a measure is proportionate or not involves a more searching investigation than application of the rationality test. Thus, in relation to the test of proportionality stricto sensu, even if the relevant decision-maker has had regard to all relevant factors and has reached a decision which cannot be said to be irrational, it remains open to the court to conclude that the measure in question fails to strike a fair balance and is disproportionate.

131 Similarly, a lower court or tribunal will commit an error of law where, in a case involving application of the duty in section 6(1) of the HRA, it holds that a measure by a public authority is disproportionate where it is proportionate or that it is proportionate where it is disproportionate. Where the lower court or tribunal has directed itself correctly as to the approach to be adopted in applying a qualified Convention right such as article 10 or article 11, has had proper regard to relevant considerations and has sought to strike a fair balance between rights and interests at the fourth stage of the proportionality analysis an appellate court will afford an appropriate degree of respect to its decision. However, a judgment as to proportionality is not the same as a decision made in the exercise of a discretion, and the appellate court is not limited to assessing whether the lower court or tribunal acted rationally or reached a conclusion which no reasonable court or tribunal could reach: see the *Belmarsh* case, para 44. There was a statutory right of appeal from the tribunal in that case only on a point of law. Lord Bingham noted at para 40 that in the judgment of the European Court of Human Rights in *Smith and Grady v United Kingdom* (1999) 29 EHRR 493 "the

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A traditional *Wednesbury* approach to judicial review . . . was held to afford inadequate protection" for Convention rights and that it was recognised that "domestic courts must themselves form a judgment whether a Convention right has been breached" and that "the intensity of review is somewhat greater than under the rationality approach" (citing *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, paras 23 and 27). At B para 44, Lord Bingham held that the finding of the tribunal on the question of proportionality in relation to the application of the ECHR could not be regarded as equivalent to an unappealable finding of fact. As he explained:

> "The European Court does not approach questions of proportionality as questions of pure fact: see, for example, *Smith and Grady v United Kingdom* . . . Nor should domestic courts do so. The greater intensity of C review now required in determining questions of proportionality, and the duty of the courts to protect Convention rights, would in my view be emasculated if a judgment at first instance on such a question were conclusively to preclude any further review [i e by an appellate court]."

132 Since that decision, this court has developed the principles to be applied to determine when an appellate court may conclude that a lower D court or tribunal has erred in law in its proportionality analysis. So far as concerns cases involving a particular application of a Convention right in specific factual circumstances without wide normative significance, such as in the present case, it has done this by reference to and extrapolation from the test set out in CPR r 52.11 (now contained in rule 52.21). An appellate court is entitled to find an error of law if the decision of the lower court or E tribunal is "wrong", in the sense understood in that provision: see *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911, paras 88–92 (Lord Neuberger of Abbotsbury PSC, with whom Lord Wilson and Lord Clarke JJSC agreed); *R (R) v Chief Constable of Greater Manchester Police* [2018] 1 WLR 4079, paras 53–65 (Lord Carnwath JSC, explaining that the appellate court is not restricted to intervening only if the F lower court has made a significant error of principle); *R (Z) v Hackney London Borough Council* [2020] 1 WLR 4327, paras 56 and 74. In the latter case it was explained at para 74 that the arguments for a limited role for the appellate court in a case concerned with an assessment of proportionality in a case such as this are of general application and the same approach applies whether or not CPR Pt 52.21 applies. This is an approach which limits the range of cases in which an appellate court will intervene to G say that a proportionality assessment by a lower court or tribunal involved an error of law, but still leaves the appellate court with a greater degree of control in relation to the critical normative assessment of whether a measure was proportionate or not than an ordinary rationality approach would do. In determining whether the lower court or tribunal has erred in law in its assessment of proportionality, it may be relevant that it has had the H 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*.

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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 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 which bears upon the determination, it is, obviously, erroneous in point of

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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. 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. 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 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 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 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.

138 Having said all this, however, the difference between application of the ordinary rationality standard on an appeal to identify an error of law by a lower court or tribunal and the application of the proportionality standard for that purpose in a context like the present should not be exaggerated. As Lord Carnwath JSC said in *R (R) v Chief Constable of Greater Manchester Police* 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

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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 . . .' "

A B C

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 45 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.

D E

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):

F

"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 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,

G H

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A that they based their decisions on an acceptable assessment of the relevant facts."

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.

B *The decision of the district judge*

141 I turn, then, to the decision of the district judge in applying 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 C 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 way: see *Kudrevicius 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.

D

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 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 E 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 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 F 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.

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:

G

> "In our view, that analysis displays an erroneous approach. The reason why the obstruction did not last longer was precisely because the police intervened to make arrests and to remove the respondents from 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 H 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."

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I agree. In my view, the district judge's assessment left out what was one of the most significant features of the action taken by the appellants. They went to the sliproad with special equipment (the specially constructed boxes to which they attached themselves) designed to make their action as disruptive and difficult to counter as was possible. They intended to block the highway for as long as possible. The fact that their action only lasted for about 90–100 minutes was because of the swift action of the police to remove them, which is the very action the proportionality of which the district judge was supposed to assess. I find it difficult to see how the action of the police was made disproportionate because it had the effect of reducing the disruption which the appellants intended to produce.

145 Therefore, the district judge left out of his assessment this further material factor or relevant consideration; alternatively, one could say that he took into account or gave improper weight to what was in context an immaterial factor, namely the short duration of the protest as produced by the very intervention by the police which was under review.

146 In my opinion, by reason of both these material errors by the district judge, the proportionality assessment by him could not stand. The case as stated discloses errors of law. This is so whether one applies ordinary *Wednesbury* and *Edwards v Bairstow* principles according to the rationality standard or the enhanced standard of review required in relation to a proportionality assessment and the appellate approach in *In re B (A Child)* and the cases which follow it. In fact, the Divisional Court held both that the district judge had erred in a number of specific respects in his assessment of proportionality and that his overall assessment was "wrong" in the requisite sense: paras 117 and 129.

The decision of the Divisional Court

147 Since the district judge had made the material errors to which I have referred, in my judgment the Divisional Court was right to allow the appeal pursuant to section 111(1) of the Magistrates' Courts Act 1980 on the grounds that the decision disclosed errors of law.

148 The question then arises as to what the Divisional Court should have done in these circumstances. Here, the fact that the appeal was by way of case stated is significant. The court hearing such an appeal may determine that there has been an error of law by the lower court but also find that the facts, as stated, do not permit the appeal court to determine the case for itself. Section 28A(3) of the Senior Courts Act 1981 provides in relevant part that:

> "The High Court shall hear and determine the question arising on the case . . . and shall— (a) reverse, affirm or amend the determination in respect of which the case has been stated; or (b) remit the matter to the magistrates' court . . . with the opinion of the High Court, and may make such other order in relation to the matter (including as to costs) as it thinks fit."

149 The Divisional Court considered that, having allowed the appeal, it was in a position to reverse the determination regarding the application of section 137 in respect of which the case had been stated. The Divisional Court made its own determination that the intervention of the police had

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A been a proportionate interference with the appellants' rights under article 10(1) and article 11(1), with the result that the appellants had no "lawful excuse" for their activity for the purpose of section 137, and therefore substituted convictions of the appellants for offences under that provision.

150 In my judgment, this went too far. As I have said, the assessment of
B proportionality of police action against protesters in a case like this is highly fact-sensitive. In my view, the facts as set out in the stated case did not allow the Divisional Court simply to conclude that the police action was, in all the circumstances of the case, proportionate. The decision to be made called for a more thorough assessment of the disruption in fact achieved (and likely to have been achieved, if the police did not intervene) by the protesters, the
C viability and availability of other access routes to the Excel Centre, and the availability to the protesters of other avenues to express their opinions (such as by way of slow marching, as it appears the police had facilitated for others at the location). The Divisional Court did not have available to it the full evidence heard by the district judge, only a summary as set out in the case stated which disclosed his error of law. Therefore, the proper course for the Divisional Court should have been to allow the appeal but to remit the
D matter to the magistrates' court for further examination of the facts. If the case had been remitted to the district judge, he could have approached the case in relation to the issue of proportionality on a proper basis and set out further findings based on the evidence presented to him. With the passage of time, that might not now be feasible, in which case the effect would have been that there was a mistrial and further examination of
E 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.

Appeal allowed.
Decision of Divisional Court set aside.
Decision of district judge restored.

SHIRANIKHA HERBERT, Barrister

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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]
THE SECRETARY OF STATE FOR TRANSPORT [2] **Claimant**

- 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

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- -

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.

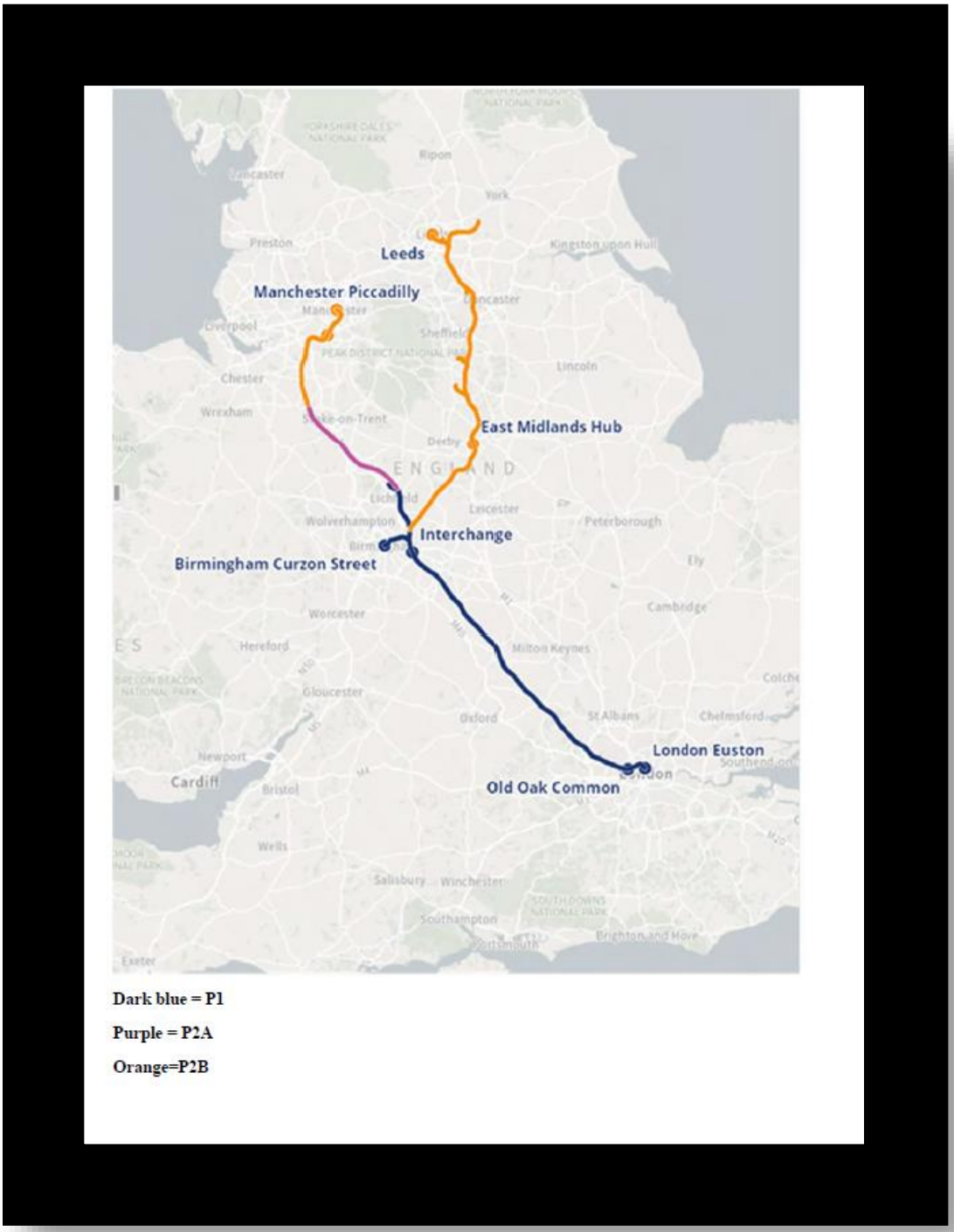
2. There are two types of Defendant. Persons Unknown (PUs) and named Defendants. The 6th Defendant (D6) attended the hearing. Many of the other named Defendants have been removed as parties to the proceedings as the claim has progressed. Most have been removed because they provided undertakings in similar 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

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

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IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

No. QB-2020-002702

[2024] EWHC 239 (KB)

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 19 January 2024

Before:

MR JUSTICE RITCHIE

B E T W E E N :

(1) MULTIPLEX CONSTRUCTION EUROPE LIMITED
(2) LUDGATE HOUSE LIMITED
(A company incorporated in Jersey)
(3) SAMPSON HOUSE LIMITED
(A company incorporated in Jersey) Claimants

- and -

PERSONS UNKNOWN ENTERING IN OR REMAINING AT
THE CLAIMANTS' CONSTRUCTION SITE AT BANKSIDE YARDS
WITHOUT THE CLAIMANTS' PERMISSION Defendants

MR T MORSHEAD (instructed by Eversheds Sutherland (International LLP) appeared on behalf of the Claimants.

THE DEFENDANTS did not attend and were unrepresented.

J U D G M E N T

MR JUSTICE RITCHIE:

1 In this case, by an application dated 21 December 2023, the three Claimants apply for a final prohibitory injunction against persons unknown to last for approximately three years, until February 2027. The evidence in support is provided by Mr Wortley in a witness statement dated 21 December 2023 and a later witness statement dated 18 January 2024. The procedure set out in the Notice of Application asked for an on-paper consideration of a temporary further interim injunction pending a hearing. This is the hearing relating to the application for the final injunction.

2 Going to the chronology of these proceedings, the relevant property is Bankside Yards, Blackfriars Road, London, SE1 9UY ("the Site"). The owners are the second and third Claimants and the main contractors on site are the first Claimant, who are entitled to possession.

3 An application for an interim injunction was made on 27 July 2020 and an interim *ex parte* injunction was made by Soole J on 30 July 2020 until 21 January 2021. Judgment was given by Soole J, which I have read and incorporate into this judgment.

4 The *ex parte* interim injunction was probably extended by Bourne J in January, but I have not seen the order and this judgment is subject to that order being confirmed as in existence by the Claimants' leading counsel, which I understand will take place this afternoon. The order that was actually put in the bundle was from another case. However, it is clear that there was a return date for the *ex parte* injunction because a witness statement was filed by Martin Wilshire on 25 January 2021, who is Director of Health and Safety at the first Claimant, that set out two recent incidents, despite the interim injunction. The first was dated before the interim injunction and involved something not particularly relevant. Four males were pointing at a crane on the Site and when the security services on Site made themselves apparent, the four males went away. They never entered the Site. The second is more worrying, because it occurred on 5 January 2021 and an unnamed person climbed a scaffold gantry on the Site but left when security was deployed. This was a direct action which was relevant to and potentially in breach of the injunction ordered by Soole J.

5 Hearsay evidence was given by Mr Wortley about urban exploring and videos of this taking place in London on cranes at various unknown locations, but also in White City. There was in Warsaw, which may not be the most relevant piece of evidence that I have ever read, but it at least showed that urban exploring by climbing buildings and cranes has prevalent in London and Europe.

6 Moving on from the order which was probably made by Bourne J, a further order was made by Stewart J on 4 March 2021, which recited the orders of Soole J (and Bourne J of 26 January 2021), which gives me some succour about the order of Bourne J and was based on the witness statement of Martin Wilshire which I have just recited. This extended the order of Bourne J to 19 May 2021. On 6 May 2021, Eady J extend the order of Stewart J to 26 July 2021. On 20 July 2021, Davis J extended the order of Eady J to January 2022. Master Dagnall, on 26 October 2021, joined the third Claimant to the claim.

7 In a witness statement dated 23 February 2022 in support of extending the interlocutory injunction further, Stuart Wortley informed the Court that a third crane was soon to be erected, updated the Court on urban explorers spotted in Blackfriars (no-one had entered the Site) and referred to evidence from Mr Wilshire and Mr Clydesdale, who believed that, despite the prevalence of urban explorers in London, the Site had not been chosen because

of the injunction being plastered all over the Site in accordance with the orders. Mr Wortley sought a final injunction in that witness statement. Exhibited to the witness statement was the judgment of Eyre J in *Mace v Persons Unknown* [2022] EWHC 329, which I have read, which gives a useful summary of the general risk in London of urban exploring and climbing on sites and of some attempts to enter the Site itself.

8 By an order of HHJ Shanks, sitting as a Deputy High Court Judge, on 3 March 2022, the interim injunction was extended until 31 December 2023. Pursuant to the expiry of that order, Mr Wortley filed his witness statement for this hearing on 21 December 2023; it updated the facts relating to trespasses on Site. There had only been one trespass. Therefore, Mr Wortley suggested the injunctions were having the desired effect. The trespass occurred on 20 December 2023, when two individuals entered the Site. They were intercepted by security and left. The reasons why the Claimants were seeking the injunction were the same as before and, in summary, they were urban exploring (which means climbing on building sites), which is inherently dangerous and puts the perpetrators, security and the public at risk and, of course, it puts the builders on Site at risk. The suggestion was made that the Site is an obvious target because it has cranes and other high structures. It is suggested that the injunctions were being effective as deterrents to urban explorers and it suggested that the balance of convenience, which I describe as the "balance of justice," favoured further restraint. This witness pointed out that the interlocutory injunctions did not restrain lawful activity because they were restricted wholly to the Site and asserted that damages would not be an adequate remedy, only an injunction would. The witness referred also to an injunction granted by Sweeting J at Elephant and Castle on a building site there and I have read the judgment of Sweeting J in that case. The solicitor for the Claimants, Mr Wortley, requested that the injunction be granted until 15 February 2027.

