IN THE HIGH COURT OF JUSTICE **Claim No: KB-2022-004333**

KING'S BENCH DIVISION

BETWEEN:

NATIONAL HIGHWAYS LIMITED

Claimant

- and -

(1) JUST STOP OIL

(2) PERSONS UNKNOWN ENTERING OR REMAINING WITHOUT THE CONSENT OF THE CLAIMANT ON, OVER, UNDER OR ADJACENT TO A STRUCTURE ON THE M25 MOTORWAY

Defendants

CLAIMANT'S AUTHORITIES

Neutral Citation Number: [2022] EWHC 736 (Admin)

Case No: CO/745/2022

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 March 2022

Before:

THE LORD BURNETT OF MALDON
LORD CHIEF JUSTICE OF ENGLAND AND WALES
MR JUSTICE HOLGATE

- -

Between:

DIRECTOR OF PUBLIC PROSECUTIONS	**Appellant**
- and -	
ELLIOTT CUCIUREAN	**Respondent**

- -
- -

Tom Little QC and James Boyd (instructed by **Crown Prosecution Service**) for the **Appellant**
Tim Moloney QC, Blinne Ní Ghrálaigh and Adam Wagner (instructed by **Robert Lizar Solicitors**) for the **Respondent**

Hearing date: 23 March 2022

- -

Approved Judgment

Lord Burnett of Maldon CJ:

Introduction

1. This is the judgment of the court to which we have both contributed. The central issue for determination in this appeal is whether the decision of the Supreme Court in *DPP v. Ziegler* [2021] UKSC 23; [2021] 3 WLR 179 requires a criminal court to determine in all cases which arise out of "non-violent" protest whether the conviction is proportionate for the purposes of articles 10 and 11 of the European Convention on Human Rights ("the Convention") which protect freedom of expression and freedom of peaceful assembly respectively.

2. The respondent was acquitted of a single charge of aggravated trespass contrary to section 68 of the Criminal Justice and Public Order Act 1994 ("the 1994 Act") consequent upon his digging and then remaining in a tunnel in land belonging to the Secretary of State for Transport which was being used in connection with the construction of the HS2 railway. The Deputy District Judge, sitting at the City of London Magistrates' Court, accepted a submission advanced on behalf of the respondent that, before she could convict, the prosecution had "to satisfy the court so that it is sure that a conviction is a proportionate interference with the rights of Mr Cuciurean under articles 10 and 11 …" In short, the judge accepted that there was a new ingredient of the offence to that effect.

3. Two questions are asked of the High Court in the case stated:

> "1. Was is it open to me, having decided that the Respondent's Article 10 and 11 rights were engaged, to acquit the Respondent on the basis that, on the facts found, the Claimant had not made me sure that a conviction for the offence under s. 68 was a reasonable restriction and a necessary and proportionate interference with the defendant's Article 10 and 11 rights applying the principles in ***DPP v Ziegler***?
>
> 2. In reaching the decision in (1) above, was I entitled to take into account the very considerable costs of the whole HS2 scheme and the length of time that is likely to take to complete (20 years) when considering whether a conviction was necessary and proportionate?"

4. The prosecution appeal against the acquittal on three grounds:

    1) the prosecution did not engage articles 10 and 11 rights;

    2) if the respondent's prosecution did engage those rights, a conviction for the offence of aggravated trespass is - intrinsically and without the need for a separate consideration of proportionality in individual cases - a justified and proportionate interference with those rights. The decision in ***Ziegler*** did not compel the judge to take a contrary view and undertake a ***Ziegler***-type fact-sensitive assessment of proportionality; and

3) in any event, if a fact-sensitive assessment of proportionality was required, the judge reached a decision on that assessment that was irrational, in the *Wednesbury* sense of the term.

5. Before the judge, the prosecution accepted that the respondent's article 10 and 11 rights were engaged and that there was a proportionality exercise of some sort for the court to perform, albeit not as the respondent suggested. In inviting the judge to state a case, the prosecution expressly disavowed an intention to challenge the conclusion that the Convention rights were engaged. It follows that neither Ground 1 nor Ground 2 was advanced before the judge.

6. The respondent contends that it should not be open to the prosecution to raise Grounds 1 or 2 on appeal. He submits that there is no sign in the application for a case to be stated that Ground 1 is being pursued; and that although Ground 2 was raised, because it was not argued at first instance, the prosecution should not be allowed to take it now.

7. Rule 35.2(2)(c) of the Criminal Procedure Rules relating to an application to state a case requires:

> "35.2(2) The application must—
>
> …
>
> (c) indicate the proposed grounds of appeal"

8. The prosecution did not include what is now Ground 1 of the Grounds of Appeal in its application to the Magistrates' Court for a case to be stated. We do not think it appropriate to determine this part of the appeal, for that reason and also because it does not give rise to a clear-cut point of law. The prosecution seeks to argue that trespass involving damage to land does not engage articles 10 and 11. That issue is potentially fact-sensitive and, had it been in issue before the judge, might well have resulted in the case proceeding in a different way and led to further factual findings.

9. Applying well-established principles set out in *R v R* [2016] 1 WLR 1872 at [53]-[54]; *R v. E* [2018] EWCA Crim 2426 at [17]-[27] and *Food Standards Agency v. Bakers of Nailsea Limited* [2020] EWHC 3632 (Admin) at [25]-[31], we are prepared to deal with Ground 2. It involves a pure point of law arising from the decision of the Supreme Court in *Ziegler* which, according to the respondent, would require a proportionality test to be made an ingredient of any offence which impinges on the exercise of rights under articles 10 and 11 of the Convention, including, for example, theft. There are many public protest cases awaiting determination in both the Magistrates' and Crown Courts which are affected by this issue. It is desirable that the questions which arise from *Ziegler* are determined as soon as possible.

Section 68 of the Criminal Justice and Public Order Act 1994

10. Section 68 of the 1994 Act as amended reads:

> "(1) A person commits the offence of aggravated trespass if he trespasses on land and, in relation to any lawful activity which persons are engaging in or are about to engage in on that or

> adjoining land, does there anything which is intended by him to have the effect—
>
> > (a) of intimidating those persons or any of them so as to deter them or any of them from engaging in that activity,
> >
> > (b) of obstructing that activity, or
> >
> > (c) of disrupting that activity.
>
> (1A) …
>
> (2) Activity on any occasion on the part of a person or persons on land is "lawful" for the purposes of this section if he or they may engage in the activity on the land on that occasion without committing an offence or trespassing on the land.
>
> (3) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding level 4 on the standard scale, or both.
>
> (4) [repealed].
>
> (5) In this section "land" does not include—
>
> > (a) the highways and roads excluded from the application of section 61 by paragraph (b) of the definition of "land" in subsection (9) of that section; or
> >
> > (b) a road within the meaning of the Roads (Northern Ireland) Order 1993."

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

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

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

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

Factual Background

14. The respondent was charged under section 68 of the 1994 Act that between 16 and 18 March 2021, he trespassed on land referred to as Access Way 201, off Shaw Lane, Hanch, Lichfield, Staffordshire ("the Land") and dug and occupied a tunnel there which was intended by him to have the effect of obstructing or disrupting a lawful activity, namely construction works for the HS2 project.

15. The Land forms part of phase one of HS2, a project which was authorised by the High Speed Rail (London to West Midlands) Act 2017 ("the 2017 Act"). This legislation gave the Secretary of State for Transport power to acquire land compulsorily for the purposes of the project, which the Secretary of State used to purchase the Land on 2 March 2021.

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

17. Protesters against the HS2 project had occupied the Land and the respondent had dug a tunnel there before 2 March 2021. The respondent occupied the tunnel from that date. He slept in it between 15 and 18 March 2021, intending to resist eviction and to disrupt activities of the HS2 project.

18. The HS2 project team applied for a High Court warrant to obtain possession of the Land. On 16 March 2021 they went on to the Land and found four protesters there. One left immediately and two were removed from trees on the site. On the same day the team found the respondent in the tunnel. Between 07.00 and 09.30 he was told that he was trespassing and given three verbal warnings to leave. At 18.55 a High Court enforcement agent handed him a notice to vacate and told him that he would be forcibly evicted if he failed to leave. The respondent went back into the tunnel.

19. The HS2 team instructed health and safety experts to help with the eviction of the respondent and the reinstatement of the Land. They included a "confined space team" who were to be responsible for boarding the tunnel and installing an air supply system. The respondent left the Land voluntarily at about 14.00 on 18 March 2021.

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

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

The Proceedings in the Magistrates' Court

22. On 18 March 2021 the respondent was charged with an offence contrary to section 68 of the 1994 Act. On 10 April 2021 he pleaded not guilty. The trial took place on 21 September 2021.

23. At the trial the respondent was represented by counsel who did not appear in this court. He produced a skeleton argument in which he made the following submissions: -

    i) "*Ziegler* laid down principles applicable to all criminal charges which trigger an assessment of a defendant's rights under articles 10 and 11 ECHR. It is of general applicability. It is not limited to offences of obstructing the highway";

    ii) *Ziegler* applies with the same force to a charge of aggravated trespass, essentially for two reasons;

        (a) First, the Supreme Court's reasoning stems from the obligation of a court under section 6(1) of the Human Rights Act 1998 ("1998 Act") not to act in a manner contrary to Convention rights (referred to in *Ziegler* at [12]). Accordingly, in determining a criminal charge where issues under articles 10 and 11 ECHR are raised, the court is obliged to take account of those rights;

        (b) Second, violence is the dividing line between cases where articles 10 and 11 ECHR apply and those where they do not. If a protest does not become violent, the court is obliged to take account of a defendant's right to protest in assessing whether a criminal offence has taken place. Section 68 does not require the prosecution to show that a defendant was violent and, on the facts of this case, the respondent was not violent;

    iii) Accordingly, before the court could find the respondent guilty of the offence charged under section 68, it would have to be satisfied by the prosecution so that it was sure that a conviction would be a proportionate interference with his rights under articles 10 and 11. Whether a conviction would be proportionate should be assessed with regard to factors derived from *Ziegler* (at [71] to [78], [80] to [83] and [85] to [86]). This required a fact-sensitive assessment.

24. The prosecution did not produce a skeleton for the judge. She recorded that they did not submit "that the respondent's article 10 and 11 rights could not be engaged in relation to an offence of aggravated trespass" or that the principles in *Ziegler* did not apply in this case (see paragraph 10 of the Case Stated).

25. The judge made the following findings:

    "1. The tunnel was on land owned by HS2.

2. Albeit that the Respondent had dug the tunnel prior to the of transfer of ownership, his continued presence on the land after being served with the warrant disrupted the activity of HS2 because they could not safely hand over the site to the contractors due to their health and safety obligations for the site to be clear.

3. The act of Respondent taking up occupation of the tunnel on 15th March, sleeping overnight and retreating into the tunnel having been served with the Notice to Vacate was an act which obstructed the lawful activity of HS2. This was his intention.

4. The Respondent's article 10 and 11 rights were engaged and the principals in R v Ziegler were to be considered.

5. The Respondent was a lone protester only occupying a small part of the land.

6. He did not act violently.

7. The views of the Respondent giving rise to protest related to important issues.

8. The Respondent believed the views he was expressing.

9. The location of the land meant that there was no inconvenience to the general public or interference with the rights of anyone other than HS2.

10. The land specifically related to the HS2 project.

11. HS2 were aware of the protesters were on site before they acquired the land.

12. The land concerned, which was to be used for storage, is a very small part of the HS2 project which will take up to 20 years complete with a current cost of billions.

13. Taking into account the above, even though there was a delay of 2.5 days and total cost of £195k I found that the [prosecution] had not made me sure to the required standard that a conviction for this offence was a necessary and proportionate interference with the Respondents article 10 and 11 rights"

Convention Rights

26. Article 10 of the Convention provides: -

"**Freedom of expression**

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

> and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

27. Article 11 of the Convention provides: -

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

28. Because section 68 is concerned with trespass, it is also relevant to refer to Article 1 of the First Protocol to the Convention ("A1P1"): -

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

29. Section 3 of the 1998 Act deals with the interpretation of legislation. Subsection (1) provides that: -

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights".

30. Section 6(1) provides that "it is unlawful for a public authority to act in a way which is incompatible with a Convention right" unless required by primary legislation (section 6(2)). A "public authority" includes a court (section 6(3)).

31. In the case of a protest there is a link between articles 10 and 11 of the Convention. The protection of personal opinions, secured by article 10, is one of the objectives of the freedom of peaceful assembly enshrined in article 11 (*Ezelin v. France* [1992] EHRR 362 at [37]).

32. The right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression, is one of the foundations of such a society. Accordingly, it should not be interpreted restrictively. The right covers both "private meetings" and "meetings in public places" (*Kudrevicius v. Lithuania* [2016] 62 EHRR 34 at [91]).

33. Article 11 expressly states that it protects only "peaceful" assemblies. In *Kudrevicius v. Lithuania* (2016) 62 EHRR 34, the Grand Chamber of the European Court of Human Rights ("the Strasbourg Court") explained that article 11 applies "to all gatherings except those where the organisers and participants have [violent] intentions, incite violence or otherwise reject the foundations of a democratic society" ([92]).

34. The respondent submits, relying on the Supreme Court judgment in Ziegler at §70, that an assembly is to be treated as "peaceful" and therefore as engaging article 11 other than: where protesters engage in violence, have violent intentions, incite violence or otherwise reject the foundations of a democratic society. He submits that the respondent's peaceful protest did not fall into any of those exclusionary categories and that the trespass on land to which the public does not have access is irrelevant, save at the evaluation of proportionality.

35. Public authorities are generally expected to show some tolerance for disturbance that follows from the normal exercise of the right of peaceful assembly in a *public place* (see e.g. *Kuznetsov v. Russia* No. 10877/04, 23 October 2008 at [44], cited in *City of London Corporation v. Samede* [2012] PTSR 1624 at [43]; *Kudrevicius* at [150] and [155]).

36. The respondent relied on decisions where a protest intentionally disrupting the activity of another party has been held to fall within articles 10 and 11 (e.g. *Hashman v. United Kingdom* [2000] 30 EHRR 241 at [28]). However, conduct deliberately obstructing traffic or seriously disrupting the activities of others is not at the core of these Convention rights (*Kudrevicius* at [97]).

37. Furthermore, intentionally serious disruption by protesters to ordinary life or to activities lawfully carried on by others, where the disruption is more significant than that involved in the normal exercise of the right of peaceful assembly *in a public place*, may be considered to be a "reprehensible act" within the meaning of Strasbourg jurisprudence, so as to justify a criminal sanction (*Kudrevicius* at [149] and [172] to

[174]; *Ezelin* at [53]; *Barraco v. France* No. 31684/05, 5 March 2009 at [43] to [44] and [47] to [48]).

38. In *Barraco* the applicant was one of a group of protesters who drove their vehicles at about 10kph along a motorway to form a rolling barricade across all lanes, forcing the traffic behind to travel at the same slow speed. The applicant even stopped his vehicle. The demonstration lasted about five hours and three major highways were blocked, in disregard of police orders and the needs and rights of other road users. The court described the applicant's conduct as "reprehensible" and held that the imposition of a suspended prison sentence for three months and a substantial fine had not violated his article 11 rights.

39. *Barraco* and *Kudrevicius* are examples of protests carried out in locations to which the public has a right of access, such as highways. The present case is concerned with trespass on land to which the public has no right of access at all. The respondent submits that the protection of articles 10 and 11 extends to trespassory demonstrations, including trespass upon private land or upon publicly owned land from which the public are generally excluded (paragraph 31 of skeleton). He relies upon several authorities. It is unnecessary for us to review them all. In several of the cases the point was conceded and not decided. In others the land in question formed part of a highway and so the decisions provide no support for the respondent's argument (e.g. *Samede* at [5] and see Lindblom J (as he then was) [2012] EWHC 34 (QB) at [12] and [136] to [143]; *Canada Goose UK Retail Limited v. Persons Unknown* [2020] 1 WLR 2802). Similarly, we note that *Lambeth LBC v. Grant* [2021] EWHC 1962 (QB) related to an occupation of Clapham Common.

40. Instead, we gain much assistance from *Appleby v. United Kingdom* [2003] 37 EHRR 38. There the applicants had sought to protest in a privately owned shopping mall about the local authority's planning policies. There does not appear to have been any formal public right of access to the centre. But, given the nature of the land use, the public did, of course, have access to the premises for shopping and incidental purposes. The Strasbourg Court decided that the landowner's A1P1 rights were engaged ([43]). It also observed that a shopping centre of this kind may assume the characteristics of a traditional town centre [44]. Nonetheless, the court did not adopt the applicants' suggestion that the centre be regarded as a "quasi-public space".

41. Instead, the court stated at [47]: -

> "[Article 10], notwithstanding the acknowledged importance of freedom of expression, does not bestow any freedom of forum for the exercise of that right. While it is true that demographic, social, economic and technological developments are changing the ways in which people move around and come into contact with each other, the Court is not persuaded that this requires the automatic creation of rights of entry to private property, or even, necessarily, to all publicly owned property (government offices and ministries, for instance). Where, however, the bar on access to property has the effect of preventing any effective exercise of freedom of expression or it can be said that the essence of the right has been destroyed, the Court would not exclude that a positive obligation could arise for the State to protect the

> enjoyment of the Convention rights by regulating property rights. A corporate town where the entire municipality is controlled by a private body might be an example (see Marsh v. Alabama [326 US 501], cited at paragraph 26 above)."

The court indicated that the same analysis applies to article 11 (see [52]).

42. The example given by the court at the end of that passage in [47] shows the rather unusual or even extreme circumstances in which it *might* be possible to show that the protection of a landowner's property rights has the effect of preventing *any* effective exercise of the freedoms of expression and assembly. But in *Appleby* the court had no difficulty in finding that the applicants did have alternative methods by which they could express their views to members of the public ([48]).

43. Likewise, *Taranenko v. Russia* (No.19554/05, 15 May 2014) does not assist the respondent. At [78] the court restated the principles laid down in *Appleby* at [47]. The protest in that case took place in the Administration Building of the President of the Russian Federation. That was a public building to which members of the public had access for the purposes of making complaints, presenting petitions and meeting officials, subject to security checks ([25], [61] and [79]). The qualified public access was an important factor.

44. The respondent also relied upon *Annenkov v. Russia* No. 31475/10, 25 July 2017. There, a public body transferred a town market to a private company which proposed to demolish the market and build a shopping centre. A group of business-people protested by occupying the market at night. The Strasbourg Court referred to inadequacies in the findings of the domestic courts on various points. We note that any entitlement of the entrepreneurs, and certain parties who were paying rent, to gain access to the market is not explored in the decision. Most importantly, there was no consideration of the principle laid down in *Appleby* and applied in *Taranenko*. Although we note that the court found a violation of article 11 rights, we gain no real assistance from the reasoning in the decision for the resolution of the issues in the present case.

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

46. The approach taken by the Strasbourg Court should not come as any surprise. articles 10, 11 and A1P1 are all qualified rights. The Convention does not give priority to any one of those provisions. We would expect the Convention to be read as a whole and harmoniously. Articles 10 and 11 are subject to limitations or restrictions which are

prescribed by law and necessary in a democratic society. Those limitations and restrictions include the law of trespass, the object of which is to protect property rights in accordance with A1P1. On the other hand, property rights might have to yield to articles 10 and 11 if, for example, a law governing the exercise of those rights and use of land were to destroy the essence of the freedom to protest. That would be an extreme situation. It has never been suggested that it arises in the circumstances of the present case, nor more generally in relation to section 68 of the 1994 Act. It would be fallacious to suggest that, unless a person is free to enter upon private land to stop or impede the carrying on of a lawful activity on that land by the landowner or occupier, the essence of the freedoms of expression and assembly would be destroyed. Legitimate protest can take many other forms.

47. We now return to *Richardson* and the important statement made by Lord Hughes JSC at [3]:

> "By definition, trespass is unlawful independently of the 1994 Act. It is a tort and committing it exposes the trespasser to a civil action for an injunction and/or damages. The trespasser has no right to be where he is. Section 68 is not concerned with the rights of the trespasser, whether protester or otherwise. References in the course of argument to the rights of free expression conferred by article 10 of the European Convention on Human Rights were misplaced. Of course a person minded to protest about something has such rights. But the ordinary civil law of trespass constitutes a limitation on the exercise of this right which is according to law and unchallengeably proportionate. Put shortly, article 10 does not confer a licence to trespass on other people's property in order to give voice to one's views. Like adjoining sections in Part V of the 1994 Act, section 68 is concerned with a limited class of trespass where the additional sanction of the criminal law has been held by Parliament to be justified. The issue in this case concerns its reach. It must be construed in accordance with normal rules relating to statutes creating criminal offences."

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

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

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

Ground 2

51. The respondent's case falls into two parts. First, Mr Moloney QC submits that the Supreme Court in *Ziegler* had decided that in any criminal trial involving an offence which has the effect of restricting the exercise of rights under articles 10 and 11 of the Convention, it is necessary for the prosecution to prove that a conviction would be proportionate, after carrying out a fact-sensitive proportionality assessment applying the factors set out in *Ziegler*. The language of the judgment in *Ziegler* should not be read as being conditioned by the offence under consideration (obstructing the highway) which required the prosecution to prove that the defendant in question did not have a "lawful excuse". If that submission is accepted, Ground 2 would fail.

52. Secondly, if that first contention is rejected, the respondent submits that the court cannot allow the appeal under Ground 2 without going on to decide whether section 68 of the 1994 Act, construed in accordance with ordinary canons of construction, is compatible with articles 10 and 11. If it is not, then he submits that language should be read into section 68 requiring such an assessment to be made in every case where articles 10 and 11 are engaged (applying section 3 of the 1998 Act). If this argument were accepted Ground 2 would fail. This argument was not raised before the judge in addition to direct reliance on the language of *Ziegler*. Mr Moloney has raised the possibility of a declaration of incompatibility under section 4 of the 1998 Act both in his skeleton argument and orally.

53. On this second part of Ground 2, Mr Little QC for the prosecution (but did not appear below) submits that, assuming that rights under articles 10 and 11 are engaged, a conviction based solely upon proof of the ingredients of section 68 is intrinsically proportionate in relation to any interference with those rights. Before turning to *Ziegler,* we consider the case law on this subject, for section 68 and other offences.

54. In *Bauer v. Director of Public Prosecutions (Liberty Intervening)* [2013] 1 WLR 3617 the Divisional Court considered section 68 of the 1994 Act. The case concerned a demonstration in a retail store. The main issue in the case was whether, in addition to the initial trespass, the defendants had committed an act accompanied by the requisite intent (the third and fourth ingredients identified in *Richardson* at [4]). The Divisional Court decided that, on the facts found by the judge, they had and so were guilty under section 68. As part of the reasoning leading to that conclusion, Moses LJ (with whom Parker J agreed) stated that it was important to treat all the defendants as principals, rather than treating some as secondary participants under the law of joint enterprise; the district judge had been wrong to do ([27] to [36]). One reason for this was to avoid the risk of inhibiting legitimate participation in protests ([27]). It was in that context that Liberty had intervened ([37]).

55. Liberty did not suggest that section 68 involved a disproportionate interference with rights under articles 10 and 11 ([37]). But Moses LJ accepted that it was necessary to ensure that criminal liability is not imposed on those taking part in a peaceful protest because others commit offences under section 68 (referring to *Ezelin*). Accordingly,

he held that the prosecution must prove that those present at and participating in a demonstration are themselves guilty of the conduct element of the crime of aggravated trespass ([38]). It was in this context that he said at [39]:

> "In the instant appeals the district judge, towards the end of his judgment, asked whether the prosecution breached the defendants' article 10 and 11 rights. Once he had found that they were guilty of aggravated trespass there could be no question of a breach of those rights. He had, as he was entitled to, concluded that they were guilty of aggravated trespass. Since no one suggests that section 68 of the 1994 Act is itself contrary to either article 10 or 11, there was no room for any further question or discussion. No one can or could suggest that the state was not entitled, for the purpose of preventing disorder or crime, from preventing aggravated trespass as defined in section 68(1)."

56. Moses LJ then went on to say that his earlier judgment in *Dehal v. Crown Prosecution Service* [2005] 169 JP 581 should not be read as requiring the prosecution to prove more than the ingredients of section 68 set out in the legislation. If the prosecution succeeds in doing that, there is nothing more to prove, including proportionality, to convict of that offence ([40]).

57. In *James v. Director of Public Prosecutions* [2016] 1 WLR 2118 the Divisional Court held that public order offences may be divided into two categories. First, there are offences the ingredients of which include a requirement for the prosecution to prove that the conduct of the defendant was not reasonable (if there is sufficient evidence to raise that issue). Any restrictions on the exercise of rights under articles 10 and 11 and the proportionality of those restrictions are relevant to whether that ingredient is proved. In such cases the prosecution must prove that any such restriction was proportionate ([31] to [34]). Offences falling into that first category were the subject of the decisions in *Norwood v. Director of Public Prosecutions* [2003] EWHC 1564 (Admin), *Hammond v. Director of Public Prosecutions* [2004] EWHC 69 (Admin) and *Dehal*.

58. The second category comprises offences where, once the specific ingredients of the offence have been proved, the defendant's conduct has gone beyond what could be regarded as reasonable conduct in the exercise of Convention rights. "The necessary balance for proportionality is struck by the terms of the offence-creating provision, without more ado". Section 68 of the 1994 Act is such an offence, as had been decided in *Bauer* (see Ouseley J at [35]).

59. The court added that offences of obstructing a highway, subject to a defence of lawful excuse or reasonable use, fall within the first category. If articles 10 and 11 are engaged, a proportionality assessment is required ([37] to [38]).

60. *James* concerned an offence of failing to comply with a condition imposed by a police officer on the holding of a public assembly contrary to section 14(5) of the Public Order Act 1986. The ingredients of the offence which the prosecution had to prove included that a senior police officer (a) had *reasonably* believed that the assembly might result in serious public disorder, serious damage to property or serious disruption to the life of the community or that the object of the organisers was to intimidate others into not doing something that they have a right to do, and (b) had given a direction imposing

conditions appearing to him to be *necessary* to prevent such disorder, damage, disruption or intimidation. The Divisional Court held that where the prosecution satisfies those statutory tests, that is proof that the making of the direction and the imposition of the condition was proportionate. As in *Bauer*, proof of the ingredients of the offence laid down by Parliament is sufficient to be compatible with the Convention rights. There was no justification for adding a further ingredient that a conviction must be proportionate, or for reading in additional language to that effect, to render the legislation compatible with articles 10 and 11 ([38] to [43]). *James* provides another example of an offence the ingredients of which as enacted by Parliament satisfy any proportionality requirement arising from articles 10 and 11 of the Convention.

61. There are also some instances under the common law where proof of the ingredients of the offence without more renders a conviction proportionate to any interference with articles 10 and 11 ECHR. For example, in Scotland a breach of the peace is an offence involving conduct which is likely to cause fear, alarm, upset or annoyance to any reasonable person or may threaten public safety or serious disturbance to the community. In *Gifford v. HM Advocate* [2012] SCCR 751 the High Court of Justiciary held that "the Convention rights to freedom of expression and freedom of assembly do not entitle protestors to commit a breach of the peace" [15]. Lord Reed added at [17]:

> "Accordingly, if the jury are accurately directed as to the nature of the offence of breach of the peace, their verdict will not constitute a violation of the Convention rights under arts 10 and 11, as those rights have been interpreted by this court in the light of the case law of the Strasbourg Court. It is unnecessary, and inappropriate, to direct the jury in relation to the Convention."

62. Similarly, in *R v. Brown* [2022] EWCA Crim 6 the appellant rightly accepted that articles 10 and 11 ECHR do not provide a defence to the offence of public nuisance as a matter of substantive criminal law ([37]). Essentially for the same reasons, there is no additional "proportionality" ingredient which has to be proved to convict for public nuisance. Moreover, the Court of Appeal held that a prosecution for an offence of that kind cannot be stayed under the abuse of process jurisdiction on the freestanding ground that it is disproportionate in relation to Convention rights ([24] to [39]).

63. *Ziegler* was concerned with section 137 of the Highways Act 1980. This is an offence which is subject to a "lawful excuse" defence and therefore falls into the first category defined in *James.* Indeed, at [2020] QB 253 [87] to [91] the Divisional Court referred to the analysis in *James.*

64. The second question certified for the Supreme Court in *Ziegler* related to the "lawful excuse" defence in section 137 of the Highways Act ([2021] 3 WLR at [7], [55] to [56] and [98] to [99]). Lord Hamblen and Lord Stephens JJSC referred at [16] to the explanation by the Divisional Court about how section 137 should be interpreted compatibly with articles 10 and 11 in cases where, as was common ground, the availability of the "lawful excuse" defence "depends on the proportionality assessment to be made".

65. The Supreme Court's reasoning was clearly expressed solely in the context of the lawful excuse defence to section 137 of the Highways Act. The Supreme Court had no need to consider, and did not express any views about, offences falling into the second

category defined in *James,* where the balance required for proportionality under articles 10 and 11 is struck by the terms of the legislation setting out the ingredients of the offence, so that the prosecution is not required to satisfy any additional case-specific proportionality test. Nor did the Supreme Court in some way *sub silencio* suggest that section 3 of the 1998 Act should be used to insert into no doubt myriad offences a proportionality ingredient. The Supreme Court did not consider, for example, *Bauer* or offences such as section 68. That was unnecessary to resolve the issues before the court.

66. Likewise, *Ziegler* was only concerned with protests obstructing a highway where it is well-established that articles 10 and 11 are engaged. The Supreme Court had no need to consider, and did not address in their judgments, the issue of whether articles 10 and 11 are engaged where a person trespasses on private land, or on publicly owned land to which the public has no access. Accordingly, no consideration was given to the statement in *Richardson* at [3] or to cases such as *Appleby*.

67. For these reasons, it is impossible to read the judgments in *Ziegler* as deciding that there is a general principle in our criminal law that where a person is being tried for an offence which does engage articles 10 and 11, the prosecution, in addition to satisfying the ingredients of the offence, must also prove that a conviction would be a proportionate interference with those rights.

68. The passages in *Ziegler* upon which the respondent relies have been wrenched completely out of context. For example, the statements in [57] about a proportionality assessment at a trial, or in relation to a conviction, were made only in the context of a prosecution under section 137 of the Highways Act. They are not to be read as being of general application whenever a criminal offence engages articles 10 and 11. The same goes for the references in [39] to [60] to the need for a fact-specific enquiry and the burden of proof upon the prosecution in relation to proportionality. Paragraphs [62] to [70] are entitled "deliberate obstruction with more than a *de minimis* impact". The reasoning set out in that part of the judgment relates only to the second certified question and was therefore concerned with the "lawful excuse" defence in section 137.

69. We are unable to accept the respondent's submission that section 6 of the 1998 Act requires a court to be satisfied that a conviction for an offence would be proportionate whenever articles 10 and 11 are engaged. Section 6 applies if both (a) Convention rights such as articles 10 and 11 are engaged and (b) proportionality is an ingredient of the offence and therefore something which the prosecution has to prove. That second point depends on the substantive law governing the offence. There is no need for a court to be satisfied that a conviction would be proportionate if the offence is one where proportionality is satisfied by proof of the very ingredients of that offence.

70. Unless a court were to be persuaded that the ingredients of a statutory offence are not compatible with Convention rights, there would be no need for the interpretative provisions in section 3 of the 1998 Act to be considered. It is through that provision that, in a properly argued, appropriate case, a freestanding proportionality requirement might be justified as an additional ingredient of a statutory offence, but not through section 6 by itself. If, despite the use of all interpretative tools, a statutory offence were to remain incompatible with Convention rights because of the lack of a separate "proportionality" ingredient, the question of a declaration of incompatibility under section 4 of the1998 Act would arise. If granted, it would remain a matter for

Parliament to decide whether, and if so how, the law should be changed. In the meantime, the legislation would have to be applied as it stood (section 6(2)).

71. Accordingly, we do not accept that section 6 imposes a freestanding obligation on a court to be satisfied that a conviction would be a proportionate interference with Convention rights if that is not an ingredient of a statutory offence. This suggestion would make it impossible for the legislature to enact a general measure which satisfactorily addresses proportionality itself, to make case-by-case assessment unnecessary. It is well-established that such measures are permissible (see e.g. *Animal Defenders International v. United Kingdom* [2013] EMLR 28).

72. It would be in the case of a common law offence that section 6 of the 1998 Act might itself require the addition of a "proportionality" ingredient if a court were to be satisfied that proof of the existing ingredients of that offence is insufficient to achieve compatibility with Convention rights.

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

74. First, section 68 has the legitimate aim of protecting property rights in accordance with A1P1. Indeed, interference by an individual with the right to peaceful enjoyment of possessions can give rise to a positive obligation on the part of the State to ensure sufficient protection for such rights in its legal system (*Blumberga v. Latvia* No.70930/01, 14 October 2008).

75. Secondly, section 68 goes beyond simply protecting a landowner's right to possession of land. It only applies where a defendant not merely trespasses on the land, but also carries out an additional act with the intention of intimidating someone performing, or about to perform, a lawful activity from carrying on with, or obstructing or disrupting, that activity. Section 68 protects the use of land by a landowner or occupier for lawful activities.

76. Thirdly, a protest which is carried out for the purposes of disrupting or obstructing the lawful activities of other parties, does not lie at the core of articles 10 and 11, even if carried out on a highway or other publicly accessible land. Furthermore, it is established that serious disruption may amount to reprehensible conduct, so that articles 10 and 11 are not violated. The intimidation, obstruction or disruption to which section 68 applies is not criminalised unless it also involves a trespass and interference with A1P1. On this ground alone, any reliance upon articles 10 and 11 (assuming they are engaged) must be towards the periphery of those freedoms.

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

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

79. Sixthly, the Supreme Court in *Richardson* regarded the private law of trespass as a limitation on the freedom to protest which is "unchallengeably proportionate". In our judgment, the same conclusion applies *a fortiori* to the criminal offence in section 68 because of the ingredients which must be proven in addition to trespass. The sanction of a fine not exceeding level 4 or a term of imprisonment not exceeding three months is in line with that conclusion.

80. We gain no assistance from para. 80 of the judgment in *Leigh v. Commissioner of Metropolitan Police* [2022] EWHC 527 (Admin), relied upon by Mr Moloney. The legislation considered in that case was enacted to address public health risks and involved a wide range of substantial restrictions on freedom of assembly. The need for case-specific assessment in that context arose from the nature and extent of those restrictions and is not analogous to a provision dealing with aggravated trespass and a potential risk to public order.

81. It follows, in our judgment, that section 68 of the 1994 Act is not incompatible with articles 10 or 11 of the Convention. Neither the decision of the Supreme Court in *Ziegler* nor section 3 of the 1998 Act requires a new ingredient to be inserted into section 68 which entails the prosecution proving that a conviction would be proportionate in Convention terms. The appeal must be allowed on Ground 2.

Ground 3

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

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

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

85. The judge accepted arguments advanced by the respondent which, in our respectful view led her into further error. She concluded that that there was no inconvenience to the general public or "interference with the rights of anyone other than HS2". She added that the Secretary of State was aware of the presence of the protesters on the Land before he acquired it (in the sense of before completion of the purchase). This last observation does not assist a proportionality assessment; but the immediate lack of physical inconvenience to members of the public overlooks the fact that HS2 is a public project.

86. In addition, we consider that the judge took into account factors which were irrelevant to a proportionality exercise for an offence under section 68 of the 1994 Act in the circumstances of this case. She noted that the respondent did not act violently. But if the respondent had been violent, his protest would not have been peaceful, so that he would not have been entitled to rely upon articles 10 and 11. No proportionality exercise would have been necessary at all.

