IN THE HIGH COURT OF JUSTICE **Claim No: PT-2024-LDS-000022**

BUSINESS AND PROPERTY COURTS IN LEEDS

PROPERTY TRUSTS AND PROBATE LIST (ChD)

B E T W E E N : -

(1) MOTOR FUEL LIMITED

(2) PEREGRINE RETAIL LIMITED

Claimants

- and -

(1) PERSONS UNKNOWN WHO FOR RESIDENTIAL PURPOSES (TEMPORARY OR OTHERWISE) ENTER OCCUPY OR SET UP ENCAMPMENT ON THE SITE OF THIRSK SERVICES, YORK ROAD, THIRSK, YO7 3AA, AS SHOWN FOR IDENTIFICATION EDGED RED ON THE ATTACHED PLAN, WITHOUT THE CONSENT OF THE CLAIMANTS

(2) PERSONS UNKNOWN WHO ENTER THE SITE OF THIRSK SERVICES, YORK ROAD, THIRSK, YO7 3AA, AS SHOWN FOR IDENTIFICATION EDGED RED ON THE ATTACHED PLAN, WITH THE INTENTION OF SYPHONING FUEL FROM THE CLAIMANTS' FILLING PUMPS AND/OR A VEHICLE OR RECEPTACLE THAT DOES NOT BELONG TO THAT INDIVIDUAL AND WITHOUT THE CONSENT OF THE OWNER OF THAT VEHICLE OR RECEPTACLE

Defendants

AUTHORITIES BUNDLE
ON BEHALF OF THE CLAIMANTS

Hearing Date: 10 January 2025

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Senior Courts Act 1981

1981 CHAPTER 54

PART II

JURISDICTION

THE HIGH COURT

Powers

37 Powers of High Court with respect to injunctions and receivers.

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

(2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just.

(3) The power of the High Court under subsection (1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction.

(4) The power of the High Court to appoint a receiver by way of equitable execution shall operate in relation to all legal estates and interests in land; and that power—

(a) may be exercised in relation to an estate or interest in land whether or not a charge has been imposed on that land under section 1 of the [M1]Charging Orders Act 1979 for the purpose of enforcing the judgment, order or award in question; and

(b) shall be in addition to, and not in derogation of, any power of any court to appoint a receiver in proceedings for enforcing such a charge.

(5) Where an order under the said section 1 imposing a charge for the purpose of enforcing a judgment, order or award has been, or has effect as if, registered under section 6

Changes to legislation: *Senior Courts Act 1981, Section 37 is up to date with all changes known to be in force on or before 20 December 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

of the [M2]Land Charges Act 1972, subsection (4) of the said section 6 (effect of non-registration of writs and orders registrable under that section) shall not apply to an order appointing a receiver made either—

(a) in proceedings for enforcing the charge; or

(b) by way of equitable execution of the judgment, order or award or, as the case may be, of so much of it as requires payment of moneys secured by the charge.

[[F1](6) This section applies in relation to the family court as it applies in relation to the High Court.**]**

Textual Amendments

F1 S. 37(6) inserted (22.4.2014) by Crime and Courts Act 2013 (c. 22), s. 61(3), **Sch. 10 para. 58**; S.I. 2014/954, art. 2(d) (with art. 3) (with transitional provisions and savings in S.I. 2014/956, arts. 3-11)

Marginal Citations

M1 1979 c, 53.

M2 1972 c. 61.

Changes to legislation:
Senior Courts Act 1981, Section 37 is up to date with all changes known to be in force on or before 20 December 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations.
View outstanding changes

Changes and effects yet to be applied to :

- s. 31(3)(a) word inserted by 2015 c. 2 s. 85(1)(a)
- s. 31(3)(a) word inserted by 2015 c. 2 s. 85(1)(a)
- s. 31(3)(b) and word inserted by 2015 c. 2 s. 85(1)(b)
- s. 31(3)(b) and word inserted by 2015 c. 2 s. 85(1)(b)
- s. 31(3A)(3B) inserted by 2015 c. 2 s. 85(2)
- s. 31(3A)(3B) inserted by 2015 c. 2 s. 85(2)

Changes and effects yet to be applied to the whole Act associated Parts and Chapters:
Whole provisions yet to be inserted into this Act (including any effects on those provisions):

- s. 31(3)(a) word inserted by 2015 c. 2 s. 85(1)(a)
- s. 31(3)(a) word inserted by 2015 c. 2 s. 85(1)(a)
- s. 31(3)(b) and word inserted by 2015 c. 2 s. 85(1)(b)
- s. 31(3)(b) and word inserted by 2015 c. 2 s. 85(1)(b)
- s. 31(3A)(3B) inserted by 2015 c. 2 s. 85(2)
- s. 31(3A)(3B) inserted by 2015 c. 2 s. 85(2)

Human Rights Act 1998

1998 CHAPTER 42

Other rights and proceedings

12 Freedom of expression.

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

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

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

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

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

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

(a) the extent to which—

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

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

(b) any relevant privacy code.

(5) In this section—

"court" includes a tribunal; and

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

Changes to legislation:
There are currently no known outstanding effects for the Human Rights Act 1998, Section 12.

A It is interesting to note that the conclusion that a payment made under a mistake but in discharge of a debt is irrecoverable is consistent with the *American Law Institute, Restatement of the Law, Restitution* (1937), to which Mr. Sumption took us. In section 33 it is stated that the holder of a cheque or other bill of exchange who, having paid value in good faith therefor, receives payment from the drawee without reason to know that the drawee is mistaken is under no duty of restitution to him although the B drawee pays because of a mistaken belief that he has sufficient funds of the drawer. The commentary states that the payee is entitled to retain the money which he has received as a bona fide purchaser, and the illustrations given by way of typical cases include the payment by a bank of a cheque drawn on it by a customer who has insufficient funds to cover the cheque, the payment going to discharge a mortgage debt.

C For these reasons as well as those given by Waller L.J. I would reject the bank's contentions on the third issue.

It follows that I, too, would allow this appeal.

Appeal allowed with costs.
Leave to appeal refused.

D *Solicitors: Davies Arnold Cooper; Stones Porter.*

[Reported by PAUL MAGRATH ESQ., Barrister]

E

[COURT OF APPEAL]

MANCHESTER AIRPORT PLC. v. DUTTON AND OTHERS

F

1999 Feb. 5; 23 Kennedy, Chadwick and Laws L.JJ.

Practice—Possession of land—Summary proceedings—Licensee having right of occupation but not exclusive possession—Trespassers entering land before licence granted—Whether licensee having sufficient interest to obtain possession order—R.S.C., Ord. 113, r. 1

G The plaintiff was granted a licence by the landowner to occupy a wood for the purpose of carrying out works in connection with the construction of an airport runway. The works involved the felling and lopping of certain trees so as to reduce the height of obstacles in the flight path. Three days before the grant of the licence the defendants, who were opposed to the works, entered the wood without permission with the intention of making it H difficult or impossible for the works to be carried out. The district judge granted the plaintiff an order for possession of the wood under R.S.C., Ord. 113.[1] An appeal by the defendants on the

[1] R.S.C., Ord. 113, r. 1: see post, p. 138C–D.

ground that the plaintiff did not have a sufficient interest in the wood to seek an order for possession since the licence granted did not give it exclusive possession of the land was dismissed.

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On appeal by the defendants:—

Held, dismissing the appeal (Chadwick L.J. dissenting), that a licensee with a right to occupy land, whether or not he was in actual occupation, was entitled to bring an action for possession against a trespasser in order to give effect to the rights under the licence; that an estate in or a right to exclusive possession of the land was not required before an order under the summary procedure in R.S.C., Ord. 113 could be obtained, but a licensee's remedy was strictly limited to enforcement of the rights he enjoyed under the licence; that the plaintiff's right to occupy the wood for the purpose of carrying out the specified works gave rise to a sufficient interest for the purposes of Order 113; and that, accordingly, the plaintiff was entitled to possession as against the defendants (post, pp. 147C–E, 149H–150C, 151C–D, F–152A).

B

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Decision of Steel J. affirmed.

The following cases are referred to in the judgments:

Allan v. Liverpool Overseers (1874) L.R. 9 Q.B. 180
Appah v. Parncliffe Investments Ltd. [1964] 1 W.L.R. 1064; [1964] 1 All E.R. 838, C.A.
Danford v. McAnulty (1883) 8 App.Cas. 456, H.L.(E.)
Hounslow London Borough Council v. Twickenham Garden Developments Ltd. [1971] Ch. 233; [1970] 3 W.L.R. 538; [1970] 3 All E.R. 326
Manchester Corporation v. Connolly [1970] Ch. 420; [1970] 2 W.L.R. 746; [1970] 1 All E.R. 961, C.A.
National Provincial Bank Ltd. v. Hastings Car Mart Ltd. [1965] A.C. 1175; [1965] 3 W.L.R. 1; [1965] 2 All E.R. 472, H.L.(E.)
Radaich v. Smith (1959) 101 C.L.R. 209
Street v. Mountford [1985] A.C. 809; [1985] 2 W.L.R. 877; [1985] 2 All E.R. 289, H.L.(E.)
University of Essex v. Djemal [1980] 1 W.L.R. 1301; [1980] 2 All E.R. 742, C.A.
Wiltshire County Council v. Frazer (1983) 82 L.G.R. 313, C.A.
Wykeham Terrace, Brighton, Sussex, In re, Ex parte Territorial Auxiliary and Volunteer Reserve Association for the South East [1971] Ch. 204; [1970] 3 W.L.R. 649

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The following additional cases were cited in argument:

Pasmore v. Whitbread & Co. Ltd. [1953] 2 Q.B. 226; [1953] 2 W.L.R. 359; [1953] 1 All E.R. 361, C.A.
Philipps v. Philipps (1878) 4 Q.B.D. 127, C.A.

G

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

Ashburn Anstalt v. Arnold [1989] Ch.1; [1988] 2 W.L.R. 706; [1988] 2 All E.R. 147, C.A.
Delaney v. T. P. Smith Ltd. [1946] K.B. 393; [1946] 2 All E.R. 23, C.A.
Devon Lumber Co. Ltd. v. MacNeill (1987) 45 D.L.R. (4th) 300
Hull v. Parsons [1962] N.Z.L.R. 465
Lows v. Telford (1876) 1 App.Cas. 414, H.L.(E.)
Lyons v. The Queen (1984) 14 D.L.R. (4th) 482
Malone v. Laskey [1907] 2 K.B. 141, C.A.

H

A *Marcroft Wagons Ltd. v. Smith* [1951] 2 K.B. 496; [1951] 2 All E.R. 271, C.A.
Marsden v. Miller (1992) 64 P. & C.R. 239, C.A.
Mehta v. Royal Bank of Scotland Plc., The Times, 25 January 1999
Moore v. MacMillan [1977] 2 N.Z.L.R. 81
Oldham v. Lawson (No. 1) [1976] V.R. 654
Portland Managements Ltd. v. Harte [1977] Q.B. 306; [1976] 2 W.L.R. 174; [1976] 1 All E.R. 225, C.A.
B *Simpson v. Knowles* [1974] V.R. 190

APPEAL from Steel J.

By an originating summons under R.S.C., Ord. 113 dated 7 August 1998 the plaintiff, Manchester Airport Plc., applied for an order against the defendants, Lee Dutton, Neville Longmire, Lance Crooks, Philip Benn, Norman Stoddard, Maxine Radcliffe and persons unknown, to recover C possession of land known as part of Arthur's Wood, Styal, in the county of Cheshire, on the ground that they were entitled to possession and that the persons in occupation were in occupation without licence or consent. On 18 September 1998 District Judge Freeman in the Manchester District Registry joined Christopher Maile as a defendant, dismissed Lance Crooks, Philip Benn and Maxine Radcliffe as defendants and made the order for D possession. An appeal by the defendants was dismissed by Steel J. on 26 October 1998.

By a notice of appeal dated 19 January 1999 the defendants sought an order that the plaintiff be refused possession of Arthur's Wood, Styal on the grounds, inter alia, that the judge was wrong in law in finding that the licence granted to the plaintiff by the National Trust gave it a title to the land sufficient for it to make an application for summary possession E against the defendants by way of the special procedure in Order 113; that the judge ought to have taken more account of the facts that the plaintiff had never been in occupation of the land, that the licence granted to the plaintiff did not grant it exclusive possession of the land and that the National Trust was prevented in law from so granting exclusive possession; that the judge placed excessive reliance on the commercial interests of the F plaintiff by fully taking into account the argument that it was wrong to expect the onus of seeking possession to fall back on the title holder of the land; that the judge ought to have taken more account of the obligations placed by Parliament on the licensor to prevent by all lawful means the encroachment on land in its care, and to protect and preserve such land, and the resulting question on the lawfulness of the licence granted to the plaintiff; and that having regard to the fact that the plaintiff G clearly had no title to the land and had never been in possession of the land the judge ought to have ruled that the plaintiff had no locus standi to seek possession against the defendants.

The facts are stated in the judgment of Chadwick L.J.

Christopher Maile, in person for all the defendants. The licence granted H to the plaintiff by the National Trust was limited to carrying out works on the land. The plaintiff had no interest in the land and, therefore, no right to take possession proceedings against trespassers: see *Street v. Mountford* [1985] A.C. 809. Since the defendants were on the land before the licence was granted, the plaintiff cannot claim as occupier but must rely on the

title. To obtain an injunction against a trespasser a licensee needs total control of the land: see *Hounslow London Borough Council v. Twickenham Garden Developments Ltd.* [1971] Ch. 233. R.S.C., Ord. 113 requires absolute title and exclusive possession. There is no case where a licensee has obtained possession under that Order. *Philipps v. Philipps* (1878) 4 Q.B.D. 127 set the criteria for possession cases: a title to the land needs to be established with documentary evidence.

A

By the National Trust Act 1907 (7 Edw. 7, c. cxxxvi) the Trust's land is inalienable. The Trust can only grant a limited licence. It cannot give exclusive possession to anyone. The plaintiff cannot claim as successor to the National Trust since to claim through a predecessor in title the same title must continue: *Pasmore v. Whitbread & Co. Ltd.* [1953] 2 Q.B. 226. A licensee therefore has no locus standi to apply for summary possession against a trespasser who was on the land before the licence was granted.

B

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Timothy King Q.C. and *Mark J. Forte* for the plaintiff. Order 113 is available to any party with sufficient interest in land to justify a claim to possession under general principles of law. Order 113 was designed to deal with squatters and other people occupying land and does not demand that the plaintiff has a good title. The Order is purely procedural, providing a summary vehicle for obtaining possession.

D

Historically the right to sue for possession lay only with those with absolute title to the land or with a lesser title derived from the absolute title. The right of a legal tenant to sue for possession against a landlord has developed to include the rights of a licensee to sue in trespass where he enjoys exclusive possession: see *Clerk & Lindsell on Torts*, 17th ed. (1995), p. 843, para. 17-12, pp. 846–848, paras. 17-16, 17-17, 17-18, p. 869, para. 17-57. The concept of "exclusive possession" is a developing concept. The test whether a licensee may sue a licensor in trespass should not be the same test as that where the licensee sues trespassers with no interest in the land. A licensee may have possession of the land: see *Hounslow London Borough Council v. Twickenham Garden Developments Ltd.* [1971] Ch. 233. The right to possession is relative: see *National Provincial Bank Ltd. v. Hastings Car Mart Ltd.* [1965] A.C. 1175.

E

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The plaintiff has a right against all the world except the National Trust, which has no objection to the proceedings. The licence gives the plaintiff the right to enter and occupy the land which confers a sufficient interest in the land to entitle the plaintiff to take possession proceedings. Since the grant of the licence the plaintiff has been in occupaton of the land: contrast *University of Essex v. Djemal* [1980] 1 W.L.R. 1301 and *Wiltshire County Council v. Frazer* (1983) 82 L.G.R. 313. Even if he had never entered into occupation, the licence gives him a sufficient right to immediate possession as against bare trespassers who claim no interest in the land.

G

Maile replied.

Cur. adv. vult.

H

23 February. The following judgments were handed down.

CHADWICK L.J. This is an appeal against an order made on 26 October 1998 by Steel J. in the Manchester District Registry. By her

A order the judge dismissed an appeal by four of the six named defendants to these proceedings, as originally constituted, against an order for possession made by the district judge on 18 September 1998 under R.S.C., Ord. 113, r. 6. The district judge had ordered that the plaintiff, Manchester Airport Plc. ("the airport company"), do recover possession of a piece of land forming part of Arthur's Wood, Styal, Cheshire, in which the named defendants and other persons unknown were said to be encamped.

B The property known as Arthur's Wood was conveyed to the National Trust for Places of Historic Interest or Natural Beauty ("the National Trust") by a conveyance dated 5 August 1980. It has been common ground in these proceedings that the National Trust thereby became, and has remained, the owner of that property. The wood is situate at or near to the proposed second runway for Manchester Airport. In order to comply C with conditions which will govern the operation of the proposed second runway (when completed) the airport company—as the operator of Manchester Airport—needs to create an obstacle limitation surface ("O.L.S."). That requires, as I understand it, a reduction in height of obstacles within the flight path. For that purpose the airport company need to carry out certain works ("the O.L.S. works") within Arthur's Wood. Put shortly, the O.L.S. works appear to involve the lopping, or in D some cases the felling, of trees. The defendants are opposed to the carrying out of those works on environmental and, I think, ecological grounds.

On or about 19 June 1998 the defendants or others entered Arthur's Wood and set up encampments—including tree-houses, ropewalks and a tunnel. It is accepted that they did so without licence or permission from the National Trust; and that as against the National Trust they are E trespassers. It may, I think, be inferred that it was, and remains, the defendants' intention that their occupation will make it difficult or impossible for the airport company to carry out the O.L.S. works.

On 22 June 1998, very shortly after the defendants had taken up occupation within Arthur's Wood, the National Trust granted a licence to the airport company. So far as material the terms of that licence are contained within the first three clauses:

F "1. In consideration of the agreements on behalf of [Manchester Airport Plc.] hereinafter contained [the National Trust] gives [Manchester Airport Plc.] and its contractors and agents licence to enter and occupy that part of Arthur's Wood Styal Cheshire shown edged red on the attached plan ('the land') for the purpose set out in this agreement.

G "2. The purpose for which the licence is granted is to enable the works agreed between the parties and set out in the document appended hereto and titled 'Trees affected by Obstacle Limitation Surface—Arthur's Wood' ('the works') to be carried out. [The National Trust] gives no warranty that the premises are legally or physically fit for the purposes specified in this clause.

H "3. This licence shall subsist from the date hereof until 31 March 1999 provided that if the works have not been completed to the satisfaction of the parties by this date this licence shall be extended by such reasonable period for the completion of the works as the parties shall agree."

The document which is said, in clause 2, to be appended to that licence has not been put in evidence; but the description in clause 2 suggests that the O.L.S. works are restricted to the topping, lopping or felling of trees. Clause 5 provides that the licence is personal to the airport company and that the rights granted shall only be exercised by the airport company, its contractors and agents.

A

It was in those circumstances that the airport company commenced these proceedings on 7 August 1998 by the issue of an originating summons. The defendants were, as I have indicated, six named individuals and "persons unknown." The summons is expressed to be a summons under Order 113. The airport company, as plaintiff, sought an order that it recover possession of the land edged red on the plan annexed to the summons (being a copy of the plan attached to the licence of 22 June 1998) "on the ground that they are entitled to possession and that the persons in occupation are in occupation without licence or consent."

B

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Order 113, r. 1 is in these terms:

> "Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order."

D

The district judge made the order sought. Four of the six named defendants appealed from that order. The appeal came before Steel J., sitting in Manchester. Their case was presented to her, as it was in this court, by the fourth named defendant, Christopher Maile, in person. Steel J. recorded his principal submission in these terms:

E

> "The appellant submits that [Ord. 113, r. 1] is very specific in its terms, and Manchester Airport, the plaintiff in this case, has no locus standi to apply for such an order [for possession]. A person who is entitled to claim possession under this Order has to have a title, has to have an absolute title and exclusive possession, and a licence to occupy which was granted to the respondents in this case, submits Mr. Maile, from 21 June 1998 does not give exclusive possession to the airport authority. The plaintiff, Manchester Airport, as a licensee concede in this case that they have no absolute title to the land which is the subject of this application. They have no exclusive possession to that land, but on behalf of the plaintiff it is submitted that they do have the locus standi to claim possession under Ord. 113, rr. 1 and 6. The appellant limits his case to this comparatively narrow issue of law, that the whole proceedings have been misconceived."

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The judge described Mr. Maile's submission as a narrow but important proposition of law. She expressed her conclusion in these terms:

> "I am satisfied, as was the district judge, that as a licensee, although they have no absolute title or exclusive possession, in this case the plaintiff has the locus standi to bring these proceedings, and that is determined by the nature of the rights which were granted to the plaintiff, a right to occupy. The licence gives the right of possession

H

A and this is, I am satisfied, a right of possession which does not give an absolute title, but it does nevertheless give a power against trespassers. That is very different from the position of proving possession against those with an interest in the property. It is not in issue that the defendant and others in this case are trespassers on this land. They do not in this case claim an interest in the property. I am satisfied that this licence gives the respondent power to seek possession B against trespassers. Also that the Order 113 procedure by originating summons was the correct means by which the plaintiff sought to claim that power."

The judge dismissed the appeal. It is from that order that the four defendants appeal to this court. The issue, as defined by the grounds set out in the notice of appeal, is in substance the same as that before the C judge: whether the licence granted to the airport company by the National Trust on 22 June 1998 gave to the airport company an interest in the land sufficient to enable it to seek an order for possession under the summary procedure contained in R.S.C., Ord. 113.

Order 113 was introduced in 1970 by the Rules of the Supreme Court (Amendment No. 2) Order 1970 (S.I. 1970 No. 944), shortly after the D decision of this court in *Manchester Corporation v. Connolly* [1970] Ch. 420. It had been held in that appeal that the court had no power to make an interlocutory order for possession. Order 113 provides a summary procedure by which a person entitled to possession of land can obtain a final order for possession against those who have entered into or remained in occupation without any claim of right—that is to say, against trespassers. The Order does not extend or restrict the jurisdiction of the court. In E *University of Essex v. Djemal* [1980] 1 W.L.R. 1301, 1304 Buckley L.J. explained the position in these terms:

"I think the Order is in fact an Order which deals with procedural matters; in my judgment it does not affect in any way the extent or nature of the jurisdiction of the court where the remedy that is sought is a remedy by way of an order for possession. The jurisdiction in F question is a jurisdiction directed to protecting the right of the owner of property to the possession of the whole of his property, uninterfered with by unauthorised adverse possession."

As that passage makes clear, Buckley L.J. made those remarks in the context of a claim by the owner of the relevant property. The question, in *University of Essex v. Djemal,* was whether the university could obtain an G order excluding those involved in a student protest from the whole of the campus, or only from such part of the campus actually in their occupation, as the judge had held in the court below. He was not addressing the question which arises in the present case: whether the plaintiff had a right to possession at all. But, it is plain from his remarks that he would have taken the view that that was a question which had to be determined under the general law. If the right does not exist under the general law, there is H nothing in the new procedure introduced in Order 113 which can have the effect of conferring that right.

An order for possession, if made under Order 113, must be in the form prescribed by rule 6(2)—that is to say in Form 42A in R.S.C., Appendix A.

The court orders that the plaintiff do recover possession of the land described in the originating summons. An order in that form is an order in rem, enforceable by a writ of possession. The nature of a writ of possession was explained by Lord Diplock in *Manchester Corporation v. Connolly* [1970] Ch. 420, 428–429:

> "The writ of possession was originally a common law writ (though it is now regulated, as I say, by Ord. 45, r. 3) under which it was ordered that the plaintiff recover possession of the land. Like other common law remedies it did not act in personam against the defendant. It authorised the executive power as represented by the sheriff to do certain things, perform certain acts, in this particular case to evict from land persons who are there and to deliver possession of the land to the plaintiff."

A writ of possession to enforce an order made under Ord. 113, r. 6 must be in Form 66A of the prescribed forms: see Ord. 113, r. 7(2). The writ is addressed to the sheriff; it recites that it has been ordered that the plaintiff do recover possession of the land; and it commands the sheriff "that you enter the said land and cause [the plaintiff] to have possession of it." A writ in that form has been issued in the present proceedings, but is stayed pending the outcome of this appeal.

It is against that background that I consider the question whether the airport company has shown that it has a right to possession of the relevant part of Arthur's Wood which is of the quality necessary to support the order for possession made in these proceedings and the writ of possession issued consequent upon that order. It is essential to keep in mind that it is not contended by the airport company that it is, or ever has been, in actual possession of the wood (or of any part of it) to the exclusion of the defendants. It has been common ground that the defendants had entered the wood and encamped there before the licence of 22 June 1998 was granted. This is not a case in which the plaintiff can rely on its own prior possession to recover possession of land from which it has been ousted. The airport company must rely on the title (if any) which it derives under the licence.

It is relevant, also, to have in mind that it has not been contended by the defendants that, in appropriate circumstances, the airport company might not be entitled to a personal remedy against one or more of them; for example, a remedy by way of injunction to restrain them, individually, from interfering with the carrying out of the O.L.S. works under the terms of the licence. There have been no claims for injunctions in the present proceedings—for reasons which are understandable in the circumstances—and the availability or otherwise of remedies in personam is not in issue on this appeal. The issue is whether the rights which the airport company acquired under the licence of 22 June 1998 enable it to evict the defendants from the wood with the assistance of the sheriff under a writ of possession.

It is necessary to consider, first, the powers of the National Trust in relation to the grant of that licence. The National Trust is a statutory corporation, established by the National Trust Act 1907 (7 Edw. 7, c. cxxxvi), for the purposes of promoting the permanent preservation for

A the benefit of the nation of lands and buildings of beauty or historic interest and, as regards lands, the preservation (so far as practicable) of their natural aspect, features and animal and plant life: see section 4 of that Act. The power of the National Trust to acquire land must, in the absence of some specific power such as that conferred by section 4 of the National Trust Act 1937 (1 Edw. 8 & 1 Geo. 6, c. lvii) (power to acquire land to hold for investment purposes), be a power to acquire that land for B the purposes of promoting its permanent preservation for the benefit of the nation. That is the statutory objective to which, prima facie, the power to acquire land is ancillary. There has been no suggestion in the present case that Arthur's Wood was acquired for any purpose other than its permanent preservation for the benefit of the nation. Land which is acquired for that purpose is inalienable: see section 21(2) of the Act of C 1907.

Section 12 of the National Trust Act 1939 (2 & 3 Geo. 6, c. lxxxvi) is in these terms, so far as material:

> "Notwithstanding anything in section 21 . . . of the Act of 1907 . . . the National Trust may grant any easement or right (not including a right to the exclusive possession of the surface) over or in respect of D any property made inalienable by or under the said section . . ."

It is plain, therefore, that the licence of 22 June 1998, whatever its terms, could not confer on the airport company a right to exclusive possession of the surface of Arthur's Wood. It could not do so because the National Trust had no power to grant such a right. The airport company do not contend otherwise. In those circumstances the question is whether some E right enjoyed by the airport company under the licence of 22 June 1998 (being a right less than a right to exclusive possession) can be the basis for an order for possession—that is to say, for an order in rem—made under Order 113.

It has long been understood that a licensee who is not in exclusive occupation does not have title to bring an action for ejectment. The position of a non-exclusive occupier was explained by Blackburn J. in F *Allan v. Liverpool Overseers* (1874) L.R. 9 Q.B. 180, 191–192, in a passage cited by Davies L.J. in this court in *Appah v. Parncliffe Investments Ltd.* [1964] 1 W.L.R. 1064, 1069–1070 and by Lord Templeman in the House of Lords in *Street v. Mountford* [1985] A.C. 809, 818. The question in *Allan v. Liverpool Overseers* was whether a steamship company was liable to be rated in respect of its occupation of certain sheds which it occupied G under licence from the Mersey Docks and Harbour Board. As Blackburn J. pointed out, liability for rates fell on a person who had exclusive occupation:

> "The poor-rate is a rate imposed by the statute on the occupier, and that occupier must be the exclusive occupier, a person who, if there was a trespass committed on the premises, would be the person to H bring an action of trespass for it. A lodger in a house, although he has the exclusive use of rooms in the house, in the sense that nobody else is to be there, and although his goods are stowed there, yet he is not in exclusive occupation in that sense, because the landlord is there for the purpose of being able, as landlords commonly do in the case

of lodgings, to have his own servants to look after the house and the furniture, and has retained to himself the occupation, though he has agreed to give the exclusive enjoyment of the occupation to the lodger. Such a lodger could not bring ejectment or trespass quare clausum fregit, the maintenance of the action depending on the possession; and he is not rateable."

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That passage, as it seems to me, provides clear authority for the proposition that an action for ejectment—the forerunner of the present action for recovery of land—as well as an action for trespass can only be brought by a person who is in possession or who has a right to be in possession. Further, that possession is synonymous, in this context, with exclusive occupation—that is to say occupation (or a right to occupy) to the exclusion of all others, including the owner or other person with superior title (save in so far as he has reserved a right to enter).

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The position of a licensee has received attention in the context of the statutory protection afforded to residential occupiers. Mr. Maile referred us to well known passages in the speech of Lord Templeman in *Street v. Mountford* [1985] A.C. 809. The question, in that case, was whether the rights conferred on the occupier of rooms by an agreement described as a licence were such that the occupier had a tenancy protected by the Rent Acts. Lord Templeman referred to what he described as the traditional view, at p. 816:

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"The traditional view that the grant of exclusive possession for a term at a rent creates a tenancy is consistent with the elevation of a tenancy into an estate in land. The tenant possessing exclusive possession is able to exercise the rights of an owner of land, which is in the real sense his land albeit temporarily and subject to certain restrictions. A tenant armed with exclusive possession can keep out strangers and keep out the landlord unless the landlord is exercising limited rights reserved to him by the tenancy agreement to enter and view and repair. A licensee lacking exclusive possession can in no sense call the land his own and cannot be said to own any estate in the land. The licence does not create an estate in the land to which it relates but only makes an act lawful which would otherwise be unlawful."

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He went on to give an example germane to the facts in the present case:

"My Lords, there is no doubt that the traditional distinction between a tenancy and a licence of land lay in the grant of land for a term at a rent with exclusive possession. In some cases it was not clear at first sight whether exclusive possession was in fact granted. For example, an owner of land could grant a licence to cut and remove standing timber. Alternatively the owner could grant a tenancy of the land with the right to cut and remove standing timber during the term of the tenancy. The grant of rights relating to standing timber therefore required careful consideration in order to decide whether the grant conferred exclusive possession of the land for a term at a rent and was therefore a tenancy or whether it merely conferred a bare licence to remove the timber."

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A In the present case the question is not whether the agreement of 22 June 1998 creates a tenancy or a licence. It does not create a tenancy, for it is a gratuitous agreement under which no rent is payable. Nor, in the present case, is the question whether the airport company, as occupier under a licence, has exclusive possession or a right to exclusive possession. That question is determined by the inability of the National Trust, in the exercise of its statutory powers, to grant a right to exclusive possession. B The question is whether a person who has a right to occupy under a licence but who does not have any right to exclusive possession can maintain an action to recover possession. But, in that context, the observations of Windeyer J. in the High Court of Australia, in *Radaich v. Smith* (1959) 101 C.L.R. 209, 222, adopted with approval by Lord Templeman in *Street v. Mountford* [1985] A.C. 809, 827, are of relevance:

C "What then is the fundamental right which a tenant has that distinguishes his position from that of a licensee? It is an interest in land as distinct from a personal permission to enter the land and use it for some stipulated purpose or purposes. And how is it to be ascertained whether such an interest in land has been given? By seeing whether the grantee was given a legal right of exclusive possession of D the land for a term or from year to year or for a life or lives . . . A right of exclusive possession is secured by the right of a lessee to maintain ejectment and, after his entry, trespass . . . All this is long established law: see *Cole on Ejectment* (1857), pp. 72, 73, 287, 458."

The lessee, having a right to exclusive possession, could, before entry into possession, maintain an action for ejectment. A licensee, if he did not have E a right to exclusive possession, could not bring ejectment. A tenant or a licensee who was in actual possession—that is to say, in occupation in circumstances in which he had exclusive possession in fact—could maintain an action for trespass against intruders; but that is because he relied on the fact of his possession and not on his title.

The licence in the present case, as it seems to me, is a clear example of a personal permission to enter the land and use it for some stipulated F purpose. In my view, it would be contrary to what Windeyer J. described as "long established law" to hold that it conferred on the airport authority rights to bring an action in rem for possession of the land to which it relates.

Faced with what may be stigmatised as the traditional view, Mr. King, on behalf of the airport company, sought to persuade us that the law as G to the recovery of possession was in a state of change or development. He submitted that it was no longer necessary to establish a right to exclusive possession in order to maintain an action for ejectment. There was now a concept of "relative possession." He referred to the view expressed by the editors of *Clerk & Lindsell on Torts*, 17th ed. (1995), when commenting upon the passage in the judgment of Blackburn J. in *Allan v. Liverpool Overseers*, L.R. 9 Q.B. 180, 191–192 which I have set out. They observe, at H p. 848, para. 17–18:

"The typical Victorian lodger described above by Blackburn J. as having a non-exclusive possession has to be distinguished from the typical modern occupational licensee, for 'in recent years it has been

> established that a person who has no more than a licence may yet have possession of the land,' and the terms of the licence may confer a sufficient right of possession."

The quotation is from the judgment of Megarry J. in *Hounslow London Borough Council v. Twickenham Garden Developments Ltd.* [1971] Ch. 233, 257, to which I shall return. But it is important to set the passage which I have just cited in context. The question addressed in that passage is not the question in this case. The question there addressed is whether a licensee who is in actual occupation may have the protection of the law of trespass against intruders; not whether a licensee who is not in occupation can evict a trespasser who is already on the property. This appears from the first two sentences of paragraph 17–18:

> "It would seem that exclusive possession against the landlord as a test for the nature of the occupant's interest is not conclusive as to the occupant's possessory interest vis-à-vis third parties. The terms of an occupational licence may give the licensee such a degree of control over access as to entitle him to the protection of the law of trespass against intruders."

It is this concept which, as it seems to me, Lord Upjohn had in mind when he said, in *National Provincial Bank Ltd. v. Hastings Car Mart Ltd.* [1965] A.C. 1175, 1232:

> "Furthermore . . . the [deserted] wife's occupation is not exclusive against the deserting husband for he can at any moment return and resume the role of occupier without the leave of the wife. Nevertheless, I cannot seriously doubt that in this case in truth and in fact the wife at all material times was and is in exclusive occupation of the home. Until her husband returns she has dominion over the house and she could clearly bring proceedings against trespassers; so I shall for the rest of this opinion assume that the wife was and is in exclusive occupation of the matrimonial home at all material times."

Mr. King placed much reliance on that passage; but, to my mind, it is of no assistance to his argument. I would accept, without hesitation, that a deserted wife who has remained in occupation of the former matrimonial home after the departure of her husband has exclusive occupation in the sense required to bring an action against intruders; but that is because her occupation has the necessary possessory quality and she does not need to rely upon her title. I would not accept—and I do not think that Lord Upjohn was intending to suggest—that a deserted wife who goes out of occupation upon or after the departure of her husband has title to bring an action to recover possession against a squatter who goes into occupation of the empty house.

Nor do I think that the airport company gains assistance from the decision of Megarry J. in *Hounslow London Borough Council v. Twickenham Garden Developments Ltd.* [1971] Ch. 233. The defendant, a building contractor, had been allowed into occupation of a site owned by the plaintiff council under a building contract. The council had sought to determine the contract by notice under its terms. The contractor refused to vacate the site. The council brought proceedings for injunctions

A restraining the contractor from "entering, remaining or otherwise trespassing" on the site. Megarry J. explained the position, at p. 268:

> "The contractor is in de facto control of the site, and whether or not that control amounts in law to possession, the injunction would in effect expel the contractor from the site and enable the borough to re-assert its rights of ownership."

B Megarry J. refused to grant what he regarded as a mandatory injunction on an interlocutory application because he was not satisfied that the council had made out a sufficiently strong case for that remedy in advance of trial. But, in the course of his judgment, he considered a submission that the contractor was in possession of the site—in which case the injunctions sought would, clearly, have been inappropriate. In that context C he said, at p. 257:

> "I do not think that I have to decide these or a number of other matters relating to possession. First, I am not at all sure that the matter is determined by the language of the contract. It is in a standard form" —containing R.I.B.A. conditions— "and may be used in a wide variety of circumstances. In some, the building owner may D be in manifest possession of the site, and may remain so, despite the building operations. In others, the building owner may de facto, at all events, exercise no rights of possession or control, but leave the contractor in sole and undisputed control of the site. Second, in recent years it has been established that a person who has no more than a licence may yet have possession of the land. Though one of the badges of a tenancy or other interest in land, possession is not necessarily E denied to a licensee."

The reference, in a judgment delivered in 1971, to the fact that "in recent years it has been established that a person who has no more than a licence may yet have possession of the land" was, I think, a reference to the dichotomy, finally put to rest by the decision of the House of Lords in *Street v. Mountford* [1985] A.C. 809, between "licence" and "tenancy" in F the context of the Rent Acts. There is no doubt that a licensee may have a right to exclusive possession without thereby becoming a tenant—for example where the licence is gratuitous—but that will depend on the terms of the licence. In any event, that is not this case. The licence of 22 June 1998 does not confer any right to exclusive possession. Further, a contractor who enters a site under a building contract may, on the facts, G take possession of the site; but, as Megarry J. held, that will require an examination of the facts.

The National Trust is not party to these proceedings and has taken no direct part in them. But the airport company has put in evidence (i) a letter dated 15 August 1998 from George Davies & Co., solicitors for the National Trust, and (ii) an affidavit sworn on 24 September 1998 by the area manager, Cheshire and Greater Manchester, of the National Trust. H The letter of 15 August 1998 refers to the licence of 22 June 1998 and continues in these terms:

> "We also confirm that it has been agreed that Manchester Airport Plc. will be responsible for the provision of security measures including

security, fencing and patrols in relation to Arthur's Wood to prevent the intrusion by protesters or other trespassers and for the eviction of any such protesters or trespassers. In addition, Manchester Airport Plc. are entitled to control access and egress to the part of Arthur's Wood as licensed."

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The area manager deposes:

"The licence itself clearly gives the airport a right to occupy as well as enter the specified site. The terms of occupation have always been understood to mean the control of access and egress to and from the site. The National Trust does not at present nor does it intend to play any part in the day to day works or the ground control of the site although reserve the right as licensor to enter should the need arise. Such control is presently effected by Manchester Airport Plc. and shall be for the duration of the licence, subject to extension."

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If the letter of 15 August 1998, and the subsequent affidavit, are intended to do no more than set out the National Trust's views as to the legal effect of the licence dated 22 June 1998, they are, as it appears to me, of no assistance. The legal effect of a written document is a matter for the court which has to give effect to its terms. The "right as licensor to enter should the need arise" is not reserved in any express term of the licence; it exists, in my view, because the licence grants no right of possession which would enable the airport company to exclude the National Trust. The right to control access to and egress from the site is not mentioned in the licence; nor is there, in the licence, any mention of responsibility for security measures. It is, I think, to be inferred that these are matters which are said to have been agreed between the National Trust and the airport company subsequent to the grant of the licence. It may be that they owe something to the solicitors' researches into *Clerk & Lindsell* after the present problems first arose. But I do not, myself, find it possible to give them any weight. They are, as it seems to me, equivocal. They are consistent with an arrangement under which the airport company is to act as the agent of the National Trust in relation to the security of the site. They are not, of themselves, evidence as to the existence of any right to possession, or title, having been granted to the airport company; a fortiori, in circumstances in which the power of the National Trust to grant such a right is circumscribed by statute.

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There was no material, in the present case, on which the judge could reach the conclusion that the airport company was in de facto possession of the relevant part of Arthur's Wood; and, for my part, I do not think that she did reach that conclusion. She treated the question as one which turned on the construction of the licence. In my view the judge was in error when she held, in a passage in her judgment to which I have already referred, that:

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"The licence gives the right of possession and this is, I am satisfied, a right of possession which does not give absolute title, but it does nevertheless give a power against trespassers."

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She did not make the distinction, essential in cases of this nature, between a plaintiff who is in possession and who seeks protection from those who

A interfere with that possession, and a plaintiff who has not gone into possession but who seeks to evict those who are already on the land. In the latter case (which is this case) the plaintiff must succeed by the strength of his title, not on the weakness (or lack) of any title in the defendant.

I would have allowed this appeal.

B LAWS L.J. I gratefully adopt the account of the facts set out in the judgment of Chadwick L.J. As there appears, the defendants or others (to whom I will compendiously refer as "the trespassers") entered Arthur's Wood and set up their encampments before the grant of the licence by the National Trust to the airport company. Moreover it appears (and I will assume it for the purpose of the appeal) that the airport company has not to date gone into occupation of the land under the licence.

C In those circumstances, the question which falls for determination is whether the airport company, being a licensee which is not de facto in occupation or possession of the land, may maintain proceedings to evict the trespassers by way of an order for possession. Now, I think it is clear that if the airport company had been in actual occupation under the licence and the trespassers had then entered on the site, the airport D company could have obtained an order for possession; at least if it was in effective control of the land. Clause 1 of the licence confers a right to occupy the whole of the area edged red on the plan. The places where the trespassers have gone lie within that area. The airport company's claim for possession would not, were it in occupation, fall in my judgment to be defeated by the circumstance that it enjoys no title or estate in the land, nor any right of exclusive possession as against its licensor (which the E National Trust had no power to grant). This, as it seems to me, is in line with the passage in Lord Upjohn's speech in *National Provincial Bank Ltd. v. Hastings Car Mart Ltd.* [1965] A.C. 1175, 1232 which Chadwick L.J. has already cited, and is supported by the judgment of Megarry J. in *Hounslow London Borough Council v. Twickenham Garden Developments Ltd.* [1971] Ch. 233; and it is clearly consonant with the view of the editors of *Clerk F & Lindsell on Torts*, p. 848, para. 17–18. Nor, I think, would such a claim be defeated by the form of possession order required in Order 113 proceedings (Form 42A) or by the prescribed form of the writ of possession (Form 66A). As Chadwick L.J. has said, the writ commands the sheriff "*that you enter the said land and cause* [the plaintiff] *to have possession of it.*" If the airport company was in de facto occupation of the site, such an order would be perfectly appropriate as against the trespassers, G notwithstanding that the order for possession is said to be a remedy in rem.

But if the airport company, were it in actual occupation and control of the site, could obtain an order for possession against the trespassers, why may it not obtain such an order *before* it enters into occupation, so as to evict the trespassers and enjoy the licence granted to it? As I understand H it, the principal objection to the grant of such relief is that it would amount to an ejectment, and ejectment is a remedy available only to a party with title to or estate in the land; which as a mere licensee the airport company plainly lacks. It is clear that this was the old law: see the passages from *Cole on Ejectment* cited in the High Court of Australia by

Windeyer J. in *Radaich v. Smith*, 101 C.L.R. 209, 222, in a passage agreed to by Lord Templeman in *Street v. Mountford* [1985] A.C. 809, 827, to which Chadwick L.J. has made reference.

However, in this I hear the rattle of mediaeval chains. Why was ejectment only available to a claimant with title? The answer, as it seems to me, lies in the nature of the remedy before the passing of the Common Law Procedure Act 1852 (15 & 16 Vict. c. 76). Until then, as Cole vividly describes it in *Cole on Ejectment* (1857), ch. 1, pp. 1–2:

> "actions of ejectment were in point of form pure fictions . . . The action was commenced . . . by a declaration, *every word of which was untrue*: it alleged a *lease* from the claimant to the nominal plaintiff (*John Doe*); an *entry* by him under and by virtue of such lease; and his subsequent *ouster* by the nominal defendant (*Richard Roe*): at the foot of such declaration was a notice addressed to the *tenants in possession*, warning them, that, unless they appeared and defended the action within a specified time, *they would be turned out of possession.* This was the only comprehensible part to a non-professional person . . . and (curiously enough) the only matter in issue was a fact or point *not alleged in the declaration*, viz. whether the claimant on the day of the alleged demise, and from thence until the service of the declaration, was *entitled to demise* the property claimed or any part thereof; i.e. whether he was himself then legally entitled to actual possession, and consequently to dispose of such possession: if not, it is obvious that the defendants might very safely admit that he did *in fact* make the alleged demise . . .
>
> "The whole proceeding was an ingenious fiction, dextrously contrived so as to raise in every case the only real question, viz. the claimant's title or right of possession . . . and whereby the delay and expense of special pleadings and the danger of variances by an incorrect statement of the claimant's title or estate were avoided. But it was objectionable, on the ground that fictions and unintelligible forms should not be used in courts of justice; especially when the necessity for them might be avoided by a simple writ so framed as to raise precisely the same question in a true, concise, and intelligible form. This has been attempted with considerable success in the Common Law Procedure Act 1852."

The Act of 1852 introduced a simplified procedure without fictions. The form of writ prescribed by sections 168 to 170 of the Act required an allegation that the plaintiff was "entitled [to possession], and to eject all other persons therefrom." Section 207, however, provided: "The effect of a judgment in an action of ejectment under this Act shall be the same as that of a judgment in the action of ejectment heretofore used."

Blackstone's Commentaries, 1st ed., Book III (1768), ch. 11, pp. 202–203 confirms the earlier fictional character of the procedure:

> "as much trouble and formality were found to attend the actual making of the lease, entry, and ouster, a new and more easy method of trying titles by writ of ejectment, where there is any actual tenant or occupier of the premises in dispute, was invented somewhat more than a century ago, by Rolle C.J., who then sat in the court of upper

A bench; so called during the exile of King Charles the Second. This new method entirely depends upon a string of legal fictions: no actual lease is made, no actual entry by the plaintiff, no actual ouster by the defendant; but all are merely ideal, for the sole purpose of trying the title."

The lesson to be learnt from these ancient forms is that the remedy by B way of ejectment was *by definition* concerned with the case where the plaintiff asserted a better title to the land than the defendant; and the fictions, first introduced in the latter half of the 16th century and in effect maintained until 1852, were designed to cut out the consequences of pleading points that might be taken if the plaintiff did not plead his case as to the relevant legal relationships with complete accuracy. Rolle C.J.'s C manoeuvre, and more so the Act of 1852, were in their way ancestors of the Access to Justice reforms to civil procedure which will come into effect on 26 April 1999.

In my judgment the old learning demonstrates only that the remedy of ejectment was simply not concerned with the potential rights of a licensee: a legal creature who, probably, rarely engaged the attention of the courts D before 1852 or for some time thereafter. It is no surprise that Blackburn J. in *Allan v. Liverpool Overseers*, L.R. 9 Q.B. 180, dealing with a question whether a licensee of docks premises was liable to rates, stated, at pp. 191–192:

"A lodger in a house . . . is not in exclusive occupation . . . because the landlord is there for the purpose of being able . . . to have his E own servants to look after the house ... Such a lodger could not bring ejectment or trespass quare clausum fregit, the maintenance of the action depending on the possession; and he is not rateable."

As one might expect this is wholly in line with the old law. But I think there is a logical mistake in the notion that because ejectment was only available to estate owners, possession cannot be available to licensees who F do not enjoy de facto occupation. The mistake inheres in this: if the action for ejectment was by definition concerned *only* with the rights of estate owners, it is necessarily silent upon the question, what relief might be available to a licensee. The limited and specific nature of ejectment means only that it was not available to a licensee; it does not imply the further proposition that *no* remedy by way of possession can now be granted to a G licensee not in occupation. Nowadays there is no distinct remedy of ejectment; a plaintiff sues for an order of possession, whether he is himself in occupation or not. The proposition that a plaintiff not in occupation may only obtain the remedy if he is an estate owner assumes that he must bring himself within the old law of ejectment. I think it is a false assumption.

I would hold that the court today has ample power to grant a remedy H to a licensee which will protect but not exceed his legal rights granted by the licence. If, as here, that requires an order for possession, the spectre of history (which, in the true tradition of the common law, ought to be a friendly ghost) does not stand in the way. The law of ejectment has no

voice in the question; it cannot speak beyond its own limits. Cases such as *Radaich v. Smith*, 101 C.L.R. 209 and *Street v. Mountford* [1985] A.C. 809 were concerned with the distinction between licence and tenancy, which is not in question here. A

In my judgment the true principle is that a licensee not in occupation may claim possession against a trespasser if that is a necessary remedy to vindicate and give effect to such rights of occupation as by contract with his licensor he enjoys. This is the same principle as allows a licensee who is in de facto possession to evict a trespasser. There is no respectable distinction, in law or logic, between the two situations. An estate owner may seek an order whether he is in possession or not. So, in my judgment, may a licensee, if other things are equal. In both cases, the plaintiff's remedy is strictly limited to what is required to make good his legal right. The principle applies although the licensee has no right to exclude the licensor himself. Elementarily he cannot exclude any occupier who, by contract or estate, has a claim to possession equal or superior to his own. Obviously, however, that will not avail a bare trespasser. B C

In this whole debate, as regards the law of remedies in the end I see no significance as a matter of principle in any distinction drawn between a plaintiff whose right to occupy the land in question arises from title and one whose right arises only from contract. In every case the question must be, what is the reach of the right, and whether it is shown that the defendant's acts violate its enjoyment. If they do, and (as here) an order for possession is the only practical remedy, the remedy should be granted. Otherwise the law is powerless to correct a proved or admitted wrongdoing; and that would be unjust and disreputable. The underlying principle is in the Latin maxim (for which I make no apology), "ubi jus, ibi sit remedium." D E

In all these circumstances, I consider that the judge below was right to uphold the order for possession. I should add that in my view there is as a matter of fact here no question of the writ of possession interfering with the prior rights of the National Trust; so much is demonstrated by the letter from the Trust's solicitors of 15 August 1998 and the affidavit of the Trust's area manager of 24 September 1998. These materials have already been set out by Chadwick L.J. With deference to his contrary view I would attach some importance to them. I agree, of course, that they do not qualify the terms of the licence; but they seem to me to show as a matter of evidence that execution of the writ of possession granted in the airport company's favour would not on the facts infringe any claims or obstruct any acts on the land by the licensor or anyone claiming under it. F G

For all the reasons I have given, I would dismiss this appeal.

KENNEDY L.J. The wording of Order 113 and the relevant facts can be found in the judgment of Chadwick L.J. In *Wiltshire County Council v. Frazer* (1983) 82 L.G.R. 313, 320 Stephenson L.J. said that for a party to avail himself of the Order he must bring himself within its words. If he does so the court has no discretion to refuse him possession. Stephenson L.J. went on, at p. 321, to consider what the words of the rule require. They require: H

A "(1) Of the plaintiff, that he should have a right to possession of the land in question and claim possession of land which he alleges to be occupied solely by the defendants. (2) That the defendants, whom he seeks to evict from [the land], should be persons who have entered into or have remained in occupation of it without his licence or consent [or that of any predecessor in title of his]."

B In my judgment those requirements are met in this case. The plaintiff does have a right to possession of the land granted to it by the licence. It is entitled "to enter *and occupy*" (my emphasis) the land in question. The fact that it has only been granted the right to enter and occupy for a limited purpose (specified in clause 2 of the licence) and that, as I would accept, the grant does not create an estate in land giving the plaintiff a C right to exclusive possession does not seem to me to be critical. What matters, in my judgment, is that the plaintiff has a right to possession which meets the first of the requirements set out by Stephenson L.J., and the defendants have no right which they can pray in aid to justify their continued possession. If it is said that such an approach blurs the distinction between different types of right and different types of remedy it seems to me that is the effect of the wording of Order 113, and the D understandable object of the law has always been to grant relief to a plaintiff seeking possession who can rely on a superior title. In *Danford v. McAnulty* (1883) 8 App.Cas. 456, 462 Lord Blackburn said that:

"in ejectment, where a person was in possession those who sought to turn him out were to recover *upon the strength of their own title*; and E consequently possession was at law a good defence against any one, and those who sought to turn the man in possession out *must show a superior legal title to his.*" (Emphasis added.)

That case was not, of course, concerned with a licence to occupy for a limited purpose but the emphasis on giving a remedy to the party who has a better right seems to me to be instructive.

F The decision in *In re Wykeham Terrace, Brighton, Sussex, Ex parte Territorial Auxiliary and Volunteer Reserve Association for the South East* [1971] Ch. 204 demonstrated the weakness of the procedure prior to the existence of Order 113. On an ex parte application the court was unable to enter judgment or make a final order against unnamed squatters who were not a party to the proceedings. Stamp J., at p. 212, observed that:

G "No doubt a different, and perhaps a better process ... could be provided to meet particular cases and more particularly a case where unknown persons are in occupation of land claimed by the plaintiff."

Order 113 was then drafted and came into operation on 20 July 1970. As I have already said it does not in my judgment require of a plaintiff that he demonstrate a right to exclusive possession and therefore, as it seems to H me, it need not be confined to giving protection to those who can demonstrate that they possess an estate in land. If it is approached in that way then, as it seems to me, decisions such as *Street v. Mountford* [1985] A.C. 809, on which Mr. Maile relied, no longer give rise to any difficulty,

and the court is able to give a remedy in a situation in which a remedy plainly ought to be provided. A

For those reasons, in addition to those set out in the judgment of Laws L.J., I would dismiss this appeal.

Appeal dismissed with costs.
Leave to appeal refused.

B

28 June 1999. The Appeal Committee of the House of Lords (Lord Nicholls of Birkenhead, Lord Hoffmann and Lord Hope of Craighead) dismissed a petition by the defendant, Christopher Maile, for leave to appeal.

Solicitors: Legal Department, Manchester Airport Plc., Manchester. C

[Reported by SUSAN DENNY, Barrister]

D

[COURT OF APPEAL]

REGINA v. SECRETARY OF STATE FOR THE HOME DEPARTMENT, *Ex parte* HINDLEY

E

1998 Oct. 5, 6, 7; Nov. 5 — Lord Woolf M.R., Hutchison and Judge L.JJ.

Prisons—Prisoners' rights—Release on licence—Mandatory life sentence prisoner—Tariff element of determinate length provisionally fixed but not communicated to prisoner—Whole life tariff subsequently fixed and communicated—Policy of review of whole life tariff limited to considerations of retribution and deterrence but later amended to take account of exceptional circumstances—Whether increase from determinate tariff to whole life tariff lawful—Whether review policy lawful—Criminal Justice Act 1991 (c. 53), s. 35—Crime (Sentences) Act 1997 (c. 43), s. 29

F

G

In 1966 the applicant and a co-defendant were convicted of the murder of two children and received mandatory life sentences. The applicant was also convicted of being an accessory after the fact to the murder of a third child, of which the co-defendant was convicted, and was sentenced to a determinate custodial term. Immediately following the trial the judge expressed the expectation to the Home Office that the applicant would be kept in prison for "a very long time" and that her co-defendant would not be released in any foreseeable future. Review of any question of release was deferred until 1982 when, in response to the Secretary of State's request, the Lord Chief Justice recommended that, while he would never release her co-defendant, no term less than

H

Supreme Court

*Secretary of State for the Environment, Food and Rural Affairs *v* Meier and others

[2009] UKSC 11

2009 June 10, 11; Dec 1

Lord Rodger of Earlsferry, Lord Walker of Gestingthorpe, Baroness Hale of Richmond JJSC, Lord Neuberger of Abbotsbury MR, Lord Collins of Mapesbury JSC

Injunction — Trespass — Order for possession — Gipsies and travellers — Travellers in trespassory occupation of area of woodland owned by Secretary of State — Fear of travellers moving to other areas of woodland also owned by Secretary of State but distinct from that occupied by defendants — Secretary of State's application for possession order against defendants in respect of other land — Whether power in court to grant — Injunction to restrain occupation — Whether appropriate — Government guidance on unauthorised encampments — Effect and relevance — CPR Pt 55

A number of travellers, including the defendants, established an unauthorised encampment in an area of woodland owned by the claimant Secretary of State and managed by the Forestry Commission. The Secretary of State issued proceedings alleging trespass and seeking an order for possession of the occupied site and of a number of other unoccupied woodland sites in the vicinity likewise vested in him and managed by the commission. He also sought an injunction to restrain the defendants from re-entering the occupied site or entering the other sites. The recorder made an order of possession of the occupied site but refused the application for possession in so far as it extended to the unoccupied sites. he also refused the injunction sought. The Court of Appeal allowed an appeal by the Secretary of State, unanimously in respect of the wider possession order and by a majority in respect of the injunction.

On appeal by the defendants—

Held, allowing the appeal in part, (1) that a possession claim against trespassers involved the person entitled to possession seeking recovery of the land in question and, accordingly, an order for possession of land not occupied by the trespassers and of which the owner enjoyed uninterrupted possession could not be justified; that where trespassers were encamped in part of a wood a possession order might be made against them in respect of the whole wood; but that, however desirable it might be to fashion or develop a remedy to meet a practical problem such as that which arose in the present case, the Court of Appeal had had no power to make an order for possession of areas of woodland not occupied by the defendants and wholly detached and separated from the area occupied by them (post, paras 7–12, 20, 38–41, 59, 63–67, 71, 78, 95, 96–98).

Ministry of Agriculture, Fisheries and Food v Heyman (1989) 59 P & CR 48 and *Secretary of State for the Environment, Food and Rural Affairs v Drury* [2004] 1 WLR 1906, CA disapproved.

University of Essex v Djemal [1980] 1 WLR 1301, CA distinguished.

(2) That where a trespass was threatened, and particularly where a trespass was being committed and had been committed in the past by the defendant, an injunction to restrain it was, in the absence of good reasons to the contrary, appropriate even though there appeared to be little prospect of enforcing it by imprisonment or sequestration; that it would not be appropriate to set aside the injunction granted by the Court of Appeal unless it had been plainly wrong to grant it or there had been an error of principle in the reasoning leading to its grant, neither of which was established; that the effect and purpose of government guidance on unauthorised

A encampments, relied on by the defendants, was not strong enough to displace the Secretary of State's right to seek the assistance of the court to prevent a legal right being infringed; and that, accordingly, the grant of the injunction should be upheld (post, paras 3, 20, 39, 79, 83–84, 87–88, 95).