9 By an order made by Jefford J on 21 December 2023, a short, temporary extension of the injunction was granted to the date of this hearing. A further witness statement was filed on 18 January 2024 by Mr Wortley relating to the service of notice of the order made by Jefford J and also updated the Court that there had been no further incidents. I have taken into account the skeleton argument provided by Mr Morshead KC, for which I am very grateful, and in discussion during the hearing the conclusion that I reached was that the proper procedure for granting a final injunction in the light of the recent case law had not been properly followed.

10 It seems to me, following the decision made in *Wolverhampton Council & Ors v London Gypsies and Travellers* [2023] UKSC 47 and [2024] 2 WLR 45, that final injunctions can be granted but that power does not override the necessary notifications to persons unknown to bring a final hearing before the Court. It is not for me to advise on the appropriate methods, but one method that is available is through the summary judgment procedure. Another, of course, is to list the final hearing and to call witnesses or to have permission to rely on written witness statements, if that is granted. Neither of those procedures has been followed and so it seems to me that it would be improper for me to treat this as a final hearing, it being *ex parte* and no notification having been given through alternative service to any unknown persons. As for the appropriate method for alternative service for bringing a final hearing or for an application for summary judgment, that is a matter for the Claimants to consider and, if necessary, obtain the relevant order upon. Therefore, I refuse to consider a final order, but I do consider it correct to consider a further interim order.

11 The grounds for granting an interim order, since the *Wolverhampton* case, it seems to me involve not less than 13 factors, which I will run through very briefly.

1 – Substantive requirements

12 There must be a civil cause of action identified in the claim form and particulars of claim. The usual feared or *quia timet* torts relied upon are trespass, damage to property, private or public nuisance, tortious interference with trade contracts, conspiracy, and consequential damage. In this case it is trespass, but not pure trespass. It is trespass allied specifically in the particulars of claim to urban exploration by way of climbing high on buildings causing a substantial risk as outlined above.

2 – Sufficient evidence to prove the claim

13 There must be sufficient evidence before the Court to justify the Court finding that the claim has a reasonable prospect of success. For the reasons set out in the previous judgment of Soole J and the reasons accepted by the other judges which I have set out above, I do consider that there is sufficient evidence to justify a finding that there is not only a real issue to be tried, but that the Claimant has a realistic prospect of success.

3 – Whether there is a realistic defence

14 Whilst this is not a summary judgment application it is an *ex parte* application. As the Supreme Court made clear in *Wolverhampton,* it is incumbent upon the Claimants to put before the Court the potential defences of the persons unknown and for those to be considered. That has been briefly touched upon in the skeleton argument of Mr Morshead, particularly in relation to Human Rights. This is not a case which involves a breach of the Human Rights of the persons unknown by way of freedom of speech or freedom of assembly. Rather, the case only concerns matters which take place on the Claimants' land. For the reasons that are explained in the skeleton argument in paras. 40 through to 47 there is no reason to suppose that anyone's Convention rights are engaged by the relief sought in this claim. I do not consider that s.12(3) of *the Human Rights Act* is breached by the continuation of the interim injunctions.

4 – The balance of convenience and compelling justification

15 It is necessary for the Court to find, in relation to a final injunction, something higher than the balance of convenience, but because I am not dealing with the final injunction, I am dealing with an interlocutory injunction against PUs, the normal test applies. Even if a higher test applied at this interlocutory stage, I would have found that there is compelling justification for granting the *ex parte* interlocutory injunction, because of the substantial risk of grave injury or death caused not only to the perpetrators of high climbing on cranes and other high buildings on the Site, but also to the workers, security staff and emergency services who have to deal with people who do that and to the public if explorers fall off the high buildings or cranes.

5 – Whether damages are an adequate remedy

16 It is quite clear to me that damages could not be an adequate remedy for severe personal injury either caused to building site workers, security service staff, emergency workers or members of the public. Compensation may follow but insurance will probably not be in place and in any event money does not cure serious injuries.

6 – The procedural requirements

17 The PUs must be clearly identified and plainly identified by reference to:

a) the tortious conduct to be prohibited and that conduct must mirror the torts claimed in the claim form; and

b) clearly defined geographical boundaries if that is possible.

In this case, I have departed from the practice used by the other High Court judges and deputy High Court judges in this case by requiring the Claimants to add the words "climb or climbing" in the definition of PUs. I was concerned that the scope of the interlocutory injunctions granted to date and sought in future would cover homeless people who sought to enter the Site and sleep under a tarpaulin, or youths who sought to drink alcopops on Site but had no intention of climbing anywhere. If those were the perpetrators which were to be restrained by this injunction, I would not have granted it. in my judgment it is not the purpose of this jurisdiction in the High Court to make PU injunctions against mere vagrants or trespassers, there must be something more and the full requirements must be satisfied. In this case, for those who climb high structures and create real risks of substantial harm to those I have listed above, the factors are satisfied. In the interim order I will make the definition of PUs has been altered to include climbing. I am satisfied that it better mirrors the substance of the claim form and the witness statements in support.

7 – The terms of the injunction

18 The prohibitions must be set out in clear words and should not be framed in legal technical terms (like the word "tortious", for instance). I am afraid I use that word a lot, but it is not to be used in the terms of the injunction. Further, if and insofar as it seeks to prohibit any conduct which is lawful viewed on its own, this must also be made absolutely clear and the Claimant must satisfy the Court that there is no other, more proportionate way, of protecting its rights or those of others. In this case, the behaviour is clearly and plainly stated in the terms of the injunction as "trespass plus climbing" or "staying on the site plus climbing" and I am satisfied that that is sufficiently tight. There is no risk of this breaching the rights of persons unknown on public highways or in public areas because it only relates geographically to the Site.

8 – Prohibitions must match the pleaded claim

19 In this case they do, now that the words "climbing" are added.

9 – The geographical boundaries

20 The boundaries are set out in clear plans which were attached to the previous injunctions and will be attached to the injunction which I grant.

10 – Temporal limits - duration

21 The duration of any final injunction should only be such as is proven to be reasonably necessary to protect the Claimants' legal rights in the light of the evidence of past tortious activity and the future feared or *quia timet* tortious activity. In this case, I am not granting a final injunction, I am granting a further interim injunction and I consider that a year or approximately a year is an appropriate duration for that to keep costs down and because there is no evidence currently before me that the general public wishes to stop urban exploration or abseiling on building sites.

11 – Service

22 Understanding that PUs are, by their nature, not identified, the proceedings, the evidence, the summary judgment application (if one is made) and any draft order and notice of a hearing must be served by alternative means which have been considered and sanctioned by the Court. In this case, the application is *ex parte* and I consider that is appropriate in the circumstances. However, if it was a final hearing, then appropriate and authorised alternative service would need to be proven.

12 – The right to set aside or vary

23 PUs must be given the right to apply to set aside or vary the injunction on shortish notice, as set out in the judgment in *Wolverhampton*. They are given that right in the order that I have made and they were given that right in the previous interlocutory orders. I note that nobody took that right up.

13 – Review

24 At least in relation final orders, they are not final in PU cases, they are *quasi* final. Final orders in PU cases are clearly not final, they are *quasi* final in that they need to be reviewed in accordance with the judgment of the Supreme Court in *Wolverhampton*. Provision needs to be made for reviewing the injunction in future and the regularity of reviews depends on the circumstances. In this case, I do not need to consider review because it is a further interlocutory injunction that I am granting.

Conclusion

25 Having run through the 13 factors I do consider, on the balance of convenience, that it is appropriate to grant a further interim injunction and I do so. I will consider the terms of the injunction as discussed with leading counsel when they are sent through to my clerk. I understand that no costs are required and, hence, the order will say "no costs on the application".

CERTIFICATE

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

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This transcript has been approved by the Judge.

Sun Street Property Limited v Persons Unknown

Positive/Neutral Judicial Consideration

Court
Chancery Division

Judgment Date
7 December 2011

Claim No: HC11C04095

High Court of Justice Chancery Division

[2011] EWHC 3432 (Ch), 2011 WL 6328895

Before: Mr Justice Roth

Wednesday 7 December, 2011

Representation

Miss K Holland QC and Mr J Wills (Instructed by DLA Piper UK LLP) appeared on behalf of the Claimant/Respondent.
Mr S Knafler QC and Mr D Renton (Instructed by Bindmans LLP) appeared on behalf of the First Defendant/Applicant.
The Second Defendant/Applicant appeared in person.

Approved Judgment

Wednesday 7 December, 2011

Mr Justice Roth:

1. There are two related applications before the court. Both concern the occupation by the applicants and others of a large commercial complex of buildings in the City of London, north of Finsbury Square. It is bounded by Sun Street, Clifton Street, Earl Street and Wilson Street. I shall refer to it as “the Property”, and I shall refer to those who are currently occupying the Property by the way they have described themselves before the court, as “the Occupiers”. The Property is owned by the respondent to the applications (the claimant in the underlying proceedings). The claimant is a company in the UBS banking group.

2. On 18 November 2011, in circumstances to which I shall return, the court made three orders: first, an interim injunction restraining trespass on the property; secondly, an order abridging to 45 minutes the time for service of proceedings for possession; thirdly, a final order for possession of the property. These applications seek to set aside the injunction and the possession order.

3. The Occupiers have established on the Property what they call a “Bank of Ideas” and, as explained in their evidence and expanded at the hearing, this involves the establishment of a community project in the property with various activities and also, more particularly, they seek to draw attention to what they claim is the inequitable use of resources and the commercial practices of UBS as a major bank. I should, therefore, make clear at the outset that the court is not expressing any view as to whether these opinions of the Occupiers or their political and social objectives are well founded or mistaken, or as to whether or not these views deserve support. The concern of the court (and the only concern of the court) is with legal rights of, respectively, the applicants and the respondent.

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4. The application to set aside the injunction was issued on 21 November and came before me in the Applications List on 28 November, when the applicants appeared in person. The court was addressed by Mr Peter Phoenix on behalf of himself and his colleagues, and he asked that the matter be adjourned to enable them to arrange for legal representation and to file evidence. Despite some resistance by the respondent, I acceded to that request and also directed that the second application, which was issued on 24 November, seeking to set aside the possession order, be stood out to come on at the same time, namely the afternoon of 5 December. At the outset of the hearing on 5 December, at his request and with the consent of the respondent, Mr Nicholas Scott was added as an applicant. Mr Stephen Knafler QC and Mr David Renton of counsel appeared instructed by Bindmans, I think formally on behalf of Mr Smith, but effectively for the applicants in general. But Mr Phoenix continued to represent himself and he also addressed the court. Miss Katherine Holland QC appeared (as she has throughout) for the respondent, now with the assistance of Jonathan Wills of counsel, instructed by DLA Piper.

The events of 18 and 19 November

5. In the early hours of Friday, 18 November, a large number of persons, including the applicants, gained access to the property, which was unoccupied. They placed notices around the property, one of which reads as follows:

> "To whom it may concern.
>
> We are a Community Arts collective.
>
> Having noticed this building has been empty for an extended period, we have occupied the property to set a community project and an exhibition.
>
> We have begun tidying and repairing the space, and assessing health and safety requirements. Preparations are being made for a number of community project uses.
>
> We are prepared to discuss our interim use of the space, as this property is unused we feel a community project would be of great benefit to the people and the area.
>
> We are caretaking the space until further notice. We are always willing to negotiate and discuss various options.
>
> There may not be a need to go to court as we hope a mutually beneficial arrangement can be agreed. If you would like to contact us you can do so on the following number. Tel [mobile number provided].
>
> Please provide our Legal observers with a contact for your organisation.
>
> This project is being filmed for a documentary on community regeneration."

The other notice was headed prominently **"LEGAL WARNING"** and began:

> "TAKE NOTICE
>
> That we live in this property, it is our home and we intend to stay here."

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The notice then continues:

> "If you want to get us out you will have to issue a claim in the County Court or in the High Court or produce to us a written statement or certificate in terms of S.12A Criminal Law Act, 1977 ."

The reference to section 12A is to a statement by someone intending to occupy premises as their residence.

6. At about 6.45 p.m. on 18 November the respondent sought and obtained an urgent "without notice" interim injunction. The application to the court was supported by a witness statement from Mr Duncan Freeman of the respondent's solicitors, which exhibited reports about the occupation of the building and stated that "Due to the numbers likely to attend" the respondent had concerns about financial damage to the Property and as to the welfare and safety of those coming onto the property, referring, among other things, to the state of the electricity and gas on the Property, as they had not been tested for some time, and similarly the state or condition of the lifts. That application was made against persons unknown entering or remaining on the Property, and the resulting injunction prohibited such persons from entering or remaining on the land. In the same hearing, the respondent placed before the court a claim form, seeking an order for possession under CPR 55 , and obtained an order abridging time for the service of possession proceedings to 45 minutes. The court ordered that service may be effected by fixing the order and documents to conspicuous places around the Property.

7. At about 9.10 p.m. a process server then fixed around the Property some ten bundles of documents, which he states comprised the following:

1. A claim form for an injunction.
2. An order for injunction.
3. An application for an injunction.
4. A claim for possession.
5. An application to abridge time.
6. A certificate of reasons.
7. A draft order for possession.
8. The first witness statement of Mr Freeman with its exhibit.

8. At about 9.15 p.m. Mr Freeman sent a text message to the mobile number which appeared on the Occupier's notice (to which I have referred) and which stated:

> "To whom it may concern.
>
> Further to the occupation today by Occupy London of the former UBS building, this text is to inform you that an injunction order has now been granted on 18 November 2011 to restrain the trespass together with ancillary orders and a copy of this injunction has been posted at conspicuous places around the Property."

9. At around 10 p.m. the respondent's legal team assembled outside the Rolls Building in Fetter Lane, and from the street rang Proudman J to proceed with its possession application. No one attended from the applicants or the Occupiers. The judge

proceeded to hear the application over the telephone, and made an order requiring the defendants or respondents to that application (the present applicants and Persons Unknown) to give up possession forthwith. Miss Holland told the court, and I of course accept, that Proudman J had made it clear that if anyone had attended on behalf of the Occupiers, the judge would not have conducted a hearing by telephone, still less where the parties were in the street, and had indicated that she would then make arrangements for a hearing in her presence to take place either that evening or the next day.

10. The possession order was not served or indeed notified to the Occupiers that evening, or indeed the next morning. It was served, again by being fixed to the Property, at about 10.40 p.m. the next day. That being a Saturday, the order was unsealed and a further sealed copy was served subsequently, in fact only during the evening of Tuesday 22 November.

The present applications.

11. I consider that there are important differences in the approach to be taken to the interim injunction and the possession order, and I shall consider them separately.

(a) The Interim Injunction.

12. At the forefront of his submissions seeking to discharge the injunction, Mr Knafler submitted that it should not have been granted without notice. He stressed that without notice injunctions are exceptional and should be used only where immediate intervention by the court is required, referring to the well-known passages in the *Court of Appeal decision in Moat House Group-South Ltd v Harris [2005] EWCA (Civ) 287, [2006] QB 606* . He said that the respondent could have contacted the Occupiers on the telephone number provided during the day on 18 November and drawn any alleged health hazards to their attention. Further, the legislative scheme for acquiring possession was by the procedure in CPR 55 , and a without notice injunction should not have been used for that purpose.

13. However, I consider that it is clear that here the interim injunction was not being used as a means of circumventing CPR 55 and obtaining possession. That is evident from the fact that, at the very same time, separate possession proceedings were commenced and an application was made for an abridgement of time for service of the claim for a possession order. The distinct purpose of the injunction was to stop more people coming onto the Property and a genuine concern about their safety, given that this was a large building complex that had been unoccupied for a considerable period. The respondent could not know how many more people might seek to occupy the building, and produced to the court as an exhibit to Mr Freeman's witness statement a report from a newspaper website on 18 November which quoted one of the Occupiers, who said:

> "We've got more people joining us from the rest of the UK and Ireland tomorrow."

It was not suggested in argument before me that this report was inaccurate. The injunction was an interim injunction to restrain such entry. Therefore, understandably and in my view very properly, it was against persons unknown. It followed the clear precedent established in the judgment of Sir Andrew Morritt (then Vice Chancellor) in Hampshire Waste Service v Persons Unknown [2003] EWHC 1738 (Ch), [2004] Env LR 9 , and effectively approved by the *Supreme Court in Secretary of State v Meier [2009] UKSC 11 [2009] 1 WLR 2780* per Lord Rodger at para 2. As Lord Neuberger observed in the same case at para 83, in some cases it may be appropriate to grant an injunction where the court considers it could have a real deterrent effect.

14. I think that the injunction in this case could have been more appropriately worded to make clear that it was directed at further entry onto the land and not to those already in occupation at the time it was served, an issue that did not arise in the Hampshire Waste case, but I do not think that in the circumstances here that is a ground now for setting it aside. Therefore, the fact that the Occupiers may themselves take various steps to make the Property safe was not directly relevant in the circumstances of the evening of 18 November. In any event, on the applicants evidence, it was only on 19 November and then further on 22 November that a health and safety officer who wished to assist them made a thorough check of the building, and

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as regards the electricity on the Property, only on or after Wednesday 23 November did an electrician attend at the Property to assist the Occupiers by commencing safety checks, which were completed by a second visit on 29 November.

15. It is not necessary to resolve the issue between the parties as to whether the Property is now safe, because that does not go to the justification for a without notice application on 18 November. This was an interim injunction, including the usual provision enabling an urgent application to discharge it, in this case on 12 hours' notice. The applicants indeed promptly applied to discharge the injunction, pursuant to that provision. And as for the position as it stands today, the matter is effectively subsumed in the possession order. If the respondent is entitled to possession, then I consider it is entitled to an injunction where there is a credible threat that more people might otherwise come onto the Property.