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

88. In our judgment, the only conclusion which could have been reached on the relevant facts of this case is that the proportionality balance pointed conclusively in favour of a conviction under section 68 of the 1994 Act, (if proportionality were an element of the offence).

Conclusions

89. We summarise certain key conclusions arising from arguments which have been made about the decision in *Ziegler*:

1) *Ziegler* does not lay down any principle that for all offences arising out of "non-violent" protest the prosecution has to prove that a conviction would be proportionate to the defendant's rights under articles 10 and 11 of the European Convention on Human Rights;

2) In *Ziegler* the prosecution had to prove that a conviction would be proportionate to the defendant's rights under articles 10 and 11 because the offence in question was subject to a defence of "lawful excuse". The same would also apply to an offence which is subject to a defence of "reasonable excuse", once a defendant had properly raised the issue. We would add that *Ziegler* made no attempt to establish any benchmark for highway cases about conduct which would be proportionate and conduct which would not. Strasbourg cases such as *Kudrevicius* and *Barraco* are instructive on the correct approach (see [39] above);

3) For other offences, whether the prosecution has to prove that a conviction would be proportionate to the defendant's rights under articles 10 and 11 solely depends upon the proper interpretation of the offence in question;

90. The appeal must be allowed. Our answer to both questions in the Case Stated is "no". The case will be remitted to the Magistrates' Court with a direction to convict the respondent of the offence charged under section 68(1) of the 1994 Act.

[HOUSE OF LORDS]

AMERICAN CYANAMID CO. . . . . APPELLANTS

AND

ETHICON LTD. . . . . RESPONDENTS

1974 Nov. 12, 13, 14;
1975 Feb. 5

Lord Diplock, Viscount Dilhorne, Lord Cross of Chelsea, Lord Salmon and Lord Edmund-Davies

Injunction—Interlocutory—Jurisdiction to grant—Principles on which interlocutory injunction to be granted—No need to be satisfied that permanent injunction probable at trial—Protection of parties—Balance of convenience—Criteria—Rule identical in patent cases

The plaintiffs, an American company, owned a patent covering certain sterile absorbable surgical sutures. The defendants, also an American company, manufactured in the United States and were about to launch on the British market a suture which the plaintiffs claimed infringed their patent. The defendants contested its validity on divers grounds and also contended that it did not cover their product. In an action for an injunction the plaintiffs applied for an interlocutory injunction which was granted by the judge at first instance with the usual undertaking in damages by the plaintiffs. The Court of Appeal reversed his decision on the ground that no prima facie case of infringement had been made out. On the plaintiffs' appeal:

Held, allowing the appeal, (1) that in all cases, including patent cases, the court must determine the matter on a balance of convenience, there being no rule that it could not do so unless first satisfied that, if the case went to trial on no other evidence than that available at the hearing of the application, the plaintiff would be entitled to a permanent injunction in the terms of the interlocutory injunction sought; where there was a doubt as to the parties' respective remedies in damages being adequate to compensate them for loss occasioned by any restraint imposed on them, it would be prudent to preserve the status quo (post, pp. 406C–F, 407G, 408F).

(2) That in the present case there was no ground for interfering with the judge's assessment of the balance of convenience or his exercise of discretion and the injunction should be granted accordingly (post, p. 410C–E).

Hubbard v. *Vosper* [1972] 2 Q.B. 84, C.A. considered.

Decision of the Court of Appeal [1974] F.S.R. 312 reversed.

The following cases are referred to in their Lordships' opinions:

Donmar Productions Ltd. v. *Bart* (*Note*) [1967] 1 W.L.R. 740; [1967] 2 All E.R. 338.

Harman Pictures N.V. v. *Osborne* [1967] 1 W.L.R. 723; [1967] 2 All E.R. 324.

Hubbard v. *Vosper* [1972] 2 Q.B. 84; [1972] 2 W.L.R. 389; [1972] 1 All E.R. 1023, C.A.

Jones v. *Pacaya Rubber and Produce Co. Ltd.* [1911] 1 K.B. 455, C.A.

Preston v. *Luck* (1884) 27 Ch.D. 497, C.A.

Smith v. *Grigg Ltd.* [1924] 1 K.B. 655, C.A.
Wakefield v. *Duke of Buccleugh* (1865) 12 L.T. 628.

The following additional cases were cited in argument:

Acetylene Illuminating Co. Ltd. v. *United Alkali Co. Ltd.* (1904) 22 R.P.C. 145, H.L.(E.).
British Thomson-Houston Co. Ltd. v. *Corona Lamp Works Ltd.* (1921) 39 R.P.C. 49, H.L.(E.).
Carroll v. *Tomado Ltd.* [1971] R.P.C. 401.
Challender v. *Royle* (1887) 36 Ch.D. 425, C.A.
Elwes v. *Payne* (1879) 12 Ch.D. 468, C.A.
Evans Marshall & Co. Ltd. v. *Bertola S.A.* [1973] 1 W.L.R. 349; [1973] 1 All E.R. 992, C.A.
Hatmaker v. *Joseph Nathan & Co. Ltd.* (1919) 36 R.P.C. 231, H.L.(E.).
May & Baker Ltd. and Ciba Ltd.'s Letters Patent, In re (1948) 65 R.P.C. 255; 66 R.P.C. 8, C.A.; *sub nom. May & Baker Ltd.* v. *Boots Pure Drug Co. Ltd.* (1950) 67 R.P.C. 23, H.L.(E.).
Mitchell v. *Henry* (1880) 15 Ch.D. 181, C.A.
Mogul Steamship Co. v. *M'Gregor, Gow & Co.* (1885) 15 Q.B.D. 476.
Natural Colour Kinematograph Co. Ltd. v. *Bioschemes Ltd.* (1915) 32 R.P.C. 256, H.L.(E.).
Newman v. *British & International Proprietaries Ltd.* [1962] R.P.C. 90, C.A.
No-Fume Ltd. v. *Frank Pitchford & Co. Ltd.* (1935) 52 R.P.C. 231, C.A.
R.C.A. Photophone Ltd. v. *Gaumont-British Picture Corporation Ltd.* (1935) 53 R.P.C. 167, C.A.
Wrotham Park Estate Co. Ltd. v. *Parkside Homes Ltd.* [1974] 1 W.L.R. 798; [1974] 2 All E.R. 321.
Zaidener v. *Barrisdale Engineers Ltd.* [1968] R.P.C. 488, C.A.

APPEAL from the Court of Appeal.

This was an appeal from an order of the Court of Appeal (Russell and Stephenson L.JJ. and Foster J.) dated February 5, 1974, whereby the judgment of Graham J. dated July 30, 1973, was reversed and his order discharged on a motion for an interlocutory injunction in an action for infringement of letters patent No. 1,043,518 in which the respondents, Ethicon Ltd., were defendants and the appellants, American Cyanamid Co., were plaintiffs. The respondents counterclaimed for revocation of the patent. Graham J. granted the appellants' application for an interlocutory injunction until the trial of the action and counterclaim, but the Court of Appeal unanimously held that, on the present evidence the claims of the patent were not likely to be construed so as to cover the respondents' product, and that a prima facie case of infringement of the patent had therefore not been established. The Court of Appeal therefore discharged the interlocutory injunction ordered by Graham J. The court refrained from expressing any view on any of the other issues raised.

The facts stated in the opinion of Lord Diplock were as follows: This interlocutory appeal concerned a patent for the use as absorbable surgical sutures of filaments made of a particular kind of chain polymer known as "a poly-hydroxyacetic ester" ("PHAE"). These were sutures of a kind that disintegrated and were absorbed by the human body once they had served their purpose. The appellants ("Cyanamid"), an American com-

pany, were the registered proprietors of the patent. Its priority date in the United Kingdom was October 2, 1964. At that date the absorbable sutures in use were of natural origin. They were made from animal tissues popularly known as catgut. The respondents ("Ethicon"), a subsidiary of another American company, were the dominant suppliers of catgut sutures in the United Kingdom market.

Cyanamid introduced their patented product in 1970. The chemical substance of which it was made was a homopolymer, i.e. all the units in the chain, except the first and the last ("the end stabilisers"), consisted of glycolide radicals. Glycolide was the radical of glycolic acid, which was another name for hydroxyacetic acid. By 1973 this product had succeeded in capturing some 15 per cent. of the United Kingdom market for absorbable surgical sutures. Faced with this competition to catgut, Ethicon, who supplied 80 per cent. of the market, were proposing to introduce their own artificial suture ("XLG"). The chemical substance of which it was made was not a homopolymer but a copolymer, i.e. although 90 per cent. by weight of the units in the chain consisted of glycolide radicals, the remaining 10 per cent. are lactide radicals, which were similar in chemical properties to glycolide radicals but not identical in chemical composition.

Cyanamid contended that XLG infringed their patent, of which the principal claim was: "A sterile article for the surgical repair or replacement of living tissue, the article being readily absorbable by living tissue and being formed from a polyhydroxyacetic ester." As was disclosed in the body of the patent, neither the substance PHAE nor the method of making it into filaments was new at the priority date. Processes for manufacturing filaments from PHAE had been the subject of two earlier United States patents in 1953 (Lowe) and 1954 (Higgins). The invention claimed by Cyanamid thus consisted of the discovery of a new use for a known substance.

On March 5, 1973, Cyanamid started a quia timet action against Ethicon for an injunction to restrain the threatened infringement of their patent by supplying sutures made of XLG to surgeons in the United Kingdom. On the same day they gave notice of motion for an interlocutory injunction. Voluminous affidavits and exhibits were filed on behalf of each party. The hearing of the motion before Graham J. lasted three days. On July 30, 1973, he granted an interlocutory injunction upon the usual undertaking in damages by Cyanamid.

Ethicon appealed to the Court of Appeal. The hearing there took eight days. On February 5, 1974, the Court of Appeal gave judgment. They allowed the appeal and discharged the judge's order. Leave to appeal from that decision was granted by the House of Lords.

Andrew Bateson Q.C. and *David Young* for the appellant company. The main issue in this appeal is whether PHAE, construed in the patent in suit, covers more than the homopolymer. In holding that that had not been established prima facie the Court of Appeal was wrong and the trial judge was right in holding that what was meant by comonomer in the patent contemplated copolymers. For the purpose of deciding whether the plaintiffs have established a prima facie case the House must decide whether on the evidence the construction for which they contend is the one

applicable to the patent in suit. On construction the case put forward by the respondents is barely arguable.

The Court of Appeal wrongly construed the claim and specification and its decision was based on a misapprehension of the evidence. It erred in holding that the appellants had not established that prima facie the patent in suit would be infringed by the marketing of the respondents' suture.

The onus is not on the plaintiffs to establish a prima facie case of infringement before an interlocutory injunction case can be granted. "Prima facie" can have many meanings. Here, if anything, it means that the plaintiff has more than a 50 per cent. chance of success. The general rule that one must establish a probability, or a strong probability, is not correct. One must look at the whole case to see whether there is a question to be tried and, if there is, then look at the balance of convenience between the parties, bearing in mind that there is good reason why the status quo should be preserved. The relevant authorities are *Preston* v. *Luck* (1884) 27 Ch.D. 497, 504–505; *Halsbury's Laws of England*, 3rd ed., vol. 21 (1957), pp. 365–366, para. 365 and *Donmar Productions Ltd.* v. *Bart* (*Note*) [1967] 1 W.L.R. 740. The shackles of *Harman Pictures N.V.* v. *Osborne* [1967] 1 W.L.R. 723 have been removed by *Hubbard* v. *Vosper* [1972] 2 Q.B. 84, 96, 101. See also *Evans Marshall & Co. Ltd.* v. *Bertola S.A.* [1973] 1 W.L.R. 349, 377, 379–380, 385–386; *Wrotham Park Estate Co. Ltd.* v. *Parkside Homes Ltd.* [1974] 1 W.L.R. 798, 810; *Terrell on the Law of Patents*, 12th ed. (1971), pp. 319–320, paras. 823, 824, pp. 322–323, para. 833, citing *Newman* v. *British & International Proprietaries Ltd.* [1962] R.P.C. 90, 93; *Challender* v. *Royle* (1887) 36 Ch.D. 425, 429–430, 435–436, 443; *Zaidener* v. *Barrisdale Engineers Ltd.* [1968] R.P.C. 488, 495 (Willmer L.J.) 497; and *Carroll* v. *Tomado Ltd.* [1971] R.P.C. 401, 405–406.

The appellants adopt the principle laid down in *Hubbard* v. *Vosper* [1972] 2 Q.B. 84, particularly the judgment of Megaw L.J. at pp. 93H–98B. There is logical reason or justification why the percentages there set out do not equally apply to plaintiffs and defendants. If there is a serious issue to be tried it will lead to a just result and mini-trials on the application for an interlocutory injunction would be prevented. It is undesirable to adopt any other course. When the court is considering whether or not to grant an interlocutory injunction the right approach is to ask first whether or not there is a serious question to be tried. When the court has some idea of the strength of the respective cases that is a factor to be taken into consideration.

In the present case Graham J. placed a heavy onus on the appellants and held that they had discharged it. The differing decisions of the Court of Appeal and the judge on the merits show that there is a serious question to be tried. On the evidence the appellant should succeed. On the question of the balance of convenience reliance is placed on Graham J.'s judgment.

Stephen Gratwick Q.C. and *G. D. Paterson* for the respondent company. On an application for an interlocutory injunction the court must look at the respective situations of the two contending parties. The first question to ask is why a plaintiff should not be left to fight his action and

get his relief by succeeding. The normal rule of English litigation is that a party gets no relief till he has gone to trial and persuaded the court that he has a right which has been infringed. He is not entitled to an interlocutory injunction just because he has a strong case. He is only so entitled if it is shown that there could be injustice if the defendant is left unfettered and that there is a serious risk of irreparable damage to the plaintiff. In the first place the plaintiff should show that there is some serious need for the defendant to be restrained. The law recognises that there are situations in which the property in dispute has some special quality of its own, e.g., cases where there is the danger of the collapse of a party wall, but in a patent action this is rarely the case and usually the interests of the parties are purely monetary, so that no question of irreparable damage arises. The *Evans Marshall* case [1973] 1 W.L.R. 349, 379–380 illustrates a true application of this principle. See also *Mogul Steamship Co.* v. *M'Gregor, Gow & Co.* (1885) 15 Q.B.D. 476, 484–486. The question is whether the plaintiff would suffer irreparable injury or only an injury which could be compensated in damages. One must look at the facts of each particular case to see whether irreparable damage would be caused. If there is simply a dispute between traders as to a monopoly there will be no irreparable damage. The grant of a patent is an exception recognised by the Statute of Monopolies 1623 which was designed to give everyone freedom to trade. In each case one must ask why damages are not a sufficient remedy. In the present case it could be serious for the defendants to have to put all their work into cold storage. There is no suggestion that they would not be good for any damages which might be awarded against them if they lost the action eventually. In *Preston* v. *Luck,* 27 Ch.D. 497, 508, the court acted on the basis suggested by the defendants. It should not be the policy of the court to preserve the statuts quo in all cases but only to prevent irreparable damage to the plaintiffs: see *Elwes* v. *Payne* (1879) 12 Ch.D. 468, 476, 479. As to the assessment of damages should the plaintiffs succeed, see *Terrell on the Law of Patents,* 12th ed., p. 372, para. 948. In practical experience, parties in patent litigation rarely find difficulty in reaching an agreement on damages.

If there is evidence of irreparable damage the next question is: What sort of a case has the plaintiff got? It must also be considered on what basis the defendants will defend the action. The plaintiffs must be able to show that the strength of their case is such that in the circumstances there should be an interlocutory injunction. It is accepted that there may be cases in which the risk of damage to the plaintiffs is such that an injunction should be granted (e.g., where a defendant is erecting a fence across the plaintiff's only approach to his house) regardless of the strength of the parties' cases, but in other cases the risk of damage could be very small and the respective cases must be considered.

The House should try this matter to the extent of establishing how much substance there is in the defendants' answer. For the purposes of an interlocutory injunction the case against the specification is so strong that relief should not be granted till the rights of the parties have been tested in court.

One may distinguish between a difficult question and a serious question. Problems may arise, not from the difficulty of a question of

A construction but from the amount of knowledge needed to present the case to the court in an age of increasingly complex technology, and, once this technical problem is mastered, there may be no serious difficulty over the construction of the specification. As to the contents of a specification, see *Terrell on the Law of Patents*, p. 416, para. 1134.

Patent specifications must not be ambiguous: *Natural Colour Kinematograph Co. Ltd.* v. *Bioschemes Ltd.* (1915) 32 R.P.C. 256, 266, 268–269,
B The plaintiffs are seeking equitable relief and he who comes to equity must do equity, whereas their specification is just the sort which was criticised in the *Natural Colour* case, 32 R.P.C. 256, 266, 268–269. If the plaintiffs have made their specification needlessly obscure, they should not be given interlocutory relief and should wait till they have proved their case for a monopoly in court. No sincere attempt was made to make it clear that that copolymers were included.

C If, however, the specification bears the wider meaning alleged, it is invalid for inutility, insufficiency, unfair basis and false suggestion, since the copolymers will not have, as surgical sutures, the characteristics described in the body of the patent. The specification wholly fails to meet the obligation imposed by statute to tell the reader fairly what is required to make the copolymers.

D "Ambiguity" in the present context has not the meaning which it ordinarily has in relation to the construction of documents but refers to the want of clarity which is a ground of objection under section 32 (1) (*i*) of the Patents Act 1949. Such an objection was made in the *Natural Colour* case, 32 R.P.C. 256, 259–260, and what Lord Loreburn said about it at p. 266 is what the defendants say here, since his observations are very appropriate to the present specification.

E The essence of this invention was discovering a material which would make a satisfactory suture. That puts on the inventor the burden of saying what materials serve that purpose; otherwise he is being grossly unfair to the public. It is in this context that the House of Lords should say that the strength of the defendants' case is such that there should be no interlocutory injunction.

F Two inventors may solve a problem by different methods. This has happened here, where the chief problem to be solved was that of absorbability. Someone using a copolymer is not doing something covered by this invention and he should not be held to be within the patent. For the plaintiffs there is no stopping point between a claim for a homopolymer and a wide claim for copolymers.

A patent cannot properly be held to cover things which do not operate
G in the way the inventor says they do: see *Hatmaker* v. *Joseph Nathan & Co. Ltd.* (1919) 36 R.P.C. 231, 232–233, 236–237, 239, which is applicable to the present case. The observations of the Lords were not confined to claims for processes. If an inventor says that by using his invention certain results are achieved, the patent is invalid if they are not achieved.

As to inutility, see *Terrell on the Law of Patents*, 12th ed., p. 99,
H para. 246, pp. 101–102, para. 251 and p. 103, para. 253. The trial judge wrongly applied the test of commercial utility. The plaintiffs say that the claim covers copolymers but the defendants' copolymer does not have any of the qualities which they allege. Different inventors may

arrive at commercially satisfactory ways of solving a problem by different inventions and by things which behave in different ways. This inventor solved the problem only by using homopolymers and materials which he said have certain characteristics. His patent cannot cover the case of people who solved the problem by methods which do not have those characteristics. The observations in *In re May & Baker Ltd. and Ciba Ltd.'s Letters Patent* (1948) 65 R.P.C. 255, 288–289; 66 R.P.C. 8; *sub nom. May & Baker Ltd.* v. *Boots Pure Drug Co. Ltd.* (1950) 67 R.P.C. 23 are directly applicable to the claim in the present case. In the medical field it is very wrong of an inventor to cast his claim more widely than is justified by the work he has done. Here the plaintiffs have cast their claim over a range of copolymers, the scope of which one does not know.

It is legitimate to frame a patent widely if the invention has been so described in the body of the specification. But unless the specification is so framed, the claim cannot be made in that way: see *British Thomson-Houston Co. Ltd.* v. *Corona Lamp Works Ltd.* (1921) 39 R.P.C. 49 quoted in *Terrell on the Law of Patents*, 12th ed., p. 97, para. 242. In the present case any claim would have to be backed up by a description in the specification intimating how other groups and units would affect the properties of the suture. This specification has not been so framed. The approach which the plaintiffs seek to make is one which the specification cannot sustain: see also *No-Fume Ltd.* v. *Frank Pitchford & Co. Ltd.* (1935) 52 R.P.C. 231, 236 and *R.C.A. Photophone Ltd.* v. *Gaumont-British Picture Corporation Ltd.* (1935) 53 R.P.C. 167, 205.

Even assuming that the plaintiffs are entitled to claim in this form, the question remains whether there was infringement. The plaintiffs are debarred from maintaining that there has been infringement because a copolymer has been used, since they have not discharged the onus of proof on this point.

As to the balance of convenience, see *Mitchell* v. *Henry* (1880) 15 Ch.D. 181, 191, 195.

As to the evidence on the balance of convenience what is relevant here, so far as regards damage to the plaintiffs, is the possible impact of an interlocutory injunction on domestic sales. This is a trifling amount of the total sales of a giant corporation and irreparable damage could not conceivably be caused to the plaintiffs. At most there could only be a minor commercial set-back in the development of their business, bearing in mind their resources. The plaintiffs have not adduced any evidence of irreparable damage. Both parties are giant corporations of enormous resources. Such damage as the plaintiffs might suffer, prior to judgment, if they succeed at the trial, will not have any material effect on their annual profit and loss account and that damage can easily be met by the defendants.

So, if there is no interlocutory injunction and the plaintiffs succeed at the trial, they will recover damages under every relevant head of damage appropriate to infringement of a patent. The basis will be the amount of business done by the defendants, which can easily be ascertained from their accounts. No other head of damage would arise. The patent will not expire till 1980 and so the perpetual injunction, which will be granted if

the plaintiffs succeed ultimately, will protect them in re-establishing a monopoly.

If an interlocutory injunction is granted and the defendants succeed at the trial, the plaintiffs will have to pay them such damages as are attributable to the injunction. There will be no simple basis on which to assess it since it must depend on an estimate of the amount of business the defendants would have done during the period of the injunction and of the diminution caused by that injunction in the future value of that business when resumed. A further source of damage to the defendants arises out of the great expense involved in developing and preparing to market their products over many years. Any delay in marketing represents a loss in the return on the investment and a loss in its actual value because it gives more time to other competitors to develop products of their own. These losses are more difficult to assess than any which could arise if an injunction were not granted and the plaintiffs succeeded.

The present case resembles *Zaidener* v. *Barrisdale Engineers Ltd.* [1968] R.P.C. 488. The balance of convenience is against the granting of an interlocutory injunction. The application can be and should be refused without the court needing to form any prima facie view as to the respective rights of the parties.

In every patent action money is at stake and there is some question of substance. If it is right to grant an interlocutory injunction in this case, where there is little evidence of the probability of irreparable damage to the plaintiffs, when would it not be right to grant such an injunction?

Paterson following. There are four points of defence: (1) On the proper construction of claim 1 of the specification there has been no infringement. (2) If on the true construction of claim 1 it is broad enough to cover the defendants' sutures, then it is invalid on grounds of inutility, insufficiency, ambiguity, no fair basis and false suggestion: section 32 (1) (*g*) (*h*) (*i*) and (*j*) of the Patents Act 1949. (3) Each claim is invalid on the ground of obviousness: section 32 (1) (*g*). (4) The balance of convenience does not favour the grant of an interlocutory injunction.

One cannot have a patent for a new use of an old product unless there is invention in the adaptation of the old product to the new use: *Acetylene Illuminating Co. Ltd.* v. *United Alkali Co. Ltd.* (1904) 22 R.P.C. 145, 155–156. The test is whether the new use lies in the track of the old use.

In 1963 three companies independently had the idea of using PHAE as a suture, Graham J. in rejecting the defendants' submissions on this point ignored the evidence of the history of the matter.

[LORD DIPLOCK intimated that their Lordships only required to hear arguments in reply on the question of balance of convenience.]

Bateson Q.C. in reply. Prospective infringers should not "jump the gun." In the light of the defendants' aggressive sales policy and in view of the fact that the case cannot be finished till 1977, there is a danger that the defendants might press the sale of those sutures, not to fill a need, but to get ahead of the plaintiffs. The balance of convenience is primarily a matter for the judge of first instance.

Their Lordships took time for consideration.

February 5, 1975. LORD DIPLOCK stated the facts and continued: My Lords, the question whether the use of XLG as an absorbable surgical suture is an infringement of Cyanamid's patent depends upon the meaning to be given to the three words " a polyhydroxyacetic ester " in the principal claim. Cyanamid's contention is that at the date of publication of the patent those words were used as a term of art in the chemistry of polymerisation not only in the narrower meaning of a homopolymer of which the units in the chain, apart from the end stabilisers, consisted solely of glycolide radicals but also in the broader meaning of a copolymer of which up to 15 per cent. of the units in the chain would be lactide radicals; and that what was said in the body of the patent made it clear that in the claim the words were used in this wider meaning.

Ethicon's first contention is that the words " a polyhydroxyacetic ester " in the principal claim bear the narrower meaning only, viz. that they are restricted to a homopolymer of which all the units in the chain except the end stabilisers consist of glycolide radicals. In the alternative, as commonly happens where the contest is between a narrower and a wider meaning in a patent specification, they attack the validity of the patent, if it bears the wider meaning, on the grounds of inutility, insufficiency, unfair basis and false suggestion. These objections are really the obverse of their argument in favour of the narrower construction. They are all different ways of saying that if the claim is construed widely it includes copolymers which will not have as surgical sutures the characteristics described in the body of the patent. Ethicon also attack the validity of the patent on the ground of obviousness.

Both Graham J. and the Court of Appeal felt constrained by authority to deal with Cyanamid's claim to an interlocutory injunction by considering first whether, upon the whole of the affidavit evidence before them, a prima facie case of infringement had been made out. As Russell L.J. put it in the concluding paragraph of his reasons for judgment with which the other members of the court agreed [1974] F.S.R. 312, 333:

> " . . . if there be no prima facie case on the point essential to entitle the plaintiffs to complain of the defendants' proposed activities, that is the end of the claim to interlocutory relief."

" Prima facie case " may in some contexts be an elusive concept, but the sense in which it was being used by Russell L.J. is apparent from an earlier passage in his judgment. After a detailed analysis of the conflicting expert testimony he said, at p. 330:

> " I am not satisfied on the present evidence that on the proper construction of this specification, addressed as it is to persons skilled in the relevant art or science, the claim extends to sterile surgical sutures produced not only from a homopolymer of glycolide but also from a copolymer of glycolide and up to 15 per cent. of lactide. That is to say that I do not consider that a prima facie case of infringement is established."

In effect what the Court of Appeal was doing was trying the issue of infringement upon the conflicting affidavit evidence as it stood, without the benefit of oral testimony or cross-examination. They were saying:

A "If we had to give judgment in the action now without any further evidence we should hold that Cyanamid had not satisfied the onus of proving that their patent would be infringed by Ethicon's selling sutures made of XLG."

The Court of Appeal accordingly did not find it necessary to go into the questions raised by Ethicon as to the validity of the patent or to consider where the balance of convenience lay.

B Graham J. had adopted the same approach as the Court of Appeal; but, upon the same evidence he had come to the contrary conclusion on the issue of infringement. He considered (at p. 321) that on the evidence as it stood Cyanamid had made out a "strong prima facie case" that their patent would be infringed by Ethicon's selling sutures made of XLG. He then went on to deal briefly with the attack upon the validity of the C patent and came to the conclusion that upon the evidence before him none of the grounds of invalidity advanced by Ethicon was likely to succeed. He therefore felt entitled to consider the balance of convenience. In his opinion it lay in favour of maintaining the status quo until the trial of the action. So he granted Cyanamid an interlocutory injunction restraining Ethicon from infringing the patent until the trial or further order.

D The grant of an interlocutory injunction is a remedy that is both temporary and discretionary. It would be most exceptional for your Lordships to give leave to appeal to this House in a case which turned upon where the balance of convenience lay. In the instant appeal, however, the question of the balance of convenience, although it had been considered by Graham J. and decided in Cyanamid's favour, was never E reached by the Court of Appeal. They considered that there was a rule of practice so well established as to constitute a rule of law that precluded them from granting any interim injunction unless upon the evidence adduced by both the parties on the hearing of the application the applicant had satisfied the court that on the balance of probabilities the acts of the other party sought to be enjoined would, if committed, violate the applicant's F legal rights. In the view of the Court of Appeal the case which the applicant had to prove before any question of balance of convenience arose was "prima facie" only in the sense that the conclusion of law reached by the court upon that evidence might need to be modified at some later date in the light of further evidence either detracting from the probative value of the evidence on which the court had acted or proving additional facts. It was in order to enable the existence of any such rule G of law to be considered by your Lordships' House that leave to appeal was granted.

The instant appeal arises in a patent case. Historically there was undoubtedly a time when in an action for infringement of a patent that was not already "well established," whatever that may have meant, an interlocutory injunction to restrain infringement would not be granted if H counsel for the defendant stated that it was intended to attack the validity of the patent.

Relics of this reluctance to enforce a monopoly that was challenged, even though the alleged grounds of invalidity were weak, are to be found

in the judgment of Scrutton L.J. as late as 1924 in *Smith* v. *Grigg Ltd.* [1924] 1 K.B. 655; but the elaborate procedure for the examination of patent specifications by expert examiners before a patent is granted, the opportunity for opposition at that stage and the provisions for appeal to the Patent Appeal Tribunal in the person of a patent judge of the High Court, make the grant of a patent nowadays a good prima facie reason, in the true sense of that term, for supposing the patent to be valid, and have rendered obsolete the former rule of practice as respects interlocutory injunctions in infringement actions. In my view the grant of interlocutory injunctions in actions for infringement of patents is governed by the same principles as in other actions. I turn to consider what those principles are.

My Lords, when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when ex hypothesi the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action. It was to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved that the practice arose of granting him relief by way of interlocutory injunction; but since the middle of the 19th century this has been made subject to his undertaking to pay damages to the defendant for any loss sustained by reason of the injunction if it should be held at the trial that the plaintiff had not been entitled to restrain the defendant from doing what he was threatening to do. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where " the balance of convenience " lies.

In those cases where the legal rights of the parties depend upon facts that are in dispute between them, the evidence available to the court at the hearing of the application for an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral cross-examination. The purpose sought to be achieved by giving to the court discretion to grant such injunctions would be stultified if the discretion were clogged by a technical rule forbidding its exercise if upon that incomplete untested evidence the court evaluated the chances of the plaintiff's ultimate success in the action at 50 per cent. or less, but permitting its exercise if the court evaluated his chances at more than 50 per cent.

The notion that it is incumbent upon the court to undertake what is in effect a preliminary trial of the action upon evidential material different from that upon which the actual trial will be conducted, is, I think, of comparatively recent origin, though it can be supported by references in

earlier cases to the need to show "a probability that the plaintiffs are entitled to relief" (*Preston* v. *Luck* (1884) 27 Ch.D. 497, 506, *per* Cotton L.J.) or "a strong prima facie case that the right which he seeks to protect in fact exists" (*Smith* v. *Grigg Ltd.* [1924] 1 K.B. 655, 659, *per* Atkin L.J.). These are to be contrasted with expressions in other cases indicating a much less onerous criterion, such as the need to show that there is "certainly a case to be tried" (*Jones* v. *Pacaya Rubber and Produce Co. Ltd.* [1911] 1 K.B. 455, 457, *per* Buckley L.J.) which corresponds more closely with what judges generally treated as sufficient to justify their considering the balance of convenience upon applications for interlocutory injunctions, at any rate up to the time when I became a member of your Lordships' House.

An attempt had been made to reconcile these apparently differing approaches to the exercise of the discretion by holding that the need to show a probability or a strong prima facie case applied only to the establishment by the plaintiff of his right, and that the lesser burden of showing an arguable case to be tried applied to the alleged violation of that right by the defendant (*Donmar Productions Ltd.* v. *Bart* (*Note*) [1967] 1 W.L.R. 740, 742, *per* Ungoed-Thomas J., *Harman Pictures N.V.* v. *Osborne* [1967] 1 W.L.R. 723, 738, *per* Goff J.). The suggested distinction between what the plaintiff must establish as respects his right and what he must show as respects its violation did not long survive. It was rejected by the Court of Appeal in *Hubbard* v. *Vosper* [1972] 2 Q.B. 84 —a case in which the plaintiff's entitlement to copyright was undisputed but an injunction was refused despite the apparent weakness of the suggested defence. The court, however, expressly deprecated any attempt to fetter the discretion of the court by laying down any rules which would have the effect of limiting the flexibility of the remedy as a means of achieving the objects that I have indicated above. Nevertheless this authority was treated by Graham J. and the Court of Appeal in the instant appeal as leaving intact the supposed rule that the court is not entitled to take any account of the balance of convenience unless it has first been satisfied that if the case went to trial upon no other evidence than is before the court at the hearing of the application the plaintiff would be entitled to judgment for a permanent injunction in the same terms as the interlocutory injunction sought.

Your Lordships should in my view take this opportunity of declaring that there is no such rule. The use of such expressions as "a probability," "a prima facie case," or "a strong prima facie case" in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.

It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages upon the

grant of an interlocutory injunction was that " it aided the court in doing that which was its great object, viz. abstaining from expressing any opinion upon the merits of the case until the hearing ": *Wakefield* v. *Duke of Buccleugh* (1865) 12 L.T. 628, 629. So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

As to that, the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.

It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo. If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark upon a course of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial.

Save in the simplest cases, the decision to grant or to refuse an interlocutory injunction will cause to whichever party is unsuccessful on the application some disadvantages which his ultimate success at the trial may

show he ought to have been spared and the disadvantages may be such that the recovery of damages to which he would then be entitled either in the action or under the plaintiff's undertaking would not be sufficient to compensate him fully for all of them. The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies; and if the extent of the uncompensatable disadvantage to each party would not differ widely, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence adduced on the hearing of the application. This, however, should be done only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party. The court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits in order to evaluate the strength of either party's case.

I would reiterate that, in addition to those to which I have referred, there may be many other special factors to be taken into consideration in the particular circumstances of individual cases. The instant appeal affords one example of this.

Returning, therefore, to the instant appeal, it cannot be doubted that the affidavit evidence shows that there are serious questions to be tried. Graham J. and the Court of Appeal have already tried the question of infringement on such affidavit evidence as was available and have come to contrary conclusions. Graham J. has already also tried the question of invalidity on these affidavits and has come to the conclusion that the defendant's grounds of objection to the patent are unlikely to succeed, so it was clearly incumbent upon him and on the Court of Appeal to consider the balance of convenience.

Graham J. did so and came to the conclusion that the balance of convenience lay in favour of his exercising his discretion by granting an interlocutory injunction. As patent judge he has unrivalled experience of pharmaceutical patents and the way in which the pharmaceutical industry is carried on. Lacking in this experience, an appellate court should be hesitant to overrule his exercise of his discretion, unless they are satisfied that he has gone wrong in law.

The factors which he took into consideration, and in my view properly, were that Ethicon's sutures XLG were not yet on the market; so they had no business which would be brought to a stop by the injunction; no factories would be closed and no work-people would be thrown out of work. They held a dominant position in the United Kingdom market for absorbent surgical sutures and adopted an aggressive sales policy. Cyanamid on the other hand were in the course of establishing a growing market in PHAE surgical sutures which competed with the natural catgut sutures marketed by Ethicon. If Ethicon were entitled also to establish themselves in the market for PHAE absorbable surgical sutures until the action is tried, which may not be for two or three years yet, and possibly thereafter until the case is finally disposed of on appeal, Cyanamid, even though ultimately successful in proving infringement, would have lost its chance of continuing to increase

its share in the total market in absorbent surgical sutures which the continuation of an uninterrupted monopoly of PHAE sutures would have gained for it by the time of the expiry of the patent in 1980. It is notorious that new pharmaceutical products used exclusively by doctors or available only on prescription take a long time to become established in the market, that much of the benefit of the monopoly granted by the patent derives from the fact that the patented product is given the opportunity of becoming established and this benefit continues to be reaped after the patent has expired.