Per Baroness Hale of Richmond JSC. I would not see procedural obstacles as necessarily precluding the "incremental development" sanctioned in the *Drury* case provided that an order could be specifically tailored against known individuals who B have already intruded on the claimant's land, are threatening to do so again and have been given a proper opportunity to contest the order. It would be helpful if the rules so provided so that the procedures could be properly thought through and the forms of order properly tailored to the facts of the case (post, para 40).

Decision of the Court of Appeal [2008] EWCA Civ 903; [2009] 1 WLR 828; [2009] PTSR 357; [2009] 1 All ER 614 reversed in part.

C The following cases are referred to in the judgments:

Bloomsbury Publishing Group Ltd v News Group Newspapers Ltd [2003] EWHC 1205 (Ch); [2003] 1 WLR 1633; [2003] 3 All ER 736
Connors v United Kingdom (2005) 40 EHRR 189
Doherty v Birmingham City Council (Secretary of State for Communities and Local Government intervening) [2008] UKHL 57; [2009] 1 AC 367; [2008] 3 WLR 636; [2009] 1 All ER 653, HL(E)
D *Fourie v Le Roux* [2007] UKHL 1; [2007] 1 WLR 320; [2007] Bus LR 925; [2007] 1 All ER 1087; [2007] 1 All ER (Comm) 571, HL(E)
Gledhill v Hunter (1880) 14 Ch D 492
Hampshire Waste Services Ltd v Intended Trespassers upon Chineham Incinerator Site [2003] EWHC 1738 (Ch); [2004] Env LR 196
Hemmings v Stoke Poges Golf Club [1920] 1 KB 720, CA
Henderson v Squire (1869) LR 4 QB 170
E *McPhail v Persons, Names Unknown* [1973] Ch 447; [1973] 3 WLR 71; [1973] 3 All ER 393, CA
Manchester Airport plc v Dutton [2000] QB 133; [1999] 3 WLR 524; [1999] 2 All ER 675, CA
Manchester Corpn v Connolly [1970] Ch 420; [1970] 2 WLR 746; [1970] 1 All ER 961, CA
Masri v Consolidated Contractors International (UK) Ltd (No 2) [2008] EWCA Civ 303; [2009] QB 450; [2009] 2 WLR 621; [2009] Bus LR 168; [2008] 2 All F ER (Comm) 1099, CA
Ministry of Agriculture, Fisheries and Food v Heyman (1989) 59 P & CR 48
R v Wandsworth County Court, Ex p Wandsworth London Borough Council [1975] 1 WLR 1314; [1975] 3 All ER 390, DC
Secretary of State for the Environment, Food and Rural Affairs v Drury [2004] EWCA Civ 200; [2004] 1 WLR 1906; [2004] 2 All ER 1056, CA
South Bucks District Council v Porter [2003] UKHL 26; [2003] 2 AC 558; [2003] G 2 WLR 1547; [2003] 3 All ER 1, HL(E)
South Cambs District Council v Persons Unknown [2004] EWCA Civ 1280; [2004] 4 PLR 88, CA
Thompson v Elmbridge Borough Council [1987] 1 WLR 1425, CA
University of Essex v Djemal [1980] 1 WLR 1301; [1980] 2 All ER 742, CA
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

H The following additional cases were cited in argument:

Jephson Homes Housing Association v Moisejevs [2001] All ER 901, CA
Kanssen v Secretary of State for the Environment, Food and Rural Affairs [2005] EWHC 1024 (Admin); [2005] NPC 76; [2005] EWCA Civ 1453, CA
Leicester City Council v Aldwinckle (1991) 24 HLR 40, CA

APPEAL from the Court of Appeal

This was an appeal by the second and fifth defendants, Sharon Horie and Lesley Rand, by leave of the House of Lords (Lord Hope of Craighead, Baroness Hale of Richmond and Lord Neuberger of Abbotsbury) given on 11 February 2009 from the decision of the Court of Appeal (Pill, Arden and Wilson LJJ; Wilson LJ dissenting in part) allowing an appeal by the Secretary of State for the Environment, Food and Rural Affairs from Mr Recorder Norman in the Poole County Court, sitting at Southampton.

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

Richard Drabble QC and *Marc Willers* (instructed by *Community Law Partnership, Birmingham*) for the second and fifth defendants.

John Hobson QC and *John Clargo* (instructed by *Whitehead Vizard, Salisbury*) for the Secretary of State.

The court took time for consideration.

1 December 2009. The following judgments were handed down.

LORD RODGER OF EARLSFERRY JSC

1 If a group of people come on to my land without my permission, I shall want the law to provide a speedy way of dealing with the situation. If they leave but come back repeatedly, depending on the evidence, I shall be able to obtain an interlocutory and final injunction against them returning. But they may come on to my land and set up camp there. Again, depending on the evidence, I shall be able to obtain an injunction (interlocutory and final) against them remaining and also against them coming back again once they leave as required by the injunction. Similarly, if the evidence shows that, once they leave, they are likely to move and set up camp on other land which I own, the court can grant an injunction (interlocutory and final) against them doing that. If authority is needed for all this, it can be found in the judgment of Lord Diplock in the Court of Appeal in *Manchester Corpn v Connolly* [1970] Ch 420.

2 Of course, it is quite likely that I won't know the identities of at least some of the trespassers. If so, Wilson J regarded an injunction as "useless" since "it would be wholly impracticable for the claimant to seek the committal to prison of a probably changing group of not easily identifiable travellers, including establishing service of the injunction and of the application": *Secretary of State for the Environment, Food and Rural Affairs v Drury* [2004] 1 WLR 1906, 1912, para 19. That may well have been an unduly pessimistic assessment. Certainly, claimants have used injunctions against unnamed defendants. And Sir Andrew Morritt V-C was satisfied that the procedural problems could be overcome. Admittedly, the circumstances in the first of his cases, *Bloomsbury Publishing Group Ltd v News Group Newspapers Ltd* [2003] 1 WLR 1633, were very different from a situation involving trespassers. But trespassing protesters were the target of the interlocutory injunction which he granted in *Hampshire Waste Services Ltd v Intended Trespassers upon Chineham Incinerator Site* [2004] Env LR 196. Similarly, in *South Cambs District Council v Persons Unknown* [2004] 4 PLR 88, the Court of Appeal (Brooke LJ and Clarke LJ) granted an injunction against persons unknown "causing or permitting

A hardcore to be deposited, caravans, mobile homes or other forms of residential accommodation to be stationed, or existing caravans or other mobile homes to be occupied on land" adjacent to a gipsy encampment in rural Cambridgeshire (para 3). Brooke LJ commented, at para 8: "There was some difficulty in times gone by against obtaining relief against persons unknown, but over the years that problem has been remedied either by statute or by rule." See the discussion of such injunctions by B Jillaine Seymour, "Injunctions Enjoining Non-Parties: Distinction without Difference" [2007] CLJ 605–624.

3 The present case concerns travellers who set up camp on the Forestry Commission's land at Hethfelton. Lord Neuberger has explained the circumstances. The identities of some, but not all, of those involved were known to the Commission. So the defendants included "persons unknown". C Despite this, the Commission sought an injunction against all the defendants, including those described as "All persons currently living on or occupying the claimant's land at Hethfelton". The recorder declined to grant an injunction on the view that it would be disproportionate. But the Court of Appeal [2009] 1 WLR 828, by a majority, reversed the recorder on this point and granted an order that

D
> "The respondents, and each of them, be restrained from entering upon, trespassing upon, living on, or occupying the parcels of land set out in the Schedule hereto, and, for the avoidance of doubt, the fourth respondent shall mean 'those people trespassing on, living on, or occupying the land known as Hethfelton Wood on any date between 13 February 2007 and 3 August 2007 save for those specifically identified as first, second, third, E fifth and sixth respondents.' "

In my view, for the reasons given by Lord Neuberger, the majority were right to grant the injunction. In any event, Mr Drabble QC, who appeared for the travellers, did not suggest that this injunction had been incompetent or defective for lack of service or in some other respect. Even Wilson LJ, who dissented on the injunction point in the Court of Appeal, did not go so far as F to suggest that it was inherently useless: he simply took the view, at para 76, that it added nothing of value to the order for possession and, therefore, the recorder would have been entitled to exercise his discretion to refuse it on that basis.

4 This brings me to the order for possession which lies at the heart of the appeal. If people not only come on to my land but oust me from it, I can G bring an action for recovery of the land. That is what the Commission did in the present case: they raised an action in Poole County Court for recovery of "land at Hethfelton nr Wool and all that land described on the attached schedule all in the county of Dorset". In effect, the Commission were asking for two things: to be put back into possession of the land on which the defendants were camped at Hethfelton, and to be put into possession of the other specified areas of land which they owned, but on which, they H anticipated, the defendants might well set up camp once they left Hethfelton.

5 The Court of Appeal granted an order for possession in respect both of the land at Hethfelton and of the other parcels of land situated some distance away. As regards the competency of granting an extended order of this kind, the court was bound by the decision in the *Drury* case

[2004] 1 WLR 1906. The central issue in the present appeal is whether that case was rightly decided. In my view it was not. A

6 Most basically, an action for recovery of land presupposes that the claimant is not in possession of the relevant land: the defendant is in possession without the claimant's permission. This remains the position even if, as the Court of Appeal held in *Manchester Airport plc v Dutton* [2000] QB 133, the claimant no longer needs to have an estate in the land. See *Megarry & Wade*, *The Law of Real Property*, 7th ed (2008), para 4-026. B To use the old terminology, the defendant has ejected the claimant from the land; the claimant says that he has a better right to possess it, and he wants to recover possession. That is reflected in the form of the order which the court grants: "that the claimant do forthwith recover" the land—or, more fully, "that the said AB do recover against the said CD possession" of the land: see *Cole*, *The Law and Practice in Ejectment* (1857), p 786, Form 262. The C fuller version has the advantage of showing that the court's order is not in rem; it is in personam, directed against, and binding only, the defendant. Of course, if the defendant refuses to leave and the court grants a writ of possession requiring the bailiff to put the claimant into possession, in principle, the bailiff will remove all those who are on the relevant land, irrespective of whether or not they were parties to the action: *R v Wandsworth County Court, Ex p Wandsworth London Borough Council* D [1975] 1 WLR 1314. So, in that way, non-parties are affected. But, if anyone on the land has a better right than the claimant to possession, he can apply to the court for leave to defend. If he proves his case, then he will be put into possession in preference to the claimant. But the original order for possession will continue to bind the original defendant. See Stamp J's lucid account of the law in *In re Wykeham Terrace, Brighton, Sussex,* E *Ex p Territorial Auxiliary and Volunteer Reserve Assocn for the South East* [1971] Ch 204, 209C–210B.

7 *In re Wykeham Terrace* and *Manchester Corpn v Connolly* [1970] Ch 420 showed the need for some reform of the procedures used in actions for recovery of land. The twin problems of unidentifiable defendants and the lack of any facility for granting an interim order for possession were F tackled by a new RSC Ord 113, the provisions of which, with some alteration of the details, have been incorporated into the current rule 55 of the CPR. In the present case no issue arises about the wording of rule 55. But I would certainly not interpret "occupied" in rule 55.1(b) as preventing the use of the special procedure in a case like *University of Essex v Djemal* [1980] 1 WLR 1301 where some protesters were excluding the university G from one part of its campus, but many students and members of staff were legitimately occupying other parts.

8 The intention behind the relevant provisions of rule 55 remains the same as with Order 113: to provide a special fast procedure in cases which only involve trespassers and to allow the use of that procedure even when some or all of the trespassers cannot be identified. These important, but limited, changes in the rules cannot have been intended, however, to go H further and alter the essential nature of the action itself: it remains an action for recovery of possession of land from people who are in wrongful possession of it. I should add that in the present case the defendants do not dispute that they are—or, at least, were at the relevant time—in possession, rather than mere occupation, of the Commission's land at Hethfelton.

A *Wonnacott*, *Possession of Land* (2006), p 27, points out that defendants rarely dispute this. But here, in any event, the defendants' possession is borne out by their offer to co-operate to allow the Commission's ordinary activities on the land not to be disrupted. This is inconsistent with the Commission being in possession. So the preconditions for an action for recovery of land are satisfied.

B **9** By contrast, the Forestry Commission were at all relevant times in undisturbed possession of the parcels of land listed in the schedule to the Court of Appeal's order. That being so, an action for the recovery of possession of those parcels of land is quite inappropriate. The only authority cited by the Court of Appeal in the *Drury* case [2004] 1 WLR 1906 for granting such an order was the decision of Saville J in *Ministry of Agriculture, Fisheries and Food v Heyman* (1989) 59 P & CR 48. But in that C case the defendant trespassers were not represented and so the point was not fully argued.

10 Saville J referred to the decision of the Court of Appeal in *University of Essex v Djemal* [1980] 1 WLR 1301, which I have just mentioned. That decision is clearly distinguishable, however. The defendant students, who had previously taken over, and been removed from, certain administrative D offices of the University of Essex, had been occupying another part of the university buildings known as "Level 6". The Court of Appeal made an order for possession extending to the whole property of the university—in effect, the whole campus. This was justified because the university's right to possession of its campus was indivisible: "If it is violated by adverse occupation of any part of the premises, that violation affects the right of possession of the whole of the premises": [1980] 1 WLR 1301, 1305C–D, per E Shaw LJ. In the *Heyman* case, by contrast, the Ministry's right to possession of its land at Grovely Woods was not violated in any way by the trespassers' adverse possession of its other land two or three miles away at Hare Wood. In my view, the *Heyman* case was wrongly decided and did not form a legitimate basis for the Court of Appeal's decision in the *Drury* case.

11 Mummery LJ [2004] 1 WLR 1906, 1916, para 35 described Wilson F J's approach in the *Drury* case as "pragmatic". And, of course, the common law does evolve by making pragmatic incremental developments. But, if they are to work, they must be consistent with basic principle and they must make sense.

12 I would not put undue emphasis on the supposed practical difficulties in providing for adequate service by attaching notices to stakes, etc, on these remoter areas of land. Doubtless, adequate arrangements G could be worked out, if extended orders were otherwise desirable. The real objection is that the Court of Appeal's extended order that "the [Commission] do recover the parcels of land set out in the Schedule hereto" is inconsistent with the fundamental nature of an action for recovering land because there is nothing to recover: the Commission were in undisturbed possession of those parcels of land. And the law is harmed rather than improved if a court grants orders which lay defendants, knowing the facts, H would rightly find incomprehensible. How, the defendants could well ask, can the Commission "recover" parcels of land which they already possess? How, too, are the defendants supposed to comply with the order? Only a lawyer could understand and explain that the order "really" means that they are not to enter and take over possession of the other parcels of Commission

land. This is, of course, what the injunction already says in somewhat old-fashioned, but tolerably clear, language.

13 Doubtless, the wording could in theory be altered, but this would really be to change the nature of the action and turn the order into an injunction, so creating parallel injunctions, one leading to the possible intervention of the bailiff and the other not.

14 The claimed justification for granting an extended order for possession of this kind is indeed that it is the only effective remedy against travellers, such as the present defendants, since it can ultimately lead to them being removed by a bailiff under a warrant for possession. Moreover, unless the Commission can obtain an extended order, they will be forced to come back to court for a new order each time the defendants move to another of their properties. An injunction is said to be a much weaker remedy in a case like the present since, if the defendants fail to comply with it, all that can be done is to seek an order for their sequestration or committal to prison. Sequestration is an empty threat, the argument continues, against people who have few assets, while committal to prison might well be inappropriate in the case of defendants who are women with young children.

15 Plainly, the idea of the Commission having to return to court time and again to obtain a fresh order for possession in respect of a series of new sites is unattractive. But the scenario presupposes that the defendants would, with impunity, disobey the injunction restraining them from entering the other parcels of land. So this point is linked to the contention that the injunction would not work.

16 I note in passing that there is actually no evidence that these defendants would fail to comply with the injunction in respect of the other parcels of land. So there is no particular reason to suppose that the Court of Appeal's injunction will prove an ineffective remedy in this case. On the more general point about the alleged ineffectiveness of injunctions in cases of this kind, *South Bucks District Council v Porter* [2003] 2 AC 558 is of some interest. There the council wanted to obtain an injunction against gipsies living in caravans in breach of planning controls because an injunction was thought to be a potentially more effective weapon than the various enforcement procedures under the planning legislation. This is in line with the thinking behind the application for an injunction in *South Cambs District Council v Persons Unknown* [2004] 4 PLR 88 which I mentioned in para 2.

17 Admittedly, if the present defendants did fail to comply with the injunction, sequestration would not be a real option since they are unlikely to have any substantial assets. And, of course, there are potential difficulties in a court trying to ensure compliance with an injunction by committing to prison defendants who are women with young children. Nevertheless, as Lord Bingham of Cornhill observed in *South Bucks District Council v Porter* [2003] 2 AC 558, at para 32, in connection with a possible injunction against gipsies living in caravans in breach of planning controls:

> "When granting an injunction the court does not contemplate that it will be disobeyed . . . Apprehension that a party may disobey an order should not deter the court from making an order otherwise appropriate: there is not one law for the law-abiding and another for the lawless and truculent."

A Taking that approach, we should, in my view, be slow to assume that an injunction is a worthless remedy in a case like the present and that only the intervention of a bailiff is likely to be effective. If that is indeed the considered consensus of those with experience in the field, then consideration may have to be given to changing the procedures for enforcing injunctions of this kind.

B **18** But any such reform would raise far-reaching issues which are not for this court. In particular, travellers are by no means the only people without means whose unlawful activities the courts seek to restrain by injunction and where the assistance of a bailiff might be attractive to claimants. Especially when Parliament has intervened from time to time to regulate the way that the courts should treat travellers, the need for caution in creating new remedies is obvious. At the very least, the matter is C one for the Master of the Rolls and the Rule Committee who have the leisure and facilities to consider the issues.

19 For these reasons I would allow the defendants' appeal to the extent proposed by Lord Neuberger.

LORD WALKER OF GESTINGTHORPE JSC

D **20** I agree with all the other members of the court that this appeal should be allowed to the extent of setting aside the wider possession order. In *Secretary of State for the Environment, Food and Rural Affairs v Drury* [2004] 1 WLR 1906, the Court of Appeal went too far in trying to achieve a practical solution. The decision cannot be seen as simply an extension of *University of Essex v Djemal* [1980] 1 WLR 1301, in which the facts were very different. I respectfully agree with the observations on injunctive relief E made by Lord Rodger at the end of his judgment.

BARONESS HALE OF RICHMOND JSC

21 Two questions are before us. First, can the court grant a possession order in respect of land, no part of which is yet occupied by the defendant, because of the fear that she will do so if ejected from land which she currently does occupy? Second, should the court grant an injunction against F that feared trespass? The Court of Appeal unanimously answered the first question in the affirmative, following the reasoning of that court in *Secretary of State for the Environment, Food and Rural Affairs v Drury* [2004] 1 WLR 1906 and the decision of Saville J in *Ministry of Agriculture, Fisheries and Food v Heyman* (1989) 59 P & CR 48. The majority also answered the second question in the affirmative; Wilson LJ dissented but G only because he thought the wider possession order a sufficient remedy in the circumstances.

22 The approach in the *Drury* and *Heyman* cases was rightly described by Mummery LJ in the *Drury* case, at para 35, as "pragmatic", depending as it did upon the comparative efficacy of possession orders and injunctions. A possession order gives the claimant the right to call upon the bailiffs or the sheriff physically to remove the trespassers from his land, which is what he H wants. An injunction can only be enforced by imposing penalties upon those who disobey. Mummery LJ considered it a "legitimate, incremental development" of the ruling of the Court of Appeal in *University of Essex v Djemal* [1980] 1 WLR 1301 that a possession order can cover a greater area of the claimant's land than that actually occupied by the trespassers.

23 The situation in the *Djemal* case was very like the situation in this and no doubt many other cases. The University of Essex consists (mainly) of some less than beautiful buildings erected in the 1960s upon a beautiful campus at Wivenhoe Park near Colchester. The students had occupied a small part of the university buildings. The university wanted an order covering the whole of the university premises. The judge had given them an order covering only the part actually occupied by the students. The Court of Appeal made the wider order sought by the university, holding that there was jurisdiction to cover "the whole of the owner's property in respect of which *his right of occupation has been interfered with*": per Buckley LJ, at p 1304 (emphasis added). Shaw LJ reasoned that the right of the university to possession of the site and buildings was "indivisible. If it is violated by adverse occupation of any part of the premises, that violation affects the *right of possession* of the whole of the premises": p 1305 (emphasis added). These were extempore judgments in a case where the students had already decided to call off their direct action, but it will be noted that Buckley LJ spoke of interference with a right of occupation, while Shaw LJ spoke of violation of a right of possession.

24 The defendants in this case are occupying only part of Hethfelton Wood. We can, I think, assume that the Forestry Commission are occupying the rest. They are carrying on their forestry work as best they can—indeed, one of their problems is that they are impeded from doing it because of the risk of harm to the vehicles and their occupants. Yet Mr Drabble, for the defendant appellants, has never resisted an order covering the whole of Hethfelton Wood, nor does he invite us to disagree with *Djemal*. Being a sensible man, he recognises that we would be disinclined to hold that if trespassers set up camp in a large garden the householder can obtain an order enabling them to be physically removed only from that part of the garden which they have occupied, even if it is clear that they will then simply move their tents to another part of the garden.

25 The questions raised by this case and the *Djemal* case should be seen as questions of principle rather than pragmatism or procedure. Still less should they be answered by reference to the forms of action which were supposedly abolished in 1876. The underlying principle is ubi ius, ibi remedium: where there is a right, there should be a remedy to fit the right. The fact that "this has never been done before" is no deterrent to the principled development of the remedy to fit the right, provided that there is proper procedural protection for those against whom the remedy may be granted. So the questions are: what is the right to be protected? And what is the appropriate remedy to fit it?

26 If we were approaching this case afresh, without the benefit and burden of history, we might think that the right to be protected is the right to the physical occupation of tangible land. A remedy should be available against anyone who does not have that right and is interfering with it by occupying the land. That remedy should provide for the physical removal of the interlopers if need be. The scope of the remedy actually granted in any individual case should depend upon the scope of the right, the extent of the actual and threatened interference with it, and the adequacy of the procedural safeguards available to those at risk of physical removal.

27 In considering the nature and scope of any judicial remedy, the parallel existence of a right of self-help against trespassers must not be

A forgotten, because the rights protected by self-help should mirror the rights that can be protected by judicial order, even if the scope of self-help has been curtailed by statute. No civil wrong is done by turning out a trespasser using no more force than is reasonably necessary: see *Hemmings v Stoke Poges Golf Club* [1920] 1 KB 720. In *Cole on Ejectment* (1857), a comprehensive textbook written after the Common Law Procedure Act 1852 (15 & 16 Vict B c 76), there is considerable discussion (in chapter VII) of the comparative merits of self-help and ejectment. Any person with a right to enter and take possession of the land might choose simply to do that rather than to sue in ejectment. But this was not advised where the right of entry was not clear and beyond doubt, or where resistance was to be expected. The effect of the criminal statutes against forcible entry was "by no means clear": whether no force at all, or only reasonable force, might be used against the trespasser. C Cole was not as sanguine as was Lord Denning MR in *McPhail v Persons, Names Unknown* [1973] Ch 447, 456. Lord Denning took the view that the statutes against forcible entry did not apply to the use of reasonable force against trespassers. Those statutes have now been replaced by section 6 of the Criminal Law Act 1977. This prohibits the use or threat of violence against person or property for the purpose of securing entry to any premises D without lawful excuse. But it also provides that a right to possession or occupation of the premises is no excuse, although there is now an exception for a "displaced residential occupier" or "protected intending occupier": section 6(1A), as inserted by Criminal Justice and Public Order Act 1994, section 72(2). This does not include the Forestry Commission, although it is not impossible that they would be able to evict the travellers without E offending against the criminal law. But in any event, the use of self-help, even if it can be lawfully achieved, is not encouraged because of the risk of disorder that it may entail.

28 Lord Denning MR in the *McPhail* case, at pp 456–457, considered that the statutes of forcible entry did not apply because the trespassing squatters were not in possession of the land at all. He quoted *Pollock on Torts*, 15th ed (1951), p 292:

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> "A trespasser may in any case be turned off land before he has gained possession, and he does not gain possession until there has been something like acquiescence in the physical fact of his occupation on the part of the rightful owner."

A trespasser who merely interferes with the right to possession or occupation G of the property may also be ejected with the use of reasonable force: one does not need to go to court, or even call the police, to eject a burglar or a poacher from one's property.

29 Although Cole contemplated that self-help might be used against a tenant who had wrongfully continued in occupation after the end of his tenancy, tenants are clearly now in a different position from squatters. Lord Denning MR thought that the statutes of forcible entry did apply to protect H them (although Cole says that the authorities on which he relied had later been overruled). Most, but not all, residential tenants are now protected by statute against eviction otherwise than by court order. This is a complicated area which need not concern us now as we are dealing with people who have never been granted any right to be where they are.

30 However, Lord Denning's basic point, at p 457 B-C, is important here: "In a civilised society, the courts should themselves provide a remedy which is speedy and effective: and thus make self-help unnecessary." It seems clear that the right of self-help has never been limited to those who have actually been dispossessed of their land: in fact on one view it is limited to those who have not been so dispossessed. There is no reason in principle why the remedy of physical removal from the land should only be available to those who have been completely dispossessed. It should not depend upon the niceties of whether the person wrongfully present on the land was or was not in "possession" in whatever legal sense the word is being used. Were the students in *University of Essex v Djemal* [1980] 1 WLR 1301 in possession of the university's premises at all? Lord Denning, supported by Sir Frederick Pollock, would not think so: see the *McPhail* case, at p 456F. Were these new travellers in possession of Hethfelton Wood at all? Again, Lord Denning would not think so. They had parked their vehicles there, but the work of the Forestry Commission was going on around them as best it could.

31 If we accept that the remedy should be available to a person whose possession or occupation has been interfered with by the trespassers, as well as to a person who has been totally dispossessed, a case like the *Djemal* case becomes completely understandable, as does the order for possession of the whole of Hethfelton Wood in this case. Nor need we be troubled by the form of the order, that the claimant "recover" the land. His occupation of the whole has been interfered with and he may recover his full control of the whole from those who are interfering with it.

32 As is obvious from the above, a great deal of confusion is caused by the different meanings of the word "possession" and its overlap with occupation. As Mark Wonnacott points out in his interesting monograph, *Possession of Land*, Cambridge University Press, (2006) p 1, the term "possession" is used in three quite distinct senses in English land law: "first, in its proper, technical sense, as a description of the relationship between a person and an estate in land; secondly, in its vulgar sense of physical occupation of tangible land" (the third sense need not concern us here). Possession, in its first sense, he divides into a relationship of right, the right to the legal estate in question, and a relationship of fact, the actual enjoyment of the legal estate in question; a person might have the one without the other. Possession of a legal estate in fact may often overlap with actual occupation of tangible land, but they are conceptually distinct: a person may be in possession of the head lease if he collects rents from the subtenants, but he will not be in physical occupation of tangible land.

33 The modern action for the possession of land is the successor to the common law action of ejectment (and some statutory remedies developed for use in the county and magistrates' courts in the 19th century). The ejectment in question was not the ejectment sought by the action but the wrongful ejectment of the right holder. Its origins lay in the writ of trespass, an action for compensatory damages rather than recovery of the estate. But the common law action to recover the estate was only available to freeholders and not to term-holders (tenants). So the judges decided that this form of trespass could be used by tenants to recover their terms. Trespass was a more efficient form of action than the medieval real actions, such as novel disseisin, so this put tenants in a better position than freeholders. As is well known, the device of involving real people as notional lessees and ejectors

A was used to enable freeholders to sue the real ejectors. These were then replaced by the fictional characters John Doe and Richard Roe. Eventually the medieval remedies were (mostly) abolished by the Real Property Limitation Act 1833; the fictional characters of John Doe and Richard Roe by the Common Law Procedure Act 1852; and the forms of action themselves by the Judicature Acts 1873–1875: see AWB Simpson, *A History of the Land Law*, Oxford, Clarendon Press, 2nd ed (1986), ch VII).

B **34** The question for us is whether the remedy of a possession action should be limited to deciding disputes about "possession" in the technical sense described by Wonnacott. The discussion in *Cole on Ejectment* concentrates on disputes between two persons, both claiming the right to possession of the land, one in occupation and the other not. Often these are between landlords and tenants who have remained in possession when the C landlord thinks that their time is up. But it is clear that in reality what was being protected by the action was the right to physical occupation of the land, not the right to possession of a legal estate in land. The head lessee who was merely collecting the rents would not be able to bring an action which would result in his gaining physical occupation of the land unless he was entitled to it.

D **35** It seems clear that the modern possession action is there to protect the right to physical occupation of the land against those who are wrongfully interfering with it. The right protected, to the physical occupation of the land, and the remedy available, the removal of those who are wrongfully there, should match one another. The action for possession of land has evolved out of ejectment which itself evolved out of the action for trespass. There is nothing in CPR Pt 55 which is inconsistent with this view, far from E it. The distinction is drawn between a "possession claim" which is a claim for the recovery of *possession of land* (rule 55.1(a)) and a "possession claim against trespassers" which is a claim for the *recovery of land* which the claimant alleges is "occupied only by a person or persons who entered or remained on the land without the consent of a person entitled to possession of that land . . ." (rule 55.1 (b)). The object is to distinguish between the F procedures to be used where a tenant remains in occupation after the end of his tenancy and the procedures to be used where there are squatters or others who have never been given permission to enter or remain on the land. That, to my mind, is the reason for inserting "only": not to exclude the possibility that the person taking action to enforce his right to occupy is also in occupation of it. There is then provision for taking action against "persons unknown". But the remedy in each case is the same: an order for physical G removal from the land.

36 It was held in *R v Wandsworth County Court, Ex p Wandsworth London Borough Council* [1975] 1 WLR 1314 that a bailiff executing a possession warrant is entitled to evict anyone found on the premises whether they were party to the judgment or not. However, there is nothing to prevent the order distinguishing between those who are and those who are H not lawfully there, provided that some means is specified of identifying them. No one would suggest that an order for possession of Hethfelton Wood would allow the removal of Forestry Commission workers or picnickers who happened to be there when the bailiffs went in. In principle, court orders should be tailored to fit the facts and the rights they are enforcing rather than the other way around.

37 This does not, however, solve the principal question before us. What is the extent of the premises to which the order may relate? As Mummery LJ suggested in the *Drury* case [2004] 1 WLR 1906, para 31, the origin was in an action to recover a term of years. The land covered by the term would be defined in the grant. It would not extend to all the land anywhere in the lawful possession of the claimant. Equally, however, as discussed earlier, the remedy can be granted in respect of land to which the claimant is entitled even though the trespasser is not technically in possession of it. This suggests that the scope may be wider than the actual physical space occupied by the trespasser, who may well move about from time to time. In any event, the usual rule is that possession of part is possession of the whole, thus begging the question of how far the "whole" may extend. It was suggested during argument that it might extend to all the land in the same title at the Land Registry. This could be seen as the modern equivalent of the "estate" from which the claimant had been unlawfully ousted. But this is artificial when a single parcel of land may well be a combination of several different registered titles.

38 The main objection to extending the order to land some distance away from the parcel which has actually been intruded upon is one of natural justice. Before any coercive order is made, the person against whom it is made must have an opportunity of contesting it, unless there is an emergency. In the case of named defendants, such as the appellants here, this need not be an obstacle. They have the opportunity of coming to court to contest the order both in principle and in scope. The difficulty lies with "persons unknown". They are brought into the action by the process of serving notice not on individuals but on the land. If it were to be possible to enforce the physical removal of "persons unknown" from land on which they had not yet trespassed when the order was made, notice would also have to be given on that land too. That might be thought an evolution too far. Whatever else a possession order may be or have been, it has always been a remedy for a present wrongful interference with the right to occupy. There is an intrusion and the person intruded upon has the right to throw the intruder out.

39 Thus, while I would translate the modern remedy into modern terms designed to match the remedy to the rights protected, and would certainly not put too much weight on the word "recover", I would hesitate to apply it to quite separate land which has not yet been intruded upon. The more natural remedy would be an injunction against that intrusion, and I would not be unduly hesitant in granting that. We should assume that people will obey the law, and in particular the targeted orders of the court, rather than that they will not. We should not be too ready to speculate about the enforcement measures which might or might not be appropriate if it is broken. But the main purpose of an injunction would be to support a very speedy possession order, with severely abridged time limits, if it is broken.

40 However, I would not see these procedural obstacles as necessarily precluding the "incremental development" which was sanctioned in *Drury*. Provided that an order can be specifically tailored against known individuals who have already intruded upon the claimant's land, are threatening to do so again, and have been given a proper opportunity to contest the order, I see no reason in principle why it should not be so developed. It would be helpful if the Rules provided for it, so that the procedures could be properly thought

A through and the forms of order properly tailored to the facts of the case. The main problem at the moment is the "scatter-gun" form of the usual order (though it is not one prescribed by the Rules).

41 It is for that reason, and that reason alone, that I would allow this appeal to the extent of setting aside the wider possession order made in the Court of Appeal.

B **LORD NEUBERGER OF ABBOTSBURY MR**

42 There is an acute shortage of sites in this country to satisfy the needs of travellers, people who prefer a nomadic way of life. Thus, in the county in which the travellers in this case pitched their camp, Dorset, it has been estimated that over 400 additional pitches are required. The inevitable consequence is that travellers establish their camps on land which they are C not entitled to occupy, normally as trespassers, and almost always in breach of planning control. Proceedings seeking to prevent their occupation have led to human rights issues being raised before domestic courts (for instance, in the House of Lords, *Doherty v Birmingham City Council (Secretary of State for Communities and Local Government intervening)* [2009] 1 AC 367), and before the European Court of Human Rights (for instance, *Connors v United Kingdom* (2005) 40 EHRR 189). The present appeal, D however, raises issues of purely domestic law, namely the permissible physical ambit of any possession order made against trespassing travellers, and the appropriateness of granting an injunction against them.

The facts and procedural history

43 Travellers often set up their camps in wooded areas. Many woods E and forests in this country are managed by the Forestry Commission and owned by the Secretary of State for the Environment, Food and Rural Affairs. The functions of the Commission are "promoting the interests of forestry, the development of afforestation and the production and supply of timber and other forest products . . .": section 1(2) of the Forestry Act 1967. The Commission runs its woods and forests commercially, although it affords members of the public relatively free and unrestricted access to F such areas.

44 All undeveloped land in the United Kingdom is susceptible to unauthorised occupation by travellers, and much of such land is vested in public bodies. But land managed by the Commission is particularly vulnerable to incursion by travellers. As the recorder who heard this case at first instance said, "[given] the public access that it affords to its land and its G needs for access for forestry vehicles, it is not protected and barricaded in the same way as much of the other land in private and local authority ownership in Dorset is now protected".

45 In 2004, the Office of the Deputy Prime Minister issued *Guidance on Managing Unauthorised Camping*. This suggests that local authorities and other public bodies distinguish between unauthorised encampment locations which are "unacceptable" (for instance, because they involve H traffic hazard or public health risks) and those which are "acceptable" (para 5.4). It further recommends that the "management of unauthorised camping must be integrated" (para 4.8), and states that "each encampment location must be considered on its merits" (para 5.4). The 2004 Guidance also indicates that specified welfare inquiries should be undertaken in

relation to the travellers and their families in any unauthorised encampment before any decision is made as to whether to bring proceedings to evict them. The Secretary of State has accepted throughout these proceedings that the Commission should comply with the terms of the 2004 Guidance before possession proceedings are brought against any travellers on land it manages, and that failure to do so may invalidate such proceedings.

46 One of the woods managed by the Commission is Hethfelton Wood, near Wool, where, at the end of January 2007, a number of new travellers established an unauthorised camp. After the Commission had carried out the inquiries recommended by the 2004 Guidance, the Secretary of State issued the current proceedings, a possession claim against trespassers within CPR r 55.1(b), and an application for an injunction, in the Poole County Court, on 13 February 2007. The original defendants were Natalie Meier, Robert and Georgie Laidlaw, Sharon Horie and "Persons Names Unknown". Ms Meier travels and lives in a vehicle with her two children, having done so since 2002. Mr Laidlaw sadly died before the hearing, and, unsurprisingly in the circumstances, Mrs Laidlaw appears to have played no part in the proceedings. Ms Horie has pursued a nomadic way of life since about 1982, and lives in vehicles together with her three children. Lesley Rand (who has been a traveller since about 1996, and lives together with her severely disabled nine-year-old daughter in a specially adapted vehicle) and Kirsty Salter (who was pregnant at the time, and has been a traveller for ten years) were subsequently added as defendants.

47 Two of the defendants had previously been encamped on another area of woodland, some five miles from Hethfelton, called Moreton Plantation, which was also managed by the Commission. Following the issue of possession proceedings in relation to Moreton, a compromise was agreed on 9 January 2007, which provided that the Secretary of State should recover possession on 29 January 2007. It was on that day that a number of the defendants moved from Moreton to Hethfelton. Some of the other defendants had previously occupied another wood managed by the Commission, Morden Heath, which had also been subject to proceedings brought by the Secretary of State, which had resulted in a possession order which was due to be executed on 5 February 2007. In anticipation of the execution of that order, those other defendants moved from Morden to Hethfelton.

48 In the claim form in the instant proceedings, the Secretary of State sought possession not only of Hethfelton, but also of "all that land described on the attached schedule all in the county of Dorset". That schedule set out more than 50 separate woods, which were owned by the Secretary of State and managed by the Commission, and which were marked on an attached plan. The number of woods of which possession was sought in addition to Hethfelton was subsequently reduced to 13, and the plan showed that those 13 woods ("the other woods") were spread over an area of Dorset around 25 miles east to west and ten miles north to south. In the injunction application, the Secretary of State sought an order against the same defendants (including "Persons Names Unknown") restraining them "from re-entering [Hethfelton] or from entering [the other woods]". Copies of the claim form seeking possession were served on the named defendants and at Hethfelton in accordance with the provisions of CPR r 55.6, together with copies of the injunction application.

A 49 The evidence established that all the occupiers of the camp at Hethfelton were new travellers, living and travelling in motor vehicles, mostly with children and often with animals. The evidence also indicated that the camp was relatively tidy, and did not involve any antisocial conduct on the part of any of the occupants. However, the presence of children and animals caused the Commission to avoid the use of heavy plant or the carrying out of substantial work, which might otherwise have occurred, in B the surrounding area. The Commission's evidence showed that other areas in Dorset managed by the Commission, in addition to Hethfelton, including Moreton and Morden, had been occupied by travellers as unauthorised camps, sometimes by one or more of the named defendants.

50 The claim came before Mr Recorder Norman, who gave a full and careful judgment on 3 August 2007. He had to resolve three issues. The first C was whether to grant an order for possession against the defendants in respect of Hethfelton. The second issue was whether to grant an order for possession in respect of any or all of the other woods. The third issue was whether to grant an injunction restraining the defendants from entering on to all or any of the other woods.

51 The recorder decided to grant an order for possession against the D defendants in respect of Hethfelton. However, he refused to make any wider order for possession, or to grant the injunction sought by the Secretary of State. Although he accepted that he had jurisdiction to make such orders, he considered it inappropriate to do so primarily because the Commission had failed to consider the matters suggested by the 2004 Guidance before the current proceedings were begun, and because the Commission was not prepared to assure the recorder that consideration would be given to that E guidance before any wider order for possession or any injunction was enforced. Paragraph 1 of the order drawn up to reflect this decision provided that "[the] claimant do forthwith recover the land known as Hethfelton Wood".

52 The defendants did not appeal against this order for possession. However, the Secretary of State appealed against the recorder's refusal to F grant an order for possession in relation to the other woods (which I will refer to as a "wider order for possession") and the injunction, and the Court of Appeal [2009] 1 WLR 828 allowed the appeal. The order made by the Court of Appeal ordered that the Secretary of State "do recover" the other woods, and that each of the defendants "be restrained from entering upon, trespassing upon, living on, or occupying" any of the other woods.

G 53 In her judgment, Arden LJ followed and applied the reasoning of the Court of Appeal in the earlier decision of *Secretary of State for the Environment, Food and Rural Affairs v Drury* [2004] 1 WLR 1906, under which it had been held that an order for possession, at least when made pursuant to a possession claim against trespassers, could, in appropriate cases, extend to land not forming part of, or contiguous with, or even near, the land actually occupied by the trespassers. She concluded that the H evidence demonstrated that at least some of the defendants had set up unauthorised encampments on woods managed by the Commission in Dorset, and that there was a substantial risk that at least some of the defendants would move on to other such woods once an order for possession was made in relation to Hethfelton.

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54 Arden LJ also said, in disagreement with the recorder, that any failure on the part of the Commission to consider the matters recommended by the 2004 Guidance before issuing the proceedings for possession of the other woods did not justify refusing to make such a wider order. This was essentially on the basis that, if there was any such failure, it could be considered at the time the wider order for possession was sought to be enforced. Pill LJ and Wilson LJ agreed. Arden LJ also considered that, for the same reasons, the recorder had been wrong to refuse the injunction sought by the Secretary of State, and again Pill LJ agreed. However, Wilson LJ dissented on this point, on the ground that the recorder had been entitled to refuse an injunction on the additional ground which he had mentioned, namely that, if he had made a wider order for possession, it would have been disproportionate to grant an injunction as well.

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55 The instant appeal is brought by Ms Horie and Ms Rand, and it raises two principal issues. The first is the extent to which an order for possession can be made in favour of a claimant in respect of land not actually occupied by a defendant. The second issue concerns the circumstances in which an injunction restraining future trespass can and should be granted; this raises two points: (a) whether an injunction against travellers is generally appropriate, and (b) the point on which the Court of Appeal differed from the recorder, namely the effect of the 2004 Guidance. I shall consider these two issues in turn and then briefly review the implications of my conclusions.

C

D

An order for possession of land not occupied by the defendants

56 In the *Drury* case [2004] 1 WLR 1906, the facts were similar to those here, except the Court of Appeal held that there was no evidence establishing that the travellers in that case had occupied, or threatened to occupy, other property managed by the Commission. Accordingly, the order for possession was in the normal form, limited, like the order made by the recorder in this case, to the wood occupied by the travellers. However, the Court of Appeal decided that an order for possession could be granted, not merely in respect of land which the defendant occupied, but also in respect of other land which was owned by the claimant, and which the defendant threatened to occupy.

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57 The essence of the Court of Appeal's reasoning was that (a) the law recognises that an anticipated trespass can give rise to a right of action; (b) an injunction would be of limited, if any, real use; (c) in those circumstances, the law should provide another remedy; (d) a wider order for possession would be of much more practical value than an injunction; (e) such an order for possession was justified by previous authority and in the light of the court's jurisdiction to grant quia timet injunctions; and (f) accordingly, such an order could be made; but (g) it should only be made in relatively exceptional circumstances: see at paras 20–24, 34–36 and 42–46, per Wilson J, Mummery LJ and Ward LJ respectively.

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58 Particularly with the advent of the Civil Procedure Rules, it is clear that judges should strive to ensure that court procedures are efficacious, and that, where there is a threatened or actual wrong, there should be an effective remedy to prevent it or to remedy it. Further, as Lady Hale points out, so long as landowners are entitled to evict trespassers physically, judges should ensure that the more attractive and civilised option of court proceedings is as

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quick and efficacious as legally possible. Accordingly, the Court of Appeal was plainly right to seek to identify an effective remedy for the problem faced by the Commission as a result of unauthorised encampments, namely that, when a possession order is made in respect of one wood, the travellers simply move on to another wood, requiring the Commission to incur the cost, effort and delay of bringing a series or potentially endless series of possession proceedings against the same people.

59 None the less, however desirable it is to fashion or develop a remedy to meet a particular problem, courts have to act within the law, and their ability to control procedure and achieve justice is not unlimited. Judges are not legislators, and there comes a point where, in order to deal with a particular problem, court rules and practice cannot be developed by the courts, but have to be changed by primary or secondary legislation—or, in so far as they can be invoked for that purpose, by practice directions. In my view, it is simply not possible to make the sort of enlarged or wider order for possession which the Court of Appeal made in this case, following (as it was, I think, bound to do) the reasoning in the *Drury* case.

60 The power of the county court for present purposes derives from section 21(1) of the County Courts Act 1984, which gives it "jurisdiction to hear and determine any action for the recovery of land". The concept of "recovery" of land was the essence of a possession order both before and after the procedure was recast by sections 168 et seq of the Common Law Procedure Act 1852, although, until the Supreme Court of Judicature Act 1875, the action lay in ejectment rather than in recovery of land: see per Lord Denning MR in *McPhail v Persons, Names Unknown* [1973] Ch 447, 457–458. None the less, the change of name did not involve a change of substance, and the essence of an order for possession, whether framed in ejectment or recovery, is that the claimant is getting back the property from the defendant, whether by recovering the property from the defendant or because the claimant had been wrongly ejected by the defendant. As stated by Wonnacott, in *Possession of Land*, p 22, "an action for recovery of land (ejectment) is an action to be put into possession of an estate in land. The complaint is that the claimant is not currently 'in' possession of it, and . . . wants . . . to be put 'in' possession of it". See also *Simpson*, *A History of the Land Law*, 2nd ed (1986), pp 144–145 and *Gledhill v Hunter* (1880) 14 Ch D 492, 496, per Sir George Jessel MR.

61 As Sir George Jessel MR explained, an action for ejectment and its successor, recovery of land, was normally issued "to recover possession from a tenant" or former tenant. An action against a trespasser, who did not actually dispossess the person entitled to possession, was based on trespass quare clausum fregit, physical intrusion on to the land. Nonetheless, where a trespasser exclusively occupies land, so as to oust the person entitled to possession, the cause of action must be for recovery of possession. (Hence, if such an action is not brought within 12 years the ousting trespasser will often have acquired title by "adverse possession".) Accordingly, in cases where a trespasser is actually in possession of land, an action for recovery of land, ie, for possession, is appropriate, as Lord Denning MR implicitly accepted in *McPhail v Persons, Names Unknown* [1973] Ch 447, 457–458.

62 This analysis is substantially reflected in the provisions of the Civil Procedure Rules and in the currently prescribed form of order for

possession. CPR Pt 55 is concerned with possession claims, and CPR r 55.1 provides:

> "(a) 'a possession claim' means a claim for the recovery of possession of land (including buildings or parts of buildings); (b) 'a possession claim against trespassers' means a claim for the recovery of land which the claimant alleges is occupied only by a person or persons who entered or remained on the land without the consent of a person entitled to possession of that land but does not include a claim against a tenant or sub-tenant whether his tenancy has been terminated or not . . ."

The special features of a possession claim against trespassers are that the defendants to the claim may include "persons unknown", such proceedings should be served on the land as well as on the named defendants, and the minimum period between service and hearing is two days (or five days for residential property) rather than the 28 days for other possession claims: see CPR rr 55.3(4), 55.6, and 55.5(2) and (3).

63 The drafting of CPR r 55.1 is rather peculiar in that, unlike that in rule 55.1(a), the definition in rule 55.1(b) does not include the word "possession". Given that, since 1875, the cause of action has been for recovery of land, the oddity, as Lord Rodger has pointed out, is the inclusion of the word "possession" in the former paragraph, rather than its exclusion in the latter. However, in so far as the point has any significance, the definition of "a possession claim", like the definition of "land", in rule 55.1(a) may well be carried into sub-rule (b). In any event, the important point, to my mind, is that a possession claim against trespassers involves the person "entitled to possession" seeking "recovery" of the land. Form N26 is the prescribed form of order in both a simple possession claim and a possession claim against trespassers: see *Civil Procedure 2009*, vol 1, p 114, para 4PD-003, table 1. That form orders the defendant to "give the claimant possession" of the land in question. Although the orders at first instance (as drafted by counsel), and in the Court of Appeal, direct that the claimant do "recover" the land in question from the defendants, that is the mirror image of ordering that the defendants "give" the claimant possession.

64 The notion that an order for possession may be sought by a claimant and made against defendants in respect of land which is wholly detached and separated, possibly by many miles, from that occupied by the defendants, accordingly seems to me to be difficult, indeed impossible, to justify. The defendants do not occupy or possess such land in any conceivable way, and the claimant enjoys uninterrupted possession of it. Equally, the defendants have not ejected the claimant from such land. For the same reasons, it does not make sense to talk about the claimant recovering possession of such land, or to order the defendant to deliver up possession of such land.

65 This does not mean that, where trespassers are encamped in part of a wood, an order for possession cannot be made against them in respect of the whole of the wood (at least if there are no other occupants of the wood), just as much as an order for possession may extend to a whole house where the defendant is only trespassing in one room (at least if the rest of the house is empty).

66 However, the fact that an order for possession may be made in respect of the whole of a piece of property, when the defendant is only in occupation of part and the remainder is empty, does not appear to me to

A assist the argument in favour of a wider possession order as made by the Court of Appeal in this case. Self-help is a remedy still available, in principle, to a landowner against trespassers (other than former residential tenants). Where only part of his property is occupied by trespassers, a landowner, exercising that remedy through privately instructed bailiffs, would, no doubt, be entitled to evict the trespassers from the whole of his property. Similarly, it seems to me, bailiffs (or sheriffs), who are required by a warrant B (or writ) of possession to evict defendants from part of a property owned by the claimant, would be entitled to remove the defendants from the whole of that property. But that does not mean that the bailiffs, whether privately instructed or acting pursuant to a warrant, could restrain the trespassers from moving on to another property, perhaps miles away, owned by the claimant.

C **67** Further, the concept of occupying part of property (the remainder of which is vacant) effectively in the name of the whole is well established: see, for example, albeit in a landlord and tenant context, *Henderson v Squire* (1869) LR 4 QB 170, 172. However, that concept cannot be extended to apply to land wholly distinct, even miles away, from the occupied land. So, too, the fact that one can treat land as a single entity if it is divided by a road or river (in different ownership from the land) seems to me to be an D irrelevance: as a matter of law and fact, the two divisions can sensibly be regarded as a single piece of land. Accordingly, I have no difficulty with the fact that the possession order made at first instance in this case extended to the whole of Hethfelton, even though the defendants occupied only a part of it.

68 The position is more problematical where a defendant trespasses on E part of land, the rest of which is physically occupied by a third party, or even by the landowner. Particular difficulties in this connection are, to my mind, raised in relation to a wide order for possession in a claim within CPR r 55.1(b). Such "a claim" may be brought "for the recovery of land which the claimant alleges is occupied only by a person or persons who entered or remained on the land without . . . consent . . ." Given that such a claim is limited to "land . . . occupied only by" trespassers, it is not F immediately easy to see how it could be brought, even in part, in relation to land occupied by persons who are not trespassers. And it is fundamental that the court cannot accord a claimant more relief than he seeks (although it is, of course, possible, in appropriate circumstances, for a claimant to amend to increase the extent of his claim, but that is not relevant here).

69 The Court of Appeal in *University of Essex v Djemal* [1980] G 1 WLR 1301 nonetheless decided that a university could be granted a possession order under RSC Ord 113, r 1, which was (in relation to the issue in this case) in similar terms to CPR r 55(1)(b), in respect of its whole campus, against trespassers who were squatting in a relatively small part, even though the remainder of the campus was lawfully occupied by academics, other employees, and indeed students. This was a thoroughly practical decision arrived at to deal with a fairly widespread problem at the H time, namely student sit-ins. There was an obvious fear that, if an order for possession was limited to the rooms occupied by the student trepassers, they would simply move to another part of the campus.

70 As already mentioned, given that there is the alternative remedy of self-help, the court should ensure that its procedures are as effective as

lawfully possible. Nonetheless, there is obviously great force in the argument that the fact that areas of the campus in that case was lawfully and exclusively occupied by academic staff, employees and students should have precluded a claim and an order for possession in respect of those areas, both in principle and in the light of the wording of RSC Ord 113, r 1.

71 However, this is not the occasion formally to consider the correctness of the decision in the *Djemal* case [1980] 1 WLR 1301, which was not put in issue by either of the parties, as the Secretary of State (like the Court of Appeal in the *Drury* case [2004] 1 WLR 1906) relied on it, and the defendants were content to distinguish it. Accordingly, the implications of overruling or explaining the decision, which may be far-reaching in terms of principle and practice, have not been debated or canvassed.

72 The Court of Appeal's conclusion in the *Drury* case, that the court could make a wider order for possession such as that in the instant case, rested very much on the reasoning in the *Djemal* case [1980] 1 WLR 1306, and in the subsequent first instance decision of *Ministry of Agriculture, Fisheries and Food v Heyman* (1989) 59 P & CR 48, which represented an "incremental development of the ruling in [the *Djemal* case]", as Mummery LJ [2004] 1 WLR 1906, para 35 put it. However, it seems to me that the decision in the *Drury* case was an illegitimate extension of the reasoning and decision in the *Djemal* case. The fact that an order for possession can be made in respect of a single piece of land, only part of which is occupied by trespassers, does not justify the conclusion that an order for possession can be made in respect of two entirely separate pieces of land, only one of which is occupied by trespassers, just because both pieces of land happen to be in common ownership. As already mentioned, bailiffs, whether acting on instructions from a landowner exercising the right of self-help to evict a trespasser or acting pursuant to a warrant of possession, can remove the trespasser on part of a piece of property from the whole of that property, but they cannot prevent him from entering a different property, possibly many miles away. Similarly, while it is acceptable, at least in some circumstances, to treat occupation of part of property as amounting to occupation of the whole of that property, one cannot treat occupation of one property as amounting to occupation of another, entirely separate, property, possibly miles away, simply because the two properties are in the same ownership.

73 Having said all that, I accept that the notion of a wider, effectively precautionary, order for possession as made in the *Drury* case has obvious attraction in practice. As the Court of Appeal explained in that case, the alternative to a wider possession order, namely an injunction restraining the defendant from camping in other woods in the area, would be of limited efficacy. An order for possession is normally enforced in the county court by applying for a warrant of possession under CPR Sch 2, CCR Ord 26, which involves the occupiers being removed from the land by the bailiffs. (The equivalent in the High Court is a writ of possession executed by the sheriff under RSC Ord 45, r 3). This is a procedurally direct and simple method of enforcement. An injunction, however, "may be enforced", and that was treated by the court in the *Drury* case [2004] 1 WLR 1906 as meaning "may only be enforced", by sequestration or committal: see RSC Ord 45, r 5(1) and, in relation to the county court, CPR Sch 2, CCR Ord 29 and section 38 of the County Courts Act 1984. Given that the claimant's aim is

A to evict the travellers, those are unsatisfactory remedies compared with applying for a warrant of possession. They are not only indirect, but they are normally procedurally unwieldy and time-consuming, and, in any event, they are of questionable value in cases against travellers, as explained in the next section of this opinion.

74 There is also some apparent force as a matter of principle in the notion that the courts should be able to grant a precautionary wider order B for possession. If judges have developed the concept of an injunction which restrains a defendant from doing something he has not yet done, but is threatening to do, why, it might be asked, should they now not develop an order for possession which requires a defendant to deliver up possession of land that he has not yet occupied, but is threatening to occupy? The short answer is that a wider or precautionary order for possession, whether C in the form granted in this case or in the prescribed Form N26, requires a defendant to do something he cannot do, namely to deliver up possession of land he does not occupy, and purports to return to the claimant something he has not lost, namely possession of land of which already he has possession.

75 What the claimant is really seeking in the present case is an order that, if the defendant goes on to the other woods, the claimant should D be entitled to possession. That is really in the nature of declaratory or injunctive relief: it is not an order for possession. A declaration identifies the parties' rights and obligations. A quia timet injunction involves the court forbidding the defendant from doing something which he may do and which he would not entitled to do. Both those types of relief are different from what the Court of Appeal intended to grant here, namely a contingent order E requiring the defendant to do something (to deliver up possession) if he does something else (trespassing) which he may do and which he would not be entitled to do. I describe the Court of Appeal as intending to grant such an order, because, as just explained, the actual order is in the form of an immediate order for possession of the other woods, which, as I have mentioned, is also hard to justify, given that the defendants were not in occupation of any part of them.

F 76 Further, while it would be beneficial to be able to make a wider possession order because of the relative ease with which it could be enforced in the event of the defendants trespassing on other woods, such an order would not be without its disadvantages and limitations. An order for possession only binds those persons who are parties to the proceedings (and their privies), although the bailiffs (and sheriffs) are obliged to execute G a warrant (or writ) of possession against all those in occupation: see *In re Wykeham Terrace, Brighton, Sussex, Ex p Territorial Auxiliary and Volunteer Reserve Association for the South East* [1971] Ch 204, 209–210; *R v Wandsworth County Court, Ex p Wandsworth London Borough Council* [1975] 1 WLR 1314, 1317–1319; *Thompson v Elmbridge Borough Council* [1987] 1 WLR 1425, 1431–1432; and the full discussion in *Wonnacott, Possession of Land*, pp 146–152. It would therefore be wrong H in principle for the court to make a wider order for possession against trespassers (whether named or not) in one wood with a view to its being executed against other trespassers in other woods. None the less, because the warrant must be executed against anyone on the land, there is either a risk of one or more of the occupiers of another wood being evicted without

having the benefit of due process, or room for delay while such an occupier applies to the court and is heard before a warrant is executed against him.

77 Quite apart from this, a warrant of possession to execute an order for possession made in the county court in a claim for possession against trespassers can only be issued without leave within three months of the order: CPR Sch 2, CCR Ord 24, r 6(2). So, after the expiry of three months, a wider possession order does not obviate the need for the claimant applying to the court before he can obtain possession of any land the subject of the order. Further, as pointed out by Wilson J in the *Drury* case [2004] 1 WLR 1906, para 22, it seems rather arbitrary that only a person who owns land which is being unlawfully occupied can obtain a wider order for possession protecting all his land in a particular area.

78 In conclusion on this issue, while there is considerable practical attraction in the notion that the court should be able to make the wide type of possession order which the Court of Appeal made in this case, following the *Drury* case, I do not consider that the court has such power. It is inconsistent with the nature of a possession order, and with the relevant provisions governing the powers of the court. The reasoning in the case on which it is primarily based, *University of Essex v Djemal* [1980] 1 WLR 1301, cannot sensibly be extended to justify the making of a wider possession order, and there are aspects of such an order which would be unsatisfactory. I should add that I have read what Lord Rodger has to say on this, the main, issue, and I agree with him.