(b) The Possession Order

16. The possession order is a final order and, in my view, it involves different considerations. As I have mentioned, it was made at about 10 p.m, which is unusual for an order of that kind, certainly as regards a commercial property. The CPR incorporate in Part 55 what is in effect a special procedural code for possession claims, which was introduced in 2001. Because of the particular problems caused by trespassers, this includes a particularly accelerated procedure for possession claims against trespassers. CPR 55.5 states:

> "(1) The court will fix a date for the hearing when it issues the claim form.
>
> (2) In a possession claim against trespassers the defendant must be served with the claim form, particulars of claim and any witness statements –
>
> (a) in the case of residential property, not less than 5 days; and
>
> (b) in the case of other land, not less than 2 days,
>
> before the hearing date."

The Rule adds a cross-reference to CPR 3.1(2)(a) whereby the court can extend or shorten the time for compliance, which is, of course, what the court did here.

17. CPR 55.8 provides:

> "(1) At the hearing fixed in accordance with rule 55.5(1) or at any adjournment of that hearing, the court may –
>
> (a) decide the claim; or
>
> (b) give case management directions.
>
> (2) Where the claim is genuinely disputed on grounds which appear to be substantial, case management directions given under paragraph (1)(b) will include the allocation of the claim to a track or directions to enable it to be allocated."

18. The circumstances in which the court should abbreviate the already short times set out in Rule 55.5(2) are set out in the practice direction to Rule 55 ,PD55A at paragraphs 3.1 and 3.2:

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> "3.1 The court may exercise its powers under rules 3.1(2)(a) and (b) to shorten the time periods set out in rules 55.5(2) and (3).
>
> 3.2 Particular consideration should be given to the exercise of this power if:
>
> (1) the defendant, or a person for whom the defendant is responsible, has assaulted or threatened to assault:
>
> (a) the claimant;
>
> (b) a member of the claimant's staff; or
>
> (c) another resident in the locality;
>
> (2) there are reasonable grounds for fearing such an assault; or
>
> (3) the defendant, or a person for whom the defendant is responsible, has caused serious damage or threatened to cause serious damage to the property … "

19. It is not clear whether the court's attention was directed to those provisions of the practice direction at the first hearing on 18 November. They are not referred to in the skeleton argument for the claimant produced to Proudman J at that hearing. In any event, the judge was persuaded to abridge the two days provided for in rule 55.5 , although it is clear that the particular circumstances to which attention is drawn in those paragraphs of the practice direction do not apply. She was persuaded to permit the accelerated period of 45 minutes for service, presumably because of what was said in the witness statement about the potentially dangerous state of the Property.

20. The applicants submit that they received no effective notice of the second hearing which led to the possession order, and thus had no opportunity to put their case to the court. Miss Holland sought to refute that submission by pointing to the court telephone number which appears on the injunction order that was in the papers fixed to the Property with the documents concerning abbreviated service in the possession claim. She said that this was the court's out of hours number, which the applicants could have telephoned for information. The same point, in effect, is made in Mr Freeman's third witness statement. It is incorrect. The telephone number given is that of the Chancery Associates, whose office shuts at 5 p.m. If the applicants had rung that number at 9.15 p.m, they would have had no answer.

21. Secondly, it was said that the applicants could have contacted the respondent's solicitors, DLA Piper, whose telephone number and reference appears in the injunction at paragraph 6. However, it is necessary to bear in mind that the documents affixed to the Property at 9.10 p.m. comprised about 100 pages. The suggestion that litigants in person can be expected to work their way through that volume of documents in a very short timeframe and identify the solicitors' contact details buried away among them is, in my view, wholly unrealistic, even if it should be assumed that the applicants would have appreciated that DLA Piper's offices would still be open at that time of the evening.

22. Finally, it was submitted that neither the court nor the provisions of CPR 55 required any other form of service. In my view, that submission is fundamentally misconceived. The form of service of a possession claim is indeed specified in Rule 55.6 , but it is the obligation of the claimant seeking relief, especially when it has the benefit of professional solicitors and the party against whom relief is sought are litigants in person, to take reasonable steps to give them adequate notice. What is reasonable and adequate is dependent on the circumstances. It should be self-evident that the shorter the period of notice, the more prominent the steps that have to be taken to bring the matter to the other party's attention. Here, the only indication that the time for service had been abridged to 45 minutes was to be found included within a bundle of some 100 pages of documents, and there was no information as to when and where the hearing was to be held that same evening. It is striking that although the respondent's solicitors sent a text to the telephone number of the Occupiers with details of the injunction, they did not send any similar message providing details of the second hearing that would seek a final possession order. Nor was any telephone call made to that number to inform the Occupiers of the time of the hearing and how they could attend.

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Nor did the documents include the out of hours number on which the Occupiers could contact the Royal Courts of Justice to discover what was happening – see the Chancery Guide at para 5.42(2) – or the telephone number of Proudman J's clerk, with whom the respondent's legal advisers were presumably in contact. Nor was any covering letter or note included with the large bundle of documents drawing any of these matters prominently to their attention. I am not suggesting that all these steps should have been taken, but what makes the position profoundly unsatisfactory is that not one of these elementary steps was taken. In short, I regard the notice given by the respondent to the Occupiers and hence to the present applicants as grossly inadequate for an application of this nature.

23. I note also that the claimant apparently did not serve Particulars of Claim, in accordance with Rules 55.4 and 55.5(2) , but Mr Knafler did not take any point on this, and here the claim form sets out fully the matters that would be found in a Particulars of Claim. What Mr Knafler does submit is that, in consequence of the short and inadequate notice given to the Occupiers, the possession order should be set aside without any consideration of the merits. He argued that the matter should be approached under CPR 3.1(2)(m) , or, alternatively, subparagraph (7), and not under Rule 39.3 , so that there was no need for the applicants to show any defence. He pointed out that CPR 39.3 applies for an application to set aside after a trial, and in this case it was common ground that there had not been a trial. And he submitted that, if the court were to go into the merits and allow the possession order to stand if it felt that the applicants had no defence, that would stand the proper procedure on its head, since it would mean that an applicant could obtain a possession order on no notice at all, and then uphold it unless the respondent could show a defence.

24. However, in my view, the position is not so simple, and every case has to be considered on its own circumstances. Whether or not CPR 39.3 should be applied by analogy when this case is looked at under CPR 3.1 , or whether, as I suggested to the parties, CPR 23.11 may be the more appropriate provision to apply in the present case, I consider that the underlying merits cannot be dismissed as irrelevant. In the *Court of Appeal decision in Forcelux Limited v Binnie [2009] EWCA (Civ) 854* , which concerned an application by a tenant to set aside a possession order where he had not received notice of the proceedings, the court made clear that the main factor in favour of granting his application to set aside the order was that the tenant had a very strong case on the merits – see paragraph 67 of the judgment of Warren J. This was emphasised in the subsequent *Court of Appeal decision of London Borough of Hackney v Findley [2011] EWCA (Civ) 8* , where Arden LJ, giving the lead judgment, said at para 24:

> "…in the absence of some unusual and highly compelling factor as in Forcelux , a court that is asked to set aside a possession order under CPR 3.1 should in general apply the requirements of CPR 39.3(5) by analogy."

In the Hackney case there was the added consideration that the possession order had been executed, which is not the situation here.

25. Thus, even if some "unusual and highly compelling factor" applies, such that showing a good defence is not an absolute requirement for setting aside the order, it will be a very relevant consideration. In particular, I think it is appropriate to ask what would have happened if no order for abbreviated service had been made. Pursuant to Rule 55.5(2) , the Occupiers would then have had two clear days' notice before a hearing. At that hearing they could have requested more time to arrange legal representation and put in evidence. I shall assume, in their favour, that such time would have been granted. But, as matters stand today, the applicants had more than two clear days between their learning of the possession order on 19 or 20 November and the first court hearing on 28 November. At that hearing they requested an adjournment to arrange for legal representation and to put in evidence, which application was granted. When the matter came back before the court on 5 December, the applicants were rerpresented by leading and junior counsel, who had put in a full skeleton argument, and the applicants had also served two witness statements addressing the other side's evidence. Although the matter was in the general applications list, the court sat late and the oral argument lasted over three hours.

26. In those circumstances, even in the absence of authority binding on this court, to set aside the possession order without consideration of the merits would be to take a very technical approach. The respondent could immediately re-issue an application and in a few days' time the matter would come on for hearing, when exactly the same arguments on the merits as were addressed to me would be heard all over again. That cannot be an appropriate or sensible course, having regard to the overriding objective that cases should be dealt with so as to save expense, expeditiously and fairly. The judgment of the

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Court of Appeal in Tombstone Ltd v Raja [2008] EWCA (Civ) 1444 , to which my attention was drawn this morning shortly before delivery of this judgment, does not in any way lead to a different conclusion – see, in particular, the judgment of the court at paragraphs 83-85. Of course, fairness means that, if the applicants have shown apparently substantial grounds of defence such that a fuller hearing with more evidence is justifiable, then such a hearing would have been directed under rule 55.8(4) , and the possession order should then be set aside so that the proceedings can take that course. But this takes me to the question: what are the grounds on which the applicants seek to oppose the respondent's claim for possession?

27. Mr Knafler relies on articles 10 and 11 of the European Convention on Human Rights . These 10 provide:

> **"Article 10**
>
> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers…
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such…restrictions…as are prescribed by law and are necessary in a democratic society, in the interests of…the protection of the reputation or the rights of others…
>
> **Article 11**
>
> 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others…
>
> 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…or for the protection of the rights and freedoms of others…"

Both these rights are, accordingly, qualified rights, as is the respondent's property right under article 1 of the First Protocol . Hence, Mr Knafler's and Mr Renton's skeleton argument submits at para 33:

> "In this case…the court is to balance the claimant's right to peaceful enjoyment of its property, found at Article 1 of the 1st Protocol ECHR and the applicants' rights to freedom of expression and assembly, at Articles 10 and 11 ECHR . Both the claimant's and the applicants' rights are qualified, rather than absolute, rights."

28. I shall assume, without deciding, that, although the respondent is obviously not a public authority within section 6 of the Human Rights Act , the obligation on the state positively to protect the exercise of individual rights from interference by others means that articles 10 and 11 could be engaged by the decision of the court as a public authority to make a possession order.

29. Both sides agree that the governing principles are set out in the judgment of the *European Court of Human Rights in the case of Appleby v The United Kingdom [2003] 37 EHRR 38* . There, the applicant sought to set up two stands in a shopping mall known as the Galleries, which formed the town centre at Washington in Tyne and Wear, in order to seek signatures from the public for a petition protesting against a proposed development in a local park. The owners of the shopping centre gave the applicants permission to do this for a month, but declined to extend the permission for a second month for a further petition. They did so on the basis that they wished to remain strictly neutral on such political issues. A letter refusing permission significantly stated:

> "… the Galleries is unique in as much as although it is the Town Centre, it is also privately owned."

In its judgment, the majority of the court recalled the key importance of freedom of expression in a functioning democracy. The court stated at paragraph 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 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 Article 1 of Protocol No. 1."

Then after rejecting the suggestion that such a shopping mall should be regarded in a special category as a quasi public place, the court stated at para 47 with regard to article 10 :

> "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 the Convention rights by regulating property rights. A corporate town where the entire municipality is controlled by a private body might be an example…"

The court then applied that test to the facts, and held that there were clearly other methods of campaigning than collecting signatures open to the applicants. The court acknowledged the applicants argument that "the easiest and most effective way of reaching people was in using the Galleries", but that, in itself, was insufficient to show that the applicants were otherwise unable to exercise their freedom of expression in a meaningful manner. For the same reason, the court held that there was no violation of article 11 .

30. In School of Oriental & African Studies v Persons Unknown, unreported, 25 November 2010 , of which I was provided with an unapproved transcript, Henderson J applied the Appleby case to the situation of students occupying part of a building at SOAS in protest against the increase in fees and cuts to the education budget. In his unreserved judgment, after reference to the judgment of the European Court of Human Rights in Appleby , the judge held that it is "entirely fanciful" to suggest that preventing the students exercising their rights in the particular building in question would prevent them form exercising their rights of expression, and similarly that article 11 did not, on the facts, require the court to override the property rights of SOAS in their own building.

31. Mr Knafler argued that Appleby shows that each case is very fact sensitive, and that here there were good grounds why the Occupiers' rights should prevail. They were not damaging the Property, which was an unoccupied building, by distinction with the situation in the SOAS case. The occupation draws attention to matters of legitimate and very real public interest and concern, both as regards the poor use of resources and as regards the conduct of large banks in general and UBS in particular.

He submitted that the location was "absolutely integral to the message the Occupiers seek to convey", and that the possession order effectively prevented the Occupiers from communicating their views to their fellow citizens in a meaningful way.

32. Those submissions confuse the question of whether taking over the bank's property is a more convenient or even more effective means of the Occupiers expressing their views with the question whether if the bank, or, more accurately, its subsidiary, recovered possession, the Occupiers would be prevented from exercising *any* effective exercise of their freedom to express their views so that, in the words of the Strasbourg Court, the essence of their freedom would be destroyed. When the correct question is asked, it admits of only one answer. The individuals or groups currently in the Property can manifestly communicate their views about waste of resources or the practices of one or more banks without being in occupation of this building complex. No one is seeking to prevent them from coming together to campaign or promulgate those views. I need hardly add that the fact that the occupation gives them a valuable platform for publicity cannot in itself provide a basis for overriding the respondent's own right as regards its property.

33. As regards article 11 , Mr Knafler pointed to the various social and educational activities being organised in the Property by the Occupiers, which he said were of social value as they benefited a substantial number of visitors. I was given details of those activities in summary, in particular by Mr Phoenix in his supplementary address to the court. I can accept that some, and perhaps many, of those activities are of value. But put in terms of article 11 , or indeed article 10 , as it must be if the argument was to have any legal effect, that would provide a justification for the taking over of any privately owned property that was not occupied or in use in a location that was convenient for socially beneficial activities or enterprises. Unsurprisingly, there is not the slightest support in any authority for the suggestion that article 11 or article 10 , if that is also said to apply, provides any basis for overriding property rights on that ground.

34. Mr Knafler sought to stress that the evidence so far before the court on these matters was only illustrative and that much more detail would be provided if the matter went to a full hearing. But as I consider that these human rights grounds stand not the slightest chance of success, they would not be advanced by the admission of further details and information.

35. I should add that my attention was drawn to the judgments of the *Court of Appeal in the Parliament Square case, Hall v Mayor of London [2010] EWCA (Civ) 817, [2011] 1 WLR 504* , where Lord Neuberger MR said at para 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."

However, the MR significantly went on to state at paragraph 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."

That case was concerned with a very prominent public space and a public demonstration. I consider that that raises different considerations from the occupation of private property, and no doubt for that reason the Court of Appeal does not refer to

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the Appleby judgment of the European Court of Human Rights , albeit that it was cited in argument – see 1 WLR at 506. Accordingly, I do not derive any particular assistance from that judgment

36. Finally, Mr Phoenix, in his oral submissions, contended that pensioners who had lost money by reason of what he alleged was inappropriate marketing by UBS of certain financial products, in particular Shared Appreciation Mortgage Schemes, had, as a result, a proprietary interest in the property. This argument formed no part of Mr Knafler's submissions and is fundamentally mistaken. Whether or not such pensioners or others may have any claims against the UBS company which marketed those products (as to which, I stress, I express no opinion), that cannot begin to give them a proprietary interest in this property of the respondent. I should add that there was no evidence that any of the Occupiers against whom the possession order was made was such a pensioner or purchaser of a UBS mortgage.

Conclusion.

37. It follows that the application to discharge the injunction is dismissed. As regards the application to set aside the possession order, despite the serious defects in the notification of the original hearing to the applicants, in all the circumstances now before the court, and having regard to the lack of any defence, I consider that it is not appropriate to set the order aside. Accordingly, that application is also dismissed.

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Neutral Citation Number: [2024] EWHC 1770 (KB)

Case No: KB-2024-BHM-000127

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 July 2024

Before :

MR JUSTICE JOHNSON

- -

Between :

University of Birmingham	**Claimant**
- and -	
(1) Persons Unknown **(2) Mariyah Ali**	**Defendants**

- -
- -

Katharine Holland KC and Michelle Caney (instructed by Shakespeare Martineau LLP) for the Claimant
Liz Davies KC and David Renton (instructed by Hodge, Jones and Allen) for the Second Defendant

Hearing date: 4 July 2024

- -

Approved Judgment

This judgment was handed down by release to The National Archives on 9 July 2024

Mr Justice Johnson:

1. This case concerns an encampment by students (and possibly others) at the University of Birmingham ("the University") on the University's campus. The campers are opposed to actions of the Israeli Defence Force in Palestine. They demand that the University takes certain steps to show that it too opposes those actions. The University seeks an order for possession of its land against the campers. It says that a summary order for possession should be made under Part 55 of the Civil Procedure Rules.

2. Mariyah Ali is one of the campers. She is, apparently, the only one who is willing to reveal her identity and take part in these proceedings. She says that there are grounds to dispute the claim and that directions should be given for a trial of the issues. Specifically, she says that the University's decisions to terminate her licence to use its land, and to seek possession of its land, are unlawful because (i) they discriminate against her on the grounds of her beliefs, contrary to sections 13 and 91 of the Equality Act 2010, (ii) the University has not complied with its public sector equality duty, contrary to section 149 of the 2010 Act, (iii) the decisions amount to a breach of the University's statutory duty to ensure freedom of speech for university students, contrary to section 43(1) of the Education (No 2) Act 1986, and (iv) they amount to a breach of her rights to freedom of expression and freedom of assembly, contrary to section 6 of the Human Rights Act 1998 read with articles 10 and 11 of the European Convention on Human Rights ("the Convention").