In addition there was a special factor to which Graham J. attached importance. This was that, once doctors and patients had got used to Ethicon's product XLG in the period prior to the trial, it might well be commercially impracticable for Cyanamid to deprive the public of it by insisting on a permanent injunction at the trial, owing to the damaging effect which this would have upon its goodwill in this specialised market and thus upon the sale of its other pharmaceutical products.

I can see no ground for interfering in the learned judge's assessment of the balance of convenience or for interfering with the discretion that he exercised by granting the injunction. In view of the fact that there are serious questions to be tried upon which the available evidence is incomplete, conflicting and untested, to express an opinion now as to the prospects of success of either party would only be embarrassing to the judge who will have eventually to try the case. The likelihood of such embarrassment provides an additional reason for not adopting the course that both Graham J. and the Court of Appeal thought they were bound to follow, of dealing with the existing evidence in detail and giving reasoned assessments of their views as to the relative strengths of each party's cases.

I would allow the appeal and restore the order of Graham J.

VISCOUNT DILHORNE. My Lords, I have had the advantage of reading the speech of my noble and learned friend, Lord Diplock. I agree with it and that this appeal should be allowed and the order of Graham J. restored.

LORD CROSS OF CHELSEA. My Lords, for the reasons given by my noble and learned friend, Lord Diplock, in his speech, which I have had the advantage of reading in draft, I would allow this appeal.

LORD SALMON. My Lords, I agree with the opinion of my noble and learned friend, Lord Diplock, and for the reasons he gives I would allow the appeal and restore the order of Graham J.

LORD EDMUND-DAVIES. My Lords, for the reasons given by my noble and learned friend, Lord Diplock, I would also allow this appeal.

Appeal allowed.

Solicitors: *Allen & Overy; Lovell, White & King.*

F. C.

Neutral Citation Number: [2017] EWHC 2945 (Ch)

Case No: HC-2017-002125

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST
CHANCERY DIVISION

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 23/11/2017

Before:

THE HONOURABLE MR JUSTICE MORGAN

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Between:

(1) INEOS UPSTREAM LTD
(2) INEOS 120 EXPLORATION LTD
(3) INEOS PROPERTIES LTD
(4) INEOS INDUSTRIES LTD
(5) JOHN BARRIE PALFREYMAN
(6) ALAN JOHN SKEPPER
(7) JANETTE MARY SKEPPER
(8) STEVEN JOHN SKEPPER
(9) JOHN AMBROSE HOLLINGWORTH
(10) LINDA KATHARINA HOLLINGWORTH — **Claimants**

- and -

(1) PERSONS UNKNOWN ENTERING OR REMAINING WITHOUT THE CONSENT OF THE CLAIMANT(S) ON LAND AND BUILDINGS SHOWN SHADED RED ON THE PLANS ATTACHED TO THE AMENDED CLAIM FORM — **First Defendant**

(2) PERSONS UNKNOWN INTERFERING WITH THE FIRST AND SECOND CLAIMANTS' RIGHTS TO PASS AND REPASS WITH OR WITHOUT VEHICLES, MATERIALS AND EQUIPMENT OVER PRIVATE ACCESS ROADS ONLAND SHOWN SHADED ORANGE ON THE PLANS ANNEXED TO THE AMENDED CLAIM FORM WITHOUT THE CONSENT OF THE CLAIMANT(S)	**Second Defendant**
(3) PERSONS UNKNOWN INTERFERING WITH THE RIGHT OF WAY ENJOYED BY THE CLAIMANT(S)/OR ITS AFFILIATES AND EACH OF ITS AND THEIR AGENTS, SERVANTS, CONTRACTORS, SUB-CONTRACTORS, GROUP COMPANIES, LICENSEES, EMPLOYEES, PARTNERS, CONSULTANTS, FAMILY MEMBERS AND FRIENDS OVER LAND SHADED PURPLE ON THE PLANS ANNEXED TO THE AMENDED CLAIM FORM	**Third Defendant**
(4) PERSONS UNKNOWN PURSUING ANY COURSE OF CONDUCT SUCH AS AMOUNTS TO HARASSMENT OF THE CLAIMANTS AND/OR ANY THIRD PARTY CONTRARY TO THE PROTECTION FROM HARASSMENT ACT 1997 WITH THE INTENTION SET OUT IN PARAGRAPH 10 OF THE ORDER OBSTRUCTING, IMPEDING OR INTERFERING WITH THE LAWFUL ACTIVITIES UNDERTAKEN BY THE CLAIMANT(S) AND ITS AGENTS, SERVANTS, CONTRACTORS, LICENSEES AND EMPLOYEES IN CONNECTION WITH THE SEARCHING OR BORING FOR OR GETTING ANY MINERAL OIL OR RELATIVE HYDROCARBON AND NATURAL GAS EXISTING IN ITS NATURAL CONDITION IN STRATA AND ALL ASSOCIATED AND CONNECTED ACTIVITIES	**Fourth Defendant**
(5) PERSONS UNKNOWN COMBINING TOGETHER TO COMMIT THE UNLAWFUL ACTS AS SPECIFIED IN PARAGRAPH 11 OF THE ORDER WITH THE INTENTION SET OUT IN PARAGRAPH 11 OF THE ORDER	**Fifth Defendant**
(6) MR JOSEPH BOYD	**Sixth Defendant**
(7) MR JOSEPH CORRÉ	**Seventh Defendant**

- -
- -

Alan Maclean QC, Janet Bignell QC, Jason Pobjoy and Gavin Bennison (instructed by **Fieldfisher LLP**) for the **Claimants**
Heather Williams QC, Blinne Ní Ghrálaigh and Jennifer Robinson (instructed by **Leigh Day**) for the **Sixth Defendant**
Stephanie Harrison QC, Stephen Simblet and Laura Profumo (instructed by **Bhatt Murphy**) for the **Seventh Defendant**

Hearing dates: 31 October 2017, 1 and 2 November 2017
- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HONOURABLE MR JUSTICE MORGAN

Mr Justice Morgan:

The applications

1. There are three applications before the court. The first application was made by the Claimants by application notice dated 31 July 2017. Although that application was expressed to be for final injunctions, the application was presented as an application for interim injunctions intended to last until the trial of this action. The background to that application is that on 28 July 2017, I granted the Claimants interim injunctions in similar terms to the orders which are now sought. Those injunctions were granted on the Claimants' ex parte application. I fixed a return date of 12 September 2017 and on that day I heard argument from counsel for the Claimants and from counsel who had been instructed by Mr Boyd and Mr Corré. Mr Boyd and Mr Corré were then joined as the Sixth and Seventh Defendants. On 12 September 2017, I granted interim injunctions which were intended to last for a short period until a further hearing with a time estimate of three days to enable the court to hear argument on the many points which needed to be considered. That hearing took place on 31 October and 1 and 2 November 2017.

2. The second application was made by the Sixth Defendant by application notice dated 6 September 2017. By that application, the Sixth Defendant sought the discharge and/or the variation of the ex parte order I had made on 28 July 2017. The third application was made by the Seventh Defendant by application notice dated 6 September 2017. By that application, the Seventh Defendant sought the discharge of the ex parte order I had made on 28 July 2017. The second and third applications were before the court on 12 September 2017 when I continued the ex parte order and the two applications of 6 September 2017 were presented at the three-day hearing as applications to discharge the ex parte order of 28 July 2017 and the further order which I made on 12 September 2017.

The Claimants

3. There are ten Claimants. The First Claimant is a subsidiary company of the INEOS corporate group, a privately owned global manufacturer of chemicals, speciality chemicals and oil products. The First Claimants commercial activities include shale gas exploration in the UK. It is the lessee of four of the Sites which are the subject of the Claimants' application (Sites 1, 2, 3 and 7). The lessors in relation to these four sites include the Fifth to Tenth Claimants. The Second to Fourth Claimants are companies within the INEOS corporate group. They are the proprietors of Sites 4, 5 and 6 respectively. The Fourth Claimant is the lessee of Site 8 and it has applied to the Land Registry to be registered as the leasehold owner of that site. I will refer to the First to Fourth Claimants as "Ineos" without distinguishing between them. The Fifth to Tenth Claimants are all individuals. The Fifth Claimant is the freeholder of Site 1. The Sixth to Eighth Claimants are the freeholders of Site 2. The Ninth to Tenth Claimants are the freeholders of Site 7. The various sites are described below.

The Sites

4. There are eight sites which are relevant. Site 1 is described as land and buildings on the south side of Dronfield Road, Eckington, Sheffield. Site 2 is described as land and buildings at Carr Farm, Winney Lane, Harthill, Sheffield. Site 3 is described as land

and buildings known as Four Topped Oak, Farnworth Road, Penketh, Warrington. Site 4 is described as land and knowns known as land for a Wellhead Site, Givenhead Farm, Ebberston, Snailton, North Yorkshire. Site 5 is described as land and buildings known as Hawkslease, Chapel Lane, Lyndhurst. Site 6 is described as land and buildings known as 38 Hans Crescent, London SW1. Site 7 is described as land and buildings on the south side of Woodsetts Road, Woodsetts, Rotherham, South Yorkshire. Site 8 is described as land and buildings known as Anchor House, 15-19 Britten Street, London. Sites 1, 2, 3, 4 and 7 comprise agricultural land. The buildings on sites 5, 6 and 8 are office buildings.

5. I was given detailed evidence about the planning applications which have been made in relation to some of these sites. I will give a brief summary of that evidence. On 8 May 2017, Ineos applied for planning permission to drill a vertical core well for shale gas exploration on Site 1. That application has been the subject of a public consultation. The position is similar in relation to Site 2 where the application was made on 30 May 2017. It is expected that the application for Site 2 will be considered by the planning committee on 23 November 2017 and it is thought to be likely that the committee will receive a recommendation for refusal of permission on traffic grounds. Ineos would wish to discuss the traffic issues with the local authority with a view to resolving them.

6. Sites 3 and 4 are not the subject of a planning application in relation to shale gas exploration. Site 3 is an existing coalbed methane production site with four wells. Site 4 is a site in Scarborough with two wells on it.

7. As to Site 7, in July 2017, Ineos submitted an Environmental Assessment Screening Report in respect of an intended application for planning permission to drill a vertical core well for shale gas exploration. The local planning authority has since confirmed that it will not require an Environmental Impact Assessment as part of a future planning application for this use. Ineos' evidence stated that it intended to submit such an application at the end of October 2017 but I do not have further information about that matter.

The Defendants

8. There are seven Defendants or groups of Defendants. The first five groups of Defendants are described as persons unknown with, in each case, further wording which is designed to provide a definition of the persons who fall into the group. The First Defendant is described as:

> "Persons unknown entering or remaining without the consent of the Claimant(s) on land and buildings shown shaded red on the plans annexed to the Amended Claim Form".

9. The Second Defendant is described as:

> "Persons unknown interfering with the First and Second claimants' rights to pass and repass with or without vehicles, materials and equipment over private access roads on land shown shaded orange on the plans annexed to the Amended Claim Form without the consent of the Claimant(s)".

10. The Third Defendant is described as

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

11. The Fourth Defendant is described as

> "Persons unknown pursuing any course of conduct such as amounts to harassment of the Claimants and/or any third party contrary to the Protection from Harassment Act 1997 with the intention set out in paragraph 10 of the [relevant] order".

12. The Fifth Defendant is described as

> "Persons unknown combining together to commit the unlawful acts as specified in paragraph 11 of the [relevant] order with the intention set out in paragraph 11 of the [relevant] order".

13. The Sixth Defendant is Mr Boyd. He appeared through counsel at the hearing on 12 September 2017 and was joined as a Defendant. The Seventh Defendant is Mr Corré. He also appeared through counsel at the hearing on 12 September 2017 and was joined as a Defendant.

Shale gas exploration

14. Ineos is engaged, or wishes to be engaged, in the business of shale gas exploration in the United Kingdom. One method of exploration which it wishes to use involves the hydraulic fracturing of rock formations, known as "fracking". Ineos is not the only operator in the United Kingdom engaged in fracking. Indeed, Ineos is a relative newcomer to this industry in the United Kingdom. Fracking has been carried on in the United Kingdom since the early 1990s.

15. Fracking has been, and remains, lawful in England. Exploration for gas in England can only be carried out under licences issued by the Oil and Gas Authority. Fracking requires planning permission from the local planning authority and is subject to various other controls. In order to identify sites where commercial production of shale gas extraction is considered to be profitable, an operator will need to carry out seismic surveys of the relevant land.

16. Fracking is controversial and has generated widespread public concern and opposition. Since 2013, there has been a number of significant protest events linked to fracking and other kinds of exploration. In 2015, the Association of Chief Police Officers published a report entitled: Policing Linked to Onshore Oil and Gas Operations. The report stated that the most significant of the protest events had been at Balcombe in Sussex, Barton Moss in Greater Manchester, Fylde in Lancashire and West Newton and Crawberry Hill in Humberside. Some of the protests involved the establishment of protest camps, the duration of which varied from a few days to

several weeks with the numbers of protestors involved varying from single figures to the low hundreds. The police report continued by stating that many of the protest events involved marches, static demonstrations, obstructions of the highway or site accesses, the use of lock-on type devices and office incursions or occupations. The report stated that the vast majority of the actions taken by protestors were peaceful.

The evidence

17. The parties have served a very considerable amount of evidence in relation to these applications. The Claimants filed seven witness statements before the hearing on 28 July 2017, six more before the hearing on 12 September 2017 and three further statements before the most recent hearing. The Sixth Defendant filed 10 witness statements and the Seventh Defendant filed 14 statements. More witness statements came just before or during the hearing itself. There is a core bundle consisting of five lever arch files and that is accompanied by 23 lever arch files of exhibits.

18. The evidence served by the Claimants sought to describe some of the forms of protest against fracking which have taken place in recent times. The Claimants focussed on the forms of protest which, the Claimants contend, involved unlawful acts which were harmful to fracking operators and third party contractors who supply goods or services to fracking operators. Much of the factual material in the evidence served by the Claimants was not contradicted by the Defendants, although the Defendants did join issue with certain of the comments made or the conclusions drawn by the Claimants and some of the detail of the factual material. The Defendants' evidence stressed the generally peaceful character of anti-fracking protests. The Defendants also commented upon the undesirable effects of the injunctions granted in this case in July and September 2017.

19. In this judgment, I will refer to people who are "protestors" against fracking. It must, however, be remembered that all of the individuals in the United Kingdom who are opposed to fracking do not form a homogeneous group but comprise a great range of individuals with different views as to what is appropriate by way of protesting against fracking. The focus of the Claimants' application is on protests which, the Claimants say, involve unlawful acts. In order to describe the persons who, the Claimants say, ought to be the subject of injunctions, I will refer to those persons as "protestors" but that does not mean that I necessarily agree with the Claimants that the threatened protests are unlawful. That question remains to be examined.

20. Part of the Claimants' evidence explained the Claimants' perception of the benefits of fracking exploration. This part of the Claimants' evidence drew evidence in reply from the Defendants who explained their perception that fracking was not in the public interest. It was accepted at the hearing before me that the court was not in a position to form a view as to which of these perceptions was more accurate. Indeed, it was accepted that this area of dispute, whilst important outside the court room, would not have any real impact on the court's decisions on the many issues which were argued on the present applications.

21. The greater part of the evidence from the Claimants relates to protest activities, which they say are unlawful activities, where the direct target of the protest activity was a company other than Ineos. The direct targets of the protest activities fall into two categories. The first category comprises companies who carry out shale gas

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

22. The second category of companies which are the direct targets of protest activities are companies which form part of the supply chain to the operators who carry on shale gas exploration. The evidence makes it clear that the object of the protestors is to cause those companies to withdraw from supplying shale gas operators. Indeed, the protestors have reason to believe that they might succeed with this object. The supply companies do not themselves carry out shale gas exploration and may be able to seek work and contracts in other industries. If the protestors' actions targeting the supply companies convince them that the costs and burdens of those actions are too great, then the supply companies may choose to give up supplying shale gas operators and may not themselves seek relief from the courts to prevent the protestors' actions.

23. In his second witness statement dated 26 July 2017, Mr Talfan Davies, the solicitor for the Claimants, described in detail earlier acts of trespass on the land of other fracking operators. This evidence has been summarised in the skeleton argument for the Claimants as follows:

> "*Case Study 1: Preston New Road*, Cuadrilla Resources Ltd. Cuadrilla obtained planning permission on 16 1 16. From 14 8 14 to date there have been numerous serious instances of trespass resulting in court proceedings for possession and injunctive relief.
>
> *Case Study 2: Leith Hill*, Europa Oil & Gas (UK) Ltd. Europa was granted planning permission in August 2015. On about 29 10 16, prior to works commencing, protestors moved on to the site and established a "*protection camp*". Protestors dug tunnels and built tree houses on the proposed drill site, again resulting in court proceedings.
>
> *Case Study 3: Daneshill*, Dart Energy Ltd. A camp was set up outside the site and there have been acts of trespass onto the site.
>
> *Case Study 4: Dutton's Lane, Upton*, IGas Energy plc. In May 2013, IGas was granted planning permission to begin exploratory drilling. In April 2014 protestors set up camp on the site. There were court proceedings. It took *20 months* for eviction to be achieved and the process took the police and

> bailiffs 9 hours. Protestors locked themselves into structures, hid in underground tunnels and even set their hands in concrete.
>
> *Case Study 5: Barton Moss/Barton Bridge*, IGas Energy plc. In June 2014 an extension to a planning permission was sought. The site was occupied by protestors.
>
> *Case Study 6: Crawberry Hill, Walkinton*, Rathlin Energy (UK) Limited. In May 2014 a permit to undertake exploratory drilling was obtained. A matter of days later, a number of protestors, including D6, unlawfully trespassed on the site, and set up a protest camp, on which they constructed a small fortress from wooden pallets. This was not dismantled for some 3 months and upon being dismantled a further small fortress was constructed by protestors on adjoining land. This remained in-situ for some 6 months.
>
> These acts of trespass have frequently been of an aggravated nature. They have required protracted and expensive proceedings to clear the sites, and have given rise to extremely dangerous conditions posing a serious risk of harm to both protestors and others. The history of activity at these sites demonstrates that trespassing protestors against hydraulic fracturing are typically well-organized, coordinated, determined. Such protestors have shown themselves not to be deterred by the prospect, some months down the line, of being the subject of eviction proceedings."

24. In his second witness statement, Mr Talfan Davies described the actions of protestors attempting to block the primary access way to operators' sites (and the sites of their contractors) either by standing or parking in front of the site entrances or by attaching themselves to the entrances. The Claimants' skeleton argument summarised this evidence (together with later evidence which updated it) as follows:

> "In the period January-August 2017, at Cuadrilla's Preston New Road site, protestors locked themselves to fencing outside the site entrance; obstructed a lorry; congregated on the public highway, forcing its closure; and engaged in numerous "*lock-on*" protests outside the site entrance. D6 played a key role in these protests. The protestors continue to congregate at the site on a daily basis with the purpose of blocking access, resulting in a number of road closures over the past months.
>
> On 6 2 17, protestors blocked access to a quarry operated by a supplier to the shale gas industry, Armstrong Aggregates, resulting in the termination of the company's supply to Cuadrilla.
>
> On 10 3 17, AE Yates, a supplier of Cuadrilla, was subjected to a "*slow walk*" on the public highway outside the entrance of its

> depot in Bolton. The company suffered a "*lock on*" protest at the entrance to the depot on 3 4 17.
>
> On 27 3 17, protestors targeted a supplier of the shale gas industry, Tarmac and Aggregate Industries, with an 11-hour blockade.
>
> On 30 3 17, anti-hydraulic fracturing protestors blocked the entrance to Eddie Stobart's Orford Depot. They engaged in slow walking outside the depot on 3 4 17.
>
> On 6 4 17, a supplier of Cuadrilla, Lomas Distribution, was subjected to a "*slow walk*", leading to protestors being arrested on suspicion of an offence under section 137 of the Highways Act 1980.
>
> On 25 April 2017, a number of protestors blockaded access to a site operated by Third Energy UK Gas Ltd near Kirby Misperton, North Yorkshire. This protest camp is situated on private farmland off a main road, being the main road via which access is afforded to Third Energy's site. The ongoing protestor activity has escalated since the 12 September 2017 hearing. The recent activity (covering the period up to 11 October 2017) is set out in detail in the seventh witness statement of Mr Talfan Davies."

25. In his second witness statement, Mr Talfan Davies gave evidence as to the actions of protestors which were aimed directly at contractors providing services to fracking operators, where the actions were designed to force or persuade the contractors to cease to provide those services. Mr Talfan Davies referred to a large number of matters of which the following is a selection:

(1) on 10 March 2017, protestors congregated outside the depot of A E Yates, a supplier of Cuadrilla, and engaged in a slow walk in order to delay vehicles leaving the depot; on 3 May 2017, protestors engaged in a lock on at this supplier's depot in Bolton;

(2) on 3 February 2017, protestors obstructed a Moore Readymix lorry on its way to Cuadrilla's site in Preston New Road;

(3) on 6 April 2017, protestors engaged in a slow walk outside the depot of Lomas Distribution, a supplier of Cuadrilla;

(4) on 18 February 2017, protestors entered the offices of MediaZoo, PR consultants for Ineos and chained themselves to piping in the lobby of the offices;

(5) in early 2017, protestors engaged in an event called "Break the Chain" intended to break the supply chain to fracking operators; the protestors targeted Tarmac & Aggregate Industries, Yorkshire Water, Centrica, A E Yates and Bell Pottinger;

(6) on 30 March 2017, protestors blocked the entranceway to Eddie Stobart's depot in Cheshire and engaged in slow walking in front of their lorries at Appleton Thorn;

(7) on 7 April 2017, protestors targeted the drilling company P R Marriott, a shale gas industry supplier; the protestors chained themselves to the gates of P R Marriott's depot; there were further incidents concerning P R Marriott on 23 May 2017, 1 July 2017, 13 July 2017 and 18 July 2017.

26. The Claimants also rely on a witness statement dated 5 September 2017 from Mr Hobday of P R Marriott in which he gave more detail as to the nature of the protests aimed at his company and the effect of those protests on his business. In addition to many incidents of blocking the entrance to its depot and slow walking in front of its lorries, Mr Hobday refers to incidents of lock-ons and protestors climbing on to the roof of lorries to prevent them moving and trespass on to the depot itself. He also refers to the setting up during the night on 30 June 2017 of a protest camp on land near to the company's depot; the land is owned by a third party and not P R Marriott.

27. In his fifth witness statement dated 5 September 2017, Mr Talfan Davies gave further evidence of protestors' activity, trespassing on private land, blocking the entrance to the operators' sites and targeting the businesses of suppliers to operators. Mr Talfan Davies provided further detailed evidence on these matters in his seventh witness statement dated 19 October 2017 and in his eighth witness statement dated 25 October 2017.

28. On 5 September 2017, Assistant Chief Constable Terry Woods wrote to the Chief Executive of United Kingdom Onshore Oil and Gas with information as to the nature and extent of protestor activity in relation to fracking. He made the following points:

(1) there were at that date six occupied anti-fracking camps in England and Wales;

(2) in early 2016, an initial increase in oil and gas exploration activity prompted a corresponding increase in anti-fracking campaigns and protest activity;

(3) since the beginning of 2017, there had been a significant uplift in anti-fracking protests directed at active drilling sites involving community-based protestors and more established environmental protest groups;

(4) although protests had mainly been peaceful, 2017 saw a significant increase in direct action with a sizeable number of arrests; the vast majority of arrests were for obstruction of the highway and of the police, infringement of section 14 of the Public Order Act, criminal damage, threatening behaviour and assault on the police;

(5) during the first three months of 2017, there were 60 arrests of anti-fracking protestors, a considerable increase on the 2016 figures;

(6) in the second quarter of 2017, there were 138 related arrests;

(7) in the third quarter of 2017, the figures for arrests were likely to be similar to the second quarter;

(8) a small number of anti-fracking activists were willing to engage in criminality and direct action;

(9) the protests have required significant policing operations;

(10) the tactics used by some protestors included:

a. slow walking;

b. placing bicycles and cars in the path of vehicles;

c. placing placards in front of drivers' windscreens;

d. climbing onto haulage tankers;

e. haulage vehicles being followed back to the depot to identify the contractor involved;

f. parking across site gates;

g. the impeding of site workers;

h. lock-on blockades of site entrances;

i. lock-ons to the underside of vehicles;

j. the targeting of secondary and tertiary supply companies.

(11) there were protestor activities at Little Plumpton in Lancashire on 22 days in July 2017 alone, leading to multiple arrests;

(12) the above-mentioned protests in July 2017 have had a significant adverse impact on the local area, businesses, public services and the police service, in the latter case with a significant financial impact on the police budget.

29. The evidence shows clearly that there is a considerable degree of organisation and exchange of information via social media between some groups of protestors. The evidence from social media shows that the identity of Ineos is well known to many potential protestors. That evidence also shows that groups of protestors were aware of areas of land in which Ineos has an interest and where it will wish to carry out seismic testing and/or drilling. I will give some examples of these matters.

30. The website "Drill or Drop" identified Site 1 in January 2017. The same website identified Site 2 in March 2017. There were acts of trespass on Site 1 in January 2017; it is possible that these acts were by protestors against fracking but I could not find on the balance of probabilities that that was the case. There were protests against Ineos' contractor at or near Site 2 on 21 July 2017.

31. Sites 3 and 4 potentially raise different considerations. Site 3 is an existing coalbed methane production site with four wells. Site 3 has not been a target for protestors but Ineos consider that there is a risk of a breach of security at Site 3. Acts of trespass on Site 3 would pose a risk to trespassers. Site 4 is a site in Scarborough with two well

cellars on it. Site 4 has been the subject of trespass in the past and has been the subject of threats on social media. Site 4 would also pose a risk to trespassers upon it.

32. In August 2017, there were significant exchanges on social media when two protestors exchanged information about vehicles used by Ineos, including descriptions and registrations. Also in August 2017, following the granting of the ex parte injunctions, one protestor suggested visiting Ineos' office at Site 6 to "test the injunction".

33. There is clear evidence that persons opposed to seismic testing and drilling have stolen or tampered with seismic testing equipment on various of the Ineos sites.

34. I referred earlier to the fact that, on 18 February 2017, protestors entered the offices of MediaZoo, PR consultants for Ineos and chained themselves to piping in the lobby of the offices.

35. Ineos' seismic testing equipment has been stored at the P R Marriott depot which has been the subject of sustained protests.

Matters requiring consideration

36. I heard detailed submissions on a large number of matters which were said to be relevant to my decision in this case. I will consider those matters in the following order:

    (1) The acts which are alleged to be unlawful;

    (2) Articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

    (3) The test for an interim injunction;

    (4) Quia timet injunctions;

    (5) The likely result at a trial;

    (6) Persons unknown;

    (7) The duty of candour on an ex parte application;

    (8) The need for clarity and precision; and

    (9) Whether I should grant any injunctions.

The acts which are alleged to be unlawful

37. The Claimants' case is that the evidence to which I have referred shows that anti-fracking protestors have in the past, to a considerable extent, committed many serious unlawful acts as part of their protests. The Claimants say that they themselves have been the subject of some of these unlawful acts but their principal concern is as to the future. They do not wish to be subjected to serious and extensive unlawful acts in the future and they submit that the court should be prepared to intervene to prevent such

unlawful acts and to allow Ineos to carry out its lawful business without such interference.

38. The Claimants have identified the following causes of action in relation to the unlawful acts to which they refer. The causes of action are:

(1) trespass on private land;

(2) actionable interference with private rights of way;

(3) public nuisance caused by interference with the Claimants' right to pass and repass on the highway, where the Claimants are able to show they have suffered particular damage over and above the ordinary damage suffered by the public at large;

(4) harassment contrary to the Protection from Harassment Act 1997; and

(5) conspiracy to injure the Claimants by unlawful means, namely, various criminal offences which are:

a. intimidation by annoyance or violence contrary to section 241(1) of the Trade Union and Labour Relations (Consolidation) Act 1992;

b. criminal damage contrary to section 1 of the Criminal Damage Act 1971;

c. theft contrary to section 1 of the Theft Act 1968;

d. obstruction of the highway contrary to section 137 of the Highways Act 1980;

e. causing danger to road-users contrary to section 22A of the Road Traffic Act 1988.

39. Leaving aside the present context which involves various forms of protest in relation to a matter which is of genuine public concern, there is not much dispute between the parties as to the ingredients of the causes of action relied upon by the Claimants. I will briefly describe those causes of action in a little more detail without regard, in the first instance, to Articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms and then I will consider the potential impact of Articles 10 and 11 in this case.

Trespass

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

Private nuisance

41. As to the cause of action for interference with a private easement, where the cause of action is in private nuisance, the position was described by Mummery LJ in West v Sharp (1999) 79 P&CR 327 at 332, as follows:

> "Not every interference with an easement, such as a right of way, is actionable. There must be a substantial interference with the enjoyment of it. There is no actionable interference with a right of way if it can be substantially and practically exercised as conveniently after as before the occurrence of the alleged obstruction. Thus, the grant of a right of way in law in respect of every part of a defined area does not involve the proposition that the grantee can in fact object to anything done on any part of the area which would obstruct passage over that part. He can only object to such activities, including obstruction, as substantially interfere with the exercise of the defined right as for the time being is reasonably required by him."

Public nuisance

42. In relation to the cause of action for obstruction of the highway, the Claimants put their case in public nuisance. However, I note that Clerk & Lindsell on Torts, 21st ed., at para. 20-180 states that the right of an owner of land adjoining the highway to gain access to the highway is a private common law right distinct from the right of the owner of the land to use the highway itself as a member of the public.

43. Some obstructions of the highway will amount to a public nuisance. I did not hear detailed submissions as to what amounts to a sufficient obstruction of the highway for the purposes of public nuisance. Instead I heard submissions as to what would amount to an obstruction of the highway for the purposes of the criminal offence created by section 137 of the Highways Act 1980. The parties assumed that the same basic principles applied to the public nuisance and to the criminal offence.

44. 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) at para. 325 where it is said:

(1) whether an obstruction amounts to a nuisance is a question of fact;

(2) an obstruction may be so inappreciable or so temporary as not to amount to a nuisance;

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

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

The notes to para. 325 contain references to cases where the test for obstruction is variously described. Thus, it has been said that any wrongful act or omission upon or near a highway whereby the public is prevented from freely, safely and conveniently passing along the highway is a nuisance. An obstruction is caused where the highway is rendered impassable or more difficult to pass along by reason of some physical obstacle.

45. In Harper v G N Haden & Sons [1933] Ch 298 at 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."

46. 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: see R v Rimmington [2006] 1 AC 459 at [7] and [44].

The Protection from Harassment Act 1997

47. In relation to the Protection from Harassment Act 1997, as amended by the Serious Organised Crime and Police Act 2005 (I will refer to the 1997 Act as amended as "the 1997 Act"), it is helpful to distinguish between a claim under the 1997 Act brought by an individual and a claim brought by a company. This is because section 7(5) provides that references in the 1997 Act to "a person", in the context of the harassment of a person, are references to a person who is an individual. Other references in the 1997 Act to "a person" can therefore include a company.

48. In the case of an individual, such as the Fifth to Tenth Claimants, such a person has a cause of action, under sections 1(1) and 3(1), where he or she is the victim of a course of conduct pursued by another person which course of conduct amounts to harassment of the victim and which the other person knows or ought to know amounts to harassment of the victim.

49. In the case of a company, such as the First to Fourth Claimants, such a person may have a cause of action pursuant to sections 1(1A) and 3A. Section 1A of the 1997 Act provides that a person must not pursue a course of conduct:

> "(a) which involves harassment of two or more persons, and
>
> (b) which he knows or ought to know involves harassment of those persons; and
>
> (c) by which he intends to persuade any person (whether or not those mentioned above) (i) not to do something that he is entitled to or required to do; or (ii) to do something that he is not under any obligation to do."

50. Accordingly, pursuant to section 1(1A) and 3A, Ineos can sue a defendant who pursues a course of conduct which the defendant knows or ought to know involves harassment of two or more individuals, who are (for example) members of the staff of Ineos, by which the defendant intends to persuade those members of staff or anyone else (such as Ineos itself) not to do something which it is entitled to do or to do something which it is not under an obligation to do. Similarly, Ineos can sue a defendant who pursues a course of conduct which the defendant knows or ought to

know involves harassment of two or more individuals, who are (for example) members of the staff of PR Marriott, by which the defendant intends to persuade those members of staff or anyone else (such as PR Marriott or Ineos itself) not to do something which it is entitled to do or to do something which it is not under an obligation to do.

51. Both sections 1(1) and 1(1A) are subject to section 1(3) which provides that those provisions do not apply to a course of conduct if the person who pursued it shows:

> "(a) that it was pursued for the purpose of preventing or detecting crime,
>
> (b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment; or
>
> (c) that in the particular circumstances the pursuit of the course was reasonable".

Section 1(3)(c) of the 1997 Act imposes an objective test of reasonableness: see also R v Colohan [2001] 2 FLR 757.

52. Section 7(2) of the 1997 Act provides that: "references to harassing a person include alarming the person or causing the person distress". This is a non-exhaustive definition. In Thomas v News Group Newspapers Ltd [2002] EMLR 78 at [30], Lord Phillips MR said that: ""Harassment is … a word which is generally understood".

53. More assistance as to the scope of "harassment" is provided by Majrowski v Guy's and St Thomas' NHS Trust [2007] 1 AC 224. In that case, Lord Nicholls said at [30]:

> "Courts are well able to separate the wheat from the chaff at an early stage of the proceedings. They should be astute to do so. In most cases courts should have little difficulty in applying the "close connection" test. Where the claim meets that requirement, and the quality of the conduct said to constitute harassment is being examined, courts will have in mind that irritations, annoyances, even a measure of upset, arise at times in everybody's day-to-day dealings with other people. Courts are well able to recognise the boundary between conduct which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable. To cross the boundary from the regrettable to the unacceptable the gravity of the misconduct must be of an order which would sustain criminal liability under section 2 ."

In the same case, Baroness Hale referred to the aim of the 1997 Act as being to deter, to punish and to encourage the perpetrator to mend his ways. She referred to "the sort of specific prohibitions which may be helpfully contained in an injunction". She then said at [66]:

> "If this was the aim, it is easy to see why the definition of harassment was left deliberately wide and open-ended. It does require a course of conduct, but this can be shown by conduct on at least two occasions (or since 2005 by conduct on one occasion to each of two or more people): section 7(3) . All sorts of conduct may amount to harassment. It includes alarming a person or causing her distress: section 7(2) . But conduct might be harassment even if no alarm or distress were in fact caused. A great deal is left to the wisdom of the courts to draw sensible lines between the ordinary banter and badinage of life and genuinely offensive and unacceptable behaviour."

54. Section 7(3) of the 1997 Act provides that: "a 'course of conduct' must involve ... (b) in the case of conduct in relation to two or more persons, conduct on at least one occasion in relation to each of those persons". Section 7(3A) of the 1997 Act provides that:

> "[a] person's conduct on any occasion shall be taken, if aided, abetted, counselled or procured by another –
>
> (a) to be conduct on that occasion of the other (as well as conduct of the person whose conduct it is); and
>
> (b). to be conduct in relation to which the other's knowledge and purpose, and what he ought to have known, are the same as they were in relation to what was contemplated or reasonably foreseeable at the time of the aiding, abetting, counselling or procuring."