Should an injunction be refused as it will probably not be enforced?

79 That brings me to the question whether an injunction restraining travellers from trespassing on other land should be granted in circumstances such as the present. Obviously, the decision whether or not to grant an order restraining a person from trespassing will turn very much on the precise facts of the case. None the less, where a trespass to the claimant's property is threatened, and particularly where a trespass is being committed, and has been committed in the past, by the defendant, an injunction to restrain the threatened trespass would, in the absence of good reasons to the contrary, appear to be appropriate.

80 However, as Lord Walker said during argument, the court should not normally make orders which it does not intend, or will be unable, to enforce. In a case such as the present, if the defendants had disobeyed an injunction not to trespass on any of the other woods, it seems highly unlikely that the two methods of enforcement prescribed by CPR Sch 2, CCR Ord 29 and section 38 of the County Courts Act 1984 (RSC Ord 45, r 5(1) in the High Court) would be invoked. The defendants presumably have no significant assets apart from their means of transport, which are also their homes, so sequestration would be pointless or oppressive. And many of the defendants are vulnerable, and most of them have young children, so imprisonment may very well be disproportionate. In *South Bucks District Council v Porter* [2003] 2 AC 558 local planning authorities were seeking injunctions to restrain gipsies from remaining on land in breach of planning law, and Lord Bingham of Cornhill said, at para 32, that "[t]he court should ordinarily be slow to make an order which it would not . . . be willing, if need be, to enforce by imprisonment".

A 81 On the other hand, in the same paragraph of his opinion, Lord Bingham also said that "[a]pprehension that a party may disobey an order should not deter the court from making an order otherwise appropriate". A court may consider it unlikely that it would make an order for sequestration or imprisonment, if an injunction it was being invited to grant were to be breached, but it may none the less properly decide to grant the injunction. Thus, the court may take the view that the defendants are more B likely not to trespass on the claimant's land if an injunction is granted, because of their respect for a court order, or because of their fear of the repercussions of breaching such an order. Or the court may think that an order of imprisonment for breach, while unlikely, would nonetheless be a real possibility, or it may think that a suspended order of imprisonment, in the event of breach, may well be a deterrent (although a suspended order C should not be made if the court does not anticipate activating the order if the terms of suspension are breached).

82 It was suggested in argument that, if a defendant established an unauthorised camp in a wood which, in earlier proceedings, he had been enjoined from occupying, the court would be likely to be sympathetic to an application by the Commission to abridge even the short time limits in CPR r 55.5(2). However, as Lord Rodger observed, if the court D were satisfied that a defendant was moving from unauthorised site to unauthorised site on woods managed by the Commission, an abridgement of time limits might be thought to be appropriate anyway. Quite apart from this, if the only reason for granting an injunction restraining a defendant from trespassing in other woods was to assist the Commission in obtaining possession of any of those other woods should the defendant camp in them, E it seems to me that this could be catered for by declaratory relief. For instance, the court could grant a declaration that the Commission is in possession of those other woods and the defendant has no right to dispossess it.

83 In some cases, it may be inappropriate to grant an injunction to restrain a trespassing on land unless the court considers not only that there is a real risk of the defendants so trespassing, but also that there is at least a F real prospect of enforcing the injunction if it is breached. However, even where there appears to be little prospect of enforcing the injunction by imprisonment or sequestration, it may be appropriate to grant it because the judge considers that the grant of an injunction could have a real deterrent effect on the particular defendants. If the judge considers that some relief would be appropriate only because it could well assist the claimant in G obtaining possession of such land if the defendants commit the threatened trespass, then a declaration would appear to me to be more appropriate than an injunction.

84 In the present case, neither the recorder nor the Court of Appeal appears to have concluded that an injunction should be refused on the ground that it would not be enforced by imprisonment or because it would have no real value. Although it may well be that a case could have been (and H may well have been) developed along those lines, it was not adopted by the recorder, and clearly did not impress the Court of Appeal. In those circumstances, it seems to me that it is not appropriate for this court to set aside the injunction unless satisfied that it was plainly wrong to grant it, or that there was an error of principle in the reasoning which led to its grant.

It does not appear to me that either of those points has been established in this case. A

The effect of the 2004 Guidance on the grant of an injunction

85 The recorder considered that it was inappropriate to grant an injunction in favour of the Secretary of State because the Commission had not complied with the 2004 Guidance in relation to the other woods before issuing the proceedings, and would not give an assurance that it would comply with the 2004 Guidance before it enforced the injunction. The Court of Appeal considered that the injunction could nonetheless be granted, as the issue of the Commission's compliance with the 2004 Guidance could be considered before the injunction was enforced. B

86 As I have already mentioned, it has been conceded by the Secretary of State throughout these proceedings that the Commission is obliged to comply with the 2004 Guidance, and that failure to do so may vitiate its right to possession against travellers trespassing on land it manages. On that basis, there is some initial attraction in the defendants' argument that, if the 2004 Guidance ought to be complied with before the injunction is enforced, it would be inappropriate to grant the injunction before the Guidance was complied with. After all, now the injunction has been granted, the defendants would be in contempt of court and prone to imprisonment (once the appropriate procedures had been complied with) if they encamped on any of the other woods. C D

87 However, I am of the opinion that the Court of Appeal was right to conclude that, even in the light of the Secretary of State's concession, the 2004 Guidance did not present an obstacle to the granting of an injunction in this case. The Guidance is concerned with steps to be taken in relation to existing unauthorised encampments: it is not concerned with preventing such encampments from being established in the first place. The recommended procedures in the 2004 Guidance were relevant to the question of whether an order for possession should be made against the defendants in respect of their existing encampment on Hethfelton. However, quite apart from the fact that they are merely aspects of a non-statutory code of guidance, those recommendations are not directly relevant to the issue of whether the defendants should be barred from setting up a camp on other land managed by the Commission. Accordingly, I do not see how it could have justified an attack on the lawfulness of the Secretary of State seeking an injunction to restrain the defendants from setting up such unauthorised camps. At least on the basis of the concession to which I have referred, I incline to the view that the existence and provisions of the 2004 Guidance could be taken into account by the court when considering whether to grant an injunction and when fashioning the terms of any injunction. However, I prefer to leave the point open, as it was, understandably, not much discussed in argument before us. E F G

88 Even if the 2004 Guidance was of relevance to the issue of whether the injunction should be granted, it seems to me that it could not be decisive. Otherwise, it would mean that such an injunction could never be granted, because it would not be possible to carry out up-to-date welfare inquiries in relation to defendants who might not move on to a wood which they were enjoined from occupying for several months, or, conceivably, even several years, after the order was made. As Arden LJ held, particularly bearing in H

A mind that it purports to be no more than guidance, the effect and purpose of the 2004 Guidance is simply not strong enough to displace the Secretary of State's right to seek the assistance of the court to prevent a legal right being infringed. Further, the fact that welfare inquiries were made in relation to the defendants' occupation of Hethfelton by social services means that the more significant investigations required by the 2004 Guidance had been carried out anyway.

B **89** Following questions from Lady Hale, it transpired for the first time in these proceedings that, at the time of the issue of the claim, the Commission had (and has) a detailed procedural code which is intended to apply when there are travellers unlawfully on its land, and that this code substantially followed the 2004 Guidance. It therefore appears that the Commission has considered the 2004 Guidance and promulgated a code which takes its C contents into account. On that basis, unless it could be shown in a particular case that the code had been ignored, it appears to me that the Commission's decision to evict travellers could not be unlawful on the ground relied on by the defendants in this case. However, it appears to me that failure to comply with non-statutory guidance would be unlikely to render a decision unlawful, although failure to have regard to the Guidance could do so.

90 If the defendants were to trespass on to land covered by the D injunction, the Commission would presumably comply with its code before seeking to enforce the injunction. If it did not do so, then, if justified on the facts of a particular case, there may (at least if the Commission's concession is correct) be room for argument that, in seeking to enforce the injunction against travellers who have set up a camp in breach of an injunction, the Secretary of State was acting unlawfully. It is true that this means that, in a E case such as this, a defendant who trespasses in breach of an injunction may be at risk of imprisonment before the Commission has complied with the 2004 Guidance. However, where imprisonment is sought and where it would otherwise be a realistic prospect, the defendant could argue at the committal hearing that the injunction should not be enforced, even that it should be discharged, on the ground that the recommendations in the 2004 Guidance have not been followed.

F **91** Accordingly, on this point, I conclude that, even assuming (in accordance with the Secretary of State's concession) that the Commission's failure to comply with the 2004 Guidance may deter the court from making an order for possession against travellers, it should not preclude the granting of an injunction to restrain travellers from trespassing on other land. However, at least in a case where it could be shown that the claimant should G have considered the 2004 Guidance, but did not do so, the Guidance could conceivably be relevant to the question whether an injunction should be granted (and if so on what terms), and, if the injunction is breached, to the question of whether or not it should be enforced (and, if so, how). In the event, therefore, the grant of an injunction was appropriate as Arden LJ and Pill LJ concluded (and the only reason Wilson LJ thought otherwise, namely the existence of the wider possession order, no longer applies).

H

The implications of this analysis

92 As I have explained, the thinking of the Court of Appeal in the *Drury* case [2004] 1 WLR 1906 proceeded on the basis that an injunction restraining trespass to land could only be enforced by sequestration or

imprisonment. In the light of the terms of CPR Sch 1, RSC Ord 45, r 5(1), this may very well be right. Certainly, in the light of the contrast between the terms of that rule and the terms of CPR Sch 1, RSC Ord 45, r 3(1) and CPR Sch 2, CCR Ord 26, r 17(1) (which respectively provide for writs and warrants of possession only to enforce orders for possession), it is hard to see how a warrant of possession in the county court or a writ of possession in the High Court could be sought by a claimant, where such an injunction was breached.

93 However, where, after the grant of such an injunction (or, indeed, a declaration), a defendant entered on to the land in question, it is, I think, conceivable that, at least in the High Court, the claimant could apply for a writ of restitution, ordering the sheriff or bailiffs to recover possession of the land for the benefit of the claimant. Such a writ is often described as one of the "writs in aid of" other writs, such as a writ of possession or a writ of delivery: see for instance CPR Sch 1, RSC Ord 46, r 1. Restitution is normally the means of obtaining possession against a defendant (or his privy) who has gone back into possession after having been evicted pursuant to a court order. It appears that it can also be invoked against a claimant who has obtained possession pursuant to a court order which is subsequently set aside (normally on appeal): see *Civil Procedure 2009*, vol 1, p 2099, para sc 46.3.3. Historically at any rate, a writ of restitution could also be sought against a person who had gone into possession by force: see *Cole on Ejectment*, pp 692–694. So there may be an argument that such a writ may be sought by a claimant against a defendant who has entered on to the land after an injunction has been granted restraining him from doing so, or even after a declaration has been made that the claimant is, and the defendant is not, entitled to possession. It may also be the case that it is open to the county court to issue a warrant of restitution in such circumstances.

94 Whether a writ or warrant of restitution would be available to support such an injunction or declaration, and whether the present procedural rules governing the enforcement of injunctions against trespass on facts such as those in the present case are satisfactory, seem to me to be questions which are ripe for consideration by the Civil Procedure Rule Committee. The precise ambit of the circumstances in which a writ or warrant of restitution may be sought is somewhat obscure, and could usefully be clarified. Further, if, as I have concluded, it is not open to the court to grant a wider order for possession, as was granted by the Court of Appeal in the *Drury* case [2004] 1 WLR 1906 and in this case, then it appears likely that there may very well be defects in the procedural powers of the courts of England and Wales. Where a person threatens to trespass on land, an injunction may well be of rather little, if any, real practical value if the person is someone against whom an order for sequestration or imprisonment is unlikely to be made, and an order for possession is not one which is open to the court. In addition, it seems to me that it may be worth considering whether the current court rules satisfactorily deal with circumstances such as those which were considered in *University of Essex v Djemal* [1980] 1WLR 1306.

Disposal of this appeal

95 Accordingly, it follows that, for my part, I would allow the defendants' appeal to the extent of setting aside the wider possession order

A made by the Court of Appeal, but dismiss their appeal to the extent of upholding the injunction granted by the Court of Appeal.

LORD COLLINS OF MAPESBURY JSC

96 At the end of the argument my inclination was to the conclusion that in *Secretary of State for the Environment, Food and Rural Affairs v Drury* [2004] 1 WLR 1906, the Court of Appeal had legitimately extended B *University of Essex v Djemal* [1980] 1 WLR 1301 to fashion an exceptional remedy to deal with cases of the present kind. I was particularly impressed by the point that an injunction might be a remedy which was not capable of being employed effectively in cases such as this. But I am now convinced that there is no legitimate basis for making an order for possession in an action for the recovery of wholly distinct land of which the defendant is not C in possession.

97 But in my opinion *University of Essex v Djemal* [1980] 1 WLR 1301 represented a sensible and practical solution to the problem faced by the university, and was correctly decided. I agree, in particular, that it can be justified on the basis that the university's right to possession of its campus was indivisible, as Lord Rodger says, or that the remedy is available to a person whose possession or occupation has been interfered with, as Lady D Hale puts it. Where the defendant is occupying part of the claimant's premises, the order for possession may extend to the whole of the premises. First, it has been pointed out, rightly, that the courts have used the concept of possession in differing contexts as a functional and relative concept in order to do justice and to effectuate the social purpose of the legal rules in which possession (or, I would add, deprivation of possession) is a necessary E element: Harris, "The Concept of Possession in English Law", in *Oxford Essays in Jurisprudence* (ed Guest, 1961) p 69, at p 72. Secondly, the procedural powers of the court are subject to incremental change in order to adapt to the new circumstances: see, eg, in relation to the power to grant injunctions, *Fourie v Le Roux* [2007] 1 WLR 320, para 30 and *Masri v Consolidated Contractors International (UK) Ltd (No 2)* [2009] QB 450, para 182.

F **98** I would therefore allow the appeal to the extent of setting aside the wider possession order.

Appeal allowed in part.
Parties to make written submissions on costs.

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M G

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

Case No: QB-2022-BHM-000044

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

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

Date: 20/09/2022

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

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

- and –

FOUR CATEGORIES OF PERSONS UNKNOWN

-and-

ROSS MONAGHAN AND 58 OTHER NAMED DEFENDANTS — **Defendants**

- -
- -

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

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

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

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

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APPROVED JUDGMENT

Mr Justice Julian Knowles:

Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

Democracy and opposition to HS2

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Claimants' land rights

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

43. Ms Dilcock goes on to explain that:

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

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

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

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

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

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

The Claimants' case

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

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

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

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

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

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

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

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

The Defendants' cases

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Discussion

Legal principles

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

(i) Trespass and nuisance

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

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

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

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

in the High Speed Rail (London - West Midlands) Act 2017 (to which I shall refer as "the 2017 Act"). That land is coloured pink on the various plans and is referred to as "the pink land". Thirdly, there is land in the temporary possession of the Second Claimant by reason of the exercise of its powers pursuant to section 15 and Schedule 16 of the 2017 Act, that land is coloured green on the plans

….

30. The first cause of action is trespass. The Claimants are entitled, as a matter of law, to bring a claim in trespass in respect of all three categories of land and, as I have said, it was not seriously suggested that they could not. In particular, I was referred to section 15 and paragraphs 1, 3 and 4 of Schedule 16 to the 2017 Act …

31. Thus, the procedure is simply this: if the Second Claimant wishes to take temporary possession of land within a defined geographical limit, it serves 28 days' notice pursuant to paragraph 4. Thereafter, it is entitled to enter on the land and 'take possession'. That, to my mind, and it was not seriously argued otherwise, gives it a right to bring possession proceedings and trespass proceedings in respect of that land.

32. In paragraph 40 of his judgment in *Ineos* at first instance [*Ineos Upstream Ltd v Persons Unknown* [2017] EWHC 2945 (Ch)], Mr. Justice Morgan says this:

> "The cause of action for trespass on private land needs no further exposition in this case."

Exactly the same is the case here, it seems to me, and it is the First Defendant, the definition of which persons I have described above, who is, or are, subject to such a claim in trespass."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

…

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(ii) The test for the grant of an injunction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(iii) The Canada Goose *requirements*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(iv) Geographical scope of the order sought

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

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

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

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

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

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

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

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

(v) European Convention on Human Rights

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

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

118. Articles 10 and 11 provide:

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

119. A1P1 provides:

> "*Article 1 Protection of property*

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

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

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

121. Section 12 provides:

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

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

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

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

124. The Claimants filed submissions in response.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(vi) Service

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

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

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

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

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

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

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

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

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

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

Merits

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

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

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

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

(i) Trespass and nuisance

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

just trying to do their jobs.

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

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

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

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

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

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

…

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(v) Scope

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(vi) Convention rights

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

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

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

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

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

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

If so, would there be an interference by a public authority with those rights?

199. Yes. The application for, and the grant of, an injunction to prevent the Defendants interfering with HS2's construction in the ways provided for in the injunction is an interference with their rights by a public authority so far as it touches on protest on public land, such as the highway, where Articles 10 and 11 are engaged.

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

200. Yes. The law in question is s 37 of the SCA 1981 and the cases which have decided how the court's discretion to grant an anticipatory injunction should be exercised: see *National Highways Ltd*, [31(2)] (Lavender J).

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

201. Yes. It would be for the protection the Claimants' rights and freedoms, and those of their contractors and others, to access and work upon HS2 Land unhindered, in accordance with the powers granted to them by Parliament which, as I have said already, determined HS2 to be in the public interest. The Claimants' have common law and A1P1 rights over the HS2 Land, as I have explained. The interference in question pursues the legitimate aims: of preventing violence and intimidation; reducing the large expenditure of public money on countering protests; reducing property damage; and reducing health and safety risks to protesters and others arising from the nature of some of the protests.

If so, is the interference 'necessary in a democratic society' to achieve that legitimate aim? This involves considering the following: Is the aim sufficiently important to justify interference with a fundamental right? Is there a rational connection between the means chosen and the aim in view? Are there less restrictive alternative means available to achieve that aim? Is there a fair balance between the rights of the individual and the general interest of the community, including the rights of others ?

202. These are the key questions on this aspect of the case, it seems to me.

203. The question whether an interference with a Convention right is 'necessary in a democratic society' can also be expressed as the question whether the interference is proportionate: *National Highways Limited,* [33] (Lavender J).

204. In *Ziegler*, Lords Hamblen and Stephens stated in [59] of their judgment that:

> "Determination of the proportionality of an interference with ECHR rights is a fact-specific enquiry which requires the evaluation of the circumstances in the individual case."

205. Lords Hamblen and Stephens also quoted, *inter alia*, [39] to [41] of Lord Neuberger MR's judgment in *Samede*

> "39. As the judge recognised, the answer to the question which he identified at the start of his judgment [the limits to the right of lawful assembly and protest on the highway] is inevitably fact sensitive, and will normally depend on a number of factors. In our view, those factors include (but are not limited to) the extent to which the continuation of the protest would breach domestic law, the importance of the precise location to the protesters, the duration of the protest, the degree to which the protesters occupy the land, and the extent of the actual interference the protest causes to the rights of others, including the property rights of the owners of the land, and the rights of any members of the public.
>
> 40. The defendants argue that the importance of the issues with which the Occupy Movement is concerned is also of considerable relevance. That raises a potentially controversial point, because as the judge said, at para 155: 'it is not for the court to venture views of its own on the substance of the protest itself, or to gauge how effective it has been in bringing the protestors' views to the fore. The Convention rights in play are neither strengthened nor weakened by a subjective response to the aims of the protest itself

> or by the level of support it seems to command … the court cannot—indeed, must not—attempt to adjudicate on the merits of the protest. To do that would go against the very spirit of articles 10 and 11 of the Convention … the right to protest is the right to protest right or wrong, misguidedly or obviously correctly, for morally dubious aims or for aims that are wholly virtuous.'
>
> 41. Having said that, we accept that it can be appropriate to take into account the general character of the views whose expression the Convention is being invoked to protect. For instance, political and economic views are at the top end of the scale, and pornography and vapid tittle-tattle is towards the bottom. In this case the judge accepted that the topics of concern to the Occupy Movement were 'of very great political importance': para 155. In our view, that was something which could fairly be taken into account. However, it cannot be a factor which trumps all others, and indeed it is unlikely to be a particularly weighty factor: otherwise judges would find themselves according greater protection to views which they think important, or with which they agree. As the Strasbourg court said in Kuznetsov v Russia, para 45: 'any measures interfering with the freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles - however shocking and unacceptable certain views or words used may appear to the authorities—do a disservice to democracy and often even endanger it. In a democratic society based on the rule of law, the ideas which challenge the existing order must be afforded a proper opportunity of expression through the exercise of the right of assembly as well as by other lawful means …' The judge took into account the fact that the defendants were expressing views on very important issues, views which many would see as being of considerable breadth, depth and relevance, and that the defendants strongly believed in the views they were expressing. Any further analysis of those views and issues would have been unhelpful, indeed inappropriate."

206. I have set out this passage, as Lavender J did in *National Highways Limited,* [35], because, given the nature of some of the submissions made to me, I want to underscore the point I made at the outset that I am not concerned with the merits of HS2, or whether it will or will not cause the environmental damage which the protesters fear it will. I readily acknowledge that many of them hold sincere and strongly held views on very important issues. However, it would be wrong for me to express either agreement or disagreement with those views, even if I had the institutional competence to do so, which I do not. Many of the submissions made to me consisted of an invitation to me to agree with the Defendants' views and to decide the case on that basis. But just like Lavender J said in relation to road protests, that is something which I cannot do, just as I could not decide this case on the basis of disagreement with protesters' views.

207. Lords Hamblen and Stephens reviewed in [71] to [86] of their judgment in *Ziegler* the factors which may be relevant to the assessment of the proportionality of an interference with the Article 10 and 11 rights of protestors blocking traffic on a road.

208. Disagreeing with the Divisional Court, they held that each of the eight factors relied on by the district judge in that case were relevant. Those factors were, in summary: (a) the peaceful nature of the protest; (b) the fact that the defendants' action did not give rise, either directly or indirectly, to any form of disorder; (c) the fact that the defendants did not commit any criminal offences other than obstructing the highway; (d) the fact that the defendants' actions were carefully targeted and were aimed only at obstructing vehicles heading to the arms fair; (e) the fact that the protest related to a 'matter of general concern'; (f) the limited duration of the protest; (g) the absence of any complaint about the defendants' conduct; and (h) the defendants' longstanding commitment to opposing the arms trade.

209. As Lavender J said in his case at [39], this list of factors is not definitive, but it serves as a useful checklist. I propose now to discuss how they should be answered in this case.

210. The HS2 protests have in significant measure not been peaceful. There have been episodes, for example, of violence, intimidation, criminal damage, and assault, as described by Mr Jordan. There have been many arrests. Even where injunctions have been obtained, protesters have resisted being removed (most recently at Cash's Pit, as described in Dilcock 4 and in other material). It follows that the protests have given rise to considerable disorder. The protesters are specifically targeting HS2, and in that sense are in a somewhat different position to the protesters in the *National Highways Ltd* case, whose protests were aimed at the public as a means of trying to influence government policy. But the HS2 protests do also affect others, such as contractors employed to work on the project (for example Balfour Beatty), those in HS2's supply chain, security staff, etc. I accept that the HS2 protests relate to a matter of general concern, but on the other hand, at the risk of repeating myself, the many and complicated issues involved – including in particular environmental concerns - have been debated in Parliament and the HS2 Acts were passed. The HS2 protests are many in number, continuing, and are threatened to be carried on in the future along the whole of the HS2 route without limit of time. The disruption, expense and inconvenience which they have caused is obvious from the evidence. I do not think that I am in any position to assess the public mood about HS2 protests. No doubt some members of the public are in favour and no doubt some are against. As I have already said, I accept that the defendants are expressing genuine and strongly held views.

211. Turning to the four questions into which the fifth *Ziegler* proportionality question breaks down, I conclude as follows.

212. Firstly, by committing trespass and nuisance, the Defendants are obstructing a large strategic infrastructure project which is important both for very many individuals and for the economy of the UK, and are causing the unnecessary expenditure of large sums of public money. In that context, I conclude that the aim pursued by the Claimants in making this application is sufficiently important to justify interference with the Defendants' rights under Articles 10 and 11, especially as that interference will be limited to what occurs on public land, where lawful protest will still be permitted. Even if the interference were more extensive, I would still reach the same conclusion. I base that

conclusion primarily on the considerable disruption caused by protests to date and the repeated need for injunctive relief for specific pockets of land.

213. Second, I also accept that there is a rational connection between the means chosen by the claimant and the aim in view. The aim is to allow for the unhindered completion of HS2 by the Claimants over land which they are in possession of by law (or have the right to be). Prohibiting activities which interfere with that work is directly connected to that aim.

214. Third, there are no less restrictive alternative means available to achieve that aim. As to this, an action for damages would not prevent the disruption caused by the protests. The protesters are unlikely to have the means to pay damages for losses caused by further years of disruption, given the sums which the Claimants have had to pay to date. Criminal prosecutions are unlikely to be a deterrent, and all the more so since many defendants are unknown. By contrast, there is some evidence that injunctions and allied committal proceedings have had some effect: see APOC, [7].

215. I have anxiously considered the geographical extent of the injunction along the whole of the HS2 route, and whether it should be more limited. I have concluded, however, given the plain evidence of the protesters' intentions to continue to protest and disrupt without limit – 'let's keep fucking up HS2's day and causing as much disruption and cost as possible. Coming to land near you' – such an extensive injunction is appropriate. The risks are real and imminent for the reasons I have already given. I accept that the Claimants have shown that the direct action protests are ongoing and simply move from one location to another, and that the protesters have been and will continue to cause maximum disruption across a large geographical extent. As the Claimants put it, once a particular protest 'hub' on one part of HS2 Land is moved on, the same individuals will invariably seek to set up a new hub from which to launch their protests elsewhere on HS2 Land. The HS2 Land is an area of sufficient size that it is not practicable to police the whole area with security personnel or to fence it, or make it otherwise inaccessible.

216. Fourth, taking account of all of the factors which I have identified in this judgment, I consider that the injunction sought strikes a fair balance between the rights of the individual protestors and the general right and interests of the Claimants and others who are being affected by the protests, including the national economy. As to this: (a) on the one hand, the injunction only prohibits the defendants from protesting in ways that are unlawful. Lawful protest is expressly not prohibited. They can protest in other ways, and the injunction expressly allows this. Moreover, unlike the protest in *Ziegler*, the HS2 protests are not directed at a specific location which is the subject of the protests. They have caused repeated, prolonged and significant disruption to the activities of many individuals and businesses and have done so on a project which is important to the economy of this country. Finally on this, the injunction is to be kept under review by the Court, it is not without limit of time, and can and no doubt will be discharged should the need for it disappear.

217. Finally, drawing matters together and looking at the same matters in terms of the general principles relating to injunctions:

a. I am satisfied that it is more likely than not that the Claimants would establish at trial that the Defendants' actions constitute trespass and nuisance and that they will continue to commit them unless restrained. There is an abundance of evidence that leads to the conclusion that there is a real and imminent risk of the tortious behaviour

continuing in the way it has done in recent years across the HS2 Land. I am satisfied the Claimants would obtain a final injunction.

b. Damages would not be an adequate remedy for the Claimants. They have given the usual undertakings as to damages.

c. The balance of convenience strongly favours the making of the injunction.

(vii) Service

218. Finally, I turn to the question of service and whether the service provisions in the injunction are sufficient.

219. The passages from [82] of *Canada Goose* I quoted earlier show that the method of alternative service against persons unknown must be such as can reasonably be expected to bring the proceedings (ie, the application) to their attention.

220. I considered service of the application at a directions hearing on 28 April 2022. At that hearing, I made certain suggestions recorded in my order at [2] as to how the application for the injunction was to be served:

> "Pursuant to CPR r. 6.27 and r. 81.4 as regards service of the Claimants' Application dated 25 March 2022:
>
> a. The Court is satisfied that at the date of the certificates of service, good and sufficient service of the Application has been effected on the named defendants and each of them and personal service is dispensed with subject to the Claimants' carrying out the following additional methods within 14 days of the date of this order:
>
> i. advertising the existence of these proceedings in the Times and Guardian newspapers, and in particular advertising the web address of the HS2 Proceedings website.
>
> ii. where permission is granted by the relevant authority, by placing an advertisement and/or a hard copy of the papers in the proceedings within 14 libraries approximately every 10 miles along the route of the HS2 Scheme. In the alternative, if permission is not granted, the Claimants shall use reasonable endeavours to place advertisements on local parish notice boards in the same approximate location.
>
> iii. making social media posts on the HS2 twitter and Facebook pages advertising the existence of these proceedings and the web address of the HS2 Proceedings website.
>
> b. Compliance with 2 (a)(i), (ii) and (iii) above will be good and sufficient service on "persons unknown"'

221. The injunction at [7]-[11] provides under the heading 'Service by Alternative Method – This Order'

> "7. The Court will provide sealed copies of this Order to the Claimant's solicitors for service (whose details are set out below).
>
> 8. Pursuant to CPR r.6.27 and r.81.4:
>
> a. The Claimant shall serve this Order upon the Cash's Pit Defendants by affixing 6 copies of this Order in prominent positions on the perimeter of the Cash's Pit Land.
>
> b. Further, the Claimant shall serve this Order upon the Second, Third and Fourth Defendants by:
>
> i. Affixing 6 copies in prominent positions on the perimeter each of the Cash's Pit Land (which may be the same copies identified in paragraph 8(a) above), the Harvil Road Land and the Cubbington and Crackley Land.
>
> ii. Advertising the existence of this Order in the Times and Guardian newspapers, and in particular advertising the web address of the HS2 Proceedings website, and direct link to this Order.
>
> iii. Where permission is granted by the relevant authority, by placing an advertisement and/or a hard copy of the Order within 14 libraries approximately every 10 miles along the route of the HS2 Scheme. In the alternative, if permission is not granted, the Claimants shall use reasonable endeavours to place advertisements on local parish council notice boards in the same approximate locations.
>
> iv. Publishing social media posts on the HS2 twitter and Facebook platforms advertising the existence of this Order and providing a link to the HS2 Proceedings website.
>
> c. Service of this Order on Named Defendants may be effected by personal service where practicable and/or posting a copy of this Order through the letterbox of each Named Defendant (or leaving in a separate mailbox), with a notice drawing the recipient's attention to the fact the package contains a court order. If the premises do not have a letterbox, or mailbox, a package containing this Order may be affixed to or left at the front door or other prominent feature marked with a notice drawing the recipient's attention to the fact that the package contains a court order and should be read urgently. The notices shall be given in prominent lettering in the form set out in Annex B. It is open to any Defendant to contact the Claimants to identify an alternative

place for service and, if they do so, it is not necessary for a notice or packages to be affixed to or left at the front door or other prominent feature.

d. The Claimants shall further advertise the existence of this Order in a prominent location on the HS2 Proceedings website, together with a link to download an electronic copy of this Order.

e. The Claimants shall email a copy of this Order to solicitors for D6 and any other party who has as at the date hereof provided an email address to the Claimants to the email address: HS2Injunction@governmentlegal.gov.uk

9. Service in accordance with paragraph 8 above shall:

a. be verified by certificates of service to be filed with Court;

b. be deemed effective as at the date of the certificates of service; and

c. be good and sufficient service of this Order on the Defendants and each of them and the need for personal service be dispensed with.

10. Although not expressed as a mandatory obligation due to the transient nature of the task, the Claimants will seek to maintain copies of this Order on areas of HS2 Land in proximity to potential Defendants, such as on the gates of construction compounds or areas of the HS2 Land known to be targeted by objectors to the HS2 Scheme.

11. Further, without prejudice to paragraph 9, while this Order is in force, the Claimants shall take all reasonably practicable steps to effect personal service of the Order upon any Defendant of whom they become aware is, or has been on, the HS2 Land without consent and shall verify any such service with further certificates of service (where possible if persons unknown can be identified) to be filed with Court."

222. Further evidence about service is contained in Dilcock 3, [7], et seq, and Dilcock 4, [7] et seq. I can summarise this as follows.

223. Before I made my order, Ms Dilcock explained that the methods of service used by the Claimants as at that date had been based on those which had been endorsed and approved by the High Court in other cases where injunctions were sought in similar terms to those in this application. She said the methods of service to that date had been effective in publicising the application.

224. She said that there had been 1,371 views (at 24 April 2022) of the Website: Dilcock 3, [11]; By 17 May 2022 (a week or so before the main hearing, and after my directions

had come into effect) there had been 2,315 page views, of which 1,469 were from unique users: Dilcock 4**,** [17]. So, in round terms, there were an additional 1,000 views after the directions hearing.

225. Twitter accounts have shared information about the injunction application and/or the fundraiser to their followers. The number of followers of those accounts is 265,268: Dilcock 3, [16].

226. A non-exhaustive review of Facebook shows that information about the injunction and/or the link to a fundraiser has been posted and shared extensively across pages with thousands of followers and public groups with thousands of followers. Membership of the groups on Facebook to which the information has been shared amounts to 564,028: Dilcock 3, [17].

227. Dilcock 4, [7] – [17], sets out how the Claimants complied with the additional service requirements pursuant to my directions of 28 April 2022. Those measures are not reliant on either notice via website or social media. The Claimants say that they complement and add to the very wide broadcasting of the fact of the proceedings.

228. The Claimants submitted that the totality of notice, publication and broadcasting had been very extensive and effective in relation to the application. They submitted that service of an order by the same means would be similarly effective, and that is what the First Claimant proposes to do should an injunction be granted.

229. I agree. The extensive and inventive methods of proposed service in the injunction, in my judgment, satisfy the *Canada Goose* test, [82(1)], that I set out earlier. That this is the test for the service an order, as well as proceedings, is clear from *Cuciurean v Secretary of State for Transport* [2021] EWCA Civ 357, [14]-[15], [24]-[26], [60], [75].

Final points

230. I reject the suggestion the injunction will have an unlawful chilling effect, as D6 in particular submitted. There are safeguards built-in, which I have referred to and do not need to mention again. It is of clear geographical and temporal scope. Injunctions against defined groups of persons unknown are now commonplace, in particular in relation to large scale disruptive protests by groups of people, and the courts have fashioned a body of law, much of which I have touched on, in order to address the issues which such injunctions can raise, and to make sure they operate fairly. I also reject the suggestion that the First Claimant lacks 'clean hands' so as to preclude injunctive relief.

Conclusion

231. I will therefore grant the injunction in the terms sought in the draft order of 6 May 2022 in Bundle B at B049 (subject to any necessary and consequential amendments to reflect post-hearing matters and in light of this judgment).

APPENDIX 1

UNNAMED DEFENDANTS
(TAKEN FROM THE AMENDED PARTICULARS OF CLAIM
DATED 28 APRIL 2022 – WITH TRACKED CHANGED REMOVED)

(1) PERSONS UNKNOWN ENTERING OR REMAINING WITHOUT THE CONSENT OF THE CLAIMANTS ON, IN OR UNDER LAND KNOWN AS LAND AT CASH'S PIT, STAFFORDSHIRE SHOWN COLOURED ORANGE ON PLAN A ANNEXED TO THE ORDER DATED 11 APRIL 2022 ("THE CASH'S PIT LAND")

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

(3) PERSONS UNKNOWN OBSTRUCTING AND/OR INTERFERING WITH ACCESS TO AND/OR EGRESS FROM THE HS2 LAND IN CONNECTION WITH THE HS2 SCHEME WITH OR WITHOUT VEHICLES, MATERIALS AND EQUIPMENT, WITH THE EFFECT OF DAMAGING AND/OR DELAYING AND/OR HINDERING THE CLAIMANTS, THEIR AGENTS, SERVANTS, CONTRACTORS, SUB-CONTRACTORS, GROUP COMPANIES, LICENSEES, INVITEES AND/OR EMPLOYEES WITHOUT THE CONSENT OF THE CLAIMANTS

(4) PERSONS UNKNOWN CUTTING, DAMAGING, MOVING, CLIMBING ON OR OVER, DIGGING BENEATH OR REMOVING ANY ITEMS AFFIXED TO ANY TEMPORARY OR PERMANENT FENCING OR GATES ON OR AT THE PERIMETER OF THE HS2 LAND, OR DAMAGING, APPLYING ANY SUBSTANCE TO OR INTERFERING WITH ANY LOCK OR ANY GATE AT THE PERIMETER OF THE HS2 LAND WITHOUT THE CONSENT OF THE CLAIMANTS

APPENDIX 2

SUMMARY OF DEFENDANTS' RESPONSES

Name	**Received and reference in the papers**	**Summary**
D6 – James Knaggs	SkA for initial hearing (05.04.22)	Definition of persons unknown is overly broad, contrary to Canada Goose. Service provisions inadequate. No foundation for relief based on trespass because not demonstrated immediate right to possession, and seeking to restrain lawful protest on highway. No imminent threat. Scope of order is large. Terms impose blanket disproportionate prohibitions on demonstrations on the highway. Chilling effect of the order.
	Defence (17.05.22)	C required to establish cause of action in trespass & nuisance across all of HS2 Land *and* existence of the power to take action to prevent such. No admission of legal rights of the C represented in maps. Denied that Cash's Pit land is illustrative of wider issues re entirety of HS2 Land. Denied there is a real and imminent risk of trespass & nuisance re HS2 Land to justify injunction. Impact and effect of injunction extends beyond the limited remit sought by HS2. Proportionality. Denial that D6 conduct re Cash's Pit has constituted trespass or public/private nuisance.
D7 – Leah Oldfield	Defence (16.05.22) **[D/3]**	D7s actions do not step beyond legal rights to protest, evidence does not show unlawful activity. Right to protest. Complaints about HS2 Scheme, complaints about conduct of HS2 security contractors. Asks to be removed from injunction on basis of lack of evidence
D8 – Tepcat Greycat	Email (16.05.22) **[D/4]**	Complaint that D8 was not identified properly in injunction application papers and that she would like name removed from schedule of Ds.
D9 – Hazel Ball	Email (13.05.22) **[D/7]**	Asks for name to be removed. Queries why she has been named in injunction application papers. Has only visited Cash's Pit twice, with no intention to return. Never visited Harvil Road.
D10 – IC Turner	Response (16.05.22) **[D/8]**	Inappropriateness of D10's inclusion as a named D (peaceful protester, no involvement with campaign this year, given proximity to route the injunction would restrict freedom of movement within vicinity). Inappropriateness of proceedings (abuse of process because of right to protest). Complaints about HS2 Scheme.
D11 – Tony Carne	Submission (13.05.22) **[D/10]**	Denies having ever been an occupier of Cash's Pit Land. Asks to be removed as named D.
D24 – Daniel Hooper	Email (16.05.22) **[D/12]**	Asks for name to be removed because already subject to wide ranging undertaking. Asks for assurance of the same by 20th May.

D29 – Jessica Maddison	Defence (16.05.22) **[D/14]**	Injunction would restrict ability to access Euston station and prevent access to GP surgery and hospital. Restriction on use of footpaths, would result from being named in injunction. Would lead to her being street homeless. Lack of evidence for naming within injunction. Criminal matters re lock on protests were discontinued before trial. Complaints about HS2 contractor conduct.
D35 – Terry Sandison	Email (07.04.22) **[D/15]**	Complaint about lack of time to prepare for initial hearing.
	Application for more time – N244 (04.04.22)	Says he wishes to challenge HS2 on various points of working practices, queries why he is on paperwork for court but feels he hasn't received proof of claims they have to use his conduct to secure injunction. Asks for a month to consider evidence and challenge the injunction and claims against himself.
D36 – Mark Kier	Large volume of material submitted (c.3k pages) **[D/36/179-D/37/2916]**	Mr Kier sets out four grounds: (1) the area of land subject to the Claim is incorrect in a number of respects; (2) the protest activity is proportionate and valid and necessary to stop crimes being committed by HS2; (3) the allegations of violence and intimidation are false. The violence and intimidation emanates from HS2; (4) the project is harmful and should not have been consented.
D39 – Iain Oliver	Response to application (16.05.22) **[D/16]**	Complaints about alleged water pollution, wildlife crimes and theft and intimidation on HS2's behalf. Considers that injunction is wrong and a gagging order.
D46 – Wiktoria Zieniuk	Not included in bundle	Brief email provided querying why she was included.
D47 – Tom Dalton	Email (05.04.22) **[D/17]**	Complaint about damage caused to door from gaffatape of papers to front door. Says he is happy to promise not to violate or contest injunction as is not involved in anti HS2 campaign and hasn't been for years. (Undertaking now signed)
D54 – Hayley Pitwell	Email (04.04.22) **[D/19]**	Request for adjournment and extension of time to submit arguments, for a hearing and for name to be removed as D. Queries whether injunction will require her to take massive diversions when driving to Wales. Complaint about incident of action at Harvil Road that led to D56 being named in this application – dispute over factual matters (esp Jordan 1 para 29.1.10). Complaint that HS2 security contractor broke coronavirus act and D54 is suing for damages. N.b. no subsequent representations received.
D55 – Jacob Harwood	17.05.22 **[D/20]**	Complaint about injunction restricting ability to use Euston station, public rights of way, canals etc. Complaint that there is lack of evidence against D55 so he should be removed as named D.
D56 – Elizbeth Farbrother	11.05.22 **[D/23]**	Correspondence and undertaking subsequently signed.
D62 – Leanne Swateridge	Email (14.05.22) **[D/23]**	Complaint about reliance on crane incident at Euston. Complaints about conduct of HS2 contractors and merits of HS2 Scheme.
Joe Rukin	First witness statement (04.04.22) **[D/24]**	Says Stop HS2 organisation is no longer operative in practice, so emailing their address does not constitute service, and the organisation is not coordinating or organising illegal activities. Failure of service of injunction application. Scope of injunction

		is disproportionately wide, and D2 definition would cover hundreds of thousands of people on a daily basis. Complaints about GDPR re service of papers for this application. Concerns about injunction restricting normal use of highways, PRoW, and private rights over land where it is held by HS2 temporarily but the original landowner has been permitted to continue to access and use it. Would criminalise people walking into their back garden.
	Second witness statement (26.04.22) **[D/25]**	Complains there is no active protest at Cubbington and Crackley now since clearance of natural habitats. Complains Dilcock 2 [8.11] is wrong about service of proceedings at Cubbington & Crackley Land.
Maren Strandevold	Email (04.04.22) **[D/26]**	Complaints about notice given for temporary possession land. Concern about temporary possession land and that there needs to be clear and unequivocal permission for those permitted to use their land subject to temporary possession to be able to continue to do so. Concerns the scope of the draft order is disproportionate.
Sally Brooks	Statement (04.04.22) **[D/27]**	Complaints about merits of HS2 Scheme, alleged wildlife crimes, and the need for members of the public to monitor the same
Caroline Thompson-Smith	Email (04.04.22) **[D/28]**	Objects to evidence of her, and that the injunction would prevent rights to freedom of expression, arts 10-11. Worry about adverse costs means she fears to engage with process.
Deborah Mallender	Statement (04.04.22) **[D/29]**	Complaints about merits of HS2 Scheme and conduct of HS2 Ltd and security contractors. Complaint that content of injunction has not been provided to all relevant persons.
Haydn Chick	Email (05.04.22) **[D/30]**	Email attachment of statement which will not open, plus article by Lord Berkeley, plus news story
Swynnerton Estates	Email (05.05.22) **[D/31]**	Email re whether Cash's Pit objectors had licence to occupy.
Steve and Ros Colclough	Letter (04.05.22) **[D/32]**	Consider themselves "persons unknown" by living nearby and using nearby PRoW. Complaint that HS2 should have written to everyone on the route informing them.
Timothy Chantler	Letter (14.05.22) **[D/33]**	Complaints about conduct of HS2 security contractors (NET re treatment of other protesters). Objection to the injunction on the basis of right to protest etc.
Chiltern Society	Letter (16.05.22) **[D/34]**	Concerns about public access to PRoW re HS2 Land. Concern of no adequate method to ensure a person using a footpath across HS2 Land would be aware of potential infringement. Concern that maintenance work on footpaths often requires accessing adjacent land which may constitute infringement.
Nicola Woodhouse	Email (16.05.22) **[D/35]**	Not lawful or practical to stop anyone accessing all land acquired by HS2. Maps provided are impossible to decipher, with land ownership not well defined. Excessive geographical scope. Notification of all relevant landowners is impossible. Residents of houses purchased by HS2 cannot move freely around their own homes, and members of the public cannot visit them.
The below statements are contained within the submission of D36 (Mark Keir)		

Val Saunders "statement in support of the defence against the Claim QB-2022-BHM-00044"	Undated **[D/37/2493]** (bundle D, vol F)	Merits of Scheme. Complaints about HS2 contractor conduct and alleged wildlife crimes. Protest important to hold HS2 to account.
Leo Smith "Witness statement" "statement in support of the defence…"	14.05.22 **[D/37/2509-2520]** (bundle D, vol F)	Merits of scheme/process of consultation. Necessity of protest to hold Scheme to account. HS2 use of NDAs re CPO. Photographs of rubbish left behind by protestors is misleading since they have been forcibly evicted. Protest mostly peaceful. Complaints about HS2 security contractor conduct. Alleged wildlife crimes. Negative impact on communities.
Misc statement – "statement in support of the defence…"	Undated **[D/37/2674-2691]** (bundle D, vol G)	Complaints about merits of scheme and conduct of HS2 security contractors against protesters.
Misc statement – "Seven arguments against HS2"	Undated **2692-2697**	Merits of scheme. Argues for scrapping.
Brenda Bateman – "statement in support of the defence…"	Undated **2698-2699**	Confusion caused by what HS2 previously said about which footpaths would be closed. Complaints about ecological impacts of Scheme, and other impacts. Complaints about use of CPO process. Right to peaceful protest should be upheld: injunction would curtail this.
Cllr Carolyne Culver – "statement in support of the Defence…"	Undated **2700-2701**	Complaints about conduct of Jones Hill Wood eviction. Issues over perceived delayed compensation for CPO. Need for nature protectors and right to protest.
Denise Baker – "Defence against the claim…"	Undated **2702-2703**	Photojournalist – concerns that injunction would limit abilities to report fairly on issues related to environment impact of HS2. Risk of arrest of journalists. Detrimental to accountability of project and govt. Concerns over conduct of HS2 security contractors.
Gary Welch – "Statement in support of the Defence…"	Undated **2704**	Criticism of merits of Scheme, and environmental impacts. Concern over closure of public foot paths recently.
Sally Brooks – "Statement in support of the Defence…"	Undated **2705-2710**	Alleged wildlife crimes. Need for members of public to monitor HS2 activities. Injunction would prevent this.
Lord Tony Berkeley – "Witness Statement"; "Statement in support of the Defence…"	12.05.22 **2711-2714**	Doubts HS2 has sufficient land to complete the project without further Parliamentary authorisation. Doubts HS2's land ownership position generally given alteration to maps included with injunction application. Injunction is an abuse of rights, and an abuse of the laws of the country and HS2 Bill which brought it into being.
Jessica Upton – "statement in support of the Defence…"	Undated **2715-2716**	Criticism of merits of scheme, ecological impact etc. Concern that public need to be able to hold HS2 to account without being criminalised for it.
Kevin Hand – "statement in support of the Defence…"	9.05.22 **2717-2718**	Ecologist who provides environmental training courses to activists and protesters against HS2. Emphasises importance of public/protesters being

		able to monitor works taking place to prevent alleged wildlife crimes.
Mark Browning – "Statement in support of the Defence…"	Undated **2719**	Partners brother is renting a property HS2 has compulsorily purchased near Hopwas in Tamworth area. Concern that the management of the pasture will be criminalised if injunction granted. Therefore requests exemption from the injunction.
Talia Woodin – "statement in support of the Defence…"	Undated **2724-2731**	Photographer and filmmaker. Concerns about alleged wildlife crimes and assaults on activists. Injunction would disable right to protest.
Victoria Tindall – "statement in support of the Defence…"	Undated **2735**	Complaint about Buckinghamshire HS2 security van monitoring ramblers near HS2 site. Concerns about privacy.
Mr & Mrs Phil Wall – "Statement"	Undated **2737-2740**	Complaints about conduct of HS2 contractors regarding works in Buckinghamshire. Complaints about CPO/blight compensation issues for their property.
Susan Arnott – "In support of the Defence…"	15.5.22 **2742**	Merits of scheme. Protests are therefore valid.
Ann Hayward – Letter regarding RWI	6.05.22 **2743-2744**	Resident of Wendover. Difficulty of reading HS2 maps, so difficult to know whether trespassing or not. Complaints about HS2 contractor conduct. RWI too broad, and service would be difficult and may be insufficient meaning everyone in vicinity of HS2 works could be at risk of arrest – risk of criminalising communities. People need to know whether injunction exists and where it is, but HS2 maps are not well defined. Would be difficult to apply the order, abide by it and police it. Important for independent ecologists to monitor HS2 works.
Annie Thurgarland – "statement in support of the Defence"	15.05.22 **2745-2746**	Criticism of merits of scheme, especially re environmental impact. Need for public to monitor works re ecology and alleged wildlife crimes. People have a right to peaceful direct action.
Anonymous	16.05.22 **2747-2751**	Anonymity because concerned about intimidation. RWI would have direct impact on tenancy contractual agreement for home, as it lies within the Act Boundary and is owned by HS2. Would be entirely at the mercy of HS2 and subcontractors to interpret the contractual agreement as they chose. Concerned that they were not notified of the RWI given the enormity of impact on residents who are lessees of HS2. Vague term un-named defendants could extend to anyone deemed as trespassing on land part of homes and gardens. Concern therefore that all land within boundary could become subject to constant surveillance, undermining right to privacy. No clarity on terms of injunction regarding tenants and when they would and would not be trespassing. Complaints about ecological impact of Scheme. Complaints about conduct of HS2 security contractors.

Anonymous (near Cash's Pit occupant)	Undated **2752-2753**	Complaints about impact of scheme on ability to use local area for recreation. Concerns that injunction would curtail protest right. Complaints about HS2 security contractors. Complaint that HS2 did not provide local residents with details of the injunction or proceedings.
Anonymous – "statement in support of the Defence…"	Undated **2754-2755**	Criticism of merits of Scheme, argument re right to protest.

Neutral Citation Number: [2022] EWCA Civ 1519

Case No: CA-2022-001987

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MR JUSTICE RITCHIE
([2022] EWHC 2457 (KB))

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/11/2022

Before:

LORD JUSTICE COULSON
LORD JUSTICE PHILLIPS
and
LORD JUSTICE EDIS

- -

Between:

Elliott Cuciurean	**Appellant**
- and -	
(1) Secretary of State for Transport **(2) HS2 Limited**	**Respondents**

- -
- -

Tim Moloney KC & Adam Wagner (instructed by **Robert Lizar Solicitors**) for the **Appellant**
Richard Kimblin KC & Michael Fry, Brendan Brett (instructed by **DLA Piper**) for the **Respondents**

Hearing Date: 9 November 2022

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Approved Judgment

This judgment was handed down remotely at 2pm on 17 November by circulation to the parties or their representatives by e-mail and by release to the National Archives

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LORD JUSTICE COULSON:

1. Introduction

1. By a judgment dated 23 September 2022 ([2022] EWHC 2457 (KB)), Ritchie J ("the judge") sentenced the appellant to 268 days immediate custody for contempt of court. He also fined him £3,000. The relevant order was dated 6 October 2022. The appellant appeals against that order as of right.

2. There were originally four Grounds of Appeal. Ground 1 complained about the judge's conduct of the contempt hearings. Grounds 2 and 3 went to the sanction that the judge imposed. Ground 4 was a challenge to the finding of contempt: the argument was that the injunction in question did not apply to the appellant and therefore he was not in contempt of court.

3. On the Monday before the appeal hearing, the court was informed that Ground 1 had been abandoned. Save in one very limited respect, I say no more about it. Of the remaining Grounds, it is appropriate to consider Ground 4 first because, if the appellant is right, there was no contempt of court. As will become apparent below, the court has concluded, by a majority, that the injunction applied to the appellant and he was in contempt of court. It is therefore necessary to consider the question of sanction (Grounds 2 and 3): for the reasons set out below, the court is unanimously of the view that the sanction imposed by the judge was not excessive or unreasonable. In the result, therefore, the appeal will be dismissed.

2. The Appellant

4. The appellant is a serial protestor against the HS2 Scheme. This has led to at least one criminal conviction, a number of findings of contempt of court and the imposition of various terms of imprisonment although, until the present case, those have always been suspended.

5. On 16 October 2020, the appellant was committed for contempt of court for 12 breaches of an injunction protecting HS2 land at Crackley, near Kenilworth in Warwickshire. In his judgment on liability ([2020] EWHC 2614 (Ch)), Marcus Smith J found the contempt proved, saying that the appellant "would go to very considerable lengths in order to give his objections to the HS2 scheme as much force as they possible could have". He found the appellant to be an evasive witness.

6. The sanction imposed by Marcus Smith J was 6 months imprisonment suspended for one year. That term was reduced by this court to 3 months imprisonment, suspended for one year ([2021] EWCA Civ 357). Despite that reduction, I note that, when that year was over, on 24 October 2021, the appellant published a social media message which read: "Goodbye suspended sentence, injunction breaking here we come." The judge rejected the suggestion that that was some sort of "joke" on the part of the appellant, and there is no appeal against that finding.

7. In fact, it appears that the appellant had not waited until the end of the one year period to continue to break the law. Between 16 and 18 March 2021 - in other words, during the period in which the suspended sentence was operational - he trespassed on land in Hanch, near Lichfield in Staffordshire, and dug and occupied a tunnel there, again to

disrupt the HS2 scheme. Although he was initially acquitted of aggravated trespass, the Divisional Court, in their judgment of 30 March 2022 ([2022] EWHC 736 (Admin)), remitted the case to the magistrates' court with the direction to convict the appellant.

8. The appellant was duly found guilty of aggravated trespass on 29 June 2022. On 21 July 2022, he was sentenced to a 10 week term of imprisonment, again suspended for a year. No further details of this sentence have been provided. It is unclear to me why, having committed a further HS2-related offence during the period in which the original suspended sentence was extant, the appellant was not given a term of immediate custody. This history also means that, at the time of the contempt with which this appeal is directly concerned (May-June 2022), the appellant knew that he was going to be convicted and sentenced for the aggravated trespass, but he did not allow that to deter him. It appears that neither of the earlier suspended sentences were ever activated, either in whole or in part and, although this history was identified by the judge, it was not treated as the particularly aggravating feature I consider it to be.

3. The Order And The Alleged Contempt

9. On 28 March 2022, the respondents commenced proceedings against 63 defendants in respect of land, known as the Cash's Pit Land ("CPL"), on the proposed route of HS2 in Staffordshire. D1-D4 were all categories of "persons unknown" defined by reference to particular activities. D1 was defined as:

> "Persons unknown entering or remaining without the consent of the claimants on, in or under land known as land at Cash's Pit, Staffordshire, coloured orange on Plan A annexed to the Particulars of Claim (the Cash's Pit Land")."

D5-D63 were all named defendants. The appellant was D33.

10. The Claim Form and Particulars of Claim ("PoC") sought immediate possession of the CPL. The PoC explained at paragraph 12 that the respondents did not know the names of all those occupying the CPL, but knew enough to identify D5-D20, D22, D31 and D63. That group of defendants, which did not include the appellant, were called the "Cash's Pit Named Defendants" in the PoC. However, the PoC made clear that there were other individuals-whether other named defendants or otherwise-who might come and go on the CPL. That was why the claim for trespass was made against both the Cash's Pit Named Defendants and D1. Those defendants, taken together, were called "the Cash's Pit Defendants".

11. At paragraph 17 of the Particulars of Claim, the respondents sought an order for possession of the CPL. At paragraph 18 they sought a declaration confirming their immediate right to possession of the CPL. Both those claims were made against the Cash's Pit Defendants. At paragraph 24, the respondents set out their reasonable fear that, having removed the Cash's Pit Defendants from the CPL, "the Defendants will return to trespass on or cause nuisance to the CPL" or on other parts of the HS2 land. This last was a reference to the wider injunction sought against the defendants in relation to the entire route of the HS2 scheme, with which this appeal is not concerned.

12. In the prayer for relief, the respondents claimed:

> "(1) An order that the Cash's Pit Defendants deliver up possession of the Cash's Pit Land to the First Claimant forthwith;
>
> (2) Declaratory relief confirming the First Claimant's immediate right to possession of the Cash's Pit Land;
>
> (3) Injunctive relief in the terms of the draft Order appended to the Application Notice;
>
> (4) Costs;
>
> (5) Further and other relief."

13. The injunction in respect of the CPL was granted by Cotter J on 11 April 2022 ("the Cotter Order"). It was to all intents and purposes in the form referred to at paragraph (3) of the prayer in the PoC. Paragraph 3 of the Cotter Order ordered the Cash's Pit Defendants to give the respondents vacant possession of the CPL. Paragraph 4 contained the operative injunction:

> "4. With immediate effect, and until the earlier of (i) Trial; (ii) Further Order; or (iii) 23.59 on 24 October 2022:
>
> a. The Cash's Pit Defendants and each of them are forbidden from entering or remaining upon the Cash's Pit Land and must remove themselves from that land.
>
> b. The Cash's Pit Defendants and each of them must not engage in any of the following conduct on the Cash's Pit land, in each case where that conduct has the effect of damaging and/or delaying and/or hindering the Claimants by obstructing, impeding or interfering with the activities undertaken in connection with the HS2 Scheme by them or by contractors, sub-contractors, suppliers or any other party engaged by the Claimants at the Cash's Pit Land:
>
> i. entering or being present on the Cash's Pit Land;
>
> ii. interfering with any works, construction or activity on the Cash's Pit Land;
>
> iii. interfering with any notice, fence or gate on or at the perimeter of the Cash's Pit Land;
>
> iv. causing damage to property on the Cash's Pit Land belonging to the Claimants, or to contractors, sub-contractors, suppliers or any other party engaged by the Claimants, in connection with the HS2 Scheme;
>
> v. climbing onto or attaching themselves to vehicles or plant or machinery on the Cash's Pit Land used by the Claimants or any other party engaged by the Claimants.
>
> c. The Cash's Pit Defendants and each of them:

> i. must cease all tunnelling activity on the Cash's Pit Land and immediately leave and not return to any tunnels on that land;
>
> ii. must not do anything on the Cash's Pit Land to encourage or assist any tunnelling activity on the Cash's Pit Land."