The test for granting a summary order for possession

3. Part 55 of the Civil Procedure Rules makes provision for possession claims, meaning claims for the recovery of possession of land: CPR 55.1(a). This includes a possession claim against trespassers, meaning (for these purposes) a claim for the recovery of land which the claimant alleges is occupied only by persons who are on the land without the consent of anyone entitled to possession of the land: CPR 55.1(b).

4. Where, in a possession claim against trespassers, the claimant does not know the name of a person in occupation or possession of the land, the claim must be brought against "persons unknown" in addition to any named defendants: CPR 55.3(4).

5. Once a claim has been issued, a hearing must be fixed. At that hearing, or any adjourned hearing, the court may either decide the claim or may give case management directions: CPR 55.8(1). CPR 55.8(2) states:

> "Where the claim is genuinely disputed on grounds which appear to be substantial, case management directions… will include the allocation of the claim to a track or directions to enable it to be allocated."

6. The test for deciding whether to make a summary possession order is the same as the test that applies to the grant of summary judgment under Part 24 of the Civil Procedure Rules: *Global 100 Limited v Maria Laleva* [2021] EWCA Civ 1835, [2022] 1 WLR 1046 *per* Lewison LJ at [13] – [14]. A summary order for possession may therefore be made if there is no real prospect of successfully defending the claim and there is no other compelling reason why the claim should be disposed of at trial: CPR 24.3. If this test is satisfied then it will necessarily follow that the court is satisfied that the claimant

would be likely to establish at a trial that possession should be granted (cf section 12(3) Human Rights Act 1998).

7. The procedure under Part 55 of the Civil Procedure Rules (and its predecessor provision, order 13 of the Rules of the Supreme Court) has been used by universities and other academic institutions on many occasions to secure summary possession orders against students taking part in encampments or "sit-ins": *University of Essex v Djemal* [1980] 1 WLR 1301, *School of Oriental and African Studies v Persons Unknown* [2010] EWHC 3977 ("*SOAS*"), *University of Sussex v Protesters* [2010] PLSCS 105, *University of Sussex v Persons Unknown* [2013] EWHC 862 (Ch), *University of Birmingham v Persons Unknown* [2015] EWHC 544, *University of Manchester v Persons Unknown* (transcript, 20 March 2023).

The issues

8. The parties agree the University is the registered freehold and leasehold owner of the land that is occupied by the camp. They agree that the defendants are in occupation of the land. They agree that the defendants do not have an interest in the land or any right to occupy the land. They agree that the University has (purportedly) terminated any licence that they had to use the land.

9. That means that subject to any defence that the defendants might have to the claim, the University is entitled to an order for possession of the land.

10. The parties agree that if the decisions to terminate any licence Ms Ali had to use the land, and to bring possession proceedings, were unlawful then Ms Ali has a real prospect of successfully defending the claim: *Lewisham London Borough Council v Malcolm* [2008] 1 AC 1399 *per* Lord Bingham at [19], *Aster Communities Ltd v Akeman-Livingstone* [2014] EWCA Civ 1081 [2014] 1 WLR 3980 *per* Arden LJ at [2], [2015] UKSC 15 [2015] AC 1399 *per* Baroness Hale at [17], *Forward v Aldwyck Housing Group Ltd* [2019] EWCA Civ 1334 [2019] HLR 47 *per* Longmore LJ at [21], [25] and [31].

11. Ms Ali's case is that the University's decisions to terminate any licence she had to use the land, and to seek possession of the land, are unlawful for the reasons set out in paragraph 2 above.

12. The primary issue on this application for a summary possession order is therefore whether Ms Ali has a real prospect of successfully defending the claim on one or more of these grounds.

The facts

13. The basic factual background is largely undisputed. I summarise the facts based on the following sources:

    (1) The statements of case, so far as the University's summary of facts in the particulars of claim is admitted in the amended defence.

    (2) A judgment of Ritchie J given at an earlier stage of these proceedings: [2024] EWHC 1529 (KB) at [5] – [29].

(3) Written witness statements of Ms Ali.

(4) Written witness statements of Dr Nicola Cárdenas Blanco, the University's director of legal services, together with exhibits to those statements.

(5) A written witness statement of Mark Lawrence, the University's head of community safety, security and emergency planning, together with exhibits to that statement.

(6) Written witness statements of Jon Elsmore, the University's director of student affairs, together with exhibits.

14. The University is a corporate body created by Royal Charter in 1990, It is an exempt charity under schedule 3 to the Charities Act 2011. Its governing body is "the council", and members of the council are the claimant's charitable trustees. It has approximately 38,000 students and 9,000 staff. It has two main campuses in Birmingham, one of which is at Edgbaston, the other at Selly Oak.

15. The University is the registered freehold and leasehold owner of land at its Edgbaston campus. Part of the Edgbaston campus includes "The Green Heart". The Green Heart is an open area of land which is intended to "provide stimulating, secure and accessible landscaped surroundings." Dr Blanco says that students use The Green Heart both to study on the grass, and to take a break from studies in the adjoining library. Marquees are often erected on The Green Heart for different events in the University's annual calendar, including enrolment in September, a festival to celebrate belonging and inclusion at the start of Semester 2, and a programme of activities in the summer term. The main site for graduation celebrations is a marquee located on The Green Heart.

16. The University has a Code of Practice on Freedom of Speech ("the Code"). The Code is incorporated in every student's contract with the University. The Code covers demonstrations and protests and other events organised by the University's staff or students. It draws attention to the Public Sector Equality Duty:

> "which requires the University to have due regard to the need to eliminate discrimination, harassment, victimisation, and to advance equality of opportunity and foster good relations between people who share 'protected characteristics' (age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation) and those who do not.
> …
> …for freedom of speech, the University 'must promote the importance of freedom of speech and academic freedom', and must 'take such steps as are reasonably practicable' to secure freedom of speech within the law. For other duties, including PSED… universities are required to 'have due regard' to the need to achieve the aims of these pieces of legislation. Therefore, in balancing these obligations and making decisions, the University will be mindful that it has a particular responsibility to promote and protect freedom of speech."

17. The Code requires the organiser of an event to comply with its provisions and to follow a prescribed procedure. This includes discussing the activity with the organiser's Head of School before proceeding. The Head of School is then responsible for determining whether (and what) additional measures should be put in place. It states:

> "Where the Head of School or Head of College's assessment is that there are particular risks raised by the event that require a fuller risk assessment and mitigations to be put in place, this should be escalated to and discussed with the Pro-Vice-Chancellor (Education) or the Pro-Vice-Chancellor (Research), who are the Authorising Officers for education and research activities respectively (see section 7.2). Examples of where this might be the case are: teaching or research seminars that involve speech which may fall within paragraph 5.2 of Appendix B; …or where other risks are raised by the event (for example due to the prevailing political context, or the timing or physical location of the event…). On these occasions, relevant aspects of the procedure in Appendix B of this Code should be followed. Examples include the completion of a risk assessment, and identification and implementation of mitigations that are relevant to the teaching or research activity. The Head of School should discuss these with the Authorising Officer, who is responsible for approving whether academic-related activities that have been escalated in this way may go ahead."

18. The Code states that the duty to promote and protect freedom of speech means that the starting point for any event is that it should be able to go ahead, but that a risk assessment must be carried out which should include the identification of steps that can be taken to ensure that lawful speech is protected. Such steps may include putting in place measures to ensure that opposing views can be put forward lawfully.

19. Mr Elsmore says that in the academic years commencing in 2020, 2021 and 2022 requests were made for a total of 1,596 events. Permission was granted in all cases. In 1,465 cases (just over 90%) no conditions were imposed. In the remaining 131 cases some conditions were imposed. Since October 2023, a number of requests have been made for "Pro-Palestinian events" to take place at the University. Permission was granted in every case (although Ms Ali gives evidence that in one case the event was required to be postponed and it has not yet been re-arranged). These events included vigils and speaking events. In a small number of cases conditions were imposed (for example to ensure that the event was held in a location away from an unauthorised protest that was taking place at the same time). There were also a number of unauthorised protests. At one of these it is said that an antisemitic banner was displayed, resulting in more than 1,500 complaints and a police investigation (this pre-dates the Green Heart camp and therefore cannot be attributed to that camp). The University became aware of one unauthorised protest in advance, and a letter was sent to the organiser to advise that the protest was not authorised, and explaining how authorisation could be secured.

20. Ms Ali describes herself as a British-Pakistani Muslim woman and one of the University's undergraduate students. She pays tuition fees to the University via the Student Loans Company. She condemns the attacks perpetrated by Hamas against

Israeli people on 7 October 2023, but she also opposes the response of the Israeli Defence Force since 9 October 2023. She considers that response amounts to genocide, or that there is a risk of genocide. She says that she has "philosophical beliefs in regards to Palestinian Liberation and Self-Determination, sanctity of religious worship; and against Genocide, and against racism and apartheid." She is a committee member of one of the University's student societies, the Friends of Palestine Society. She is concerned that the University's investment strategy "might be directly or indirectly involved, perhaps through profiting from investments in companies who have a very direct, or lesser, involvement in the conflict." She gives, as an example, a partnership between the University's engineering department with BAE Systems which, she says, builds fighter jets that are used by the Israeli Defence Force to attack Palestinian civilians.

21. In late April 2024, a student society wrote a letter to the University's Vice-Chancellor and made a series of demands. These included that the University should apologise "for the University's delay in condemning Israel's genocide and scholasticide Gaza, and for it's repression of student and staff organising in solidarity with Palestinians, and specifically the University's currently known investments and partnerships with companies, particularly arms manufacturers, linked to Israel."

22. From the early hours of 9 May 2024, a camp commenced at The Green Heart. No permission had been sought for the camp, as required by the Code.

23. The camp initially involved approximately 15 people. Those present were served with notices entitled "notice to quit" which stated that the University had not given permission for a protest at The Green Heart, that the occupation amounted to a trespass, and that the University required them to leave the campus immediately. Further such notices were served as new tents appeared on the camp. A series of "demands" were made of the University (relating to its relationship with institutions and businesses connected to Israel) on social media accounts which are said to be associated with the campers.

24. On 17 May 2024, the Vice-Chancellor published a message "to all students". This said:

> "You may have seen that a group of tents has been set up on the Green Heart by individuals protesting in support of Palestine and I wanted to address this in this message. Firstly, I want to emphasise that we will support students who wish to take part in protests about issues that they care deeply about. There are many ways in which this can be done lawfully, including through authorised demonstrations and our staff have worked with students over recent weeks and months to encourage this wherever possible. However, this does not extend to setting up tents where there is no authority or permission to do so. Although the camp has been largely peaceful to date, the Green Heart is a space which is important for University activities, and the presence of the camp (which has also included those who are not members of the University community) causes disruption to current and planned University activities in and close to that area. This includes examinations, the summer programme activities, which take place from the start of June, and the July degree

> ceremonies. It is also true that camps at other universities have led to incidents that we do not want to see repeated here.
>
> While I have informed the students involved that I am unable to meet with them whilst the camp is in place, members of the University's senior team are visiting the camp daily for welfare checks. Once the encampment ends, I remain open to meeting with them. As I have said above, there are other ways in which protests can be done lawfully, and we are happy to discuss and facilitate these with the organisers so that those who wish to can continue to protest…"

25. On 24 May 2024, the University sent an email to an email account associated with the campers. It said that the camp would cause "increasing disruption to essential activity planned for the whole student community, including the summer term programme and graduation ceremonies and celebrations".

26. The evidence suggests there were 61 tents on The Green Heart on 3 June 2024, rising to 83 by 20 June 2024. Dr Blanco says that the campers advertise daily schedules of events to take place on The Green Heart and continue to call for external third parties to attend and to join the camp.

27. Ms Ali is one of those taking part in the occupation. She is doing so, she says, to manifest her beliefs. For periods of time there were camps in other parts of the claimant's land, but those camps have ceased following an order made by Ritchie J.

28. The University claim that a number of concerning incidents have occurred, but the facts of these are disputed. For example, there is evidence of red paint being sprayed on one of the University's buildings, but Ms Ali says that was some distance from the camp and there is no evidence that it relates to the camp. In another incident, there is a dispute as to whether an item being carried by a student was a weapon or a religious item. Mr Elsmore says that on 22 May 2024 a group of masked individuals from the camp entered one of the University's building and surrounded the outside of a meeting room where a meeting was taking place. They banged on the door and walls of the meeting room, shouting and chanting loudly, intimidating the staff who were attending the meeting, many of whom were visibly shaken. I was provided with a video of this incident. Mr Elsmore also says:

> "The encampment has caused ongoing disruption to the wider university community, with a number of complaints and concerns raised by staff and students - in particular our Jewish staff and students who have described the encampment as having created an uncomfortable and hostile environment. The permanence of the camp is creating an increasingly uncomfortable and hostile environment for all others who use the campus including members of staff. The protestors have stated that their intention is to disrupt University business. Masked protestors have shouted at staff, blocked people's movement around campus, attempted to force their way into University meetings. On Wednesday 5 June 2024 several buildings across the campus were vandalised by masked individuals. This

> included spraying red paint across a large part of the front of the Aston Webb building, damaging an important sculpture which is part of the University's Research and Cultural Collections. This act of vandalism was posted on social media by pal_action who state that the action was carried out by midlands_pal_act being one of the groups associated with the camp and it was supported on social media by the bhamliberationzone account."

29. It is not practical, on this summary application where no oral evidence has been heard, to resolve the rights and wrongs of these disputed accounts. I proceed, in Ms Ali's favour, on the basis (which, anyway, is consistent with the bulk of the evidence) that the camp has been (at least largely) peaceful and has not involved any actual or threatened violence.

30. On the other hand, the camp has the undoubted effect that the University's land has been occupied in a way that has prevented the University from using it in the way it would wish. For example, it is unable (so long as the camp continues) to hold graduation ceremonies at The Green Heart, which it would otherwise have done. This amounts to a significant incursion into the University's right to possession of its land. It also prevents the University from operating the Code in the way it would wish, so as to ensure freedom of speech (including for those who hold views that differ from the campers). It also has a potential impact on many of the University's (ex) students, for example by depriving them of having a graduation ceremony at The Green Heart.

The decision to bring possession proceedings

31. The camp was discussed by the University's executive board (which forms part of the claimant's council, and hence its governing body) on 13 May 2024. The Vice Chancellor said that the camp involved "individuals protesting in support of Palestine". The minutes record "There were many ways to protest lawfully and the profile of a cause raised, including through authorised demonstrations. However, this did not extend to setting up and occupying tents on University property without authority or permission to do so."

32. On 3 June 2024 the Board's minutes record:

> "…there had been escalation and growing disruption to University business and student events. There had been several incursions by members of the camp wearing masks into Aston Webb. There had been a demonstration outside the meeting of the Investment Sub-committee. Attempts had been made by protestors to enter the Vice-Chancellor's Office. The student summer programme due to be held in the Green Heart and Chancellor's Court had been disrupted as the encampment occupied the spaces where the programme was to be held. The Graduation Ball due to be held in Chancellor's Court was also at risk of not going ahead. Those in the encampment had stated publicly their intention to disrupt University activities. It was particularly concerning that junior members of staff had been targeted and reported feeling intimidated and upset by the masked protestors. There was a significant risk that the

> encampments and actions of protestors would disrupt the forthcoming Graduation Ball, Open Days, and Graduation Ceremonies. Other universities with encampments had seen growing escalation with very concerning incidents at Manchester, Oxford, Leeds and Exeter. Nottingham, the only University to go to court to date over the issue, had not experienced such escalation; the University had made offers to the encampment to meet them to listen to their concerns and to offer alternative means for them to protest peacefully if they ended their encampment but all these had been rejected by the camp with the message that they would only meet the Vice-Chancellor to discuss their demands. The University would make another offer to meet this week, this time with the Pro-Vice-Chancellor (Education), noting the threat to the Graduation Ball and other student events;
> …
> UEB discussed the matter. UEB… noting its concern over the camp's disruption of and risks to University business and key events for students, such as the Graduation Ball and Graduation Ceremonies, as well as the Open Days.
>
> **Resolved** that in relation to the encampments, the University would:
>
> (i) apply for a Possession Order in the High Court…
>
> (ii) continue to make further attempts to engage with the encampment, noting the Pro-Vice-Chancellor (Education) would offer this week to meet the encampment."

33. On 11 June 2024, the Vice-Chancellor sent a message to students in which he explained the decision to bring possession proceedings:

> "Taking legal action is not a step that any of us would take lightly and I recognise that not everyone will agree with this approach. This is now necessary as a result of the escalation and unacceptable behaviour, and in order to look after the interests of the whole University community, including students and graduands, and their families and friends who wish to enjoy their graduation ceremonies without concern that their special day will be disrupted."

34. Dr Blanco says that the decision to bring possession proceedings was made because the camp was unauthorised, it amounted to a trespass, it was interfering with the University's activities and it was having a negative impact on other members of the claimant's community. She says the decision had nothing to do with the beliefs of Ms Ali or the other defendants, and that the same decision would have been made if the protest related to any other cause.

35. Dr Blanco is not a member of the Executive Board. She was not present when the decision to seek a possession order was made. She does not identify the source of her

knowledge for this part of her witness statement. I do not therefore attach any weight to it.

Procedural background

36. The University issued proceedings on 10 June 2024. A hearing took place on 14 June 2024, before Ritchie J. Hodge, Jones and Allen solicitors wrote a letter to the court "in support of the Persons Unknown" indicating that they were not yet formally instructed but intended to act as legal representatives once instructions had been obtained and funding arranged. They sought an adjournment of 21 days. Following a hearing on 14 June 2024, Ritchie J handed down a reserved judgment on 19 June 2024. He made an order joining Ms Ali as a second defendant to the claim and recording that the proceedings had been validly served against all defendants. He also granted summary orders for possession:

    (1) in respect of part of the University's land known as "Chancellor's Court" against all defendants.