55. Section 2 of the 1997 Act creates the crime of harassment. Sections 3 and 3A create the statutory tort. The only difference between the tort and the crime is in the standard of proof required: Ferguson v British Gas Trading Ltd [2009] 3 All ER 304. Sections 3 and 3A refer to the possibility of the court granting an injunction in relation to "an actual or apprehended breach" of sections 1(1) or 1(1A) and to the consequences of the grant of such an injunction.

Conspiracy

56. The type of conspiracy alleged by the Claimants is a conspiracy to injure by unlawful means. They do not seek to rely upon a conspiracy using lawful means, where the predominant intent is to injure the Claimants.

57. For there to be a conspiracy to injure by unlawful means, there must be:

(1) a combination by two or more persons;

(2) to undertake an unlawful act or to do a lawful act by unlawful means;

(3) with the intention to injure the claimant; and

(4) causing loss and damage to the claimant.

58. The unlawful acts asserted by the Claimants are said to be criminal offences. It was not disputed before me that the criminal acts which are asserted by the Claimants in this case constitute unlawful acts for the purposes of this tort: see JSC BTA Bank v Ablyazov (No 14) [2017] QB 853 at [46]-[47] and [53]-[54].

59. The Claimants rely on the tort of conspiracy to deal with the problem, as they perceive it, that the unlawful acts intended to be committed by the protestors will have a direct impact upon the supply chain of goods and services to Ineos but where the real target of the acts will be Ineos itself. The tort of conspiracy allows a victim of a conspiracy to sue where the acts are aimed at that victim even where the unlawful behaviour has its most direct impact on a third party. The other value of the tort of conspiracy from the Claimants' point of view is that it enables them to claim a remedy in a civil court for breach of a criminal statute where the conduct in question does not, absent a conspiracy, lead to civil liability.

60. The criminal offences which are asserted by the Claimants are:

(1) intimidation by annoyance or violence contrary to section 241(1) of the Trade Union and Labour Relations (Consolidation) Act 1992;

(2) criminal damage contrary to section 1 of the Criminal Damage Act 1971;

(3) theft contrary to section 1 of the Theft Act 1968;

(4) obstruction of the highway contrary to section 137 of the Highways Act 1980; and

(5) causing danger to road-users contrary to section 22A of the Road Traffic Act 1988.

61. Section 241(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 provides:

> "(1) A person commits an offence who, with a view to compelling another person to abstain from doing or to do any act which that person has a legal right to do or abstain from doing, wrongfully and without legal authority –
>
> (a) uses violence to or intimidates that person or his spouse or civil partner or children, or injures his property,
>
> (b) persistently follows that person about from place to place,
>
> (c) hides any tools, clothes or other property owned or used by that person, or deprives him of or hinders him in the use thereof,
>
> (d) watches or besets the house or other place where that person resides, works, carries on business or happens to be, or the approach to any such house or place, or

> (e) follows that person with two or more other persons in a disorderly manner in or through any street or road."

62. This offence is not confined to the context of industrial disputes, and can be committed by protestors: DPP v Todd [1966] Crim LR 344. The word "wrongfully" requires that the offending conduct under s.241(1) be independently unlawful as a civil wrong: Blackstone's Criminal Practice 2017 at B11.140, B11.144. The words "intimidates", "persistently follows" and "in a disorderly manner" are to be given their ordinary, natural meaning. The essence of "watching and besetting" is preventing access to and egress from somewhere: Blackstone's Criminal Practice 2017 at B11.144.

63. Criminal damage and theft do not require any exposition in this case.

64. Section 137(1) of the Highways Act 1980 is in these terms:

> "If a person, without lawful authority or excuse, in any way wilfully obstructs the free passage along a highway he is guilty of an offence and liable to a fine …".

65. In order for there to be an offence under section 137 of the 1980 Act, it must be shown that:

(1) there is an obstruction of the highway which is more than de minimis; occupation of a part of a road, thus interfering with people having the use of the whole of the road, is an obstruction: Nagy v Weston [1965] 1 All ER 78 at 80 B-C;

(2) the obstruction must be wilful, i.e. deliberate;

(3) the obstruction must be without lawful authority or excuse; "without lawful excuse" may be the same thing as "unreasonably" or it may be that it must in addition be shown that the obstruction is unreasonable.

66. It is helpful to refer to four cases involving protest on the highway, namely, Hubbard v Pitt [1976] QB 142, Hirst and Agu v Chief Constable of West Yorkshire (1987) 85 CR App Rep 143, DPP v Jones [1999] 2 AC 240 and Birch v DPP [2000] Crim LR 301.

67. In Hubbard v Pitt, in relation to a claim for an interim injunction to restrain picketing outside an estate agency, Lord Denning held (applying Nagy v Weston) that the picketing was a reasonable use of the highway. There is an important passage in his judgment at pages 178-179, which I will not set out, which discussed the legal position (even before Articles 10 and 11) as to the right to demonstrate and the right to protest. He said that such demonstrations and protests were not prohibited "[a]s long as all is done peaceably and in good order, without threats or incitement to violence or obstruction to traffic". This was a dissenting judgment in that the majority of the court granted an injunction on the basis of a claim in private nuisance. However, the parts of Lord Denning's judgment to which I have referred have been approved in later cases.

68. In Hirst and Agu v Chief Constable of West Yorkshire, it was held that the phrase "without lawful authority or excuse" covered activities otherwise lawful in themselves which might be reasonable in all the circumstances. The court approved a passage in Nagy v Weston (not itself a case involving demonstrations or protests) which referred to the length of time taken up by the obstruction, the place where it occurred, the purpose for which it was done and whether it caused an actual obstruction rather than a potential obstruction. It was also said that the activity causing the obstruction must be inherently lawful. An obstruction caused by unlawful picketing in pursuance of a trade dispute would be "without lawful excuse".

69. In DPP v Jones, the issue was as to the scope of the public's rights of access to the public highway and whether those rights of access were restricted so that they precluded any right of peaceful assembly on the highway: see per Lord Irvine of Lairg at page 251D-E. The argument for the prosecutor in that case was that the public's right of access was restricted to a right to pass and repass and other incidental activities; any wider use of the highway was said to be a trespass. The argument arose in the context of section 14A of the Public Order Act 1986 which referred to a "trespassory assembly". This argument was rejected. Lord Irvine reviewed the cases where actions on the highway were held to exceed the public's rights of access to the highway. At page 254G-255A, he said:

> "The question to which this appeal gives rise is whether the law today should recognise that the public highway is a public place, on which all manner of reasonable activities may go on. For the reasons I set out below in my judgment it should. Provided these activities are reasonable, do not involve the commission of a public or private nuisance, and do not amount to an obstruction of the highway unreasonably impeding the primary right of the general public to pass and repass, they should not constitute a trespass. Subject to these qualifications, therefore, there would be a public right of peaceful assembly on the public highway."

70. Later in his speech in DPP v Jones, Lord Irvine considered section 137 of the Highways Act and the earlier cases including Hirst and Agu with which he obviously agreed. Lord Clyde agreed with Lord Irvine and he stated at page 281E-F:

> "I am not persuaded that in any case where there is a peaceful non-obstructive assembly it will necessarily exceed the public's right of access to the highway. The question then is, as in this kind of case it may often turn out to be, whether on the facts here the limit was passed and the exceeding of it established. The test then is not one which can be defined in general terms but has to depend upon the circumstances as a matter of degree. It requires a careful assessment of the nature and extent of the activity in question. If the purpose of the activity becomes the predominant purpose of the occupation of the highway, or if the occupation becomes more than reasonably transitional in terms of either time or space, then it may come to exceed the right to use the highway."

Lord Hutton agreed with Lord Irvine.

71. The issue in DPP v Jones related to what amounted to a trespass on the highway and the majority in the House of Lords stressed that the assembly in that case was not obstructive. Nonetheless, the majority did approve Hirst and Agu which had considered section 137 of the Highways Act 1980 and held that it is possible to have an obstruction of the highway which is reasonable and therefore has a lawful excuse for the purposes of that section.

72. In Birch v DPP, a peaceful demonstration involved protestors sitting on the road blocking the traffic. It was held that no one was permitted unreasonably to obstruct the highway and that there was no right to demonstrate in a way which did obstruct the highway.

73. Section 22A(1) and (2) of the Road Traffic Act 1988 provides:

> "(1) A person is guilty of an offence if he intentionally and without lawful authority or reasonable cause -
>
> (a) causes anything to be on or over a road, or
>
> (b) interferes with a motor vehicle, trailer or cycle, or
>
> (c) interferes (directly or indirectly) with traffic equipment,
>
> in such circumstances that it would be obvious to a reasonable person that to do so would be dangerous.
>
> (2) In subsection (1) above 'dangerous' refers to danger either of injury to any person while on or near a road, or of serious damage to property on or near a road; and in determining for the purposes of that subsection what would be obvious to a reasonable person in a particular case, regard shall be had not only to the circumstances of which he could be expected to be aware but also to any circumstances shown to have been within the knowledge of the accused."

Articles 10 and 11

74. As I explained earlier, I have so far considered the causes of action relied upon by the Claimants without explicit regard being paid to Articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms. It is agreed that these Articles are engaged on the facts of this case even though none of the Claimants is a public authority.

75. Article 10 provides:

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

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

76. Article 11 provides:

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

77. The demonstrations and protests in this case do involve the expressions of opinions and assembly and association with others. Both Articles confer qualified, rather than absolute, rights. Both Articles are qualified in relation to matters which involve public safety, matters needed for the prevention of disorder or crime and for the protection of the rights of others.

78. Ms Williams QC, for the Sixth Defendant made a number of submissions as to the significance of Articles 10 and 11 and cited a number of relevant authorities. In particular, she submitted:

(1) freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and the development of every man;

(2) freedom of expression is available for ideas which offend, shock or disturb the State or any sector of the population;

(3) although Article 11 refers to "peaceful assembly" the only type of assembly which did not qualify were those in which the organisers and participants intended to use violence or where they denied the foundations of a democratic society; use by a small number of protestors of violence did not lead to the whole assembly being branded as non-peaceful;

(4) direct action protests can fall within Articles 10 and 11; such protests can include lock-ons, sit ins, protest camps and long term occupations;

(5) although Articles 10 and 11 do not justify criminality or breaches of the law, these Articles do extend to direct action protest activity which deliberately intends to cause annoyance, offence or disruption;

(6) whether the Articles confer a right to carry on direct action protest activity in a particular case will depend upon whether the rival right which is said to qualify Articles 10 and 11, for example the criminal law or the rights of others, satisfies the threefold test referred to below;

(7) the threefold test is that the matter relied upon to restrict or qualify the rights conferred by these Articles, must be:

a) prescribed by law; and

b) necessary in a democratic society; and

c) pursue one or more of the legitimate aims specified in Article 10(2) or 11(2), as the case may be.

(8) a matter is prescribed by law only if it satisfies the established principles as to certainty and legality;

(9) whether something is necessary in a democratic society requires the court to consider whether the interference with the Article 10 or Article 11 right corresponds to a pressing social need and whether it is proportionate to the legitimate aim pursued; restraints on freedom of expression are acceptable only to the extent that they are necessary and justified by compelling reasons; the need for restraint must be convincingly established; this submission applied not only as to whether Articles 10(2) and 11(2) restricted the rights to freedom of expression and assembly by reference to the rights of others but also extended to the question whether the rights of others should be protected by the criminal law or additionally protected by the grant of an injunction.

79. In addition to a number of leading Strasbourg cases which established the above propositions, Ms Williams cited a number of domestic decisions, namely, Westminster CC v Haw [2002] EWHC 2073 (QB), Tabernacle v Secretary of State for Defence [2009] EWCA Civ 23, Mayor of London v Hall [2010] EWCA Civ 817, [2011] 1 WLR 504 and City of London v Samede [2012] EWCA Civ 160, [2012] 2 All ER 1039 which are relevant in the present case as they concerned protests involving direct action.

80. In Westminster CC v Haw, the highway authority sought a final injunction to remove Mr Haw who was camping on the pavement opposite the Houses of Parliament. The court (Gray J) applied the authorities to which I have earlier referred as to section 137 of the Highways Act 1980 and asked whether Mr Haw's obstruction of the pavement was unreasonable. The court had regard to the duration, place, purpose and effect of the obstruction as well as the fact that Mr Haw was exercising his right to freedom of expression under Article 10. It was held that the obstruction was reasonable.

81. In Tabernacle v Secretary of State for Defence, the Court of Appeal considered an application for judicial review of a bye-law made by the Secretary of State for Defence which would have the effect of banning a protest camp at Aldermaston. The court asked itself whether the Secretary of State had justified the bye-law in a way which satisfied the requirements of Articles 10 and 11. It was held that he had not done so as the suggested justification was limited to dealing with possible nuisance created by the camp. Laws LJ then said at [43]:

> "Rights worth having are unruly things. Demonstrations and protests are liable to be a nuisance. They are liable to be inconvenient and tiresome, or at least perceived as such by others who are out of sympathy with them. Sometimes they are wrong-headed and misconceived. Sometimes they betray a kind of arrogance: an arrogance which assumes that spreading the word is always more important than the mess which, often literally, the exercise leaves behind. In that case, firm but balanced regulation may be well justified. In this case there is no substantial factor of that kind. As for the rest, whether or not the AWPC's cause is wrong-headed or misconceived is neither here nor there, and if their activities are inconvenient or tiresome, the Secretary of State's shoulders are surely broad enough to cope."

82. In Mayor of London v Hall, the Court of Appeal refused permission to appeal to a group of protestors who were camping on Parliament Square against an order for possession and an injunction requiring their removal from the Square. The court regarded the location of the protest as significant (in the protestors' favour) for the purpose of Articles 10 and 11. The court was required to balance the protestors' rights to protest against other matters referred to in Articles 10(2) and 11(2), including the rights of others. The trial judge had referred to issues as to public health and the prevention of criminal damage; he also referred to the rights of others to use the Square. He held that the balancing exercise resulted in it being appropriate to make the order for possession and grant the injunction. The Court of Appeal added into the balancing exercise the rights of different protestors to demonstrate on the Square. The decision in Tabernacle was distinguished. A different result was reached in relation to Mr Haw and a supporter of his and their cases were remitted for further consideration.

83. In City of London v Samede, the Court of Appeal refused permission to appeal to a group of protestors against a possession order and an injunction requiring their removal from St Paul's Churchyard. The protestors relied on Articles 10 and 11 and submitted that the judge had reached the wrong conclusion when carrying out the balancing exercise required by Articles 10 and 11. Referring to the question, posed by the judge, as to the limits to the right of lawful assembly and protest on the highway, Lord Neuberger MR (giving the judgment of the court) said at [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."

As to the extent to which the court should take into account the views being expressed by the protestors, Lord Neuberger said at [41]:

> " … 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."

The test for an interim injunction

84. I will now address the test which I should apply to an application for an interim injunction. Normally, the test is that stated in American Cyanamid Co v Ethicon Ltd [1975] AC 396 which 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). The Defendants say that this does not identify the appropriate test in the present case and that the right test to apply is that laid down in section 12 of the Human Rights Act 1998 which provides:

> "12(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."

85. The meaning of "likely" in section 12(3) was considered in Cream Holdings Ltd v Banerjee [2005] 1 AC 253, in particular at [22] per Lord Nicholls. I do not think that any of the special considerations referred to by Lord Nicholls apply in the

circumstances of the present case. I consider that in this case "likely" can simply be taken to mean "more likely than not".

86. The parties did not agree as to whether section 12(3) applies in this case. I am satisfied that it does. I have to ask whether the order I am asked to make "might" affect the exercise of the Convention right to freedom of expression. As I am not granting a final injunction after a trial and as I have not therefore made a final determination as to the extent of the Defendants' rights as to freedom of expression, an interim order which restricts demonstrations and protests "might" affect the Defendants' rights to freedom of expression.

Quia timet injunctions

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.

96. At this point, I will comment on a slightly different but related point. Was it premature for Ineos to seek ex parte relief in this case on 28 July 2017? The Defendants say that I was misled on the ex parte application into believing that an interference with Ineos's rights was so imminent that it was appropriate for Ineos to apply to the court on an urgent ex parte basis. In fact, I did not grant the injunction ex parte on the basis of alleged urgency. I did not form the view that the order had to be made on 28 July 2017 and could not wait for a day or so to allow the Defendants to be given notice of the hearing. Instead, I took the view that the giving of notice of the application to the Defendants would tip them off as to what might happen at a hearing of the application which might have led them to take some of the action which the injunctions which were sought were intended to prevent. The evidence did show that it was possible for protestors to trespass on land and set up protest camps on short notice.

The likely result at a trial

97. In this case, I am not asked to grant a final injunction but am asked to grant an interim injunction until trial or further order. I recognise however that the grant of an interim injunction is likely to have a significant effect on some of the methods the Defendants wish to use in order to protest against Ineos' intended fracking operations. I cannot predict whether this case will ever go to trial.

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

99. Before addressing the legal points which arise, I will make my findings as to which of the risks apprehended by the Claimants would be considered to be imminent and real. I consider that on the evidence before me there is an imminent and real risk of:

    (1) trespass on the Claimants' land;

    (2) interference with equipment on the Claimants' land;

    (3) substantial interference with the private rights of way enjoyed by some of the Claimants;

    (4) action to prevent the Claimants leaving their land and passing and repassing on the highway; and

    (5) action to prevent third party contractors leaving their land and passing and repassing on the highway.

100. I referred earlier to the police report as to the types of direct action which the police have noted in the past. Based on how matters are there described, I consider that there is an imminent and real risk of specific actions such as:

    (1) trespass on land;

    (2) slow walking;

    (3) protestors placing themselves and things such as bicycles and cars and other objects in the path of vehicles;

    (4) placing placards in front of drivers' windscreens;

    (5) climbing onto vehicles;

    (6) parking across site gates;

    (7) the impeding of site workers;

    (8) lock-on blockades of site entrances;

    (9) lock-ons to the underside of vehicles; and

    (10) the targeting of secondary and tertiary supply companies.

101. I consider that the particular causes of action which need to be explored to consider the remedy which might be appropriate for these risks are:

    (1) trespass to land;

(2) damage to, and theft of, equipment on the Claimants' land;

(3) actionable interference with an easement;

(4) interference with the common law right to access the highway from private land;

(5) obstruction of the highway as an actionable public nuisance; and

(6) conspiracy to injure Ineos by means of the matters in (1) to (5) above in relation to third party contractors supplying goods and services to Ineos.

102. For the reasons which I will give later in this judgment, I do not favour the grant of an injunction against "harassment" largely because of the lack of clarity of that term for the purposes of being included in an injunction. Further, if it is appropriate to grant injunctions against the specific matters referred to in paragraphs 99 and 100 using the causes of action referred to in paragraph 101 above, then that is preferable to an injunction designed to restrain "harassment" without further specification. I take a similar view in relation to some of the generally expressed terms of section 241(1) of the Trade Union and Labour Relations (Consolidation) Act 1992.

103. As regards the cause of action in trespass, the right to freedom of expression and the right of assembly under Articles 10 and 11 are relevant. However, there is clear authority as to how those Articles should be applied in cases where the claim is for trespass to private land. I was referred to Appleby v United Kingdom (2003) 37 EHHR 783, School of Oriental and African Studies v Persons Unknown [2010] EWHC 3977 (Ch) and Sun Street Property Ltd v Persons Unknown [2011] EWHC 3432 (Ch). Although the law is quite clear and the result of applying it in the present case was not really in dispute before me, I will refer further to the last of these three cases as it is relevant to submissions I will later deal with as to whether I was misled when I granted injunctions ex parte on 28 July 2017.

104. In Sun Street, the judge (Roth J) referred to Articles 10 and 11 and to the earlier cases of Appleby and School of Oriental and African Studies. He also referred to Mayor of London v Hall and quoted two paragraphs ([37] and [38]) from that case which referred to a number of relevant matters when balancing competing rights for the purposes of Articles 10 and 11. Roth J then contrasted the position of a prominent public space with private land. On the facts of the particular case, Roth J said at [32] in relation to submissions as to Article 10:

> "Those submissions confuse the question of whether taking over the bank's property is a more convenient or even more effective means of the Occupiers expressing their views with the question whether if the bank, or, more accurately, its subsidiary, recovered possession, the Occupiers would be prevented from exercising *any* effective exercise of their freedom to express their views so that, in the words of the Strasbourg Court, the essence of their freedom would be destroyed. When the correct question is asked, it admits of only one answer. The individuals or groups currently in the Property can manifestly communicate their views about waste of

> resources or the practices of one or more banks without being in occupation of this building complex. No one is seeking to prevent them from coming together to campaign or promulgate those views. I need hardly add that the fact that the occupation gives them a valuable platform for publicity cannot in itself provide a basis for overriding the respondent's own right as regards its property."

105. In the present case, if a final injunction were sought on the basis of the evidence presented on this interim application, the court is (to put it no higher) likely to grant an injunction to restrain the protestors from trespassing on the land of the Claimants. The land is private land and the rights of the Claimants in relation to it are to be given proper weight and protection under Articles 10(2) and 11(2). The Claimants' rights are prescribed by law, namely the law of trespass, and that law is clear and predictable. The protection of private rights of ownership is necessary in a democratic society and the grant of an injunction to restrain trespass is proportionate having regard to the fact that the protestors are free to express their opinions and to assemble elsewhere. There would also be concerns as to safety in the case of trespass on the Claimants' land at a time when that land was an operational site for shale gas exploration.

106. I take the same view as to the claim in private nuisance to prevent a substantial interference with the private rights of way enjoyed in relation to Sites 3 and 4. I would not distinguish for present purposes between the claim in trespass to protect the possession of private land and the claim in private nuisance to protect the enjoyment of a private right of way over private land.

107. The Claimants' claim in relation to obstruction of the highway outside Sites 1 to 8 is put in public nuisance. However, as indicated earlier, based on the passage in Clerk & Lindsell referred to above, the Claimants have a private common law right to access the highway from their land which fronts upon the highway but I will assume in favour of the protestors that if they were carrying on a reasonable use of the highway which impacted on the Claimants' right to access the highway, that would not be an infringement of the right of access to the highway.

108. Two matters need to be considered as to the use of the highway. The first is as to whether the actions of the protestors amount to a reasonable use of the highway and the second is as to the application of Articles 10 and 11. I will proceed on the basis that these matters should be dealt with in the same way for the purposes of the law as to public nuisance as they do in relation to the criminal offence under section 137 of the Highways Act 1980.

109. It is clear from the authorities that, to some extent, demonstrations and protests on the highway can be a reasonable use of the highway. The question is whether direct action of the kind used in the present case would be held to be reasonable use. The particular direct action of which there are examples in the present case are slow walking, lock-ons and other obstructions of the highway.

110. I have seen video footage of the way in which slow walking has been carried out as part of anti-fracking protests. One type of slow walking involved a number of protestors walking on the main road in front of a vehicle, with the result that the

vehicle and all of the traffic backed up behind it was forced to proceed at the pace of the walkers. The "walking" by the protestors was at an unnaturally slow pace. Anyone who was out for a walk or who wanted to get somewhere would not have walked at the pace shown in the video evidence. The pace of the walking was as slow as possible so as not to amount to the protestors being stationary on the highway. Another example of slow walking shown by the video evidence was where the protestors walked in front of vehicles trying to leave a depot of one of the fracking operators. Again, the pace of the walking was the bare minimum so as not to amount to the protestors being stationary on the highway.

111. It is perhaps implicit in the protestors' wish not to remain stationary on the highway that they recognised that to do so would have amounted to an unreasonable use of the highway. In any event, I think that it is likely that on an application for a final injunction, a court would take the view that standing still in order to block the passage of vehicles on the highway because the vehicles are being used for a purpose to which the protestor objects would not be a reasonable use of the highway. If so, I simply do not see that the somewhat token amount of movement involved in slow walking would change the legal assessment of the protestors' actions.

112. The lock-ons in the present case involve protestors being locked-on to each other or to something which cannot easily be moved. The idea is that when the police wish to remove the protestors, the process of removal will take much longer because of the need to cut through the means by which the protestors are locked-on. If the protestors are lying on the highway in a way which obstructs the traffic then the additional element of locking-on is designed to prolong the period of such obstruction. On an application for a final injunction, I think that it is likely that a court would hold that the act of lying in the road to obstruct traffic particularly with the additional delay in removal caused by locking-on to someone else or to something would not be regarded as a reasonable use of the highway.

113. I reach these conclusions as to what would amount to reasonable use of the highway by paying proper attention to the facts of the earlier cases which accepted that demonstrations and protests on the highway could be considered to be a reasonable use of the highway. The degree of obstruction of the highway which was contemplated in those cases as being potentially reasonable was strikingly more limited than what has been involved in the direct action protests of the anti-fracking protestors in this case.

114. Accordingly, if on the application for a final injunction, it is likely that a court would hold that the direct action protests on the highway amounted to a public nuisance and a criminal offence under section 137 of the Highways Act 1980, what then would be the result of an application of Articles 10 and 11? As explained in Mayor of London v Hall and Samede, that question is fact sensitive. The court has regard to number of factors which include the extent to which the continuation of the protest would breach domestic law, the importance of the location of the protest to the protestors, the duration of the protest and the extent of the actual interference with the rights of others, including the public. I consider that a court considering whether to grant a final injunction would take the view that the rights of the fracking operators should prevail over the claims of the protestors to be entitled to do what they do under Articles 10 and 11. The protestors are doing much more than expressing their opinions about the undesirability of fracking. They are taking direct action against the

fracking operators in an attempt to make them stop their fracking activities. It would not be surprising in such a case that the court would take the view that balancing the entitlement to freedom of expression and assembly against the rights of others, the balance should be struck in favour of protecting the rights of others from a direct interference with those rights. As to the location of the protests, the location of the direct action is chosen as the best place to interfere with the activities of the fracking operators rather than (as in Parliament Square or St Paul's Churchyard) the best place to express opinions to the general public. As to the duration of the obstruction of the highway and the interference with the rights of others, the duration is intended to be long enough to have an adverse impact on the activities of the fracking operators.

115. As explained above, there are a number of ingredients to the tort of conspiracy to injure by unlawful means. I will start by considering the unlawful means. Theft and criminal damage are plainly unlawful means. There is clear evidence as to criminal offences under section 137 of the Highways Act 1980 aimed at third party contractors providing services to fracking operators. There is also evidence which shows that there have been activities contrary to section 22A of the Road Traffic Act 1988. Locking-on to a vehicle is an interference with the vehicle which is dangerous.

116. As to the combination by protestors to commit unlawful acts, there is clear evidence as to such a combination. In particular, the offences under section 137 of the Highways Act 1980 involved a number of protestors acting together in a way which must have been planned and were not coincidence. Further, the evidence shows that the protestors intended to injure the fracking operator whether the protests took place in relation to the premises and vehicles of the operator or of the third party contractors.

Persons unknown

117. I am asked to grant interim injunctions against five categories of "Persons Unknown". In paragraphs 8 - 12 above, I have set out the descriptions of the first five sets of Defendants, variously described as Persons Unknown.

118. The Claimants submit that the joinder of parties as "Persons Unknown" is now an established and permissible way to proceed. Accordingly, they submit that they are able to use that procedure in this case and no special justification for using it needs to be shown. They say that they do not have to show that it is impossible for them to ascertain the names of any of the protestors who might be involved in the conduct which is to be restrained by the injunctions. They say that they do not have to use the different procedural rules whereby a claimant can sue a named defendant as a representative of others with the same interest: see CPR rule 19.6.

119. At the inter partes hearing in September 2017, I heard submissions from the Defendants on the procedure used by the Claimants in this respect. I was concerned at the idea that the court might be asked to grant a quia timet injunction against persons who had not yet committed the acts which the injunction would prevent them from doing but yet they would be defined as defendants as Persons Unknown who have committed such acts. For example, the First Defendants are defined as Persons Unknown entering or remaining on specified areas of land but when the proceedings were issued and the ex parte injunctions were granted, no one had entered on the specified land as a trespasser (subject to the possibility that there might have been a

trespass on Site 1). Proceeding in this way would seem to produce the result that at the time when the court made its order there were no persons within the defined category of Persons Unknown. How then, later, did some persons come within that category and become subject to the court's order? Did they become parties by their unilateral action which was action forbidden by the court's order?

120. The first case which permitted a claimant to sue persons unknown defined by other words of description (without specific statutory authority for that procedure) was Bloomsbury Publishing Group Ltd v News Group Newspapers Ltd [2003] 1 WLR 1633. In that case, the judge (Sir Andrew Morritt V-C) said at [21] that it was not material that the description of persons unknown might apply to no one. In Hampshire Waste Services Ltd v Intended Trespassers [2004] Env LR 196, the same judge granted a quia timet injunction to restrain future trespass by protestors. The judge amended the description of the persons unknown in that case so that it referred to persons entering or remaining on the relevant land without the consent of the owner of it. The judge did not favour a description which involved a legal concept such as "trespass" nor did he favour a description which involved a person's subjective state of mind, for example, his intentions. These two cases were discussed with approval by Lord Rodger of Earlsferry in Secretary of State for the Environment, Food and Rural Affairs v Meier [2009] 1 WLR 2780 at [2].

121. Before the development of the law in Bloomsbury Publishing, in 1991, Parliament had introduced a new section, section 187B, into the Town and Country Planning Act 1990 which provided for the making of rules of court so as to permit a local authority in certain cases to obtain injunctive relief against persons unknown. Those powers were considered by the Court of Appeal in South Cambridgeshire DC v Gammell [2006] 1 WLR 658. At [32], Sir Anthony Clarke MR described the position where an injunction had been granted against persons unknown of a certain description and following that order a person had done the thing which the order provided should not be done. It was held that when that person did the thing forbidden by that order, that person became a party to the proceedings and committed a breach of the order. It was not necessary to make a further order of the court adding that person as a party.

122. Although, in Hampshire Waste, the judge did not favour a description of persons unknown which included a reference to their intentions (and the same view was taken in South Cambridgeshire DC v Persons Unknown [2004] EWCA Civ 1280) there have been later cases where words such as "intending" or "proposing" have been used.

123. Since Bloomsbury Publishing, there have been many cases where the courts have been asked to grant, and have granted, injunctions against persons unknown. As it happens, many of these involved injunctions against various kinds of protestors. I consider that the position has now been reached that the procedure adopted by the Claimants in the present case is a course which was open to them. Although the Defendants made detailed submissions calling into question the use of this procedure, the Defendants did not focus on the words of description which were used in this case and did not suggest modifications to the wording adopted by the Claimants.

The duty of candour on an ex parte application

124. Before considering whether to grant injunctions in this case and, if so, the terms of any injunctions, it is necessary to consider the submission made by the Defendants which criticised the Claimants' conduct of the ex parte application made to the court on 28 July 2017. The Defendants submitted that the Claimants had not conducted that application in a fair way, informing the court in a full and frank way of the points which were available to the Defendants and which could have been put forward by the Defendants if they had been given proper notice of that hearing.

125. There was no real dispute as to the relevant legal principles. The problem, as always in this area, was said to arise in relation to the application of those principles. The Claimants said that there had been no breach of the duty of candour in relation to the ex parte application. The Defendants said that there were several grave breaches of the duty of candour and that the right response from the court would be to discharge the ex parte injunctions (and the continuation of them in September 2017) and to refuse to grant to the Claimants any injunctive relief prior to the trial of the action.

126. Although there was no real dispute as to the legal principles which are well known, it is helpful to set out an often quoted summary of the principles together with some more recent comments since that summary was first provided. The summary is in the judgment of Mr Boyle QC sitting as a Deputy High Court Judge in The Arena Corporation Ltd v Schroeder [2003] EWHC 1089 (Ch) at [213] in these terms:

> "(1) If the court finds that there have been breaches of the duty of full and fair disclosure on the ex parte application, the general rule is that it should discharge the order obtained in breach and refuse to renew the order until trial.
>
> (2) Notwithstanding that general rule, the court has jurisdiction to continue or re-grant the order.
>
> (3) That jurisdiction should be exercised sparingly**,** and should take account of the need to protect the administration of justice and uphold the public interest in requiring full and fair disclosure.
>
> (4) The Court should assess the degree and extent of the culpability with regard to non-disclosure. It is relevant that the breach was innocent, but there is no general rule that an innocent breach will not attract the sanction of discharge of the order. Equally, there is no general rule that a deliberate breach will attract that sanction.
>
> (5) The Court should assess the importance and significance to the outcome of the application for an injunction of the matters which were not disclosed to the court. In making this assessment, the fact that the judge might have made the order anyway is of little if any importance.

> (6) The Court can weigh the merits of the plaintiff's claim, but should not conduct a simple balancing exercise in which the strength of the plaintiff's case is allowed to undermine the policy objective of the principle.
>
> (7) The application of the principle should not be carried to extreme lengths or be allowed to become the instrument of injustice.
>
> (8) The jurisdiction is penal in nature and the court should therefore have regard to the proportionality between the punishment and the offence.
>
> (9) There are no hard and fast rules as to whether the discretion to continue or re-grant the order should be exercised, and the court should take into account all relevant circumstances."

127. That summary was cited by Christopher Clarke J in Re OJSC ANK Yugraneft [2008] EWHC 2614 (Ch), [2010] BCC 475 and he added his own comments at [103]-[106], as follows:

> "103 I regard that as a helpful review of the applicable principles, subject to the overriding principle, reflected in proposition (9), that the question of whether, in the absence of full and fair disclosure, an order should be set aside and, if so, whether it should be renewed either in the same or in an altered form, is pre-eminently a matter for the court's discretion, to which (as Mr Boyle observes at [180]) the facts (if they be such) that the non-disclosure was innocent and that an injunction or other order could properly have been granted if the relevant facts had been disclosed, are relevant. In exercising that discretion the court, like Janus, looks both backwards and forwards.
>
> 104 The court will look back at what has happened and examine whether, and if so, to what extent, it was not fully informed, and why, in order to decide what sanction to impose in consequence. The obligation of full disclosure, an obligation owed to the court itself, exists in order to secure the integrity of the court's process and to protect the interests of those potentially affected by whatever order the court is invited to make. The court's ability to set its order aside, and to refuse to renew it, is the sanction by which that obligation is enforced and others are deterred from breaking it. Such is the importance of the duty that, in the event of any substantial breach, the court strongly inclines towards setting its order aside and not renewing it, so as to deprive the defaulting party of any advantage that the order may have given him. This is particularly so in the case of freezing and seizure orders.

> 105 As to the future, the court may well be faced with a situation in which, in the light of all the material to hand after the non-disclosure has become apparent, there remains a case, possibly a strong case, for continuing or re-granting the relief sought. Whilst a strong case can never justify non disclosure, the court will not be blind to the fact that a refusal to continue or renew an order may work a real injustice, which it may wish to avoid.
>
> 106 As with all discretionary considerations, much depends on the facts. The more serious or culpable the non-disclosure, the more likely the court is to set its order aside and not renew it, however prejudicial the consequences. The stronger the case for the order sought and the less serious or culpable the non-disclosure, the more likely it is that the court may be persuaded to continue or re-grant the order originally obtained. In complicated cases it may be just to allow some margin of error. It is often easier to spot what should have been disclosed in retrospect, and after argument from those alleging non-disclosure, than it was at the time when the question of disclosure first arose."

128. Thus, if the court finds that an applicant has obtained ex parte relief but has failed to comply with the duty or candour or of full and frank disclosure, the court can respond in a number of ways. One response is to discharge the ex parte order which was obtained. If the court does discharge the ex parte order, the court needs to consider whether to grant the same or a similar order following an inter partes hearing. The fact that the court has discharged the ex parte order by reason of the non-disclosure can be enough to persuade the court not to make an inter partes order to which the applicant would otherwise be entitled but a refusal to make an inter partes order does not automatically follow from a decision to discharge the ex parte order.