14. Consistent with the PoC, the Cash's Pit Defendants were defined in the Cotter Order as:

> "D1 and D5 to D20, D22, D31 and D63 whose names appear in the schedule annexed to this Order at Annex A."

The relevant parts of Annex A identified D1 in the same terms as the Particulars of Claim (paragraph 9 above).

15. Paragraph 6 of the Cotter Order was in the following terms:

> "6. The Court makes declarations in the following terms:
>
> The Claimants are entitled to possession of the Cash's Pit Land and the Defendants have no right to dispossess them and where the Defendants or any of them enter the said land the Claimants shall be entitled to possession of the same."

Paragraphs 7, 8 and 9 of the Cotter Order were all concerned with the service of the Order itself by the various methods identified there.

16. The appellant was in court when the Cotter Order was made. He said that, at the time, he understood that the Cotter Order related to him. As Mr Wagner fairly conceded on his behalf during the appeal hearing: "he always thought he was bound by the order". The appellant further admitted that, despite that knowledge, he continued his protest against the HS2 scheme by going on to the CPL on 10 May 2022, and staying in the tunnel from 10 May 2022 to 25 June 2022, a period of 46 days. The evidence was that, every day, the respondents' contractors issued verbal warnings to the occupiers of the CPL about the terms of the Cotter Order. On 25 June 2022, the appellant burrowed out of the tunnel with others and escaped across a field outside the CPL.

4. The Subsequent Proceedings

17. By then, the appellant and six others were the subject of an application for committal for contempt. Those committal proceedings were commenced on 8 June 2022. It is accepted that the papers were served on the appellant on 9 June when he was still occupying the CPL. On 10 June he was served with notice of a directions hearing in the committal proceedings, to take place on 14 June 2022. The appellant stayed on the CPL and did not attend and was not represented at the directions hearing.

18. At the directions hearing various directions were made as to i) the provision by the defendants of a service address by 20 June; and ii) the service of any evidence by 27 June. Although those directions, too, were served on him, the appellant did not comply with them. Following his flight from the CPL, a skeleton argument was provided on his

behalf on 20 July, in accordance with the judge's directions. This raised, for the first time, the argument that he was not in contempt at all because of the wording of the Cotter Order.

19. The committal hearing took place over three days in July 2022 (25, 26 and 27 July), involving the appellant and a number of co-defendants. The appellant then sought an adjournment to put in evidence on a variety of issues, including a personal medical issue. The judge acceded to that request, which led to a further two day hearing on 22 and 23 September 2022. In my view, this process was unnecessarily drawn-out, particularly given the relatively straightforward issues raised by the contempt proceedings.

20. As I have said, although the appellant thought at the time that the Cotter Order applied to him, and admitted the conduct which amounted to contempt, it was argued by Mr Wagner at the hearing in July that, on a proper construction of the Cotter Order, it did not concern him. The argument was that he was not one of the named defendants within the definition of Cash's Pit Defendants and, because he was a named defendant, he could not be a 'Persons Unknown' within the definition of D1. The judge rejected that argument. That left the September hearing to address the issue of sanctions against the appellant.

21. The judge found that the appellant's culpability was high for the reasons set out at [142]-[144] of the judgment under appeal. No challenge is made to those findings. The judge also identified the wide-ranging nature of the harm he had caused at [145], noting that "the limited tax-payers resources of our society would have been better spent on the NHS, social care, the environment, the underprivileged and other needy issues then chasing and waiting around after you as you played your underground civil disobedience games in breach of the Cotter Injunction". The judge had earlier noted at [34] – [36] and [142] that any increase in cost in the HS2 project was an increase that had to be met by the tax-payer, and that the cost of the security for the events at the CPL alone amounted to approximately £8 million. Again, there is no appeal against those findings in respect of harm.

22. As to aggravating factors, the judge said this:

> "[146] **Aggravating factors** You accept that you did not engage with the Courts or the lawyers for HS2 at all until after you came out of the tunnel. You did not attend the pre-trial review about which I am sure that you were aware. You did not raise any evidential or legal issues which would be relevant to the final hearing at the pre-trial review. You did not serve the evidence which you now rely upon in accordance with the Court's directions.
>
> [147] On the other hand from late June onwards you did engage, you instructed lawyers, applied for legal aid and you served your first witness statement, you gave evidence to me direct and you provided mitigation through your counsel. However you did not do so at the main hearing because you did not gather your evidence on time. Instead you sought an adjournment to put in more evidence because you had not prepared the evidence you wished to rely upon before the main hearing. You increased the costs and expenses of HS2 and the Secretary of State as a result."

The judge also referred to the previous contempt in respect of the injunction at Crackley, and the aggravated trespass at Lichfield.

23. On the question of insight, the judge found at [150] that the appellant had not shown any real understanding of the effects of his actions on society and tax payers' funds, on the emergency services and on the court system. At [151] he said:

> "[151] In addition you attempted to assert at the start of the main sanctions hearing that you did not consider that you personally were bound by the Cotter Injunction due to a misreading of or a technical point taken on the terms which you adopted after talking to your lawyers. I have already ruled on that application and dismissed it. The approved transcript of my judgment is in the Appendix to this judgment."

The judge dealt in detail with the possible mitigating factors between [152]-[165]. He found that the case passed the custody threshold (which is not a finding which is appealed to this court), and he concluded that a fine would not be sufficient punishment [169].

24. In calculating the sanction, the judge took a starting point of 332 days imprisonment (46 days underground x 7 days per day of occupation), and reduced that by around 20% to reflect the mitigating factors. That left a net term of 268 days imprisonment. The judge said that, in all the circumstances, he could not suspend the term [171], a conclusion which, again, is not appealed. He concluded by saying this: "the dialogue between you and the Courts in relation to conscientious objection has been far too one-sided for far too long".

5. Was The Appellant Caught By The Cotter Order (Ground 4)?

5.1 The Issue

25. The first issue raised by this appeal is whether or not the appellant was caught by the Cotter Order. If he was not, then there would be no contempt. So although it was the last ground of appeal, it must be considered first.

26. During the July hearing, the judge gave a number of *ex tempore* judgments on matters which arose during the course of argument. They were then usefully gathered up as an Appendix to the September judgment. The first of these concerned the appellant's argument that he was not caught by the Cotter Order. The judge ruled against the appellant for two reasons. First, he said that no notice of the submission had been given at the pre-trial review; that it was a preliminary issue which had not been raised until 5 days before the hearing. He described it as "a last-minute ambush". He therefore rejected the submission on procedural grounds. If he was wrong about that, the judge went on to consider and reject the submission on its merits.

5.2 The Procedural Bar

27. In their written skeleton argument on appeal, Mr Moloney KC and Mr Wagner complained that the judge was wrong to dismiss the submission as a matter of procedure because it was not a preliminary issue, but a substantive defence to the claim for

contempt. In his skeleton argument, Mr Kimblin KC did not seek to support this aspect of the judge's approach.

28. I can well understand the judge's irritation that, at the start of what appeared to be a hearing dealing with sanctions for admitted contempt on the part of a large number of defendants, the appellant was raising, for the first time, an issue of liability. Furthermore, it is not an answer to say that this was a pure point of law and that, because it was in the skeleton argument (which was served in time), there was no default on the part of the appellant. The appellant subsequently gave evidence on this topic: he should therefore have addressed this point in a witness statement served weeks before the hearing in accordance with the judge's directions. In addition, as I note below at paragraph 52, there was an obvious riposte to this argument which, somewhat ironically, Mr Wagner said in July that he could not deal with, because it was raised late. There was therefore a real risk that, in raising the point for the first time at the hearing, the appellant was gaining a potential procedural advantage.

29. However, I accept Mr Wagner's basic submission that this was not a preliminary issue as such, but a substantive argument about whether the appellant was caught by the Cotter Order, and therefore whether or not he was in contempt of court. Although the appellant can properly be criticised for not complying with court orders until the last minute or beyond, and for not giving what I consider to be proper and fair notice of this issue, it was plainly something which the judge had to address at the hearing in July. In effect, the respondents had to show that the appellant's submission on the wording of the Cotter Order was wrong in order to establish contempt.

30. I note that, in his ruling on this aspect of the case, the judge did not identify any part of the CPR which would have permitted him, as a matter of procedure, to rule out the appellant's submission without considering it on the merits. Pleadings are not usually required in contempt applications and certainly none were ordered here, so the judge's criticism that the matter had not been pleaded was erroneous. Although, as I have said, the point was not unlinked to the evidence, it would have been wrong in principle to rule out any consideration of what was, at root, a matter of construction because of the absence of evidence, particularly in circumstances where the direction in respect of witness statements was not framed as an unless order.

31. I therefore agree with Mr Wagner that the judge erred in dismissing the appellant's argument as a matter of procedure. The remaining question is whether he was wrong to dismiss it on its merits.

5.3 The Substantive Argument

32. The core of the argument is that the appellant was a named defendant (D33) in the Cotter Order and therefore could not be a 'Person Unknown' at the same time. That is said to be illogical: he was known (and named), and therefore he could not be a 'Person Unknown'. Mr Wagner accepted that his argument was "a narrow one", although he said that paragraph 6 of the Cotter Order provided support for the proposition that, when the respondents wanted orders to cover all the defendants, they had no difficulty in framing them as such.

33. In answer to that, Mr Kimblin said that there were two stages: getting possession of the CPL (paragraph 3 of the Cotter Order) and then keeping it free of protestors (paragraph

4). He said that the named defendants within the definition of Cash's Pit Defendants were those relevant to stage one; those who were believed at the time to be in occupation of the CPL. Since the appellant was not believed to be in occupation of the CPL at the time of the Cotter Order, he was not one of those named defendants. But, he said, in respect of stage two, anyone who then went to the CPL after the order was made "became a person to whom the injunction was addressed and a defendant" in the words of Sir Tony Clarke MR in *South Cambridgeshire DC v Gammell* [2005] EWCA Civ 1439; [2006] 1WLR 658 at [32]. They were therefore covered by the definition of D1 whether they were otherwise named or not.

34. I agree with Mr Kimblin. My reasons are these. The Cash's Pit Defendants, as defined in the Cotter Order, fell into two groups. One group were those particular defendants "whose names appear in the Schedule and Annex to the order". They were D5-D20, D22, D31 and D63. They did not include the appellant because it was believed (correctly, as it turned out) that he was not occupying the CPL in April. He was not therefore in that group, called in the PoC "the Cash's Pit Named Defendants".

35. The other group of Cash's Pit Defendants were those defined as D1, namely "persons unknown entering or remaining without the consent of the claimants on, in or under the CPL". That was aimed at Mr Kimblin's second stage, after possession: keeping the CPL free of protestors. On the face of it, when the appellant went to the CPL the following month, and remained there for 46 days, he fell within the definition of D1. Thus, although he was not a *named* Cash's Pit Defendant, he was a *defined* Cash's Pit Defendant because he was caught by that definition of D1.

36. It is not seriously argued to the contrary that, on the plain words of the D1 definition, the appellant was not caught by the definition. The argument therefore depends on other parts of the Cotter Order, and alleged inconsistencies or illogicalities to which those other parts might give rise. Although I accept that the wording of an injunction in a contempt case should be free from all reasonable doubt, it is not insignificant that, for the purposes of the appeal, the critical parts of the Cotter Order are clear. Who are the Cash's Pit Defendants? Certain named defendants and D1. Did the appellant fall within the definition of D1? When he went to the CPL and occupied the tunnel after the Cotter Order, Yes, he did. He did all the things prohibited by paragraph 4(b).

37. The main argument put forward by Mr Wagner is that the appellant could not be a "person unknown" because he was known to the respondents and named in the Cotter Order. But why not? If the definition of D1 is clear, then there is no reason why he could not be both. The principal purpose of the wide definition of D1 was to cover anyone who might go onto the CPL after the making of the Cotter Order. At the time that the Cotter Order was made, the appellant was not a person known to the respondents as occupying the CPL. So he was not in that group of named defendants, who were on the CPL at the time. But the respondents could not look into the future. They did not know what the appellant (or any of the other defendants, named or not) was going to do thereafter. But they still needed to protect themselves against anyone, be they named defendants or others, from trespassing on to the CPL and causing nuisance after they had obtained possession.

38. In this way, the respondents needed a 'Persons Unknown' category to protect themselves against trespass and nuisance in the future. Through the definition of D1, the Cotter Order gave them that, and provided the vital means of ensuring that those

who needed to be notified of the injunction were notified appropriately. And when, the following month, the appellant went to the CPL and occupied the tunnel, he was notified of the terms of the injunction (although he knew them anyway) and he fell foursquare within the definition of D1.

39. Mr Wagner said during argument that, in this case "'Persons Unknown' describes activities which will make you a defendant and in breach of the order". I agree with that. It is the prohibited activities in the future which matter for the definition of D1, not whether the respondents happened to know your name at the date of the Cotter Order, and so could name you as a defendant. When the appellant went to the CPL and occupied the tunnel in May 2022, he was undertaking an activity which caused him to be within the D1 definition, and therefore a defendant in breach of the Cotter Order. It matters not that he was separately a named defendant.

40. I accept that the declaration at paragraph 6 of the Cotter Order extends to all defendants, and plainly caught the appellant. It may therefore have been possible for the respondents to include a wider group of defendants - perhaps all the defendants - in the relevant parts of the Cotter Order at paragraphs 3 and 4. But a declaration is a different thing to an injunction and, certainly in a case of this sort, precise targeting is less important. Furthermore, I do not consider that this goes to the narrow argument advanced by Mr Wagner: what matters is whether the relevant part of the Order, which is the definition of Cash's Pit Defendants, includes the appellant *if* the appellant went on to the site in breach of its terms. I believe it clearly did.

41. As with many matters of interpretation, different views are possible. I have seen the judgment of Phillips LJ in draft, and note that he takes a different view on the wording of the Cotter Order. But although I understand why, it does not, with great respect to him, cause me to alter my conclusion.

42. Moreover, I would be troubled about any interpretation which signalled to the respondents that they would have been better off naming *all* the defendants in respect of *all* the prohibitions, so as not to fall foul of this sort of narrow argument, even though they knew that not all the named defendants were on the CPL originally. It would be unfortunate if this court sent a signal that 'kitchen sink' drafting was better than a properly targeted injunction; indeed, such a signal would be contrary to the judgment of this court in *Canada Goose*, noted below.

43. For those reasons, I consider that the judge was right to conclude that the appellant was a Cash's Pit Defendant for the purposes of the Cotter Order. In my view, such a reading is in accordance with *Gammel,* and the cases on 'persons unknown' injunctions.

44. In this context, I should address briefly the decision of this court in *Canada Goose UK Retail Limited v Persons Unknown* [2020] EWCA Civ 303; [2020] 1WLR 2802. Ground 1 of the appeal in that case was concerned with whether there was effective service on "persons unknown". It built upon the Supreme Court decision in *Cameron v Hussain* [2019] UKSC 6; [2019] 1 WLR 1471 and Lord Sumption's observations that service of the originating process "is the act by which the defendant is subjected to the court's jurisdiction" [14], and that "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" [19].

45. The problem in *Canada Goose* was that the injunction was too widely drafted and gave rise to issues of service and proper notification. Hence, at paragraph 82 of the judgment of the court in that case (to which Mr Wagner referred in argument), the obvious point was made that if defendants are known and have been identified, they must be joined as individual defendants to the proceedings, in contrast to "persons unknown". That latter category "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".

46. As that brief summary makes plain, this part of the judgment in *Canada Goose* was concerned with service, and in particular the problem of service on "persons unknown". Service is not in issue here: in accordance with *Canada Goose*, the respondents joined the appellant as a named defendant and served him as such. They served him again when he went to the CPL in May. But *Canada Goose* was not stipulating that, in every case, and regardless of the wording of the order in question, a named defendant could not also be, in particular and clearly defined future circumstances, a "person unknown".

47. I also consider that paragraph 82(1) of the judgment in *Canada Goose*, which refers to the "persons unknown" as including "people who in the future will join the protest and fall within the description of the 'persons unknown'", supports the respondents' case. In respect of the CPL, the appellant "joined the protest" in May and fell within the description of 'persons unknown' in D1.

5.4 Ambiguity

48. Mr Wagner had a fall-back position in respect of Ground 4. He said that, even if he was wrong as to its construction, the Order was ambiguous and, in those circumstances, it could not properly form the basis of findings of contempt of court. He referred to *Cuadrilla* (citation below) in which Leggatt LJ (as he then was) said at [59] that, "in principle, people should not be at risk of being penalised for breach of a court order if they act in a way that the order does not clearly prohibit. Hence a person should not be held to be in contempt of court if it is unclear whether their conduct is covered by the terms of the order." Mr Wagner argued that, if it was unclear whether the order related to the appellant, he should not have been found in contempt of court.

49. I accept the proposition that a lack of clarity in the underlying order may impact on the court's ability or willingness to find contempt of court. I also acknowledge that, in view of Phillips LJ's dissenting judgment, it may be said that this is just such a case. However, for two principal reasons, I do not consider that any question of ambiguity arises here.

50. The first reason is because, although I respectfully acknowledge that the argument put forward by Mr Wagner is plausible, it did not sway me from what I consider to be the clear and sensible construction of the Cotter Order. Merely because there is an alternative argument does not make the Cotter Order ambiguous, or trouble me as to the propriety of the finding of contempt of court.

51. Secondly, I consider that the proof of this pudding is in the eating. Leggatt LJ talked about "conduct" because it is obvious that, if it is unclear what conduct is prohibited, a subsequent finding of contempt will or may be unjustified. But this is not a case in which conduct is in issue: the appellant accepts that what he did breached the Cotter

Order. On the appellant's case, what may matter is identity: who was caught by the Cotter Order? But here, the appellant accepts that he understood that the Cotter Order referred to him and "always thought he was bound by it". He did not consider that to be ambiguous at the time he was deliberately occupying the tunnel. He would have acted as he did come what may. Accordingly, I do not consider that the fact that an alternative construction was plausible means that the Order was so ambiguous as to make the finding of contempt unjustified.

52. I should add this. The underlying reality is that, by his presence on the CPL for 46 days, despite the daily warnings and the service of the contempt proceedings, the appellant was *prima facie* procuring and encouraging the breach of the injunction by those to whom it was addressed. That would put him in contempt of court regardless of the narrow construction argument. When this proposition was put to Mr Wagner by the judge at the hearing in July, he said that, because the contempt case had not so far been put in that way, he was not able to deal with it. I am uncomfortable with that, not only because it seems to me self-evident that the appellant was in contempt in those ways, but also because the objection to that alternative way of looking at the contempt potentially rewarded the appellant for taking his original argument about the Cotter Order so late. It is another reason why I consider that any question of doubt about the relationship between the Cotter Order and the appellant should, perhaps unusually in a case of this sort, be resolved in the respondents' favour.

53. In essence, however, I conclude that the appellant was the subject of the injunction; he always knew that he was the subject of the injunction; he deliberately breached the terms of the injunction; and his conduct, however it is categorised, amounted to a contempt of court. In those circumstances, in my view, there is no room for any ambiguity.

54. In my view, therefore, Ground 4 of the appeal must fail.

6. Was The Sanction Excessive (Grounds 2 & 3)?

6.1 The Legal Principles

55. The legal principles as to sanctions in protestor cases were summarised recently in the judgment of this court in *Breen & Ors v Esso Petroleum Company Ltd* [2022] EWCA Civ 1405 at [5]-[17]. It is therefore unnecessary to repeat those paragraphs here: they should be read as if they were part of this judgment. The principles there set out are distilled from what I consider to be the most relevant authorities, namely *Cuadrilla Boland Ltd. & Others v Persons unknown & Others* [2020] EWCA Civ 9: [2020] 4 WLR 29 ("*Cuadrilla")*; *Cuciurean v SoS for Transport & Anr* [2021] EWCA Civ 357 (*"Cuciurean"); Attorney General v Crosland* [2021] UKSC 15; [2021] 4 WLR 103 ("*Crosland")*; *National Highways Limited v Heyatawin* [2021] EWHC 3078 (KB); [2022] Env.L.R. 17 (*"Heyatawin")*; *National Highways Limited v Buse & Others.* [2021] EWHC 3404 (QB) ("*Buse")* and *National Highways Ltd v Springorum and Others* [2022] EWHC 205 (QB) ("*Springorum*").

56. As to the test which this court should apply, an appeal like this is not a re-hearing but a review: see CPR r.52.21(1). This court will only interfere if it is satisfied that the decision under appeal is "(a) wrong, or (b) unjust because of a serious procedural or other irregularity": r.52.21(3). A decision on sanction involves an exercise of judgment

which is best made by the judge who deals with the case at first instance: see [20] of *Cuciurean*. This approach was also stated in [85] of *Cuadrilla*, which led Leggatt LJ to say that it followed that "there is limited scope for challenging on an appeal a sanction which is imposed for contempt of court as being excessive (or unduly lenient)".

6.2 *Ground 2(a) Legal Submission On Liability Wrongly Treated As an Aggravating Factor.*

57. It is said that the judge erred in treating the argument under Ground 4 - namely the construction argument as to whether or not he was caught by the terms of the Cotter Order - as an aggravating factor. Mr Moloney argues that it was wrong in principle for a defendant to be penalised for running an unsuccessful defence.

58. The answer to this complaint is that the judge did not treat this as an aggravating factor. I have set out at paragraph 22 above those matters which he expressly regarded as aggravating factors, and this was not identified. What the judge might have said during the course of argument in July about what was or may be an aggravating factor is nothing to the point: it is what he said in the sanctions judgment in September that matters. The premise on which Ground 2(a) is based is therefore not made out.

59. I accept that the judge did have regard to this point when considering the question of the appellant's insight: see [151] of the judgment, set out at paragraph 23 above. In my view, what the judge said there was erroneous: the running of an argument on the construction of the Cotter Order on the advice of his lawyers had nothing to do with the appellant's insight (or lack of it). However, it does not appear that the judge's (erroneous) observations in this paragraph was a relevant element in the assessment of the sanction. It did not appear to have been treated as an aggravating factor in any event.

60. For the avoidance of doubt, I reject out of hand Mr Kimblin's submission that in some way the criticisms of the judge in Ground 1, now abandoned, also reflected adversely on the appellant's insight. They are wholly unrelated.

61. However, I cannot leave this part of the case without expressing my disquiet over the way in which the judge suggested that the appellant was "taking a risk" by continuing with the submission that he was not bound by the Cotter Order. Indeed, in his *ex tempore* judgment in July on this point, the judge said:

> "38. I did offer D33 the option to withdraw this application at the close of submissions yesterday and that offer was refused. The effect of that refusal shall be taken into account when sentencing for D33's admitted intentional and deliberate breaches of the injunction."

62. Although, for the reasons I have given, the running of the construction argument does not appear to have had any effect upon the judge's assessment of the appropriate sanction two months later, the judge had no right to offer some sort of 'deal' to the appellant, or to suggest that, if the appellant pursued his argument on liability, he might be penalised for so doing. That was, I regret to say, an unprincipled approach which might have prevented a defendant from ventilating a legitimate defence. It should not have happened.

63. However, as a matter of substance, I consider that there is nothing in Ground 2(a) because there is nothing to show that the running of the construction point was in fact

taken into account in the assessment of the sanction at all, much less as an aggravating factor.

6.3 *Ground 2 (b): Submission Of Further Evidence Not An Aggravating Factor*

64. Mr Moloney argued that the judge wrongly penalised the appellant by reference to his subsequent evidence, at the September hearing, about a private medical issue.

65. In my view, that complaint is unfair, and based on a misreading of the judge's judgment, when set in its proper context. The point that the judge was making was that the appellant did not engage with the courts once the committal proceedings had been served. He stayed in the tunnel. He did not attend or arrange representation at the pre-trial review. As a result he did not raise in advance any particular issues to be addressed at the trial itself. He did not serve any evidence.

66. It was only from late June/early July onwards that the appellant engaged in the process. As a result, he was not properly ready for the hearing later in July. The expert evidence, which went amongst other things to the private medical issue, was not ready for that hearing. The appellant was therefore obliged to seek an adjournment of the sanctions hearing. That is why the matter had to be put off until September. It was that aspect of the history which the judge regarded as an aggravating factor.

67. In my view, the judge was entitled to reach that conclusion. The appellant had ignored the committal proceedings until too late to allow a complete resolution of the issues at the hearing in July. That was the reason why the sanctions hearing had to be adjourned until September. In my view, the courts have, throughout, gone out of their way to accommodate the appellant, and the judge was entitled to regard it as an aggravating factor that the same could not be said the other way round. As noted in *Breen v Esso* at [62], the heart of a committal application is the defendant's flouting of court orders. Repeated failures to comply with court directions, will – in an appropriate case – be rightly regarded as an aggravating factor, as they were in *Breen v Esso*.

68. There is therefore nothing in Ground 2(b).

6.4 Ground 3(a) No Application Of The 'Cuadrilla' Discount

69. Mr Moloney argued by reference to the decision in *Cuadrilla* that the judge should have granted a discount to the sanction which would otherwise have been imposed. That entitlement was said to arise out of the fact that the court was dealing with a conscientious objector. In particular, Mr Moloney said that the judge was wrong to conclude that, in a case where he had concluded that dialogue was not possible, no discount was applicable. He did not suggest that the judge was wrong to conclude that, in this case, dialogue was not possible. His narrow submission was that, even in such a case, some (albeit limited) discount was still appropriate.

70. In response, Mr Kimblin argued that the judge plainly did take *Cuadrilla* into account but identified a number of matters (in particular the absence of a dialogue with the appellant and the presence of a monologue) which meant that the applicability of a *Cuadrilla* discount in this case had not been made out.

71. As Lord Justice Edis pointed out during the course of argument, it is rather misleading to talk about a *Cuadrilla* discount at all. It is not as if there is some sort of guideline sanction from which a reduction, to a greater or lesser extent, then needs to be made to reflect the decision in *Cuadrilla*. What matters is that the judge reaches a proportionate sanction in all the circumstances of the case, including the culpability of the contemnor. I respectfully agree with that.

72. Accordingly, the position is rather more nuanced than Mr Moloney suggested. Moreover, *Cuadrilla* is itself based on what Lord Hoffmann said in *R v Jones (Margaret)* [2006] UKHL 16; [2007] 1 AC 136, at [89]:

> "But there are conventions which are generally accepted by the law-breakers on one side and the law-enforcers on the other. The protestors behave with a sense of proportion and do not cause excessive damage or inconvenience. And they vouch the sincerity of their beliefs by accepting the penalties imposed by the law. The police and prosecutors, on the other hand, behave with restraint and the magistrates impose sentences which take the conscientious motives of the protestors into account".

73. So it follows that if, for example, the court concluded that a defendant had not behaved with a sense of proportion, or had caused excessive harm, or had not accepted the penalties imposed, his or her culpability would be much higher and there would be little or no basis to expect corresponding restraint from the courts.

74. In addition, in a case of a serial contemnor such as the appellant, where the court has concluded that dialogue is no longer possible, the fact that the underlying protest was non-violent and a matter of conscience may be of no or negligible weight in the balancing exercise. That is because the whole thrust of *Cuadrilla*, and the subsequent cases, is about the importance of dialogue. As Dame Victoria Sharp, President of the Kings Bench Division, noted in *Heyatawin* at [53]:

> "53. In some contempt cases, there may be scope for the court to temper the sanction imposed because there is a realistic prospect that this will deter further law-breaking or, to put it another way, encourage contemnors to engage in the dialogue described in *Cuadrilla* with a view to mending their ways or purging their contempt. However, it is always necessary to consider whether there is such a prospect on the facts of the case. In some cases, there will be. In some cases, not. Moreover, it is important to add, that "there is no principle which justifies treating the conscientious motives of the protestor as a licence to flout court orders with impunity": *Attorney General v Crosland* [2021] UKSC 15, at [47]."

75. It is clear that, in the present case, the judge did take *Cuadrilla* into account: see for example [154]. It is also clear that he did not give it very much weight because of the absence of dialogue: see [155]. I consider that he was quite entitled to reach that conclusion. The mitigating factors available to the appellant were limited. His serial contempt of court meant that he was emphatically not the sort of defendant which the court had in mind in *Cuadrilla.* A protestor, no matter how conscientious he or she believes themselves to be, cannot keep ignoring the court's orders, and then expect some sort of discount in the sanction to be applied every time they are dealt with for

contempt. That would be contrary to principle and the two-way nature of the process emphasised by Lord Hoffmann in *Jones*.

76. I therefore reject Ground 3(a).

6.5 Ground 3(b) Requiring Detailed Views From The Appellant

77. The next complaint is that the judge erred in asking the appellant, during the course of argument, to provide details of an alternative to HS2. The lack of a coherent answer was then reflected in the judgment at [153]. The appellant's complaint is that there is no authority for the proposition that a defendant must give a detailed account of his beliefs in order to qualify for mitigation. Mr Moloney fairly accepted that this was "a small point".

78. The full passage of the judgment to which this point goes reads as follows:

> "[152] **Mitigation:** In mitigation you assert that you are a conscientious protester. You assert that you have been a conscientious campaigner for 3 years. You assert that by delaying the HS2 project you are seeking to avert an "environmental catastrophe". You assert you are concerned about the carbon foot print of the use of heavy
> machinery and the destruction of ancient woodland and habitats. You have not been able to explain how your tunnelling and obstruction makes any such contribution to avoiding an environmental catastrophe save for the mere assertion. You assert that the HS2 project is a 'scam'.
>
> [153] You asserted in your witness statement that a new project should instead be built. You called it a *"transport network that has sufficient interconnectivity to present a real alternative to travelling by car".* It is wholly unclear to me how that would be built nationwide without heavy machinery, a lot of it, which would give off fumes."

79. Again, I consider the criticism of these passages to be unfair. There are two reasons for that. First, as already noted, one of the distinguishing features of a protester case may be the extent to which dialogue with the contemnor is possible. The judge cannot be criticised for endeavouring to initiate that dialogue with the appellant. The legitimacy of a protestor's claim that he or she was driven solely by conscience is undermined if the court concludes that their protests are quixotic or hopelessly impractical, and merely adding to the considerable cost of the project which they are disrupting.

80. Secondly, it does not seem to me that these paragraphs had any real significance in the judge's assessment of any sanction, save perhaps to add further weight to the conclusion that the so-called *Cuadrilla* discount was of very limited application in this case.

81. I pause here to note that, instead of asking the appellant about alternatives to HS2, the judge might have been better off simply noting that HS2 is being built after many years of public and Parliamentary scrutiny. It was Parliament which concluded that HS2 was the best solution, a decision confirmed by a review of the Scheme after the 2019 General Election: see *Packham v SoS For Transport and Others* [2020] EWHC 829 (Admin), subsequently upheld by the Court of Appeal.

82. I therefore reject Ground 3(b).

6.6 Ground 3(d): Discount for Plea

83. Just as Mr Moloney did, I take Ground 3(d) next. That is a complaint that there was insufficient credit for the equivalent of the appellant's guilty plea. I reject that submission for two reasons.

84. First, it might be said that, on the facts, there should be no or no significant discount for the equivalent of a guilty plea, given that the argument that the Cotter Order did not apply to the appellant (and that therefore there was no contempt of court) has continued right up to this judgment. In a criminal case, if a defendant admits the facts of the offence but says that their admission is subject to the resolution of an overarching issue (whether following legal argument or a Newton Hearing) which may provide a complete defence, they will usually plead not guilty. The discount for plea does not start to run until that matter has been resolved against the defendant and a guilty plea entered. Here, the argument that the appellant was not in contempt of court at all has been run right up to the Court of Appeal. There has therefore been no equivalent of a guilty plea.

85. Secondly, to the extent that any credit is due, it would be modest. The appellant did not leave the CPL when he was served with the committal proceedings. He did not participate in the legal process until the last moment, failing to comply with the earlier directions of the court. Even if one ignores the qualified nature of any plea, it was effectively made just before the hearing. In a criminal case, that would not entitle a defendant to more than about 10% discount. Here, given the qualified nature of the plea, the appropriate reduction would have been even less.

86. For those reason, I do not consider that there is anything in Ground 3(d).

6.7 Ground 3(c) 20% Discount for Mitigation

87. As noted above, the judge identified a 20% discount for all matters of mitigation. The complaint is that the 20% was not broken down.

88. I reject that criticism. In a criminal case, a judge must identify the discount for a guilty plea, because there are strict guidelines relating to the precise discount available in any given circumstance. That does not apply here. Aside from that, a judge sentencing in the Crown Court will usually take all other mitigating factors into account in one composite discount. In a contempt case, the judge is quite entitled to take an overall percentage to reflect the mitigating factors.

89. I should also make it quite clear that, in my view, the judge's 20% discount in this case was generous. There was, given the appellant's history, little that could be said by way of mitigation.

90. I therefore reject Ground 3(c).

6.8 Summary On Grounds 2 &3

91. For the reasons set out above, I consider that there is nothing in Grounds 2 or 3. They are either wrong in principle or not applicable on the facts of this case. They do not meet the applicable test on appeal noted at paragraph 56 above.

7. The Overall Sanction

92. The overall sanction in this case was a custodial term of 268 days and a fine of £3,000.

93. It was not appropriate to fine the appellant on the particular facts of this case. He has no assets, and was the subject of a term of immediate custody. The reasons why a fine is usually inappropriate for an impoverished protestor serving a term of imprisonment are explained in *Breen v Esso* at [83]-[88]. The fine must therefore be quashed.

94. As to the methodology by which the judge calculated the overall term, I do not consider it appropriate for the reasons set out in *Breen v Esso* at [47]-[49]. In the light of that, and my acknowledgement above of the fact that the judge made some comments which were erroneous and/or irrelevant, it is appropriate for this court to review the overall sanction and to consider whether the period of 268 days was excessive or unreasonable.

95. In my view, the period of 268 days imprisonment (the equivalent of just under 9 months) was not excessive or unreasonable. The judge found that the appellant's culpability was high and that the harm that he had caused was wide-ranging. As I have said, there is no appeal against those findings and, in my judgment, they were rightly made. In addition, for the reasons I have already explained, there were a range of aggravating factors, including the appellant's previous history of offending, and the fact that there were earlier suspended sentences, whilst there was little in the way of mitigation.

96. The term was also consistent with the sanction imposed in recent cases. Depending on the circumstances of the case, a first time contemnor may receive immediate prison sentences of between 3 to 6 months: see *Heyatawin* and *Breen*. The appellant in this case was a serial contemnor with suspended sentences imposed in the past. He must therefore have expected a significantly longer custodial term than in those cases.

97. For those reasons, I consider that the appellant can have no complaints about the term imposed by the judge. It was in no way excessive or unreasonable. Save for quashing the fine of £3,000, I would dismiss this appeal.

LORD JUSTICE PHILLIPS:

98. I agree with Coulson LJ, for the reasons he gives, that the Judge was wrong not to entertain the legal argument that the appellant was not caught by the terms of the injunction granted by the Cotter Order. I take a different view, however, as to the merits of that argument. For my part, I would allow the appeal on ground 4.

99. The Cotter Order is expressly addressed to the appellant, naming him as D33. Paragraph 6 grants relief against him (in common with all defendants) in the form of a declaration, including that, in the event that he enters the CPL, the respondents are entitled to possession as against him. The Cotter Order does not list him as one of the named defendants against whom an injunction is granted, first and foremost, against entering the CPL.

100. Contrary to the Judge's alternative finding (having refused to entertain the objection), I see no basis for interpreting the Cotter Order so that, upon entering the CPL, the appellant became not only D33 but also a "person unknown" within the rubric describing D1 for the following reasons:

   i) It is plain that D33 is not only a "known" person for the purposes of the proceedings and the Order, but is "known" as a person who may subsequently enter the CPL, as expressly referenced (and for which relief is granted) in paragraph 6 of the Order. In those circumstances, I cannot see how D33 could fall within the definition of person unknown within the rubric of D1. Interpreting D1 as including the appellant would be directly contrary to the authoritative guidance provided by this Court in the *Canada Goose* case at [82] that "If they are known and have been identified, they must be joined as individual defendants in the proceedings". There is a clear and principled distinction between unknown persons and those who are known about, a distinction which rules out, quite clearly in my judgment, interpreting D1 as including a known defendant such as D33. While the distinction may be most important in relation to questions of service, the fact that service does not in the event prove to be an issue does not remove the distinction which must be made (and understood to have been made) at the time an injunction is granted.

   ii) The Order fully anticipates that the appellant (as D33) may subsequently enter the CPL, and grants declaratory relief in that regard, but not injunctive relief. In those circumstances, it would be bizarre, and in my judgment impermissible, to find that an injunction was not applied for or granted in respect of anticipated conduct by a known defendant, but came into effect by the back-door through the rubric defining D1. Orders should not, in my judgment, be interpreted in that way.

101. I appreciate that, as the appellant believed that he was bound by the injunction at the time it was made and served, the above analysis would exculpate him on a technical and (in the broadest sense) unmeritorious basis. However, such arguments are properly open to any defendant and require close attention, particularly in the context of applications to commit for contempt. The Judge was quite wrong not to entertain the argument and it is concerning that he indicated that it would be held against the appellant if the point was pursued. If the appellant was not, as I would find, subject to the injunction by virtue of a technical flaw in the drafting of the Order, it would be quite wrong to commit him nonetheless. The proper course might have been to apply to commit him on the basis that, whilst on notice of the Order, he assisted or procured its breach by those injuncted, but I make no comment on whether such an application would have been (or would in future be) justified or successful.

102. If the appellant's liability for contempt is upheld notwithstanding my views, I am in full agreement with Coulson LJ as to the proper disposal of the issues arising in relation to the appropriate sanction to be imposed.

LORD JUSTICE EDIS:

103. I agree with the judgment of Coulson LJ. I would make the order he proposes for the reasons he gives. I add only two observations about sentencing in these cases.

104. First, I would respectfully endorse these observations made by Coulson LJ in *Breen and others v. Esso Petroleum Company Limited* [2022] EWCA Civ 1405 at paragraph 8.

> "In accordance with general principles, any sanction for civil contempt must be just and proportionate. It must not be excessive. But in civil contempt cases, the purposes of sanctions are rather different from those in criminal cases. Whilst they include punishment and rehabilitation, an important aspect of the harm is the breach of the court's order: see [17] of *Cuciurean.* An important objective of the sanction is to ensure future compliance with the order in question: see *Willoughby v Solihull Metropolitan Borough Council* [2013] EWCA Civ 699 at [20]."

105. I would suggest that in civil contempts, as opposed to criminal contempts, punishment is probably a less significant aim of an order than securing compliance with the orders of the court. The distinction was examined by Lord Toulson in *R v. O'Brien* [2014] UKSC 23; [2014] AC 1246 at [42]:-

> "The question whether a contempt is a criminal contempt does not depend on the nature of the *court* to which the contempt was displayed; it depends on nature of the *conduct*. To burst into a court room and disrupt a civil trial would be a criminal contempt just as much as if the court had been conducting a criminal trial. Conversely, disobedience to a procedural order of a court is not in itself a crime, just because the order was made in the course of criminal proceedings. To hold that a breach of a procedural order made in a criminal court is itself a crime would be to introduce an unjustified and anomalous extension of the criminal law. "Civil contempt" is not confined to contempt of a civil court. It simply denotes a contempt which is not itself a crime."

106. Although some of the authorities refer to rehabilitation as a purpose of committal orders in cases involving breaches of orders it is not necessarily true that short orders of imprisonment such as are frequently found in such cases have any rehabilitative effect. They are amply justified where they are required in order to secure compliance with an order of the court even though they may not tend to promote rehabilitation. The court will always seek to impose the least onerous order it can, while at the same time securing compliance with its order. Where that requires immediate committal to prison that will be the result even though the effect is likely to be seriously adverse to the contemnor and not conducive to rehabilitation.

107. The civil court cannot impose community orders which are designed to promote rehabilitation. In some of the statutory schemes for civil injunctions there are powers to impose positive requirements, but in practice there is often no infrastructure to enable these orders to be made. Usually, the choice of sanction is limited to fines, costs orders and suspended or immediate committal orders.

108. The statutory purposes of sentencing established by section 57 of the Sentencing Act 2020 do not apply in the contempt jurisdiction.

109. The second observation I would make concerns the use of a fine in conjunction with a sentence of imprisonment. I agree with Coulson LJ that the fine in this case was wrong because the appellant does not have the means to pay it and enforcement attempts will be a further drain on public resources. However, I consider that there will be cases where a fine and a committal to prison may well be appropriate.

110. It is clear that no prison term should be imposed where the court concludes that a fine constitutes a sufficient sanction. The question arises where a court decides that the custody threshold is met and further decides that compliance with the order would be more effectively secured if a fine were also imposed on a person with the means to pay it.

111. *Arlidge Eady & Smith On Contempt* 5th Edition at [14-118] says:-

> "It has long been established that the courts may impose fines for criminal contempt, either with or without sentences of imprisonment."

In this respect there is no reason why the powers of the court should differ as between criminal and civil contempt. It may well be that orders for a committal to prison and a fine are rare and confined to cases of people with very substantial assets who show themselves to be prepared to lose their liberty but may be more concerned about those assets. In appropriate cases I would say that they should be available.

Neutral citation number: [2022] EWHC 3382 (Ch)

No: PT-2022-MAN-000145

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
IN MANCHESTER
PROPERTY TRUST AND PROBATE LIST (ChD)

Manchester Civil Justice Centre
1 Bridge Street
Manchester M60 9DJ

Wednesday, 30 November 2022

Before:

HIS HONOUR JUDGE HODGE KC
Sitting as a Judge of the High Court

Between:

VISTRA TRUST CORPORATION (UK) LIMITED
(as trustee for the Property Income Trust for Charities)

Claimant

- and -

CDS (SUPERSTORES INTERNATIONAL) LIMITED

Defendant

MS KATHARINE HOLLAND KC (instructed by **Pinsent Masons LLP**) appeared on behalf of the Claimant.

MS STEPHANIE TOZER KC (instructed by **Osborne Clarke LLP**) appeared on behalf of the Defendant.

A

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B

APPROVED JUDGMENT

C

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H

JUDGE HODGE KC:

1 This is my extemporary judgment on the first hearing of a Part 8 claim issued on 14 October 2022 by Vistra Trust Corporation (UK) Limited, as trustee of the Property Income Trust for Charities (as claimant) against CDS (Superstores International) Limited (as defendant), and proceeding in the Property Trust and Probate List of the Business and Property Courts in Manchester under Case No: PT-2022-MAN-000145.

2 At this hearing, Ms Katharine Holland KC appears for the claimant and Ms Stephanie Tozer KC appears for the defendant. Both counsel have produced helpful written skeleton arguments dated (in the case of Ms Holland) 23 November 2022 and (in the case of Ms Tozer) 25 November 2022.

3 This is the first hearing of the Part 8 claim; and it is also the return date of an application, issued by the claimant on 10 November 2022, seeking summary judgment under CPR 24 on the grounds that the claimant believes, on the evidence, that the defendant has no real prospect of successfully defending the claim and that the claimant knows of no other reason why the disposal of this claim should await a trial.

4 In support of the claim and Part 24 application there are now no less than three witness statements, dated 13 October, 9 November and 29 November 2022, from Mr Scott Robert Fawcett. He is a director of asset management at Mayfair Capital Investment Limited, which is charged with the management of the assets of the claimant investment fund, including the property the subject of this Part 8 claim, which is a retail superstore trading as 'The Range' and situated at Dennis Road, Widnes. In answer to the claim and application, there are two

witness statements from Mr Michael Cotter, dated 1 and 17 November 2022. Mr Cotter is the financial controller and property manager of the defendant company.

5 The nature of the claim is set out in the details forming part of the Part 8 claim form. It relates to a lease, dated 11 February 2008, of the property which was made between Property Alliance Group Limited (as landlord) and B&Q Plc (as tenant). The original term was for 21 years from and including 11 February 2008, and thus expiring on 11 February 2029; but that fixed term was subject to a tenant's contractual break option, contained within clause 21 of the lease, in the following terms:

> "If the Tenant shall desire to determine the Term on or after 11th February 2023 and shall give to the Landlord not less than 6 calendar months prior notice in writing of its desire then this Lease and everything herein contained shall cease and determine on such date but without prejudice to any claim by either party against the other in respect of any antecedent breach of any covenant or condition herein contained."

I would observe that that tenant's contractual break option is not in any way expressly subject to prior compliance with the tenant's covenants in the lease.

6 On 21 December 2015 the reversion immediately expected upon the determination of the lease became vested in the claimant. By letter dated 10 December 2018 from Birketts LLP, who were then the solicitors acting for B&Q, the claimant was informed that B&Q *"wishes to terminate the Lease on 11 February 2023 in accordance with clause 21 of the Lease"*. That letter was expressed on its face to be sent by special delivery and first-class post. It also stated that Birketts acted for Butler Mason Limited, which was the managing agent with power of attorney for and on behalf of B&Q Plc, the tenant of the premises under the lease dated 11 February 2008. The letter stated that, for the avoidance of doubt, Birketts enclosed a formal break notice and would be grateful if the claimant could acknowledge safe receipt by signing,

dating and returning the duplicate notice enclosed with the letter. Accompanying that letter was the tenant's notice to terminate, which was expressed to be given by Birketts LLP as solicitors and agents acting for and on behalf of the tenant. It was expressly given pursuant to clause 21 of the lease. There is no evidence that, as requested by Birketts, the claimant ever signed any acknowledgment of having received the notice to terminate.

7 On 26 November 2020, the lease was assigned by B&Q to the defendant; and, on the same day, a licence to assign was entered into between the claimant, B&Q, and the defendant. The transfer is exhibited to the first witness statement of Mr Fawcett and was executed as a deed by Butler Mason Limited as attorney for B&Q Limited. Likewise, the licence to assign was similarly put in evidence, and was also executed as a deed by Butler Mason Limited as attorney for B&Q Limited.

8 On 30 June 2022, the defendant purported to make a tenant's request for a new business tenancy under s.26 of the Landlord and Tenant Act 1954 for a term of 15 years, beginning on 12 February 2023, namely the day after the break date. It is the claimant's case that that request was not a valid request for the purposes of s.26 of the 1954 Act and that the defendant was not entitled to seek a new tenancy under that Act. That is said to be the effect of s.26(4) of the 1954 Act; the effect of a decision of Rattee J, at first instance, in *Garston v Scottish Widows' Fund and Life Assurance Society* [1996] 1 WLR 834, which was approved on appeal by the Court of Appeal at [1998] 1 WLR 1583; and it is also said to follow from s.24(1) of the 1954 Act. It is therefore the claimant's case that the lease will expire by virtue of the break notice on 11 February 2023, whereupon the defendant will be obliged to deliver up possession of the property in accordance with the tenant's covenant to yield up in clause 11.15 of the lease.

9 In correspondence between the claimant's solicitors, Pinsent Masons LLP, and the solicitors then acting for the defendant, Paul Taylor Solicitors, the defendant has disputed the claimant's case that the lease will come to an end on 11 February 2023. As a result, the claimant seeks a declaration from the court that, pursuant to s.26(4) of the 1954 Act, the s.26 request was not a valid request for the purposes of that section as a result of the earlier break notice having been served under the terms of the lease. The claimant also seeks a declaration that the lease will terminate on 11 February 2023 pursuant to the break notice, and that the defendant is thereupon obliged to deliver up vacant possession of the property.

10 The defendant filed an acknowledgment of service on 2 November 2022. In section B the defendant states that it intends to contest the claim and to seek a declaration that the lease will not terminate on 11 February 2023 and that the defendant is entitled to remain in possession of the property thereafter; alternatively, that its s.26(4) request is valid. In section D, the defendant objects to the claimant proceeding under Part 8 on the footing that there is a substantial dispute of fact about whether a valid break notice has been served by the defendant's predecessor so, in accordance with CPR 8.1(2), it is not appropriate for the claimant to make use of the Part 8 procedure.

11 This claim had been preceded by a number of solicitors' letters, through which I have been taken at some length by Ms Holland for the claimant. The correspondence effectively begins with a letter from Pinsent Masons, for the claimant, dated 14 July 2022, to the defendant's then solicitors. By way of background, Pinsent Masons state that, as the defendant is aware, its predecessor in title to the premises, B&Q Limited, had served a valid break notice dated 10 December 2018 to terminate the lease on 11 February 2023, and that the lease was subsequently assigned to the defendant with full knowledge of that break notice. Reference is made to the purported s.26 notice; and the claimant's solicitors assert that that request is

invalid and ineffective on the basis that it is trite law that the service of a break notice by a tenant prohibits a tenant from serving a valid request for a new tenancy pursuant to s.26.

12 In a letter to Paul Taylor Solicitors, for the defendant, dated 24 August 2022, Pinsent Masons state, at numbered paragraph 2, that the claimant's position is that the break notice constituted a 'notice to quit' for the purposes of the 1954 Act and, as a result, prohibited the defendant from serving any notice under s.26 of the 1954 Act. In response, by letter dated 24 August 2022, the defendant's solicitors state:

> "While the break notice was effective to bring to an end the original tenancy ending on the 11 February 2028 the result was to create a new tenancy ending on the 11th February 2023 to which, absent any express exclusion clause in the lease, the Act must clearly apply."

That letter clearly proceeded on the footing that there had been a valid break notice.

13 However, a change of position became evident in a letter from the defendant's solicitors dated 7 October 2022. That letter acknowledges that the break notice is central to the claimant's case and that in order for the claimant to succeed it would need to be unimpeachable. However, there are said to be *"a number of issues, grey areas and uncertainties which raise question marks about its efficacy"*, the claimant's ability to rely on it, or the extent to which it is proper for the claimant to do so. As a result, the solicitors express themselves of the view that it is unlikely to stand up to the sort of scrutiny which it would receive in the course of any proceedings. They proceed to set out those issues. So far as material, they are said to be as follows:

> "a. the break notice was served in the name of B&Q plc but signed by Birketts, the solicitors for Butler & Mason. Are you able please to furnish us with any authority giving Butler & Mason or their solicitors power to sign the notice on behalf of B&Q plc?

b. a duplicate notice was delivered at the same time containing an acknowledgment of service, but this was not signed and returned and no admission was made, leaving a question mark as to its validity."

14 No issue was expressly raised as to the validity of the service of the break notice. Pinsent Masons responded to those queries by letter dated 13 October 2022. That letter includes the following:

> "Vistra's clear position is that the Break Notice served by B&Q Plc is valid. Taking each of the points you have made in turn Vistra's response is as follows:-
>
> a. We enclose copies of the following letters received by Vistra:-
>
> i. Letter from Butler Mason Limited dated 28 September 2016 explaining that they were appointed as asset manager to this property by B&Q Plc and all correspondence should be sent to them [That letter is at p.154 of the hearing bundle and made it clear that Butler Mason Limited 'will be dealing with all matters relating to B&Q's lease of this property, including all payments, lease and property matters'];
>
> ii. Letter from B&Q Plc dated 4 October 2016 further explaining that they had appointed Butler Mason Limited as their asset manager [That letter is at p.155 and states: 'Please note that from 19 September 2016 they will take on overall responsibility for the management of this property portfolio. Please accept this letter as authority to forward all demands for rent, service charge and insurance together with any correspondence and copies of notices directly to their registered office'];
>
> iii. Letter dated 10 July 2018 from Birketts Solicitors who act for B&Q explaining that Butler Mason Limited are B&Q Plc's managing agent with power of attorney [That letter is at p.156 and began: 'We act for Butler Mason Limited which is the managing agent with power of attorney for and on behalf [of] B&Q Plc, the tenant of the above premises under a lease dated 11 February 2018']; and
>
> iv. Letter dated 28 September 2018 again from Birketts Solicitors who again explained that Butler Mason Limited are B&Q Plc's managing agent with power of attorney [That letter is at p.158 and began: 'We act for and on behalf of Butler Mason Limited which in turn is the managing agent with power of attorney for and on behalf of B&Q Plc. As you are aware, B&Q is your current tenant of the above premises under a lease dated 11 February 2008']."

15 Returning to the Pinsent Masons letter dated 13 October 2022, that continues:

> "All these letters pre-date the service of the Break Notice on 10 December 2018 and clearly explain and represent that Mason Butler Limited are authorised by B&Q Plc to deal with this property and Lease on behalf of B&Q Plc.
>
> Further, and perhaps more telling, is the fact that [the defendant] has itself accepted the authority of Butler Masons Limited to deal with this property and Lease on behalf of B&Q Plc as [the defendant] are a party to both the Licence to Assign the Lease dated 26 November 2020 and the Transfer of the Lease also dated 26 November 2020 (where [the defendant] was paid a reverse premium of £960,000 by B&Q Plc to take an assignment of the Lease) with B&Q Plc and both these documents are executed by Butler Masons Limited as attorney for B&Q Plc.
>
> b. The validity of the Break Notice was not conditional upon Vistra acknowledging receipt of the Break Notice and therefore the point you raise is totally irrelevant."

There appears to have been no response to that letter, although it is fair to observe that the claim form was issued on the following day. Thereafter, the defendant appears to have instructed Osborne Clarke LLP to act as its litigation solicitors.

16 I have already mentioned that there are now three witness statements from Mr Fawcett, including one dated 29 November, which is yesterday. Ms Tozer objected to the claimant placing any reliance on this witness statement. The position is that CPR 8.5 contains detailed provisions for the filing and service of written evidence on Part 8 claims. CPR 8.6 provides that no written evidence may be relied on at the hearing of the claim unless (a) it has been served in accordance with rule 8.5, or (b) the court gives permission.

17 When this was pointed out to her, Ms Holland invited the court to give the claimant permission to rely upon Mr Fawcett's third witness statement. In summary, her grounds were that Mr Fawcett's third witness statement responds to a point raised for the first time in Ms Tozer's skeleton argument. That point relates to the service and validity of the break notice itself. It

is perhaps appropriate, at this point, in order to put that issue into context, to refer to certain passages from Mr Cotter's two witness statements.

18 In his first witness statement, at paragraphs 17 through to 21, Mr Cotter relates that he cannot recall how and when he had first become aware that B&Q had purported to serve a break notice on the landlord, although he acknowledges that it was certainly before the defendant completed its assignment from B&Q. As he remembers it, it did not seem very significant, when he first learned of it, because at that time the intention had been that the parties would enter into a deed of variation to bring the lease to an end on the break date and that there would be a reversionary lease after that. The first Mr Cotter heard that the landlord was suggesting that the break was effective, and that it might not proceed with the reversionary lease, was an email he had received from Mr Fawcett on 24 November - and thus two days before the transfer of the lease completed - asking Mr Cotter to speak to Mr Fawcett after he had spoken to B&Q's management company.

19 Mr Cotter relates that he had started to get concerned that things were not progressing as they should when he had been advised of 'radio silence' by his solicitors, Paul Taylor, a few days earlier. Mr Cotter relates that although he had been a little concerned in the days leading up to 24 November 2020, because Paul Taylor had advised that there was radio silence from the other side, it was not until he had received an email from Mr Fawcett on that day, asking him to call him once he had spoken to B&Q's managing agent, that Mr Cotter realised that the deal might not go through as they had discussed.

20 Mr Cotter does not recall discussing the precise legal mechanics during his call with the managing agent, but he did understand that the claimant was now saying that the defendant could only have until 11 February 2023, and not the 15 years they had originally discussed.

Mr Cotter states that to say that he *"was surprised is an understatement"* because up until that point, all negotiations had clearly been on the basis that the lease would not terminate on the break date. That was precisely the purpose of the deed of variation. The claimant's lawyers have never explained to the defendant why they suddenly concluded that a valid break notice had been served, and that the lease would terminate on the break date, when this had not been their position previously. The defendant completed its assignment on 26 November 2020 and began fitting out the unit the following day. It has traded from the premises since 26 February 2021, and the defendant wishes to continue doing so.

21 It is clear from that witness evidence that Mr Cotter, and the defendant, were aware of the break notice prior to the defendant's completion of the assignment of the lease to itself from B&Q. It is also clear, from the emails exhibited to Mr Fawcett's first witness statement, that the claimant's solicitors had informed B&Q's solicitors, Birketts, that the claimant had entered into an agreement with a third party to take a new lease of the unit after the expiry of the current lease following service of the break notice. Birketts were invited to make the defendant aware of this, and to make it clear that the claimant would not be offering the defendant a reversionary lease. That instruction was contained within an email of 25 November at 8.15 a.m. on the day before the assignment completed. Later that morning, at 9.28 a.m., Birketts responded stating that the prospective assignee, i.e. the defendant, was aware of the claimant's agreement with the third party.

22 In his second witness statement, at paragraph 10, Mr Cotter states that, to the best of his recollection, and having refreshed his memory from his solicitors' file of papers, the first time the defendant was provided with a copy of the break notice was on 25 November 2020, which was the day before completion. He continues:

> "We have never acknowledged that the break notice was valid, was validly served, or been provided with any evidence that this was the case."

That is the first reference to any issue concerning service of the break notice. It does not include any positive assertion that the break notice had not been validly served.

23 At paragraph 13, Mr Cotter raises, again apparently for the first time, a reference to the results of searches of the Companies House database for B&Q. He states that he notes that the break notice was served on behalf of 'B&Q plc', with no gaps between B, the ampersand, and Q, whereas the correct name for B&Q at the date of the break notice was B & Q Plc (with gaps between the B, the ampersand, and the Q); and that this was later changed to the name given in the break notice on 6 November 2019. Mr Cotter exhibits copies of the relevant entries from the Companies House database for B&Q, and also a number of search results within the Companies House database for other companies which have, or have had, similar names to 'B&Q'.

24 It was only in Ms Tozer's skeleton argument, at paragraph 14(a), that Ms Tozer first raised any issue as to how the alleged break notice had in fact been served. The point she made was that clause 16 of the lease made it clear that unless the claimant acknowledged receipt - which it is common ground on the evidence that it has not done - then the break notice would be valid only if it had been sent by special delivery. Ms Tozer made the point that the claimant has not made any assertion that the break notice was sent by special delivery; and there is no evidence before the court that this was the case, other than a reference on the relevant letterhead. For this reason, she submits that there can be no question of judgment being given in the claimant's favour at this stage.