    (2) In respect of Edgbaston Campus against all those in occupation of that campus save for any of the University's students or staff.

37. As to the balance of the claim, Ritchie J adjourned the proceedings to 25 June 2024.

38. On 19 June 2024 Hodge, Jones & Allen filed a notice of acting on behalf of Ms Ali. At the adjourned hearing on 25 June 2024, Ritchie J recused himself from further involvement in the proceedings. The hearing was relisted for hearing on 4 July 2024.

Does Ms Ali have a real prospect of successfully defending the claim?

39. In order to answer this question, it is necessary to determine whether Ms Ali has a real prospect of success in respect of any of her four defences (see paragraph 2 above).

(i) Unlawful discrimination: section 13 of the Equality Act 2010

40. A person's "religion or belief" is a protected characteristic for the purposes of the Equality Act 2010: section 4. A person's belief, in this context, means any religious or philosophical belief (or lack of belief): section 10(2). For the purposes of the 2010 Act, a person discriminates against another if, because of a protected characteristic, they treat that person less favourably than they treat or would treat others: section 13(1). The University's governing body must not discriminate against Ms Ali (or any other student) by not affording her access to a facility, or by subjecting her to any other detriment: section 91(2)(d) and 91(2)(f) of the Equality Act 2010. If there are facts from which the court could decide, in the absence of any other explanation, that the University contravened the 2010 Act then the court must hold that the contravention occurred, unless the University proves otherwise: section 136 of the 2010 Act.

41. The University disputes that Ms Ali has a belief that is protected by the 2010 Act. It says that Ms Ali's claimed beliefs do not satisfy the criteria required to constitute a philosophical belief within the meaning of the 2010 Act, as explained by Burton J in *Grainger PLC v Nicholson* [2010] ICR 360 at [24]. I heard extensive submissions on this issue from Liz Davies KC for Ms Ali and Michelle Caney (who argued this part of

the case for the University). It is the type of issue which may well be better determined following oral evidence at trial rather than at a summary hearing. In the event, it is not necessary to determine the issue and I prefer not to do so. I am content to assume (but, emphatically, without in any way deciding the point) that Ms Ali has a real prospect of establishing that she has a relevant philosophical belief, amounting to a protected characteristic.

42. The next issue is whether the University's governing body decided to terminate any licence Ms Ali had to use the land, and to bring these proceedings, because of her belief. There is no evidence to support such a suggestion. The basic facts do not suggest that this was the University's motivation. Ms Ali has not provided any evidence to support her contention that this was the motivation for terminating her licence or bringing possession proceedings. The University has disclosed minutes of the meetings that resulted in the decision to bring possession proceedings. Nothing in those minutes suggests that the decision was motivated by Ms Ali's beliefs. Rather, they suggest that they were motivated by the unauthorised nature of the camp and the disruption it caused. That is consistent with the communications sent by the Vice Chancellor before and after the decision was made. Ms Ali has not identified any comparator unauthorised camp that was permitted to proceed where the campers espoused different beliefs. By contrast, the University points to a previous instance where it has taken enforcement action against an unauthorised camp which had nothing to do with Israel or Palestine: *University of Birmingham v Persons Unknown* [2015] EWHC 544 (Ch).

43. Ms Davies and David Renton point out, in their written submissions, that at a hearing under CPR 55.8 the court is not obliged to accept the claimant's evidence. I agree. They also point out that at a trial they would be able to cross-examine the witnesses. Again, I agree. They also point out that this hearing is taking place prior to disclosure. Again, I agree. But that does not mean that the case should be permitted to continue just because something might emerge on disclosure or in cross-examination.

44. There is nothing in the facts, as they have emerged from the available evidence, which would entitle the court to decide that the University terminated Ms Ali's licence, or brought these proceedings, because of Ms Ali's beliefs. The reverse burden of proof under section 136 of the 2010 Act is not triggered. Ms Ali does not therefore have any real prospect of establishing a contravention of section 91(2) of the 2010 Act on the grounds of direct discrimination within the meaning of section 13 of the 2010 Act.

45. In the course of her oral submissions, Ms Davies recognised that this element of the case could not be sustained. Very properly, she formally withdrew the claim for direct discrimination.

46. Ms Davies maintains, however, that this is not fatal to Ms Ali's claim for discrimination contrary to the 2010 Act. She argues that even if there had not been direct discrimination on the grounds of Ms Ali's belief, the University did discriminate against Ms Ali on the grounds of actions taken by her (the participation in the camp) which were a manifestation of her belief. This, says Ms Davies, is sufficient to constitute unlawful discrimination. She relies on the decision of Eady J, President of the Employment Appeal Tribunal, in *Higgs v Farmor's School* [2023] EAT 89 [2023] ICR 1072. That case concerned claims in the employment tribunal for direct discrimination on grounds of religion or belief contrary to section 13 of the 2010 Act. Eady J drew attention to EU law, and specifically Council Directive 2000/78/EC which aims to combat certain

forms of discrimination in the workplace. The protection afforded by the Directive extends not just to the holding of a particular belief, but also its manifestation: Eady J at [32], *Bougnaoui v Micropole SA* (Case C-188/15) [2018] ICR 139 at [30]. Further, article 9 of the Convention protects the freedom to manifest one's religion or beliefs. The employment tribunal has no jurisdiction to entertain a claim for breach of Convention rights, but claims for breach of the Equality Act 2010 must be determined compatibly, so far as possible, with those rights: Eady J at [35]. Eady J explained the step-by-step analytical approach that should be taken to such a claim "within the employment context": Eady J at [94]. That analytical approach corresponds to the test for deciding whether an interference with the freedom to manifest breach of article 9 of the Convention is justified.

47. The present case does not arise in the employment context. The court (unlike the employment tribunal) has jurisdiction to determine a claim for breach of Convention rights, and the court, as a public body, must itself act compatibly with Convention rights. I do not see any basis on which Ms Ali could realistically fail in an argument under article 9 of the Convention, but succeed in an argument raised under the Equality Act 2010 interpreted in the way explained in *Higgs*. For all these reasons, I prefer to deal with this aspect of the case by reference to article 9 of the Convention – see paragraphs 58 – 75 below.

(ii) Breach of public sector equality duty: section 149 of the 2010 Act

48. Section 149 of the Equality Act 2010 states:

> "Public sector equality duty
>
> (1) A public authority must, in the exercise of its functions, have due regard to the need to—
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act…
>
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
>
> (2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).
>
> …
>
> (5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
>
> (a)tackle prejudice, and
>
> (b)promote understanding.

> (6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.
>
> (7) The relevant protected characteristics are—
> …
> religion or belief;
> …
> …"

49. Public authority: The duty under section 149 of the 2010 Act only applies to public authorities, or to a person exercising public functions. Katharine Holland KC, for the University, submits that a university is not a public authority, and it is not, here, exercising public functions. The relevant function, she says, is the claim for possession of land that it owns. It owns its land in a purely private capacity, and there is no public element to its decision to enforce its right to possess its own land.

50. There may well be force in this argument in some contexts, for example if a university seeks possession of a property that it has leased. However, the test for determining whether a person is exercising public functions is multi-factorial, fact-sensitive and complex. Here, the defendants claim to be exercising public law rights. The University owes statutory duties to its students, including under section 43 of the 1986 Act. Disputes concerning a University's compliance with section 43 of the 1986 Act may be brought by way of a claim for judicial review - that provision does not create private rights which can readily be assured by other means: *R v University College London ex parte Riniker* [1995] ELR 213 *per* Sedley J at 216. The University is seeking an order for possession in a context where Ms Ali claims to be exercising her rights of freedom of expression and assembly, and her right to manifest her beliefs. I do not consider that it would be appropriate to make a final ruling on the issue following a summary hearing where there has been no disclosure and no oral evidence. I therefore assume, for the purposes of this decision, and in Ms Ali's favour, that the decisions to terminate Ms Ali's licence and to seek a possession order did amount to the exercise of public functions.

51. Breach of section 149: The next question is whether the University breached its obligations under section 149. Ms Davies relies on well-established principles as to the application of section 149 of the 2010 Act, as explained by McCombe LJ in *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345. She draws particular attention to:

(1) The intention of Parliament that considerations of equality of opportunity are placed at the centre of formulation of policy by all public authorities.

(2) The heavy burden on public authorities in discharging the duty and ensuring the availability of evidence to demonstrate that discharge.

(3) The obligation to fulfil the duty before and at the time when a particular policy is being considered.

(4) The obligation to assess the risk and extent of any adverse impact and the ways in which such a risk may be eliminated, before adopting a proposed policy.

(5) The need for the duty to be discharged in substance rather than by ticking boxes.

52. Ms Davies submits that there was a breach of this obligation. At no point did the University assess the risk and extent of any adverse impact that its decision to seek possession might have, and the ways in which such a risk might be eliminated. There was simply a "one-way discussion" with no consideration of the fact that Ms Ali had rights that needed to be accommodated. Nor was any consideration given to taking lesser steps, such as meeting the students and listening to them.

53. The evidence convincingly shows that the University had due regard to the factors identified in section 149 of the 2010 Act, including the need to foster good relations between persons who share a relevant protected characteristic and those who do not (and, specifically in this context, those who have conflicting views or beliefs), and the need to tackle prejudice and to promote understanding. The relevant underlying policy is the Code. The public sector equality duty is explicitly referenced in the Code, and not simply in a "tick box" manner. The substantive content of the Code indicates a real commitment to structured decision-making on requests to hold events on campus. It does so in a way that is designed to ensure freedom of speech and to accommodate those who hold different, challenging, and opposing views and beliefs. The evidence shows that, in practice, the University has delivered on that commitment. It authorises hundreds of diverse events every year, and has not refused authorisation for any single event. It has imposed conditions in only a small proportion of cases. Where it has done so it appears from the evidence that that has been to enhance, promote and protect freedom of speech, rather than in any way to undermine the expression of opinion or manifestation of belief. It has authorised many events which have enabled Ms Ali, and those who hold similar beliefs, to express their views and manifest their beliefs. It has apparently tolerated similar events, including protests, which were held without authorisation (there is no evidence of any disciplinary action being taken against students in such circumstances). It did not immediately issue proceedings when the camp commenced on 9 May 2024. The Vice Chancellor's message to students on 17 May 2024 expressed a commitment to support students who wished to take part in protests about issues that they cared deeply about. It pointed out that there were many ways in which that could be done lawfully, including through authorised demonstrations. It expressed a commitment to work with the organisers of the camp to enable them to continue to protest. The decision to issue proceedings was not made until 3 June 2024. It is now accepted that the decision was not made because of Ms Ali's beliefs, or the beliefs of others taking part in the encampment. The decision was made because of the impact of the camp on the rights of the University and its students, and because those taking part in the camp were unwilling to bring it to an end peacefully and explore other ways of manifesting their beliefs.

54. All of this demonstrates that throughout its decision-making process the University practically and substantively had regard to its public sector equality duty. Ms Ali does not have a real prospect of success on this issue.

(iii) Breach of section 43 of the Education (No 2) Act 1986

55. Section 43 of the 1986 Act states:

> "**Freedom of speech in universities, polytechnics and colleges**
>
> (1) Every individual and body of persons concerned in the government of any establishment to which this section applies shall take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees of the establishment and for visiting speakers.
>
> (2) The duty imposed by subsection (1) above includes (in particular) the duty to ensure, so far as is reasonably practicable, that the use of any premises of the establishment is not denied to any individual or body of persons on any ground connected with—
>
> (a) the beliefs or views of that individual or of any member of that body; or
>
> (b) the policy or objectives of that body."

56. Subsection (2): It is convenient first to address the specific duty imposed by subsection (2). Ms Ali claims a breach of this duty because, she says, the University is denying her the use of The Green Heart on a ground connected with her beliefs or on a ground connected with the objectives of those taking part in the camp. Ms Holland does not dispute that The Green Heart is "premises" within the meaning of section 43(2). Her primary argument is that the defendants are not using the premises. They are, instead, occupying (part of) the premises. That is a false dichotomy. The defendants are using the premises by occupying them for their encampment. As to the reason why the University seeks to deny the defendants the use of the premises, I have already rejected the discrimination claim. That reason has no connection with the beliefs of the defendants or their objectives. Ms Ali thus has no real prospect of establishing a breach of subsection (2).

57. Subsection (1): The University has promulgated a Code which is intended to ensure that freedom of speech within the law is secured for its members, students and employees and for visiting speakers. The evidence shows that the Code achieves its intended effect. The University has thus taken such steps as are reasonably practicable to ensure that freedom of speech is secured. Its decision to seek a summary possession order in this case, where the defendants have decided not to act in accordance with the Code, does not amount to a breach of subsection (1).

(iv) Breach of Convention rights: section 6 of the Human Rights Act 1998 read with articles 9, 10 and 11 of the Convention

58. It is unlawful for a public authority to act in a way which is incompatible with a Convention right: section 6(1) of the Human Rights Act 1998. The rights and freedoms set out in Articles 9, 10 and 11 of the Convention are each Convention rights: section 1(1)(a) of the 1998 Act. Article 9 provides that everyone has the right to manifest their beliefs. Article 10 provides that everyone has the right to freedom of expression. Article 11 provides that everyone has the right to freedom of assembly and to freedom of association with others. In each case the right is qualified; conduct of a public authority

that interferes with the right may be justified if the conduct is (a) prescribed by law and (b) necessary for the protection of the rights of others: article 9(2), 10(2), article 11(2).

59. Ms Ali contends that the decision to terminate her licence to use the land, the decision to seek a possession order, and (if it were made) a summary possession order, each amount to an unjustified interference with her rights under articles 10 and 11. It is convenient, at this point, to consider also whether it would amount to an unjustified interference with her rights under article 9 (see paragraph 47 above).

60. For the reasons given at paragraph 50 above, I proceed on the basis that Ms Ali has a real prospect of establishing that the University is, in this context, to be treated as a public authority for the purposes of the Human Rights Act 1998. Even if that is wrong, the court is a public authority and must act compatibly with Convention rights.

61. Ms Holland disputes that a summary possession order will interfere with Ms Ali's rights under articles 9, 10 and 11 of the Convention. She says that Ms Ali is not exercising such rights by camping on the University's land and that the Convention does not give anyone a right to trespass: *Richardson v Director of Public Prosecutions* [2014] UKSC 8, [2014] AC 635 *per* Lord Hughes at [3], *Director of Public Prosecutions v Cuciurean* [2022] EWHC 736 (Admin), [2022] QB 888 *per* Lord Burnett CJ at [45], *Ineos Upstream Limited v Persons Unknown* [2019] EWCA Civ 515, [2019] 4 WLR 100 *per* Longmore LJ at [36]. Further, she submits that there is no scope for a Convention defence to a possession claim under Part 55 of the Civil Procedure Rules: *McDonald v McDonald* [2016] UKSC 28, [2017] AC 273.

62. I do not consider that this point is straightforward. In *Cuciurean*, Lord Burnett CJ considered it was "highly arguable" that articles 10 and 11 were not engaged on the facts of that case, but did not ultimately determine the issue (see at [45]). There are many cases where articles 10 and 11 have been found to be engaged in the context of conduct which amounts to a trespass, or an obstruction of the highway, or is disruptive: *Director of Public Prosecutions v Ziegler* [2021] UKSC 23, [2022] AC 408 *per* Lord Hamblen and Lord Stephens at [64] – [69], *Steel v United Kingdom* (1998) 28 EHRR 603 at [142], *Appleby v United Kingdom* (2003) 37 EHRR 38, *Kudrevičius v Lithuania* (2016) 62 EHRR 34 at [98], *Cuadrilla Bowland Ltd v Persons Unknown* [2020] EWCA Civ 9, [2020] 4 WLR 29 (see *per* Leggatt LJ at [23], [43] and [45]), *Hall v Mayor of London* [2010] EWCA (Civ) 817 *per* Lord Neuberger MR at [37] – [42], *City of London Corporation v Samede* [2012] EWCA Civ 160, [2012] 2 All ER 1039, *R (Tabernacle) v Secretary of State for Defence* [2009] EWCA Civ 23 *per* Laws LJ at [37].

63. In *Hicks v Director of Public Prosecutions* [2023] EWHC 1089 (Admin) Chamberlain J (at [46]) described a submission that "articles 10 and 11 are not engaged where expressive speech takes place on private land on which the speaker is trespassing" as "ambitious", but it was not necessary to decide the point. Bean LJ agreed (at [52]).

64. In the present case it is also unnecessary to resolve the point. I prefer not to do so on what is a summary application where there has been no process of disclosure and no oral evidence. I assume, in Ms Ali's favour, that the decision to make a possession order, and the making of an order, do interfere with her rights under articles 9, 10 and 11 of the Convention.

65. (a) Prescribed by law: The University is the registered owner of the land at The Green Heart. Its decisions to terminate any licence that Ms Ali had, and to seek a summary possession order, do not amount to unlawful discrimination, a breach of the public sector equality duty or a breach of section 43 of the 1986 Act. These decisions are not otherwise unlawful. The making of a summary possession order is regulated by Part 55 of the Civil Procedure Rules. Those decisions, and the making of a summary possession order, are thus prescribed by law.

66. (b) Necessary for the protection of the rights of others: The termination of any licence, the decision to seek a possession order, and the making of an order, is for the purpose of protecting the University's right to occupy its own land, to the exclusion of others. The underlying purpose, therefore, is "the protection of the rights of others".

67. In order to show that the interference with Ms Ali's Convention rights is necessary for the protection of its property rights, the University must show that the measure constituting the interference (the decisions to terminate the licence and seek a possession order, and the making of the order) is proportionate. That means that (1) the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) the measure is rationally connected to the objective, (3) no less intrusive measure could be used without unacceptably compromising the achievement of the objective, and (4) balancing the severity of the measure's effects on Ms Ali's rights against the importance of the objective, to the extent that the measure will contribute to its achievement, the former does not outweigh the latter: *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39, [2014] AC 700 *per* Lord Reed at [74].