129. Ms Williams on behalf of the Sixth Defendant made the following principal submissions:

(1) The relief sought on an ex parte basis was in wide sweeping terms;

(2) There was no genuine urgency;

(3) The Claimants had spent an enormous amount of time in preparing the application;

(4) The voluminous extent of the exhibits meant that the court would be heavily reliant on the Claimants' summaries of what the evidence showed;

(5) There was a heavy onus on the Claimants to ensure that the summaries of the evidence did not overstate the evidential position;

(6) The Claimants misled the court in relation to matters of law, as follows:

a) The Claimants did not inform the court that there would only be an actionable obstruction of the highway, or the criminal offence of obstruction of the highway, if the use of the highway was unreasonable;

b) The Claimants' description of the three-pronged test to be applied pursuant to Articles 10 and 11 was inadequate; and

c) The Claimants failed to identify the correct test as to the right to protest on public land;

(7) The Claimants misled the court in relation to factual assertions, as follows:

a) The court was misled as to the alleged urgency of the application;

b) The evidence materially overstated the allegedly imminent risk of injury death or harm and the nature of Ineos' duties in that respect;

c) The selections from social media were unrepresentative;

d) The court was played an unrepresentative 10 minutes of video evidence;

e) The Claimants did not make it clear that the vast majority of anti fracking protests were peaceful and lawful;

f) The Claimants did not make it clear that peaceful protest activity had already taken place in relation to Sites 1 and 2;

g) Mr Fellows' witness statement was unfair in its description of what happened at a meeting in January 2017 in relation to Site 1;

h) Mr Pickering overstated the extent to which there was a consensus that fracking was safe;

i) The Claimants did not make it clear that there was usually, but not always, a delay between the grant of planning permission for drilling on land and the occupation of that land;

j) The experiences of other fracking companies was misdescribed in Mr Talfan Davies' second witness statement; and

k) There were other examples of the facts being misdescribed.

130. Ms Harrison QC for the Seventh Defendant made the following submissions on this part of the case:

(1) At no point was there any inkling of the court being told what could have been said by someone acting for a potential defendant;

(2) The material provided to the court at the ex parte hearing was very extensive; the draft order ran to many pages; there was a 37-page skeleton argument; there were seven witness statements with three lever arch files of exhibits; there was six hours of video footage;

(3) The court was heavily dependent on the material put before it by the Claimants so that the duty of candour on the Claimants was particularly high;

(4) The Claimants misled the court into thinking there was an imminent threat of tortious conduct;

(5) The Claimants referred to "militant protestor activity" and "a recent escalation of unlawful activity";

(6) The Claimants should have told the court that there had been peaceful protests;

(7) The Claim Form stated that the case did not raise any issues under the Human Rights Act 1998;

(8) The court was misled as to the position in relation to Articles 10 and 11;

(9) The court was misled as to the right to protest on the highway and DPP v Jones was not cited;

(10) There was no mention of Article 8;

(11) The description of the position under the Protection from Harassment Act 1997 was inadequate;

(12) The Claimants misrepresented the controversial nature of fracking;

(13) Ineos did not tell the court of its safety failings at other sites;

(14) The Claimants did not explain the rural nature of the drilling sites and the effect of fracking on the local community;

(15) The Claimants falsely alleged that the police supported the application for injunctions; and

(16) The Claimants did not tell the court that posting up notices of the injunction would be a criminal offence of fly-posting.

131. As can be seen, the Defendants' criticisms of the Claimants' conduct of the ex parte application are very extensive. I am quite clear that as regards many of the matters which are now raised by the Defendants, I was not misled. As regards some of the other contentions that the court was misled as to the facts, I consider that it is not appropriate on the Defendants' applications to discharge an ex parte injunction for the court to engage with the underlying disputes of fact. The duty of candour requires the court to be told the crucial facts or the material facts. As to which facts are material, that is judged in a broad sense. The court must preserve a sense of proportion in reacting to a complaint that it was misled. It must not allow the argument to descend into such a degree of detail that it is in danger of not being able to see the wood for

the trees. Further, an application to discharge an ex parte injunction on the ground of non-disclosure ought to be capable of being dealt with reasonably concisely. One of the things which normally cannot be done is to determine what the disputed facts are in order to assess whether the court was misled as to the facts. The position is otherwise if the facts are truly so plain that they can be readily and summarily established. The resolution of disputes as to the facts is normally a matter for the trial rather than for an application to discharge an ex parte injunction. In making the comments in this paragraph, I have followed the guidance given in Kazakhstan Kagazy plc v Arip [2004] EWCA Civ 381 at [36].

132. I will now deal with the allegation that I was misled as to the facts in accordance with the above guidance. By this stage, I have spent a considerable amount of time absorbing what is said in the various witness statements and the exhibits so that I am familiar with all of that material. I have re-read the 37-page skeleton argument which was before me on 28 July 2017. I have also read a transcript of that hearing. The ex parte application was a heavy application. The court was provided with an enormous amount of material. However, the witness statements themselves were not unmanageable, although still lengthy. Whether the exhibits fully supported the statements made by the witnesses is not a question which can be adjudicated upon on the applications to discharge the ex parte injunctions. It is certainly not plain and obvious that they did not. I have of course considered in a general way the allegations of misleading facts but my overall assessment is that the court was not misled.

133. I turn then to consider the submissions that I was misled as to the law to be applied. I deal first with the submission that I was misled as to the civil and criminal law as to what amounts to an obstruction of the highway and the extent to which protests on the highway are lawful. The skeleton argument prepared for the ex parte hearing referred to the law as to public nuisance and, separately, as to section 137 of the Highways Act 1980. In relation to section 137, the skeleton argument referred to the defence of lawful authority and excuse and separately to the question whether a defendant's use of the highway was reasonable, citing both Westminster CC v Haw and Nagy v Weston. The former of those cases cited both Hurst and Agu and DPP v Jones. I consider that the skeleton adequately directed me to the point that some protest activity on the highway could be a reasonable use of the highway. I considered at the ex parte hearing that it was likely (see section 12(3) of the Human Rights Act 1998) that at trial the Claimants would establish that the obstructions of the highway complained of in this case were actionable and an infringement of section 137. Following the three day inter partes hearing, I plainly have an even deeper understanding of what the case law says about non-obstructive protests on the highway but I remain of the view that the present case is a clear one that the direct action protests on the highway in this case go well beyond lawful reasonable use of the highway.

134. As to the position under the Human Rights Act 1998, the ex parte application was presented on the basis that Articles 10 and 11 were engaged and that section 12(3) applied. As to the potential application of Articles 10 and 11, it was submitted:

> "**The Relevance of the Defendants' Convention Rights to the Applicable Test**

> 23. For the purpose of the present application only, Cs accept that the court must be satisfied that any relief granted by it would not amount to a disproportionate interference with Ds' Convention rights under Articles 10 and 11 of the European Convention, when balanced against Cs' rights to peaceful enjoyment of their possessions (including their real property, personal property and corporate goodwill) under Article 1 of Protocol 1 of the European Convention ("A1P1"). These rights are all qualified rights.
>
> 24. A corporate entity's goodwill and intangible assets are possessions which qualify for protection under A1P1, albeit that an entity's expected or anticipated future income is not a possession: Clayton and Tomlinson, *The Law of Human Rights* (2nd Ed, 2009) at 18.22, citing R (Countryside Alliance) v Attorney-General [2008] 1 AC 719; [2007] UKHL 52 at 747C-G ([22]), per Lord Bingham.
>
> 25. Cs' case is that Ds' have no defence to this application based on their Convention rights, as:
>
> a. in the balancing exercise between Cs' A1P1 rights and Ds' Convention rights, Article 10 has no presumptive priority over other qualified Convention rights, including A1P1: Thames Cleaning and Support Services Ltd v United Voices of the World [2016] EWHC 1310 (QB) at [35], per Warby J.
>
> b. when a private landowner's A1P1 rights are to be balanced against protesters' rights under Articles 10 and 11 of the European Convention, the latter will only be capable of altering the position which would obtain under domestic law where the failure to restrict the landowner's property rights would prevent any effective exercise of freedom of expression, or where the essence of the right would be destroyed: Appleby v United Kingdom (2003) 37 EHRR 38 at [47], applied in Sun Street Property Ltd v Persons Unknown [2011] EWHC 3432 at [32]-[33], per Roth J; and Manchester Ship Canal Developments Ltd v Persons Unknown [2014] EWHC 646 (Ch) at [37], per HHJ Pelling QC.
>
> c. there can be no argument that the injunction sought by Cs would have this effect, as Cs seek no more than to prevent Ds engaging in activities which are unlawful under domestic law."

135. In Thames Cleaning, the judge (Warby J) dealt with Articles 10 and 11 and section 12(3) in four short paragraphs. It might be said that his discussion on those matters was not a full exposition of the relevant principles but, conversely, the Claimants can say that their description of the legal position was not inadequate because it was at least as thorough as the judge's in that case.

136. At the ex parte hearing, I was specifically taken to the decision in Sun Street where the judge (Roth J) set out the full text of Articles 10 and 11 and the decision in Appleby. Sun Street also referred to Mayor of London v Hall and I was provided with a copy of the decision at first instance in that case. Earlier in this judgment, I have described what was decided in that case. It was argued at the inter partes hearing that the decision in Sun Street only deals with the right to possession of private land and therefore has nothing to say about the right to protest on the highway. Although this was not argued before me, it may be that Sun Street is a potentially relevant authority even when the "rights of others" referred to in Article 10(2) or 11(2) are the rights of a private operator, who is not a public authority, to carry on a lawful business (with or without goodwill) and so that the authority is not restricted to a case where the right in question is a right to the possession of private land.

137. Of course, after three days of an inter partes hearing with lengthy skeleton arguments, the citation of many authorities and oral submissions from four leading counsel, my understanding as to the operation of Articles 10 and 11 is now deeper than it was on 28 July 2017. However, on 28 July 2017, I was not misled as to the importance of the rights conferred by Articles 10 and 11. Further, much of the case law on these Articles to which I was referred by Ms Williams is an elaboration of the words of the Articles and many of the principles are clear enough from the wording of Articles 10(2) and 11(2). Further, I was aware from the authorities cited to me on 28 July 2017 that Articles 10 and 11 extended to direct action protests and involved a fact sensitive assessment. I also bear in mind that after the detailed exposition from the Defendants as to Articles 10 and 11, the case remains a clear one where I consider that it is not open to the Defendants to rely on Articles 10 and 11 in an attempt to justify direct action for the purpose of harming the Claimants with a view to forcing them to give up their lawful business. I consider that I was not misled as to the basic principles as to Articles 10 and 11 by reason of any breach by the Claimants of their duty of candour.

138. For the sake of completeness, the fact that the Claimants' solicitor ticked the box on the Claim Form saying that there were no issues under the Human Rights Act 1998 has no significance, particularly in the light of the way matters were described in the skeleton argument.

139. As to the position under the Protection from Harassment Act 1997, the matter was not very clearly presented initially at the ex parte hearing but during the hearing, I was taken to the basic provisions of the 1997 Act and the distinction between a case where the victim of the harassment is an individual and a case was made within section 1(1A) and section 3A. Also, I raised the question whether it was appropriate to grant an injunction against "harassment" without further specification and with some hesitation, I made such an order.

140. Having considered the applications to discharge the ex parte injunction and the order in September 2017 which continued it, I am not persuaded that the Claimants did break their duty of candour to the court. If I had been persuaded that there was a breach of that duty, based on the submissions made to me, I would not have refused to grant an injunction until trial on account of the earlier breach of duty. Applying the approach in paragraphs [103]-[106] of OJSC Ank Yugraneft, I would have held that any breach was innocent and insubstantial and the case for an injunction was strong.

That would have led me to grant an injunction until trial even if the facts of this case had crossed the line into being a breach of the duty of candour.

The need for clarity and precision

141. It is important in this case that any injunction granted must be expressed in clear and precise terms. There is a general requirement to that effect, as explained in A-G v Punch Ltd [2003] 1 AC 1046 per Lord Nicholls at [35]:

> "35 Here arises the practical difficulty of devising a suitable form of words. An interlocutory injunction, like any other injunction, must be expressed in terms which are clear and certain. The injunction must define precisely what acts are prohibited. The court must ensure that the language of its order makes plain what is permitted and what is prohibited. This is a well established, soundly-based principle. A person should not be put at risk of being in contempt of court by an ambiguous prohibition, or a prohibition the scope of which is obviously open to dispute. An order expressed to restrain publication of "confidential information" or "information whose disclosure risks damaging national security" would be undesirable for this reason."

Should I grant injunctions and if so, in what terms

142. I have held that there is an imminent and real risk that, in the absence of injunctions, the Defendants will interfere with the legal rights of the Claimants. Further, in the absence of injunctions, it is unlikely that the Claimants will receive any legal redress or compensation for the infringement of their rights. Ineos's business activities are lawful. The Defendants wish Ineos to stop carrying on those activities and wish to put pressure on Ineos to stop. However, on my findings in this judgment, the Defendants' means of putting pressure on Ineos involve unlawful behaviour on their part, including criminal acts. I have also held, applying section 12(3) of the Human Rights Act 1998, that it is likely that the court following a trial would grant a permanent injunction to restrain the interferences with the Claimants' legal rights. The normal response of a court to this state of affairs would be to grant similar interim injunctions without further ado.

143. The Defendants submit that this is not a proper case in which the court should intervene by granting interim injunctions. It is said that the civil courts should leave it to the criminal law and to the police to deal with any criminal behaviour which arises. Put that way, I am not attracted to that submission. The fact that the same conduct might involve criminal offences as well as wrongdoing which is actionable in a civil court is not usually a reason to deny a claimant in a civil court an injunction to restrain interference with his legal rights. The detection and prosecution of alleged criminal offenders is generally left to public authorities but there is no reason for a civil court to deny to a claimant the advantages which ought to flow from the grant to it of an injunction. It was also suggested that if Ineos were granted injunctions that would complicate the position of the police and would result in Ineos being in a position to tell the police what to do and contrary to the wishes of the police. I do not see how that would be so. If the injunctions are complied with then the result ought to

be that there would be less need for the police to be involved. If the injunctions are not complied with and the police are involved, then they will be free to form their own decisions as to the appropriate response to the situation as they find it. It is not appropriate for me to try to predict whether any injunctions which are granted will be obeyed. I was not asked to refuse to grant injunctions on the ground that they would not be obeyed and it would not be right to refuse relief on that ground. Equally, it is not appropriate for me to speculate as to the ease or difficulty which the Claimants would have in seeking to enforce any clearly expressed injunction.

144. I conclude that I ought to grant injunctions in this case provided that they can be expressed in clear terms having regard to the matters emphasised in Attorney General v Punch Ltd.

145. In relation to the injunctions to restrain trespass on Sites 1, 3, 4, 5, 6 and 8 (where there are no public footpaths) are concerned, it is a straightforward matter to grant an injunction in terms which prevent the Defendants entering or remaining on that land without the consent of the relevant Claimants. The Defendants say that such an order would go too far as it would prevent the Defendants attending on such a site, for example the offices of Ineos, to hand in a petition against fracking. The Defendants say that they are entitled to enter Ineos' offices for such a purpose as part of their rights under Articles 10 and 11. They also submit that they are entitled to go on to Ineos' land to stand there with a placard. I do not agree with these submissions. At the lowest, I consider that it is likely that a court asked to grant a final injunction against trespass would hold that the Defendants were not so entitled.

146. In the case of Sites 2 and 7, there is a public footpath across the sites. The orders granted in July and September 2017 provided that the injunction was not to prevent a member of the public using those footpaths. The Defendants made a number of practical points about what is involved in using a public footpath. A public footpath will have a particular width in legal terms although there may be a lack of clarity both in fact and in law as to what that width is. Further, there will be occasions when a walker will leave the footpath without causing any harm to anyone but yet leaving the footpath will result in an act of trespass and a breach of an order restraining trespass. An obvious example would be where the walker is pulled off the path by his dog or he goes off the path to retrieve his dog. My view is that the order should continue to provide as it did in July and September 2017. It is not sensible to start drafting elaborate wording dealing with various practical problems which walkers face when asked to keep to a public footpath. Conversely, it is not sensible to refuse to grant an injunction against trespassing on Sites 2 and 7 on account of what is suggested to be a particular difficulty in this respect.

147. Another point raised as to the public footpaths is that it was submitted that the legal principles as to reasonable use of a highway should apply equally to reasonable use of a public footpath. Thus, it is submitted, if the public are entitled to protest on a highway, they are entitled to protest on a public footpath. I consider that I do not need to rule on this submission. The injunction in relation to trespassing on Sites 2 and 7 will permit the public to use the public footpaths in accordance with their rights to do so, whatever they are. If members of the public wish to use the footpath to protest against fracking but without otherwise trespassing on Sites 2 and 7, then it remains to be seen whether there will be any complaint about such protests. If there are complaints, then at that stage they can be raised and determined.

148. I will also grant injunctions to restrain the Defendants from causing damage to, or removal of, equipment on Sites 1, 2, 3, 4 and 7. It will not be necessary to join a new class of Defendants for this purpose as they will be the First Defendants because they have entered upon those Sites.

149. As regards the injunctions to restrain interference with the private rights of way in the case of Sites 3 and 4, I will grant the injunctions in the terms granted in September 2017. The injunctions will prevent "substantial interference" with the rights of way. I was not asked to include any definition of what would amount to substantial interference and I do not think that it is appropriate to do so. The concept of substantial interference with a right of way is simple enough and is well established.

150. I now turn to consider what restrictions, if any, should be placed on protestors' activities on the highway. In September 2017, the injunction referred to the Defendants "unreasonably interfering and/or interfering without lawful authority or excuse" with the right to pass and repass. I consider that it is appropriate for any order to be more clear as to what is not allowed. I will restrain any obstruction which prevents the Claimants accessing the highway from any of their Sites, with the intention of causing inconvenience and delay. Given that there has been argument about slow walking on the highway, I consider that the injunctions should expressly state that walking in front of vehicles with the object of slowing then down and with the intention of causing inconvenience and delay is not permitted. Other activities which are not to be permitted are blocking the highway with persons or things when done with a view to slowing down or stopping the traffic and with the intention of causing inconvenience and delay. Similarly, I will restrain the climbing by protestors on to vehicles being used by the Claimants (which would be a trespass to such vehicles).

151. There will also be an injunction to restrain a combination, with the intent of causing injury to Ineos, where the combination is to commit any of the modes of obstructing access to the highway or use of the highway referred to above, the access and use in question being by a third party contractor engaged to supply goods or services to Ineos. The injunction will name the contractors intended to be embraced by this order.

152. That brings me finally to the injunctions sought in relation to harassment. The principal injunction which is sought in respect of harassment relates to the corporate claimants rather than the individuals. In relation to the corporate claimants, the ingredients of the statutory tort are a little complicated and require a claimant to show that a defendant has carried on a course of conduct (as defined in section 7) with the relevant knowledge (as defined in section 1(2)) which involves harassment of two or more persons by which he intends to persuade any person not to do something which he is entitled or required to do or to do something that he is not under an obligation to do. Accordingly, any injunction granted to prevent the commission of the statutory tort would have to be expressed to refer to all of the necessary ingredients of the tort. Such an injunction would involve a considerable measure of complication.

153. I consider that there is a further difficulty with the harassment injunction in this case. As explained earlier, "harassment" is not defined by the 1997 Act. The authorities say that the court can be expected to distinguish between things which are, and which are not, harassment. However, this produces the result that an order which simply restrains "harassment" without more would not be as certain as is desirable as a

defendant would not know in advance what the court's decision would ultimately be. This is a particularly acute problem where the courts have explained that behaviour which is annoying and irritating may not be harassment. In the present context, of protest on a matter of public importance, there are likely to be strongly expressed objections to fracking. The expression of those objections may lead to the making of abusive and insulting comments about Ineos (and indeed about the individual Claimants who have made their land available to Ineos) where there might be real difficulty in knowing whether the conduct amounts to harassment. It would be unfortunate if any order made by the court did not enable a Defendant to know what was being restrained. If the order is not clear, a Defendant might commit a breach of it whilst believing that he was complying with the order. There would also be the risk of a chilling effect if a Defendant felt constrained not to do something which he was lawfully entitled to do for fear of finding himself in breach of a court order.

154. The order put forward by the Claimants does not provide any information as to what is and is not permitted beyond the use of the word "harassment". The draft order does contain a qualification as to the intention with which the "harassment" is done but a Defendant who does wish to harm Ineos still has to know whether his intended conduct will or will not amount to harassment and breach the order.

155. In Majrowski, Lady Hale referred to an injunction under the 1997 Act "specifying" the matters to be restrained by the injunction. I was shown a large number of cases where courts have granted injunctions restraining harassment. Many of these cases involved injunctions against protestors wishing to pursue various kinds of protests. In many of these cases, the orders granted spelt out the behaviour which was to be restrained. It is true that in such cases, it was normal for the order to add a general prohibition on "harassment" although I have some reservations as to the appropriateness of doing so. In Heathrow Airport Ltd v Garman [2007] EWHC 1957 (QB), the judge (Swift J) declined to grant an injunction against harassment under the 1997 Act in a case involving public protest: see at [99]. She was influenced, as I am, by the lack of clarity as to what is forbidden and what is not forbidden by such an order.

156. In the present case, I have identified what the Claimants have established in relation to an imminent and real risk of harm. The matters established primarily relate to trespass on land and obstructions of the highway. If those matters are restrained, as I hold that they can be, by an order which is clear and precise, I do not consider that the Claimants have demonstrated a need for the court to make an order against harassment within the Protection from Harassment Act 1997, where there is no clear definition to what is restrained and what is permitted. I consider than such an order could have undesirable consequences which the court would wish to avoid. However, I will give the Claimants permission to apply in the future for an injunction against harassment expressed in clear and precise terms specifying the matters which are restrained by such an order if the Claimants can demonstrate that there is a need for such an order in addition to the other orders which are in force.

157. Having made these findings, the Claimants in the first instance will need to draft an order to give effect to them. If the terms of an order are not agreed, I will determine any outstanding matters following the hand down of this judgment.

Case No: B2/2011/0755

Neutral Citation Number: [2012] EWCA Civ 56
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CLERKENWELL AND SHOREDITCH COUNTY COURT
HIS HONOUR JUDGE MITCHELL
9EC02371

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1st February 2012

Before :

LORD JUSTICE LONGMORE
LORD JUSTICE PATTEN
and
LADY JUSTICE RAFFERTY

- -

Between :

LONDON BOROUGH OF ISLINGTON	**Appellant/ Defendant**
- and -	
(1) MARGARET ELLIOTT **(2) PETER MORRIS**	**Respondents/ Claimants**

- -

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- -

Mr S Butler (instructed by **Legal Services**) for the **Appellants**
Mr R. Duddridge (instructed by **Bishop & Sewell LLP**) for the **Respondents**

Hearing date : 5th December 2011

- -

Judgment

Lord Justice Patten :

Introduction

1. This is an appeal by the London Borough of Islington ("the Council") with the leave of the court against an order of His Honour Judge Mitchell made in the Clerkenwell and Shoreditch County Court on 14th February 2011. The judge ordered the Council, which was the defendant in the action, to pay to the claimants their costs of the claim up to 6th March 2009; one half of their costs from 7th March up to and including 20th March 2009; and the whole of their costs thereafter.

2. The appeal is therefore one against an order for costs but in substance it is a challenge to the way in which the judge assessed the claimants' prospects of success in relation to the grant of a *quia timet* injunction which they had sought in the proceedings in order to compel the Council to remove a number of Ash trees from the garden of a property at 47, Balfour Road, London N5 ("Number 47") of which the Council is the freehold owner. The basis of the claim was an allegation that the roots of the trees constituted an actual or potential nuisance to the claimants' adjoining property at 49 Balfour Road ("Number 49") but in its defence (served on 28th April 2009) the Council confirmed that a works order to remove the trees had been issued to its contractors on 10th December 2008 and on 23rd June 2009 the trees were actually removed.

3. The action continued only because the parties were unable to resolve their differences about costs and the judge had the unenviable task of having to try the action in order to decide what costs order to make. Although lamentable, this proved to be unavoidable and neither party to this appeal has suggested that the judge was wrong in principle to take this course as opposed to resolving the issue on a summary basis. The issue of principle which the judge had therefore to consider and which justified the grant of permission to appeal in this case is whether a claim to a *quia timet* injunction to prevent a nuisance can succeed when the alleged nuisance (in this case the tree roots) has at the date of the trial caused no physical damage to the claimants' property but is likely ultimately to do so unless prevented by an order of the court. In short, the question is how proximate and likely does the occurrence of physical damage have to be before the court will intervene.

The facts

4. Number 47 is owned by the Council and is let to tenants on short-term tenancies. The contemporary photographs show that the gardens were not well maintained and that a number of saplings and small trees had been allowed to grow unchecked. The judge found that there were six Ash trees in the rear garden and about three in the front. One of the Ash trees in the rear garden was about one metre from the boundary fence with number 49 and some two metres from the rear wall of that house. When a plan was prepared in October 2008 this tree was already four metres in height with a girth

of 150 mm. One of the Ash trees in the front garden was about four metres away from the front wall of Number 49; was four to five metres in height and had a girth of between 150 and 200 mm. All these trees were self-sown. It was also the view of the expert witnesses called to give evidence that Ash trees are unsuitable (due to their size and rate of growth) for planting in a small garden of this kind.

5. In May 2004 Ms Elliott wrote to the Council expressing concern that the trees growing in the garden of Number 47 might undermine the foundations of her house if allowed to grow unchecked. The Council appear to have written to its tenant about this but no further action was taken. In October 2004 Ms Elliott wrote again to complain that the trees had grown by several feet and were now obstructing the light to her first floor windows. This was followed by further correspondence in January and November 2005 all directed to the rate of growth of the trees. It was made clear to the Council that the tenants of Number 47 made minimal use of the garden and had taken no steps to cut back or remove the trees. It was therefore clear that the Council would have to take responsibility for this.

6. By November 2006 the position remained unchanged but on 13th November an officer in the Tenancy Management section wrote to the claimants' ward councillor saying that instructions had been given to deal with the problem but that, due to an oversight, nothing had been done. However, she assured the councillor that the matter would now be dealt with promptly.

7. Again this proved to be a false hope because by September 2007 no steps had been taken to reduce the size of the trees or to remove them. The claimants, who by now were understandably exasperated by the lack of progress, instructed solicitors (Messrs Bishops & Sewell LLP) and they wrote to the Council on 11th September 2007 about the problems emanating from Number 47. The first was water penetration which was thought to be due to a problem with the kitchen or a shower unit at Number 47. This is unconnected to the second problem which was the trees. They said in the letter that the overhanging branches were now blocking out the light to Number 49 and that the roots "may be causing damage to [the claimants'] property".

8. The Council was asked to take steps to remedy these problems failing which the claimants would have no alternative but to institute proceedings. This did provoke a response from the Council. An officer wrote on 28th September asking for more information about the water leak but said that the Council had no obligation to maintain the gardens on behalf of the tenants. It would, however, arrange for Greenspace (a division of the Council's Environmental and Conservation Department) to carry out an inspection of the overhanging branches to decide whether further action needed to be taken. This might, however, take some time due to lack of resources.

9. In relation to the tree roots, the letter stated that it would be necessary for root samples to be taken:

> "so it can conclusively be determined that the trees are in fact the cause of any damage ….. As your clients are making these claims then the onus is on them to provide any report".

10. It looks as if this letter may not have been received by the claimants' solicitors because they wrote again on 28th November repeating their complaints about the tree roots and saying that there were signs of cracking in the concrete patio at the rear of Number 49 which might be attributable to the tree roots. The Council replied on 17th December and explained that due to a change in the tenants of Number 47 and associated problems of access, an inspection by Greenspace would not take place until the New Year. It would, however, still be necessary for the root samples to be taken to establish any alleged encroachment by the trees. This would be a matter for the claimants to arrange.

11. In these circumstances, the claimants instructed Mr George Mathieson, a civil engineer, to inspect their property and report. He did so early in 2008 and wrote a letter of advice to the claimants dated 12th March 2008 setting out his preliminary findings. He explained that due to their high water demand, trees such as the Ash should not be planted within 15-20 m from the nearest house and should be regularly pruned. His letter went on:

> "While the Ash saplings in the garden bordering onto yours have not yet caused any damage to your property, they need to be dealt with as a matter of urgency so as to prevent them from causing inevitable damage in the short to medium term."

12. The claimants' solicitors wrote to the Council on 18th March 2008 saying that the damp problem was continuing and, that in relation to the trees, Mr Mathieson had advised that there was an urgent need to deal with the Ash saplings adjacent to Number 49. They asked for the work to be carried out in four weeks without the need for an application to be made for an injunction. The letter of advice from Mr Mathieson was forwarded to the Council on 7th April together with recommendations from a builder as to how to deal with the damp problem.

13. In the meantime, the Council had written to Bishop & Sewell on 3rd April stating that Greenspace had taken soil samples from the Ash tree near the fence and their comments were awaited. On 23rd April the Council wrote a further letter to the claimants' solicitors which indicated that they should direct their complaints about the trees to Greenspace who were responsible for deciding whether trees in the Borough should be lopped or removed. Accordingly on 1st May the solicitors did just that. They sent a copy of Mr Mathieson's letter to Greenspace and asked to be informed about the results of the soil samples taken. They also asked for an undertaking that the Ash trees would be removed and the other trees kept regularly pruned.

14. The reply from Mr James Chambers, the Council's Senior Tree Officer, was not encouraging and also disclosed a state of internal confusion about who (if anybody) had been instructed to deal with the tree issue on behalf of the Council. He said in his letter that he had no record of receiving any request to inspect the trees at Number 47 and did not intend to do so until the "required documents are received". But in relation to the complaint about the tree roots, he said this:

> "… I note you have also provided a copy of a letter from a 'George Mathieson Associates' offering some opinions on trees in the area. This letter does clearly state that there is no damage to no. 49 at this time.

> No tree removal will be undertaken in relation to Alleged Tree Root Damage (ATRD) claims unless and until detailed and extensive evidence that directly implicates a tree as a major causal factor in significant damage to a building, and where no other alternative remains.
>
> Trees will certainly not be removed on the grounds that they may hypothetically cause damage at some point in the future. Any necessary tree work can only be determined through a tree inspection, which you can request as mentioned above."

15. The claimants' solicitors responded on 2nd June saying that their client was frustrated by the lack of progress and that she reserved her right to issue proceedings for an injunction to compel the Council to abate the nuisance. They received a reply from the Council on 4th June saying that Greenspace were now arranging an inspection of the trees but that it would be for the claimants to provide the root samples in order to substantiate their claim that damage was being caused. In fact the statement in this letter about an inspection being arranged was incorrect. The Council's evidence at the trial in the form of a witness statement from Mr Chambers was that the Tree Service was first asked to inspect the trees at Number 47 in November 2008 and that a works order was issued to remove the saplings on 3rd December 2008. As mentioned earlier (due, it is said, to access difficulties), the work was not carried out until 23rd June 2009.

16. The claimants' position as of June 2008 was that they had reached something of an impasse. The Council's position (as communicated in the letter from Mr Chambers) was that the trees would not be removed unless and until they could be proved to be causing significant damage to Number 49. The claimants therefore sought further advice from Mr Mathieson. His recommendation was that the taking of soil samples would be expensive and was unnecessary because it was obvious that the trees were growing rapidly and would, if unchecked, inevitably lead to damage being caused to both properties. The trees should therefore be removed immediately and at relatively little cost instead of being allowed to grow and cause potentially extensive damage in the future which could only be remedied at considerable expense.

17. Accordingly Bishop & Sewell wrote to the Council on 26th June enclosing a copy of Mr Mathieson's recent letter of advice. The letter concluded by saying that:

> "In a final attempt to avoid the issue of court proceedings, our client requires that the trees in the front and rear gardens are properly lopped in accordance with our client's expert's report by close of business on Thursday 10 July 2008. If this is not done by this date, then our client will have no alternative but to make an application to the court to compel you to abate this nuisance".

18. The Council then wrote to Bishop & Sewell stating that a tree referral request had been sent to the Tree Service. As mentioned earlier, this was untrue but in November the request was made with the consequences I have outlined. Bishop & Sewell were not, however, informed of this. They instructed Mr Mathieson to produce a detailed report which could be used in court proceedings which he did based on inspections of

the property in February and September 2008. In his report dated 30th November 2008 he concluded that there was no evidence of actual root intrusion and damage in respect of the drains and foundations of Number 49 but that damage of this kind was in time inevitable absent the pruning and removal of the trees. He estimated that significant damage would probably begin to appear within about five years.

19. Between July 2008 and March 2009 there was no further correspondence between the parties about the possibility of the claimants seeking injunctive relief and had the Council communicated its intention to remove the trees that would have been the end of the matter. On 3rd March 2009 Bishop & Sewell wrote again to the Council but this letter does not refer to the issue about tree roots. It was all about the damp problem which they said had recurred and needed to be remedied failing which proceedings would be commenced. The Council replied to this letter on 16th March promising action but again there is no mention of the trees.

20. The position therefore is that there was no further communication between the parties on the issue of nuisance from trees after the correspondence in June 2008. The claimants had put the Council on notice that unless the trees were lopped or removed, proceedings for an injunction would be instituted and had imposed a deadline of 10th July. But this was allowed to pass without action being taken. The Council had subsequently decided to remove the trees but had not informed the claimants of this or carried out the work by the time that the proceedings were issued on 20th March 2009.

21. Had Bishop & Sewell taken the precaution of writing a formal letter before action to the Council before instituting the claim then it seems likely that they would have been told of what was planned. But they did not do that. The claim form was issued seeking damages and an injunction and the particulars of claim alleged that if the Ash trees were not appropriately maintained or cut back they threatened to cause damage to Number 49 by encroaching roots and the extraction of water from the foundations which was likely to be disruptive and expensive to repair.

22. In the defence served on 28th April 2009 the allegation that the Ash trees constituted an actual or potential nuisance was denied as was the claimants' entitlement to a *quia timet* injunction. But in paragraph 3 the Council pleaded that a works order had been issued on 10th December 2008 to remove the trees and that the work would be carried out within a reasonable period of time.

23. As already stated, the removal of the trees took place on 23rd June. On 12th August Bishop & Sewell proposed the making of a consent order in *Tomlin* form staying the proceedings on terms that the Council should carry out regular inspections of Number 47; should take any necessary steps to reduce the growth of any remaining trees; and should undertake to pay the reasonable costs of any repairs to Number 49 caused by past or future tree growth. The *Tomlin* order also provided for the Council to pay the costs of the action.

24. The action was stayed on 2nd September 2009 to allow for settlement but the Council declined to agree to the terms proposed. I should mention that at that stage the claimants' costs were stated to be some £24,251 which included an After the Event insurance premium of £7,875 and solicitors' profit costs of £9,550. The claimants modified their terms of settlement by offering simply to discontinue on the payment

by the Council of £22,000 towards their costs. But this was not acceptable and the action therefore proceeded to trial.