25 At paragraph 14(b) of her skeleton, Ms Tozer made the point that, equally importantly, the claimant has failed to provide any proper answer to the defendant's question about whether Birketts had in fact been authorised to serve the alleged break notice on behalf of B&Q Plc. The claimant has not provided the power of attorney so the court could not determine whether serving a notice to terminate the existing lease was within the scope of Butler Mason Limited's authority or not. Her submission is that the claimant's assertion that this should be assumed in its favour, so that summary judgment should be given on its claim, is somewhat bold in the face of the defendant's challenge. Nor has any evidence been produced to show that any power of attorney was in existence as at December 2018. It is in order to address those points that Mr Fawcett's third witness statement was served yesterday evening. Ms Tozer apparently only received it whilst she was travelling by train from London to Manchester.

26 In his third witness statement, Mr Fawcett asserts that the break notice was served by special delivery by B&Q's lawyers, Birketts, and was received by the claimant at its registered office address. Mr Fawcett says that this was communicated to him by email from B&Q's agent, Howard Cooke, in an email to him dated 10 December 2018 enclosing the break notice; and by Barry Gowdy, who was a director of the claimant, in an email to Mr Fawcett dated 13 December 2018. He says that there was no contractual need to acknowledge receipt of the break notice. At all times, the claimant is said to have accepted the validity of the break notice.

27 Ms Tozer points out that the emails which Mr Fawcett exhibits merely state, in the case of the email from B&Q's agent, *"break notice for the units that will no doubt reach you eventually but I thought I would get you a copy now"*. Ms Tozer also points out that the other email, from a director of the claimant to Mr Fawcett, merely states:

> *"Please see attached scanned copy letter and documents from Birketts. Please advise if you wish me to sign and return the duplicate notice."*

I accept Ms Tozer's submission that all of this adds nothing of any real evidential weight to the evidence that is already before the court as to whether the notice was served by special delivery. I could, therefore, see no reason why the claimant should not be allowed to rely on that evidence.

28 The other element of the new evidence to be found in Mr Fawcett's third witness statement is the fact that, following service of the break notice, negotiations with B&Q had continued, and draft heads of terms had been circulated by B&Q's agents, dated 15 April 2019. Mr Fawcett points out that paragraph 8 of those heads of terms states that:

> "The existing lease is at a passing rent of £748,858 per annum, expiring on 11 February 2028 with a tenant's break notice, which has already been exercised, so expiry is 11 February 2023."

29 Those heads of terms had been produced by Savills, who were B&Q's agents, on Savills' notepaper, and had been forwarded to Mr Fawcett by the claimant's agent, Jones Lang LaSalle, acting by Mark Rudman. I could see no reason why that evidence should not be admitted at this late stage. I can see no proper basis upon which the defendant would need to respond to that evidence; and it adds very little to the evidence that is already before the court. It is evidence that the former tenant, B&Q, and its agents, regarded the break notice as having already been exercised; but it is no evidence that that position had been accepted by the claimant.

30 In short, I allowed Ms Holland to rely upon that evidence for three reasons: First, because it seemed to me that the assertion that there had been no valid service of the break notice, on the validity of which the defendant's s.26 request (which has given rise to this litigation) is

founded, was only advanced for the first time in Ms Tozer's skeleton argument, which was exchanged last Friday (25 November). Since then, there has been further activity in this litigation, in the form of an application by the defendant to exclude certain passages from Mr Fawcett's second witness statement, which has resulted in a hearing which, I am told, lasted three hours before HHJ Bever only yesterday. In those circumstances, I could understand why Mr Fawcett's third witness statement has been produced so late.

31 Secondly, it seemed to me to add very little to the evidence that was already before the court, for the reasons that Ms Tozer has advanced to me.

32 Thirdly, it seemed to me that there was very little, if any, evidence that the defendant could have adduced by way of response. The whole thrust of Ms Tozer's submissions is that this is not an appropriate case for summary judgment because the matter needs disclosure since the relevant events took place at a time when the defendant had no involvement with the property. That is why, Ms Tozer says, disclosure is required from the claimant, and possibly also third party disclosure from B&Q, their solicitors, Birketts, and their managing agents, Butler Mason Limited.

33 In those circumstances, I allowed the claimant to rely upon this further evidence, and refused Ms Tozer's application for an adjournment for the defendant to put in evidence in rebuttal. I should make it clear, however, that I would have decided this claim, and this application, in precisely the same way even if I had not had regard to Mr Fawcett's third witness statement.

34 In her skeleton argument on behalf of the defendant, Ms Tozer concedes that if, as she asserts, the alleged break notice was not effective, then the existing lease will not come to an end on 11 February and therefore the s.26 request dated 30 June 2022 must be invalid because the lease will remain 'on foot' beyond the date from which a new tenancy was requested.

However, Ms Tozer submits that if the break notice was effective, then her s.26 request would be valid, or at least that she has a case suitable for trial that that is the case.

35 Before turning to Ms Tozer's submissions, however, I remind myself that this is an application for summary judgment. Ms Tozer referred me to the law governing such applications, as summarised by Lewison J in *Easyair Limited v Opal Telecom Limited* [2009] EWHC 339 (Ch) at [15]. The correct approach on applications for summary judgment is as follows:

(i) The court must consider whether the defendant has a 'realistic' as opposed to a 'fanciful' prospect of success.

(ii) A 'realistic' defence is one that carries some degree of conviction, i.e., one that is more than merely arguable.

(iii) In reaching its conclusion, the court must not conduct a 'mini-trial'.

(iv) That, however, does not mean that the court must take at face value, and without analysis, everything that a defendant says in its statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents.

(v) In reaching its conclusion, however, the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial.

(vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should not be decided without the fuller investigation into the facts at trial than

is possible or permissible on an application for summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case might add to, or alter, the evidence available to any trial judge, and so affect the outcome of the case.

(vii) On the other hand, it is not uncommon for an application under Part 24 to give rise to a short point of law or construction; and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of that question, and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: If the respondent's case is bad in law, it will in truth have no real prospect of succeeding on its claim, or successfully defending the claim against it (as the case may be). Similarly, if the applicant's case is bad in law, the sooner that is determined the better. However, if it is possible to show, by evidence, that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist, and can be expected to be available at trial, it would be wrong to give summary judgment, because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on any question of construction.

36 At the end of oral submissions this morning, I referred both counsel to observations I have recently made in *The Metropolitan Borough Council of Sefton v Allenbuild Limited* [2022] EWHC 1443 (TCC). At [87], I fully accepted that in reaching its conclusion on an application for summary judgment, the court must take into account not only the evidence actually placed before it on that application but also the evidence that could reasonably be expected to be

available at trial. However, I went on to hold that a defendant must lay a sufficient evidential foundation for any submission that more evidence could reasonably be expected to be available at trial. A defendant should identify the nature of such evidence, and should explain why it was not presently available to be placed before the court. It was just not good enough for a defendant to express the unparticularised hope (like Mr Micawber in *David Copperfield*) that something might 'turn up'. I said that the fifth of the principles expounded by Lewison J in *Easyair* should not be seen as an endorsement of such Micawberism. In that case, I held that the defendant had laid no such evidential foundation, nor had the defendant persuaded me that there was any need, or any proper basis, for adjourning the summary judgment application. By way of example, the defendant had pointed to no difficulties in adducing any evidence from the solicitors who had represented it in the adjudication proceedings. In that case, pursuant to the overriding objective, and in the interests of proportionality, and the saving of the time and costs of a further hearing, involving further recourse to the court's scarce resources, justice to both parties had dictated that I should finally determine the summary judgment application at that hearing.

37 In response to that, Ms Tozer took me to passages at paragraph 24.2.5 of the current (2022) edition of Volume 1 of *Civil Procedure*, at pages 797-8. There it is emphasised that the overall burden of proof rests on the applicant to establish that there are grounds to believe that the respondent has no real prospect of success, and that there is no other reason for a trial. If an applicant for summary judgment adduces credible evidence in support of their application, the respondent becomes subject to an evidential burden of proving some real prospects of success, or some other reason for a trial. The standard of proof required of the respondent is not high; it suffices merely to rebut the applicant's statement of belief. In determining that question, the court must bear in mind that the respondent's case must carry some degree of conviction. The court is not required to accept, without analysis, anything that may be said

by a party in their statements before the court. In evaluating the prospects of the success of a claim or a defence, judges are not required to abandon their critical faculties; but the proper disposal of an issue under Part 24 does not involve the judge in conducting a mini-trial, so the court hearing a Part 24 application should be wary of trying issues of fact on evidence where the facts are apparently credible, and are to be set against the facts being advanced by the other side. Choosing between them is the function of the trial judge, and not the judge hearing an interim application, unless there is some inherent improbability in what is being asserted, or some extraneous evidence which would contradict it. When deciding whether the respondent has some real prospect of success, the court should not apply the standard which would be applicable at trial, namely the balance of probabilities, on the evidence presented on an application for summary judgment; the court should also consider the evidence that could be reasonably expected to be available at trial.

38 Ms Tozer, in her skeleton argument and her oral submissions, takes a number of points on the validity of the break notice. Her first point is that the break notice was given on 10 December 2018, to expire on 11 February 2023; that was some four years and two months before the expiry of the break notice. Ms Tozer submits that that was too long before the break date. She submits that a break notice should be given a reasonable time before the break date. She points out that in the present case the break date was the first occasion on which the rent for the premises was to be reviewed, on an upwards only basis, to the open market rent for the demised premises. Previous rent reviews had been to a predetermined rental level. She submits that the question of whether the break notice was served prematurely is a matter which requires the context of the lease to be weighed in order to determine what the parties objectively should be taken to have intended as to when the break notice might be served.

39 Ms Tozer has referred me to the decision of His Honour Judge Thomas, sitting as a judge of the Chancery Division, in *Multon v Cordell* [1986] 1 EGLR 44. That case involved an option for the renewal of a lease for a further term of 21 years after the expiry of the existing term of 35 years. It was not concerned with a tenant's break notice. The issue was whether a request to exercise the option, made as early as January 1981, was valid when the original term was only due to expire in 1984. The option in question provided that the landlord would, on the written request of the tenant, made three months before the expiration of the term thereby created, and if there should not, at the time of such request, be any existing breach or non-observance of any of the covenants on the part of the tenant, grant a new lease of the demised premises for a further term of 21 years from the expiration of the term, at the same rent, and containing the like covenants and provisos as were therein contained.

40 The judge held that the option clause contemplated that the request should be made a reasonably short time before the Christmas of 1983, especially in view of the proviso in the clause that there must be no breach or non-observance of covenants at the date of the request. Since the request had been made nearly three years before Christmas 1983, the judge held that it had not been made at a reasonable time and was, therefore, invalid. The judge's reasons are set out at page 45 between letters B and D. The judge held that in specifying a period of three months before the expiration of the term of 35 years, the clause was specifying a brief period before the expiration of that term; and this suggested to him that the request must be made within a reasonably short time before Christmas 1983. He also noted that the clause provided that breaches or non-observance of the tenant's covenants were to be considered at the time the request was made. It seemed to him that it must have been in the contemplation of the parties, when the lease was executed, that consideration of whether or not there were breaches of covenants should be as late in the term of years as was reasonably possible; in

other words, that there should not be a long interval between the request and the end of the term.

41 I have no doubt that in the particular context of that lease, and dealing with a tenant's option to renew rather than a tenant's option to break, the decision of the judge was entirely correct; but this case is, as Ms Holland submits, clearly distinguishable. This is an option to determine the lease, and not an option to require a new term. There is no significance in the date of exercise of the break, as there was with the date of the exercise of the option to renew in *Multon v Cordell*. When one is concerned with whether a lease is going to be brought to an end, there is advantage to both landlord and tenant in knowing as soon as possible whether the lease is going to come to an end prematurely, and in advance of its contractual expiry date, by the exercise of an earlier tenant's break clause.

42 Further, the clause in the present case is very differently worded to that in *Multon v Cordell*. Rather than referring to a written request made three months before the expiration of the term, clause 21 provides that if the tenant shall desire to determine the term on or after 11 February 2023, and shall give to the landlord not less than six calendar months' prior notice in writing of its desire, then the lease, and everything therein contained, shall cease and determine. The break notice has to be exercised not less than six calendar months prior to the break date, but there is no provision for any maximum period of notice; and I see no reason to imply any term that the notice is to be given only a reasonable time before a date six months before 11 February 2023.

43 In my judgment, there is no real prospect of the defendant succeeding at trial in an argument that the break notice is invalid because it was given prematurely. Ms Tozer submitted that at the time of the grant of the lease, the original parties could not possibly have intended that

a valid break notice could be served years ahead of the break date since there would be a very real risk that one party or the other would forget, due to changes in personnel or otherwise, that this had occurred, leading to injustice or potential hardship. In my judgment, it achieves certainty, and avoids any risk of forgetting about the need to exercise the break clause, to construe it as being exercisable at any time at least six months before the break date. In the present case, it was exercised soon after the immediately preceding rent review date; and I can see nothing wrong with that.

44 Ms Tozer's next point related to the fact that the break notice had been given by Birketts on behalf of B&Q, acting on the instructions of the managing agents. She submitted that there was no evidence of the terms, or scope, of the power of attorney pursuant to which Butler Mason had been acting as managing agent for B&Q Plc. I am entirely satisfied, on the documents that are before the court, that Birketts, acting as solicitors for Butler Mason, who had been invested with the powers of management of the property, had full authority from B&Q to give the break notice on their part. B&Q themselves had described Butler Mason's role as that of asset manager taking on overall responsibility for the management of this portfolio property; that was in their letter to the claimant of 4 October 2016. I am entirely satisfied that there can be no issue as to the authority of Birketts to have given the break notice on behalf of B&Q.

45 The next point is whether a reasonable recipient of the notice would have been in any doubt that it was given on behalf of B&Q Plc. The doubt is said to arise from the fact that in the Birketts letter, and also in the notice to terminate itself, the tenant is described as B&Q Plc (without any gaps between the B, the ampersand, and the Q) whereas at the time the notice was given, the correct name of the tenant was B & Q Plc (with gaps between the B, the ampersand, and the Q). I am in no doubt whatsoever that anyone reading this notice would

have entertained no doubt that it was being given on behalf of B&Q as the tenant of the lease. The notice is expressed to be given on behalf of the tenant of the premises under the lease dated 11 February 2008. When one looks to the lease itself, there is no consistency as to how the tenant's name appears: On the front sheet, there are gaps between the B, the ampersand, and the Q; but in the description of the tenant, in the prescribed clauses at LR3, there are no such gaps. When one goes to the parties clause, there are such gaps; but when one goes to the provisions as to service in clause 16.1.2.1, again there are no gaps between the B, the ampersand, and the Q. Thus there is no internal consistency in the lease itself as to how the tenant's name appears. I have no doubt whatsoever that the reasonable recipient of the break notice, and its accompanying letter, would have taken the view that it was being given on behalf of the tenant under the lease.

46 Ms Tozer's next point was that there is no evidence of proper service of the break notice in accordance with the provisions of the lease. She points to clause 16.1, which provides that a notice under the lease must be in writing and, unless the receiving party or its authorised agent acknowledges receipt, is valid if (and only if) it is given by hand or sent by special delivery post or recorded delivery. Ms Tozer points to the fact that there is no evidence that the notice was sent by special delivery beyond the fact that that is stated on the face of the notice. Ms Tozer makes the valid point that Mr Fawcett's third witness statement does not provide any documentary evidence in support of his assertion (at paragraph 10.3) that the break notice was served by special delivery by B&Q's lawyers, Birketts, and received by Vistra at its registered office address. However, the notice was, on its face, headed 'By Special Delivery' as well as 'First Class Post'. The break notice was clearly treated by the former tenant, B&Q Plc, as having been effective, as evidenced by the heads of terms for the B&Q surrender prepared by B&Q's own agents, Savills. The defendant's former solicitors had proceeded upon the footing that the break notice had been validly served. As they stated

in their letter of 24 August, the break notice was effective to bring to an end the original tenancy; and it was on that footing that the s.26 request had been served which has led to the present claim.

47 In my judgment, and against that background, to raise a triable issue as to the proper service of the break notice, it was incumbent upon the defendant to point to some credible evidence to contradict the statement on the face of the Birketts' covering letter that it had been sent by special delivery. There is no reason to question the validity of that statement made in a letter dated as long ago as 10 December 2018. In my judgment, the defendant has not raised a triable issue on that point.

48 Ms Tozer also submitted that anything may have happened between 2018 and 2020 that could have led to the break notice being withdrawn, or being treated as being of no effect. The fact, however, is that at the time it took the assignment, the defendant was aware that the claimant was asserting that there had been a valid break notice. The claimant's solicitors invited Birketts to make it clear to the defendant that the claimant had entered into an agreement with a third party to take a new lease of the unit following the expiry of the current lease after service of the break notice; and Birketts assured the claimant's solicitors that the defendant, as the prospective assignee, was aware of the claimant's agreement with that third party. In those circumstances, I am satisfied that it is mere speculation to suggest that the break notice had in any way been withdrawn or suspended. Ms Tozer makes the point that she only needs to succeed on any one of those arguments; but I am satisfied that she has not raised a triable issue as to any of them.

49 Finally, Ms Tozer accepts that if the alleged break notice was ineffective, then the s.26 request was invalid. However, she submits that if it was effective, then it does not follow that the s.26

request was invalid. Her argument is that s.26(4) of the Landlord and Tenant Act only precludes a tenant from serving a request where 'the tenant' has already given notice to quit. She submits that the natural meaning of those words is that a tenant is precluded from serving a s.26 request where it itself has already served a break notice. She submits that there is nothing on the face of the provision to suggest that it is intended to apply where a break notice has been served by a predecessor of the tenant making the s.26 request. In that regard, she points to provisions in the Landlord and Tenant Act 1927 which distinguish between the present tenant and its predecessors in title.

50 I cannot accept that submission. Section 26(4) provides that a tenant's request for a new tenancy shall not be made if the tenant has already given notice to quit. I see no reason for restricting that section to a notice to quit given by the same tenant as the tenant who makes the request for a new tenancy. Section 26(4) does not provide that a tenant's request for a new tenancy shall not be made if **that** tenant has already given notice to quit. If Ms Tozer were right, then if a tenant were to serve a contractual break notice, and then assign to a successor, that successor could serve a s.26 request. That seems to me to run counter to any sensible reading of the section; and also to run counter to the reasoning of the first instance judge, Rattee J, in *Garston v Scottish Widows*, which was expressly accepted by Nourse LJ (with the agreement of Mummery LJ and Sir John Vinelott) on appeal.

51 I accept Ms Holland's submissions that that does not represent the law. Once a tenant has served a contractual break notice, then any tenant of those premises is precluded from making a request for a new tenancy. Moreover, if, as in the present case, a request for a new tenancy were made to commence on the day immediately after the break date, then that would not comply with the requirements of s.26(2) because of the proviso to that subsection, as it has

been construed in *Garston v Scottish Widows*. That date would be earlier than the date when the current tenancy would otherwise come to an end by fluxion of time.

52 So, for all of those reasons, and despite Ms Tozer's valiant submissions to the contrary, I am entirely satisfied that the defendant has no real prospect of successfully defending this claim; and there is no suggestion that there is any other reason why the claim should proceed to a trial. I therefore grant the claimant's application. That concludes this extemporary judgment.

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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Official Court Reporters and Audio Transcribers

5 New Street Square, London, EC4A 3BF

Tel: 020 7831 5627 Fax: 020 7831 7737

civil@opus2.digital

This transcript has been approved by the Judge

Court of Appeal

*National Highways Ltd *v* Persons Unknown and others

[2023] EWCA Civ 182

2023 Feb 16; 23 Dame Victoria Sharp P, Sir Julian Flaux C, Lewison LJ

Injunction — Final — Anticipatory — Highway authority applying for summary judgment seeking final anticipatory injunction prohibiting protestors from disrupting strategic road network — Whether necessary for authority to prove protestors had already committed threatened torts in order to obtain injunction — CPR r 24.2

The claimant highway authority brought claims in trespass, private nuisance and public nuisance in connection with a series of protests in which the protesters were blocking motorways and other roads that formed part of the strategic road network. Having obtained interim anticipatory injunctions against a number of named defendants and "persons unknown", the claimant applied for summary judgment under CPR Pt 24[1] seeking a final anticipatory injunction against all defendants. The judge granted a final injunction against 24 named defendants who had already been found to have been in contempt of court for breaching the interim injunctions, but granted only an interim injunction against the 109 remaining named defendants and the unnamed defendants. The claimant appealed on the ground that the judge had erred in law in concluding that summary judgment for a final injunction could not be granted against the defendants if the claimant had not shown on the balance of probabilities that they had already committed the tort of trespass or nuisance.

On the appeal—

Held, allowing the appeal, that when considering whether an anticipatory injunction (whether final or interim) ought to be granted, it was not a necessary criterion that the defendant should have already committed the threatened tort; that, rather, the essence of an anticipatory injunction was that the tort was threatened and that, for some reason, the claimant's cause of action was not complete; that the test to be 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 defendant had no real prospect of successfully defending the claim for an injunction; that it followed that the judge in the present case had erred in law in assuming that, before summary judgment for a final anticipatory judgment could be granted, the claimant had to demonstrate that each defendant had committed the tort of trespass or nuisance and that there was no defence to a claim that such a tort had been committed; that, further, in applying the test under rule 24.2, the fact that very few of the defendants had served a defence or any evidence or otherwise engaged with the proceedings, despite having been given ample opportunity to do so, was of considerable relevance as supporting the claimant's case that the defendants had no real prospect of successfully defending the claim for an injunction at trial; that if the judge had applied the right test under rule 24.2 and had proper regard to the requirement in rule 24.5 that, if a respondent to a summary judgment application wished to rely on written evidence, he should file and serve such evidence he would, and ought to have, concluded that the 109 named defendants and the unnamed defendants had had no realistic prospect of successfully defending the claim at trial;

[1] CPR r 24.2: "The court may give summary judgment against a . . . defendant on the whole of a claim or on a particular issue if— (a) it considers that . . . (ii) that defendant has no real prospect of successfully defending the claim or issue; and (b) there is no other compelling reason why the case or issue should be disposed of at a trial . . ."

R 24.5(1): "If the respondent to an application for summary judgment wishes to rely on written evidence at the hearing, he must— (a) file the written evidence; and (b) serve copies on every other party to the application, at least 7 days before the summary judgment hearing."

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A and that, accordingly, a final injunction would be granted to the claimant in respect of all the defendants (post, paras 37–43).

Vastint Leeds BV v Persons Unknown [2019] 4 WLR 2 and *Barking and Dagenham London Borough Council v Persons Unknown* [2023] QB 295, CA applied.

Decision of Bennathan J [2022] EWHC 1105 (QB) reversed in part.

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

American Cyanamid Co v Ethicon Ltd [1975] AC 396; [1975] 2 WLR 316; [1975] 1 All ER 504, HL(E)
Barking and Dagenham London Borough Council v Persons Unknown [2022] EWCA Civ 13; [2023] QB 295; [2022] 2 WLR 946; [2022] 4 All ER 51, CA
Canada Goose UK Retail Ltd v Persons Unknown [2020] EWCA Civ 303; [2020] 1 WLR 2802; [2020] 4 All ER 575, CA
C *City of London Corpn v Samede* [2012] EWCA Civ 160; [2012] PTSR 1624; [2012] 2 All ER 1039, CA
Director of Public Prosecutions v Cuciurean [2022] EWHC 736 (Admin); [2022] QB 888; [2022] 3 WLR 446; [2022] 4 All ER 1043, DC
Director of Public Prosecutions v Jones (Margaret) [1999] 2 AC 240; [1999] 2 WLR 625; [1999] 2 All ER 257, HL(E)
Director of Public Prosecutions v Ziegler [2021] UKSC 23; [2022] AC 408; [2021] 3 WLR 179; [2021] 4 All ER 985, SC(E)
D *Easyair Ltd (trading as OpenAir) v Opal Telecom Ltd* [2009] EWHC 339 (Ch)
Ineos Upstream Ltd v Persons Unknown [2019] EWCA Civ 515; [2019] 4 WLR 100; [2019] 4 All ER 699, CA
King v Stiefel [2021] EWHC 1045 (Comm); (Note) [2022] 1 All ER (Comm) 990
Vastint Leeds BV v Persons Unknown [2018] EWHC 2456 (Ch); [2019] 4 WLR 2

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

Abaidildinov v Amin [2020] EWHC 2192 (Ch); [2020] 1 WLR 5120
Barking and Dagenham London Borough Council v Persons Unknown [2021] EWHC 1201 (QB); [2022] JPL 43
Canada Goose UK Retail Ltd v Persons Unknown [2019] EWHC 2459 (QB); [2020] 1 WLR 417
F *Cream Holdings Ltd v Banerjee* [2004] UKHL 44; [2005] 1 AC 253; [2004] 3 WLR 918; [2004] 4 All ER 617, HL(E)
Cuadrilla Bowland Ltd v Persons Unknown [2020] EWCA Civ 9; [2020] 4 WLR 29, CA
Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2006] EWCA Civ 661; [2007] FSR 3, CA
Elliott v Islington London Borough Council [2012] EWCA Civ 56; [2012] 7 EG 90 (CS), CA
G *Fourie v Le Roux* [2007] UKHL 1; [2007] 1 WLR 320; [2007] Bus LR 925; [2007] 1 All ER 1087; [2007] 1 All ER (Comm) 571, HL(E)
Hooper v Rogers [1975] Ch 43; [1974] 3 WLR 329; [1974] 3 All ER 417, CA
Ineos Upstream Ltd v Persons Unknown [2017] EWHC 2945 (Ch)
Lloyd v Symonds [1998] EHLR Dig 278, CA
Secretary of State for Transport v Persons Unknown [2019] EWHC 1437 (Ch)
Ward (AC) & Son Ltd v Catlin (Five) Ltd [2009] EWCA Civ 1098; [2010] Lloyd's Rep IR 301, CA

H **APPEAL** from Bennathan J

On 21 and 24 September and 2 October 2021 the claimant, National Highways Ltd, issued three claim forms using the modified CPR Pt 8 procedure provided by CPR r 65.43 by which it applied for interim

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anticipatory injunctions against the defendants, persons unknown, who from 13 September 2021 onwards had been involved in protests organised by Insulate Britain in and around London and south-east England, blocking highways forming part of the strategic road network ("SRN"). Interim injunctions without notice were granted (i) on 21 September 2021 by Lavender J in relation to the M25, (ii) on 24 September 2021 by Cavanagh J in relation to parts of the SRN in Kent and (iii) on 2 October 2021 by Holgate J in relation to M25 feeder roads. The injunctions were originally made only against persons unknown but contained an express obligation on the claimant to identify and add named defendants. On 1 October 2021 May J ordered that 113 people arrested for participation in the protests be added as named defendants. On the return date of 12 October 2021 the three injunctions were continued until trial or further order and the claims were ordered to proceed together. The claimant continued to add further named defendants as protests continued.

On 22 October 2021 the claimant applied under CPR Pt 81 for an order committing certain defendants to prison for contempt of court for alleged breaches of the M25 injunction. The committal applications were determined on 17 November 2021 (*National Highways Ltd v Heyatawin* [2021] EWHC 3078 (QB)), on 15 December 2021 (*National Highways Ltd v Buse* [2021] EWHC 3404 (QB)) and on 2 February 2022 (*National Highways Ltd v Springorum* [2022] EWHC 205 (QB)), with 24 of the 133 named defendants ("the contemnor defendants") being found to have been in contempt of court.

Also on 22 October 2021 the claimant filed consolidated particulars of claim in three actions, claiming that the conduct of the protesters constituted (i) trespass; (ii) private nuisance; and/or (iii) public nuisance. In October and November 2021 the claims were served on the named defendants. No named defendants were added after November 2021. On 24 March 2022 the claimant applied for summary judgment under CPR r 24.2 and final anticipatory injunctions against all defendants. By orders dated 9 and 12 May 2022 Bennathan J [2022] EWHC 1105 (QB) dismissed the application in part, granting summary judgment and a final injunction against the 24 contemnor defendants but refusing to grant summary judgment and granting an interim injunction against the remaining 109 named defendants and the unnamed defendants.

By an appellant's notice filed on or about 3 November 2022 and with the permission of and pursuant to the orders of the Court of Appeal (Whipple LJ) dated 27 October 2022 and 8 November 2022, the claimant appealed on the ground that the judge had erred in law in concluding that a final injunction could not be granted against the 109 named defendants (and the unnamed defendants) on the basis that a claim for a final injunction and/or the summary judgment procedure imported some further requirement on the claimant to show, on the balance of probabilities, that the defendants had already committed the torts in question. Pursuant to CRP rr 6.15(3)(b) and 23.4(2)(c) permission was given for the appeal to be heard without notice, the defendants having seven days from the date of the order within which to apply to set it aside or vary it, service of documents by posting being dispensed with pursuant to CPR rr 6.15 and 6.27, leave being given to serve by electronic means as detailed in the order.

The facts are stated in the judgment of the court, post, paras 2–25.

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A *Myriam Stacey KC*, *Admas Habteslasie* and *Michael Fry* (instructed by *DLA Piper UK LLP*) for the claimant.

David Crawford and Matthew Tulley, two of the named defendants, in person on behalf of the 109 named defendants.

The court took time for consideration.

B 23 February 2023. **SIR JULIAN FLAUX C** handed down the following judgment of the court.

Introduction

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

E *Factual and procedural background*

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

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

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

(2) In QB-2021-003626, Cavanagh J granted an interim injunction on 24 September 2021 in relation to parts of the SRN in Kent.

(3) In QB-2021-003737, Holgate J granted an interim injunction on 2 October 2021 in relation to M25 "feeder" roads.

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

4 Each of the injunctions was originally made only against persons unknown, but contained an express obligation on NHL to identify and add named defendants. To enable that to occur a number of disclosure orders were made, providing for chief constables of the relevant police forces to

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

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

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

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

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

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

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

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

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

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

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

F

The judgment below

13 Having set out the background to the claims, the judge referred to the SJ application at para 5. He evidently considered summary judgment a distinct process from the grant of a final injunction, since, at para 4 of the judgment, he says that the application for a final injunction is being made "in G addition to" the application for summary judgment. The judge then goes on to deal separately with summary judgment at paras 24–36 then with the injunction at paras 37–49 of the judgment.

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

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

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

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

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

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

18 The judge then turned to the question of injunction. At para 37 he cited the test for the grant of an interim injunction in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396. In relation to the first two aspects of that test, whether there was a serious issue to be tried and whether damages would be an adequate remedy, he concluded that they were easily met:

> "the actions previously carried out and those threatened by IB clearly amount to a strong basis for an action for trespass and private and public nuisance. Given the scale of disruption at risk and the impracticality of obtaining damages on that scale from a diverse group of protesters, some of whom may have no assets, damages would obviously not be an adequate remedy."

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

> "(1) Is there a strong possibility that the defendants will imminently act to infringe the claimants' rights?
>
> "(2) If so, would the harm be so 'grave and irreparable' that damages would be an inadequate remedy[?] I note that the use of those two

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A words raises the bar higher than the similar test found within *American Cyanamid*."

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

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

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

"(1) The courts need to be cautious before making orders that will render future protests by unknown people a contempt of court [*Ineos*].

"(2) The terms must be sufficiently clear and precise to enable persons E potentially effected [sic] to know what they must not do [*Ineos* and *Canada Goose*].

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

22 The judge then referred to cases where the balance between the F competing rights of protesters and others have been considered, starting with *Director of Public Prosecutions v Jones (Margaret)* [1999] 2 AC 240. As the judge noted, that decision was reached before the Human Rights Act 1998 came into force and has to be read with a degree of caution in the light of *Director of Public Prosecutions v Ziegler* [2022] AC 408. In that case, protesters blocked a road leading to a venue where an arms fair was held. The Supreme Court restored the decision of the district judge dismissing the G prosecution because the lawful excuse defence under section 137 of the Highways Act 1980 applied. The judge also referred to *Director of Public Prosecutions v Cuciurean* [2022] QB 888, saying at para 44:

"The limits to *Ziegler* were made clear in *Director of Public Prosecutions v Cuciurean* in which Lord Burnett CJ held that *Ziegler* did not impose an extra test in a case of aggravated trespass under section 68 H of the Criminal Justice and Public Order Act 1994, as article 10 and 11 rights do not generally include the right to trespass, and parliament had set the balance between those rights, and the lawful occupier's rights under article 1 of Protocol 1, by the terms of that offence. The type of trespass in *Cuciurean* was on premises to which the public were not

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allowed any access, so while the decision is important and, of course, informative, it does not provide a direct and complete answer to a case, such as the instant one of trespass on a highway."

23 It is worth noting, at this point, that under regulation 15 of the Motorways Traffic (England and Wales) Regulations 1982 (SI 1982/1163), pedestrians are not allowed on a motorway save in cases of accident or emergency (which these protests did not constitute) so that the defendants had no right to be on the M25 or other motorways and a lawful excuse defence would not have been available. Although we drew the attention of Ms Stacey to that provision, it was not relied upon by NHL, either before the judge or before this court.

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

> "in deciding the terms of the injunctions I had to be conscious of the right to protest which may, on occasions, mean a protest that causes some degree of interference to road users is lawful [*Jones* and *Ziegler*]. I should not ban lawful conduct unless it is necessary to do so as there is no other way to protect the claimant's rights [*Canada Goose*]. The consequence of my banning protests that should be permitted would be to expose protesters to sanctions up to and including imprisonment, as there is no human rights defence by the time of contempt proceedings [*National Highways Ltd v Heyatawin* [2022] Env LR 17]."

25 At para 49, in balancing the competing interests, he said:

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

The ground of appeal

26 NHL appeals on the single ground that the judge erred in law in concluding that a final injunction could not be granted against the 109

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A named defendants (and the unnamed defendants) on the basis that a claim for a final injunction and/or the summary judgment procedure imported some further requirement on NHL to show, on the balance of probabilities, that all defendants had actually already committed the torts in question.

The submissions

B **27** Ms Stacey submitted that the judge had applied the wrong legal tests in determining whether to grant a final precautionary or anticipatory injunction. The test for whether to grant such an injunction is whether there was an imminent or real risk of commission of the torts alleged, here trespass and nuisance: per Longmore LJ in *Ineos* [2019] 4 WLR 100, para 34(1). This form of injunction was granted when the claimant's rights were threatened, but, for whatever reason, the claimant's cause of action was not C complete: per Marcus Smith J in *Vastint* [2019] 4 WLR 2, para 31(2):

> "Quia timet injunctions are granted where the breach of a claimant's rights is threatened, but where (for some reason) the claimant's cause of action is not complete. This may be for a number of reasons. The threatened wrong may, as here, be entirely anticipatory."

D **28** The court's jurisdiction to grant quia timet or anticipatory injunctions extends to the grant of final injunctions, not just interim ones: *Vastint*, para 27. Ms Stacey referred to the two-stage test for considering whether to grant a quia timet injunction, set out by Marcus Smith J in *Vastint*, adopted by the judge in the present case and which we quoted at para 19 above. In relation to the first stage, whether there is a strong E possibility that, unless restrained, the defendants would imminently act in contravention of the claimant's rights, Ms Stacey drew attention to the factors identified by Marcus Smith J at para 31(4), in particular the attitude of the defendants, which she submitted was a significant factor here. In relation to the second stage, whether the threatened harm would be grave and irreparable, she referred to real harm suffered by members of the public, such as missing a hospital appointment or a funeral or having an accident.

F **29** In relation to that part of the final injunction which was sought against persons unknown, Ms Stacey submitted that, whilst the law had been in a state of flux the decision of the Court of Appeal in *Barking and Dagenham London Borough Council v Persons Unknown* [2023] QB 295 ("*Barking*") represents the law as it currently stands. In that case, this court held that there was power under section 37 of the Senior Courts Act 1981 to G grant a final injunction against persons who were unknown and unidentified, so-called "newcomers". This court held there was no jurisdictional obstacle to such an injunction, rejecting the reasoning of the earlier Court of Appeal decision in *Canada Goose* [2020] 1 WLR 2802.

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

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

32 In relation to summary judgment under CPR Pt 24, Ms Stacey submitted that there was no suggestion in CPR r 24.3 that summary judgment was not available in a claim for a final precautionary injunction. She referred to the well-established principles applicable to applications for summary judgment set out by Lewison J (as he then was) in *Easyair Ltd (trading as OpenAir) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) followed and applied many times since, as cited at para 24.2.3 of *Civil Procedure 2022*, vol 1. She submitted that principle (vii) was precisely in point here. There was a short point of law and there was no reason not to decide it on the SJ application.

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

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

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

35 At the hearing of the appeal, some 20 of the named defendants attended court. Three of those were contemnor defendants against whom the judge granted a final injunction and in respect of whom there was no appeal before the court. The other 17 were some of the 109 defendants.

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A One of them, David Crawford, was deputed to address the court on their behalf. He made polite and measured submissions explaining his own motives in participating in IB protests and denying that there was any imminent and real risk of further protests. Similar points about the absence of risk were made shortly by one of the other 17 named defendants, Matthew Tulley, who had served a defence and who also spoke.

B **36** The difficulty which the named defendants face is that none of their points was made before the judge because they simply failed to engage in the proceedings. In relation to the test for the grant of an anticipatory injunction, the judge considered the evidence which was before him and concluded that there was a real and imminent risk of the torts of trespass and nuisance being committed so as to justify the grant of the injunction against the 109 named defendants, albeit on an interim basis. There was and is no cross-appeal by C the defendants against any part of the judgment dealing with the grant of an injunction. The matters which Mr Crawford and Mr Tulley put forward cannot be relied upon before this court as a basis for challenging the judge's conclusion as to real and imminent risk and as to the appropriateness of granting an injunction.

D *Discussion*

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 E 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 F 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 G 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 H 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.

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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.

41 It is no answer to the failure to serve a defence or any evidence that, as the judge seems to have thought (see para 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* [2021] EWHC 1045 (Comm). If the judge had applied the right test under CPR r 24.2 and had had proper regard to CPR r 24.5, he would and should have concluded that none of the 109 named defendants had any realistic prospect of successfully defending the claim at trial and that, accordingly, NHL was entitled to a final injunction against those defendants.

42 Although *Barking* [2023] QB 295 was cited to the judge and he refers to it at para 36 of the judgment, albeit in a different context, the judge did not consider specifically in his judgment whether to grant a final injunction against the persons unknown. Given that the decision of the Court of Appeal in that case represents the current state of the law and we have no means of discerning what the Supreme Court will decide, it seems to us that we should grant a final injunction against the persons unknown, as sought by NHL. The alternative would be to adjourn that part of the appeal until after the Supreme Court has handed down judgment, but since, as we have said, there is to be a review hearing in the High Court in April to determine whether the injunctions should be continued or discharged it seems preferable to leave the High Court to determine the consequence in the event that the Supreme Court reverses the decision of the Court of Appeal.

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

Appeal allowed.

CATHERINE MAY, Solicitor

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Neutral Citation Number: [2023] EWHC 1038 (KB)

Case Nos: QB-2021-003841
and QB-2021-004122

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 May 2023

Before :

THE HONOURABLE MR JUSTICE MORRIS

- -

Between:

TRANSPORT FOR LONDON	**Claimant**
- and -	
(1) PERSONS UNKNOWN	
(2) MR ALEXANDER RODGER AND 137 OTHERS	**Defendants**

- -
- -

Andrew Fraser-Urquhart KC and Charles Forrest (instructed by **TfL**) for the **Claimant**
Barry Mitchell and **David Rinaldi** (Named Defendants 9 and 135) attended.
No attendance by or representation for the other **Defendants**

Hearing dates: 29 and 30 March 2023

- -

Approved Judgment

Mr Justice Morris :

Introduction

1. By this action Transport for London ("the Claimant") seeks a final injunction against 129 of the 138 named defendants ("the Named Defendants") and certain defined persons unknown ("Persons Unknown"). The Defendants, including the Persons Unknown, are supporters of, and activists connected with, "Insulate Britain" ("IB"). This is the final trial of the action.

2. The claims arise from disruptive protests on the highway since September 2021 under the auspices of IB and other affiliated groups. A very large proportion of those protests have involved protesters deliberately blocking roads by sitting down in the road, and often gluing themselves to its surface and/or "locking" themselves to each other to make their removal more time-consuming. The 129 Named Defendants are all alleged to have taken part in one or more IB protests.

3. By the final injunction, the Claimant seeks an order that prevents the blocking, for the purpose of protests, of roads and surrounding areas at 34 identified locations, referred to as the "IB Roads". The IB Roads are a very important part of the TfL Strategic Road Network (the "GLA Roads"). GLA Roads are, broadly speaking, the most important roads in Greater London, carrying a third of London's traffic, despite comprising only 5% of its road network length. The locations fall into two categories: first, bridges or junctions of great importance and their surrounding access roads; and secondly, certain longer protected stretches of road, such as the A4 and the North Circular Road.

4. This case is the latest in a number of similar "protest" cases which have come before this Court and the Court of Appeal. In particular, some of those cases concern protests under the auspices of a related group "Just Stop Oil" ("JSO"). In a number of those cases, written judgments have been handed down, covering issues, both legal and factual, similar to those in this case. In particular I have in mind the judgments of Bennathan J and the Court of Appeal in the case which I refer to as *NHL v IB*, reported at [2022] EWHC 1105 (QB) and [2023] EWCA Civ 182 respectively, and the judgments of Freedman J and Cavanagh J in the case which I refer to as *TfL v JSO*, reported at [2022] EWHC 3102 (KB) and [2023] EWHC 402 (KB) respectively. I also refer to the judgment of Lavender J in another NHL case dated 17 November 2021 [2021] EWHC 3081 (QB). In this judgment, I do not repeat all of the relevant factual and legal background; rather, where uncontroversial or where I agree, I cross-refer to, and adopt, certain passages in those judgments.

Summary conclusion

5. For the reasons set out in this judgment, I am satisfied that the Claimant has established its case and that it is appropriate to grant a final injunction against 129 of the Named Defendants and against Persons Unknown in the terms set out in the orders which I make today.

Brief procedural history

6. The Claimant has brought two actions, commenced, respectively, on 12 October 2021 and 8 November 2021. Interim injunctions in the two actions had already been granted

on an urgent and without notice basis, respectively, by May J on 8 October 2021 and by Jay J on 4 November 2021. At subsequent on notice hearings, these interim injunctions were extended, in some cases in varied form. On 11 October 2022 the interim injunctions which are currently in force were made by Cotter J. On the same occasion the judge ordered an expedited trial. Initially the Claimant intended to apply for summary judgment. However following the judgment of Bennathan J in *NHL v IB*, it decided to proceed instead to a final trial. That decision was made and the direction given before the Court of Appeal, more recently in February this year, granted full summary judgment in *NHL v IB*. In the course of the hearing before me, I indicated that the interim injunctions would remain in place until this judgment is handed down.

7. The final prohibitory injunction is sought against 129 Named Defendants and against Persons Unknown when acting for the purposes of protesting in the name of IB (as defined more specifically in the title to the claim). (The activities of the Named Defendants which are enjoined are not limited to them acting in the name of IB). The final order, as originally sought, was in terms very similar to the interim injunctions currently in force, and included provision both for alternative service and for third party disclosure from the Metropolitan Police. As matters developed at the hearing, the Claimant no longer seeks any order for third party disclosure: see further paragraph 62 below.

8. The Claimant's evidence for this trial comprises witness statements of Mr Abbey Ameen, the Claimant's principal in-house solicitor and Mr Glynn Barton, formerly the Claimant's Director of Network Management and now its Chief Operating Officer, both dated 27 February 2023. Each gave evidence in court verifying the contents of his statement. The former sets out at some considerable length, with extensive exhibits, detailed information about the various protest groups and the array of different proceedings brought by different parties (as set out below). He gave detailed evidence of the IB (and the JSO) protests that have taken place and of their effect, both in the London area and elsewhere, particularly around the M25. He also gave evidence of the service of documents and other steps taken to bring the proceedings to the attention of the Defendants and IB. Mr Barton's statement sets out the justification for the roads selected by the Claimant to be protected by the final injunction sought. He provides evidence as to why the IB Roads are so strategically important and why they should be protected. His evidence is that their strategic importance means that they are more likely to be targeted by IB protesters, whose intention is to cause maximum disruption and thus maximum damage is caused to other users of the highway and the wider public interest.

The Parties

The Claimant

9. The Claimant is a statutory corporation created by the Greater London Authority Act 1999. It is both the highway authority and the traffic authority for the GLA Roads. More detail of the Claimant's statutory functions, powers and duties in relation to the GLA Roads and the provisions under which it brings these proceedings are set out in Freedman J's judgment in *TfL v JSO* at §§8 and 9.

10. The Claimant makes this claim pursuant to its duties under section 130 Highways Act 1980 (power to take legal proceedings as part of performing the duty to assert and

protect the rights of the public to use and enjoy the highway) and on the basis that the conduct of the Defendants in participating in the IB protests constitutes (i) trespass, (ii) private nuisance and/or (iii) public nuisance.

The Named Defendants

11. The claim forms identify, at Annex 1, the 139 Named Defendants, each individually numbered from 1 to 139. The Named Defendants have all participated at IB protests (M25 or IB roads) or JSO protests.

12. Mr Ameen has explained in detail the steps taken to serve the Named Defendants with all relevant court documents in the course of the proceedings, following the making of earlier orders for alternative service. As regards this trial, the Named Defendants were sent, by first class post, the notice of hearing for this trial on 10 January 2023. It was also emailed to IB on 10 January 2023 and was put up on the TfL and Greater London Authority websites. In a further witness statement dated 2 April 2023, Mr Ameen has explained how all the written materials relevant to this trial were sent to the Named Defendants, including the evidence, draft final orders and skeleton argument, on dates between 28 February 2023 and 16 March 2023.

13. No defendant has acknowledged service or filed a defence. Up until the final trial, no defendant had attended any hearing in these claims since 12 November 2021; and no defendant has served any evidence or skeleton argument for this trial. However, at or leading up to this trial, four Named Defendants have made representations.

14. First, Matthew Tulley, Named Defendant 65, in advance of the hearing, offered an undertaking to the Court. In an email to Mr Ameen, he asserted that he has not breached the existing injunctions and that he has no intention of doing so. Secondly, Mr David Rinaldi, Named Defendant 135 both wrote to the Claimant and appeared on the first morning of the hearing. Thirdly, Mr Barry Mitchell, Named Defendant 9, also attended court on the first morning of the hearing. Each of these three Named Defendants has offered an undertaking in terms similar to the terms of the final injunction which I have decided to grant. Accordingly, whilst each remains a party to the claims, the final injunction is not made as against them and their names are now excluded from Annex 1 to the final injunction.

15. A fourth defendant, James Bradbury (Named Defendant 39), following notification on 10 January 2023, wrote to the Claimant on 16 January 2023, claiming that he had not blocked any TfL infrastructure and asking for clarification of the case against him. Following a rather general reply from the Claimant, he wrote again on 10 February 2023 maintaining his position and asking why his name had been added to the injunction. Following that email, the Claimant served all the trial materials on Mr Bradbury at his home address, which sets out the case against him both generally and the specific evidence against him individually. In this regard, and in response to my inquiry since the date of the hearing, Mr Ameen has provided a further witness statement dated 28 April 2023, explaining that the initial trial materials were sent to Mr Bradbury twice, by first class post on 28 February 2023 and by an email from him personally to Mr Bradbury sent on 8 March 2023 (responding in fact to Mr Bradbury's email of 16 January 2023). Mr Bradbury did not reply to that email. On 15 March 2023 further trial materials were sent by post to Mr Bradbury. He has not responded to

any of those materials sent to him. Absent any such response, I am satisfied that the final injunction is properly made against Mr Bradbury.

16. However, in relation to six Named Defendants, the Claimant seeks permission to discontinue the proceedings pursuant to CPR 38.2(2)(a)(i). In the case of five of those Defendants, the Claimant has not been able to effect service of documents upon them, due to the lack of a correct, or any, address for service. In addition, one further Defendant has, unfortunately, since died. I therefore grant permission to the Claimants to file a Notice of Discontinuance pursuant to CPR 38.3(1)(a) in respect of Named Defendants 8, 34, 91, 102, 108 and 112 and an order under CPR 6.28 dispensing with service of the Notice of Discontinuance on these six Named Defendants. I will order that the discontinuance of the proceedings against them will take effect on the date of the order of the Court; their names are thus excluded from Annex 1 to the final injunction. I will also order that these six Named Defendants will be entitled to their costs (if any).

17. In these circumstances, excluding these six Named Defendants and the two Named Defendants who appeared at the hearing, I was satisfied that it was appropriate to proceed to hear the trial in the absence of the remaining 131 Named Defendants, pursuant to CPR 39.3(1).

18. It further follows that the final injunction order is made against 129 Named Defendants as set out in Annex 1 to the order which I will make.

The Factual Background

Insulate Britain

19. Insulate Britain (IB) is an environmental activist group which takes direct protest action in furtherance of two demands: first, that the UK government immediately promises to fully fund and take responsibility for the insulation of all social housing in Britain by 2025; and secondly that the UK government immediately promises to produce within four months a legally binding national plan to fully fund and take responsibility for the full low-energy and low-carbon whole-house retrofit, with no externalised costs, of all homes in Britain by 2030 as part of a just transition to full decarbonisation of all parts of society and the economy. IB says doing so will provide warmer homes and contribute to reducing the UK's carbon emissions.

20. The Named Defendants are those who have been engaging in deliberately highly disruptive protests under the banner "Insulate Britain". All protests are peaceful. IB has repeatedly made un-retracted statements that its protests will continue until his demands are met.

Other groups: Extinction Rebellion and Just Stop Oil

21. There are two other similar groups: Extinction Rebellion and Just Stop Oil (JSO). Extinction Rebellion describes itself as an international movement that uses non-violent civil disobedience in an attempt to halt mass extinction and minimise the risk of social collapse through, inter alia, reducing greenhouse gas emissions to net zero by 2025. Extinction Rebellion has engaged in deliberately disruptive protests on, inter alia, public highways. However on 31 December 2022 it announced that it would

temporarily cease disruptive protests. IB was founded by six members of Extinction Rebellion.

22. JSO is a group, formed in December 2021, which has been demanding that the government halt all future licensing consents for the exploration, development and production of fossil fuels in the United Kingdom. There is an intersection between the groups Insulate Britain, JSO and Extinction Rebellion. In February 2022 IB joined the JSO coalition, although IB and JSO are not in formal coalition with each other. JSO has also repeatedly said that it will continue its deliberately disruptive protests until its demands are met. More detail about JSO is set out at §§19 to 21, and 23 to 26 of Freedman J's judgment in *TfL v JSO*.

23. Since September 2021, the courts have granted a number of other injunctions, similar in form to the interim injunctions granted in this case, against members and supporters of those organisations. These were obtained at the behest of other bodies, including National Highways Limited ("NHL") and HS2 Ltd. Many of the same named defendants appear in a number of the cases.

IB protests

24. Mr Ameen refers to a substantial number of IB protests. IB protests started in about September 2021. The last protest on the road solely under the IB banner was on 4 November 2021. Individual acts of IB protest took place up until April 2022. The last IB protest on the roads, as part of the JSO coalition, but retaining the IB identity took place on 12 October 2022. Mr Ameen's evidence is that the interim injunctions had been effective in reducing and/or pausing IB protests.

25. Despite this, in early 2023 IB made a public statement that it would continue with its protests, and despite the announcement from Extinction Rebellion. An article in The Guardian dated January 2023 reported as follows:

> *Insulate Britain and Just Stop Oil have doubled down on their commitment to disruptive climate "civil resistance" after Extinction Rebellion announced new tactics prioritising "relationships over roadblocks".*
>
> *Insulate Britain said its supporters remained prepared to go to prison. "Insulate Britain supporters remain committed to civil resistance as the only appropriate and effective response to the reality of our situation in 2023," its statement said.*
>
> *"In the UK right now, nurses, ambulance drivers and railway workers are on strike because they understand that public disruption is vital to demand changes that governments are not willing or are too scared to address."*

26. As of 30 March 2022, 174 people had been arrested, 857 times, during IB protests on public highways. Mr Ameen's evidence is that the IB and JSO protests have been very dangerous and disruptive, creating an immediate threat to life, putting at risk the lives of those protesting, those driving on the roads and those policing the protests. At times, the protests have also caused a risk of violence between protesters and ordinary users

of the highways; in some cases force has been used to remove protesters from the highway. He gives examples of particular such incidents.

JSO protests: April 2022 onwards

27. JSO protests started in March or April 2022. These protests have, until recently, largely involved protesters blocking highways with their physical presence, normally either by sitting down or gluing themselves to the road surface. There were protests daily by JSO between 1 October and 31 October 2022. During that period, there were, on a daily basis, large scale protests at key areas of largely the central London road system. On many occasions, JSO have been reported as saying that they will not cease their protests until their demands are met and that they will not be discouraged from doing so by injunctions from the court. The protests on roads in London have continued, even after interim injunctions were made and served. More detail of these JSO protests is set out at §§27 and 28 of Freedman J's judgment in *TfL v JSO*. Since November 2022 there have been further JSO protests, including a new tactic of "slow marches", as explained by §13 of Cavanagh J's judgment.

Other proceedings

The Claimant and GLA Roads: proceedings in relation to JSO

28. In addition to the current proceedings, in October 2022 the Claimant commenced proceedings in respect of JSO protests, *TfL v JSO*, and was granted an urgent without notice interim injunction against certain named defendants and persons unknown in connection with protests which involved JSO protesters sitting down in and blocking GLA Roads. This injunction was continued, on notice, on 31 October 2022 by Freedman J and again by Cavanagh J on 24 February 2023, who at the same time directed an expedited final trial and made an order under CPR 31.22. These are the judgments referred to at paragraph 4 above.

29. There is a large overlap between the defendants named in the *TfL v JSO* injunctions and the Defendants in this case. Of the 138 Named Defendants in this case, 65 are also named defendants in the *TfL v JSO* claim. As regards those 65 individuals the injunctions sought in this case and those granted (and now applied for) in *TfL v JSO* have precisely the same effect, since, in their case, the prohibition is not limited by reference to the banner under which any protest might take place. It follows that the final injunction against the Named Defendants in this case will also cover their participation in any future JSO protests on the IB Roads.

National Highways Limited and the M25 (SRN): IB and JSO

30. NHL has also obtained injunctions in respect of major parts of The Strategic Road Network, namely the M25 and feeder roads on to the M25. NHL initially obtained interim injunctions, and has now obtained a final anticipatory injunction against IB protesters – in part from Bennathan J on 9 May 2022 and then more extensively from the Court of Appeal recently on 14 March 2023. The judgments in this case are referred to in paragraph 4 above. Since autumn of 2022, NHL also has an ongoing claim against

JSO protesters protecting structures on the M25 such as overhead gantries. On 21 November 2022 Soole J granted an interim injunction in respect of such JSO protests.

The Issues

31. I consider the position of the Named Defendants and Persons Unknown in turn. The issues that fall for consideration are as follows

(1) *The Named Defendants:* whether the Court should grant a final injunction in the terms sought against the remaining Named Defendants. This involves consideration, in particular, of the following:

- the Claimant's underlying causes of action, in general;

- the conditions for the grant of a final anticipatory prohibitory final injunction, in general;

- the position under Articles 10 and 11 European Convention of Human Rights ("ECHR").

(2) *Persons Unknown:* whether the Court should grant a final injunction in the terms sought against Persons Unknown. This involves, additionally, consideration of the provision for alternative service and briefly, the now withdrawn application for a third party disclosure order. The three orders (as originally sought) - an injunction against Persons Unknown, an order for alternative service and a third party disclosure order – are closely interrelated. In general and in practice, to date, the Claimant (and others) have sought and obtained injunctions against persons unknown and at the same time obtained a direction for alternative service and third party disclosure orders against the police in order to identify persons hitherto unknown who had taken part in protests. Once the identity of those protesters was then disclosed, the Claimant was then able to serve the protesters with the relevant court documents, through the provision for alternative service.

(1) The grant of a final injunction against the Named Defendants

The relevant legal principles

The causes of action

32. In the present case, the Claimant's case is that its rights are or will be infringed by the Defendants committing one or more of the torts of trespass, public nuisance and private nuisance. The relevant principles applicable to each of these torts, particularly in the context of protests on the highway, are set out by Bennathan J in *NHL v IB* at §§28 to 31. See also *High Speed Two (HS2) Ltd v Persons Unknown* [2022] EWHC 2360 (KB) ("*HS2*") at §§74, 77-79, 84-90.

33. Trespass to land is the commission of an intentional act which results in the immediate and direct entry onto land in the possession of another without justification. If land is subject to a public right of way or similar, a person who unlawfully uses the land for any purpose other than that of exercising the right to which it is subject is a trespasser. However the public have a right of reasonable use of the highway which may include

protest. A protest involving obstructing the highway may be lawful by reason of Articles 10 and11 ECHR.

34. Private nuisance is any continuous activity or state of affairs causing a substantial and unreasonably interference with a claimant's land or his use or enjoyment of that land. In the case of an easement, such as a right of way, there must be a substantial interference with the enjoyment of it.

35. A public nuisance is one which inflicts damage, injury, or inconvenience on all the King's subjects or on all members of a class who come within the sphere or neighbourhood of its operation (*HS2* at §84). The position in relation to an obstruction of the highway for the purposes of public nuisance is stated in *Halsbury's Laws* Vol 55 (2019) at §354: (a) a nuisance with reference to a highway has been defined as 'any wrongful act or omission upon or near a highway, whereby the public are prevented from freely, safely and conveniently passing along it'; (b) whether an obstruction amounts to a nuisance is a question of fact; (c) an obstruction is caused where the highway is rendered impassable or more difficult to pass along by reason of some physical obstacle; but an obstruction may be so inappreciable or so temporary as not to amount to a nuisance; (d) generally, it is a nuisance to interfere with any part of the highway; and (e) it is not a defence to show that, although the act complained of is a nuisance with regard to the highway, it is in other respects beneficial to the public.