68. *(1) Sufficient importance*: The law gives strong protection to the right of a land-owner to possess its own land. That right is "of real weight when it comes to proportionality": *Manchester City Council v Pinnock (Nos 1 and 2)* [2010] UKSC 45, [2011] 2 AC 104 *per* Lord Neuberger MR at [54]. It is a right that has been consistently recognised as being of sufficient importance to justify interference with the qualified Convention rights of students who are seeking to trespass on university premises.

69. *(2) Rational connection*: There is a direct connection between the measure and the University's objective to secure possession of its land. The measure (a summary possession order) has consistently been recognised as being appropriate in this context: *Secretary of State for Environment Food and Rural Affairs v Meier* [2009] UKSC 11, [2009] 1 WLR 2780 *per* Baroness Hale at [35] and Lord Collins at [96].

70. *(3) Less intrusive measure*: There may be other measures that could achieve the same objective. It might (subject to the application of the Protection from Eviction Act 1977) be open to the University to exercise the remedy of self-help. Or it might be open to the University to seek injunctive relief to prevent the trespass. Neither of these measures would be less intrusive of Ms Ali's Convention rights. They would both have at least the same impact on those rights. Even if the remedy of self-help is available, it is undesirable because of the risk of disturbance and the potential for use of force that is not regulated by a court order. "In a civilised society, the courts should themselves provide a remedy which is speedy and effective: and thus make self-help unnecessary": *McPhail v Persons Unknown* [1973] Ch 477 *per* Lord Denning MR at 456E and 457C. An injunction could be tailored. It might, for example, permit one token tent symbolically to remain to enable the University to take possession of the rest of the land whilst allowing the defendants still to exercise their Convention rights on the land

through the medium of a single tent. That would not, however, achieve the legitimate aim of enabling the University to recover all its land, rather than only part of its land. There is no measure that is less intrusive of the defendants' rights that could achieve the legitimate aim of restoring the land to the University.

71. *(4) Balance*: It is not for a court to tell anyone how they should exercise their article 9, 10 and 11 rights. Weight should be attached to the defendants' autonomous choices as to the way in which they wish to manifest their beliefs, or assemble together or express their opinions. Ms Ali has, anyway, advanced cogent reasons as to why the defendants have chosen to exercise their rights by means of a camp at The Green Heart.

72. There are, however, many other ways in which the defendants could exercise their Convention rights without usurping to themselves land that belongs to the University. The University has shown that it is anxious to ensure that its students, including Ms Ali, are able to exercise their Convention rights. It has formulated a Code which achieves that end. That Code forms part of the contract between the University and its students. By entering into that contract, Ms Ali agreed to comply with the Code. She decided to breach that agreement, and not to follow the Code, and not to engage with the University, when she embarked on the camp. No good reason has been given by Ms Ali, or any of the other defendants, for that decision. It impacts on the University's ability to ensure freedom of speech for its students, for example by ensuring that alternative or competing opinions are also heard. Ms Ali's licence to use the land at The Green Heart has been terminated. The termination of her licence was lawful (subject to the questions that arise under the 1998 Act). She is a trespasser. I have assumed that her rights under articles 9, 10 and 11 of the Convention are engaged, but her conduct is "not at the core of [those] freedom[s]": *Kudrevičius* at [97]. The weight that is to be given to those rights is significantly attenuated by reason of each of these contextual factors.

73. As against that, the University's right to possession of its own land is of real weight (see paragraph 68 above). That is all the more so where the University positively seeks to use its land in a way that gives full voice to rights of free expression and where part of the reason for seeking possession is because the campers have completely disregarded a framework that is designed to protect freedom of expression.

74. For these reasons, the severity of the impact on Ms Ali's rights does not (by a significant margin) come anywhere close to outweighing the importance of the objective of the University being able to regain possession of its own land. This is a conclusion that can comfortably and confidently be reached on a summary application.

75. It follows that Ms Ali does not have a real prospect of establishing that a possession order would amount to an unlawful interference with her Convention rights. She thus has no real prospect of successfully defending the claim on that basis.

Is there any other compelling reason why the claim should go to trial?

76. The parties sought to argue issues which are not straightforward and which are potentially fact sensitive: whether the University is exercising a public function when it seeks a summary possession order in this context, whether the defendants' beliefs amount to a protected characteristic within the meaning of the 2010 Act, whether the defendants' activities fall within the scope of articles 9, 10 or 11 of the Convention, and

whether the defendants are entitled to rely on the Convention as a defence to a claim for the summary possession of land. If any of them had required resolution then it might well have been better to determine them only after a process of disclosure, and after hearing oral evidence tested under cross-examination at a trial. That may then have amounted to a compelling reason why the claim should have proceeded to a trial, rather than being subject to summary determination.

77. It is not necessary to determine those issues and I prefer not to do so. Irrespective of the answer to those issues, Ms Ali has no real prosect of establishing discrimination on the grounds of her belief, a breach of the public sector equality duty, a breach of section 43 of the 1986 Act or a breach of her Convention rights. She therefore has no real prospect of success on any of her defences to the claim. There is good reason for claims like this to be determined summarily ("a remedy which is speedy and effective") where it is possible to do so. That is the case here. There is no other compelling reason why the case should go to trial. Put another way, there is no reason not to exercise the discretion in CPR 55.8(1) to make a summary order for possession.

Claim against "persons unknown"

78. The claim against the first defendant, the "persons unknown", is not defended. The University has proved its case against the first defendant. It has proved that it has a right to regain possession of its land. Its decision to terminate any licence to use the land, and to seek a summary possession order, was not unlawful on any ground, and the granting of a summary possession order is compatible with the defendants' Convention rights. The University has taken all practicable steps to notify the "persons unknown" of these proceedings and this hearing (section 12(2)(a) Human Rights Act 1998).

Relief

79. It follows that a summary order for possession will be made.

80. A residual issue concerns whether the order should be made only in respect of the land at The Green Heart, or whether it should extend to the remainder of the University's land at Edgbaston Campus and also to its land at the Selly Oak Campus and the Exchange Building. There is currently no camp at the Edgbaston Campus besides that at The Green Heart. Nor is there any camp at the Selly Oak Campus or the Exchange Building. Nor is there evidence of any immediate risk that anybody might unlawfully occupy that land.

81. However, there was an occupation of the Chancellor's Court as part of the activity which is now continuing at The Green Heart. The camp at The Green Heart commenced without warning, and in the early hours of the morning. The evidence suggests that in other universities similar camps are taking place, and that there is the potential where a possession order is made in only one limited area for a camp simply to move to another part of the campus. In these circumstances, the authorities recognise that it is justified to make a summary possession order not just in respect of the occupied land, but also other land belonging to the University (albeit this issue has been left open by the Supreme Court): *Djemal per* Buckley LJ at 1304G and *per* Shaw LJ at 1305D, *Meier per* Lord Neuberger at [69] – [70], *SOAS per* Henderson J at [31], *University of Sussex v Protesters per* Vos J at [8] – [9], *University of Sussex v Persons Unknown per* Sales

J at [26]. It is justified to make the wider order that is sought in the circumstances of the present case.

Outcome

82. There is no real prospect of Ms Ali successfully showing that the University has discriminated against her, contrary to section 91 and 13 of the 2010 Act, or that it has breached its public sector equality duty, or that it has breached section 43 of the 1986 Act, or that a possession order would be incompatible with her Convention rights.

83. The defendants have no real prospect of successfully defending the claim, and there is no other compelling reason why the claim should proceed to trial or why a summary possession order should not be made.

84. The University has therefore established that it is entitled to a summary possession order.

Neutral Citation Number: [2024] EWHC 1771 (KB)

Case No: KB-2024-BHM-000107

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 July 2024

Before :

MR JUSTICE JOHNSON

- -

Between :

University of Nottingham	**Claimant**
- and -	
(1) Mx Joel Butterworth (also known as River Butterworth) (they/them) **(2) Persons Unknown**	**Defendants**

- -
- -

Katharine Holland KC and Michelle Caney (instructed by Shakespeare Martineau LLP) for the Claimant
Owen Greenhall and Audrey Mogan (instructed by Bindmans LLP) for the First Defendant

Hearing date: 5 July 2024

- -

Approved Judgment

This judgment was handed down by release to The National Archives on 9 July 2024

Mr Justice Johnson:

1. This case concerns a camp by students (and possibly others) at the University of Nottingham ("the University") on the University's campus. The campers are opposed to actions of the Israeli Defence Force in Palestine. They demand that the University takes certain steps to show that it too opposes those actions. The University seeks an order for possession of its land against the campers. It says that a summary order for possession should be made under Part 55 of the Civil Procedure Rules.

2. River Butterworth is one of the campers. They are the only camper who is taking part in these proceedings. They say that there are grounds to dispute the claim and that directions should be given for a trial of the issues. Specifically, they say that that the University's decisions to terminate their licence to use its land, and to seek possession of its land, are unlawful because (i) the University has failed to comply with its duties and obligations under statute and its own policies ("the public law defence") and (ii) the decisions amount to a breach of their rights to freedom of expression and freedom of assembly, contrary to section 6 of the Human Rights Act 1998 read with articles 10 and 11 of the European Convention on Human Rights ("the human rights defence").

3. Mx Butterworth was a student at the University and is at the end of their term as the postgraduate officer of the University's student union. The day of the hearing was (at least on one view) their final day at the University. Katharine Holland KC, for the University, did not suggest that this was necessarily a fundamental obstacle to the claim. I agree. The decisions which Mx Butterworth seeks to impugn were made at a time when they were undoubtedly a member of the University. In any event, there are other campers who are students at the University. It is convenient to use Mx Butterworth's defence to the claim as a vehicle to assess the issues that arise when deciding whether the University should be granted a possession order.

4. This application was heard the day after an application by the University of Birmingham which raises similar issues. The representatives of the Universities are the same in each case. The representatives of the defendants are different, but Owen Greenhall, who appears for Mx Butterworth, helpfully attended the Birmingham hearing, and David Renton (junior counsel in the Birmingham case) helpfully attended the Nottingham hearing. I am giving judgment in both cases at the same time. In this judgment I make reference to the reasoning in the Birmingham judgment: [2024] EWHC 1770 (KB).

The test for granting a summary order for possession

5. The test for granting a summary order for possession is whether there is (a) no real prospect of a successful defence to the claim and (b) no other compelling reason why the claim should be disposed of at trial: *Birmingham* at [3] – [7].

The issues

6. Mx Butterworth put the University to proof that it is the registered freehold owner of the land. The University adduced Land Registry records that establish its ownership of the land, and Mx Butterworth did not suggest otherwise.

7. Mx Butterworth agrees that they are in occupation of the land. They did not identify any interest in the land or any right to occupy the land. They agree that any licence that they had to use the land has (purportedly) been terminated.

8. That means that subject to any defence that the defendants might have to the claim, the University is entitled to an order for possession of its land.

9. The parties agree that if the decisions to terminate any licence Mx Butterworth had to use the land, and to bring possession proceedings, were unlawful then Mx Butterworth would have a real prospect of successfully defending the claim: *Birmingham* at [10].

10. Mx Butterworth's case is that the University's decisions to terminate any licence they had to use the land, and to seek possession of the land, are unlawful for the reasons set out in paragraph 2 above.

11. The primary issue on this application for a summary possession order is therefore whether Mx Butterworth has a real prospect of successfully defending the claim on one or both of those grounds.

The facts

12. The basic factual background is largely undisputed. I summarise the facts based on the following sources:

    (1) The statements of case.

    (2) Written statements of Mx Butterworth dated 11 June 2024 and 1 July 2024.

    (3) Written statements of Asher Rose, Adrian Black, Professor Andreas Bieler, Dr Andreas Wittel, Animah Kosai, Anthony Dranfield, Caroline Morris, Chloe Birney, Dr Koshka Duff, Lily Friesen, Professor Mark Jago, Perveen Hussain, Sage Stephanou, Syed Shah, Dr Thomas Kemp. They have each visited the encampment and speak of it variously as being hospitable, approachable, inclusive, peaceful, welcoming, well organised, safe, friendly, respectful, calm, quiet and gentle, with no signs of aggressive or provocative or disruptive behaviour, or antisemitism or incitement to violence.

    (4) A witness statement of Jason Carter, the University's Director of Governance and Assurance.

    (5) Witness statements of Dr Paul Greatrix, the University's Registrar.

    (6) A witness statement of Stuart Croy, the University's Head of Security.

13. The second statement of Dr Greatrix and the statement of Mr Croy were served after the deadline for filing witness statements (but they relate to events that postdate that deadline). Mx Butterworth does not object to the statements being adduced. I grant the University permission to rely on those statements, and I abridge time for the service of those statements.

14. The University is a corporation formed by Royal Charter in 1948 (having previously been a civic college since 1881). It has about 34,000 students and 8,000 staff. It is an

educational charity that is regulated by the Office of Students. It enters into a contract with each of its students. Under this contract, each student agrees to comply with the University's policies.

15. The University maintains a governance policy entitled "Free Speech and Academic Freedom at the University of Nottingham". Mx Butterworth relies on the following extract from this policy:

> "Free Speech and Academic Freedom at the University of Nottingham
>
> Freedom of speech and the free exchange of ideas are central to the University of Nottingham's mission of advancing truth, knowledge, and understanding. Pursuit of these aims requires free and open enquiry within the law, including the airing of ideas or perspectives which may be unpopular or cause offence. This is especially important given that many ideas which were previously regarded as deeply controversial or offensive are now widely accepted. Thus, a commitment to freedom of speech must apply to challenging or unpopular ideas as well as ideas about which there is broad consensus.
>
> The University commits to protecting and promoting free speech and academic freedom so that students and staff can become acquainted with new information and ideas and with diverse viewpoints. The University provides an inclusive and supportive environment that encourages civil and peaceful debate, one in which students and staff can challenge their own and others' beliefs and opinions and scrutinise these on their merits. This commitment reflects the University's core values of inclusivity, ambition, openness, fairness, and respect, and it is consistent with its legal responsibility to protect and promote free speech and academic freedom as detailed in the Higher Education (Freedom of Speech) Act 2023.
>
> Promoting Free Speech and supporting people
>
> …Freedom of expression applies to all who wish to seek, receive, or impart information and ideas of all kinds, and includes the right to protest peacefully; protest is itself a legitimate expression of freedom of speech. In seeking to protect the freedom of speech of its staff and students, the University will take appropriate measures, in accordance with the terms of this statement, to assist staff and students whose freedom of speech is threatened. We prioritise the wellbeing of our staff and students and provide a range of services designed to support them whilst working and studying at the University.
> …

> Civil Debate within the law
>
> …These commitments inform all of the University of Nottingham's specific policies that have implications for the freedom of speech and academic freedom. Whilst it is recognised that it can be difficult in practice to balance competing rights and obligations, this statement provides a framework for any decision-making on behalf of the University that may have implications for the freedom of speech, which should always take into account relevant domestic and international standards."

16. The University maintains a Code of Practice that deals with meetings or other activities on the University's premises ("the Code"). This states that so far as is reasonably practicable, no premises of the University shall be denied to anyone on any grounds connected with the beliefs or views of that person. It sets out a procedure to be adopted in respect of events or meetings on University premises to which any external speaker is invited, or where an internal speaker is invited and it is reasonably foreseeable that the event will raise controversial issues. The Code requires that notice is given to the "Event Approver" at least three weeks before the date of the event. The Event Approver then gives notice of the proposed event to the Registrar. The Registrar may impose such conditions on the event as are reasonably necessary to fulfil the University's responsibilities concerning the protection of free speech within the law. If the Registrar is not satisfied that adequate arrangements can be made to maintain good order, he may refuse permission for the event. There is a right of appeal against rulings of the Registrar to the Vice-Chancellor.

17. The University has award-winning campuses. Its campuses include Jubilee Campus which covers about 65 acres, 1.5 miles from Nottingham City Centre, and 1 mile from the University's main campus. The University is the registered freehold owner of the Jubilee Campus. The Jubilee Campus includes a building known as the Advanced Manufacturing Building.

18. Mx Butterworth is the elected postgraduate officer of the University's Student Union. They are a trustee of the union. They have taken part in previous demonstrations at the University that have included occupation of university premises in April 2022, March 2023 and December 2023. On each occasion the University issued possession proceedings. In the latter two cases a possession order was made; in the first case the camp dispersed so it was not necessary to obtain a possession order.

19. Mx Butterworth is deeply concerned about the war in Gaza and the loss of life that is taking place. They say that they are aware of the finding of the International Criminal Court that the actions of Israel plausibly amount to genocide (it is not necessary to decide whether that is an accurate reflection of that court's finding) and the court's subsequent order that Israel cease its offensive in Rafah which, they say, Israel has ignored. They want to put pressure on institutions "not to become complicit in these crimes". They say that they are aware that the University conducts research, and develops weapons, for arms companies at its Advanced Manufacturing Building. They demand that the University discloses details of its financial relationships, ends partnerships with arms companies, provides bursaries for Palestinian students, and contributes to the reconstruction of educational infrastructure in Gaza.

20. A camp opposite the Advanced Manufacturing Building commenced at about 9.55pm on 10 May 2024. At that time the University's security staff became aware of individuals setting up about 20 tents in that area. No permission had been sought for the camp, as required by the Code. Mx Butterworth has not explained the failure to comply with the Code. Nor has any other camper.

21. The campers used showers and toilet facilities in the Advanced Manufacturing Building. The University's security staff cleared them from that building but allowed them to use toilet facilities in another building.

22. Mx Butterworth says the camp is there to protest on behalf of the Palestinian people. Mx Butterworth and other campers arrange speeches, creative activities and cultural activities at the camp. They have a library tent and a schedule of open talks, and they hold vigils which are inclusive to people of all faiths and people who have no faith.