25. The judge heard expert evidence from Mr Mathieson and from Ms Fiona Critchley, an arboriculturalist instructed on behalf of the Council. They had met in the usual way before the trial and had reached agreement on a number of matters. Trees more than 10 metres from Number 49 were unlikely to have any significant effect on the building. The growth rate of the relevant trees and their rooting patterns could not be predicted. It was therefore impossible to say precisely how and when damage would occur. What they disagreed on was how imminent the risk of significant and serious damage was. Mr Mathieson (as foreshadowed in his reports) thought that the risk was impending and that such damage was likely to occur to the drainage system within 5 years. Ms Critchley considered that it was impossible to predict if or when the closest trees would cause damage or what its nature would be. The judge set out his conclusions on this issue in paragraphs 43-46 of his judgment:

> "43. I conclude from this evidence that there are a number of areas of uncertainty in this case; uncertainty about the nature of the soil (Is it gravel? Is it clay?); about the depth of the foundations; whether or not there are drains present in the backgarden under the patio and uncertainty about the rate of growth of the trees.
>
> 44. The evidence shows that the work could be carried out in early 2010 without great expense or effort. The evidence I have had from Mr. Chambers is that it would have cost £500 to cut down the 8 saplings and to treat them with poison. It would require much greater work and expense the larger the trees.
>
> 45. I am also satisfied that both experts were satisfied that there was a risk that trees 1 and 10 would penetrate drains and affect the foundations, but the effects could not be seen possibly because damage would not occur after some years - possibly three or five years or more. I would add this to the experts' conclusions. The uncertainties that I have listed could not be resolved without expense which was out of all proportion to the cost of the works (for example the drains under the patio, taking soil samples and so forth). I note that Mr. Chambers did not consider that it was necessary to take root samples before he cut down the Ash-saplings.
>
> 46. I also conclude that, unless cracking was caused in the patio, it was unlikely that more evidence of the risk increasing or becoming more imminent could be obtained before serious damage was done to the property."

26. The judge was obviously right to conclude that damage to Number 49 could well occur before there was any physical sign of it above ground level. He was also clearly right that the cost and trouble of removing the trees at an early stage would be considerably less than if they were allowed to grow unchecked for several more years. Any prudent landowner would therefore take the course recommended by

Mr Mathieson in this case. It would also have been no more than good neighbourliness for the Council to have recognised the concerns of the claimants at an early stage and that the problem caused by the Ash trees was due to the neglect of the gardens of Number 47 by the tenants of that property. The trees were self-sown and entirely unsuitable for the location where they had been allowed to grow. Even a properly cautious policy of preservation and environmental conservation should have recognised this.

27. But this appeal is not about the reasonableness of the Council's position at the time. As the judge himself recognised, damage is the essential component of any claim in nuisance and the claimants had no cause of action unless they could prove either that their property had already suffered physical damage due to the encroachment by the trees or that the prospect of such damage was sufficiently imminent and certain as to justify the grant of *quia timet* relief.

28. On the judge's findings, actual damage was not established and the success of the claim (and therefore the costs outcome) depended on the claimants' proving the existence of a real and substantial risk of damage of an imminent kind.

Quia timet relief

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

30. A much-quoted formulation of this principle is set out in the judgment of Pearson J in *Fletcher v Bealey* (1884) 28 Ch D 688 at 698 where he first quotes from Mellish LJ in *Salvin v. North Brancepeth Coal Company* (1874) LR 9 Ch App 705 and then adds his own comments that:

> "… it is not correct to say, as a strict proposition of law, that, if the plaintiff has not sustained, or cannot prove that he has sustained, substantial damage, this Court will give no relief; because, of course, if it could be proved that the plaintiff was certainly about to sustain very substantial damage by what the defendant was doing, and there was no doubt about it, this Court would at once stop the defendant, and would not wait until the substantial damage had been sustained. But in nuisance of this particular kind, it is known by experience that unless substantial damage has actually been sustained, it is impossible to be certain that substantial damage ever will be sustained, and, therefore, with reference to this particular

> description of nuisance, it becomes practically correct to lay down the principle, that, unless substantial damage is proved to have been sustained, this Court will not interfere. I do not think, therefore, that I shall be very far wrong if I lay it down that there are at least two necessary ingredients for a *quia timet* action. There must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended damage will, if it comes, be very substantial. I should almost say it must be proved that it will be irreparable, because, if the danger is not proved to be so imminent that no one can doubt that, if the remedy is delayed, the damage will be suffered, I think it must be shewn that, if the damage does occur at any time, it will come in such a way and under such circumstances that it will be impossible for the Plaintiff to protect himself against it if relief is denied to him in a *quia timet* action."

31. More recently in *Lloyd v Symonds* [1998] EWCA Civ 511 (a case involving nuisance caused by noise) Chadwick LJ said that:

> "On the basis of the judge's finding that the previous nuisance had ceased at the end of May 1996 the injunction which he granted on 7th January 1997 was *quia timet*. It was an injunction granted, not to restrain anything that the defendants were doing (then or at the commencement of the proceedings on 20th June 1996), but to restrain something which (as the plaintiff alleged) they were threatening or intending to do. Such an injunction should not, ordinarily, be granted unless the plaintiff can show a strong probability that, unless restrained, the defendant will do something which will cause the plaintiff irreparable harm -- that is to say, harm which, if it occurs, cannot be reversed or restrained by an immediate interlocutory injunction and cannot be adequately compensated by an award for damages. There will be cases in which the court can be satisfied that, if the defendant does what he is threatening to do, there is so strong a probability of an actionable nuisance that it is proper to restrain the act in advance rather than leave the plaintiff to seek an immediate injunction once the nuisance has commenced. "Preventing justice excelleth punishing justice" -- see Graigola Merthyr Co Ltd v Swansea Corporation [1928] Ch 235 at page 242. But, short of that, the court ought not to interfere to restrain a threatened action in circumstances in which it is satisfied that it can do complete justice by appropriate orders made if and when the threat of nuisance materialises into actual nuisance (see Attorney-General v Nottingham Corporation [1904] 1 Ch 673 at page 677).
>
> ….
>
> In the present case, therefore, I am persuaded that the judge approached the question whether or not to grant a permanent

> injunction on the wrong basis. He should have asked himself whether there was a strong probability that, unless restrained by injunction, the defendants would act in breach of the Abatement Notice served on 22nd April 1996. That notice itself prohibited the causing of a nuisance. Further he should have asked himself whether, if the defendants did act in contravention of that notice, the damage suffered by the plaintiff would be so grave and irreparable that, notwithstanding the grant of an immediate interlocutory injunction (at that stage) to restrain further occurrence of the acts complained of, a remedy in damages would be inadequate. Had the judge approached the question on that basis, I am satisfied that he could not have reached the conclusion that the grant of a permanent injunction *quia timet* was appropriate in the circumstances of this case."

32. In this case there is, I think, no real dispute that if the roots of the Ash tree had in time extended under the drains and foundations of Number 49, serious and substantial damage was likely to result. Nor would damages in those circumstances have been an adequate remedy. Had it been established that there was an imminent likelihood of such damage occurring, the court's equitable jurisdiction to prevent an apprehended infringement of property rights would undoubtedly be exercised so as to prevent the claimants from having to suffer the disruption which would be involved. Inevitably there will be cases where other discretionary considerations require to be taken into account. If the offending tree was particularly rare or valuable in terms of its appearance, one would expect the court to attempt to strike a balance which might involve less drastic action being taken than the complete removal of the tree. But this is not that kind of case. Here the determining issue was whether (absent an injunction) there was imminent danger of actual damage.

33. In *Hooper v Rogers* [1973] 1 Ch 43 the defendant had cut a track across a steep slope which provided the foundation of the plaintiff's farmhouse. The evidence was that this had exposed the slope to a process of soil erosion which would eventually undermine the farmhouse and cause it to collapse. The judge at first instance found that this constituted a real risk of damage and granted a mandatory injunction requiring the slope to be re-instated. In the Court of Appeal the grant of the injunction was challenged on the basis that the test of imminent danger set out by Pearson J in *Fletcher v Bealey* (supra) was not satisfied. Russell LJ (at p. 30) addressed that issue in these terms:

> "Again it seems to me that "imminent" is used in the sense that the circumstances must be such that the remedy sought is not premature; and again I stress that there is no suggestion that in the present case any other step than reconstituting the track will be available to save the farmhouse from the probable damage.
>
> 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. I am not prepared to hold that on the evidence in this unusual case the judge was wrong in considering that he could have ordered the defendant to fill in and consolidate the road at the suit of the plaintiff as owner of the farm-house, or that he was wrong in ordering damages in lieu of such an order."

34. The question therefore is one of assessing the likelihood of the damage occurring at all and (if that is established) the probable timescale. The judge's conclusions on those issues are set out in paragraphs 49-50 of his judgment:

> "49. Examining the matter in relation to the *quia timet* injunction, I am satisfied that there was a real likelihood of harm at some stage - that is a harm which could not sensibly be ignored. The likely extent of the harm would be damage to the drains resulting in seepage, possibly of sewage or other waste water, and/or the foundations including cracking of walls and settlement. Harm of either kind would raise concern about the other kind of harm. There would be the risk of increased insurance cover and difficulties, possibly, in selling the property. The costs or effort required by the defendant to remove the harm was minimal. There was no likelihood, in my judgment, of other methods of reducing the harm becoming available before the damage occurred. The same steps would be needed; the trees would have had to have been cut down. But I have to ask myself, however, would there be a need for an order? While there was no imminent harm in the sense of something happening within a three to five year period, there was a likelihood that in some years the work would needed to have been done to avoid damage. There was no reason for delaying the work. Delay would only increase costs.
>
> 50. Given the Local Authority's history of dealing with the claimants' reasonable complaints, I am not satisfied that they would have done the work without an order. It was reasonable, in my judgment, for the claimants to commence the action when they did rather than wait. As has been pointed out, it has taken two years for this case to come onto trial even after the claim was issued. I am satisfied therefore that, if the work had not been carried out, the claimants would have been successful in obtaining their injunction. Therefore, the general rule should apply in relation to costs."

35. Mr Butler, on behalf of the Council, submits that, on the basis of a finding that no damage was likely to be caused in less than 3 years, it could not be said that there was any imminent danger of such damage at the time when the injunction was granted. It was therefore premature. Mr Duddridge, for the claimants, relies on the judge's findings that damage to Number 49 by the trees was likely to occur. In these circumstances, the judge was entitled (as in *Hooper v Rogers*) to conclude that an actionable nuisance was inevitable and to require the trees to be removed at minimal cost and inconvenience to both parties.

36. The question whether this was an appropriate case for the grant of *quia timet* relief has, I think, to be considered in the light of all the relevant circumstances known at the trial and not merely by reference to the narrower question of whether the tree roots were likely to cause physical damage to Number 49 within a particular period of time. The wider consideration of relevant factors had, in my view, to take into account the issues of the relative cost of removing the trees (which the judge did consider) and also the likelihood of the potential source of nuisance being controlled by action taken by the Council in the intervening period of 3 years before any actual damage occurred.

37. In *Hooper v Rogers* the inevitability of subsidence attributable to the new track was such that nothing short of its removal would cure the problem. It was therefore realistic for the judge in that case to have taken the view that an injunction should be granted as the only means of preventing that risk from materialising. Questions of timing were less significant because the defendant landowner was not prepared to restore the slope underpinning the plaintiff's property unless compelled to do so by an order of the court.

38. But cases involving damage caused by trees are not necessarily so stark. Where, as in this case, the experts have identified an appreciable period of time before any actual damage is likely to occur, the judge must take into account the ability and willingness of the defendant to prevent such damage occurring by taking steps in the meantime to control the growth of the trees on his land. The claimant has to show that an injunction is necessary in order to prevent the occurrence of the nuisance. The defendant is entitled to rely on his own rights and obligations as an adjoining landowner to cure the problem and it ought therefore in principle to be only in cases where the risk of damage is so imminent and the intransigence of the defendant so obvious that the court should ordinarily be prepared to grant an injunction in order to prevent a nuisance which does not yet exist. Mandatory injunctions of this kind are not justified merely on the ground that if nothing is done a tree on adjoining land may at some point in the future begin to cause damage to the claimant's property.

39. Judge Mitchell expressed the view that the Council would not have done the work without an order and that the claimants would have obtained an injunction had the work not been carried out. The judge gives no reasons for this conclusion and it is difficult to reconcile that with his earlier finding of fact that on 10th December 2008 a works order was in fact signed for the removal of the trees. Nor was there any challenge to the pleading in the Council's defence that it intended to carry those works out.

40. In these circumstances, it was not open to the judge in my view to hold that the injunction was necessary in order to prevent the potential nuisance from becoming an actual one. Although the claimants had initially to face a combination of delay and misleading information from the Council, it had by December 2008 at the latest resolved to remedy the problem by removing the trees. There was therefore no necessity for the grant of *quia timet* relief at the trial and the plea that the Council intended to carry out the work was a complete answer to the claim. If the appropriate rule to apply was that costs should follow the event then the judge should have dismissed the claim with costs.

The costs order

41. The judge's order was split into three periods in order to incorporate a discount for the 14 day period between 3rd March 2009 when the letter was sent by the claimants' solicitors complaining about the leak and the issue of the claim form on 20th March. The judge explained the thinking behind his order as follows:

> "51. I also have regard to the defendants' litigation conduct. There has been a failure by the defendants over five years until November 2009, to do anything at all. Opportunities were missed when the property was vacant in 2006 and 2008. Assurances that the works would be done in 2006 were not met. Misleading or false information was provided in April 2008. In June 2008, even if the claimants are not entitled under the general rule to costs, in my judgment, the defendants' conduct was such as to lead to only one conclusion, namely that the claimants were acting reasonably in commencing their action. The defendant's did not act reasonably and they should pay the claimants' costs.
>
> 52. But that is subject to one proviso. Letters before action were written on 1st May 2008, 2nd June 2008 and 26th June 2008. Nothing was thereafter written until March 2009 - a considerable gap. Despite the lamentable history, in my judgment, it would have been reasonable to expect the claimants to send one further letter. That might have resulted in their being told the work was in hand and, therefore, the claim did not need to be issued. But, given the history, they might not have been told that. They must therefore bear some responsibility, but the greater responsibility by far is that of the defendants.
>
> 53. Therefore, I shall make an order that the defendants are to pay the costs up to and including 2nd March 2009 - that is 14 days before the claim commenced - but, thereafter, only one half of the costs between 2nd March 2009 and up to and including the issue of the claim. The half costs cover the 14 day period, when a letter before action should have been written and considered and is calculated to take into account the real possibility that the defendants would not have notified the claimants that there was no need to commence the action."

42. Because I consider that the judge was wrong in his assessment of whether an injunction was needed in this case to prevent the potential nuisance, it is for this court to re-consider how the discretion under CPR 44 should be exercised. Neither side wished the matter to be remitted to the County Court for that purpose.

43. The judge's alternative basis for his costs order was that the claimants had acted reasonably in commencing the action because assurances given much earlier that the

work would be done were not carried out and false and misleading information was given in 2008. The history does, however, have to be examined in more detail than that. The assurance given to the claimants' ward councillor in November 2006 was certainly not acted on but the Council's response to Bishop & Sewell's letter of 28th September 2007 was that it had no obligation to maintain the garden of Number 47. The most that was promised was an inspection by Greenspace. It was for the claimants to produce evidence of the incursion of tree roots.

44. Mr Mathieson was instructed for this purpose and produced the reports I have referred to but the Council's response to this was that any risk of damage was still some years away. The information about the date of inspections by Greenspace in 2008 was misleading but it did not initially affect the claimants because they assumed that the inspections were taking place. When the 10th July deadline passed it was reasonable for them to have assumed that nothing was about to be done but the decision to wait until March before issuing proceedings could also be taken as an indication that proceedings were still not in contemplation.

45. The gap in the correspondence between July 2008 and March 2009 covers the period in which the Council did finally inspect and decide to remove the trees. It had received the threat of proceedings in June 2008 but the decision to remove the trees (if carried out) really brought the possibility of a successful action for an injunction to an end.

46. It is misleading to regard the letter of 3rd March 2009 as the resumption of the earlier correspondence. It makes no mention of the tree problem but was directed solely to the continuing issue of the damp. The Council dealt with it on that basis. The first it knew of the proceedings was when it was served with the claim form. The judge was therefore right to take the absence of a further letter before action into account but was, I think, wrong merely to reduce the costs awarded to the claimants for the 14 days before the claim was commenced. Given that there had been no further correspondence in relation to the trees before June 2008, the claimants should have written a letter before action prior to the issue of the claim form to make it clear that they did intend to go ahead with the action. This would have led to their being informed about the works order and the proceedings could have been avoided.

47. But at the same time I recognise the uncertainty which may have been created by the promises of an inspection in 2008 followed by silence on the part of the Council as to whether it intended to carry out any work to the trees. Although this is likely to have been cleared up by the sending of a letter before action, some allowance should be made for the Council's own failure to respond substantively to the June 2008 letter once it had decided to remove the trees.

48. It seems to me therefore that the right order is that there should be no order for costs in relation to the period up to and including the service of the defence. From that moment on it was apparent that the claim must fail and the Council is entitled to its costs of the action after that date. Neither of the offers of settlement made by the claimants accurately reflects their position in the litigation.

Conclusion

49. I would therefore allow the appeal and make an order in the terms referred to above.

Lady Justice Rafferty:

50. I agree.

Lord Justice Longmore:

51. I also agree.

Neutral Citation Number: [2019] EWCA Civ 515

Case No: A3/2018/0066 & A3/2018/0080

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
PROPERTY, TRUSTS AND PROBATE LIST
THE HONOURABLE MR JUSTICE MORGAN

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/04/2019

Before:

THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
THE RIGHT HONOURABLE LORD JUSTICE DAVID RICHARDS
and
THE RIGHT HONOURABLE LORD JUSTICE LEGGATT

- -

Between:

1) JOSEPH BOYD	**Appellants**
2) JOSEPH CORRÉ	
- and -	
INEOS UPSTREAM LIMITED & 9 OTHERS	**Respondents**
-and-	
FRIENDS OF THE EARTH	**Intervener**

- -
- -

Ms Heather Williams QC, Ms Blinne Ní Ghrálaigh & Ms Jennifer Robinson (instructed by **Leigh Day**) for the **First Appellant**
Ms Stephanie Harrison QC & Stephen Simblet (instructed by **Bhatt Murphy Solicitors**) for the **Second Appellant**
Mr Alan Maclean QC & Mr Jason Pobjoy (instructed by **Fieldfisher LLP**) for the **Respondents**
Mr Henry Blaxland QC & Mr Stephen Clark (instructed by **Bhatt Murphy**) for the **Interveners by way of written submissions**

Hearing dates: 5th & 6th March 2019

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Approved Judgment

Lord Justice Longmore:

Introduction

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

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

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

The Claimants

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

The Defendants

5. The first five defendants are described as groups of "Persons Unknown" with, in each case, further wording designed to provide a definition of the persons falling within the group. The first defendant is described as:-

> "Persons unknown entering or remaining without the consent of the claimant(s) on land and buildings shown shaded red on the plans annexed to the amended claim form."

6. The second defendant is described as:-

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

7. The third defendant is described as:-

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

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

9. The fifth defendant is described as:-

> "Persons unknown combining together to commit the unlawful acts as specified in paragraph 10 of the [relevant] order with the intention set out in paragraph 10 of the [relevant] order."

10. The sixth defendant is Mr Boyd. He appeared through counsel at a hearing before the judge on 12th September 2017 and was joined as a defendant. The seventh defendant is Mr Corré. He also appeared through counsel at the hearing on 12th September 2017 and was joined as a defendant. The judge had originally granted ex parte relief on 28th July 2017 against the first five defendants until a return date fixed for 12th September 2017. On that date a new return date with a 3 day estimate was then fixed for 31st October 2017 to enable Mr Boyd and Mr Corré to file evidence and instruct counsel to make submissions on their behalf.

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

The judgment

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

> "Much of the factual material in the evidence served by the claimants was not contradicted by the defendants, although the defendants did join issue with certain of the comments made or the conclusions drawn by the claimants and some of the detail of the factual material." (para 18)

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

13. The judge then commented (para 21):-

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

14. The judge then proceeded to consider the evidence, expressed himself satisfied that there was a real and imminent threat of unlawful activity if he did not make an interim order pending trial and that a similar order would be made at that trial. He accordingly made the orders requested by the claimants apart from that relating to harassment. The orders were in summary that:-

1) the first defendants were restrained from trespassing at any of the Sites;

2) the second defendants were restrained from interfering with access to Sites 3 and 4, which were accessed by identified private access roads;

3) the third defendants were restrained from interfering with access to public rights of way by road, path or bridleway to Sites 1-4 and 7-8, such interference being defined as (a) blocking the highway (b) slow walking (c) climbing onto vehicles (d) unreasonably preventing access to or egress from the Sites and (e) unreasonably obstructing the highway;

4) the fifth defendants were restrained from combining together to

a) commit an offence under section 241(1) of the Trade Union and Labour Relations (Consultation) Act 1992;

b) commit an offence of criminal damage under section 1 of the Criminal Damage Act 1971 or of theft under section 1 of the Theft Act 1968;

c) obstruct free passage along a public highway, including "slow walking", blocking the highway, climbing onto vehicles and otherwise obstructing the highway with the intention of causing inconvenience and delay; and

d) cause anything to be done on a road or interfere with any motor vehicle or other traffic equipment

"in such circumstances that it would or could be obvious to a reasonable person that to do so would or could be dangerous"

all with the intention of damaging the claimants.

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

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

This appeal

17. Permission to appeal has been granted on three grounds:-

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

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

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

Persons Unknown: the law

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

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

20. Sir Andrew Morritt V-C followed his own decision in Hampshire Waste Services Ltd v Intended Trespassers Upon Chineham Incinerator Site [2004] Env LR 196. In that case, similarly to this, there had been in the past a number of incidents of environmental protesters trespassing on waste incineration sites. There was to be a "Global Day of Action against Incinerators" on 14th July 2003 and the claimants applied for an injunction restraining persons from entering or remaining at named waste incineration sites without the claimant's consent. Sir Andrew observed that it would be wrong for the defendants' description to include a legal conclusion such as was implicit in the use of a description with the word "trespass" and that it was likewise undesirable to use a description with the word "intending" since that depended on the subjective intention of the individual concerned which would not be known to the claimants and was susceptible of change. He therefore made an order against persons entering or remaining on the sites without the consent of the claimants in connection with the Global Day of Action.

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

22. In the present case, the judge held (para 121) that since Bloomsbury there had been many cases where injunctions had been granted against persons unknown and many of those injunctions had been granted against protesters. For understandable reasons, those cases (unidentified) do not appear to have been taken to an appellate court. Ms Harrison on behalf of Mr Corré submitted that the procedure sanctioned by Sir Andrew Morritt V-C without adverse argument was contrary to principle unless expressly permitted by statute, as by the Town and Country Planning Act 1990 (as inserted by section 3 of the Planning and Compensation Act 1991 during the subsistence of the RSC which would otherwise have prohibited it) ("the 1990 Act") or by the CPR (e.g. CPR 19.6 dealing with representative actions or CPR 55.3(4), the

successor to the RSC Order 113). The principles on which she relied for this purpose were that a court cannot bind a person who is not a party to the action in which such an order is made and that it was wrong that someone, who had to commit the tort (and thus be liable to proceedings for contempt) before he became a party to the action, should have no opportunity to submit the order should not have been made before he was in contempt of it.

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

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

> "(1) The principles in the South Bucks case set out above apply when the court is considering whether to grant an injunction against named defendants. (2) They do not apply in full when a court is considering whether or not to grant an injunction against persons unknown because the relevant personal information would, ex hypothesi, not be available. However this fact makes it important for courts only to grant such injunctions in cases where it is not possible for the applicant to identify the persons concerned or likely to be concerned. (3) The correct course for a person who learns that he is enjoined and who wishes to take further action, which is or would be in breach of the injunction, and thus in contempt of court, is not to take such action but to apply to the court for an order varying

> or setting aside the order. On such an application the court should apply the principles in the South Bucks case. (4) The correct course for a person who appreciates that he is infringing the injunction when he learns of it is to apply to the court forthwith for an order varying or setting aside the injunction. On such an application the court should again apply the principles in the South Bucks case. (5) A person who takes action in breach of the injunction in the knowledge that he is in breach may apply to the court to vary the injunction for the future. He should acknowledge that he is in breach and explain why he took the action knowing of the injunction. The court will then take account of all the circumstances of the case, including the reasons for the injunction, the reasons for the breach and the applicant's personal circumstances, in deciding whether to vary the injunction for the future and in deciding what, if any, penalty the court should impose for a contempt committed when he took the action in breach of the injunction. In the first case the court will apply the principles in the South Bucks case and in the Mid Bedfordshire case. (6) In cases where the injunction was granted at a without notice hearing a defendant can apply to set aside the injunction as well as to vary it for the future. Where, however, a defendant has acted in breach of the injunction in knowledge of its existence before the setting aside, he remains in breach of the injunction for the past and in contempt of court even if the injunction is subsequently set aside or varied. (7) The principles in the South Bucks case are irrelevant to the question whether or not a person is in breach of an injunction and/or whether he is in contempt of court, because the sole question in such a case is whether he is in breach and/or whether he is in contempt of court."

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

26. Ms Harrison further relied on the recent case of Cameron v Liverpool Victoria Insurance Co Ltd [2019] UKSC 6; [2019] 1 WLR 1471 in which the Supreme Court held that it was not permissible to sue an unknown driver of a car which had collided with the claimant's car for the purpose of then suing that unknown driver's insurance company, pursuant to the provisions of the Road Traffic Act 1988 requiring the insurance company to satisfy a judgment against the driver once the driver's liability has been established in legal proceedings. Lord Sumption (with whom Lord Reed, Lord Carnwath, Lord Hodge and Lady Black agreed) began his judgment by saying that the question on the appeal was in what circumstances was it permissible to sue an unnamed defendant but added that it arose in a rather special context. He answered that question by concluding (para 26) that a person, such as the driver of the Micra car in that case,

> "who is not just anonymous but cannot be identified with any particular person, cannot be sued under a pseudonym or description, unless the circumstances are such that the service of the claim form can be effected or properly dispensed with."

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

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

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

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

29. Despite the persuasive manner in which these arguments were advanced, I cannot accept them. In my judgment it is too absolutist to say that a claimant can never sue persons unknown unless they are identifiable at the time the claim form is issued. That was done in both the Bloomsbury and the Hampshire Waste cases and no one has hitherto suggested that they were wrongly decided. Ms Harrison shrank from submitting that Bloomsbury was wrongly decided since it so obviously met the justice of the case but she did submit that Hampshire Waste was wrongly decided. She submitted that there was a distinction between injunctions against persons who existed but could not be identified and injunctions against persons who did not exist and would only come into existence when they breached the injunction. But the supposedly absolute prohibition on suing unidentifiable persons is already being departed from. Lord Sumption's two categories apply to persons who do exist, some of whom are identifiable and some of whom are not. But he was not considering persons who do not exist at all and will only come into existence in the future. I do not consider that he was intending to say anything adverse about suing such persons. On the contrary, he referred (para 11) to one context of the invocation of the

jurisdiction to sue unknown persons as being trespassers and other torts committed by protesters and demonstrators and observed that in some of those cases proceedings were allowed in support of an application for a quia timet injunction

> "where the defendant could be identified only as those persons who might in future commit the relevant acts."

But he did not refer in terms to these cases again and they do not appear to fit into either of the categories he used for the purpose of deciding the Cameron case. He appeared rather to approve them provided that proper notice of the court order can be given and that the fundamental principle of justice on which he relied for the purpose of negating the ability to sue a "hit and run" driver (namely that a person cannot be made subject to the court's jurisdiction without having such notice as will enable him to be heard) was not infringed. That is because he said this (para 15):-

> "… Where an interim injunction is granted and can be specifically enforced against some property or by notice to third parties who would necessarily be involved in any contempt, the process of enforcing it will sometimes be enough to bring the proceedings to the defendant's attention. In Bloomsbury Publishing Group, for example, the unnamed defendants would have had to identify themselves as the persons in physical possession of copies of the book if they had sought to do the prohibited act, namely disclose it to people (such as newspapers) who had been notified of the injunction. The Court of Appeal has held that where proceedings were brought against unnamed persons and interim relief was granted to restrain specified acts, a person became both a defendant and a person to whom the injunction was addressed by doing one of those acts: South Cambridgeshire District Council v Gammell [2006] 1 WLR 658, para 32. In the case of anonymous but identifiable defendants, these procedures for service are now well established, and there is no reason to doubt their juridical basis."

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

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

32. It is not easy to formulate the broad principles on which an injunction against unknown persons can properly be granted. Ms Harrison's fall-back position was that they should only be granted when it was necessary to do so and that it was never necessary to do so if an individual could be found who could be sued. In the present case notice and service of the injunction was ordered to be given to the potentially interested parties listed in Schedule 21 of the order. This listed Key Organisations,

Local Action Groups and Frack Free Organisations all of whom could have been, according to her, named as defendants, rendering it unnecessary to sue persons unknown. This strikes me as hopelessly unrealistic. The judge was satisfied that unknown persons were likely to commit the relevant torts and that there was a real and imminent risk of their doing so; it is most unlikely that there was a real and imminent risk of the Schedule 21 organisations doing so and I cannot believe that, if it is possible to sue one or more such entities, it is wrong to sue persons unknown.

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

34. I would tentatively frame those requirements in the following way:-

1) there must be a sufficiently real and imminent risk of a tort being committed to justify quia timet relief;

2) it is impossible to name the persons who are likely to commit the tort unless restrained;

3) it is possible to give effective notice of the injunction and for the method of such notice to be set out in the order;

4) the terms of the injunction must correspond to the threatened tort and not be so wide that they prohibit lawful conduct;

5) the terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do; and

6) the injunction should have clear geographical and temporal limits.

Application of the law to this case

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

Width and clarity of the injunctions granted by the judge

36. The right to freedom of peaceful assembly is guaranteed by both the common law and Article 11 of the ECHR. It is against that background that the injunctions have to be assessed. But this right, important as it is, does not include any right to trespass on

private property. Professor Dicey in his Law of the Constitution devoted an entire chapter of his seminal work to what he called the right of public meeting saying this at page 271 of the 10th edition (1959):-

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

37. This neatly states the common law as it was in 1959, see Oxford Edition (2013) page 154 I do not think it has changed since. There is no difficulty about defining the tort of trespass and an injunction not to trespass can be framed in clear and precise terms, as indeed Morgan J has done. I would, therefore, uphold the injunction against trespass given against the first defendants subject to one possible drafting point and always subject to the point about section 12(3) of the HRA. I would likewise uphold the injunction against the second defendants described as interfering with private rights of way shaded orange on the plans of the relevant sites. It is of course the law that interference with a private right of way has to be substantial before it is actionable and the judge has built that qualification into his orders. He was not asked to include any definition of the word substantial and said (para 149) that it was not appropriate to do so since the concept of substantial interference was simple enough and well-established. I agree.

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

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

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

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

42. Mr Alan Maclean QC for the claimants submitted that the court should grant advance relief of this kind in appropriate cases in order to save time and much energy later devoted to legal proceedings after the events have happened. But it is only when

events have happened which can in retrospect be seen to have been illegal that, in my view, wide-ranging injunctions of the kind granted against the third and fifth defendants should be granted. The citizen's right of protest is not to be diminished by advance fear of committal except in the clearest of cases, of which trespass is perhaps the best example.

Geographical and Temporal Limits

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

Section 12(3) of the Human Rights Act

44. Section 12 of the HRA 1998 provides:-

> "12(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
>
> (2) If the person against whom the application for relief is made ("the respondent") is neither present nor represented, no such relief is to be granted unless the court is satisfied – (a) that the applicant has taken all practicable steps to notify the respondent; or (b) that there are compelling reasons why the respondent should not be notified.
>
> (3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed."

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

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

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

46. Ms Williams then suggested many things which the judge failed (according to her) to take into account and submitted that it was not enough for Mr Maclean to point to the earlier passage (para 18) in the judgment where the judge had said that the factual

evidence of the claimants was not contradicted by the defendants because he had added:-

> "although the defendants did join issue with certain of the comments made or the conclusions drawn by the claimants and some of the detail of the factual material."

There was, she said, no assessment of Mr Boyd's or Mr Corré's challenges to the inferences which the claimants invited the judge to draw or to the conclusions drawn by them, let alone analysis of the (admittedly small) amount of factual contradiction.

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

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

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

Disposal

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

Conclusion

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

Lord Justice David Richards:

52. I agree.

Lord Justice Leggatt:

53. I also agree.

Neutral Citation Number: [2020] EWCA Civ 9

Case No: A3/2019/2391; A3/2019/2395

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)
MANCHESTER DISTRICT REGISTRY
HHJ Pelling QC (sitting as a Judge of the High Court)
E30MA313

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/01/2020

Before:

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal, Civil Division)
LORD JUSTICE DAVID RICHARDS
and
LORD JUSTICE LEGGATT

- -

Between:

CUADRILLA BOWLAND LIMITED & ORS	**Claimants/ Respondents**
- and -	
(1) PERSONS UNKNOWN ENTERING OR REMAINING WITHOUT THE CONSENT OF THE CLAIMANT(S) ON LAND AT LITTLE PLUMPTON AS MORE PARTICULARLY DESCRIBED IN THE CLAIM FORM AND SHOWN EDGED RED ON THE PLAN ANNEXED TO THE CLAIM FORM **(2) PERSONS UNKNOWN INTERFERING WITH THE PASSAGE BY THE CLAIMANTS AND THEIR AGENTS, SERVANTS, CONTRACTORS, SUB-CONTRACTORS, GROUP COMPANIES, LICENSEES, INVITEES OR EMPLOYEES WITH OR WITHOUT VEHICLES, MATERIALS AND EQUIPMENT TO, FROM, OVER AND ACROSS THE PUBLIC HIGHWAY KNOWN AS PRESTON NEW ROAD** **(3) PERSONS UNKNOWN COMMITTING THE ACTS SPECIFIED AT PARAGRAPH 7 OF THE ORDER & ORS**	**Defendants**
- and -	

KATRINA LAWRIE **LEE WALSH** **CHRISTOPHER WILSON**	**Appellants/ Respondents to Committal Applications**

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Kirsty Brimelow QC, Adam Wagner and Richard Brigden (instructed by **Robert Lizar Solicitors**) for the **Appellants**
Tom Roscoe (instructed by **Eversheds Sutherland (International) LLP**) for the **Respondents**

Hearing dates: 10-11 December 2019
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Approved Judgment

Lord Justice Leggatt:

Introduction

1. On 3 September 2019 His Honour Judge Pelling QC, sitting as a judge of the High Court, made an order committing the three appellants to prison for contempt of court. Their contempt consisted in deliberately disobeying an earlier court order, which I will refer to as "the Injunction", made on 11 July 2018 with the aim of preventing trespass on the claimants' land, unlawful interference with the claimants' rights of passage to and from their land and unlawful interference with the supply chain of the first claimant ("Cuadrilla"). As punishment for two deliberate breaches of the Injunction, the judge committed one of the appellants, Katrina Lawrie, to prison for two months plus four weeks. The other appellants, Lee Walsh and Christopher Wilson, were both committed to prison for four weeks. In each case execution of the committal order was suspended on condition that the appellant obeys the Injunction for a period of two years.

2. The appellants have exercised their rights of appeal against the committal order. They appeal on the grounds (1) that the relevant terms of the Injunction were insufficiently clear and certain to be enforceable by committal because those terms made the question whether conduct was prohibited depend on the intention of the person concerned; and (2) that imposing the sanction of imprisonment (albeit suspended) was inappropriate and unduly harsh in the circumstances of this case. Relevant circumstances include the facts that the Injunction was granted, not against the appellants as named individuals, but against "persons unknown" who committed specified acts, and that the acts done by the appellants in breach of the Injunction were part of a campaign of protest involving 'direct action' designed to disrupt Cuadrilla's activities. This context is one in which the appellants' rights to freedom of expression and assembly are engaged.