The requirements for a final anticipatory injunction

36. The Claimant seeks a final anticipatory (also referred to as a precautionary or *quia timet*) prohibitory injunction against the Named Defendants. To grant such an order the Court must be satisfied that (1) there is a strong probability that that the defendants will imminently act to infringe the claimant's rights and (2) the ensuing harm would be so grave and irreparable that damages would be an inadequate remedy: see *Vastint Leeds BV v Persons Unknown* [2018] EWHC 2456 (Ch) at §31(3)-(4). There is no requirement for the Claimant to prove that its rights have already been infringed; but only that there is a real and imminent risk that they will be infringed: *NHL v IB* (CA) at §§37-39 and 19. The question here therefore is whether there is a real and imminent risk that one or more of the three torts will be committed by the Defendants.

Articles 10 and 11 ECHR

37. A protest which obstructs the highway may be lawful by reason of Articles 10 and 11 ECHR. (Articles 10 and 11 ECHR are set out at §34 of Freedman J's judgment in *TfL v JSO*). If so, this provides a defence to the alleged torts of trespass (and private and public nuisance). The relevant principles are derived from *DPP v Ziegler* [2021] UKSC 23 approving *City of London Corp v Samede* [2012] EWCA Civ 160 at §§38-44. In summary, the issues which arise under Articles 10 and 11 require consideration of the following five questions:

(1) Is what the defendant did in exercise of one of the rights in Articles 10 or 11?

(2) If so, is there an interference by a public authority with that right?

(3) If there is an interference, is it prescribed by law?

(4) If so, is the interference in pursuit of a legitimate aim as set out in paragraph (2) of Article 10 or Article 11?

(5) If so, is the interference 'necessary in a democratic society' so that a fair balance was struck between the legitimate aim and the requirements of freedom of expression and freedom of assembly?

38. Question (5) is the requirement of "proportionality" – a fact-specific inquiry which requires evaluation of the circumstances in the individual case. Question (5) in turn requires consideration of four sub-questions as follows:

(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/intrusive alternative means available to achieve that aim?

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

As regards sub-question (4), a non-exhaustive list of relevant factors is set out in *DPP v Ziegler* at §§59, 61, 70-78, 81-86 and 116.

Application to the facts of this case

39. I turn to apply these legal principles to the facts of this case.

The causes of action: the torts

40. On the evidence before me I am satisfied that, subject to the considerations arising under Articles 10 and 11 ECHR, the conduct, both in the past and threatened in the future, of the Defendants in protesting on the IB Roads by deliberately blocking and obstructing those roads, prima facie constitutes the torts of trespass, private nuisance and public nuisance. As to trespass, the protesters directly enter on to land in the possession of the Claimant and use the land for a purpose other than exercising a public right of way; whether they are justifiably exercising a right to protest turns upon the application of Articles 10 and 11. Secondly, as to private nuisance the protests causes a substantial and unreasonable interference with the enjoyment and exercise of the rights of way of other road users. Thirdly, as to public nuisance, as a result of the protests, the public are prevented from freely, safely and conveniently passing along the IB Roads (the highway); the protests deliberately cause a physical obstacle on the IB Roads rendering them impassable or more difficult to pass along. I consider in paragraphs 44 and 45 below, whether, nevertheless, the protests are lawful under Articles 10 and 11.

Requirements for grant of final anticipatory injunction

41. First, I am satisfied that, on the facts here, that there is a real and imminent risk of further protests (on the part of the Defendants) and that, subject to the Article 10 and 11 issues, those protests will infringe the Claimant's rights. The evidence of Mr Ameen demonstrates that the Named Defendants have repeatedly, deliberately and over a long

period carried out those protests in order to cause the maximum disruption to the Claimants and the public. IB has repeatedly stated that they will continue to protest and that they will not be discouraged by injunctions. Further the fact that, apart from those Defendants referred to in paragraphs 14 and 15 above, none of the Named Defendants has sought to engage with the proceedings suggests that there is no arguable defence to the Claimant's claim including its claim for a final anticipatory injunction; see *NHL v IB* (CA) at §§40 and 41. The final injunction sought *in relation to the Named Defendants* is not limited to protesting under the IB banner; it applies to them individually protesting under whatever banner they choose.

42. I have considered whether the fact that the last protest solely under the IB banner took place in November 2021 (and last joint protest in October 2022) affects my assessment of whether there is a real and imminent risk of further future IB protests on the IB Roads, such that an anticipatory injunction is not justified. I have concluded that nevertheless there is such a real and imminent risk. First, IB itself (and expressly in contrast to the position of Extinction Rebellion) continues to state that it will continue its protests and has so stated recently (see paragraph 25 above). Secondly, I accept that the level of IB protests since November 2021 is likely to have been affected by a combination of the effect of the interim injunctions granted in this case and colder weather in the winter months. It follows that in the summer months the prospect of protest activity is likely to increase. Moreover if no final injunction were to be granted, then the chilling effect of the court injunctions to date would be removed, increasing the risk of the resumption of protests. Thirdly, if no final injunction were to be granted in respect of protests under the IB banner, then, it might well be that the recent switch from protests under the IB banner to protests under the JSO banner would be reversed, not least because of the more recent imposition of interim injunctions in the *TfL v JSO* case. (I note that in *NHL v IB* both Bennathan J and CA granted injunctions "against IB", despite the fact that, by that time, the transition from IB to JSO had occurred). Finally, in the case of the Named Defendants, since the final injunction will apply to them, regardless of the banner under which they protest, I take account of the fact that JSO protests have been continuing and of JSO's recent statements of intent. This is particularly relevant in the case of the 65 Named Defendants who are also defendants in the *TfL v JSO* case.

43. Secondly, I am satisfied and find that the ensuing harm from further protests at IB Roads will be grave and irreparable. As demonstrated by the evidence relating to past protests, the deliberate blocking of roads so that vehicles of all types cannot pass would cause serious disruption to many people, risk to life and of violence, economic harm, nuisance and the diversion of public resources. Damages would be an inadequate remedy for such harm, in the light of the matters to which I have referred; first, because much of it will be unquantifiable; secondly because the Claimant could not recover for losses sustained by others; and thirdly, the Defendants would be unlikely to be able to pay such damages as might be quantifiable.

Articles 10 and 11 ECHR

44. In the present case the answers to the first four questions set out in paragraph 37 above are as follows:

   (1) By participating in IB protests on the public highway, the Defendants have been, and will be, exercising their rights to freedom of expression and freedom of

assembly in Articles 10 and 11 ECHR respectively: see Lavender J at §31(1) and Freedman J in *TfL v JSO* at §39.

(2) The grant of a final injunction would be an interference with those Article 10 and 11 rights.

(3) Any such interference is prescribed by law i.e. by the power contained in section 37 Senior Courts Act 1981, the case law which govern the exercise of that power and the Claimant's duties as a highway and traffic authority under section 130 Highways Act 1980: see Lavender J at §31(3) and *HS2* at §200.

(4) The interference is in pursuit of a legitimate aim, namely the protection of the rights and freedoms of others, such as other lawful highway users (under Article 11(2)) and in the interests of public safety and the prevention of disorder on the IB roads (under Articles 10(2) and 11(2)).

45. Turning then to question (5) - whether the interference is "necessary in a democratic society" - and each of the four sub-questions in paragraph 38 above, I find as follows:

(1) The aims of preventing the obstruction of the public using the important IB roads and preventing the violence and danger which occur when this is jeopardised are sufficiently important to justify the interference with the Defendants' rights. The evidence is that the IB protests have caused considerable disruption and a risk to safety (see paragraph 26 above).

(2) There is a rational connection between the means chosen (final injunctive relief) and the aim in view. The aim is to allow road users to exercise their right to use the road system and final injunctive relief would prohibit the deliberate obstruction of the IB Roads by protesters which prevents or hinders the exercise of that right. The grant of interim injunctions in this case and in other cases has been successful to date in reducing such deliberately obstructive protests on the highways: see paragraph 24 above.

(3) There are no less restrictive or alternative means to achieve these aims than a final injunction in the form sought. Damages would not prevent any further protests, for the reasons given in paragraph 43 above. Prosecutions for offences involved in protests can only be brought after the event and in any case are not a sufficient deterrent because IB (and JSO) protesters have said they protest in full knowledge of and regardless of this risk and many have returned to the roads multiple times having been arrested, bailed, prosecuted, and convicted. Other traditional security methods such as guarding or fencing of IB Roads are wholly impractical for resource and logistical reasons. Recent changes to the law in the form of the Policing, Crime, Sentencing and Courts Act 2022, which came into force in May and June 2022, have not changed the approach of protesters.

(4) Finally, as to sub-question (4) I find that making a final injunction strikes "a fair balance between the rights of the individual and the general interest of the community, including the rights of others". Applying the factors enumerated in *Ziegler*, the factors favouring the grant of the final injunction include the ten points referred to by Freedman J in *NHL v JSO* at §§43 to 51. Whilst in that case his findings were directed towards JSO protests, I am satisfied that they apply

with equal force to past and future IB protests. As regards the fourth point made by Freedman J (intention to block the highway), in the present cases, the locations of the IB protests have varied widely across London and have been chosen with a view to causing maximum disruption. Further a final injunction relating to the IB Roads does not prevent the Defendants from continuing to express their views at another location or near to the IB Roads provided they do not breach the terms of the injunction. In addition a failure to make a final injunction would encourage the continuation of IB's protests on the IB Roads which are liable to be targeted because of their strategic importance and the damage and disruption which would necessarily entail. IB has repeatedly and recently stated that it will continue to protest until its demands are met. On the other side of the balance, I have taken into account, to the appropriate degree, the sincerity of the protesters' views on what is an important matter of public interest, the nature of their message and objectives and the potential availability of alternative routes or modes of transport around the protest. As to the protesters' views, I refer to the observations of Lord Neuberger MR in *Samede* at §41. It is not appropriate for the Court to express agreement or disagreement with those views. Overall, and having myself considered all matters relevant to the balance under sub-question (4), in reaching this conclusion on the "fair balance", I have taken into account and endorse the final balance of points made by Freedman J at §61

46. In these circumstances I am satisfied that it is just and convenient for a final injunction to be made against the Named Defendants.

(2) <u>The position of Persons Unknown, Alternative Service and Third Party Disclosure</u>

47. I turn to consider whether the final injunction should also be granted against "persons unknown". On the present case, the "persons unknown" are identified specifically through an express link to Insulate Britain. The final injunction applies only to a "person unknown" who is protesting "on behalf of, in association with, under the instruction or direction of, or using the name of, Insulate Britain". (The position of Named Defendants is different in this regard: see paragraph 41 above). As explained in paragraph 31(2) above, this issue and the issues of alternative service (and third party disclosure) are interrelated to some extent.

An order against Persons Unknown in principle

The relevant legal principles

Barking and Dagenham LBC v Persons Unknown

48. In principle, "persons unknown" include both anonymous defendants who are identifiable at the time the proceedings commence, but whose names are unknown and also what have been referred to as "newcomers", that is to say people who at the relevant time of the issue of proceedings and at the time of the grant of the injunction are unknown and unidentified, but who in the future will join the protest and as a result with then fall within the description of the "persons unknown".

49. As regards the making of a final injunctive order against "newcomer" persons unknown, the relevant principles are contained in the decision of the Court of Appeal in *Barking and Dagenham London Borough Council v Persons Unknown* [2022]

EWCA Civ 13 [2022] 2 WLR 946 ("*Barking and Dagenham*") at §§75,77, 79-89, 91, 107-108, 117. The principles can be summarised as follows:

(1) The court has power to grant a final injunction that binds individuals who are not parties to the proceedings at that time, including against persons who at the time of the grant of the injunction are unidentified and unknown (i.e. "newcomers").

(2) A person unknown (newcomer) who subsequently *knowingly* acts in breach of the terms of the injunction thereby makes himself a party to the proceedings and is bound by the injunction. It is the act of infringing the order (with knowledge of the order) that makes the infringer a party. There is no need to serve formally that person with the proceedings in order for him or her to become a party to the proceedings and be bound by the injunction.

(3) Even after a final injunction is granted the court retains the right to supervise and enforce it; the proceedings are not at an end until the injunction is discharged.

(4) Where a newcomer breaches the injunction and thereby makes himself a new party to the proceedings, he can apply to set aside the injunction.

(5) Persons unknown must be described with sufficiently clarity to enable persons unknown to be served with proceedings.

(6) These principles apply to the tortious actions of protesters (as well as to persons unknown in other types of case, such as those setting up unauthorised encampments).

(7) All persons unknown injunctions, including final injunctions ought normally to have a fixed end point for review and it is good practice to provide for a periodic review.

An appeal to the Supreme Court in *Barking and Dagenham* was heard in February this year and judgment is now awaited. Nevertheless the foregoing represents the current state of the law: see *NHL v IB* (CA*)* at §42.

The Canada Goose guidelines

50. In the earlier case of *Canada Goose UK Retail Ltd v Persons Unknown* [2020] EWCA Civ 303 at §82, the Court of Appeal set out seven guidelines for the grant of *interim* injunctions against persons unknown. These are set out at §84 of Freedman J's judgment in *TfL v JSO* and were applied to the facts in that case at §§85 to 91. Subject to necessary modifications and in so far as applicable, it appears that these guidelines apply also to the grant of a *final* injunction against persons unknown: see *Barking and Dagenham* at §89. I am satisfied that each of the seven guidelines are met in this case. Whilst he was considering *interim* relief in respect of *JSO* protests, in my judgment the analysis and reasoning of Freedman J at §§85 to 91 applies with equal force to persons unknown protesting under the IB banner. Taking each in turn:

(1) At the beginning of and during the course of these proceedings, identified defendants have been joined as Named Defendants and have been served with the Claim and subsequent documentation. As regards the future, the provisions for

the alternative service (see section on this below) ensure fairness for any newcomers who will, under the final injunction, have liberty to apply to the Court to vary or discharge the final injunction against him/her specifically or everyone.

(2) The identification of "Persons Unknown" is clear, precise and targets their conduct, and derives further clarity from the fact that the conduct in question has been ongoing for many months and is threatened to continue. The identification of Persons Unknown through the express link with IB provides further clarity and precision and limits the scope of Persons Unknown.

(3) In so far as this applies also to *final* anticipatory relief, there is a sufficiently real and imminent risk of a tort being committed: see paragraphs 41 and 42 above.

(4) The final injunction identifies the Named Defendants individually and, as regards persons unknown, the final injunction contains provisions for alternative service, which will enable them to be served with the order.

(5) The concern that the prohibited acts must correspond to the threatened tort is not acute in the present case; in both trespass and nuisance, defining the unlawful conduct is straightforward. It involves the deliberate interference with the free passage of the public along the highway by land for the purposes of protesting.

(6) The prohibited conduct and the description of persons unknown uses non-technical language without reference to any cause of action and is clear in its scope and application and capable of being understood by a defendant. Its reliance on personal intention (i.e. "deliberate" actions for "the purpose of protesting") can be proven without undue complexity and it is necessary to prevent capturing what may otherwise be lawful ordinary highway use, by Named Defendants or anyone else.

(7) The final injunction has a clear geographical limit, being restricted to the IB Roads which are select in number, of high strategic importance, and which are therefore also liable to be targeted by IB. The temporal limit is less acute in relation to final injunctions, but here it is satisfied by the time limit, review and liberty to apply provisions referred to in paragraph 52 below.

51. For these reasons I am satisfied that it is just and convenient to grant the final injunction against the Persons Unknown.

Time limit and review

52. In order to protect the public and the Claimant's rights, and given the extent and nature of the Defendants' disruptive protests and IB repeated statements that they will not stop protesting until their demands are met, the final injunction will last for a period of 5 years. In addition provision is made for a yearly review by the Court for supervisory purposes. A review provision was included in the final injunctions made by Bennathan J and the Court of Appeal in *NHL v IB*. This will also enable the Court to consider the implications, if any, of the Supreme Court judgment in the *Barking and Dagenham* case. In any event, the final injunction will provide for liberty for any Defendant (Named or Person Unknown) to apply to vary or discharge the injunction at any time.

Alternative service (and third party disclosure)

53. The Claimant seeks an order for alternative service, similar to that contained in the existing interim injunctions (and in many other NHL and TfL cases). It also sought an order for third party disclosure, again similar to that contained in the interim injunctions. In the course of the hearing, it withdrew that application for reasons I explain below.

54. The alternative service to be permitted is service of all documents by email to IB itself coupled with individual posting through the letterbox, or affixing to the front door, a package, with a notice in prominent writing. In principle, the underlying purpose of the provision for alternative service is to provide a method of ensuring that those who might breach its terms are made aware of the order's existence: see *NHL v IB* (Bennathan J) at §50 and *TfL v JSO* (Cavanagh J) at §32. I am satisfied that, for the reasons set out in Mr Ameen's witness statement and by Cavanagh J at §32, it is appropriate to permit alternative service in the terms proposed in the draft final injunction

55. In my judgment, there might appear to be a tension between the rationale for the provision for alternative service and the analysis in *Barking and Dagenham* in relation to persons unknown. On the one hand, it is said that alternative service is required so as to make a person aware of the proceedings and the injunction; on the other hand, *Barking and Dagenham* establishes that merely knowingly acting in breach of the injunction is sufficient to render a person party to the proceedings and automatically in breach and that formal service itself is not necessary.

56. I note that in the orders made in *NHL v IB* by both Bennathan J and the Court of Appeal there was express provision that persons who had not been served would not be bound by the terms of the injunction (and the fact that the order had been sent to the relevant organisation's website or otherwise publicised did not constitute service). Bennathan J explained at §52 that the effect of that provision was that anyone arrested at a protest could be served and risked imprisonment if they *thereafter* breached the terms of the injunction. The making of such a provision however seems to me to be inconsistent with the decision in *Barking and Dagenham* that merely *knowingly* acting in breach of the injunction is sufficient to render a person party to the proceedings and that service is not required to make such a person bound or in breach. This was picked up by Cavanagh J in *TfL v JSO* at §52 where he pointed out that (1) given the wide media coverage and publicity, it was "vanishingly unlikely" that anyone minded to take part in a protest was unaware that injunctions had been granted by the courts; (2) as a result it was not necessary to include an order in the terms made by Bennathan J; and (3) he noted TfL's stated intention of not commencing committal proceedings against a person unknown unless that person had previously been arrested and then served with the order.

57. In the present case Mr Fraser-Urquhart KC has indicated that the Claimant will continue to adopt this "two strike" practice: it would not seek to commit a person unknown who attends a prohibited protest (even with knowledge of the injunction) first time round, but would only do so if that person is then served with the injunction and attends a second prohibited protest. By that time, such a person would no longer be a Person Unknown.

58. In the light of this indication, I then questioned the purpose of the inclusion of Persons Unknown in the final injunction. Mr Fraser-Urquhart accepted that the Claimant's intended practice could be seen to dilute the deterrent effect of the Persons Unknown element of the final injunction. He nevertheless submitted that its inclusion would increase the preventative effectiveness of the final injunction by way of wider publicity; and further that an injunction limited only to Named Defendants would substantially weaken that wider deterrent effect. I accept these contentions. There is a distinction between, on the one hand, the making a final injunction against a newcomer and, on the other, the consequences of such a final injunction – i.e. whether a person unknown becomes a party and is subject to, and in breach of, the injunction, which depends on knowingly acting contrary to the terms of the final injunction. *Barking and Dagenham* is not authority for the proposition that the court can only grant a final injunction against a newcomer person unknown where the Court can be sure that the person unknown acting in breach of its terms in the future will know that he is acting in breach.

59. As a result, I do not consider that the Claimant's intended practice undermines the appropriateness of including Persons Unknown in the final injunction nor of making orders for alternative service.

60. One final point in this regard: since mere knowledge of the injunction on the part of a person unknown is sufficient to render him potentially bound by its terms, and in order to increase the preventative purpose of the injunction, I took the view that the Claimant should bolster the steps it takes to publicise more widely the making of the final injunction. As a result the Claimant has now included at paragraph 7b of the draft final injunction additional provisions: to email a copy of the order not only to IB, but also to JSO, and other environmental protest groups; to post on the Claimant's twitter feed; to notify the Press Association and to place a notice in the London Gazette. In this way the likelihood of someone minded to take part in protests being unaware of the Court's order will be further diminished.

Third party disclosure order

61. To date, in many cases, claimants have sought and obtained an order for third party disclosure under CPR 31.17 directing the police to disclose to the claimant details of those who have been arrested at protests. Such orders were made in the interim injunctions in the present case, providing, first, for disclosure of the name and address of any person arrested at an IB protest on the IB Roads and, secondly, for all arrest notes and footage relating to any breach or potential breach of the injunction or any predecessor injunctions. (The former provision concerned persons unknown and the latter was directed to support possible contempt proceedings against Named Defendants). Moreover, and significantly, those injunctions provided for those disclosure duties to be "continuing" duties, for as long as the injunction remained in force. Similar orders have been made in the *NHL v IB* and *TfL v JSO* cases.

62. In the present case, the Claimant sought the inclusion in the final injunction of a third party disclosure order in the same terms. In advance of the hearing, I raised with the Claimant questions in relation to this issue, and in particular as to the Court's jurisdiction to make an order in the terms sought (under CPR 31.17, s.34 Senior Court Act 1981 or otherwise), including whether there is power to order disclosure of documents/information which are/is not yet in existence, but which may only come into existence in the future (and if so, whether it should) – in other words, in relation to

protests which have not yet happened. Subsequently, in the course of argument, Mr Fraser-Urquhart informed the Court that the Claimant did not pursue the application for third party disclosure order. It did not require any information about protests which had already taken place. He indicated that the Claimant might come back to the Court and seek a disclosure order in the event that a further protest had occurred. I say no more about this issue, save to say that in my judgment, if it arises for consideration again, the Court would greatly be assisted by detailed submissions for and against the making of such an order.

Conclusion

63. In the light of my conclusions at paragraphs 46, 51 and 54 above, there will be judgment for the Claimant for a final injunction in the terms of the draft order submitted.

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

With the intention of preventing unauthorised encampments by Gypsies or Travellers within their administrative areas, a number of local authorities issued proceedings under CPR Pt 8 seeking injunctions under section 37 of the Senior Courts Act 1981[1] prohibiting "persons unknown" from setting up such camps in the future. Injunctions of varying length were granted to some 38 local authorities, or groups of local authorities, on varying terms by way of both interim and permanent injunctions. After the hearing of an application to extend one of the injunctions which was coming to an end, a judge ordered a review of all such injunctions as remained in force and which the local authority in question wished to maintain. The judge discharged the injunctions which were final and directed at unknown persons, holding that final injunctions could only be made against parties who had been identified and had had an opportunity to contest the order sought. The Court of Appeal allowed appeals by some of the local authorities and restored those final injunctions which were the subject of appeal, holding that final injunctions against persons unknown were valid since any person who breached one would as a consequence become a party to it and so be entitled to contest it.

D

E

F

On appeal by three intervener groups representing the interests of Gypsies and Travellers—

Held, dismissing the appeal, (1) that although now enshrined in statute, the court's power to grant an injunction was, and continued to be, a type of equitable remedy; that although the power was, subject to any relevant statutory restrictions, unlimited, the principles and practice which the court had developed governing the proper exercise of that power did not allow judges to grant or withhold injunctions purely on their own subjective perception of the justice and convenience of doing so in a particular case but required the power to be exercised in accordance with those equitable principles from which injunctions were derived; that, in particular, equity (i) sought to provide an effective remedy where other remedies available under the law were inadequate to protect or enforce the rights in issue, (ii) looked to the substance rather than to the form, (iii) took an essentially flexible approach to the formulation of a remedy and (iv) was not constrained by any limiting rule or principle, other than justice and convenience, when fashioning a remedy to suit new circumstances; and that the application of those principles had not only allowed the general limits or conditions within which injunctions were granted to be adjusted over time as circumstances changed, but had allowed new kinds of injunction to be formulated in response to the emergence of particular problems, including

G

H

[1] Senior Courts Act 1981, s 37: see post, para 145.

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prohibitions directed at the world at large which operated as an exception to the normal rule that only parties to an action were bound by an injunction (post, paras 16–17, 19, 22, 42, 57, 147–148, 150–153, 238).

Venables v News Group Newspapers Ltd [2001] Fam 430 applied.

Dicta of Lord Mustill in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, 360–361, HL(E) and of Lord Scott of Foscote 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 has become the subject of a newcomer injunction wishes to raise particular circumstances applicable to them and relevant to a balancing of their article 8 Convention rights against the claim for an injunction, this can be done under the liberty to apply (post, para 183).

(iii) The emphasis in this appeal has been on newcomer injunctions in Gypsy and Traveller cases and nothing said should be taken as prescriptive in relation to newcomer injunctions in other cases, such as those directed at protesters who engage

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A in direct action. Such activity may, depending on all the circumstances, justify the grant of an injunction against persons unknown, including newcomers (post, para 235).

Decision of the Court of Appeal sub nom *Barking and Dagenham London Borough Council v Persons Unknown* [2022] EWCA Civ 13; [2023] QB 295; [2022] 2 WLR 946; [2022] 4 All ER 51 affirmed on different grounds.

B The following cases are referred to in the judgment of Lord Reed PSC, Lord Briggs JSC and Lord Kitchin:

A (A Protected Party) v Persons Unknown [2016] EWHC 3295 (Ch); [2017] EMLR 11
Abela v Baadarani [2013] UKSC 44; [2013] 1 WLR 2043; [2013] 4 All ER 119, SC(E)
Adair v The New River Co (1805) 11 Ves 429
C *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55; [1976] 2 WLR 162; [1976] 1 All ER 779, CA
Ashworth Hospital Authority v MGN Ltd [2002] UKHL 29; [2002] 1 WLR 2033; [2002] 4 All ER 193, HL(E)
Attorney General v Chaudry [1971] 1 WLR 1614; [1971] 3 All ER 938, CA
Attorney General v Crosland [2021] UKSC 15; [2021] 4 WLR 103; [2021] UKSC 58; [2022] 1 WLR 367; [2022] 2 All ER 401, SC(E)
D *Attorney General v Harris* [1961] 1 QB 74; [1960] 3 WLR 532; [1960] 3 All ER 207, CA
Attorney General v Leveller Magazine Ltd [1979] AC 440; [1979] 2 WLR 247; [1979] 1 All ER 745; 68 Cr App R 342, HL(E)
Attorney General v Newspaper Publishing plc [1988] Ch 333; [1987] 3 WLR 942; [1987] 3 All ER 276, CA
Attorney General v Punch Ltd [2002] UKHL 50; [2003] 1 AC 1046; [2003] 2 WLR
E 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
F 487, SC(E)
Birmingham City Council v Afsar [2019] EWHC 1619 (QB)
Blain (Tony) Pty Ltd v Splain [1993] 3 NZLR 185
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Astellas Pharma Ltd v Stop Huntingdon Animal Cruelty [2011] EWCA Civ 752; The Times, 11 July 2011, CA
Birmingham City Council v Nagmadin [2023] EWHC 56 (KB)
Cambridge City Council v Traditional Cambridge Tours Ltd [2018] EWHC 1304 (QB); [2018] LLR 458
Cameron v Liverpool Victoria Insurance Co Ltd (Motor Insurers' Bureau intervening) [2019] UKSC 6; [2019] 1 WLR 1471; [2019] 3 All ER 1, SC(E)
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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;

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A 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, B Lewison and Elisabeth Laing LJJ) [2022] EWCA Civ 13; [2023] QB 295 allowed the appeals.

With permission granted by the Supreme Court on 25 October 2022 (Lord Hodge DPSC, Lord Hamblen and Lord Stephens JJSC) London Gypsies and Travellers, Friends, Families and Travellers and Derbyshire Gypsy Liaison Group appealed against the Court of Appeal's orders. The following local C 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) D Rochdale Metropolitan Borough 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.

E

Richard Drabble KC, *Marc Willers KC*, *Tessa Buchanan* and *Owen Greenhall* (instructed by *Community Law Partnership, Birmingham*) for the appellants.

The appellants are concerned about the detrimental consequences which the injunctions sought by the local authorities will have for the nomadic F lifestyle of Gypsies and Travellers, including a chilling effect on those seeking to practise the traditional Gypsy way of life.

A court cannot exercise its statutory power under section 37 of the Senior Courts Act 1981 so as to grant an injunction which will bind "newcomers" (i e persons who at the time of the grant of the injunction are neither defendants to the application nor identifiable, and who were described in the G injunction only as "persons unknown") save on an interim basis or for the protection of Convention rights as an exercise of the jurisdiction first recognised in *Venables v News Group Newspapers Ltd* [2001] Fam 430.

The High Court's power to grant an injunction under section 37 neither expressly permits nor prohibits the making of orders against persons unknown and so does not on its own terms provide an answer to the question. Although it had previously been argued by some of the local authorities H below that, regardless of any limitations which applied to section 37, the court had a separate power to grant injunctions against persons unknown by virtue of section 187B of the Town and Country Planning Act 1990 the Court of Appeal held that the procedural limitations under section 37 and section 187B were the same and that the latter did not bestow any

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additional or more extensive jurisdiction on the court: see [2023] QB 295, paras 113–118.

A final injunction operates only between the parties to the claim: see *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191. The act by which a person becomes a party is the service of the claim form: see *Cameron v Hussain* [2019] 1 WLR 1471. A person who is unknown and unidentifiable cannot be served with a claim form. He or she will thus not be a party and will not be bound by the final injunction.

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: see *Porter v Freudenberg* [1915] 1 KB 857, 883, 887–888, *Barton v Wright Hassall LLP* [2018] 1 WLR 1119, para 8 and *Cameron*, paras 17–18.

Cameron, in particular, is determinative of the appeal. It dealt with—and the decision is therefore binding as to—the position of newcomers, albeit that the proposed defendant was someone who was said to have committed an unlawful act in the past, rather than a person who might commit an unlawful act in the future. Even if *Cameron*, because of that distinction, was not strictly concerned with newcomers, the application of the Supreme Court's reasoning in that case leads inescapably to the conclusion that such persons cannot be sued.

Newcomers are by their very nature anonymous. A person unknown may, if defined with sufficient particularity, be capable of being identified with a particular person. In the first instance decision in *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 417, para 150 Nicklin J suggested that some of the protesters "could readily be identified on . . . camera footage as alleged 'wrongdoers' and, if necessary, given a pseudonym (e g '. . . the man shown in the footage . . . holding the loudhailer')". The person in question will still be anonymous, but he or she is identifiable and whatever the practical difficulties in locating him or her, it is not conceptually impossible to effect service. By contrast, however, designations of the type used in the instant cases, which are intended to capture newcomers ("persons unknown", "persons unknown occupying land", "persons unknown depositing waste", "persons unknown fly-tipping") do not identify anyone. They do not "enable one to know whether any particular person is the one referred to": see *Cameron*, para 16.

The Court of Appeal wrongly held that *South Cambridgeshire District Council v Gammell* [2006] 1 WLR 658 was authority for the proposition that a final injunction can bind newcomers. That case concerned an interim injunction. It was explained by the Supreme Court as an example of alternative service—not as authority for the proposition that final injunctions bind newcomers—and the Court of Appeal below erred in departing from that interpretation. The other cases relied on by the Court of Appeal below (in particular *Bloomsbury Publishing Group plc v News Group Newspapers Ltd* [2003] 1 WLR 1633, *Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator Site* [2004] Env LR 9 and *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100) provide no real support for the Court of Appeal's decision. Those cases either (at best) simply accepted, without deciding the point, that final injunctions could

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A bind newcomers or, when properly understood, they undermine such a conclusion.

The reasoning in *Gammell* cannot properly be extended to cover final injunctions to bind newcomers. There is a qualitative distinction between interim and final injunctions. Parties must be identified before a final determination takes place so that they have an opportunity to present their case. The courts have long been willing to accept lower—or at least different—standards of fairness at the interim stage, in recognition of the fact that interim orders are temporary and designed to hold the ring (or limit damage) pending trial. Thus, for example, interim orders may be sought without notice to the defendant, or may control the way in which a defendant deals with his or her property in order to prevent the defendant frustrating any eventual judgment. Interim orders may indeed be more favourable to a claimant than any final order could be: see, for example, *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191, 224 ("*Spycatcher*").

As Nicklin J recognised at first instance, the courts have recognised that this can create an incentive for a claimant to obtain an interim injunction and then fail to progress the case to trial: see [2021] EWHC 1201 (QB) at [89]. The answer to this has not been to expand the principle in *Spycatcher* to final orders: instead, the court will put in place directions to ensure that the matter is progressed to a final hearing: see Nicklin J, paras 91–93. Interim relief which binds newcomers can only properly be granted where it is to preserve the position pending trial.

Although in certain cases the court has granted injunctions on a contra mundum basis (see *In re X (A Minor) (Wardship: Injunction)* [1984] 1 WLR 1422, *Venables v News Group Newspapers Ltd* [2001] Fam 430, *X (formerly Bell) v O'Brien* [2003] EMLR 37, *Carr v News Group Newspapers Ltd* [2005] EWHC 971 (QB), *OPQ v BJM* [2011] EMLR 23, *RXG v Ministry of Justice* [2020] QB 703 and *D v Persons Unknown* [2021] EWHC 157 (QB)), there is a principled distinction between that line of cases and injunctions prohibiting the unauthorised use or occupation of land. Those cases were all concerned with the publication of personal information, such as the identity of offenders. Once in the public domain, the subject matter protected by the injunction is irretrievably lost. This court should confirm that an injunction contra mundum should only be granted where to do otherwise would defeat the purpose of the injunction. That principle will not apply in traveller injunction cases.

Stephanie Harrison KC, *Stephen Clark* and *Fatima Jichi* (instructed by *Hodge Jones & Allen LLP*) for Friends of the Earth, intervening.

"Persons unknown" injunctions, although said to be aimed at curtailing unlawful protest, also have a chilling effect on lawful campaigning and protest. They expose wide groups of citizens to the risk of prohibitively costly legal proceedings and punitive sanctions, including unlimited fines and imprisonment for contempt for up to two years. There are serious obstacles to contesting the claims and a significant inequality of arms when accessing justice with no costs protection.

There is an increasingly widespread use of such injunctions, often on an industry and country-wide basis, with private companies in particular utilising private law proceedings as a default mechanism to address perceived

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public order issues despite there being tailored statutory provisions and safeguards provided for by Parliament in the criminal law.

The ruling of the Supreme Court in *Cameron v Hussain* [2019] 1 WLR 1471, paras 11–12 makes clear that it is not simply a matter of the court's wide discretion to entertain a claim if a person (who is not evading service) cannot be served and cannot reasonably be expected to have notice of the claim so that he may have an opportunity to defend it. Identification is necessary so that the court can be satisfied that a person is properly subject to its jurisdiction with the capacity to be a party to legal proceedings. However unjust the outcome for the claimant who may have been wronged (as in the case of the claimant in *Cameron*, who had been injured in a vehicle collision caused by the negligence of another driver of unknown identity), the claim has simply not been validly brought.

One of the purposes of a persons unknown injunction is to deter such newcomers from coming into existence and if it is effective there will only ever have been one party to the claim, namely the claimant. This is not, therefore, properly to be described as a permissible claim against persons unknown in the *Bloomsbury Publishing* sense (see *Bloomsbury Publishing Group plc v News Group Newspapers Ltd* [2003] 1 WLR 1633). It is simultaneously a claim against nobody, but can only be effective if it is in principle binding on everybody.

Justice between parties to litigation is not only about a just outcome. That outcome must be arrived at pursuant to a fair and just process. In addition to being contrary to basic principles of procedural fairness and natural justice, in both the Gypsy and Traveller context and in the protest context, newcomer injunctions can have arbitrary and disproportionate adverse impacts on fundamental rights, including the Convention rights under articles 8, 10 and 11 and the common law protections for free speech and assembly.

The notion that a person only becomes a party to proceedings by the acts that put them in breach of an order made in their absence and upon its enforcement against them is fundamentally at odds with such core principles. In contempt cases, the court's approach will not be concerned with whether the injunction should have been granted or the appropriateness of the terms which have led to the contempt. An order of the court has to be obeyed unless and until it has been set aside or varied by the court.

Even if an injunction is subsequently varied or set aside, that is irrelevant to the liability in contempt of a person who breaches the injunction (although it may be relevant to sentence): see *South Cambridgeshire District Council v Gammell* [2006] 1 WLR 658, paras 33–34 and *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29, paras 76–77. Moreover, in *Secretary of State for Transport v Cuciurean* [2021] EWCA Civ 357 at [57]–[62] the Court of Appeal rejected the argument that liability for contempt for breach of a persons unknown injunction required knowledge of its terms.

In the protest context, the courts have recognised the injustice of the enforcement of orders against individuals without giving them an opportunity to be heard and without consideration of their individual circumstances even if bound by the order when made: see *Astellas Pharma*

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A *Ltd v Stop Huntingdon Animal Cruelty* [2011] EWCA Civ 752 and *RWE Npower plc v Carrol* [2007] EWHC 947 (QB).

The lack of procedural fairness and natural justice intrinsic to orders against newcomers means that they should not even be imposed at the interim stage. If such injunctions were to be allowed on an interim basis, they should be limited to cases where there is a danger of real and imminent B unlawful action, with a view to holding the ring and allowing claimants time to identify unknown but existing defendants.

Jude Bunting KC and *Marlena Valles* (instructed by *Liberty*) for Liberty, intervening.

It is not open to the court to significantly expand the contra mundum jurisdiction so as to permit courts in Gypsy, Roma and Traveller ("GRT") or C protester cases to make persons unknown orders (interim or final) which bind newcomers. The Court of Appeal's conclusion in this case demonstrates the serious limitations of seeking to solve complex questions of social policy by deploying a tool of civil law. A court cannot lawfully make a final injunction against newcomers when the injunction is likely to interfere with the human rights of newcomers and there has not been any assessment of the individual facts of their case.

D Unlike established orders such as freezing orders, *Anton Piller* orders, or possession orders which are targeted at specific people, final persons unknown injunctions frequently involve severe interference with the rights of a large category of people, often extending to vast swathes of land, entire boroughs or the entirety of the strategic road network. They can cover entirely peaceful, lawful protest.

E In both GRT cases (where article 8 rights are involved) and in protest cases (where articles 10 and 11 are involved) an individual assessment of proportionality is required. In the former context, there is a clear line of Strasbourg authority emphasising the strictness of the proportionality test when imposing measures which affect the GRT community, such as injunctions to prevent encampments. A potential breach of planning authorisation, for example, will not be enough: see *Winterstein v France* F (Application No 27013/07) (unreported) 17 October 2013. Consideration must be given to individualised matters such as the length of time of the encampment, the consequences of removal and the risk of becoming homeless. Similar considerations apply in protester cases: see *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 417, para 136 and *Kudrevičius v Lithuania* (2015) 62 EHRR 34, paras 145, 155. This applies G not just to Convention rights, but to fundamental common law rights such as the right to a home, to respect for one's ethnic identity and to freedom of expression.

The serious impact of persons unknown injunctions is graphically illustrated by the way in which some claimants have aggressively sought committal of persons who have breached persons unknown injunctions, even in circumstances where the breaches were "trivial and wholly technical" as in H *MBR Acres Ltd v McGivern* [2022] EWHC 2072 (QB). In that case a solicitor was prosecuted by a private company for attending a protest site in her professional capacity and was said to have breached the injunction by parking her car for an hour in an "exclusion zone". The committal proceedings lasted two days and were dismissed as "wholly frivolous", but

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necessitated the solicitor self-reporting to the Solicitors Regulation Authority and ceasing to work for her firm until authorised to return. A

General category measures involve complex issues of policy and are matters for the legislature, as in the measures considered in *In re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2023] AC 505: see also *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105, para 52. A court at first instance is singularly ill-equipped to make such a category assessment. B

Nigel Giffin KC and *Simon Birks* (instructed by *Walsall Metropolitan Borough Council Legal Services*) for the second respondent local authority.

The essential starting point for addressing these issues is section 37 of the Senior Courts Act 1981, because section 37 is the statutory power which is being exercised when the High Court grants an injunction in a case of this nature (unless it is acting under a specific statutory power). There are three important points to make about what Parliament has enacted in section 37(1). First, it is a statutory power which Parliament has elected to confer in terms of the greatest possible breadth. It is engaged whenever the court considers that the grant of an injunction would be "just and convenient". Secondly, section 37(1) expressly applies both to interlocutory (interim) orders, and to final orders, without drawing any distinction between them whatsoever. Thirdly, the section 37 power is expressly exercisable in "all" cases where the grant of an injunction would be just and convenient. The appellants are therefore wrong to suggest that it is only exercisable in "some" cases, not including cases of the present nature. C D

The courts are well aware that, as with any other broad discretionary power conferred upon it, the section 37 power must be exercised on a principled basis. Thus it is axiomatic, for example, that the grant of injunctive relief in a particular form must represent a proportionate response to the factual situation with which the court is faced; that the court must so far as possible ensure fairness to all those affected by the injunction; and that the injunction is consistent with Convention rights. E

It is wrong to fetter the exercise of the section 37 power in advance, whether by inflexible judge-made rules, or through the division of cases into rigid and potentially artificial categories to which distinct rules apply. Rather, a broad and flexible approach is called for: see *Convoy Collateral Ltd v Broad Idea International Ltd* [2023] AC 389. If the grant of an injunction would not be a fair or proportionate measure on particular facts, then it will not be granted. But if an injunction in a particular form would be the appropriate response to the actual or threatened commission of a legal wrong—and especially if such an injunction represents the only effective means of protecting legal rights and preventing significant harm—then the court should be slow to conclude that it is powerless to grant such relief. F G

Newcomer injunctions are just one sub-species of the "precautionary" (quia timet) injunction which is solidly established in English law, and for whose award the courts have long since established a framework of governing principles. The claimants in these proceedings manifestly have an interest which merits protection. H

Cameron v Hussain [2019] 1 WLR 1471 should be seen as a case about the need for the court to guard against exposing people to detrimental legal consequences without their having had an opportunity to be heard or

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A otherwise to defend their interests. It did not lay down an absolute conceptual or jurisprudential bar to the grant of newcomer injunctions. Albeit stating that the general rule is that proceedings may not be brought against unnamed parties, Lord Sumption specifically endorsed the approach in *South Cambridgeshire District Council v Gammell* [2006] 1 WLR 658 of granting injunctions against anonymous but identifiable defendants provided that the injunction is brought to the attention of the putative defendant (for
B example by posting copies of the documents in some prominent place near the land in question) and the defendant is afforded an opportunity to apply to set it aside

The practice endorsed in *Cameron* applies as much to final orders as it does to interim orders. There is no relevant conceptual difference between the two, and it would be paradoxical if the court's powers were less
C extensive when making a final order after trial. Nicklin J in the present case attempted to resolve this paradox by saying that interim injunctions could only be granted against persons unknown for a short period during which they were expected to be identifiable, but there is no sign of any such approach in existing authority, for example *Bloomsbury Publishing Group plc v News Group Newspapers Ltd* [2003] 1 WLR 1633 or *Ineos Upstream*
D *Ltd v Persons Unknown* [2019] 4 WLR 100.

Newcomer injunctions are not intrinsically incompatible with natural justice. There are many situations in which courts make orders without having heard the persons who might be affected by them, usually because it is impractical, for one reason or another, to afford a hearing to those persons in advance of the making of the order. In such circumstances, fairness is secured by enabling any person affected to seek the recall of the order
E promptly at a hearing inter partes: see *R (M) v Secretary of State for Constitutional Affairs and Lord Chancellor* [2004] 1 WLR 2298, para 39 and *A v British Broadcasting Corpn* [2015] AC 588, para 67.

Guidelines are already in place as to when newcomer injunctions should be granted and as to the safeguards which must be observed: see *Ineos* [2019] 4 WLR 100, *Cuadrilla Bowland Ltd v Persons Unknown* [2020]
F 4 WLR 29 and *Bromley London Borough Council v Persons Unknown* [2020] PTSR 1043. Those guidelines provide a fair balance. They would be otiose if the Supreme Court acceded to the appeal and the safeguards which they provide were to be replaced by a universal prohibition. For examples of the court applying the correct approach to particular facts, see *Hillingdon London Borough Council v Persons Unknown* [2020] PTSR 2179,
G paras 95–122, *Cambridge City Council v Traditional Cambridge Tours Ltd* [2018] LLR 458, para 81 and *Birmingham City Council v Nagmadin* [2023] EWHC 56 (KB), at [34]–[37], [49]–[54], [59]–[60]. [Reference was also made to *Crédit Agricole Corporate and Investment Bank v Persons Having Interest in Goods Held by the Claimant* [2021] 1 WLR 3834.]

The operation of newcomer injunctions is not intrinsically incompatible with Convention principles of proportionality. It is accepted that, depending
H on the nature of the injunction in question, Convention rights of newcomers may well (though will not always) be engaged. But they have to be balanced against any competing common law or Convention rights of persons living in close proximity to the land in question who would otherwise be adversely affected by the prohibited acts. This is always a fact-sensitive exercise. The

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court is well-equipped to carry out the necessary proportionality test even where the newcomers are not before the court, just as it is when granting injunctions which carry *Spycatcher*-type consequences for third parties: see *Attorney General v Punch Ltd* [2003] 1 AC 1046, paras 108, 113–114, 116, 122–123.

Mark Anderson KC and *Michelle Caney* (instructed by *Wolverhampton City Council Legal Services*) for the first respondent local authority.

Precautionary injunctions against persons unknown which bind newcomers form a species of injunction against the world, as the Court of Appeal correctly held in the present case: see [2023] QB 295, paras 119–121. The fact that they are exceptional orders that are only granted in narrow circumstances as a last resort (see *Bromley London Borough Council v Persons Unknown* [2020] PTSR 1043, para 99 et seq and *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100, paras 31–34) falsifies any "floodgates" argument.

Section 37 of the Senior Courts Act 1981 frames the question which the courts must ask: is it "just and convenient" to grant an injunction? The appellants' argument would require the Supreme Court to pre-judge this question by holding in advance that it will never be just and convenient to grant an injunction to prevent future wrongs by persons who cannot be identified when the injunction is granted.

This would not only deny a remedy to the victims of unlawful encampments: it would prevent courts from granting injunctions to prevent a wide range of other wrongdoing, such as urban exploring and car cruising. To remove from the armoury of the courts the remedy which the courts have devised over the last 20 years would be to incentivise such wrongful conduct.

Moreover, if wrongdoers know that they cannot be subject to an injunction which does not name them, they will be provided with a perverse incentive to preserve their anonymity.

There is no fundamental distinction between interim and final injunctions. Section 37 includes the power to fashion an injunction which has some of the characteristics of both and such injunctions should be permitted where they are just and convenient. *Bloomsbury Publishing Group plc v News Group Newspapers Ltd* [2003] 1 WLR 1633 illustrates this.

The courts have laid down guidelines as to when such injunctions should be granted and as to the safeguards which must be observed. Those guidelines provide a fair balance. They would be otiose if the Supreme Court acceded to the appeal and the safeguards which they provide were replaced by a universal prohibition. This would offend principles of justice, most notably the principle that where there is a wrong, the law should provide a remedy: see *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] 1 WLR 2780, para 25.

It makes no sense to say that such injunctions should only be granted to protect Convention rights. There is no authority that Convention rights must be in play before an injunction against the world can be issued. As the Court of Appeal correctly observed at paras 80 and 120, the fact that protester or encampment cases do not fall within the exceptional category with which *Venables v News Group Newspapers Ltd* [2001] Fam 430 was concerned does not mean that a species of injunction against the world is not also appropriate in protester or encampment cases.

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A On the contrary, if it is right for the court to fashion an unconventional injunction, addressed to the whole world, in order to protect a claimant's Convention rights, it is unprincipled to conclude that it must never do so to protect non-Convention rights. The distinction between Convention rights and other rights is arbitrary and artificial.

Caroline Bolton and *Natalie Pratt* (instructed by *Sharpe Pritchard LLP* B and *Legal Services, Barking and Dagenham London Borough Council*) for the third to tenth respondent local authorities.

Each of the third to tenth respondent local authorities' injunctions in these proceedings were sought and granted pursuant to section 187B of the Town and Country Planning Act 1990. Travellers injunctions under section 187B should be seen as a statutory exception to the "general" rule set C out in *Cameron v Hussain* [2019] 1 WLR 1471, para 9 that proceedings may not be brought against unnamed parties.

By section 187B(1) a local authority may seek an injunction to restrain "any actual or apprehended breach of planning control": hence the local authority only has to "apprehend" a breach in order to apply for an injunction. By subsection (2) the court "may" grant "such injunction as it thinks appropriate", thus giving it the same wide jurisdiction as under D section 37 of the Senior Courts Act 1981. (The permissive "may" in subsection (2) applies not only to the *terms* of any injunction but also to the decision *whether* to grant an injunction: see *South Bucks District Council v Porter* [2003] 2 AC 558, para 28.) And by subsection (3), rules of court (currently to be found in CPR PD 49E) may provide for injunctions to be issued against persons whose identity is unknown. In unauthorised E encampment cases the court may describe the persons targeted by reference to evidence of what might potentially happen on the land sought to be protected, in the same way that persons unknown in unauthorised development cases are often defined by reference to the evidence of what was happening on the land (for example the injunction directed at "persons unknown . . . causing or permitting hardcore to be deposited [and] caravans . . . stationed [on F specified land]" in *South Cambridgeshire District Council v Persons Unknown* [2004] 4 PLR 88).

Section 187B does not confine itself to interim injunctions. Nor was the Court of Appeal in *South Cambridgeshire District Council v Gammell* [2006] 1 WLR 658 confining itself to interim injunctions, as may be seen from its reliance (at para 29) on *Mid-Bedfordshire District Council v Brown* [2005] 1 WLR 1460, which was a case about a final injunction (under G section 187B) which bound newcomers as well as the named defendant. [Reference was also made to *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] 1 WLR 2780, paras 1–4 and *Redbridge London Borough Council v Stokes* [2018] EWHC 4076 (QB) at [10]–[23].]

Richard Kimblin KC and *Michael Fry* (instructed by *Treasury Solicitor*) for High Speed Two (HS2) Ltd and the Secretary of State, intervening.

H Although the appellants complain about the "chilling effect" of injunctions on the right to protest, consideration should also be given to the beneficial effect of injunctions to deter disruptive, unlawful conduct: see *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] 1 WLR 2780, para 83. It is no part of the Secretary of State's or HS2's case that lawful

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protest should be constrained. However, since 2021 there has been significant disruption to the strategic road network caused by the unlawful conduct of protesters seeking a change of government policy. Similarly, since 2017 there has been significant disruption to the construction of the HS2 rail link by the unlawful conduct of activists opposed to the project. Hence the need for the Secretary of State and HS2 to seek tailored "newcomer" injunctions (see, for example, *High Speed Two (HS2) Ltd v Persons Unknown* [2022] EWHC 2360 (KB)) to prevent activities which are not only unlawful but often risk injury to contractors and/or members of the public.

Any person affected by such injunctions will have liberty to apply at any time to vary or discharge the injunction and anyone who successfully discharges an order would in principle be entitled to their costs. Further, claimants are normally required to give a cross-undertaking in damages that, should it later be determined that the interim injunction should not have been granted, they must compensate for any loss caused by the injunction.

Although the term "contra mundum" is frequently used—the ultimate in catch-all terms—it is necessary to consider what it actually means on the particular facts of each case. It is obtuse to consider the appropriateness of a contra mundum order on the basis that everybody is affected: it is not, for example, the whole world which wishes to climb gantries on the M25. Rather, the court should (and does as a matter of practice) take a view about who, in the particular circumstances, might be affected. It will be a cautious view. It is a matter of degree and a judgement which is not difficult to make.

Drabble KC replied.

The court took time for consideration.

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

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

2 In these circumstances, the appeal raises the question whether (and if so, on what basis, and subject to what safeguards) the court has the power to grant an injunction which binds persons who are not identifiable at the time

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A 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 B 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 C 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 D 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.

E 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.

F

(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. G The claims were brought under the procedure laid down in Part 8 of the Civil Procedure Rules 1998 ("CPR"), which is appropriate where the claimant seeks the court's decision on a question which is unlikely to involve a substantial dispute of fact: CPR 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 H 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

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A 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 B 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 C 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 D 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". E 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 F 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* G *Unknown* [2022] JPL 43.

11 Putting the matter broadly at this stage, Nicklin J concluded, in the light particularly of the decision of the Court of Appeal in *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 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 H 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

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A 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 B 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:

C (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 D 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 E 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?

F *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:

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

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

H (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

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issued, in terms which mean that persons do not become bound by the injunction until they infringe it?

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

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

(1) The jurisdiction to grant injunctions

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

17 The injunction is equitable in origin, and remains so despite its statutory confirmation. The power of courts with equitable jurisdiction to grant injunctions is, subject to any relevant statutory restrictions, unlimited: Spry, *Equitable Remedies*, 9th ed (2014) ("*Spry*"), p 333, cited with approval in, among other authorities, *Broadmoor Special Hospital Authority v Robinson* [2000] QB 775, paras 20–21 and *Cartier International AG v British Sky Broadcasting Ltd* [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 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.

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A 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: B

"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."

C 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: D 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 E 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 F 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.

G 21 It has often been recognised that the width and flexibility of the equitable jurisdiction to issue injunctions are not to be cut down by categorisations based on previous practice. In *Castanho v Brown & Root (UK) Ltd* [1981] AC 557, for example, Lord Scarman stated at p 573, in a speech with which the other Law Lords agreed, that "the width and flexibility of equity are not to be undermined by categorisation". To similar H 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

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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." A

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: B

"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." C

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. D E

(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. F

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

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

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A 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 B 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. C 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 D 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 E 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 F 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 G 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.

28 However, it has long been established that in appropriate H 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

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explained by Sir Thomas Plumer MR in *Meux v Maltby* (1818) 2 Swans 277, 281–282: A

> "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." B

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 The New River Co* (1805) 11 Ves 429, 445; CPR r 19.8(4)(a). C

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] Lexis Citation 198, concerned with picketing; *EMI Records Ltd v Kudhail* [1985] FSR 36, concerned with copyright D 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 E 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* [1986] Lexis Citation 644, concerned with protests. In addition, since F 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).

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(ii) Wardship proceedings

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

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A *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 B 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 C 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.

D 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 E 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 F 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

G 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 H 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 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.

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(v) Embargoes on draft judgments

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35 It is the practice of some courts to circulate copies of their draft judgments to the parties' legal representatives, subject to a prohibition on further, unauthorised, disclosure. The order therefore applies directly to non-parties to the proceedings: see, for example, *Attorney General v Crosland* [2021] 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.

B

(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.

C

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

D

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

E

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*; *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):

F

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

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

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> " 'The Sunday Times' in the instant case was perfectly at liberty, before publishing, either to inform the respondent and so give him the

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A 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, B 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 C 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 D 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, E 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 F 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 G 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 *Owners of cargo lately laden on board the Siskina v Distos Cia Naviera SA* H [1979] AC 210 ("*The Siskina*"), at p 256. There has been a gradual but growing reaction against that reasoning (which Lord Diplock himself recognised was too narrowly stated: *British Airways Board v Laker Airways Ltd* [1985] AC 58, 81) over the past 40 years, culminating in the recent decision in *Broad Idea* [2023] AC 389, cited in para 17 above, where the

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Judicial Committee of the Privy Council rejected such a rigid doctrine and asserted the court's governance of its own practice. It is now well established that the grant of injunctive relief is not always conditional on the existence of a cause of action. Again, it is relevant to consider some established categories of injunction against "no cause of action defendants" (as they are sometimes described) in order to see whether newcomer injunctions fall into an existing legitimate class, or, if not, whether they display analogous features.

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

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

46 Another exception, of great importance in modern commercial practice, is the *Mareva* or freezing injunction. In its basic form, this type of order restrains the defendant from disposing of his assets. However, since assets are commonly held by banks and other financial institutions, the principal effect of the injunction in practice is generally to bind non-parties, as explained earlier. The order is ordinarily made on a without notice application. It differs from a traditional interim injunction: its purpose is not to prevent the commission of a wrong which is the subject of a cause of action, but to facilitate the enforcement of an actual or prospective judgment or other order. Since it can also be issued to assist the enforcement of a decree arbitral, or the judgment of a foreign court, or an order for costs, it need not be ancillary to a cause of action in relation to which the court making the order has jurisdiction to grant substantive relief, or indeed ancillary to a cause of action at all (as where it is granted in support of an order for costs). Even where the claimant has a cause of action against one defendant, a freezing injunction can in certain limited circumstances be granted against another defendant, such as a bank, against which the

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A 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, B 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 C 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 D 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 E 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 F ("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 G 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.

H *(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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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 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 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 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 under the authority of the heads of division. It has no statutory force and cannot alter the general law.

53 As we have explained at paras 27–33 above, there are undoubtedly circumstances in which proceedings may be validly commenced although the defendant is not named in the claim form, in addition to those mentioned in the rules and practice directions mentioned above. All of those examples—representative defendants, the wardship jurisdiction, and the principle established in the *Venables* case [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 the court to deal with cases justly and at proportionate cost. Since this objective is inconsistent with an undue reliance on form over substance, the joinder of a defendant by description was held to be permissible, provided that the description was "sufficiently certain as to identify both those who are included and those who are not" (para 21). It will be necessary to return to that case, and also to consider more recent decisions concerned with proceedings brought against unnamed persons.

55 Service of the claim form is a matter of greater significance. Although the court may exceptionally dispense with service, as explained below, and may if necessary grant interlocutory relief, such as interim injunctions, before service, as a general rule service of originating process is

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A the act by which the defendant is subjected to the court's jurisdiction, in the sense of its power to make orders against him or her (*Dresser UK Ltd v Falcongate Freight Management Ltd* [1992] QB 502, 523; *Barton v Wright Hassall LLP* [2018] 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 B 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.

C **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.

D

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 E 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.