23. On 12 May 2024, a group calling itself the Nottingham Camp for the Liberation of Palestine ("NCLP", which includes Mx Butterworth) sent an email to the University's Executive Board setting out its demands and stating that if the University did not actively consider them, it would escalate its action.

24. Mr Carter says that the University estimates there are about 50 individuals in the camp including students, but others too. For the most part, the University does not know the names of the campers because they are masked or are wearing balaclavas or hoods to hide their identities.

25. Mx Butterworth says that despite a number of attempts on the part of NCLP, the University has failed to engage with it. Attempts at a meeting broke down when the campers refused to remove their masks, and the University refused to engage in a meeting with masked campers.

26. The University makes a number of allegations of disruptive conduct by the campers. These are denied by Mx Butterworth. It is not necessary, or practical, to resolve these disputes on a summary application. I am content to determine the application on the assumption that the camp has been entirely peaceful (at least in the sense of it being non-violent), consistent with the evidence of the many witnesses who have visited the camp and provided statements in support of the defendants.

The decision to bring possession proceedings

27. At 11.50am on 14 May 2024 a notice was issued to the defendants making it clear that the University supported lawful freedom of speech and freedom of assembly, but that they did not have a licence to occupy the land, that they were trespassers and that they were required to leave immediately or else court proceedings would be issued. In his statement made the same day, Mr Carter says that the campers remained in occupation and that the University had "no choice but to take Court action to forcibly remove the occupiers."

Procedural background

28. Proceedings were issued on 14 May 2024 against Mx Butterworth, three other named defendants, and "persons unknown". A hearing took place before Ritchie J on 17 May

2024. Following that hearing, on 20 May 2024, Ritchie J made an order granting the University permission to discontinue the claim against all named defendants apart from Mx Butterworth (the other named defendants had given written confirmation that they were not involved in the camp). The description of the "persons unknown" was amended to distinguish between students and members of staff, and others. An order for possession was made against those who are not students or members of staff. The claim against Mx Butterworth and the remaining persons unknown was adjourned to 24 May 2024. On 20 May 2024 that hearing was vacated. It was eventually relisted on 5 July 2024. On 10 June 2024 Ritchie J made further orders which amended the precise terms of the order of 20 May 2024.

Does Mx Butterworth have a real prospect of successfully defending the claim?

29. In order to answer this question, it is necessary to determine whether Mx Butterworth has a real prospect of success in respect of either of their two defences.

(i) Public law defence: breach of policy or statute

30. Breach of policy: Owen Greenhall and Audrey Mogan, on behalf of Mx Butterworth, submit that the University is obliged by its freedom of speech policy to engage with the campers. I do not agree. The passages from the policy that Mx Butterworth relies on are set out at paragraph 15 above. Nothing in those passages requires the University to engage with Mx Butterworth or the other campers. The Code sets out a structured framework to engage with those seeking to put on events. Mx Butterworth and the other campers did not comply with the Code because they did not notify the Event Approver of the proposed encampment. The framework within which engagement takes place was therefore never triggered.

31. Mr Greenhall further submits that the University failed to consider the principles set in the free speech policy when deciding to terminate the campers' licences to use the land and to seek possession of the land. However, there is no evidence to support this contention and, anyway, nothing in the free speech policy inhibits the University from taking the steps that it has, here, taken in response to a trespassory encampment.

32. The Code does restrict any power the University might otherwise have to deny Mx Butterworth the use of its land on any grounds connected with their beliefs or views of that person. There is, however, no evidence that the University's grounds for seeking to deny Mx Butterworth the use of its land have any connection with Mx Butterworth's beliefs or views. The evidence shows that the University has sought possession of its land in other cases concerning the expression of different views, and there is no evidence that it has tolerated any other camps. All the evidence suggests that it is the appropriation of its land (and the associated claimed disruption) to which the University objects, and not the beliefs or views held by Mx Butterworth.

33. Breach of section 43 of the 1986 Act: Section 43 of the 1986 Act states:

> "**Freedom of speech in universities, polytechnics and colleges**
>
> (1) Every individual and body of persons concerned in the government of any establishment to which this section applies shall take such steps as are reasonably

> practicable to ensure that freedom of speech within the law is secured for members, students and employees of the establishment and for visiting speakers.
>
> (2) The duty imposed by subsection (1) above includes (in particular) the duty to ensure, so far as is reasonably practicable, that the use of any premises of the establishment is not denied to any individual or body of persons on any ground connected with—
>
> (a) the beliefs or views of that individual or of any member of that body; or
>
> (b) the policy or objectives of that body."

34. Mx Butterworth has not identified any arguable basis on which the University has failed to comply with these provisions. The University has promulgated a policy and Code which precisely seek to ensure that freedom of speech within the law is secured for the University's members, students and employees and for visiting speakers. There is no evidence of a breach of the policy or the Code by the University. Mx Butterworth has, by contrast, fundamentally breached the Code by occupying the University's land without first giving notification under the Code. Nor, as explained above, is there any evidence that the University is bringing possession proceedings because of Mx Butterworth's beliefs. There is therefore no real prospect of establishing a breach of section 43.

35. Breach of section A1 of the Higher Education and Research Act 2017: This provision is not in force. There can be no question of the University being in breach of it.

36. For all these reasons, Mx Butterworth does not have a real prospect of success on their public law defence.

(ii) Human rights defence: Breach of section 6 of the Human Rights Act 1998 read with articles 10 and 11 of the Convention

37. For the same reasons as in *Birmingham*, the critical issue, at least so far as this summary application is concerned, is whether there is a real prospect that, at trial, the court will find that any interference with Mx Butterworth's Convention rights is unjustified: *Birmingham* at [58] – [64].

38. The University's decisions to terminate any licence that Mx Butterworth had, and to seek a summary possession order, are not unlawful on any public law ground. Those decisions, and the making of a summary possession order, are thus prescribed by law: *Birmingham* at [65]. For the same reasons as in *Birmingham* (at [66] – [70]), the objective of the measure taken by the University is sufficiently important to justify the limitation of a protected right, the measure is rationally connected to the objective, and no less intrusive measure could be used without unacceptably compromising the achievement of the University's legitimate aim.

39. The critical issue is whether the severity of the measure's effects on Mx Butterworth's rights is outweighed by the importance of the objective that is pursued by the measure.

For reasons that largely mirror those given in *Birmingham* (at [71] – [75]), I am satisfied that it is. Mx Butterworth's conduct is, at best, right at the margin of the protection afforded by article 10 and 11. They did not comply with the Code (which would have enabled a structured approach to a decision as to whether the encampment would be permitted and what, if any, conditions would be appropriate). They did not give any advance notice of the camp. They are trespassing on the University's land and have now been doing so for 8 weeks. There are many other ways in which Mx Butterworth could lawfully exercise their Convention rights. By contrast, the most appropriate (and least intrusive) way in which the University can vindicate its own legal rights is by these proceedings.

40. It follows that Mx Butterworth does not have a real prospect of establishing that a possession order would amount to an unlawful interference with their Convention rights. They do not have a real prospect of successfully defending the claim on that basis.

Is there any other compelling reason why the claim should go to trial?

41. For the same reasons as given in *Birmingham* (at [76] – [77]), there is no other compelling reason why the claim should go to trial.

Claim against "persons unknown"

42. The claim against the "persons unknown", is not defended. The University has proved its case against the "persons unknown". It has proved that it has a right to regain possession of its land. Its decision to terminate any licence to use the land, and to seek a summary possession order, is lawful, and the granting of a summary possession order is compatible with the defendants' Convention rights. There is no longer any need to draw a distinction between different categories of "persons unknown". They can now be described, simply and compositely, as "persons unknown" as required by CPR 55.3(4).

Relief

43. It follows that a summary order for possession will be made.

44. For the same reasons as given in *Birmingham* (at [79] – [81]) the order for possession should be in respect of the whole of the Jubilee Campus rather than just the site of the camp.

Outcome

45. There is no real prospect of Mx Butterworth successfully showing that the University has acted in breach of its policy, or section 43 of the 1986 Act, or section A1 of the Higher Education and Research Act 2017, or that a possession order would be incompatible with their Convention rights.

46. The defendants have no real prospect of successfully defending the claim, and there is no other compelling reason why the claim should proceed to trial or why a summary possession order should not be made.

47. The University has therefore established that it is entitled to a summary possession order.

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

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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. **(A) Substantive Requirements**

Cause of action

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

Full and frank disclosure by the Claimant

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

Sufficient evidence to prove the claim

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

No realistic defence

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

Balance of convenience – compelling justification

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

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

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

Damages not an adequate remedy

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

(B) Procedural Requirements

Identifying PUs

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

The terms of injunction

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

The prohibitions must match the claim

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

Geographic boundaries

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

Temporal limits - duration

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

Service

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

The right to set aside or vary

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

Review

(15) Even a final injunction involving PUs is not totally final. Provision must be made for reviewing the injunction in the future. The regularity of the reviews depends on the circumstances. Thus such injunctions are "Quasi-final" not wholly final.

59. Costs and undertakings may be relevant in final injunction cases but the Supreme Court did not give guidance upon these matters.

60. I have read and take into account the cases setting out the historical growth of PU injunctions including *Ineos Upstream v PUs* [2019] EWCA Civ. 515, per Longmore LJ at paras. 18-34. I do not consider that extracts from the judgment are necessary here.

Applying the law to the facts

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

(A) Substantive Requirements

Cause of action

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

Full and frank disclosure

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

Sufficient evidence to prove the claim

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

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

No realistic defence

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

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

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

Balance of convenience – compelling justification

67. In my judgment the balance of convenience and justice weigh in favour of granting the final injunction. The balance tips further in the Claimants' favour because I consider that there are compelling justifications for the injunction against the named Defendants and the PUs to protect the Claimants' 8 Sites 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

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

E

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.

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

G

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

H

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

[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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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.

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

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)

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)

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)

Birmingham City Council v Afsar [2019] EWHC 1619 (QB)

Blain (Tony) Pty Ltd v Splain [1993] 3 NZLR 185

Bloomsbury Publishing Group plc v News Group Newspapers Ltd [2003] EWHC 1205 (Ch); [2003] 1 WLR 1633; [2003] 3 All ER 736

Brett Wilson LLP v Persons Unknown [2015] EWHC 2628 (QB); [2016] 4 WLR 69; [2016] 1 All ER 1006

British Airways Board v Laker Airways Ltd [1985] AC 58; [1984] 3 WLR 413; [1984] 3 All ER 39, HL(E)

Broadmoor Special Hospital Authority v Robinson [2000] QB 775; [2000] 1 WLR 1590; [2000] 2 All ER 727, CA

Bromley London Borough Council v Persons Unknown [2020] EWCA Civ 12; [2020] PTSR 1043; [2020] 4 All ER 114, CA

Burris v Azadani [1995] 1 WLR 1372; [1995] 4 All ER 802, CA

CMOC Sales and Marketing Ltd v Person Unknown [2018] EWHC 2230 (Comm); [2019] Lloyd's Rep FC 62

Cameron v Hussain [2019] UKSC 6; [2019] 1 WLR 1471; [2019] 3 All ER 1, SC(E)

Canada Goose UK Retail Ltd v Persons Unknown [2019] EWHC 2459 (QB); [2020] 1 WLR 417; [2020] EWCA Civ 303; [2020] 1 WLR 2802; [2020] 4 All ER 575, CA

Cardile v LED Builders Pty Ltd [1999] HCA 18; 198 CLR 380

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Carr v News Group Newspapers Ltd [2005] EWHC 971 (QB)
Cartier International AG v British Sky Broadcasting Ltd [2014] EWHC 3354 (Ch); [2015] Bus LR 298; [2015] 1 All ER 949; [2016] EWCA Civ 658; [2017] Bus LR 1; [2017] 1 All ER 700, CA; [2018] UKSC 28; [2018] 1 WLR 3259; [2018] Bus LR 1417; [2018] 4 All ER 373, SC(E)
Castanho v Brown & Root (UK) Ltd [1981] AC 557; [1980] 3 WLR 991; [1981] 1 All ER 143; [1981] 1 Lloyd's Rep 113, HL(E)
Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334; [1993] 2 WLR 262; [1993] 1 All ER 664; [1993] 1 Lloyd's Rep 291, HL(E)
Chapman v United Kingdom (Application No 27238/95) (2001) 33 EHRR 18, ECtHR (GC)
Commerce Commission v Unknown Defendants [2019] NZHC 2609
Convoy Collateral Ltd v Broad Idea International Ltd [2021] UKPC 24; [2023] AC 389; [2022] 2 WLR 703; [2022] 1 All ER 289; [2022] 1 All ER (Comm) 633, PC
Cuadrilla Bowland Ltd v Persons Unknown [2020] EWCA Civ 9; [2020] 4 WLR 29, CA
D v Persons Unknown [2021] EWHC 157 (QB)
Dresser UK Ltd v Falcongate Freight Management Ltd [1992] QB 502; [1992] 2 WLR 319; [1992] 2 All ER 450, CA
EMI Records Ltd v Kudhail [1985] FSR 36, CA
ESPN Software India Private Ltd v Tudu Enterprise (unreported) 18 February 2011, High Ct of Delhi
Earthquake Commission v Unknown Defendants [2013] NZHC 708
Ernst & Young Ltd v Department of Immigration 2015 (1) CILR 151
F (orse A) (A Minor) (Publication of Information), In re [1977] Fam 58; [1976] 3 WLR 813; [1977] 1 All ER 114, CA
Financial Services Authority v Sinaloa Gold plc [2013] UKSC 11; [2013] 2 AC 28; [2013] 2 WLR 678; [2013] Bus LR 302; [2013] 2 All ER 339, SC(E)
Fourie v Le Roux [2007] UKHL 1; [2007] 1 WLR 320; [2007] Bus LR 925; [2007] 1 All ER 1087, HL(E)
Friern Barnet Urban District Council v Adams [1927] 2 Ch 25, CA
Guaranty Trust Co of New York v Hannay & Co [1915] 2 KB 536, CA
Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator Site [2003] EWHC 1738 (Ch); [2004] Env LR 9
Harlow District Council v Stokes [2015] EWHC 953 (QB)
Heathrow Airport Ltd v Garman [2007] EWHC 1957 (QB)
Hubbard v Pitt [1976] QB 142; [1975] 3 WLR 201; [1975] ICR 308; [1975] 3 All ER 1, CA
Ineos Upstream Ltd v Persons Unknown [2019] EWCA Civ 515; [2019] 4 WLR 100; [2019] 4 All ER 699, CA
Iveson v Harris (1802) 7 Ves 251
Joel v Various John Does (1980) 499 F Supp 791
Kingston upon Thames Royal London Borough Council v Persons Unknown [2019] EWHC 1903 (QB)
M and N (Minors) (Wardship: Publication of Information), In re [1990] Fam 211; [1989] 3 WLR 1136; [1990] 1 All ER 205, CA
MacMillan Bloedel Ltd v Simpson [1996] 2 SCR 1048
McPhail v Persons, Names Unknown [1973] Ch 447; [1973] 3 WLR 71; [1973] 3 All ER 393, CA
Manchester Corpn v Connolly [1970] Ch 420; [1970] 2 WLR 746; [1970] 1 All ER 961, CA
Marengo v Daily Sketch and Sunday Graphic Ltd [1948] 1 All ER 406, HL(E)
Mareva Cia Naviera SA v International Bulkcarriers SA [1975] 2 Lloyd's Rep 509, CA
Maritime Union of Australia v Patrick Stevedores Operations Pty Ltd [1998] 4 VR 143

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Mercedes Benz AG v Leiduck [1996] AC 284; [1995] 3 WLR 718; [1995] 3 All ER 929; [1995] 2 Lloyd's Rep 417, PC
Meux v Maltby (1818) 2 Swans 277
Michaels (M) (Furriers) Ltd v Askew (1983) 127 SJ 597, CA
Murphy v Murphy [1999] 1 WLR 282; [1998] 3 All ER 1
News Group Newspapers Ltd v Society of Graphical and Allied Trades '82 (No 2) [1987] ICR 181
North London Railway Co v Great Northern Railway Co (1883) 11 QBD 30, CA
Norwich Pharmacal Co v Customs and Excise Comrs [1974] AC 133; [1973] 3 WLR 164; [1973] 2 All ER 943, HL(E)
OPQ v BJM [2011] EWHC 1059 (QB); [2011] EMLR 23
Parkin v Thorold (1852) 16 Beav 59
Persons formerly known as Winch, In re [2021] EWHC 1328 (QB); [2021] EMLR 20, DC; [2021] EWHC 3284 (QB); [2022] ACD 22, DC
R v Lincolnshire County Council, Ex p Atkinson (1995) 8 Admin LR 529, DC
R (Wardship: Restrictions on Publication), In re [1994] Fam 254; [1994] 3 WLR 36; [1994] 3 All ER 658, CA
RWE Npower plc v Carrol [2007] EWHC 947 (QB)
RXG v Ministry of Justice [2019] EWHC 2026 (QB); [2020] QB 703; [2020] 2 WLR 635, DC
Revenue and Customs Comrs v Egleton [2006] EWHC 2313 (Ch); [2007] Bus LR 44; [2007] 1 All ER 606
Secretary of State for the Environment, Food and Rural Affairs v Meier [2009] UKSC 11; [2009] 1 WLR 2780; [2010] PTSR 321; [2010] 1 All ER 855, SC(E)
Siskina (Owners of cargo lately laden on board) v Distos Cia Naviera SA [1979] AC 210; [1977] 3 WLR 818; [1977] 3 All ER 803; [1978] 1 Lloyd's Rep 1, HL(E)
Smith v Secretary of State for Housing, Communities and Local Government [2022] EWCA Civ 1391; [2023] PTSR 312, CA
South Bucks District Council v Porter [2003] UKHL 26; [2003] 2 AC 558; [2003] 2 WLR 1547; [2003] 3 All ER 1, HL(E)
South Cambridgeshire District Council v Gammell [2005] EWCA Civ 1429; [2006] 1 WLR 658, CA
South Cambridgeshire District Council v Persons Unknown [2004] EWCA Civ 1280; [2004] 4 PLR 88, CA
South Carolina Insurance Co v Assurantie Maatschappij "De Zeven Provincien" NV [1987] AC 24; [1986] 3 WLR 398; [1986] 3 All ER 487; [1986] 2 Lloyd's Rep 317, HL(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)
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
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
Z Ltd v A-Z and AA-LL [1982] QB 558; [1982] 2 WLR 288; [1982] 1 All ER 556; [1982] 1 Lloyd's Rep 240, CA

The following additional cases were cited in argument:

A v British Broadcasting 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
Crédit Agricole Corporate and Investment Bank v Persons Having Interest in Goods Held by the Claimant [2021] EWHC 1679 (Ch); [2021] 1 WLR 3834; [2022] 1 All ER 83; [2022] 1 All ER (Comm) 239
High Speed Two (HS2) Ltd v Persons Unknown [2022] EWHC 2360 (KB)
Hillingdon London Borough Council v Persons Unknown [2020] EWHC 2153 (QB); [2020] PTSR 2179
Kudrevičius v Lithuania (Application No 37553/05) (2015) 62 EHRR 34, ECtHR (GC)
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
B following local authorities participated in the appeal as respondents: (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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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.