Background

3. Cuadrilla and the other claimants own an area of land off the Preston New Road (A583), near Blackpool in Lancashire, on which Cuadrilla has engaged in the hydraulic fracturing, or "fracking", of rock deep underground for the purpose of extracting shale gas. It is not in dispute that all Cuadrilla's activities have been carried out in accordance with the law. Equally, there is no dispute that Cuadrilla's activities are controversial and that a significant number of people, including the appellants, have sincere and strongly held views that fracking ought not to take place because of its impact on the environment. It is also common ground that the appellants, like everyone else, have the right to express their views and to protest against an activity to which they object subject only to such restrictions as are prescribed by law and are necessary in a democratic society for (amongst other legitimate aims) the prevention of disorder or crime or the protection of the rights and freedoms of others. The right of protest is protected both by the common law of England and Wales and by articles 10 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "Human Rights Convention") which is incorporated into UK law by the Human Rights Act 1998.

4. Protests on and near Cuadrilla's site started in 2014, well before any drilling or preparatory work had commenced, when part of the site was occupied by a group of protestors. On 21 August 2014 Cuadrilla issued proceedings to recover possession of the land and for an injunction to prohibit further trespassing. Such an injunction was granted until 6 October 2016.

5. Protests intensified after work in preparation for exploratory drilling at the site started in January 2017. The evidence adduced by the claimants when they applied for a further injunction in May 2018 showed that, since January 2017, Cuadrilla and its employees, contractors and suppliers had been subjected to numerous 'direct action' protests, designed to obstruct works on the site. The actions taken by some protestors included 'locking on' – that is, chaining oneself to an object or another person – at the entrance to the site in order to prevent vehicles from entering or leaving it; 'slow walking' – that is, walking on the highway as slowly as possible in front of vehicles attempting to enter or leave the site; and climbing onto vehicles to prevent them from moving.

6. The overall scale of such protest activity is indicated by the fact that, between January 2017 and May 2018, the police had made over 350 arrests in connection with protests against Cuadrilla's operations, including 160 arrests for obstructing the highway, and substantial police resources had to be deployed in order to deal with the actions of protestors, with around 100 officers directly involved each day and at a total policing cost of some £7 million.

7. In July 2017 a group calling themselves "Reclaim the Power" organised a "month of action" targeting Cuadrilla. Of the many actions taken by protestors during that month to attempt to disrupt transport to and from the Preston New Road site, one particularly disruptive incident involved criminal offences and led to sentences which were the subject of an appeal to the Criminal Division of the Court of Appeal: see *R v Roberts* [2018] EWCA Crim 2739; [2019] 1 WLR 2577. That incident began on the morning of 25 July 2017, when two protestors managed to climb on top of lorries approaching the site along the Preston New Road, forcing the lorries to stop to avoid putting the safety of the two men at risk. Two more men later climbed on top of the lorries. Each of the protestors stayed there for two or three days and the last one did not come down until 29 July 2017. For all this time the lorries were therefore unable to move, with the result that one carriageway of the road remained blocked. Substantial disruption was caused to local residents and other members of the public.

8. Further particularly serious disruption occurred on 31 July 2017. The events of that day were described in a letter from Assistant Chief Constable Terry Woods put in evidence by Cuadrilla, as follows:

> "The last day of the RTP [Reclaim the Power] rolling resistance month of action saw a final lock-in involving a supposedly one tonne weight concrete barrel lock-on in the rear of a van with a prominent RTP activist attached to it via an arm tube. This action, coupled with an already tense atmosphere amongst the RTP activists, anti-fracking activists and local protestors, resulted in confrontation with police and they arrested two protestors. During the evening the protestors then became aware of a convoy *en route* to the drill site resulting in four

> protestors deploying in two pairs with arm tube lock-ons and blocking the A583. Further confrontation and aggression towards police ensued, with one of the locked-on protestors also assaulting a police officer. A security staff van was then mobbed by protestors and damaged, with a further protestor being arrested from that incident. Protestors also blockaded three vans of police protest liaison officers outside the Maple Farm Camp. The vehicle of a drill site staff member's partner dropping them off was then confronted by protestors, with a number of protestors climbing on the roof of the vehicle as it attempted to reverse away. The A583 was finally reopened to traffic at around 21:00 once police had removed all the protestors locked on, resulting in four arrests …"

9. At the hearing of the application for an injunction on 31 May and 1 June 2018, evidence was also adduced that the "Reclaim the Power" protest group was planning and promoting a further campaign of sustained direct action targeting Cuadrilla from 11 June to 1 July 2018. The group had openly stated their intention to organise a mass blockade of the Preston New Road dubbed "Block around the Clock" with the aim of completely preventing access to and egress from Cuadrilla's site for four days from 27 June to 1 July 2018.

The Injunction

10. It was against this background that HHJ Pelling QC granted an interim injunction on 1 June 2018 to restrain four named individuals and "persons unknown" from trespassing on the claimants' land, unlawfully interfering with the claimants' rights of passage to and from their land and unlawfully interfering with Cuadrilla's supply chain. This injunction was granted until 11 July 2018. On that date it was replaced by a further order in similar terms, to continue until 1 June 2020 (unless varied or discharged in the meantime). This is the Injunction that was in force when the appellants did the acts which led to their committal for contempt of court.

11. As with the order initially made on 1 June 2018, the Injunction had three limbs, each designed to prevent a different type of wrong (tort) being done to the claimants.

Paragraph 2: trespass

12. The first type of wrong, prohibited by paragraph 2 of the Injunction, was trespassing on the claimants' land situated off the Preston New Road. The land was identified by reference to the title numbers under which it is registered at the Land Registry and was denoted in the order as "the PNR Land".

Paragraph 4: nuisance

13. The second type of wrong which the Injunction sought to prevent was unlawful interference with the claimants' freedom to come and go to and from their land. An owner of land adjoining a public highway has a right of access to the highway and a person who interferes with this right commits the tort of private nuisance. In addition, it is a public nuisance to obstruct or hinder free passage along a public highway and an owner of land specially affected by such a nuisance can sue in respect of it, if the

obstruction of the highway causes them inconvenience, delay or other damage which is substantial and appreciably greater in degree than any suffered by the general public: see *Clerk & Lindsell on Torts* (22nd Edn, 2018) para 20-181.

14. These rights protected by the law of nuisance underpinned paragraph 4 of the Injunction, which applied to the second defendant. The second defendant to the proceedings is described as:

> "Persons unknown interfering with the passage by the claimants and their agents, servants, contractors, sub-contractors, group companies, licensees, invitees or employees with or without vehicles, materials and equipment to, from, over and across the public highway known as Preston New Road."

Paragraph 4 of the Injunction prohibited persons falling within this description from carrying out the following acts on any part of "the PNR Access Route":

> "4.1 blocking any part of the bell-mouth at the Site Entrance with persons or things when done with a view to slowing down or stopping the traffic;
>
> 4.2 blocking or obstructing the highway by slow walking in front of vehicles with the object of slowing them down;
>
> 4.3 climbing onto any part of any vehicle or attaching themselves or anything or any object to any vehicle at any part of the Site Entrance;
>
> in each case with the intention of causing inconvenience or delay to the claimants and/or their agents, servants, contractors, sub-contractors, group companies, licensees, invitees or employees."

An exception was made in paragraph 5 for a weekly walk or march from Maple Farm on the Preston New Road to the Site Entrance followed by a meeting or assembly for up to 15 minutes at the bell-mouth of the Site Entrance.

15. The "PNR Access Route" was defined in paragraph 3 to mean:

> "The whole of the Preston New Road (A583) between the junction with Peel Hill to the northwest and 50 metres to the east of the vehicular entrance to the PNR Site ("the Site Entrance" - as marked on the plan annexed to this Order as Annex 2) …"

Paragraph 7: unlawful means conspiracy

16. The third type of wrong which the Injunction was designed to prevent was unlawful interference with Cuadrilla's supply chain. This was the subject of paragraph 7 of the Injunction, which prohibited persons unknown from "committing any of the following

offences or unlawful acts by or with the agreement or understanding of any other person":

> "…
>
> 7.2 obstructing the free passage along a public highway, or the access to or from a public highway, by:
>
> (i) blocking the highway or access thereto with persons or things when done with a view to slowing down or stopping vehicular or pedestrian traffic, and with the intention of causing inconvenience and delay;
>
> (ii) slow walking in front of vehicles with the object of slowing them down, and with the intention of causing inconvenience and delay;
>
> (iii) climbing onto or attaching themselves to vehicles;
>
> …
>
> in each case with an intention of damaging [Cuadrilla] by obstructing, impeding or interfering with the lawful activities undertaken by it or its group companies, or contractors, sub-contractors, suppliers or service providers engaged by [Cuadrilla], in connection with [Cuadrilla's] searching or boring for or getting any mineral oil or relative hydrocarbon and natural gas existing in its natural condition in strata at the PNR Site or on the PNR Land."

17. The tort underpinning this limb of the Injunction was that of conspiracy to injure by unlawful means.

18. Conspiracy is one of a group of "economic torts" which are an exception to the general rule that there is no duty in tort to avoid causing economic loss to another person unless the loss is parasitic upon some injury to person or damage to property. As explained by Lord Sumption and Lord Lloyd-Jones in *JSC BTA Bank v Ablyazov (No 14)* [2018] UKSC 19; [2018] 2 WLR 1125, para 7, the modern law of conspiracy developed in the late nineteenth and early twentieth centuries as a basis for imposing civil liability on the organisers of strikes and other industrial action. In the form of the tort relevant for present purposes, the matters which the claimant must prove to establish liability are: (i) an unlawful act by the defendant, (ii) done with the intention of injuring the claimant, (iii) pursuant to an agreement (whether express or tacit) with one or more other persons, and (iv) which actually does injure the claimant.

The breaches of the Injunction

19. As required by the terms of the Injunction, extensive steps were taken to publicise it and bring it to the notice of protestors. These steps included: (i) fixing sealed copies of the Injunction in transparent envelopes to posts, gates, fences and hedges and positioning signs at no fewer than 20 conspicuous locations around the PNR Land including at the Site Entrance and at either side of the public highway in each

direction from the Site Entrance advertising the existence of the Injunction; (ii) leaving a sealed copy of the Injunction at protest camps; (iii) advertising and making copies of the Injunction available online; and (iv) sending a press release and copies of the Injunction to 16 specified news outlets.

20. Despite this publicity, a number of incidents occurred in the period July to September 2018 which led Cuadrilla on 11 October 2018 to issue a committal application.

The incident on 24 July 2018

21. The first main incident occurred on 24 July 2018 and involved all three appellants. The facts alleged, which were not seriously disputed by the appellants, were that at around 7am on the morning of that day they (and three other individuals) lay down in pairs on the road across the Site Entrance. Each person was attached to the other person in the pair by an 'arm tube' device. This was done in such a way as to prevent any vehicle from entering or leaving the site. The protestors remained in place for some six and a half hours until around 1.30pm, when they were cut out of the arm tube devices and removed by the police.

The incident on 3 August 2018

22. The second main incident occurred on 3 August 2018 and involved Ms Lawrie alone. It took place on the "PNR Access Route" (as defined in paragraph 3 of the Injunction) about 1200 metres to the west of the Site Entrance. At about 12.55pm Ms Lawrie, along with three other people, attempted to stop a tanker lorry which was on its way to the site in order to collect rainwater. In doing so she stood in the path of the lorry, raising her arms above her head. To avoid hitting her, the lorry had to veer across the centre line of the carriageway into the opposite lane. These facts were proved by video evidence from a camera on the dashboard of the lorry cab.

The other breaches of the Injunction

23. There were three more minor incidents:

    (1) On 1 August 2018 Ms Lawrie trespassed on the PNR Land for approximately two minutes.

    (2) Also on 1 August 2018, Mr Walsh sat down on the road in front of the Site Entrance until he was forcibly removed by police officers.

    (3) On 22 September 2018, as a sewage tanker was attempting to enter the site, Ms Lawrie ran into its path, forcing it to stop. She then lay on the ground in front of the lorry before being helped to her feet by security staff and persuaded to move.

The findings of contempt of court

24. Although two other individuals were also named as respondents, the committal application was pursued only against the three current appellants. The application was heard in two stages. The first stage was a hearing over four days from 25 to 28 June 2019 to decide whether the appellants were guilty of contempt of court.

The legal test for contempt

25. It was common ground at that hearing that a person is guilty of contempt of court by disobeying a court order that prohibits particular conduct only if it is proved to the criminal standard of proof (that is, beyond reasonable doubt) that the person: (i) having received notice of the order did an act prohibited by it; (ii) intended to do the act; and (iii) had knowledge of all the facts which would make doing the act a breach of the order: see *FW Farnsworth Ltd v Lacy* [2013] EWHC 3487 (Ch), para 20. It would not necessarily follow from proof of these facts that the person had knowingly disobeyed the order; but the judge took the sensible approach that, unless this further fact was established, it would not be appropriate to impose any penalty for the breach.

26. For reasons given in a judgment delivered on 28 June 2018, the judge found all the relevant factual allegations proved to the requisite criminal standard of proof. There is no appeal against any of his factual findings.

Knowledge of the Injunction

27. The main factual dispute at the hearing concerned the appellants' knowledge of the Injunction at the time when the incidents occurred. Although they gave evidence to the effect that they did not know of its terms, the judge rejected that evidence as inherently incredible and untruthful.

28. The judge explained in detail his reasons for reaching that conclusion. In the case of Ms Lawrie, the relevant evidence included her own admissions that there was a lot of discussion about the Injunction around the time that it was granted and that she was concerned about its effect on lawful protesting. As the judge observed, that evidence only made sense on the basis that she was aware of its terms. There were also photographs showing Ms Lawrie placing decorations on the fence around the site "in such close proximity to the notices summarising the effect of the [Injunction] as to make it virtually impossible for her not to have read the information in the notice unless she was deliberately choosing not to do so". In the case of Mr Walsh, the relevant evidence included social media posts that he had shared with others that referred to or summarised the main effects of the Injunction. The third appellant, Mr Wilson, accepted that he was aware of the Injunction and that it affected protests at the site entrance. There was also video evidence of Cuadrilla's security guards seeking to draw the Injunction to the attention of the appellants by providing them with copies of it, which they refused to take.

The intentions proved

29. In relation to the first main incident on 24 July 2018, in which each of the appellants lay in the road across the Site Entrance attached to another person by an arm tube device, they all gave evidence that in taking this action they intended to protest. The judge accepted this but thought it obvious from what they did, and was satisfied beyond reasonable doubt, that they also intended to stop vehicles from entering or leaving the site and thereby cause inconvenience and delay to Cuadrilla. Having found on this basis that the appellants were in breach of paragraph 4 of the Injunction, he considered it unnecessary to decide whether they were also in breach of paragraph 7.

30. In relation to the second main incident which occurred on 3 August 2018, Ms Lawrie admitted that she together with others was attempting to stop the lorry. The judge found it proved beyond reasonable doubt that she was acting with the agreement or understanding of others present and with the intention of slowing down or stopping the vehicle, causing inconvenience and delay, and thereby damaging Cuadrilla by interfering with the activities undertaken at the site. He accordingly found that she was in breach of paragraph 7 of the Injunction.

31. The judge also found that the three more minor incidents (referred to at paragraph 23 above) all involved intentional breaches of the Injunction, but he did not consider that it was in the public interest to impose any sanction for those breaches.

The committal order

32. The second stage of the committal application was a hearing held on 2 and 3 September 2019 to decide what sanctions to impose for the two principal breaches of the Injunction found proved at the earlier hearing. The judge had already made it clear that he would not impose immediate terms of imprisonment, so that the available penalties were (a) no order (except in relation to costs), (b) a fine or (c) a suspended term of imprisonment.

33. The judge was satisfied that, in relation to both incidents, the custody threshold was passed such that it was necessary to make orders for committal to prison, although their effect should be suspended. In reaching that conclusion and in fixing the length of the suspended prison terms, the judge had regard to his finding that the breaches were intentional and to the need not only to punish the appellants for their intentional disobedience of the court's order, but also to deter future breaches of the order (whether by them or others).

34. The judge recognised that the breaches were committed as part of a protest but was not persuaded that this should result in lesser penalties. The judge also had regard, by analogy, to the Sentencing Council guideline on sentencing for breach of a criminal behaviour order. This guideline identifies three levels of culpability, where level A represents a very serious or persistent breach, level B a deliberate breach falling between levels A and C, and level C a minor breach or one just short of reasonable excuse. Harm – which includes not only any harm actually caused but any risk of harm posed by the breach – is also divided into three categories. Category 1 applies where the breach causes very serious harm or distress or "demonstrates a continuing risk of serious criminal and/or anti-social behaviour". Category 3 applies where the breach causes little or no harm or distress or "demonstrates a continuing risk of minor criminal and/or anti-social behaviour". Category 2 applies to cases falling between categories 1 and 3.

35. In the case of the first incident involving all three appellants, where the Site Entrance was blocked by a 'lock-on' for several hours, the judge assessed the level of culpability as falling at the lower end of level B and the harm caused together with the continuing risk of breach demonstrated as falling at the lower end of category 2. The guideline indicates that the starting point in sentencing for breach of a criminal behaviour order in category 2B is 12 weeks' custody, with a category range between a medium level community order and one year's custody. A community order is not an available sanction for contempt of court. In the circumstances the judge concluded

that the appropriate penalty was a short suspended term of imprisonment, which he fixed at four weeks.

36. In relation to the second main incident, involving Ms Lawrie alone, the judge assessed the level of culpability as at the top end of level B within the guideline and the degree of harm that was at risk of being caused as in the top half of category 2. In making that assessment, he said:

> "The risk I have identified was a serious one, involving the risk of death or injury to Ms Lawrie; to the driver of the vehicle she was attempting to stop by standing in front of it in the highway; and those driving on the other side of the road into which the lorry was forced by reason of the presence of Ms Lawrie in the road. Those risks were worsened by the fact that the incident occurred during a period of heavy rain …"

The judge also found that the breach was aggravated by "the failure of Ms Lawrie to acknowledge the danger posed by her conduct, or to apologise for it, or to offer any assurance that it will not happen again".

37. The sanction imposed for this contempt of court was committal to prison for two months. As with the penalties imposed in relation to the first incident, execution of the order was suspended on condition that the Injunction is obeyed for a period of two years.

Variation of the Injunction

38. In the same judgment given on 3 September 2019 in which he decided what sanctions to impose, HHJ Pelling QC also dealt with an application by the appellants to vary the Injunction, in particular by removing paragraphs 4 and 7. In making that application, the appellants relied on the decision of this court in *Ineos Upstream Ltd v Persons Unknown* [2019] EWCA Civ 515; [2019] 4 WLR 100, which I will discuss shortly. For the moment I note that, while the judge on 3 September 2019 made some variations to the wording of the Injunction, he rejected the appellants' contention that the original wording was impermissibly wide or uncertain. Furthermore, none of the variations made on 3 September 2019 would, had they been incorporated in the original wording of the Injunction, have rendered the appellants' conduct not a breach.

39. The appellants applied for permission to appeal against the decision not to vary the Injunction by removing paragraphs 4 and 7. However, on 2 November 2019 the Government announced a moratorium on fracking with immediate effect. In the light of the moratorium, the claimants themselves applied on 19 November 2019 to remove paragraphs 4 and 7 of the Injunction for the future on the ground that they no longer require this protection, as Cuadrilla has ceased fracking operations on the site and will not be able to resume such operations unless and until the moratorium is lifted. On 25 November 2019 the judge granted the claimants' application. In these circumstances the appellants withdrew their appeal against the judge's previous refusal to vary the Injunction in that way, as the relief which they were seeking had been granted (albeit for different reasons from those which they were advancing).

The right to protest

40. Before I come to the grounds of the appeal against the committal order, I need to say something more about the two contextual features of this case which I mentioned at the start of this judgment. The first is the legal relevance of the fact, properly emphasised by counsel for the appellants, that the appellants' breaches of the Injunction were a form of non-violent protest against activities to which they strongly object.

41. The right to engage in public protest is an important aspect of the fundamental rights to freedom of expression and freedom of peaceful assembly which are protected by articles 10 and 11 of the Human Rights Convention. Those rights, and hence the right to protest, are not absolute; but any restriction on their exercise will be a breach of articles 10 and 11 unless the restriction (a) is prescribed by law, (b) pursues one (or more) of the legitimate aims stated in articles 10(2) and 11(2) of the Convention and (c) is "necessary in a democratic society" for the achievement of that aim. Applying the last part of this test requires the court to assess the proportionality of the interference with the aim pursued.

42. Exercise of the right to protest – for example, holding a demonstration in a public place – often results in some disruption to ordinary life and inconvenience to other citizens. That by itself does not justify restricting the exercise of the right. As Laws LJ said in *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23, para 43:

> "Rights worth having are unruly things. Demonstrations and protests are liable to be a nuisance. They are liable to be inconvenient and tiresome, or at least perceived as such by others who are out of sympathy with them."

Such side-effects of demonstrations and protests are a form of inconvenience which the state and other members of society are required to tolerate.

43. The distinction between protests which cause disruption as an inevitable side-effect and protests which are deliberately intended to cause disruption, for example by impeding activities of which the protestors disapprove, is an important one, and I will come back to it later. But at this stage I note that even forms of protest which are deliberately intended to cause disruption fall within the scope of articles 10 and 11. Restrictions on such protests may much more readily be justified, however, under articles 10(2) and 11(2) as "necessary in a democratic society" for the achievement of legitimate aims.

44. The clear and constant jurisprudence of the European Court of Human Rights on this point was reiterated in the judgment of the Grand Chamber in *Kudrevičius v Lithuania* (2016) 62 EHRR 34. That case concerned a demonstration by a group of farmers complaining about a fall in prices of agricultural products and seeking increases in state subsidies for the agricultural sector. As part of their protest, some farmers including the applicants used their tractors to block three main roads for approximately 48 hours causing major disruption to traffic. The applicants were convicted in the Lithuanian courts of public order offences and received suspended sentences of 60 days imprisonment. They complained to the European Court that their criminal convictions and sentences violated articles 10 and 11 of the Convention.

In examining their complaints, the Grand Chamber first considered whether the case fell within the scope of article 11 and concluded that it did. The court noted (at para 97) that, on the facts of the case, "the disruption of traffic cannot be described as a side-effect of a meeting held in a public place, but rather as the result of intentional action by the farmers, who wished to attract attention to the problems in the agricultural sector and to push the government to accept their demands". The judgment continues:

> "In the Court's view, although not an uncommon occurrence in the context of the exercise of freedom of assembly in modern societies, physical conduct purposely obstructing traffic and the ordinary course of life in order to seriously disrupt the activities carried out by others is not at the core of that freedom as protected by article 11 of the Convention."

Despite this, the court did not consider that the applicants' conduct was "of such a nature and degree as to remove their participation in the demonstration from the scope of protection of … article 11" (see para 98).

45. In the present case the claimants accept that the conduct of the appellants which constituted contempt of court likewise fell within the scope of articles 10 and 11 of the Human Rights Convention, even though disruption of Cuadrilla's activities was not merely a side-effect but an intended aim of the appellants' conduct. It follows that both the Injunction prohibiting this conduct and the sanctions imposed for disobeying the Injunction were restrictions on the appellants' exercise of their rights under articles 10(1) and 11(1) which could only be justified if those restrictions satisfied the requirements of articles 10(2) and 11(2) of the Convention.

The *Ineos* case

46. A second significant feature of this case is that the Injunction was granted not against the current appellants as named individuals but against "persons unknown". Injunctions of this kind were considered in *Ineos Upstream Ltd v Persons Unknown* [2019] EWCA Civ 515; [2019] 4 WLR 100, which forms an essential part of the backdrop to the issues raised on this appeal.

47. Like the present case, the *Ineos* case concerned an injunction granted on the application of a company engaged or planning to engage in 'fracking' to restrain unlawful interference with its activities by protestors whom it was unable to name. In the *Ineos* case, however, the court was not concerned, as it is here, with breaches of such an injunction. The appeal involved a challenge to the making of an injunction against persons unknown before any allegedly unlawful interference with the claimants' activities had yet occurred. This context is important in understanding the decision.

48. The main question raised on the appeal was whether it was appropriate in principle to grant an injunction against "persons unknown". That question was decided in favour of the claimant companies. The court held that there is no conceptual or legal prohibition on suing persons unknown who are not currently in existence but will come into existence if and when they commit a threatened tort. Nor is there any such prohibition on granting a '*quia timet*' injunction to restrain such persons from

committing a tort which has not yet been committed. Nonetheless, Longmore LJ (with whose judgment David Richards LJ and I agreed) warned that a court should be inherently cautious about granting such injunctions against unknown persons since the reach of such an injunction is necessarily difficult to assess in advance (see para 31).

49. Longmore LJ stated the requirements necessary for the grant of an injunction of this nature "tentatively" (at para 34) in the following way:

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

50. In the light of precedents which were not cited in the *Ineos* case but which have been drawn to our attention on the present appeal, I would enter a caveat in relation to the fourth of these requirements. While it is undoubtedly desirable that the terms of an injunction should correspond to the threatened tort and not be so wide that they prohibit lawful conduct, this cannot be regarded as an absolute rule. The decisions of the Court of Appeal in *Hubbard v Pitt* [1976] QB 142 and *Burris v Azadani* [1995] 1 WLR 1372 demonstrate that, although the court must be careful not to impose an injunction in wider terms than are necessary to do justice, the court is entitled to restrain conduct that is not in itself tortious or otherwise unlawful if it is satisfied that such a restriction is necessary in order to afford effective protection to the rights of the claimant in the particular case. In both those cases the injunction was granted against a named person or persons. What, if any, difference it makes in this regard that the injunction is sought against unknown persons is a question which does not need to be decided on the present appeal but which may, as I understand, arise on a pending appeal from the decision of Nicklin J in *Canada Goose UK Retail Ltd v Persons Unknown* [2019] EWHC 2459 (QB); and in these circumstances I express no opinion on the point.

51. In the *Ineos* case the judge had proceeded on the basis that the evidence adduced by the claimants of protests against other companies engaged in fracking (including Cuadrilla) would, if accepted at trial, be sufficient to show a real and imminent threat of trespass on the claimants' land, interference with the claimants' rights of passage to and from their land and interference with their supply chain. On that basis he granted an injunction in similar – although in some respects wider and more vaguely worded – terms to the Injunction granted in the present case. The Court of Appeal allowed an appeal brought by two individuals who objected to the order made on the ground that the judge's approach – which simply accepted the claimants' evidence at face value – did not adequately justify granting a *quia timet* injunction which might affect the exercise of the right to freedom of expression, as it did not satisfy the requirement in section 12(3) of the Human Rights Act 1998 that the applicant is "likely" to establish at trial that such an injunction should be granted. The Court of Appeal also held that

the parts of the injunction seeking to restrain future acts which would amount to an actionable nuisance or a conspiracy to cause loss by unlawful means should be discharged in any event, as the relevant terms were too widely drafted and lacked the necessary degree of certainty. I will come back to one aspect of the reasoning on that point when discussing the first ground of appeal.

This appeal

52. I turn now to the issues raised on this appeal. The appellants' notice puts forward three grounds. However, Ms Brimelow QC, who now represents the appellants, did not pursue one of them. This challenged the judge's finding that Ms Lawrie was in contempt of court by trespassing on the "PNR Land" on 1 August 2018 in breach of paragraph 2 of the Injunction. As Ms Brimelow accepted, a challenge to that finding, even if successful, would provide no reason for disturbing the committal order, as the judge considered that there was no public interest in taking any further action in relation to the three minor incidents, of which the trespass incident was one, and made no order in respect of them. The order under appeal was based only on the 'lock-on' at the Site Entrance by all three appellants on 24 July 2018 and Ms Lawrie's action in standing in the path of a lorry on 3 August 2018. Nothing turns, therefore, on whether or not Ms Lawrie trespassed on the "PNR Land" on 1 August 2018.

53. The two grounds of appeal pursued are that, in relation to the two incidents on which the order for committal was based:

(1) the judge erred in committing the appellants under paragraphs 4 and 7 of the Injunction, as these paragraphs were insufficiently clear and certain because they included references to intention;

(2) alternatively, the judge erred by imposing an inappropriate sanction (consisting of suspended orders for imprisonment) which was too harsh.

(1) Was the Injunction unclear?

54. It is a well-established principle that an injunction must be expressed in terms which are clear and certain so as to make plain what is permitted and what is prohibited: see e.g. *Attorney General v Punch Ltd* [2002] UKHL 50; [2003] 1 AC 1046, para 35. This is just as, if not even more, essential where the injunction is addressed to "persons unknown" rather than named defendants. As Longmore LJ said in the *Ineos* case, para 34, in stating the fifth of the requirements quoted at paragraph 49 above: "the terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do".

55. A similar need for clarity and precision "to a degree that is reasonable in the circumstances" forms part of the requirement in articles 10(2) and 11(2) of the Human Rights Convention that any interference with the rights to freedom of expression and assembly must be "prescribed by law": see *The Sunday Times v United Kingdom* (1979) 2 EHRR 245, para 49; *Kudrevičius v Lithuania* (2016) 62 EHRR 34, para 109.

The references to intention in the Injunction

56. As mentioned, the aspect of paragraphs 4 and 7 of the Injunction which the appellants contend made those terms insufficiently clear and certain to support findings of contempt was the fact that they included references to the defendant's intention. Paragraph 4.1, of which all three appellants were found to be in breach by their 'lock on' at the Site Entrance on 24 July 2018, prohibited "blocking any part of the bell mouth at the Site Entrance with persons or things when done with a view to slowing down or stopping the traffic" and "with the intention of causing inconvenience or delay to the claimants". Establishing a breach of this term therefore required proof of two intentions. Paragraph 7.2(1), of which Ms Lawrie was found to have been in breach when she stood in front of a lorry on 3 August 2018, required proof of three intentions: namely, those of "slowing down or stopping vehicular or pedestrian traffic", "causing inconvenience and delay", and "damaging [Cuadrilla] by obstructing, impeding or interfering with the lawful activities undertaken by it or its group companies, or contractors …" It was also necessary to prove that the act was done with the agreement or understanding of another person.

Types of unclarity

57. There are at least three different ways in which the terms of an injunction may be unclear. One is that a term may be ambiguous, in that the words used have more than one meaning. Another is that a term may be vague in so far as there are borderline cases to which it is inherently uncertain whether the term applies. Except where quantitative measurements can be used, some degree of imprecision is inevitable. But the wording of an injunction is unacceptably vague to the extent that there is no way of telling with confidence what will count as falling within its scope and what will not. Evaluative language is often open to this objection. For example, a prohibition against "unreasonably" obstructing the highway is vague because there is room for differences of opinion about what is an unreasonable obstruction and no determinate or incontestable standard by which to decide whether particular conduct constitutes a breach. Language which does not involve a value judgment may also be unduly vague. An example would be an injunction which prohibited particular conduct within a "short" distance of a location (such as the Site Entrance in this case). Without a more precise definition, there is no way of ascertaining what distance does or does not count as "short".

58. A third way in which the terms of an injunction may lack clarity is that the language used may be too convoluted, technical or otherwise opaque to be readily understandable by the person(s) to whom the injunction is addressed. Where legal knowledge is needed to understand the effect of a term, its clarity will depend on whether the addressee of the injunction can be expected to obtain legal advice. Such an expectation may be reasonable where an injunction is granted in the course of litigation in which each party is legally represented. By contrast, in a case of the present kind where an injunction is granted against "persons unknown", it is unreasonable to impose on members of the public the cost of consulting a lawyer in order to find out what the injunction does and does not prohibit them from doing.

59. All these kinds of clarity (or lack of it) are relevant at the stage of deciding whether to grant an injunction and, if so, in what terms. They are also relevant where an application is made to enforce compliance or punish breach of an injunction by

seeking an order for committal. In principle, people should not be at risk of being penalised for breach of a court order if they act in a way which 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. That is so whether the term in question is unclear because it is ambiguous, vague or inaccessible.

60. It is important to note that whether a term of an order is unclear in any of these ways is dependent on context. Words which are clear enough in one factual situation may be unclear in another. This can be illustrated by reference to the ground of appeal which was abandoned. The argument advanced was that paragraph 2 of the Injunction was insufficiently clear to form the basis of a finding of contempt of court because the "PNR Land" was described by reference to a Land Registry map and such maps are, so it was said, only accurate to around one metre. Assuming (which was in issue) that there is this margin of error, the objection that the relevant term of the Injunction was insufficiently clear would have been compelling in the absence of proof that Ms Lawrie crossed the boundary of the land as it was marked on the map by more than a metre. As it was, however, the judge was satisfied from video evidence that Ms Lawrie entered on the land by much more than a metre. The alleged vagueness in the term of the Injunction was therefore immaterial.

The concept of intention

61. Of these three types of unclarity, it is the third that is said to be material in the present case. For the appellants, Ms Brimelow QC argued that references to intention in an injunction addressed to "persons unknown" made the terms insufficiently clear because intention is a legal concept which is difficult for a member of the public to understand. In the judgment given on 28 June 2019 in which he made findings of contempt of court, the judge referred to the maxim that a person "is presumed to intend the natural and probable consequences of his acts", citing a passage from the speech of Lord Bridge in *R v Maloney* [1985] AC 905, 928-9. Ms Brimelow submitted that a person with no legal knowledge or training would not understand that, even if they do not have in mind a particular consequence of their action, they will be held to intend any natural and probable consequence of it. Such a person might reasonably consider that their intention was, for example, to prevent fracking, or to protect the environment, or to protest, rather than, say, to cause inconvenience and delay to Cuadrilla, even if such inconvenience and delay was a natural or probable consequence of what they did.

62. I do not accept that the references in the terms of the Injunction to intention had any special legal meaning or were difficult for a member of the public to understand. In criminal law there has not for more than 50 years been any rule of law that persons are presumed to intend the natural and probable consequences of their acts. That notion was given its quietus by section 8 of the Criminal Justice Act 1967, which provides:

> "A court or jury, in determining whether a person has committed an offence —
>
> (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but

> (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances."

63. This was the point that Lord Bridge was making in the *Maloney* case in the passage to which HHJ Pelling QC referred. The House of Lords made it clear in that case that juries should no longer, save in rare cases, be given legal directions as to what is meant by intention. Lord Bridge described it (at 926) as the "golden rule" that, when directing a jury on intent, a judge should avoid any elaboration or paraphrase of what is meant by intent and should leave it to the jury's good sense to decide whether the person accused acted with the intention required to be guilty of a crime. Just as no elaboration of the concept of intention is required for juries, so equally its meaning does not need to be explained to members of the public to whom a court order is addressed. It is not a technical term nor one that, when used in an injunction prohibiting acts done with a specific intention, is to be understood in any special or unusual sense. It is an ordinary English word to be given its ordinary meaning and with which anyone who read the Injunction would be perfectly familiar.

64. That is not to say that proof of an intention is always straightforward. Often it causes no difficulty. A person's immediate intention may be obvious from their actions. Thus, when the appellants and three others lay across the Site Entrance on 24 July 2018 in pairs linked by arm tube devices, it was obvious that they were intending to stop vehicles from entering or leaving the site. Had that not been their intention, they would not have positioned themselves where they did. Similarly, when in the incident on 3 August 2018 Ms Lawrie stood in the road in front of a lorry, waving her arms, there could be no doubt that her intention was to cause the vehicle to stop. To determine whether less direct consequences or potential consequences of a person's actions are intended may require further knowledge of, or inference as to, their plans or goals. In so far as there is evidential uncertainty, however, a person alleged to be in contempt of court by disobeying an injunction is protected by the requirement that the relevant facts must be proved to the criminal standard of proof. Hence where the injunction prohibits an act done with a particular intention, if there is any reasonable doubt about whether the defendant acted with that intention, contempt of court will not be established.

65. I accordingly cannot accept that there is anything objectionable in principle about including a requirement of intention in an injunction. Nor do I accept that there is anything in such a requirement which is inherently unclear or which requires any legal training or knowledge to comprehend.