F

(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 G 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 H 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

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identify intended defendants in that way (see para 27 above). He noted (para 11) the anomalous consequence:

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

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

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

(2) Hampshire Waste Services

60 Later that same year, Sir Andrew Morritt V-C made another order against persons unknown, this time in a protester case, *Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator Site* [2004] Env LR 9 ("*Hampshire Waste Services*"). The claimants, operators of a number of waste incinerator sites which fed power to the national grid, sought an injunction to restrain protesters from entering any of various named sites in connection with a "Global Day of Action against Incinerators" some six days later. Previous actions of this kind presented a danger to the protesters and to others and had resulted in the plants having to be shut down. The police were, it seemed, largely powerless to prevent these threatened activities. The Vice-Chancellor, having referred to *Bloomsbury*, had no doubt the order was justified save for one important matter: the claimants were unable to identify any of the protesters to whom the order would be directed or upon whom proceedings could be served. Nevertheless, the Vice-Chancellor was satisfied that, in circumstances such as these, joinder by description was permissible, that the intended defendants should be described as "persons entering or remaining without the consent of the claimants, or any of them, on any of the incinerator sites at [specified addresses] in connection with the 'Global Day of Action Against Incinerators' (or similarly described event) on or around 14 July 2003", and that posting notices around the sites would amount to effective substituted service. The court should not refuse an application simply because difficulties in enforcement were envisaged. It was, however, necessary that any person who wished to do so should be able promptly to apply for the order to be discharged, and that was allowed for. That being so, there was no need for a formal return date.

61 Whereas in *Bloomsbury* the injunction was directed against a small number of individuals who were at least theoretically capable of being identified, the injunction granted in *Hampshire Waste Services* was effectively made against the world: anyone might potentially have entered or remained on any of the sites in question on or around the specified date. This

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A is a common if not invariable feature of newcomer injunctions. Although the number of persons likely to engage in the prohibited conduct will plainly depend on the circumstances, and will usually be relatively small, such orders bear upon, and enjoin, anyone in the world who does so.

(3) Gammell

B **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 C 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 D 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 E 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* F *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 G 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 H 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

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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 B case. Ms Gammell had therefore already become a defendant when she stationed her caravan on the site. Her proper course (and that of any newcomer in the same situation) was to make a prompt application to vary or discharge the injunction as against her (which she had not done) and, in the meantime, to comply with the injunction. The individualised proportionality exercise could then be carried out with regard to her C 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.

D

(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* E *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 F 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 G 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 H 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).

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A *(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 B who could not at that stage be identified by name, although often they could be identified by some form of description. But before long, many local authorities began to take a bolder line and claims were brought simply against "persons unknown".

69 A further important development was the grant of Traveller injunctions, not just against those who were in unauthorised occupation of C 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 D 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 E 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 F 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 G 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 H 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).

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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.

B

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

C

D

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.

E

F

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.

G

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

H

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A 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 B 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 C conflicting needs and often satisfying no one."

78 For many years there has also been a good deal of publicly available guidance on the issue of unauthorised encampments, much of which embodies obvious good sense and has been considered by the judges dealing with these applications. So, for example, materials considered in the authorities to which we will come have included a Department for the D 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 E 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 F 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 G 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 H 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

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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. The claimant then brought an action for damages against the registered keeper, but it transpired that that person had not been driving the vehicle at the time of the accident. In addition, although there was an insurance policy in force in respect of the vehicle, the insured person was fictitious. The claimant could not sue the insurers, as the relevant legislation required that the driver was a person insured under the policy. The claimant could have sought compensation from the Motor Insurers' Bureau, which compensates the victims of uninsured motorists, but for reasons which were unclear she applied instead to amend her claim to substitute for the registered keeper the person unknown who was driving the car at the time of the collision, so as to obtain a judgment on which the insurer would be liable under section 151 of the Road Traffic Act 1988 ("the 1988 Act"). The judge refused the application.

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

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

83 Lord Sumption proceeded to explain that permissible modes of service had been broadened considerably over time but that the object of all of these modes of service was the same, namely to enable the court to be satisfied that one or other of the methods used had either put the defendant in a position to ascertain the contents of the claim or was reasonably likely to

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

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

D **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.

E

(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 F 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.

G **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 H 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

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form the intention to engage in the activity at some later date. Lord Sumption's categorisation of persons who might properly be sued was not intended to exclude newcomers. To the contrary, Longmore LJ continued, Lord Sumption appeared rather to approve the decision in *Bloomsbury* and he had expressed no disapproval of the decision in *Hampshire Waste Services*.

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

(8) Bromley

90 The issue of unauthorised encampments by Gypsies and Travellers was considered by the Court of Appeal a short time later in *Bromley London Borough Council v Persons Unknown* [2020] 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

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A 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, B 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. C Conversely, there is nothing in *Bromley* to suggest that final injunctions against unidentified newcomers cannot or should never be granted.

93 As it was, the Court of Appeal dismissed the appeal. Coulson LJ, with whom Ryder and Haddon-Cave LJJ agreed, endorsed what he described as the elegant synthesis by Longmore LJ in *Ineos* (at para 34) of certain essential requirements for the grant of an injunction against persons unknown in a protester case (paras 29–30). He considered it appropriate to add in the D 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 E 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; F (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 G 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.

H **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

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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 against suing persons unknown who were not currently in existence but would come into existence if and when they committed a threatened tort. Nonetheless, it continued, a court should be inherently cautious about granting such an injunction against unknown persons since the reach of such an injunction was necessarily difficult to assess in advance.

(10) Canada Goose

97 Only a few months later, in *Canada Goose* [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 opened a store in London but was faced with what it considered to be a campaign of harassment, nuisance and trespass by protesters against the manufacture and sale of such clothing. Accordingly, with the manager of the store, it issued proceedings and decided to seek an injunction against the protesters.

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

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A 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 B for service of the interim injunction, and to one other individual who had requested a copy.

100 In these circumstances, an application by the claimants for summary judgment and a final injunction was unsuccessful. The judge held that the claim form had not been served on any defendant to the proceedings; that it was not appropriate to permit service by alternative means (under CPR r 6.15) or to dispense with service (under CPR r 6.16); C 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 D 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 E 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.

F **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 G (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 H 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

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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 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

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A 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. B 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 C against persons unknown under review even if they were final in character. In that regard, the Master of the Rolls made the point that, for as long as the court is concerned with the enforcement of an order, the action is not at an end.

4. *A new type of injunction?*

D 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.

E 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 F 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 G 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 H 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;

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In re Persons formerly known as Winch [2021] EMLR 20 and [2021] EWHC 3284 (QB); [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, 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."

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A 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 B 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.

C **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 D impossible (even alternative service being tantamount to no service at all), the judge had accordingly been right to refuse permission to amend.

115 That said, with the benefit of the further scrutiny that the point has received on this appeal, we have, with respect, some difficulties with other aspects of Lord Sumption's analysis. In the first place, we agree that it is generally necessary that a defendant should have such notice of the E 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 F 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 G 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 H 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

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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.

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117 We also have difficulty in fitting the unnamed defendants in *Bloomsbury* [2003] 1 WLR 1633 within Lord Sumption's class of identifiable persons who in due course could be served. It is true that they would have had to identify themselves as the persons referred to if they had sought to do the prohibited act. But if they learned of the injunction and decided to obey it, they would be no more likely to be identified for service than the hit and run driver in *Cameron.* The *Bloomsbury* case also illustrates the somewhat unstable nature of Lord Sumption's distinction between anonymous and unidentifiable defendants. Since the unnamed defendants in *Bloomsbury* were unidentifiable at the time when the claim was commenced and the injunction was granted, one would have thought that the case fell into Lord Sumption's second category. But the fact that the unnamed defendants would have had to identify themselves as the persons in possession of the book if (but only if) they disobeyed the injunction seems to have moved the case into the first category. This implies that it is too absolutist to say that a claimant can never sue persons unknown unless they are identifiable at the time the claim form is issued. For these reasons also, it seems to us that the classification of cases as falling into one or other of Lord Sumption's categories (or into a third category, as suggested by the Court of Appeal in *Canada Goose,* para 63, and in the present case, para 35) may be a distraction from the fundamental question of whether service on the defendant can in practice be effected so as to bring the proceedings to his or her notice.

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

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119 More importantly, we are not comfortable with an analysis of *Bloomsbury* which treats its legitimacy as depending upon its being categorised as falling within a class of case where unnamed defendants may be assumed to become identifiable, and therefore capable of being served in due course, as we shall explain in more detail in relation to the supposed

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A *Gammell* solution, notably included by Lord Sumption in the same class alongside *Bloomsbury*, at para 15 in *Cameron*.

120 We also observe that *Cameron* was not concerned with equitable remedies or equitable principles. Nor was it concerned with newcomers. Understandably, given that the case was an action for damages, Lord Sumption's focus was particularly on the practice of the common law courts B 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 defendant, but the "no cause of action defendants" against whom freezing injunctions, *Norwich Pharmacal* orders, *Bankers Trust* orders and internet C blocking orders may be obtained. The result of the orders made against those defendants may be to enable the unnamed defendant then to be identified and served, and effective relief obtained: see, for example, *CMOC Sales and Marketing Ltd v Person Unknown* [2019] Lloyd's Rep FC 62. In other words, the identification of the unknown defendant can depend upon the availability of injunctions which are granted at a stage when that defendant D remains unidentifiable. Furthermore, injunctions and other orders which operate contra mundum, to which (as we have already observed) newcomer injunctions can be regarded as analogous, raise issues lying beyond the scope of Lord Sumption's judgment in *Cameron*.

121 It also needs to be borne in mind that the unnamed defendants in *Bloomsbury* formed a tiny class of thieves who might be supposed to be E 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 F 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 G 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* H [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

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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 does stand as a precedent for the grant of relief otherwise than on an emergency basis against defendants who, although joined, have yet to be served.

125 We turn next to the supposed *Gammell* [2006] 1 WLR 658 solution, and its apparent approval in *Cameron* as a juridically sound means of joining unnamed defendants by their self-identification in the course of disobeying the relevant injunction. It has the merit of being specifically addressed to newcomer injunctions in the context of Travellers, but in our view it is really no solution at all.

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

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

The Master of the Rolls' analysis was not directed to a submission that injunctions could not or should not be granted at all against newcomers, as is now advanced on this appeal. No such submission was made. Furthermore, he was concerned only with the circumstances of a person who had both been served with and (by oral explanation) notified of the terms of the

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A 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 B 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 C 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 D 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*.

128 This court is not of course bound to consider the matter, as was the E 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 F 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 G 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 H approval (at para 17) in the *Meier* case [2009] 1 WLR 2780 (para 67 above). Similarly, Baroness Hale of Richmond JSC stated in the same case at para 39, in relation to an injunction against trespass by persons unknown, "We should assume that people will obey the law, and in particular the targeted orders of the court, rather than that they will not."

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

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 Pvt Ltd v Tudu Enterprise* (unreported) 18 February 2011.

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

133 As we have explained, the *Gammell* solution was adopted by the Court of Appeal in the present case as a means of overcoming the difficulties arising in relation to final injunctions against newcomers which had been

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A 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 *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.

B 135 First, the court's starting point in *Canada Goose* was that there were "some very limited circumstances", such as in *Venables*, in which a final injunction could be granted contra mundum, but that protester actions did not fall within "that exceptional category". Accordingly, "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* C *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 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 D observation that it was "consistent with the fundamental principle in *Cameron* . . . that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard" (ibid). As we have explained, however, there are means of enabling a person who is affected by a final injunction to be heard after the order has been made, as was discussed in *Bromley* and recognised by the Master of the Rolls in the present case.

E 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 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 F 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.

G 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 H 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

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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. A

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, at the time when it is ordered, operates against a person who has not been served in due time with the application so as to be able to oppose it, who may have had no notice (even informal) of the intended application to court for the grant of it, and who may not at that stage even be a defendant served with the proceedings in which the injunction is sought. This is so regardless of whether the injunction is in form interim or final.

140 More to the point, the injunction typically operates against a particular newcomer before (if ever) the newcomer becomes a party to the proceedings, as we have explained at paras 129–132 above. An ordinarily law-abiding newcomer, once notified of the existence of the injunction (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, if the defendants are defined as persons who behave in the manner restrained. Unless they apply to do so they will never become a defendant. If the person is a Traveller, they will simply pass by the prohibited site rather than camp there. They will not identify themselves to the claimant or to the court by any conspicuous breach, nor trigger the *Gammell* process by which, under the current orthodoxy, they are deemed then to become a defendant by self-identification. Even if the order was granted at a formally interim stage, the compliant Traveller will not ever become a party to the

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A proceedings. They will probably never become aware of any later order in final form, unless by pure coincidence they pass by the same site again looking for somewhere to camp. Even if they do, and are again dissuaded, this time by the final injunction, they will not have been a party to the proceedings when the final order was made, unless they breached it at the interim stage.

B **141** In considering whether injunctions of this type comply with the standards of procedural and substantive fairness and justice by which the courts direct themselves, it is the compliant (law-abiding) newcomer, not the contemptuous breaker of the injunction, who ought to be regarded as the paradigm in any process of evaluation. Courts grant injunctions on the assumption that they will generally be obeyed, not as stage one in a process intended to lead to committal for contempt: see para 129 above, and the C cases there cited, with which we agree. Furthermore the evaluation of potential injustice inherent in the process of granting injunctions against newcomers is more likely to be reliable if there is no assumption that the newcomer affected by the injunction is a person so regardless of the law that they will commit a breach of it, even if the grant necessarily assumes a real risk that they (or a significant number of them) would, but for the injunction, D invade the claimant's rights, or the rights (including the planning regime) of those for whose protection the claimant local authority seeks the injunction. That is the essence of the justification for such an injunction.

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

143 The distinguishing features of an injunction against newcomers are F 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 G 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 H 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

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A
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.

B

C

(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.

D

(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.

E

(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.

F

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 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 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?

G

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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

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A about whether there is any jurisdiction or principled basis for granting it, it behoves this court to go back to first principles about the means by which the court navigates such uncharted water. Much emphasis was placed in this context upon the wide generality of the words of section 37 of the 1981 Act. This was cited in para 17 above, but it is convenient to recall its terms:

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

This or a very similar formulation has provided the statutory basis for the grant of injunctions since 1873. But in our view a submission that section 37 C 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, D 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 E 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 general limits or conditions within which injunctions are granted may F properly be adjusted over time. The equitable origin of these principles is beyond doubt, and their continuing vitality as an analytical tool may be seen at work from time to time when changes or developments in the scope of injunctive relief are reviewed: see e g *Castanho v Brown & Root (UK) Ltd* [1981] AC 557 (para 21 above).

147 The expression of the readiness of equity to change and adapt its principles for the grant of equitable relief which has best stood the test of G 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 H 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

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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 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 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 p 187, 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 matter of substance and that which is matter of form; and if it find, that by

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A insisting on the form, the substance will be defeated, it holds it to be inequitable to allow a person to insist on such form, and thereby defeat the substance."

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

C 152 The third general equitable principle is equity's essential flexibility, as explained at paras 19–22 above. Not only is an injunction always discretionary, but its precise form, and the terms and conditions which may be attached to an injunction (recognised by section 37(2) of the 1981 Act), are highly flexible. This may be illustrated by the lengthy and painstaking development of the search order, from its original form in *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55 to the much more sophisticated D 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 International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509. Of course, this E flexibility enables not merely incremental development of a new type of injunction over time in the light of experience, but also the detailed moulding of any standard form to suit the justice and convenience of any particular case.

153 Fourthly, there is no supposed limiting rule or principle apart from justice and convenience which equity has regarded as sacrosanct over time. This is best illustrated by the history of the supposed limiting principle (or F 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 G 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.

H 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'

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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.

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).

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

158 It may be said, correctly, that orders of this kind are usually made so as to protect the integrity of the court's process from abuse. Nonetheless they have the effect of attaching to a species of intangible property a legal regime giving rise to a liability, if infringed, which sounds in contempt, regardless of the identity of the infringer. In conceptual terms, and shorn of

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A 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.

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

160 Protection of the court's process from abuse, or preservation of C 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 D relevant documents in advance of the formal process of disclosure. *Norwich Pharmacal* orders are a form of advance third party disclosure designed to enable a claimant to identify and then sue the wrongdoer. Anti-suit injunctions preserve the integrity of the appropriate forum from forum shopping by parties preferring without justification to litigate elsewhere.

161 But internet blocking orders (para 49 above) stand in a different E category. The applicant intellectual property owner does not seek assistance from internet service providers ("ISPs") to enable it to identify and then sue the wrongdoers. It seeks an injunction against the ISP because it is a much more efficient way of protecting its intellectual property rights than suing the numerous wrongdoers, even though it is no part of its case against the ISP that it is, or has even threatened to be, itself a wrongdoer. The injunction is F 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 G 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 H 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.

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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 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, 428–429 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

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A 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. B 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 C 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.

D (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 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 F 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 G 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 H 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

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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 instructions quickly taken by telephone during the short adjournment) that, in summary, byelaws took too long to obtain (requiring two stages of negotiation with central government), would need to be separately made in relation to each site, would be too inflexible to address changes in the use of the relevant sites (particularly if subject to development) and would unduly criminalise the process of enforcing civil rights. The appellants did not engage with the detail of any of these points, their objection being more a matter of principle.

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

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

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

175 In the present context notice of the application would not risk defeating its purpose, and there would usually be no such urgency as would justify applying without notice. The absence of notice is simply inherent in F an application for this type of injunction because, quoad newcomers, the applicant has no idea who they might turn out to be. A practice requirement to advertise the intended application, by notices on the relevant sites or on suitable websites, might bring notice of the application to intended newcomers before it came to be made, but this would be largely a matter of happenstance. It would for example not necessarily come to the attention of G 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 H 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)

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and the opportunity to oppose the petition, without needing to be joined as defendants. We say more about this and how advance notice of an application for a newcomer injunction might be given to newcomers and persons and bodies representing their interests in the next section of this judgment.

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

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

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

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

181 There are of course exceptions to this pattern of temporary camping as trespassers, as when Travellers buy a site for camping on, and are then proceeded against for breach of planning control rather than for

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A trespass: see e g the *Gammell* case and the appeal in *Bromley London Borough Council v Maughan* heard at the same time. In such a case the potential procedural injustice of a without notice injunction might well be sufficient to require the local authority to proceed against the owners of the 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 B application made on notice. But the issue on this appeal is not whether newcomer injunctions against Travellers are always justified, but rather whether the objections are such that they never are.

182 The next logical objection (although little was made of it on this appeal) is that an injunction of this type made on the application of a local authority doing its duty in the public interest is not generally accompanied by a cross-undertaking in damages. There is of course a principled reason C 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 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 D submissions about it. In any event, if this were otherwise a decisive reason why an injunction of this type should never be granted, it may be assumed that local authorities, or some of them, would prefer to offer a cross undertaking rather than be deprived of the injunction.

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

184 We have already briefly mentioned Mr Drabble KC's point about the G 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 H 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

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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 textbook 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, the relevant principles and safeguards will inevitably evolve in these and other cases in the light of experience. Nevertheless, they do have a bearing on the issues of principle we have to decide, in that we must be satisfied that the points raised by the appellants do not, individually or collectively, preclude the grant of what are in some ways final (but regularly reviewable) injunctions that prevent persons who are unknown and unidentifiable at the date of the order from trespassing on and occupying local authority land. We have also been invited to give guidance on these matters so far as we feel able to do so having regard to our conclusions as to the nature of newcomer injunctions and the principles applicable to their grant.

(1) Compelling justification for the remedy

188 Any applicant for the grant of an injunction against newcomers in a Gypsy and Traveller case must satisfy the court by detailed evidence that

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A there is a compelling justification for the order sought. This is an overarching principle that must guide the court at all stages of its consideration (see para 167(i)).

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

D

(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 E 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* (1995) 8 Admin LR 529, local authorities used this power with great energy. But they made little or no corresponding use of the related powers conferred on them by section 24 of the CSCDA 1960 to provide sites where caravans might be brought, whether for temporary purposes or for use as permanent F residences, and in that way compensate for the closure of the commons. As a result, it became increasingly difficult for Travellers and Gypsies to pursue their nomadic way of life.

192 In the light of the problems caused by the CSCDA 1960, section 6 of the Caravan Sites Act 1968 ("CSA 1968") imposed on local authorities a duty to exercise their powers under section 24 of the CSCDA 1960 to G 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. H 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

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impact of any legislation specifically affecting that jurisdiction including the Housing (Wales) Act 2014 ("H(W)A 2014"). Section 101(1) of the H(W)A 2014 imposes on the authority a duty to "carry out an assessment of the accommodation needs of Gypsies and Travellers residing in or resorting to its area". If the assessment identifies that the provision of sites is inadequate to meet the accommodation needs of Gypsies and Travellers in its area and the assessment is approved by the Welsh Ministers, the authority has a *duty* to exercise its powers to meet those needs under section 103 of the H(W)A 2014.

(ii) General "needs" assessments

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

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

(iii) Planning policy

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

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

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

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

B

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

202 The availability of transit sites (and information as to where they may be found) is also important in providing short-term or temporary accommodation for Gypsies and Travellers moving through a local authority G 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 H 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

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of the public; and the resources available to the local authorities for deployment to meet the needs of these nomadic communities having regard to the wider obligations which the authorities must also discharge. In this way a deeper level of trust may be established and so facilitate and encourage a constructive approach to the implementation of proportionate solutions to the problems the nomadic communities continue to present, without immediate and expensive recourse to applications for injunctive relief or enforcement action.

(v) Public spaces protection orders

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

(vi) Criminal Justice and Public Order Act 1994

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

206 Section 61 of the CJPOA confers powers on the police to deal with two or more persons who they reasonably believe are trespassing on land with the purpose of residing there. The police can direct these trespassers to leave (and to remove any vehicles) if the occupier has taken reasonable steps to ask them to leave and they have caused damage, disruption or distress as those concepts are elucidated in section 61(10). Failure to leave within a reasonable time or, if they do leave, a return within three months is an offence punishable by imprisonment or a fine. A defence of reasonable excuse may be available in particular cases.

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

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A authorities) there is a suitable pitch available on a site managed by the authority or social housing provider in that area.

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

(vii) Byelaws

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

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

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

212 Other powers to make byelaws and to impose penalties for breach are conferred on authorities in relation to commons by, for example, the Commons Act 1899 (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 H Countryside Act 1949 (12, 13 & 14 Geo 6, c 97) (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

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preservation of other open country under section 17 of the Countryside and Rights of Way Act 2000.

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

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

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

(viii) A need for review

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

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A 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 B 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 C 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 D 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 E 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.

F

(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) G 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 H 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.

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(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

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A 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 B 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 C 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 D 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 E 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 F 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).

G **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 H 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

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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;

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A 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

B **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.

C

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:

D (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 E 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.

F (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.

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

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

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

(iv) In deciding whether to grant a newcomer injunction, the application H 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.

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

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

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

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

Appeal dismissed.

Colin Beresford, Barrister

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Neutral Citation Number: [2024] EWHC 134 (KB)

Claim no: QB-2022-000904

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
THE ROYAL COURTS OF JUSTICE

Date: 26th January 2024

Before:
MR JUSTICE RITCHIE

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

BETWEEN

(1) VALERO ENERGY LTD
(2) VALERO LOGISTICS UK LTD
(3) VALERO PEMBROKESHIRE OIL TERMINAL LTD

Claimants

-and-

(1) PERSONS UNKNOWN WHO,
IN CONNECTION WITH ENVIRONMENTAL PROTESTS BY THE 'JUST STOP OIL' OR 'EXTINCTION REBELLION' OR 'INSULATE BRITAIN' OR 'YOUTH CLIMATE SWARM' (ALSO KNOWN AS YOUTH SWARM) MOVEMENTS ENTER OR REMAIN WITHOUT THE CONSENT OF THE FIRST CLAIMANT UPON ANY OF THE 8 SITES (defined below)

(2) PERSONS UNKNOWN WHO,
IN CONNECTION WITH ENVIRONMENTAL PROTESTS BY THE 'JUST STOP OIL' OR 'EXTINCTION REBELLION' OR 'INSULATE BRITAIN' OR 'YOUTH CLIMATE SWARM' (ALSO KNOWN AS YOUTH SWARM) MOVEMENTS CAUSE BLOCKADES, OBSTRUCTIONS OF TRAFFIC AND INTERFERE WITH THE PASSAGE BY THE CLAIMANTS AND THEIR AGENTS, SERVANTS, EMPLOYEES, LICENSEES, INVITEES WITH OR WITHOUT VEHICLES AND EQUIPMENT TO, FROM,

OVER AND ACROSS THE ROADS IN THE VICINITY OF
THE 8 SITES (defined below)

(3) MRS ALICE BRENCHER AND 16 OTHERS

Defendants

Katharine Holland KC and **Yaaser Vanderman**
(instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Claimant**.
The Defendants did not appear.

Hearing date: 17th January 2024

- -

Approved Judgment

This judgment was handed down remotely at 14.00pm on Friday 26th January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mr Justice Ritchie:

The Parties

1. The Claimants are three companies who are part of a large petrochemical group called the Valero Group and own or have a right to possession of the 8 Sites defined out below.

2. The "4 Organisations" relevant to this judgment are:
   2.1 Just Stop Oil.
   2.2 Extinction Rebellion.
   2.3 Insulate Britain.
   2.4 Youth Climate Swarm.
   I have been provided with a little information about the persons who set up and run some of these 4 Organisations. They appear to be crowdfunded partly by donations. A man called Richard Hallam appears to be a co-founder of 3 of them.

3. The Defendants are firstly, persons unknown (PUs) connected with 4 Organisations who trespass or stay on the 8 Sites defined below. Secondly, they are PUs who block access to the 8 Sites defined below or otherwise interfere with the access to the 8 Sites by the Claimants, their servants, agents, licensees or invitees. Thirdly, they are named persons who have been involved in suspected tortious behaviour or whom the Claimants fear will be involved in tortious behaviour at the 8 Sites and the relevant access roads.

The 8 Sites

4. The "8 Sites" are:
   4.1 the first Claimant's Pembroke oil refinery, Angle, Pembroke SA71 5SJ (shown outlined red on plan A in Schedule 1 to the Order made by Bourne J on 28.7.2023);
   4.2 the first Claimant's Pembroke oil refinery jetties at Angle, Pembroke SA71 5SJ (as shown outlined red on plan B in Schedule 1 to the Order made by Bourne J on 28.7.2023);
   4.3 the second Claimant's Manchester oil terminal at Churchill Way, Trafford P ark, Manchester M17 1BS (shown outlined red on plan C in Schedule 1 to the Order made by Bourne J on 28.7.2023);
   4.4 the second Claimant's Kingsbury oil terminal at plot B, Trinity Road, Kingsbury, Tamworth B78 2EJ (shown outlined red on plan D in Schedule 1 to the Order made by Bourne J on 28.7.2023);
   4.5 the second Claimant's Plymouth oil terminal at Oakfield Terrace Road, Cattedown, Plymouth PL4 0RY (shown outlined red on plan E in Schedule 1 to the Order made by Bourne J on 28.7.2023);
   4.6 the second Claimant's Cardiff oil terminal at Roath Dock, Rover Way, Cardiff CF10 4US (shown outlined red on plan F in Schedule 1 to the Order made by Bourne J on 28.7.2023);

4.7 the second Claimant's Avonmouth oil terminal at Holesmouth Road, Royal E dward dock, Avonmouth BS11 9BT (shown outlined red on the plan G in Schedule 1 to the Order made by Bourne J on 28.7.2023);

4.8 the third Claimant's Pembrokeshire terminal at Main Road, Waterston, Milford Haven SA73 1DR (shown outlined red on plan H in Schedule 1 to the Order made by Bourne J on 28.7.2023).

Bundles

5. For the hearing I was provided with a core bundle and 5 lever arch files making up the supplementary bundle, a bundle of authorities, a skeleton argument, a draft order and a final witness statement from Ms Hurle. Nothing was provided by any Defendant.

Summary

6. The 4 Organisations and members of the public connected with them seek to disrupt the petrochemical industry in England and Wales in furtherance of their political objectives and demands. After various public threats and protests and on police intelligence the Claimants issued a Claim Form on the 18th of March 2022 alleging that they feared tortious trespass and nuisance by persons unknown connected with the 4 Organisations at their 8 Sites and their access roads and seeking an interim injunction prohibiting that tortious behaviour.

7. Various interim prohibitions were granted by Mr Justice Butcher on the 21st of March 2022 in an ex-parte interim injunction protecting the 8 Sites and access thereto. However, protests involving tortious action took place at the Claimant's and other companies' Kingsbury site between the 1st and the 15th of April 2022 leading to not less than 86 protesters being arrested. The Claimants applied to continue their injunction and it was renewed by various High Court judges and eventually replaced by a similar interim injunction made by Mr Justice Bourne on the 28th of July 2023.

8. On the 12th of December 2023 the Claimants applied for summary judgment and for a final injunction to last five years with annual reviews. This judgment deals with the final hearing of that application which took place before me.

9. Despite valid service of the application, evidence and notice of hearing, none of the named Defendants attended at the hearing which was in open Court and no UPs attended at the hearing, nor did any member of the public as far as I could see in Court. The Claimants' counsel informed me that no communication took place between any named Defendant and the Claimants' solicitors in relation to the hearing other than by way of negotiations for undertakings for 43 of the named Defendants who all promised not to commit the feared torts in future.

The Issues

10. The issues before me were as follows:

10.1 Are the elements of CPR Part 24 satisfied so that summary judgment can be entered?

10.2 Should a final injunction against unknown persons and named Defendants be granted on the evidence presented by the Claimants?

10.3 What should the terms of any such injunction be?

The ancillary applications

11. The Claimants also made various tidying up applications which I can deal with briefly here. They applied to amend the Claimants' names, to change the word "limited" to a shortened version thereof to match the registered names of the companies. They applied to delete two Defendants, whom they accepted were wrongly added to the proceedings (and after the hearing a third). They applied to make minor alterations to the descriptions of the 1st and 2nd Defendants who are unknown persons. The Claimants also applied for permission to apply for summary judgment. This application was made retrospectively to satisfy the requirements of CPR rule 24.4. None of these applications was opposed. I granted all of them and they are to be encompassed in a set of directions which will be issued in an Order.

Pleadings and chronology of the action

12. In the Claim Form the details of the claims were set out. The Claimants sought a *quia timet* (since he fears) injunction, fearing that persons would trespass into the 8 Sites and cause danger or damage therein and disrupt the processes carried out therein, or block access to the 8 Sites thereby committing a private nuisance on private roads or a public nuisance on public highways. The Claimants relied on the letter sent by Just Stop Oil dated 14th February 2022 to Her Majesty's Government threatening intervention unless various demands were met. Just Stop Oil asserted they planned to commence action from the 22nd of March 2022. Police intelligence briefings supported the risk of trespass and nuisance at the Claimants' 8 Sites. 3 unidentified groups of persons in connection with the 4 Organisations were categorised as Defendants in the claim as follows: (1) those trespassing onto the 8 Sites; (2) those blockading or obstructing access to the 8 Sites; (3) those carrying out a miscellany of other feared torts such as locking on, tunnelling or encouraging others to commit torts at the 8 Sites or on the access roads thereto. The Claim Form was amended by order of Bennathan J. in April 2022; Re amended by order of Cotter J. in September 2022 and re re amended in July 2023 by order of Bourne J.

13. In late March 2022 Mr Justice Butcher issued an interim ex parte injunction on a quia timet basis until trial, expressly stating it was not intended to prohibit lawful protest. He prohibited the Defendants from entering or staying on the 8 sites; impeding access to the 8 sites; damaging the Claimants' land; locking on or causing or encouraging others to breach the injunction. The Order provided for various alternative methods of service for the unknown persons by fixing hard copies of the injunction at the entrances and on access road at the 8 Sites, publishing digital copies online at a specific website and sending emails to the 4 Organisations.

14. Despite the interim injunction, between the 1st and the 7th of April 2022 protesters attended at the Claimants' Kingsbury site and 48 were arrested. Between the 9th and 15th of April 2022 further protesters attended at the Kingsbury site and 38 were arrested. No application to commit any person to prison for contempt was made. The protests were not just at the Claimants' parts of the Kingsbury site. They targeted other owners' sites there too.

15. On the return date, the original interim injunction was replaced by an Order dated 11th of April 2022 made by Bennathan J. which was in similar terms and provided for alternative service in a similar way and gave directions for varying or discharging the interim injunction on the application by any unknown person who was required provide their name and address if they wished to do so (none ever did). Geographical plans were attached to the original injunction and the replacement injunction setting out clearly which access roads were covered and delineating each of the 8 Sites. Undertakings were given by the Claimants and directions were given for various Chief Constables to disclose lists and names of persons arrested at the 8 Sites on dates up to the 1st of June 2022.

16. The Chief Constables duly obliged and on the 20th of September 2022 Mr Justice Cotter added named Defendants to the proceedings, extended the term of the interim injunction, provided retrospective permission for service and gave directions allowing variation or discharge of the injunction on application by any Defendant. Unknown persons who wished to apply were required to self-name and provide an address for service (none ever did). Then, on the 16th of December 2022 Mr Justice Cotter gave further retrospective permission for service of various documents. On the 20th of January 2023 Mr Justice Soole reviewed the interim injunction, gave permission for retrospective service of various documents and replaced the interim injunction with a similar further interim injunction. Alternative service was again permitted in a similar fashion by: (1) publication on a specified website, (2) e-mail to the 4 Organisations, (3) personal service on the named Defendants where that was possible because they had provided addresses. At that time no acknowledgement of service or defence from any Defendant was required.

17. In April 2023 the Claimants changed their solicitors and in June 2023 Master Cook gave prospective alternative service directions for future service of all Court documents by: (1) publication on the named website, (2) e-mail to the 4 Organisations, (3) fixing a notification to signs at the front entrances and the access roads of the 8 Sites. Normal service applied for the named Defendants who had provided addresses.

18. On the 28th of July 2023, before Bourne J., the Claimants agreed not to pursue contempt applications for breaches of the orders of Mr Justice Butcher and Mr Justice Bennathan for any activities before the date of the hearing. Present at that hearing were counsel for Defendants 31 and 53. Directions were given permitting a redefinition of "Unknown

Persons" and solving a substantial range of service and drafting defects in the previous procedure and documents since the Claim Form had been issued. A direction was given for Acknowledgements of Service and Defences to be served by early October 2023 and the claim was discontinued against Defendants 16, 19, 26, 29, 38, 46 and 47 on the basis that they no longer posed a threat. A direction was given for any other Defendant to give an undertaking by the 6th of October 2023 to the Claimants' solicitors. Service was to be in accordance with the provisions laid down by Master Cook in June 2023.

19. On the 30th November 2023 Master Eastman ordered that service of exhibits to witness statements and hearing bundles was to be by: (1) uploading them onto the specific website, (2) emailing a notification to the 4 Organisations, (3) placing a notice at the 8 Sites entrances and access roads, (4) postal service to of a covering letter named Defendants who had provided addresses informing them where the exhibits could be read.

20. The Claimants applied for summary judgment on the 12th of December 2023.

21. By the time of the hearing before me, 43 named Defendants had provided undertakings in accordance with the Order of Mr Justice Bourne. Defendants 14 and 44 were wrongly added and so 17 named Defendants remained who had refused to provide undertakings. None of these attended the hearing or communicated with the Court.

The lay witness evidence

22. I read evidence from the following witnesses provided in statements served and filed by the Claimants:
    - 22.1 Laurence Matthews, April 2022, June 2023.
    - 22.2 David Blackhouse, March and April 2022, January, June and November 2023.
    - 22.3 Emma Pinkerton, June and December 2023.
    - 22.4 Kate McCall, March and April 2022, January (x3) 2023.
    - 22.5 David McLoughlin, March 2022, November 2023.
    - 22.6 Adrian Rafferty, March 2022
    - 22.7 Richard Wilcox, April and August 2022, March 2023.
    - 22.8 Aimee Cook, January 2023.
    - 22.9 Anthea Adair, May, July and August 2023.
    - 22.10 Jessica Hurle, January 2024 (x2).
    - 22.11 Certificates of service: supplementary bundles pages 3234-3239.

Service evidence

23. The previous orders made by the Judges who have heard the interlocutory matters dealt with all previous service matters. In relation to the hearing before me I carefully checked the service evidence and was helpfully led through it by counsel. A concern of substance arose over some defective evidence given by Miss Hurle which was hearsay but did not state the sources of the hearsay. This was resolved by the provision

of a further witness statement at the Court's request clarifying the hearsay element of her assertion which I have read and accept.

24. On the evidence before me I find, on the balance of probabilities, that the application for summary judgment and ancillary applications and the supporting evidence and notice of hearing were properly served in accordance with the orders of Master Cook and Master Eastman and the CPR on all of the Defendants.

Substantive evidence

25. **David Blackhouse.** Mr. Blackhouse is employed by Valero International Security as European regional security manager. In his earlier statements he evidenced his fears that there were real and imminent threats to the Claimants' 8 Sites and in his later statements set out the direct action suffered at the Claimants' sites which fully matched his earlier fears.

26. In his first witness statement he set out evidence from the police and from the Just Stop Oil website evidencing their commitment to action and their plans to participate in protests. The website set out an action plan asking members of the public to sign up to the group's mailing list so that the group could send out information about their proposed activities and provide training. Intervention was planned from the 22nd of March 2022 if the Government did not back down to the group's demands. Newspaper reports from anonymous spokespersons for the group threatened activity that would lead to arrests involving blocking oil sites and paralysing the country. A Just Stop Oil spokesperson asserted they would go beyond the activities of Extinction Rebellion and Insulate Britain through civil resistance, taking inspiration from the old fuel protests 22 years before when lorries blockaded oil refineries and fuel depots. Mr. Blackhouse also summarised various podcasts made by alleged members of the group in which the group asserted it would train up members of the public to cause disruption together with Youth Climate Swarm and Extinction Rebellion to focus on the oil industry in April 2022 with the aim of causing disruption in the oil industry. Mr. Blackhouse also provided evidence of press releases and statements by Extinction Rebellion planning to block major UK oil refineries in April 2022 but refusing to name the actual sites which they would block. They asserted their protests would *"continue indefinitely*" until the Government backed down. Insulate Britain's press releases and podcasts included statements that persons aligned with the group intended to carry out "*extreme protests"* matching the protests 22 years before which allegedly brought the country to a "*standstill*". They stated they needed to cause an "*intolerable level of disruption".* Blocking oil refineries and different actions disrupting oil infrastructure was specifically stated as their objective.

27. In his second witness statement David Blackhouse summarised the protest events at Kingsbury terminal on the 1st of April 2022 (which were carried out in conjunction with similar protests at Esso Purfleet, Navigator at Thurrock and Exolum in Grays). He was present at the Site and was an eye-witness. The protesters blocked the access roads which were public and then moved onto private access roads. More than 30 protesters

blocked various tankers from entering the site. Some climbed on top of the tankers. Police in large numbers were used to tidy up the protest. On the next day, the 2nd of April 2022, protesters again blocked public and private access roads at various places at the Kingsbury site. Further arrests were made. Mr Blackhouse was present at the site.

28. In his third witness statement he summarised the nationwide disruption of the petrochemical industry which included protests at Esso West near Heathrow airport; Esso Hive in Southampton, BP Hamble in Southampton, Exolum in Essex, Navigator terminals in Essex, Esso Tyburn Road in Birmingham, Esso Purfleet in Essex, and the Kingsbury site in Warwickshire possessed by the Claimants and BP. In this witness statement Mr. Blackhouse asserted that during April 2022 protesters forcibly broke into the second Claimant's Kingsbury site and climbed onto pipe racks, gantries and static tankers in the loading bays. He also presented evidence that protesters dug and occupied tunnels under the Kingsbury site's private road and Piccadilly Way and Trinity Road. He asserted that 180 arrests were made around the Kingsbury site in April 2022. He asserted that he was confident that the protesters were aware of the existence of the injunction granted in March 2022 because of the signs put up at the Kingsbury site both at the entrances and at the access roads. He gave evidence that in late April and early May protesters stood in front of the signs advertising the injunction with their own signs stating: "*we are breaking the injunction*". He evidenced that on the Just Stop Oil website the organisation wrote that they would not be "intimidated by changes to the law" and would not be stopped by "private injunctions". Mr. Blackhouse evidenced that further protests took place in May, August and September at the Kingsbury site on a smaller scale involving the creation of tunnels and lock on positions to facilitate road closures. In July 2022 protesters under the banner of Extinction Rebellion staged a protest in Plymouth City centre marching to the entrance of the second Claimant's Plymouth oil terminal which was blocked for two hours. Tanker movements had to be rescheduled. Mr. Blackhouse summarised further Just Stop Oil press releases in October 2022 asserting their campaign would "continue until their demands were met by the Government". He set out various protests in central London and on the Dartford crossing bridge of the M25. Mr. Blackhouse also relied on a video released by one Roger Hallam, who he asserted was a co-founder of Just Stop Oil, through YouTube on the 4th of November 2022. He described this video as a call to arms making analogies with war and revolution and encouraging the *"systematic disruption of society*" in an effort to change Government policies affecting global warming. He highlighted the sentence by Mr Hallam:

> "if it's necessary to prevent some massive harm, some evil, some illegality, some immorality, it's justified, *you have a right of necessity to cause harm".*

The video concluded with the assertion "there is no question that disruption is effective, the only question is doing enough of it". In the same month Just Stop Oil was encouraging members of the public to sign up for arrestable direct action. In November

2022 Just Stop Oil tweeted that they would escalate their legal disruption. Mr. Blackhouse then summarised what appeared to be statements by Extinction Rebellion withdrawing from more direct action. However Just Stop Oil continued to publish in late 2022 that they would not be intimidated by private injunctions. Mr Blackhouse researched the mission statements of Insulate Britain which contained the assertion that their continued intention included a campaign of civil resistance, but they only had the next two to three years to sort it out and their next campaign had to be more ambitious. Whilst not disclosing the contents of the briefings received from the police it was clear that Mr. Blackhouse asserted, in summary, that the police warned that Just Stop Oil intended to have a high tempo civil resistance campaign which would continue to involve obstruction, tunnelling, lock one and at height protests at petrochemical facilities.

29. In his 4th witness statement Mr Blackhouse set out a summary of the direct actions suffered by the Claimants as follows ("The Refinery" means Pembroke Oil refinery):

> "***September 2019***
> 6.5 The Refinery was the target of protest activity in 2019, albeit this was on a smaller scale to that which took place in 2022 at the Kingsbury Terminal. The activity at the Refinery involved the blocking of access roads whereby the protestors used concrete "Lock Ons" i.e. the protestors locked arms, within the concrete blocks placed on the road, whilst sitting on the road to prevent removal. Although it was a non-violent protest it did impact upon employees at the Refinery who were prevented from attending and leaving work. Day to day operations and deliveries were negatively impacted as a result.
> 6.6…
> ***Friday 1st April 2022***
> Protestors obstructed the crossroads junction of Trinity Road, Piccadilly Way, and the entrance to the private access road by sitting in the road. They also climbed onto two stationary road tanker wagons on Piccadilly Way, about thirty metres from the same junction, preventing the vehicles from moving, causing a partial obstruction of the road in the direction of the terminal. They also climbed onto one road tanker wagon that had stopped on Trinity Road on the approach to the private access road to the terminal. Fuel supplies from the Valero terminal were seriously disrupted due to the continued obstruction of the highway and the entrance to the private access road throughout the day. Valero staff had to stop the movement of road tanker wagons to or from the site between the hours of 07:40 hrs and 20:30 hrs. My understanding is that up to twenty two persons were arrested by the Police before Valero were able to receive road tanker traffic and resume normal supplies of fuel.
> ***Sunday 3rd April 2022***

6.6.1 Protestors obstructed the same entrance point to the private shared access road leading from Trinity Road. The obstructions started at around 02:00 hrs and continued until 17:27 hrs. There was reduced access for road tankers whilst Police completed the removal and arrest of the protestors.

Tuesday 5th April 2022

6.6.2 Disruption started at 04:49 hrs. Approximately twenty protestors blocked the same entrance point to the private shared access road from Trinity Road. They were reported to have used adhesive to glue themselves to the road surface or used equipment to lock themselves together. Police attended and I understand that eight persons were arrested. Road tanker movements at Valero were halted between 04:49 hrs and 10:50 hrs that day.

Thursday 7th April 2022

6.6.3 This was a day of major disruption. At around 00:30 hrs the Valero Terminal Operator initiated an Emergency Shut Down having identified intruders on CCTV within the perimeter of the site. Five video files have been downloaded from the CCTV system showing a group of about fifteen trespassers approaching the rear of the Kingsbury Terminal across the railway lines. The majority appear to climb over the palisade fencing into the Kingsbury Terminal whilst several others appear to have gained access by cutting mesh fencing on the border with WOSL. There is then footage of protestors in different areas of the site including footage at 00:43 hrs of one intruder walking across the loading bay holding up what appears to be a mobile phone in front of him, clearly contravening site safety rules. He then climbed onto a stationary road tanker on the loading bay. There is clear footage of several others sitting in an elevated position in the pipe rack adjacent to the loading bay. I am also aware that Valero staff reported that two persons climbed the staircase to sit on top of one of the gas oil storage tanks and four others were found having climbed the staircase to sit on the roof of a gasoline storage tank. Police attended and spent much of the day removing protestors from the site enabling it to reopen at 18:00 hrs. There is CCTV footage of one or more persons being removed from top of the stationary road tanker wagon on the loading bays.

6.6.4 The shutdown of more than seventeen hours caused major disruption to road tanker movements that day as customers were unable to access the site.

Saturday 9th April 2022

6.6.5 Protest activity occurred involving several persons around the entrance to the private access road. I believe that Police made three arrests and there was little or no disruption to road tanker movements.

Sunday 10th April 2022

6.6.6 A caravan was left parked on the side of the road on Piccadilly way, between the roundabout junction with the A51 and the entrance to the Shell fuel terminal. Police detained a small group of protestors with the caravan including one who remained within a tunnel that had been excavated under the road. It appeared to be an attempt to cause a closure of one of the two routes leading to the oil terminals.

6.6.7 By 16:00 hrs police responded to two road tankers that were stranded on Trinity Road, approximately 900 metres north of the entrance to the private access road. Protestors had climbed onto the tankers preventing them from being driven any further, causing an obstruction on the second access route into the oil terminals.

6.6.8 The Police managed to remove the protestors on top of the road tankers but 18:00 hrs and I understand that the individual within the tunnel on Piccadilly Way was removed shortly after.

6.6.9 I understand that the Police made twenty-two arrests on the approach roads to the fuel terminals throughout the day. The road tanker wagons still managed to enter and leave the Valero site during the day taking whichever route was open at the time. This inevitably meant that some vehicles could not take their preferred route but could at least collect fuel as required. I was subsequently informed that a structural survey was quickly completed on the road tunnel and deemed safe to backfill without the need for further road closure.

Friday 15th April 2022

6.6.10 This was another day of major disruption. At 04:25 hrs the Valero operator initiated an emergency shutdown. The events were captured on seventeen video files recording imagery from two CCTV cameras within the site between 04:20 hrs and 15:45 hrs that day.

6.6.11 At 04:25 a group of about ten protestors approached the emergency access gate which is located on the northern corner of the site, opening out onto Trinity Road, 600 metres north of the entrance to the shared private access road. They were all on foot and could be seen carrying ladders. Two ladders were used to climb up the outside of the emergency gate and then another two ladders were passed over to provide a means of climbing down inside the Valero site. Seven persons managed to climb over before a police vehicle pulled up alongside the gate. The seven then dispersed into the Kingsbury Terminal.

6.6.12 The video footage captures the group of four males and three females sitting for several hours on the pipe rack, with two of them (one male and one female) making their way up onto the roof of the loading bay area nearby. The two on the roof sat closely together whilst the male undressed and sat naked for a considerable time sunbathing. The video footage concludes with footage of Police and the Fire and Rescue service working together to remove the two individuals.

6.6.13 The Valero terminal remained closed between 04:30 hrs and 16:00 hrs that day causing major disruption to fuel collections. The protestors breached the site's safety rules and the emergency services needed to use a 'Cherry Picker' (hydraulic platform) during their removal. There were also concerns that the roof panels would not withstand the weight of the two persons sitting on it.

6.6.14 I understand that Police made thirteen arrests in or around Valero and the other fuel terminals that day and had to request 'mutual aid' from neighbouring police forces.

Tuesday 26th April 2022

6.6.15 I was informed that approximately twelve protestors arrived outside the Kingsbury Terminal at about 07:30 hrs, increasing to about twenty by 09:30 hrs. Initially they engaged in a peaceful non obstructive protest but by 10:00 hrs had blocked the entrance to the private access road by sitting across it. Police then made a number of arrests and the obstructions were cleared by 10:40 hrs. On this occasion there was minimal disruption to the Valero site.

Wednesday 27th April 2022

6.6.16 At about 16:00 hrs a group of about ten protestors were arrested whilst attempting to block the entrance to the shared private access road.

Thursday 28th April 2022

6.6.17 At about 12:40 hrs a similar protest took place involving a group of about eight persons attempting to block the entrance to the shared private access road. The police arrested them and opened the access by 13:10 hrs.

Wednesday 4th May 2022

6.6.18 At about 13:30 hrs twelve protestors assembled at the entrance to the shared private access road without incident. I was informed that by 15:49 hrs Police had arrested ten individuals who had attempted to block the access.

Thursday 12th May 2022

6.6.19 At 13:30 hrs eight persons peacefully protested at the entrance to the private access road. By 14:20 hrs the numbers increased to eleven. The activity continued until 20:15 hrs by which time Police made several arrests of persons causing obstructions. I have retained images of the obstructions that were taken during the protest.

Monday 22nd August 2022

6.6.20 Contractors clearing undergrowth alerted Police to suspicious activity involving three persons who were on land between Trinity Road and the railway tracks which lead to the rear of the Valero and WOSL terminals. The location is about 1.5 km from the entrance to the shared private access road to the Kingsbury Terminal. A police dog handler attended and arrested two of the persons with the third making

off. Three tunnels were found close to a tent that the three were believed to be sleeping in. The tunnels started on the roadside embankment and two of them clearly went under the road. The entrances were carefully prepared and concealed in the undergrowth. Police agreed that they were 'lock in' positions for protestors intending to cause a road closure along one of the two approach roads to the oil terminals. The road was closed awaiting structural survey. I have retained a collection of the images taken by my staff at the scene.

Tuesday 23rd August 2022

6.6.21 During the morning protestors obstructed a tanker in Trinity Road, approximately 1km from the Valero Terminal. There was also an obstruction of the highway close to the Shell terminal entrance on Piccadilly Way. I understand that both incidents led to arrests and a temporary blockage for road tankers trying to access the Valero site. Later that afternoon another tunnel was discovered under the road on Trinity Way, between the roundabout of the A51 and the Shell terminal. It was reported that protestors had locked themselves into positions within the tunnel. Police were forced to close the road meaning that all road tanker traffic into the Kingsbury Terminal had to approach via Trinity road and the north. It then became clear that the tunnels found on Trinity Road the previous day had been scheduled for use at the same time to create a total closure of the two routes into the fuel terminals.

6.6.22 The closure of Piccadilly Way continued for another two days whilst protestors were removed and remediation work was completed to fill in the tunnels.

Wednesday 14th September 2022

6.6.23 There was serious disruption to the Valero Terminal after protestors blocked the entrance to the private access road. I believe that Police made fifty one arrests before the area was cleared to allow road tankers to access the terminal.

6.6.24 Tanker movements were halted for just over seven hours between mid-day and 19:00 hrs. On Saturday 16th July and Sunday 17th July 2022, the group known as Extinction Rebellion staged a protest in Plymouth city centre. The protest was planned and disclosed to the police in advance and included a march of about two hundred people from the city centre down to the entrance to the Valero Plymouth Terminal in Oakfield Terrace Rd. The access to the terminal was blocked for about two hours. Road tanker movements were re-scheduled in advance minimising any disruption to fuel supplies."

I note that the events of 16th July 2022 are out of chronological order.

30. In his 5th witness statement the main threats identified by Mr Blackhouse were; (1) protesters directly entering the 8 Sites. He stated there had been serious incidents in the

past in which protestors forcibly gained access by cutting through mesh border fencing or climbing over fencing and then carrying out dangerous activities such as climbing and sitting on top of storage tanks containing highly flammable fuel and vapour. He warned that the risk of fire for explosion at the 8 Sites is high due to the millions of litres of flammable liquid and gas stored at each. Mobile phones and lighters are heavily controlled or prohibited. (2) He warned that any activity which blocked or restricted access roads would be likely to create a situation where the Claimants were forced to take action to reduce the health and safety risks relating to emergency access which might include evacuating the sites or shutting some activity on the sites.

31. Mr. Blackhouse warned of the knock-on effects of the Claimants having to manage protester activity to mitigate potential health and safety risks which would impact on the general public. If activity on the 8 Sites is reduced or prevented due to protester activity this would reduce the level of fuel produced, stored and transported, which would ultimately result in shortages at filling station forecourts, potentially panic buying and the adverse effects thereof. He referred to the panic buying that occurred in September 2021. Mr Blackhouse described the various refineries and terminals and the businesses carried on there. He also described the access roads to the sites. He described the substantial number of staff accessing the sites and the substantial number of tanker movements per day accessing refineries. He also described the substantial number of ship movements to and from the jetties per annum. He warned of the dangers of blocking emergency services getting access to the 8 Sites. He stated that if access roads at the 8 Sites were blocked the Claimants would have no option but to cease operations and shut down the refineries to ensure compliance with health and safety risk assessments. He informed the Court that one of the most hazardous times at the refineries was when restarting the processes after a shut down. The temperatures and pressures in the refinery are high and during restarting there is a higher probability of a leak and resultant explosions. Accordingly, the Claimants seek to limit shutdown and restart activity as much as possible. Generally, these only happen every four or five years under strictly controlled conditions.

32. Mr. Blackhouse referred to an incident in 2019 when Extinction Rebellion targeted the Pembroke oil refinery and jetties by blocking the access roads. He warned that slow walking and blocking access roads remained a real risk and a health and safety concern. He also informed the Court that local police at this refinery took a substantial time to deal with protesters due to locking on and climbing in, resulting in significant delay. He further evidenced this by reference to the Kingsbury terminal protest in 2022.

33. Mr. Blackhouse asserted that all of the 8 Sites are classified as “Critical National Infrastructure”. The Claimants liaise closely with the National Protective Security Authority and the National Crime Agency and the Counter Terrorism Security Advisor Service of the police. Secret reports received from those agencies evidenced continuing potential activity by the 4 Organisations. In addition, on the 8th of July 2023 Extinction Rebellion stickers were placed on a sign at the refinery.

34. Overall Mr. Blackhouse asserted that the deterrent effect of the injunctions granted has diminished the protest activity at the 8 Sites but warned that it was clear that at least some of the 4 Organisations maintained an ongoing campaign of protest activity throughout the UK. He asserted it was critical that the injunctive relief remained in place for the protection of the Claimants' employees, visitors to the sites, the public in surrounding areas and the protesters themselves.

35. **David McLoughlin.** Mr McLoughlin is a director employed by the Valero group responsible for pipeline and terminals. His responsibilities include directing operations and logistics across all of the 8 Sites.

36. He warned the Court that blocking access to the 8 Sites would have potentially very serious health and safety and environmental consequences and would cause significant business disruption. He described how under the *Control of Major Accidents Hazards Involving Dangerous Substances Regulations 2015* the 8 Sites are categorised according to the risks they present which relate directly to the quantity of dangerous substances held on each site. Heavy responsibilities are placed upon the Claimants to manage their activities in a way so as to minimise the risk to employees, visitors and the general public and to prevent major accidents. The Claimants are required to carry out health and safety executive guided risk assessments which involve ensuring emergency services can quickly access the 8 Sites and to ensure appropriate manning. He warned that there were known safety risks of causing fires and explosions from lighters, mobile phones, key fobs and acrylic clothing. The risks are higher around the storage tanks and loading gantries which seemed to be favoured by protestors. He warned that the Plymouth and Manchester sites were within easy reach of large populations which created a risk to the public. He warned that blocking access roads to the 8 Sites would give rise to a potential risk of breaching the 2015 Regulations which would be both dangerous and a criminal offence. Additionally blocking access would lead to a build-up of tankers containing fuel which themselves posed a risk. He warned of the potential knock-on effects of an access road blockade on the supply chain for in excess of 700 filling stations and to the inward supply chain from tankers. He warned of the 1-2 day filling station tank capacity which needed constant and regular supply from the Claimants' sites. He also warned about the disruption to commercial contracts which would be caused by disruption to the 8 Sites. He set out details of the various sites and their access roads. He referred to the July 2022 protest at the Plymouth terminal site and pointed out the deterrent effect of the injunction, which was in place at that time, had been real and had reduced the risk.

37. **Emma Pinkerton.** Miss Pinkerton has provided 5 witness statements in these proceedings, the last one dated December 2023. She is a partner at CMS Cameron McKenna Nabarro Olswang LLP.

38. In her 3rd statement she set out details relating to the interlocutory course of the proceedings and service and necessary changes to various interim orders made.

39. In her last witness statement she gave evidence that the Claimants do not seek to prevent protesters from undertaking peaceful lawful protests. She asserted that the Defendants had no real prospect of successfully defending the claim and pointed out that no Acknowledgments of Service or Defences had been served. She set out the chronology of the action and service of proceedings. She dealt with various errors in the orders made. She summarised that 43 undertakings had been taken from Defendants. She pointed out that there were errors in the naming of some Defendants. Miss Pinkerton summarised the continuing threat pointing out that the Just Stop Oil Twitter feed contained a statement dated 9th June 2023 setting out that the writer explained to Just Stop Oil connected readers that the injunctions banned people from taking action at refineries, distribution hubs and petrol stations and that the punishments for breaking injunctions ranged from unlimited fines to imprisonment. She asserted that the Claimants' interim injunctions in combination with those obtained by Warwickshire Borough Council had significantly reduced protest activity at the Kingsbury site.