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

8 In most cases, the local authorities obtained an order for service of the claim forms by alternative means under CPR r 6.15, usually by fixing copies in a prominent location at each site, or by fixing there a copy of the injunction with a notice that the claim form could be obtained from the claimant's offices. Injunctions were obtained, invariably on without notice applications where the defendants were unnamed, and were similarly displayed. They contained a variety of provisions concerning review or liberty to apply. Some injunctions were of fixed duration. Others had no specified end date. Some were expressed to be interim injunctions. Others were agreed or held by Nicklin J to be final injunctions. Some had a power of arrest attached, meaning that any person who acted contrary to the injunction was liable to immediate arrest.

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

10 From around mid-2020, applications were made in some of the claims to extend or vary injunctions of fixed duration which were nearing their end. After a hearing in one such case, Nicklin J decided, with the concurrence of the President of the Queen's Bench Division and the Judge in Charge of the Queen's Bench Civil List, that there was a need for review of all such injunctions. After case management, in the course of which many of the claims were discontinued, there remained 16 local authorities (or groups of local authorities) actively pursuing claims. The appellants were given permission to intervene. A hearing was then fixed at which four issues of principle were to be determined. Following the hearing, Nicklin J determined those issues: *Barking and Dagenham London Borough Council v Persons Unknown* [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 F or by whom it is raised". However, as Pickford LJ went on to observe, the word is often used in another sense: "that although the court has power to decide the question it will not according to its settled practice do so except in a certain way and under certain circumstances". In order to avoid confusion, it is necessary to distinguish between these two senses of the word: between the power to decide—in this context, the power to grant an injunction—and the principles and practice governing the exercise of that 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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(UK) Ltd [1981] AC 557, for example, Lord Scarman stated at p 573, in a speech with which the other Law Lords agreed, that "the width and flexibility of equity are not to be undermined by categorisation". To similar effect, in *South Carolina Insurance Co v Assurantie Maatschappij "De Zeven Provincien" NV* [1987] AC 24, Lord Goff of Chieveley, with whom Lord Mackay of Clashfern agreed, stated at p 44:

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

In *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 (para 19 above), Lord Browne-Wilkinson, with whose speech Lord Keith of Kinkel and Lord Goff agreed, expressed his agreement at p 343 with Lord Goff's observations in the *South Carolina* case. In *Mercedes Benz AG v Leiduck* [1996] AC 284, 308, Lord Nicholls of Birkenhead referred to these dicta in the course of his illuminating albeit dissenting judgment, and stated:

> "As circumstances in the world change, so must the situations in which the courts may properly exercise their jurisdiction to grant injunctions. The exercise of the jurisdiction must be principled, but the criterion is injustice. Injustice is to be viewed and decided in the light of today's conditions and standards, not those of yester-year."

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

(2) Injunctions against non-parties

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

24 Where the defendants are described in a claim form, or an injunction describes the persons enjoined, simply as persons unknown, the entire world falls within the description. But the entire human race cannot be regarded as being parties to the proceedings: they are not before the court, so that they are subject to its powers. It is only when individuals are served with the claim form that they ordinarily become parties in that sense, although is also possible for persons to apply to become parties in the absence of service. As

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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."

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

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

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

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

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

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

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

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

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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 existence of a cause of action. Again, it is relevant to consider some established categories of injunction against "no cause of action defendants" (as they are sometimes described) in order to see whether newcomer injunctions fall into an existing legitimate class, or, if not, whether they display analogous features.

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

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

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

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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 examples—representative defendants, the wardship jurisdiction, and the F 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 proceedings brought against unnamed persons. H

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 "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 B by the introduction of the CPR. He concluded, at para 21:

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

(2) Hampshire Waste Services

60 Later that same year, Sir Andrew Morritt V-C made another order against persons unknown, this time in a protester case, *Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator Site* [2004] D 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 E 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 F 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 G any person who wished to do so should be able promptly to apply for the order to be discharged, and that was allowed for. That being so, there was no need for a formal return date.

61 Whereas in *Bloomsbury* the injunction was directed against a small number of individuals who were at least theoretically capable of being identified, the injunction granted in *Hampshire Waste Services* was effectively made against the world: anyone might potentially have entered or H 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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Ms Gammell had therefore already become a defendant when she stationed her caravan on the site. Her proper course (and that of any newcomer in the same situation) was to make a prompt application to vary or discharge the injunction as against her (which she had not done) and, in the meantime, to comply with the injunction. The individualised proportionality exercise could then be carried out with regard to her particular circumstances on the hearing of the application to vary or discharge, and might in any event be relevant to sanction. This reasoning, and in particular the notion that a newcomer becomes a defendant by committing a breach of the injunction, has been subject to detailed and sustained criticism by the appellants in the course of this appeal, and this is a matter to which we will return.

(4) Meier

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

(5) Later cases concerning Traveller injunctions

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

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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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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 early return date.

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

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

76 These considerations are all the more significant given what from these relatively early days was acknowledged by many to be a central and recurring set of problems in these cases (and it is one to which we must return in considering appropriate guidelines in cases of this kind): the Gypsies and Travellers to whom they were primarily directed had a lifestyle which made it difficult for them to access conventional sources of housing provision; their attempts to obtain planning permission almost always met with failure; and at least historically, the capacity of sites authorised for their occupation had fallen well short of that needed to accommodate those seeking space on which to station their caravans. The sobering statistics were referred to by Lord Bingham of Cornhill in *South Bucks District Council v Porter* [2003] 2 AC 558 (para 65 above), para 13.

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

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

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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.

D **82** A further appeal by the insurer to the Supreme Court was allowed unanimously. Lord Sumption considered in some detail the extent of any right in English law to sue unnamed persons. He referred to the decision in *Bloomsbury* and the cases which followed, many of which we have already mentioned. Then, at para 13, he distinguished between two kinds of case in which the defendant could not be named, and to which different considerations applied. The first comprised anonymous defendants who 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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persons potentially affected to know what they must not do; and (6) the injunction should have clear geographical and temporal limits.

(8) Bromley

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

91 Important aspects of the background were that some Gypsy and Traveller communities had a particular association with Bromley; the borough had a history of unauthorised encampments; there were no or no sufficient transit sites to cater for the needs of these communities; the grant of these injunctions in ever increasing numbers had the effect of forcing Gypsies and Travellers out of the boroughs which had obtained them, thereby imposing a greater strain on the resources of those which had not yet applied for such orders; there was a strong possibility that unless restrained by the injunction those targeted by these proceedings would act in breach of the rights of the relevant local authority; and although aspects of the resulting damage could be repaired, there would nevertheless be significant irreparable damage too. The judge was satisfied that all the necessary ingredients for a quia timet injunction were in place and so it was necessary to carry out an assessment of whether it was proportionate to grant the injunction sought in all the circumstances of the case. She concluded that it was not proportionate to grant the injunction to restrain entry and encampments but that it was proportionate to grant an injunction against fly-tipping and the disposal of waste.

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

93 As it was, the Court of Appeal dismissed the appeal. Coulson LJ, with whom Ryder and Haddon-Cave LJJ agreed, endorsed what he described as

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

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

(11) The present case

105 The circumstances of the present appeals were summarised at paras 6–12 above. In the light of the foregoing discussion, it will be apparent that, in holding that interim injunctions could be granted against persons unknown, but that final injunctions could be granted only against parties who had been identified and had had an opportunity to contest the final order sought, Nicklin J applied the reasoning of the Court of Appeal in *Canada Goose* [2020] 1 WLR 2802. The Court of Appeal, however, 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 can be described by reference to the behaviour prohibited by the injunction, and that those persons will then become parties to the action in the event that they breach the injunction. As we will explain, we do not regard that as a satisfactory approach, essentially because it is based on the premise that the injunction will be breached and leaves out of account the persons affected by the injunction who decide to obey it. It also involves the logical paradox that a person becomes bound by an injunction only as a result of infringing it. However, even leaving *Gammell* to one side, the Court of Appeal subjected the reasoning in *Canada Goose* to cogent criticism.

107 Among the points made by the Master of the Rolls, the following should be highlighted. No meaningful distinction could be drawn between interim and final injunctions in this context (para 77). No such distinction had been drawn in the earlier case law concerned with newcomer injunctions. It was unrealistic at least in the context of cases concerned with protesters or Travellers, since such cases rarely if ever resulted in trials. In addition, in the case of an injunction (unlike a damages action such as *Cameron*) there was no possibility of a default judgment: the grant of an injunction was always in the discretion of the court. Nor was a default judgment available under Part 8 procedure. Furthermore, as the facts of the earlier cases demonstrated and *Bromley* [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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between cases concerned with anonymous defendants who were identifiable but whose names were unknown, such as squatters occupying a property, and cases concerned with defendants, such as most hit and run drivers, who were not only anonymous but could not be identified. The distinction was of critical importance, in Lord Sumption's view, because a defendant in the first category of case could be served with the claim form or other originating process, whereas a defendant in the second category could not, and consequently could not be given such notice of the proceedings as would enable him to be heard, as justice required.

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

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

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

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

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

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

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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
B classification of cases as falling into one or other of Lord Sumption's categories (or into a third category, as suggested by the Court of Appeal in *Canada Goose,* para 63, and in the present case, para 35) may be a distraction from the fundamental question of whether service on the defendant can in practice be effected so as to bring the proceedings to his or her notice.

118 We also note that Lord Sumption's description of *Bloomsbury* and
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.
F Understandably, given that the case was an action for damages, Lord Sumption's focus was particularly on the practice of the common law courts and on cases concerned with common law remedies (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
H other words, the identification of the unknown defendant can depend upon the availability of injunctions which are granted at a stage when that defendant remains unidentifiable. Furthermore, injunctions and other orders which operate contra mundum, to which (as we have already observed) newcomer injunctions can be regarded as analogous, raise issues lying beyond the scope of Lord Sumption's judgment in *Cameron*.

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

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

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

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

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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
B disobeying the relevant injunction. It has the merit of being specifically addressed to newcomer injunctions in the context of Travellers, but in our view it is really no solution at all.

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

129 The *Gammell* solution, as we have called it, suffers from a number of problems. The most fundamental is that the effect of an injunction against newcomers should be addressed by reference to the paradigm example of the newcomer who can be expected to obey it rather than to act in disobedience to it. As Lord Bingham observed in *South Bucks District Council v Porter* [2003] 2 AC 558 (cited at para 65 above) at para 32, in connection with a possible injunction against Gypsies living in caravans in breach of planning controls, "When granting an injunction the court does not contemplate that it will be disobeyed". Lord Rodger JSC cited this with approval (at para 17) in the *Meier* case [2009] 1 WLR 2780 (para 67 above). Similarly, Baroness Hale of Richmond JSC stated in the same case at para 39, in relation to an injunction against trespass by persons unknown, "We should assume that people will obey the law, and in particular the targeted orders of the court, rather than that they will not."

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

131 Nevertheless, a satisfactory solution, which respects the procedural rights of all those whose behaviour is constrained by newcomer injunctions, including those who obey them, should if possible be found. The practical need for such injunctions has been demonstrated both in this jurisdiction and elsewhere: see, for example, the Canadian case of *MacMillan Bloedel Ltd v Simpson* [1996] 2 SCR 1048 (where reliance was placed at para 26 on *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191 as establishing the contra mundum effect even of injunctions inter partes), American cases such as *Joel v Various John Does* (1980) 499 F Supp 791, New Zealand cases such as *Tony Blain Pty Ltd v Splain* (para 130 above), *Earthquake Commission v Unknown Defendants* [2013] NZHC 708 and *Commerce Commission v Unknown Defendants* [2019] NZHC 2609, the Cayman Islands case of *Ernst & Young Ltd v Department of Immigration* 2015 (1) CILR 151, and Indian cases such as *ESPN Software India Private Ltd v Tudu Enterprise* (unreported) 18 February 2011.

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

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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 D approach is permissible as a matter of legal principle.

133 As we have explained, the *Gammell* solution was adopted by the Court of Appeal in the present case as a means of overcoming the difficulties arising in relation to final injunctions against newcomers which had been identified in *Canada Goose* [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 final injunction could be granted contra mundum, but that protester actions F 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 E proceedings when the final order was made, unless they breached it at the interim stage.

141 In considering whether injunctions of this type comply with the standards of procedural and substantive fairness and justice by which the courts direct themselves, it is the compliant (law-abiding) newcomer, not the contemptuous breaker of the injunction, who ought to be regarded as the paradigm in any process of evaluation. Courts grant injunctions on the 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 F grant of injunctions since 1873. But in our view a submission that section 37 tells you all you need to know proves both too much and too little. Too much because, as we have already observed, it is certainly not the case that judges can grant or withhold injunctions purely on their own subjective perception of the justice and convenience of doing so in a particular case. Too little because the statutory formula tells you nothing about the principles which the courts have developed over many years, even centuries, G to inform the judge and the parties as to what is likely to be just or convenient.

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 eg *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 above).

B

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

C

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

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

F

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

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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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merely squatters present when the order was made, but also squatters who arrived on the relevant land thereafter, unless they apply to be joined as defendants to assert a right of their own to remain.

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

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

(iii) Applicant local authorities can be seen and trusted to comply with the most stringent form of disclosure duty on making an application, so as both

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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.

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

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

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

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

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

171 Although we reject the constitutional objection, we accept that the availability of non-judicial remedies, such as the making of byelaws and the exercise of other statutory powers, may bear on questions (i) and (v) in para 167 above: that is to say, whether there is a compelling need for an injunction, and whether it is, on the facts, just and convenient to grant one. This was a matter which received only cursory examination during the hearing of this appeal. Mr Anderson KC for Wolverhampton submitted (on

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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 B engage with the detail of any of these points, their objection being more a matter of principle.

172 We have not been able to reach any conclusions about the issue of practicality, either generally or on the particular facts about the cases before the court. In our view the theoretical availability of byelaws or other measures or powers available to local authorities as a potential alternative remedy is not shown to be a reason why newcomer injunctions should never 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 F point that an application which had not been formally served on persons joined as defendants so as to enable them to attend and oppose it did not in an appropriate case mean that it had to be heard in their absence, or while they were ignorant that it was being made. In the modern world of the CPR, where "ex parte" has been replaced with "without notice", the phrase "ex parte on notice" admits no translation short of a simple oxymoron. But it demonstrates that giving informal notice of a without notice application is a 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 H prevention of which is the very reason for the application.

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

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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
B unlawfully before serving them with an application for an injunction, the Travellers might move to another site rather than raise a defence to the prevention of continued camping on the original site. By the time the application came to be heard, the identified group would have moved on, leaving the local authority to clear up, and might well have been replaced by another group, equally unidentifiable in advance of their arrival.

181 There are of course exceptions to this pattern of temporary
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 eg the *Gammell* case and the appeal in *Bromley London Borough Council v Maughan* heard at the same time. In such a case the potential procedural injustice of a without notice injunction might well be sufficient to require the local authority to proceed against the owners of the
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 appeal) is that an injunction of this type made on the application of a local
E 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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duty to exercise their powers under section 24 of the CSCDA 1960 to provide adequate accommodation for Gypsies and Travellers residing in or resorting to their areas. The appellants accept that in the years that followed many sites for Gypsies and Travellers were established, but they contend with some justification that these sites were not and have never been enough to meet all the needs of these communities.

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

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

(ii) General "needs" assessments

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

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

(iii) Planning policy

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

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

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

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

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

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

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

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

221 The actual or intended respondents to the application must be defined as precisely as possible. In so far as it is possible actually to identify persons to whom the order is directed (and who will be enjoined by its terms) by name or in some other way, as Lord Sumption explained in *Cameron* [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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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

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

(12) Conclusion

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

6. Outcome

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

(i) The court has jurisdiction (in the sense of power) to grant an injunction against "newcomers", that is, persons who at the time of the grant of the injunction are neither defendants nor identifiable, and who are described in the order only as persons unknown. The injunction may be granted on an interim or final basis, necessarily on an application without notice.

(ii) Such an injunction (a "newcomer injunction") will be effective to bind anyone who has notice of it while it remains in force, even though that person had no intention and had made no threat to do the act prohibited at the time when the injunction was granted and was therefore someone against whom, at that time, the applicant had no cause of action. It is inherently an order with effect contra mundum, and is not to be justified on the basis that those who disobey it automatically become defendants.

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

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

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

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

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

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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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