40. Miss Pinkerton provided a helpful summary of incidents since June 2023. On the 26th of June 2023 Just Stop Oil protesters carried out four separate slow marches across London impacting access on King's College Hospital. On the 3rd of July 2023 protesters connected with Extinction Rebellion protested outside the offices of Wood Group in Aberdeen and Surrey letting off flares and spraying fake oil across the entrance in Surrey. On 10th July 2023 several marches took place across London. On the 20th of July 2023 supporters of Just Stop Oil threw orange paint over the headquarters of Exxon Mobile. On the 1st of August 2023 protesters connected with Just Stop Oil marched through Cambridge City centre. On the 13th of August 2023 protesters connected with Money Rebellion (which may be associated with Extinction Rebellion) set off flares at the AIG Women's Open in Tadworth. On the 18th of August 2023 protesters associated with Just Stop Oil carried out a slow march in Wells, Somerset and the next day a similar march took place in Exeter City centre. On the 26th of August 2023 a similar march took place in Leeds. On the 2nd of September 2023 protesters associated with Extinction Rebellion protested outside the London headquarters of Perenco, an oil and gas company. On the 9th of September 2023 there was a slow march by protesters connected with Just Stop Oil in Portsmouth City centre. On the 18th of September 2023 protesters connected with Extinction Rebellion poured fake oil over the steps of the Labour Party headquarters and climbed the building letting off smoke grenades and one protester locked on to a handrail. On the 1st of October 2023 protesters connected with Extinction Rebellion protested in Durham. On the 10th of October 2023 protesters connected with Just Stop Oil sprayed orange paint over the Radcliffe Camera library building in Oxford and the facade of the forum at Exeter University. On the 11th of October 2023 protesters connected with Just Stop Oil sprayed orange paint over parts of Falmouth University. On the 17th of October 2023 various protesters were arrested in connection with the Energy Intelligence forum in London. On the 19th of October

2023 protests took place in Canary Wharf targeting financial businesses allegedly supporting fossil fuels and insurance companies in the City of London. On the 30th of October 2023 60 protesters were arrested for slow marching outside Parliament. On the 10th of November 2023 protesters connected with Extinction Rebellion occupied the offices of the Daily Telegraph. On the 12th of November 2023 protesters connected with Just Stop Oil marched in Holloway Road in London. On the 13th of November 2023 protesters connected with Just Stop Oil marched from Hendon Way leading to a number of arrests. On the 14th of November 2023 protesters connected with Just Stop Oil marched from Kennington Park Rd. On the same day the Metropolitan Police warned that the costs of policing such daily marches was becoming unsustainable to the public purse. On the 15th of November 2023 protesters connected with Just Stop Oil marched down the Cromwell Road and 66 were arrested. On the 18th of November 2023 protestors connected with Just Stop Oil and Extinction Rebellion protested outside the headquarters of Shell in London and some arrests were made. On the 20th of November 2023 protesters connected with Just Stop Oil gathered in Trafalgar Square and started to march and some arrests were made. On the 30th of November 2023 protesters connected with Just Stop Oil gathered in Kensington in London and 16 were arrested.

41. Miss Pinkerton extracted some quotes from the Just Stop Oil press releases including assertions that their campaign would be "*indefinite*" until the Government agreed to stop new fossil fuel projects in the UK and mentioning their supporters storming the pitch at Twickenham during the Gallagher Premiership Rugby final. Further press releases in June and July 2023 encouraging civil resistance against oil, gas and coal were published. In an open letter to the police unions dated 13th September 2023 Just Stop Oil stated they would be back on the streets from October the 29th for a resumption after their 13 week campaign between April and July 2023 which they asserted had already cost the Metropolitan Police more than £7.7 million and required the equivalent of an extra 23,500 officer shifts.

42. Miss Pinkerton also examined the Extinction Rebellion press statements which included advice to members of the public to picket, organise locally, disobey and asserted that civil disobedience works. On the 30th of October 2023 a spokesperson for Just Stop Oil told the Guardian newspaper that the organisation supporters were willing to slow march to the point of arrest every day until the police took action to prosecute the real criminals who were facilitating new oil and gas extraction.

43. Miss Pinkerton summarised the various applications for injunctions made by Esso Oil, Stanlow Terminals Limited, Infranorth Limited, North Warwickshire Borough Council, Esso Petroleum, Exxon Mobile Chemical Limited, Thurrock Council, Essex Council, Shell International, Shell UK, UK Oil Pipelines, West London Pipeline and Storage, Exolum Pipeline Systems, Exolum Storage, Exolum Seal Sands and Navigator Terminals.

44. Miss Pinkerton asserted that the Claimants had given full and frank disclosure as required by the Supreme Court in *Wolverhampton v London Gypsies* (citation below). In summary she asserted that the Claimants remained very concerned that protest groups including the 4 Organisations would undertake disruptive, direct action by trespass or blocking access to the 8 Sites and that a final injunction was necessary to prevent future tortious behaviour.

Previous decision on the relevant facts

45. In *North Warwickshire v Baldwin and 158 others and PUs* [2023] EWHC 1719, Sweeting J gave judgment in relation to a claim brought by North Warwickshire council against 159 named defendants relating to the Kingsbury terminal which is operated by Shell, Oil Pipelines Limited, Warwickshire Oil Storage Limited and Valero Energy Ltd. Findings of fact were made in that judgment about the events in March and April 2022 which are relevant to my judgment. Sweeting J. found that protests began at Kingsbury during March 2022 and were characterised by protesters glueing themselves to roads accessing the terminal; breaking into the terminal compounds by cutting through gates and trespassing; climbing onto storage tanks containing unleaded petrol, diesel and fuel additives; using mobile phones within the terminal to take video films of their activities while standing on top of oil tankers and storage tanks and next to fuel transfer equipment; interfering with oil tankers by climbing onto them and fixing themselves to the roofs thereof; letting air out of the tyres of tankers; obstructing the highways accessing the terminal generally and climbing equipment and abseiling from a road bridge into the terminal. In relation to the 7th of April Sweeting J found that at 12:30 (past midnight) a group of protesters approached one of the main terminal entrances and attempted to glue themselves to the road. When the police were deployed a group of protesters approached the same enclosure from the fields to the rear and used a saw to break through an exterior gate and scaled fences to gain access. Once inside they locked themselves onto a number of different fixtures including the top of three large fuel storage tanks containing petrol diesel and fuel additives and the tops of two fuel tankers and the floating roof of a large fuel storage tank. The floating roof floated on the surface of stored liquid hydrocarbons. Sweeting J found that the ignition of liquid fuel or vapour in such a storage tank was an obvious source of risk to life. On the 9th of April 2022 protesters placed a caravan at the side of the road called Piccadilly Way which is an access road to the terminal and protesters glued themselves to the sides and top of the caravan whilst others attempted to dig a tunnel under the road through a false floor in the caravan. That was a road used by heavily laden oil tankers to and from the terminal and the collapse of the road due to a tunnel caused by a tanker passing over it was identified by Sweeting J as including the risk of injury and road damage and the escape of fuel fluid into the soil of the environment.

Assessment of lay witnesses

46. I decide all facts in this hearing on the balance of probabilities. I have not seen any witness give live evidence. None were required for cross-examination by the Defendants. None were challenged. I take that into account.

47. Having carefully read the statements I accept the evidence put before me from the Claimants' witnesses. I have not found sloppiness, internal inconsistency or exaggeration in the way they were written or any reason to doubt the evidence provided.

The Law

Summary Judgment

48. Under CPR part 24 it is the first task of this Court to determine whether the Defendants have a realistic prospect of success in defending the claim. Realistic is distinguished from a fanciful prospect of success, see *Swain v Hillman* [2001] 1 ALL ER 91. The threshold for what is a realistic prospect was examined in *ED and F Man Liquid Products v Patel* [2003] EWCA Civ. 472. It is higher than a merely arguable prospect of success. Whilst it is clear that on a summary judgement application the Court is not required to effect a mini trial, it does need to analyse the evidence put before it to determine whether it is worthless, contradictory, unimpressive or incredible and overall to determine whether it is credible and worthy of acceptance. The Court is also required to take into account, in a claim against PUs, not only the evidence put before it on the application but also the evidence which could reasonably be expected to be available at trial both on behalf of the Claimants and the Defendants, see *Royal Brompton Hospitals v Hammond (#5)* [2001] EWCA Civ. 550. Where reasonable grounds exist for believing that a fuller investigation of the facts of the case at trial would affect the outcome of the decision then summary judgement should be refused, see *Doncaster Pharmaceuticals v Bolton Pharmaceutical Co* [2007] F.S.R 3. I take into account that the burden of proof rests in the first place on the applicant and also the guidance given in *Sainsbury's Supermarkets v Condek Holdings* [2014] EWHC 2016, at paragraph 13, that if the applicant has produced credible evidence in support of the assertion that the applicant has a realistic prospect of success on the claim, then the respondent is required to prove some real prospect of success in defending the claim or some other substantial reason for the claim going to trial. I also take into account the guidance given at paragraph 40 of the judgment of Sir Julian Flaux in the Court of Appeal in *National Highways Limited v Persons Unknown* [2023] EWCA Civ. 182, that the test to be applied when a final anticipatory injunction is sought through a summary judgment application is the same as in all other cases.

49. CPR part 24 r.24.5 states that if a respondent to a summary judgment application wishes to put in evidence he "must" file and serve written evidence 7 days before the hearing. Of course, this cannot apply to PUs who will have no knowledge of the hearing. It does apply to named and served Defendants.

50. But what approach should the Court take where named Defendant served nothing and PUs are also Defendants? In *King v Stiefel* [2021] EWHC 1045 (Comm) Cockerill J. ruled as follows on what to do in relation to evidence:

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

51. In my judgment, in a case such as this, where named Defendants have taken no part and where other Defendants are PUs, the safest course is to follow the guidance of the Supreme Court and treat the hearing as ex-parte and to consider the defences which the PUs could run.

Final Injunctions

52. The power of this Court to grant an injunction is set out in S.37 of *the Senior Courts Act 1981*. The relevant sections follow:

> "37 Powers of High Court with respect to injunctions ….
> (1) The High Court may by order (whether interlocutory or final) grant an injunction … in all cases in which it appears to the court to be just and convenient to do so.
> (2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just."

53. An injunction is a discretionary remedy which can be enforced through contempt proceedings. There are two types, mandatory and prohibitory. I am only dealing with an application for the latter type and only on the basis of quia timet – which is the fear of the Claimants that an actionable wrong will be committed against them. Whilst the balance of convenience test was initially developed for interim injunctions it developed such that it is generally used in the granting of final relief. I shall refer below to how it is refined in PU cases.

54. In law a landowner whose title is not disputed is prima facie entitled to an injunction to restrain a threatened or apprehended trespass on his land: see Snell's Equity (34th ed) at para 18-012. In relation to quia timet injunctions, like the one sought in this case, the Claimants must prove that there is a real and imminent risk of the Defendant causing the torts feared, not that the torts have already been committed, per Longmore LJ in *Ineos Upstream v Boyd* [2019] 4 WLR 100, para 34(1). I also take account of the

judgment of Sir Julian Flaux in *National Highways v PUs* [2023] 1 WLR 2088, in which at paras. 37-40 the following ruling was provided:

> "37. Although the judge did correctly identify the test for the grant of an anticipatory injunction, in para 38 of his judgment, unfortunately he fell into error in considering the question whether the injunction granted should be final or interim. His error was in making the assumption that before summary judgment for a final anticipatory injunction could be granted NHL had to demonstrate, in relation to each defendant, that that defendant had committed the tort of trespass or nuisance and that there was no defence to a claim that such a tort had been committed. That error infected both his approach as to whether a final anticipatory injunction should be granted and as to whether summary judgment should be granted.
> 38. As regards the former, it is not a necessary criterion for the grant of an anticipatory injunction, whether final or interim, that the defendant should have already committed the relevant tort which is threatened. *Vastint* [2019] 4 WLR 2 was a case where a final injunction was sought and no distinction is drawn in the authorities between a final prohibitory anticipatory injunction and an interim prohibitory anticipatory injunction in terms of the test to be satisfied. Marcus Smith J summarises at para 31(1) the effect of authorities which do draw a distinction between final prohibitory injunctions and final mandatory injunctions, but that distinction is of no relevance in the present case, which is only concerned with prohibitory injunctions.
> 39. There is certainly no requirement for the grant of a final anticipatory injunction that the claimant prove that the relevant tort has already been committed. The essence of this form of injunction, whether interim or final, is that the tort is threatened and, as the passage from *Vastint* at para 31(2) quoted at para 27 above makes clear, for some reason the claimant's cause of action is not complete. It follows that the judge fell into error in concluding, at para 35 of the judgment, that he could not grant summary judgment for a final anticipatory injunction against any named defendant unless he was satisfied that particular defendant had committed the relevant tort of trespass or nuisance.
> 40. The test which the judge should have applied in determining whether to grant summary judgment for a final anticipatory injunction was the standard test under CPR r 24.2, namely, whether the defendants had no real prospect of successfully defending the claim. In applying that test, the fact that (apart from the three named defendants to whom we have referred) none of the defendants served a defence or any evidence or otherwise engaged with the proceedings, despite being given ample opportunity to do so, was not, as the judge thought, irrelevant, but of considerable relevance, since it supported NHL's case

> that the defendants had no real prospect of successfully defending the claim for an injunction at trial."

55. In relation to the substantive and procedural requirements for the granting of an injunction against persons unknown, guidance was given in *Canada Goose v Persons Unknown* [2021] WLR 2802, by the Court of Appeal. In a joint judgment Sir Terence Etherton and Lord Justices Richards and Coulson ruled as follows:

> "82 Building on *Cameron* [2019] 1 WLR 1471 and the *Ineos* requirements, it is now possible to set out the following procedural guidelines applicable to proceedings for interim relief against "persons unknown" in protestor cases like the present one:
> (1) The "persons unknown" defendants in the claim form are, by definition, people who have not been identified at the time of the commencement of the proceedings. If they are known and have been identified, they must be joined as individual defendants to the proceedings. The "persons unknown" defendants must be people who have not been identified but are capable of being identified and served with the proceedings, if necessary by alternative service such as can reasonably be expected to bring the proceedings to their attention. In principle, such persons include both anonymous defendants who are identifiable at the time the proceedings commence but whose names are unknown and also Newcomers, that is to say people who in the future will join the protest and fall within the description of the "persons unknown".
> (2) The "persons unknown" must be defined in the originating process by reference to their conduct which is alleged to be unlawful.
> (3) Interim injunctive relief may only be granted if there is a sufficiently real and imminent risk of a tort being committed to justify quia timet relief.
> (4) As in the case of the originating process itself, the defendants subject to the interim injunction must be individually named if known and identified or, if not and described as "persons unknown", must be capable of being identified and served with the order, if necessary by alternative service, the method of which must be set out in the order.
> (5) The prohibited acts must correspond to the threatened tort. They may include lawful conduct if, and only to the extent that, there is no other proportionate means of protecting the claimant's rights.
> (6) The terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do. The prohibited acts must not, therefore, be described in terms of a legal cause of action, such as trespass or harassment or nuisance. They may be defined by reference to the defendant's intention if that is strictly necessary to correspond to the threatened tort and done in non-technical

language which a defendant is capable of understanding and the intention is capable of proof without undue complexity. It is better practice, however, to formulate the injunction without reference to intention if the prohibited tortious act can be described in ordinary language without doing so.
(7) The interim injunction should have clear geographical and temporal limits. It must be time limited because it is an interim and not a final injunction. We shall elaborate this point when addressing Canada Goose's application for a final injunction on its summary judgment application."

56. I also take into account the guidance and the rulings made by the Supreme Court in *Wolverhampton City Council v London Gypsies* [2023] UKSC 47; [2024] 2 WLR 45 on final injunctions against PUs. This was a case involving a final injunction against unknown gypsies and travellers. The circumstances were different from protester cases because Local Authorities have duties in relation to travellers. In their joint judgment the Supreme Court ruled as follows:

"167. These considerations lead us to the conclusion that, although the attempts thus far to justify them are in many respects unsatisfactory, there is no immoveable obstacle in the way of granting injunctions against newcomer Travellers, on an essentially without notice basis, regardless of whether in form interim or final, either in terms of jurisdiction or principle. But this by no means leads straight to the conclusion that they ought to be granted, either generally or on the facts of any particular case. They are only likely to be justified as a novel exercise of an equitable discretionary power if:
(i) There is a compelling need, sufficiently demonstrated by the evidence, for the protection of civil rights (or, as the case may be, the enforcement of planning control, the prevention of anti-social behaviour, or such other statutory objective as may be relied upon) in the locality which is not adequately met by any other measures available to the applicant local authorities (including the making of byelaws). This is a condition which would need to be met on the particular facts about unlawful Traveller activity within the applicant local authority's boundaries.
(ii) There is procedural protection for the rights (including Convention rights) of the affected newcomers, sufficient to overcome the strong prima facie objection of subjecting them to a without notice injunction otherwise than as an emergency measure to hold the ring. This will need to include an obligation to take all reasonable steps to draw the application and any order made to the attention of all those likely to be affected by it (see paras 226—231 below); and the most generous provision for liberty (ie permission) to apply to have the injunction

varied or set aside, and on terms that the grant of the injunction in the meantime does not foreclose any objection of law, practice, justice or convenience which the newcomer so applying might wish to raise.
(iii) Applicant local authorities can be seen and trusted to comply with the most stringent form of disclosure duty on making an application, so as both to research for and then present to the court everything that might have been said by the targeted newcomers against the grant of injunctive relief.
(iv) The injunctions are constrained by both territorial and temporal limitations so as to ensure, as far as practicable, that they neither outflank nor outlast the compelling circumstances relied upon.
(v) It is, on the particular facts, just and convenient that such an injunction be granted. …"
…
"5. The process of application for, grant and monitoring of newcomer injunctions and protection for newcomers' rights
187. We turn now to consider the practical application of the principles affecting an application for a newcomer injunction against Gypsies and Travellers, and the safeguards that should accompany the making of such an order. As we have mentioned, these are matters to which judges hearing such applications have given a good deal of attention, as has the Court of Appeal in considering appeals against the orders they have made. Further, the relevant principles and safeguards will inevitably evolve in these and other cases in the light of experience. Nevertheless, they do have a bearing on the issues of principle we have to decide, in that we must be satisfied that the points raised by the appellants do not, individually or collectively, preclude the grant of what are in some ways final (but regularly reviewable) injunctions that prevent persons who are unknown and unidentifiable at the date of the order from trespassing on and occupying local authority land. We have also been invited to give guidance on these matters so far as we feel able to do so having regard to our conclusions as to the nature of newcomer injunctions and the principles applicable to their grant.
Compelling justification for the remedy
188. Any applicant for the grant of an injunction against newcomers in a Gypsy and Traveller case must satisfy the court by detailed evidence that there is a compelling justification for the order sought. This is an overarching principle that must guide the court at all stages of its consideration (see para 167(i))."
…
"(viii) *A need for review*
(2) Evidence of threat of abusive trespass or planning breach
218. We now turn to more general matters and safeguards. As we have foreshadowed, any local authority applying for an injunction against

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

219. The full disclosure duty is of the greatest importance (see para 167(iii)). We consider that the relevant authority must make full disclosure to the court not just of all the facts and matters upon which it relies but also and importantly, full disclosure of all facts, matters and arguments of which, after reasonable research, it is aware or could with reasonable diligence ascertain and which might affect the decision of the court whether to grant, maintain or discharge the order in issue, or the terms of the order it is prepared to make or maintain. This is a continuing obligation on any local authority seeking or securing such an order, and it is one it must fulfil having regard to the one-sided nature of the application and the substance of the relief sought. Where relevant information is discovered after the making of the order the local authority may have to put the matter back before the court on a further application.

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

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

221. The actual or intended respondents to the application must be defined as precisely as possible. In so far as it is possible actually to identify persons to whom the order is directed (and who will be enjoined by its terms) by name or in some other way, as Lord Sumption explained in *Cameron* [2019] 1 WLR 1471, the local authority ought to do so. The fact that a precautionary injunction is also sought against newcomers or other persons unknown is not of itself a justification for failing properly to identify these persons when it is possible to do so, and serving them with the proceedings and order, if necessary, by seeking an order for substituted service. It is only permissible to seek or maintain an order directed to newcomers or other persons unknown where it is impossible to name or identify them in some other and more precise way. Even where the persons sought to be subjected to the injunction are newcomers, the possibility of identifying them as a class by reference

to conduct prior to what would be a breach (and, if necessary, by reference to intention) should be explored and adopted if possible.

(4) The prohibited acts

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

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

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

(5) *Geographical and temporal limits*

225. The need for strict temporal and territorial limits is another important consideration (see para 167(iv)). One of the more controversial aspects of many of the injunctions granted hitherto has been their duration and geographical scope. These have been subjected to serious criticism, at least some of which we consider to be justified. We have considerable doubt as to whether it could ever be justifiable to grant a Gypsy or Traveller injunction which is directed to persons unknown, including newcomers, and extends over the whole of a borough or for significantly more than a year. It is to be remembered that this is an exceptional remedy, and it must be a proportionate response to the unlawful activity to which it is directed. Further, we consider that an injunction which extends borough-wide is likely to leave the Gypsy and Traveller communities with little or no room for manoeuvre, just as Coulson LJ warned might well be the case (see generally, *Bromley* [2020] PTSR 1043, paras 99—109. Similarly, injunctions of this kind must be reviewed periodically (as Sir Geoffrey Vos MR explained in these appeals at paras 89 and 108) and in our view ought to come to an end (subject to any order of the judge), by effluxion of time in all cases after no more than a year unless an application is made for their renewal. This will give all parties an opportunity to make

full and complete disclosure to the court, supported by appropriate evidence, as to how effective the order has been; whether any reasons or grounds for its discharge have emerged; whether there is any proper justification for its continuance; and whether and on what basis a further order ought to be made.

(6) Advertising the application in advance

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

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

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

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

(7) *Effective notice of the order*

230. We are not concerned in this part of our judgment with whether respondents become party to the proceedings on service of the order upon them, but rather with the obligation on the local authority to take steps actively to draw the order to the attention of all actual and potential

respondents; to give any person potentially affected by it full information as to its terms and scope, and the consequences of failing to comply with it; and how any person affected by its terms may make an application for its variation or discharge (again, see para 167(ii) above).

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

(8) *Liberty to apply to discharge or vary*

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

(9) *Costs protection*

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

(10) *Cross-undertaking*

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

(11) *Protest cases*

235. The emphasis in this discussion has been on newcomer injunctions in Gypsy and Traveller cases and nothing we have said should be taken as prescriptive in relation to newcomer injunctions in other cases, such as those directed at protesters who engage in direct action by, for example, blocking motorways, occupying motorway gantries or occupying HS2's land with the intention of disrupting construction. Each of these activities may, depending on all the circumstances, justify the grant of an injunction against persons unknown, including newcomers. Any of these persons who have notice of the order will be bound by it, just as effectively as the injunction in the proceedings the subject of this appeal has bound newcomer Gypsies and Travellers.

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

57. I conclude from the rulings in *Wolverhampton* that the 7 rulings in *Canada Goose* remain good law and that other factors have been added. To summarise, in summary judgment applications for a final injunction against unknown persons ("PUs") or newcomers, who are protesters of some sort, the following 13 guidelines and rules must be met for the injunction to be granted. These have been imposed because a final injunction against PUs is a nuclear option in civil law akin to a temporary piece of legislation affecting all citizens in England and Wales for the future so must be used only with due safeguards in place.

58. **<u>(A) Substantive Requirements</u>**

Cause of action

(1) There must be a civil cause of action identified in the claim form and particulars of claim. The usual quia timet (since he fears) action relates to the fear of torts such as trespass, damage to property, private or public nuisance, tortious interference with trade contracts, conspiracy with consequential damage and on-site criminal activity.

Full and frank disclosure by the Claimant

(2) There must be full and frank disclosure by the Claimant (applicant) seeking the injunction against the PUs.

Sufficient evidence to prove the claim

(3) There must be sufficient and detailed evidence before the Court on the summary judgment application to justify the Court finding that the immediate fear is proven on the balance of probabilities and that no trial is needed to determine that issue. The way this is done is by two steps. Firstly stage (1), the claimant has to prove that the claim has a realistic prospect of success, then the burden shifts to the defendant. At stage (2) to prove that any defence has no realistic prospect of success. In PU cases where there is no defendant present, the matter is considered ex-parte by the Court. If there is no evidence served and no foreseeable realistic defence, the claimant is left with an open field for the evidence submitted by him and his realistic prospect found at stage (1) of the hearing may be upgraded to a balance of probabilities decision by the Judge. The Court does not carry out a mini trial but does carry out an analysis of the evidence to determine if it the claimant's evidence is credible and acceptable. The case law on this process is set out in more detail under the section headed "The Law" above.

No realistic defence

(4) The defendant must be found unable to raise a defence to the claim which has a realistic prospect of success, taking into account not only the evidence put before the Court (if any), but also, evidence that a putative PU defendant might reasonably be foreseen as able to put before the Court (for instance in relation to the PUs civil rights to freedom of speech, freedom to associate, freedom to protest and freedom to pass and repass on the highway). Whilst in *National Highways* the absence of any defence from the PUs was relevant to this determination, the Supreme Court's ruling in *Wolverhampton* enjoins this Court not to put much weight on the lack of any served defence or defence evidence in a PU case. The nature of the proceedings are "ex-parte" in PU cases and so the Court must be alive to any potential defences and the Claimants must set them out and make submissions upon them. In my judgment this is not a "Micawber" point, it is a just approach point.

Balance of convenience – compelling justification

(5) In interim injunction hearings, pursuant to *American Cyanamid v Ethicon* [1975] AC 396, for the Court to grant an interim injunction against a defendant the balance of convenience and/or justice must weigh in favour of granting the injunction. However, in PU cases, pursuant to *Wolverhampton,* this balance is angled against the applicant to a greater extent than is required usually, so that there

must be a “compelling justification” for the injunction against PUs to protect the claimant’s civil rights. In my judgment this also applies when there are PUs and named defendants.

(6) The Court must take into account the balancing exercise required by the Supreme Court in *DPP v Ziegler* [2021] UKSC 23, if the PUs’ rights under the European Convention on Human Rights (for instance under Articles 10(2) and 11(2)) are engaged and restricted by the proposed injunction. The injunction must be necessary and proportionate to the need to protect the Claimants’ right.

Damages not an adequate remedy

(7) For the Court to grant a final injunction against PUs the claimant must show that damages would not be an adequate remedy.

(B) Procedural Requirements

Identifying PUs

(8) The PUs must be clearly and plainly identified by reference to: (a) the tortious conduct to be prohibited (and that conduct must mirror the torts claimed in the Claim Form), and (b) clearly defined geographical boundaries, if that is possible.

The terms of injunction

(9) The prohibitions must be set out in clear words and should not be framed in legal technical terms (like “tortious” for instance). Further, if and in so far as it seeks to prohibit any conduct which is lawful viewed on its own, this must also be made absolutely clear and the claimant must satisfy the Court that there is no other more proportionate way of protecting its rights or those of others.

The prohibitions must match the claim

(10) The prohibitions in the final injunctions must mirror the torts claimed (or feared) in the Claim Form.

Geographic boundaries

(11) The prohibitions in the final injunctions must be defined by clear geographic boundaries, if that is possible.

Temporal limits - duration

(12) The duration of the final injunction should be only such as is proven to be reasonably necessary to protect the claimant’s legal rights in the light of the evidence of past tortious activity and the future feared (quia timet) tortious activity.

Service

(13) Understanding that PUs by their nature are not identified, the proceedings, the evidence, the summary judgment application and the draft order must be served by alternative means which have been considered and sanctioned by the Court. The applicant must, under the Human Rights Act 1998 S.12(2), show that it has taken all practicable steps to notify the respondents.

The right to set aside or vary

(14) The PUs must be given the right to apply to set aside or vary the injunction on shortish notice.

Review

(15) Even a final injunction involving PUs is not totally final. Provision must be made for reviewing the injunction in the future. The regularity of the reviews depends on the circumstances. Thus such injunctions are "Quasi-final" not wholly final.

59. Costs and undertakings may be relevant in final injunction cases but the Supreme Court did not give guidance upon these matters.

60. I have read and take into account the cases setting out the historical growth of PU injunctions including *Ineos Upstream v PUs* [2019] EWCA Civ. 515, per Longmore LJ at paras. 18-34. I do not consider that extracts from the judgment are necessary here.

Applying the law to the facts

61. When applying the law to the facts I take into account the interlocutory judgments of Bennathan J and Bourne J in this case. I apply the balance of probabilities. I treat the hearing as an ex-parte hearing at which the Claimants must prove their case and put forward the potential defences of the PUs and show why they have no realistic prospect of success.

<u>(A) Substantive Requirements</u>

Cause of action

62. The pleaded claim is fear of trespass, crime and public and private nuisance at the 8 Sites and on the access roads thereto. In the event, as was found by Sweeting J, Bennathan J. and Bourne J. all 3 feared torts were committed in April 2022 and thereafter mainly at the Kingsbury site but also in Plymouth later on. In my judgment the claim as pleaded is sufficient on a quia timet basis.

Full and frank disclosure

63. By their approach to the hearing I consider that the Claimant and their legal team have evidenced providing full and frank disclosure.

Sufficient evidence to prove the claim

64. In my judgment the evidence shows that the Claimants have a good cause of action and fully justified fears that they face a high risk and an imminent threat that the remaining 17 named Defendants (who would not give undertakings) and/or that UPs will commit the pleaded torts of trespass and nuisance at the 8 Sites in connection with the 4 Organisations. I consider the phrase "in connection with" is broad and does not require membership of the 4 Organisations (if such exists), or proof of donation. It requires merely joining in with a protest organised by, encouraged by or at which one or more of the 4 Organisations were present or represented. The history of the invasive and dangerous protests in April 2022, despite the existence of the interim injunction made

by Butcher J, is compelling. Climbing onto fuel filled tankers on access roads is a hugely dangerous activity. Invading and trespassing upon petrochemical refineries and storage facilities and climbing on storage tanks and tankers is likewise very dangerous. Tunnelling under roads to obstruct and damage fuel tankers is also a dangerous tort of nuisance. I accept the evidence of further torts committed between May and September 2022. I have carefully considered the reduction in activity against the Claimants' Sites in 2023, however the threats from the spokespersons who align themselves or speak for the 4 Organisations did not reduce. I find that the reduction or abolition of direct tortious activity against the Claimants' 8 Sites was probably a consequence of the interim injunctions which were restraining the PUs connected with the 4 Organisations and that it is probable that without the injunctions direct tortious activity would quickly have recommenced and in future would quickly recommence.

No realistic defence

65. The Defendants have not entered any appearance or defence. Utterly properly Miss Holland KC dealt with the potential defences which the Defendants could have raised in her skeleton. Those related to Articles 10 and 11 of the European Convention on Human Rights. In *Cuciurean v Secretary of State for Transport* [2021] EWCA 357, [9(1)]-[9(2)] (emphasis added) Warby LJ said:

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

66. I consider that any defence assertion that the final injunction amounts to a breach of the Defendants' rights under Articles 10 and 11 of the *European Convention on Human Rights* would be bound to fail. Trespass on the Claimants' 8 sites and criminal damage thereon is not justified by those Articles and they are irrelevant to those pleaded causes. As for private nuisance the same reasoning applies. The Articles would only be relevant to the public nuisance on the highways. The Claimants accept that those rights would be engaged on public highways. However, the injunction is prescribed by law in that it is granted by the Court. It is granted with a legitimate aim, namely to protect the Claimant's civil rights to property and access thereto, to avoid criminal damage, to avoid serious health and safety dangers, to protect the right to life of the Claimants' staff and invitees should a serious accidents occur and to enable the emergency services by enabling to access the 8 Sites. There is also a wider interest in avoiding the disruption to emergency services, schools, transport and national services from disruption in fuel supplies. In my judgment there are no less restrictive means available to achieve the aim of protecting the Claimants' civil rights and property than the terms of the final injunction. The Defendants have demonstrated that they are committed to continuing to carry out their unlawful behaviour. In my judgment an injunction in the terms sought strikes a fair balance. In particular, the Defendants' actions in seeking to *compel* rather than *persuade* the Government to act in a certain way (by attacking the Claimants 8 Sites), are not at the core of their Article 10 and 11 rights, see *Attorney General's Reference (No 1 of 2022)* [2023] KB 37, at para 86. I take into account that direct action is not being carried out on the highway because the highway is in some way important or related to the protest. It is a means by which the Defendants can inflict significant disruption, see *National Highways Ltd v Persons Unknown* [2021] EWHC 3081 (KB), at para 40(4)(a) per Lavender J and *Ineos v Persons Unknown* [2017] EWHC 2945 (Ch), at para.114 per Morgan J. I take into account that the Defendants will still be able to protest and make their points in other lawful ways after the final injunction is granted, see *Shell v Persons Unknown* [2022] EWHC 1215, at para. 59 per Johnson J. I take into account that the impact on the rights of others of the Defendants' direct action, for instance at Kingsbury, is substantial for the reasons set out above. As well as being a public nuisance, the acts sought to be restrained are also offences contrary to s.137 of the *Highways Act 1980* (obstruction of the highway), s.1 of the *Public Order Act 2023* (locking-on) and s.7 of the *Public Order Act 2023* (interference with use or operation of key national infrastructure). In these circumstances I do not consider that the Defendants have any realistic prospect of success on their potential defences.

Balance of convenience – compelling justification

67. In my judgment the balance of convenience and justice weigh in favour of granting the final injunction. The balance tips further in the Claimants' favour because I consider that there are compelling justifications for the injunction against the named Defendants and the PUs to protect the Claimants' 8 Sites d the nearby public from the threatened torts, all of which are at places which are part of the National Infrastructure. In

addition, there are compelling reasons to protect the staff and visitors at the 8 Sites from the risk of death or personal injury and to protect the public at large who live near the 8 Sites. The risk of explosion may be small, but the potential harm caused by an explosion due to the tortious activities of a protester with a mobile phone or lighter, who has no training in safe handling in relation to fuel in tankers or storage tanks or fuel pipes, could be a human catastrophe.

68. I also take into account the dangers involved in shutting down any refinery site. I take into account that a temporary emergency shutdown had to be put in place at Kingsbury on 7th April 2022 and the dangers that such safety measures cause on restart.

69. I take into account that no spokesperson for any of the 4 Organisations has agreed to sign undertakings and that 17 Defendants have refused to sign undertakings. I take into account the dark and ominous threats made by Roger Hallam, the asserted co-founder of Just Stop Oil and the statements of those who assert that they speak for the Just Stop Oil and the other organisations, that some will continue action using methods towards a more excessive limit.

Damages not an adequate remedy

70. I consider that damages would not be an adequate remedy for the feared direct action incursions onto or blockages of access at the 8 Sites. None of the named Defendants are prepared to offer to pay costs or damages. 43 have sought to exchange undertakings for the prohibitions in the interim injunctions, but none offered damages or costs. Recovery from PUs is impossible and recovery from named Defendants is wholly uncertain in any event. No evidence has been put before this Court about the 4 Organisations' finances or structure or legal status or to identify which legal persons hold their bank accounts or what funding or equipment they provided to the protesters or what their legal structure is. Whilst no economic tort is pleaded the damage caused by disruption of supply and of refining works may run into substantial sums as does the cost to the police and emergency services resulting from torts or crimes at the 8 Sites and the access roads thereto. Finally, any health and safety risk, if triggered, could potentially cause fatalities or serious injuries for which damages would not be a full remedy. Persons injured or killed by tortious conduct are entitled to compensation, but they would always prefer to suffer no injury.

(B) Procedural Requirements

Identifying PUs

71. In my judgment, as drafted the injunction clearly and plainly identifies the PUs by reference to the tortious conduct to be prohibited and that conduct mirrors the feared torts claimed in the Claim Form. The PUs' conduct is also limited and defined by reference to clearly defined geographical boundaries on coloured plans.

The terms of the injunction

72. The prohibitions in the injunction are set out in clear words and the order avoids using legal technical terms. Further, in so far as the prohibitions affect public highways, they do not prohibit any conduct which is lawful viewed on its own save to the extent that such is necessary and proportionate. I am satisfied that there is no other more proportionate way of protecting the Claimants' rights or those of their staff, invitees and suppliers.

The prohibitions must match the claim

73. The prohibitions in the final injunction do mirror the torts feared in the Claim Form.

Geographic boundaries

74. The prohibitions in the final injunction are defined by clear geographic boundaries which in my judgment are reasonable.

Temporal limits - duration

75. I have carefully considered whether 5 years is an appropriate duration for this quasi-final injunction. The undertakings expire in August 2026 and I have thought carefully about whether the injunction should match that duration. However, in the light of the threats of some of the 4 Organisations on the longevity of their campaigns and the continued actions elsewhere in the UK, the express aim of causing financial waste to the police force and the Claimants and the total lack of engagement in dialogue with the Claimants throughout the proceedings, I do not consider it reasonable to put the Claimants to the further expense of re-issuing for a further injunction in 2 years 7 months' time. I have seen no evidence suggesting that those connected with the 4 organisations will abandon or tire of their desire for direct tortious action causing disruption, danger and economic damage with a view to forcing Government to cease or prevent oil exploration and extraction.

Service

76. I find that the summary judgment application, evidence in support and draft order were served by alternative means in accordance with the previous Orders made by the Court.

The right to set aside or vary

77. The final injunction gives the PUs the right to apply to set aside or vary the final injunction on short notice.

Review

78. Provision has been made in the quasi-final injunction for review annually in future. In the circumstances of this case I consider that to be a reasonable period.

Conclusions

79. I grant the quasi-final injunction sought by the Claimants for the reasons set out above.

END

Neutral Citation Number: [2024] EWHC 2599 (KB)

Case No: KB-2024-002210

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/10/2024

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

HEATHROW AIRPORT LIMITED	**Claimant**
- and –	
PERSONS UNKNOWN WHO (IN CONNECTION WITH JUST STOP OIL OR OTHER ENVIRONMENTAL CAMPAIGN) ENTER, OCCUPY OR REMAIN (WITHOUT THE CLAIMANT'S CONSENT) UPON 'LONDON HEATHROW AIRPORT' AS IS SHOWN EDGED PURPLE ON THE ATTACHED PLAN A TO THE PARTICULARS OF CLAIM	**Defendants**

- -
- -

Katharine Holland KC and Jacqueline Lean
(instructed by **Bryan Cave Leighton Paisner**) for the **Claimant**
The Defendants did not appear and were not represented

Hearing date: **9 July 2024**

- -

Approved Judgment

This judgment was handed down remotely at 10:30 on 14 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Julian Knowles:

Introduction

1. Following a hearing on 9 July 2024 I granted the Claimant's without notice application for a precautionary injunction to restrain anticipated protests at Heathrow Airport (the Airport) by environmental campaigners and others falling within the description of the Defendants on the Order. The Claimant is the owner and operator of the Airport. It says the planned action would amount to trespass and nuisance.

2. Having read the evidence in advance, and after hearing Ms Holland KC on behalf of the Claimant, I was satisfied it was entitled to the order it was seeking. These are my reasons.

3. The injunction is the sort of 'newcomer injunction' which have been granted by the courts in protest and other cases in recent years. The evolution of this sort of injunction, and the relevant legal principles, were set out by the Supreme Court in *Wolverhampton City Council and others v London Gypsies and Travellers and others* [2024] 2 WLR 45. I will refer to this as the *Wolverhampton Travellers* case.

4. Recent examples of such injunctions are: *Jockey Club Racecourses Ltd v Persons Unknown* [2024] EWHC 1786 (Ch); *Exolum Pipeline System Ltd and others v Persons Unknown* [2024] EWHC 1015 (KB); *Valero Energy Ltd v Persons Unknown* [2024] EWHC 134 (KB); *Multiplex Construction Europe Ltd v Persons Unknown* [2024] EWHC 239 (KB); *High Speed 2 (HS2) Limited v Persons Unknown* [2024] EWHC 1277 (KB); and *Wolverhampton City Council v Persons Unknown* [2024] EWHC 2273 (KB). The legal basis for newcomer injunctions, and the principles which guide whether they should be granted in a particular case, are therefore now firmly established.

5. A few weeks before the present application I granted a similar application by the operators of London City Airport to restrain the same sort of anticipated conduct which the Claimant fears.

Without notice

6. The application before me was made without notice. I was satisfied this was appropriate for the following reasons.

7. Ordinarily, the Claimants would be required to demonstrate that there were 'good' (as required by CPR r 25.3(1)) or 'compelling' (Human Rights Act 1998, s 12(2)(b) (if it applies here, a point I will return to) reasons for bringing an application without notice. Those requirements do not technically apply here as they only affect

applications brought against parties to proceedings. In the present case, which relates only to Persons Unknown who are newcomers, there is no defendant: *Wolverhampton Travellers*, [140]-[143]. Nonetheless, I proceeded on the basis that the relevant tests had to be satisfied.

8. I was and am satisfied that there are good and compelling reasons for the application to have been made without notice.

9. In particular, the Claimant was justifiably concerned about the severe harm that could result if Persons Unknown were to be notified about this application. As I shall describe, there have been repeated serious threats about the scale and sort of direct action planned, and this will pose a serious risk of physical harm, financially injurious disruption and huge public inconvenience. The damage caused would for the most part be irreparable. There was plainly a risk that would-be protesters would trespass upon the Airport before the application was heard and carry out the threatened direct action, thus partially defeating the purpose of the injunction.

10. I carefully considered the Convention rights of the Defendants. However, the Airport is private land, and for the reasons I explained in *High Speed Two (HS2) Limited v Persons Unknown* [2022] EWHC 2360 (KB), [80]-[81], [131], these Convention rights are not therefore engaged. Persons unknown have no right to enter the Airport (save for lawful and permitted purposes) or to protest there. The position is therefore different from injunctions or laws restricting assembly and protest on the highway or public land, where the Convention is engaged: cf *Re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2023] AC 505; *Birmingham City Council v Afsar* [2019] EWHC 1560 (KB).

Background

11. The evidence in support of the application principally comes from Jonathan Coen, the Airport's Director of Security, and Akhil Markanday, of Bryan Cave Leighton Paisner, the Claimant's solicitors. I will refer to their statements as 'Coen' and 'Markanday' respectively, meaning no discourtesy.

12. Just Stop Oil (JSO) is one of a number of groups which in recent years have become prominent for staging public protests. Each of these organisations shares a common objective of reducing the rate of climate change and each of them has used acts of civil disobedience to draw attention to the climate crisis and the particular objectives of their organisation.

13. JSO's website refers to itself as:

> "a non-violent civil resistance group demanding the UK Government stop licensing all new oil, gas and coal projects."

14. The Airport is Europe's busiest airport. The average number of daily flights exceeds 1,300, with an average of nearly 227,000 passengers daily. It is a designated Critical National Infrastructure site. It is the Claimant's case that it is a clear and obvious target for the planned disruptive action, and, indeed, features in one of the videos on the JSO website promoting the proposed campaign.

15. Details about the campaign of disruption at airports being organised and/or publicised by the Defendants are set out in Markanday, [14]-[24,] and Coen, [23] – [25]. Examples of recent unlawful actions at airports generally (supporting the Claimant's concerns as to the apprehended actions) and at or directed at the Airport previously are set out in Markanday, [25]-[28], and Coen, [26]-[28].

16. By way of summary, in March 2024, the Daily Mail reported that environmental activists associated with the JSO campaign were planning a campaign of disruptive action at airports over the summer of 2024, advocating actions such as:

    a. Cutting through fences and gluing themselves to runway tarmac;

    b. Cycling in circles on runways;

    c. Climbing onto planes to prevent them from taking off; and

    d. Staging sit-ins at terminals 'day after day' to stop passengers getting inside airports.

17. At the relevant time JSO's own website emphasised that the group plans to target action on airports during the summer of 2024, with recent updates on its fundraising pages stating (inter alia) that 'We're escalating our campaign this summer to take action at airports' and 'We're going so big that we can't even tell you the full plan, but know this – Just Stop Oil will be taking our most radical action yet this summer. We'll be taking action at sites of key importance to the fossil fuel industry; **super-polluting airports.**'

18. In June 2024 JSO sent a letter to MPs threatening further action if its demands were not met by a deadline of 12 July 2024. That was three days after the hearing before me. That was plainly an imminent threat.

19. UK and foreign airports, including Heathrow, have previously been the subject of unlawful trespass or other disruptive actions by environmental activists, including:

    a. Two JSO supporters breaching the perimeter fence at Stansted Airport on 20 June 2024, and spraying paint over private jets (Markanday, [25]);

b. Extinction Rebellion activists blocking access to Farnborough Airport on 2 June 2024 (Markanday, [26]);

c. A group affiliated with JSO, called Last Generation, causing disruption at Munich airport on 18 May 2024, including people gluing themselves to the runway (Markanday, [27]);

d. On 27 September 2021, climate change protestors defied a court order and blocked part of the M25 at Heathrow (Coen, [28(a)]);

e. In September 2019, the climate change group, Heathrow Pause, attempted to disrupt flights into and out of the Airport by flying drones in the Airport's exclusion zone (Coen, [27(a)]); and

f. On 13 July 2015, 13 members of the climate change protest group 'Plane Stupid' broke through the perimeter fence and onto the northern runway at the Airport. They chained themselves together in protest, disrupting hundreds of flights (Coen [27(c)]).

20. In the London City Airports case (see above) I also had evidence about protests by environmental activists there in 2019.

21. I was and am satisfied on all of the Claimant's evidence that there is real threat of disruptive protest to the Airport by environmental protesters. For reasons I will come to, this protest will not be lawful.

22. I turn to the question of harm.

Risk of harm

23. I was and am satisfied that the anticipated protest would cause a serious risk of harm; those harms being serious injury and death; financial harm; and unquantifiable inconvenience. I adopt the analysis in [17] et seq of the Claimant's Skeleton Argument and highlight the following.

24. The Airport is a busy, operational site serving passengers and cargo, with two runways and, as I have said, around 1,300 flight every day. As a Code F compliant airport (an International Civil Aviation Organisation designation), it can receive the largest aircraft which many other airports cannot, and accordingly has a higher proportion of long-haul aircraft landing than other UK airports (Coen, [31]).

25. In his witness statement Mr Coen says at [29]:

> "29. Heathrow is a complex operational environment. Health and Safety is naturally taken very seriously and we consider there to be a real risk that any unlawful direct action at the Airport may endanger our staff, other companies' staff, our passengers, other legitimate visitors and the participants themselves."

26. The risks of harm are set out by Mr Coen at [29]-[33]. The risks to life and limb principally arise from:

    a. Trespassers being struck by landing, departing or taxi-ing aircraft, or others being struck by aircraft having to take evasive action (Coen, [30]);

    b. Trespassers coming too close to a jet engine (Coen, [30(a)]);

    c. Emergency services and the Airport's own rescue and fire-fighting services potentially having to put themselves at risk to remove and/or rescue trespassers (and in the event of an airfield emergency, their response potentially being hampered) (Coen [30(c)]);

27. There would also be severe disruption to passengers, and the proper operations of the Airport more generally (Coen, [43]). The potential economic loss to the Claimant would be significant (Coen, [37]). The disruption would have effects beyond the Airport itself, including, but not limited to, the potential need for other airports to find capacity to accommodate in-bound flights which might have to be diverted from Heathrow (Coen, [34(f)]); the need to divert additional Police resources to the Airport (Coen, [34(g)]); disruption to the highway network (Coen, [34(d)]); and impacts on businesses and wider economy given the contribution which the Airport makes to the wider economy (Coen, [12]-[13], [15] and [34(b)]).

The site

28. The Airport occupies a very large area. I am satisfied that the site to be covered by the injunction is clearly shown on the plans produced by Mr Markanday that are in the bundle and which form part of the Order. I can summarise matters as follows.

29. The land within the Airport perimeter comprises a significant number of land parcels registered at HM Land Registry. A Schedule of Titles is appended to the Particulars of Claim. The land which is owned by the Claimant, either freehold or leasehold, is shown on one of the plans in the bundle; this equates to the area shown edged purple on Plan A to the Particulars of Claim.

30. A number of the parcels of land listed in the Schedule of Titles are subject to leases to third parties. Those parts of the Airport which are subject to above-surface leases are shown hatched blue on Plan A.

31. There are, in addition, a number of areas, within terminal buildings which are occupied by third parties. (As explained in Markanday, [12], in light of the complexity of seeking to show which parts of different floors of the terminal buildings are subject to leases (etc) to third parties, for the purposes of this claim, the terminal buildings are excluded from those parts of the Airport to which the Claimant asserts an immediate entitlement to possession by virtue of its freehold/leasehold ownership). These areas are shown shaded orange on Plan A. Those parts of the Airport to which the Claimant asserts an immediate entitlement to possession, in its capacity as freehold or leasehold owner under the titles shown in the Schedule of Titles, are therefore those areas shown shaded yellow but excluding those areas hatched blue or shaded orange on Plan A.

32. As operator of the Airport, the Claimant holds a certificate for the operation of the Airport issued by the Civil Aviation Authority (CAA) under the relevant legislation (the Certificate). It also has an Economic Licence granted by the CAA under Part 1 of the Civil Aviation Act 2012 (the Licence). In broad terms, these confer the right to control the Airport and the right to charge fees.

33. The Claimant has also made the Heathrow Airport – London Byelaws 2014 (the Byelaws) pursuant to s 63 of the Airports Act 1986. They regulate the use and operation of the Airport, and the conduct of all persons while within the Airport. They came into force on 13 April 2014. Section 64 makes it an offence punishable by a fine to breach byelaws made under s 63. Several of the byelaws are relevant, but for example, Byelaw 3.19 provides:

> "no person shall organise or take part in any demonstration, procession or public assembly likely to obstruct or interfere with the proper use of the Airport or obstruct or interfere with the safety of passengers or persons using the Airport"

Causes of action

34. The Claimant seeks an injunction to restrain acts it said would constitute trespass and nuisance.

35. I am satisfied that the Claimant has an overwhelmingly strong case and that there is (or would be) no realistic defence. I will say more about this later.

Legal principles

36. I recently reviewed some of the relevant case law in this area in my judgment in *Wolverhampton City Council v Persons Unknown* [2024] EWHC 2273 (KB), to which the reader is referred.

Precautionary relief

37. The test for precautionary relief of the type sought by the Claimants is whether there is an imminent and real risk of harm: *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100, [34(1)] (Court of Appeal) and the first instance decision of Morgan J: [2017] EWHC 2945 (Ch), [88]. See also *High Speed Two (HS2) Limited*, [99]-[101]. 'Imminent' in this context simply means 'not premature': *Hooper v Rogers* [1975] Ch 43, 49.

38. I was satisfied that this application was not premature and that, for the reasons I gave earlier, there is more than a real risk of harm.

'Newcomer' or 'Persons Unknown' injunctions

39. As I explained earlier, the law in relation to this type of injunction was set out by the Supreme Court in *Wolverhampton Travellers.* In *Valero*, [58], and *Multiplex,* [11], Ritchie J set out a list of factors to be satisfied in the protest context (albeit in the former case the context of a summary judgment application).

40. The present application is for injunctive relief against pure trespassers on private land. It is, therefore, unlike, for example, *Wolverhampton Travellers*, which involved injunctive relief sought by local authorities against Travellers (in respect of whom they have statutory duties) on local authority land; *Valero*, which involved injunctive relief against protesters, on both private and public land, and which therefore materially engaged Article 10 and 11 ECHR rights; and (I might add) the *Abortion Services* case, which concerned protests on public land.

41. Notwithstanding this, many of the *Valero* and *Multiplex* factors are still relevant to this application, which involves Persons Unknown who are newcomers, and I propose to analyse the Claimant's case by reference to them.

42. *There must be a civil cause of action identified*: here, the causes of action are trespass and nuisance.

43. In relation to trespass, as set out [5] of the Particulars of Claim, the Claimant is entitled to immediate possession of those parts of the Airport shown shaded yellow on Plan A in its capacity as the registered freehold or leasehold proprietor of those parts of the Airport. The availability of injunctive relief to restrain an anticipated trespass of land to which a landowner is entitled to immediate possession is well

established: see, for example, *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] 1 WLR 2780.

44. However, it is also well established that an entitlement to exclusive possession, or actual possession itself, is not required where possession, or injunctive relief, is sought against trespassers: *Manchester Airport Plc v Dutton & ors* [2000] 1 QB 133. In *High Speed Two (HS2) Limited v Four Categories of Persons Unknown* [2022] EWHC 2360 (KB), in granting injunctive relief to restrain protests over the HS2 route and other land, I said at [77]: 'In relation to trespass, all that needs to be demonstrated by the claimant is a better right to possession than the occupiers', citing *Dutton* at p147.

45. In *Mayor of London v Hall* [2011] 1 WLR 504, the Court of Appeal was satisfied that the Mayor of London, as the person with 'control' of Parliament Square Gardens, could properly seek injunctive relief against the defendants founded in trespass, even though title was vested in the Crown ([22]-[27]).

46. The Claimant plainly comes within these principles. As well as its title holding over the relevant parcels of land, it is the operator of the Airport as a whole and so in control of it. It holds the Certificate and the Licence, which mean that it is responsible for the safe and efficient operation of the Airport. And it has made byelaws pursuant to the power given to it by s 63 of the Airports Act 1986 which regulate the use and operation of the airport and the conduct of all persons within the Airport.

47. As the Defendants have no interest, estate or other right to possession of the Airport, or right to enter it without permission (which they do not have), there can be no dispute that the Claimant enjoys a better right to possession of the Airport than they do. As set out in Coen, [20], whilst it is the case that large parts of the Airport are broadly open to the public, that is with the Claimant's permission and consent for legitimate short-term purposes connected with Heathrow's status as an airport – for example, to travel themselves or to drop-off/collect other travellers. That general consent is subject to compliance with the Byelaws.

48. The Claimant is therefore entitled to injunctive relief to restrain trespass over the whole of the Airport, as shown edged purple on Plan A, being the land over which it has control even if not, by reason of title, an immediate right to possession in its capacity as landowner.

49. I turn to nuisance. This can either be private nuisance or public nuisance.

50. The essence of a claim for private nuisance is that the acts of the defendant have wrongfully interfered with the claimant's use and/or enjoyment of its property. I am satisfied that in the present case, the acts complained of would fall into this category of nuisance by interference with enjoyment discussed in *Clerk & Lindsell on Torts* (24th Edn), [19-08].

51. A public nuisance is one which 'inflicts damage, injury or inconvenience on all the King's subjects or on all members of a class who come within the sphere of a neighbourhood of its operation': *High Speed 2 (HS2) Limited*, [84]. A public nuisance is actionable in private law if the claimant can establish that he has sustained a particular damage or injury other than and beyond the general injury to the public, and that such damage is direct and substantial: *Benjamin v Storr* (1873-74) LR 9.

52. I am satisfied that the Defendants' threatened conduct satisfies these tests and would constitute a public nuisance. The actions apprehended by the Claimant would substantially affect members of the public, including, but not limited to persons wishing to use the Airport for the purpose of air travel - as well as the Claimant.

53. *Sufficient evidence to prove the claim*: I am satisfied that there is sufficient evidence to prove the claims as set out above. There is more than a 'serious issue to be tried'. It is overwhelmingly certain that the Claimants would prevail at trial.

54. *Whether there is a realistic defence to the claims*: I do not consider that there is or can be a realistic defence to the claims. As explained earlier, I do not consider that the Convention has any application in case.

55. *The balance of convenience and compelling justification*: in *Multiplex*, [15], Ritchie J said:

> "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."

56. In the case before me, there is more than a real risk of grave injury and death, as I explained earlier. Other harm would also result.

57. *Whether damages are an adequate remedy*: this criterion is plainly not applicable in the present case, where Claimants seek to restrain conduct which has caused and is capable of causing considerable non-pecuniary harm many people. Further, the evidence of Mr Coen shows that the economic loss to the Claimant would be huge and of such a scale that there is no credible reason to believe that any of the Defendants could or would meet any such award (Coen [39(d)]).

58. *Procedural requirements relating to the conduct*: these are, principally, that: (a) the persons unknown must be clearly identified by reference to the tortious conduct to be prohibited; and (b) there must be clearly defined geographical boundaries. I am satisfied that these requirements have been fulfilled.

59. *The terms of the injunction must be clear*: the prohibited conduct must not be framed in technical or legal language. In other words, what is being prohibited must be clear to the reader. I am satisfied this requirement is made out. The prohibitions have been set out in clear words.

60. *The prohibitions must match the pleaded claim(s)*: I am satisfied that this requirement has been fulfilled.

61. *Temporal limits/duration*: the injunction is time limited to five years and provision is made for annual reviews. Furthermore, there is always the right of any person affected to come to court at any time to seek a variation or discharge of the injunction: *High Speed 2 (HS2) Limited v Persons Unknown* [2024] EWHC 1277 (KB), [58]-[59]. As the claim is being brought against Persons Unknown only, no return date hearing or final hearing is required.

62. *Service of the order*: this is an especially important condition. I am satisfied that the service provisions contained in the order will be sufficient to bring the injunction to the attention of the public.

Other matters requiring consideration

63. Cross-undertaking in damages: the order contains an appropriate cross-undertaking.

64. As some of what the order prohibits is criminal by virtue of the Airport's Byelaws (see above) I considered whether the injunction was necessary. In *Wolverhampton*

Travellers, [216]-[217], the Supreme Court said that if byelaws are available to control the behaviour complained of then consideration must be given to them as a relevant means of control in place of an injunction.

65. I was and am satisfied that the existence of byelaws is not a sufficient means of control and that an injunction is necessary. Byelaws have not prevented previous disruptive protests. Although handed down after the hearing in this case, I would also adopt my reasoning in *Wolverhampton City Council,* [35]-[43], where I granted injunctions to prevent so-called car cruising (in effect, organised dangerous driving) on when it is appropriate to grant an injunction in support of the criminal law. I am satisfied the relevant tests are satisfied here.

66. At [43] of its Skeleton Argument the Claimant made submissions in compliance with its duty of full and frank disclosure on reasons why it might be said not to be appropriate to grant an injunction.

67. Firstly, it said it could be argued that there is no justification for this application to have been made without notifying Persons Unknown. I addressed this earlier.

68. Second, it said it could be argued that there has been no direct threat against the Airport in particular, such that a precautionary injunction ought not to be granted. In other words, that there is not a sufficiently imminent risk. For the reasons set out above, I was satisfied there was the necessary imminence. It is not necessary to wait for the necessary harm to have occurred before applying for injunction relief. The Airport is an obvious target, as Mr Coen said.

69. Third, it referred to arguments based on the Defendants' Convention rights. These have no application for the reasons explained earlier.

Conclusion

70. It was for the substance of these reasons that I granted the injunction.