Dicta in the Ineos case

66. Nevertheless, I acknowledge that the appellants' argument gains some traction from a statement in the judgment of Longmore LJ in the *Ineos* case. One of the terms of the injunction granted by the judge at first instance in that case, like paragraph 7 of the Injunction in this case, was designed to protect the claimants from financial damage caused by an unlawful means conspiracy. In the *Ineos* case the term in question prohibited persons unknown from "combining together to commit the act or offence of obstructing free passage along a public highway (or access to or from a public highway) by … slow walking in front of the vehicles with the object of slowing them down and with the intention of causing inconvenience and delay or … otherwise

unreasonably and/or without lawful authority or excuse obstructing the highway with the intention of causing inconvenience and delay, all with the intention of damaging the claimants." The wording of this prohibition was held to be insufficiently clear, both because it contained language which was too vague ("slow walking" and "unreasonably and/or without lawful authority or excuse obstructing the highway") and because, as Longmore LJ put it, "an ordinary person exercising legitimate rights of protest is most unlikely to have any clear idea of what would constitute lawful authority or excuse": see *Ineos Upstream Ltd v Persons Unknown* [2019] EWCA Civ 515; [2019] 4 WLR 100, para 40.

67. In addition to making these points, however, Longmore LJ also agreed with a submission that one of the "problems with a *quia timet* order in this form" was that "it is of the essence of the tort [of conspiracy] that it must cause damage". He commented:

> "While that cannot of itself be an objection to the grant of *quia timet* relief, the requirement that it cause damage can only be incorporated into the order by reference to the defendants' intention which, as Sir Andrew Morritt said in *Hampshire Waste*, depends on the subjective intention of the individual which is not necessarily known to the outside world (and in particular to the claimants) and is susceptible to change and, for that reason, should not be incorporated into the order."

68. Although this was not an essential part of the court's reasoning, I agreed with the judgment of Longmore LJ in the *Ineos* case and therefore share responsibility for these observations. However, while I continue to agree with the other reasons given for finding the form of order made by the judge in the *Ineos* case unclear as well as too widely drawn, with the benefit of the further scrutiny that the point has received on this appeal I now consider the concern expressed about the reference to the defendants' intention to have been misplaced.

69. It is not in fact correct, as suggested in the passage quoted above, that the requirement of the tort of conspiracy to show damage can only be incorporated into a *quia timet* injunction by reference to the defendants' intention. It is perfectly possible to frame a prohibition which applies only to future conduct that actually causes damage. It is, however, correct that, in order to make the terms of the injunction correspond to the tort and avoid prohibiting conduct that is lawful, it is necessary to include a requirement that the defendants' conduct was intended to cause damage to the claimant. As already discussed, there is nothing ambiguous, vague or difficult to understand about such a requirement. The only potential difficulty created by its inclusion is one of proof.

The Hampshire Waste case

70. The case of *Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator Site* [2003] EWHC 1739 (Ch); [2004] Env LR 9, to which Longmore LJ referred, involved an application by companies which owned and operated waste incineration sites for an injunction to restrain persons from trespassing on their sites in connection with a planned day of protest by environmental protestors described as "Global Day of Action Against Incinerators". On similar occasions in the past

protestors had invaded sites owned by the claimants and caused substantial irrecoverable costs.

71. The injunction was sought against defendants described in the draft order as "Persons intending to trespass and/or trespassing" on six specified sites "in connection with the 'Global Day of Action Against Incinerators' (or similarly described event) on or around 14 July 2003". Sir Andrew Morritt V-C considered that the case for granting an injunction to prevent the threatened trespass to the claimants' property was clearly made out and that, in circumstances where the claimants were unable to name any of the protestors who might be involved, it was appropriate to grant the injunction against persons unknown. He raised two points, however, about the proposed description of the defendants (see para 9). The two points were that:

> "it seems to me to be wrong that the description of the defendant should involve a legal conclusion such as is implicit in the use of the word 'trespass'. Similarly, it seems to me to be undesirable to use a description such as 'intending to trespass' because that depends on the subjective intention of the individual which is not necessarily known to the outside world and in particular the claimants, and is susceptible of change."

To address these points, the Vice-Chancellor amended the opening words of the proposed description of the defendants to refer to: "Persons entering or remaining without the consent of the claimants" on the specified sites.

72. I take the Vice-Chancellor's objection to the use of the word "trespass" to have been that trespass is a legal concept and that the class of persons affected by the injunction ought to be identified in language which does not use a legal term of art. His objection to the reference to intention was different. It was not that intention is a legal concept which might not be clear to persons notified of the injunction. It was that "the outside world and in particular the claimants" would not necessarily know whether a person did or did not have the relevant intention and also that this state of affairs was susceptible of change.

73. Although the Vice-Chancellor did not spell this out, what was particularly unsatisfactory, as it seems to me, about the proposed description was that it would have made the question whether a person was a defendant to the proceedings dependent not on anything which that person had done (with or without a specific intention) but solely on their state of mind at any given time (which might change). Thus, a person who had formed an intention of joining a protest which would involve entering on the claimants' land would fall within the scope of the injunction even if he or she had done nothing which interfered with the claimants' legal rights or which was even preparatory or gave rise to a risk of such interference. It is easy to see why the Vice-Chancellor regarded this as undesirable.

74. I do not consider that the same objection applies to a term of an injunction which prohibits doing specified acts with a specified intention. Limiting the scope of a prohibition by reference to the intention required to make the act wrongful avoids restraining conduct that is lawful. In so far as it creates difficulty of proof, that is a difficulty for the claimant and not for a person accused of breaching the injunction – for whom the need to prove the specified intention provides an additional protection.

Accordingly, although the inclusion of multiple references to intention – as in paragraph 7 of the Injunction in this case – risks introducing an undesirable degree of complexity, I would reject the suggestion that there is any reason in principle why references to intention should not be incorporated into an order or that the inclusion of such references in the terms of the Injunction in the present case provided a reason not to enforce it by committal.

The width of the Injunction

75. I mentioned earlier that the appellants withdrew their appeal against the judge's decision on 3 September 2019 to refuse their application to vary the Injunction, when the relief which they were seeking was granted for different reasons following the Government's moratorium on fracking. The arguments which the appellants would have made on that appeal, however, did not disappear from the picture.

76. It is no defence to an application for the committal of a defendant who has disobeyed a court order for the defendant to say that the order is not one that ought to have been made. As a matter of principle, a court order takes effect when it is made and remains binding unless and until it is revoked by the court that made it or on an appeal; and for as long as the order is in effect, it is a contempt of court to disobey the order whether or not the court was right to make it in the first place: see e.g. *M v Home Office* [1992] QB 270, 298-299; *Burris v Azadani* [1995] 1 WLR 1372, 1381. In the present case, therefore, it is not open to the appellants to argue that they were not guilty of contempt of court because the Injunction should not have been granted or should not have been granted in terms which prohibited the acts which they chose to commit in defiance of the court's order.

77. If it were shown that the court was wrong to grant an injunction which prohibited the appellants' conduct, that would nonetheless be relevant to the question whether it was appropriate to punish the appellants' contempt of court by ordering their committal to prison. Although no such argument was raised in the appellants' grounds of appeal against the committal order, in the course of her oral submissions Ms Brimelow QC suggested that this was the case. She did so, as I understood it, by reference to the grounds on which the appellants had sought permission to appeal against the judge's refusal to remove paragraphs 4 and 7 of the Injunction (before that appeal was withdrawn). Although there was no formal application to rely on those grounds for the purpose of the appeal against the committal order, it would be unreasonable not to permit this.

78. The grounds on which the appellants argued that paragraphs 4 and 7 should not have been included in the Injunction were essentially the same, however, as the grounds on which they argued that those terms could not properly form the basis of findings of contempt of court – namely, that the terms were insufficiently clear and certain because of their references to intention. For the reasons already given, I do not consider this to be a valid objection.

79. I would add that it has not been argued – and I see no reason to think – that on the facts of this case paragraph 4 of the Injunction, as it stood when the breaches occurred, was too widely drawn. Although a similarly worded term was criticised by this court in the *Ineos* case, there was in that case, as I have emphasised, no previous history of interference with the claimants' rights. The injunction sought was therefore

what might be called a 'pure' *quia timet* injunction, in that it was not aimed at preventing repetition of wrongful acts which had caused harm to the claimants but at preventing such acts in circumstances where none had yet taken place. The significance which the court attached to this can be seen from para 42 of the judgment of Longmore LJ, where he said:

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

80. In the present case, by contrast, there was a well documented history of obstruction and attempts to obstruct access to and egress from Cuadrilla's site by blocking the Site Entrance and by obstructing the highway or otherwise interfering with traffic on the part of the Preston New Road defined in paragraph 3 of the Injunction as the "PNR Access Route". That history of conduct which clearly infringed the claimants' rights of free passage provided a solid basis for the prohibition in paragraph 4.

81. Paragraph 7 is a different matter. The only breach of paragraph 7 in issue on this appeal, however, is Ms Lawrie's conduct on 3 August 2018 in standing in the road in an attempt to stop a lorry which was approaching the Site Entrance and with the intention of causing inconvenience and delay to Cuadrilla. Cuadrilla had no need to rely on the tort of unlawful means conspiracy in seeking to restrain such conduct. It clearly amounted to an actionable public nuisance. As such, the prohibition in paragraph 4 could have been framed so as to prohibit such conduct. Indeed, one of the variations made to the Injunction on 3 September 2019 was an amendment to paragraph 4 to prohibit:

> "Standing, sitting, walking or lying in front of any vehicle on the carriageway with the effect of interfering with the vehicular passage along the PNR Access Route by the claimants and/or their agents, servants, contractors, sub-contractors, group companies, licensees, invitees or employees;"

This squarely covered conduct of the kind which occurred on 3 August 2018.

82. The word "effect" was included in the variations made on 3 September 2019 to avoid referring to intention. In my view, reference to intention should not have been removed because there is nothing unclear in such a requirement and I see no sufficient justification for framing the prohibition more widely so as to catch unintended effects. But what matters for present purposes is that the terms of the Injunction were not criticised – and it seems to me could not reasonably be criticised – as too wide in so far as they prohibited the conduct of Ms Lawrie on 3 August 2018, as they did both before and after the variations were made.

83. I am therefore satisfied that, when considering the sanctions imposed on the appellants, it cannot be said in mitigation that the acts which formed the basis of the committal order were not acts which ought to have been prohibited by the Injunction.

(2) Were the sanctions too harsh?

84. The second ground of appeal pursued by the appellants is that – on the footing that the relevant restrictions placed on their conduct by the Injunction were legally justified – the judge was nevertheless wrong to punish their breaches of the Injunction by ordering their committal to prison (albeit that execution of the order was suspended).

The standard of review on appeal

85. In deciding what sanction to impose for a contempt of court, a judge has to assess and weigh a number of different factors. The law recognises that a decision of this nature involves an exercise of judgment which is best made by the judge who deals with the case at first instance and with which an appeal court should be slow to interfere. It will generally do so only if the judge: (i) made an error of principle; (ii) took into account immaterial factors or failed to take into account material factors; or (iii) reached a decision which was outside the range of decisions reasonably open to the judge. It follows that there is limited scope for challenging on an appeal a sanction imposed for contempt of court as being excessive (or unduly lenient). If, however, the appeal court is satisfied that the decision of the lower court was wrong on one of the above grounds, it will reverse the decision and either substitute its own decision or remit the case to the judge for further consideration of sanction. See *Liverpool Victoria Insurance Co Ltd v Zafar* [2019] EWCA 392 (Civ), paras 44-46; *McKendrick v Financial Conduct Authority* [2019] EWCA Civ 524; [2019] 4 WLR 65, paras 37-38.

86. The appellants' case that the judge's decision was wrong is put in two ways. First, it is argued that the judge made an error of principle and/or failed to take into account a material factor in treating as irrelevant the fact that, when they disobeyed the Injunction, the appellants were exercising rights of protest which are protected by the common law and by articles 10 and 11 of the Human Rights Convention. Secondly, it is argued that, in having regard (as the judge did) to the guideline issued by the Sentencing Council which applies to sentencing in criminal cases for breach of a criminal behaviour order, the judge misapplied that guideline and, in consequence, reached a decision that was unduly harsh.

Sentencing protestors

87. The fact that acts of deliberate disobedience to the law were committed as part of a peaceful protest will seldom provide a defence to a criminal charge. But it is well established that it is a relevant factor in assessing culpability for the purpose of sentencing in a criminal case. On behalf of the appellants, Ms Brimelow QC emphasised the following observations of Lord Hoffmann in *R v Jones (Margaret)* [2006] UKHL 16; [2007] 1 AC 136, para 89:

> "My Lords, civil disobedience on conscientious grounds has a long and honourable history in this country. People who break the law to affirm their belief in the injustice of a law or

> government action are sometimes vindicated by history. The suffragettes are an example which comes immediately to mind. It is the mark of a civilised community that it can accommodate protests and demonstrations of this kind. But there are conventions which are generally accepted by the law-breakers on one side and the law-enforcers on the other. The protesters 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 protesters into account."

88. This passage was quoted with approval by Lord Burnett of Maldon CJ, giving the judgment of the Court of Appeal Criminal Division in *R v Roberts* [2018] EWCA Crim 2739; [2019] 1 WLR 2577, the case mentioned earlier that arose from 'direct action' protests at Cuadrilla's site in July 2017 by four men who climbed on top of lorries. Three of the protestors were sentenced to immediate terms of imprisonment, but on appeal those sentences were replaced by orders for their conditional discharge, having regard to the fact that they had already spent three weeks in prison before their appeals were heard. The Court of Appeal indicated that the appropriate sentence would otherwise have been a community sentence with a punitive element involving work (or perhaps a curfew). The Lord Chief Justice (at para 34) summarised the proper approach to sentencing in cases of this kind as being that:

> "the conscientious motives of protestors will be taken into account when they are sentenced for their offences but that there is in essence a bargain or mutual understanding operating in such cases. A sense of proportion on the part of the offenders in avoiding excessive damage or inconvenience is matched by a relatively benign approach to sentencing. When sentencing an offender, the value of the right to freedom of expression finds its voice in the approach to sentencing."

89. Ms Brimelow submitted that this approach to sentencing should have been, but was not, followed in the present case when deciding what sanction to impose for the breaches of the Injunction committed by the appellants.

Were custodial sentences wrong in principle?

90. At one point in her oral submissions Ms Brimelow sought to argue that, where a deliberate breach of a court order is committed in the course of a peaceful protest, it is wrong in principle to punish the breach by imprisonment, even if the sanction is suspended on condition that there is no further breach within a specified period. This mirrored a submission which she made when representing the protestors in the *Roberts* case. The submission was rejected in the *Roberts* case (at para 43) and I would likewise reject it as contrary to both principle and authority.

91. There is no principle which justifies treating the conscientious motives of a protestor as a licence to flout court orders with impunity from imprisonment, whatever the nature or extent of the harm intended or caused provided only that no violence is used.

Court orders would become toothless if such an approach were adopted – particularly in relation to those for whom a financial penalty holds no deterrent because it cannot be enforced as they do not have funds from which to pay it. Unsurprisingly, no case law was cited in which such an approach has been endorsed. Not only, as mentioned, was it rejected in the *Roberts* case in the context of sentencing for criminal offences, but it is also inconsistent with the jurisprudence of the European Court of Human Rights.

92. Thus, in *Kudrevičius v Lithuania* (2016) 62 EHRR 34, mentioned earlier, the Grand Chamber of the European Court saw nothing disproportionate in the decision to impose on the applicants a 60 day custodial sentence suspended for one year (along with some restrictions on their freedom of movement) – a sentence which the court described as "lenient" (see para 178). The Grand Chamber also referred with approval to earlier cases in which sentences of imprisonment imposed on demonstrators who intentionally caused disruption had been held not to violate articles 10 and 11 of the Human Rights Convention. For example, in *Barraco v France* (application no 31684/05) 5 March 2009, the applicant had taken part in a protest which involved blocking traffic on a motorway for several hours. The European Court held that his conviction and sentence to a suspended term of three months' imprisonment (together with a fine of €1,500) did not violate article 11.

93. Another case cited by the Grand Chamber in *Kudrevičius* that is particularly in point because it involved defiance of court orders is *Steel v United Kingdom* (1999) 28 EHRR 603. In that case the first applicant took part in a protest against a grouse shoot in which she intentionally obstructed a member of the shoot by walking in front of him as he lifted his shotgun to take aim, thus preventing him from firing. She was convicted of a public order offence, fined and ordered to be bound over to keep the peace for 12 months. Having refused to be bound over, the applicant was committed to prison for 28 days. The second applicant took part in a protest against the building of a motorway extension in which she stood under the bucket of a JCB digger in order to impede construction work. She was likewise convicted of a public order offence, fined and ordered to be bound over. She also refused to be bound over and was committed to prison for seven days. The European Court held that in each of these cases the measures taken against the protestors interfered with their rights under article 10 of the Convention but that in each case the measures were proportionate to the legitimate aims of preventing disorder, protecting the rights of others and also (in relation to their committal to prison for refusing to agree to be bound over) maintaining the authority of the judiciary.

94. The common feature of these cases, as the court observed in the *Kudrevičius* case, is that the disruption caused was not a side-effect of a protest held in a public place but was an intended aim of the protest. As foreshadowed earlier, this is an important distinction. It was recently underlined by a Divisional Court (Singh LJ and Farbey J) in *Director of Public Prosecutions v Ziegler* [2019] EWHC 71 (Admin); [2019] 2 WLR 1451, a case – like the *Kudrevičius* case – involving deliberate obstruction of a highway. After quoting the statement that intentional disruption of activities of others is not "at the core" of the freedom protected by article 11 of the Convention (see paragraph 44 above), the Divisional Court identified one reason for this as being that the essence of the rights of peaceful assembly and freedom of expression is the opportunity to persuade others (see para 53 of the judgment). The court pointed out

that persuasion is very different from attempting (through physical obstruction or similar conduct) to compel others to act in a way you desire.

95. Where, as in the present case, individuals not only resort to compulsion to hinder or try to stop lawful activities of others of which they disapprove, but do so in deliberate defiance of a court order, they have no reason to expect that their conscientious motives will insulate them from the sanction of imprisonment.

96. On the other hand, courts are frequently reluctant to make orders for the immediate imprisonment of protestors who engage in deliberately disruptive but non-violent forms of direct action protest for conscientious reasons. It is notable that in the *Kudrevičius* case and in the earlier cases there cited in which custodial sentences were held by the European Court to be a proportionate restriction on the rights of protestors, in all but one instance the sentence imposed was a suspended sentence. The exception was *Steel v United Kingdom*, but in that case too the protestors were not immediately sentenced to imprisonment: it was only when they refused to be bound over to keep the peace that they were sent to prison. A similar reluctance to make (or uphold) orders for immediate imprisonment is apparent in the domestic cases to which counsel for the appellants referred, including the *Roberts* case. As Lord Burnett CJ summed up the position in that case (at para 43):

> "There are no bright lines, but particular caution attaches to immediate custodial sentences."

There are good reasons for this, which stem from the nature of acts which may properly be characterised as acts of civil disobedience.

Civil disobedience

97. Civil disobedience may be defined as a public, non-violent, conscientious act contrary to law, done with the aim of bringing about a change in the law or policies of the government (or possibly, though this is controversial, of private organisations): see e.g. John Rawls, *A Theory of Justice* (1971) p.364. Where these conditions are met, such acts represent a form of political protest, both in the sense that they are guided by principles of justice or social good and in the sense that they are addressed to other members of the community or those who hold power within it. The public nature of the act – in contrast to the actions of other law-breakers who generally seek to avoid detection – is a demonstration of the protestor's sincerity and willingness to accept the legal consequences of their actions. It is also essential to characterising the act as a form of political communication or address. Eschewing violence and showing some measure of moderation in the level of harm intended again signal that, although the means of protest adopted transgress the law, the protestor is engaged in a form of political action undertaken on moral grounds rather than in mere criminality.

98. It seems to me that there are at least three reasons for showing greater clemency in response to such acts of civil disobedience than in dealing with other disobedience of the law. First, by adhering to the conditions mentioned, a person who engages in acts of civil disobedience establishes a moral difference between herself and ordinary law-breakers which it is right to take into account in determining what punishment is deserved. Second, by reason of that difference and the fact that such a protestor is generally – apart from their protest activity – a law-abiding citizen, there is reason to

expect that less severe punishment is necessary to deter such a person from further law-breaking. Third, part of the purpose of imposing sanctions, whether for a criminal offence or for intentional breach of an injunction, is to engage in a dialogue with the defendant so that he or she appreciates the reasons why in a democratic society it is the duty of responsible citizens to obey the law and respect the rights of others, even where the law or other people's lawful activities are contrary to the protestor's own moral convictions. Such a dialogue is more likely to be effective where authorities (including judicial authorities) show restraint in anticipation that the defendant will respond by desisting from further breaches. This is part of what I believe Lord Burnett CJ meant in the *Roberts* case at para 34 (quoted above) when he referred to "a bargain or mutual understanding operating in such cases".

99. These considerations explain why, in a case where an act of civil disobedience constitutes a criminal offence or contempt of a court order which is so serious that it crosses the custody threshold, it will nonetheless very often be appropriate to suspend the operation of the sanction on condition there is no further breach during a specified period of time. Of course, if the defendant does not comply with that condition, he or she must expect that the order for imprisonment will be implemented.

The judge's approach

100. The judge had regard to the fact that the breaches of the Injunction committed by the appellants in this case were part of a protest but did not accept that this was relevant in deciding what sanction to impose. That was an error. As I have indicated, it is clear from the case law that, even where protest takes the form of intentional disruption of the lawful activities of others, as it did here, such protest still falls within the scope of articles 10 and 11 of the Human Rights Convention. Any restrictions imposed on such protestors are therefore lawful only if they satisfy the requirements set out in articles 10(2) and 11(2). That is so even where the protestors' actions involve disobeying a court order. Although – as the judge observed – the appellants' rights to freedom of expression and assembly had already been taken into account in deciding whether to make the order which they disobeyed, imposing a sanction for such disobedience involved a further and separate restriction of their rights which also required justification in accordance with articles 10(2) and 11(2) of the Human Rights Convention.

101. That said, the judge was in my opinion entitled to conclude – as he made it clear that he did – that the restrictions which he imposed on the liberty of the appellants by making suspended orders for their committal to prison were in any event justified by the need to protect the rights of the claimants and to maintain the court's authority. The latter aim is specifically identified in article 10(2) as a purpose capable of justifying restrictions on the exercise of freedom of expression. It is also, as it seems to me, essential for the legitimate purpose identified in both articles 10(2) and 11(2) of preventing disorder.

Reference to the Sentencing Council guideline

102. In deciding what sanctions were appropriate, the judge approached the decision, correctly, by considering both the culpability of the appellants and the harm caused, intended or likely to be caused by their breaches of the Injunction. I see no merit in the appellants' argument that, in making this assessment, he misapplied the

Sentencing Council guideline on sentencing for breach of a criminal behaviour order. In *Venables v News Group Newspapers* [2019] EWCA Civ 534, para 26, this court thought it appropriate to have regard to that guideline in deciding what penalty to impose for contempt of court in breaching an injunction. As the court noted, however, the guideline does not apply to proceedings for committal. There is therefore no obligation on a judge to follow the guideline in such proceedings and I do not consider that, if a judge does not have regard to it, this can be said to be an error of law. The criminal sentencing guideline provides, at most, a useful comparison.

103. Caution is needed in any such comparison, however, as the maximum penalty for contempt of court is two years' imprisonment as opposed to five years for breach of a criminal behaviour order. It would be a mistake to assume that the starting points and category ranges indicated in the sentencing guideline should on that account be made the subject of a linear adjustment such that, for example, the starting point for a contempt of court that would fall in the most serious category in the guideline (category 1A) should only be of the order of 10 months' custody (which is roughly 40% of the guideline starting point of two years' custody). As the Court of Appeal observed in *McKendrick v Financial Conduct Authority* [2019] EWCA Civ 524; [2019] 4 WLR 65, para 40:

> "[Counsel for the appellant] was correct to submit that the decision as to the length of sentence appropriate in a particular case must take into account that the maximum sentence is committal to prison for two years. However, because the maximum term is comparatively short, we do not think that the maximum can be reserved for the very worst sort of contempt which can be imagined. Rather, there will be a comparatively broad range of conduct which can fairly be regarded as falling within the most serious category and as therefore justifying a sentence at or near the maximum."

104. A further material difference is that, in proceedings for contempt of court, a community order is not available as a lesser alternative to the sanction of imprisonment. There may therefore be cases where, although the sentencing guideline for breach offences might suggest that a community order would be an appropriate sentence, it is necessary to punish a contempt of court by an order for imprisonment because the contempt is so serious that neither of the only alternative sanctions of a fine and/or an order for costs could be justified.

Sanction for the first incident

105. In relation to the first incident on 24 July 2018 involving all three appellants, there is no basis for saying that the judge's assessment of culpability and harm by reference to the sentencing guideline for breach offences, or his decision on sanction in the light of that assessment, was wrong on any of the grounds listed in paragraph 85 above. The judge was right to start from the position that a deliberate breach of a court order is itself a serious matter. He was entitled, as he also did, to treat the appellants' culpability as aggravated by the element of planning involved in their use of lock-on devices and to take account of (i) the number of hours of disruption and delay caused by their conduct, (ii) evidence that the incident caused Cuadrilla additional (and

irrecoverable) costs of around £1,000, and (iii) the fact that the incident only ended when police were deployed to cut through the arm lock devices and remove the appellants. It was also relevant that the appellants expressed no remorse and gave no indication that they would not commit further breaches of the Injunction. Nor were they entitled to any credit for admitting their contempt, as they declined to do so, thereby necessitating a trial at which evidence had to be called.

106. Had it not been for the fact that the appellants' actions could be regarded as acts of civil disobedience in the sense I have described, short immediate custodial terms would in my view have been warranted. As it is, it cannot be said that the judge's decision to impose suspended terms of imprisonment of four weeks was wrong in principle or outside the range of decisions reasonably open to him.

Sanction for the second incident

107. In relation to the second incident on 3 August 2018 involving Ms Lawrie alone, somewhat different considerations apply. Although Ms Lawrie's action in standing in the path of a lorry to try to stop it was also found to be a deliberate breach of the court's order, there was no evidence of planning and the incident was far shorter in duration lasting only a few seconds. In assessing the harm caused or risked by Ms Lawrie's breach of the Injunction, the judge emphasised the danger of injury or death to which her action had exposed Ms Lawrie herself, the driver of the lorry and other road-users. However, as David Richards LJ pointed out in the course of argument, in approaching the matter in this way the judge seems to have lost sight of the fact that the purpose of paragraph 7 of the Injunction, which he was punishing Ms Lawrie for disobeying, was not to protect the safety of road-users but was to protect Cuadrilla from suffering economic loss as a result of conspiracy to disrupt its supply chain by unlawful means. In assessing the seriousness of the breach, the judge should have focused on the extent to which the breach caused, or was intended to cause or risked causing, harm of the kind which the relevant term of the Injunction was intended to prevent. Had he done this, the judge would have been bound to conclude not only that no harm was actually caused but that the amount of economic loss intended or threatened by delaying a lorry on its way to collect rainwater from the site was slight.

108. The judge was, I consider, entitled to take into account as aggravating Ms Lawrie's culpability the nature of the unlawful means used and the fact that, on his findings, it amounted not merely to a public nuisance through obstruction of the highway but to an offence of causing danger to road-users contrary to section 22A of the Road Traffic Act 1988. To be guilty of an offence under that statutory provision, it is not necessary that the person concerned should have intended to cause, or realised that they were causing, danger to life or limb, and the judge made no such finding in relation to Ms Lawrie. It is sufficient that it would be obvious to a reasonable person that their action would be dangerous – a matter of which the judge was clearly satisfied on the evidence.

109. Ms Lawrie was not prosecuted, however, and the judge was not sentencing her for a criminal offence under the Road Traffic Act. In the circumstances, giving all due weight to the nature of the unlawful means used, the fact that this was Ms Lawrie's second deliberate breach of the Injunction and her complete lack of contrition, I do not consider that the term of imprisonment of two months which the judge imposed was justified. In my judgment, although the judge was right to conclude that the

custody threshold was crossed, the appropriate penalty for this contempt of court was the same as that imposed for the earlier contempt committed by all three appellants – that is, a suspended term of imprisonment of four weeks.

Conclusion

110. For these reasons, I would vary the committal order made by HHJ Pelling QC on 3 September 2019 by substituting for the period of imprisonment of two months in paragraph 2 of the order a period of four weeks. In all other respects I would dismiss the appeal.

Lord Justice David Richards:

111. I agree.

Lord Justice Underhill:

112. I agree with Leggatt LJ, for the reasons which he gives, that this appeal should be dismissed save in the one respect which he identifies. The courts attach great weight to the right of peaceful protest, even where this causes disruption to others; but it is also important for the rule of law that deliberate breaches of court orders attract a real penalty, and I can see nothing wrong in principle in the judge's conclusion that the appellants' conduct here merited a custodial sentence, albeit suspended.

Neutral Citation Number: [2020] EWCA Civ 303

Case No: A2/2019/2604

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Nicklin J
[2019] EWHC 2459 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/03/2020

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE DAVID RICHARDS
and
LORD JUSTICE COULSON

- -

Between :

CANADA GOOSE UK RETAIL LIMITED (1)
James HAYTON (for and on behalf of the Employees, Security Personnel and Protected Persons pursuant to CPR 19.6) (2) — **Appellants**

- and -

PERSONS UNKNOWN WHO ARE PROTESTORS AGAINST THE MANUFACTURE AND SALE OF CLOTHING MADE OF OR CONTAINING ANIMAL PRODUCTS AND AGAINST THE SALE OF SUCH CLOTHING AT CANADA GOOSE, 244 REGENT STREET, LONDON W1B 3BR (1)
PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS (PETA) FOUNDATION (a charitable company limited by guarantee, in its own right and for and on behalf of its employees and members pursuant to CPR 19.6) (2) — **Respondents**

- -

Ranjit Bhose QC and **Michael Buckpitt** (instructed by **Lewis Silkin LLP**) for the **Appellants**
The **Respondents** did not appear and were not represented
Sarah Wilkinson appeared as Advocate to the Court

Hearing dates : 4 & 5 February 2020

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Approved Judgment

Sir Terence Etherton MR, Lord Justice David Richards and Lord Justice Coulson :

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

2. The first appellant, Canada Goose Retail Limited UK ("Canada Goose"), is the UK trading arm of Canada Goose, an international retail clothing company which sells products, mostly coats, which contain animal fur and down. In November 2017 it opened a store at 244 Regent Street in London ("the store"). The second appellant is the manager of the store. The appellants are the claimants in these proceedings, in which they seek injunctive relief and damages in respect of what is described in the claim form as "a campaign of harassment and [the commission] of acts of trespass and/or nuisance against [them]".

3. The first respondents ("the Unknown Persons respondents"), who are the first defendants in the proceedings, were described in the claim form as: "Persons unknown who are protesters against the manufacture and sale of clothing made of or containing animal products and against the sale of such clothing at [the store]". The second respondent, who was added as the second defendant in the course of the proceedings, is People for the Ethical Treatment of Animals (PETA) Foundation ("PETA").

4. This is an appeal from the order of Nicklin J of 20 September 2019 by which he dismissed the application of the appellants for summary judgment for injunctive relief against the respondents and he discharged the interim injunctions which had been granted by Teare J on 29 November 2017 and continued, as varied, by HHJ Moloney QC (sitting as a Judge of the High Court) on 15 December 2017.

Factual background

5. From the week before it opened on 9 November 2017, the store has been the site of many protests from animal rights activists, protesting against Canada Goose's use of animal fur and down, and in particular the way that the fur of coyotes is procured. For a detailed description of the evidence about the protests, reference should be made to Nicklin J's judgment at [132]-[134]. The following is a brief summary.

6. A number of the protestors were members of PETA, which is a charitable company dedicated to establishing and protecting the rights of all animals. PETA organised four demonstrations outside the store. They were small-scale in nature, and PETA gave advance notice of them to the police. In addition, some protestors appear to have been coordinated by Surge Activism ("Surge"), an animal rights organisation. Other protestors have joined the on-going protest as individuals who were not part of any wider group.

7. The demonstrations have been largely small in scale, with up to 20 people attending and generally peaceful in nature, with protestors holding signs or banners and handing out leaflets to those passing or entering the store. On some occasions more aggressive tactics have been used by the protestors, such as insulting members of the public or Canada Goose's employees.

8. A minority of protestors have committed unlawful acts. Prior to the opening of the store, around 4 and 5 November 2018, the front doors of the store were vandalised with "*Don't shop here*" and "*We sell cruelty*" painted on the windows and red paint was splashed over the front door. On three occasions, 11, 18 and 24 November 2017, the number of protestors (400, 300, and 100, respectively) had a serious impact on the operation of the store. The police were present on each of those occasions. On one occasion five arrests were made. On 18 November 2017 the police closed one lane of the carriageway on Regent Street. There is also evidence of criminal offences by certain individual protestors, including an offence of violence reported to the police during the large protest on 18 November 2017.

The proceedings

9. Canada Goose commenced these proceedings against the Unknown Persons respondents by a claim form issued on 29 November 2017. As mentioned above, they were described in the heading of the claim form and the particulars of claim as:

> "Persons unknown who are protestors against the manufacture and sale of clothing made of or containing animal products and against the sale of such clothing at Canada Goose, 244 Regent Street, London W1B 3BR"

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

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

> (1) Assaulting, molesting, or threatening the Protected Persons [defined in the particulars of claim as including Canada Goose's employees, security personnel working at the store and customers];
>
> (2) Behaving in a threatening and/or intimidating and/or abusive and/or insulting manner towards Protected Persons.
>
> (3) Doing acts which they know or ought to know cause harassment, fear, alarm, distress and/or intimidation to the Protected Persons;
>
> (4) Intentionally photographing or filming the Protected Persons with the purpose of identifying them and/or targeting them;

(5) Making in any way whatsoever any abusive or threatening communication to the Protected Persons;

(6) Making or attempting to make repeated communications not in the ordinary course of the First Claimant's retail business to or with Employees by telephone, email or letter;

(7) Entering the Store;

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

(9) Demonstrating at the Stores within the Inner Exclusion Zone;

(10) Demonstrating at the Stores within the Outer Exclusion Zone save that no more than 3 Protestors may at any one time demonstrate and hand out leaflets therein;

(11) Using at any time a Loudhailer within the Inner Exclusion Zone and Outer Exclusion Zone or otherwise within 50 metres of the Building Line of the Store.

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

"(1) Assaulting, molesting, or threatening the Protected Persons (defined as including Canada Goose's employees, security personnel working at the store, customer and any other person visiting or seeking to visit the store);

(2) Behaving in a threatening and/or intimidating and/or abusive and/or insulting manner directly at any individual or group of individuals within the definition of Protected Persons;

(3) Intentionally photographing or filming the Protected Persons with the purpose of identifying them and/or targeting them in connection with protests against the manufacture and/or sale or supply of Animal Products;

(4) Making in any way whatsoever any abusive or threatening electronic communication to the Protected Persons;

(5) Entering the Store;

(6) Blocking or otherwise obstructing the Entrance to the Store;

(7) Banging on the windows of the Store;

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

> (9) Projecting images on the outside of the Store;
>
> (10) Demonstrating at the Store within the Inner Exclusion Zone;
>
> (11) Demonstrating at the Store within the Outer Exclusion Zone A save that no more than 3 Protestors may at any one time demonstrate and hand out leaflets within the Outer Exclusion Zone A (but not within the Inner Exclusion Zone provided that no obstruction occurs other than that which is implicit in handing out leaflets;
>
> (12) Demonstrating at the Store within the Outer Exclusion Zone B [as defined in the order] save that no more than 5 Protestors may at any one time demonstrate and hand out leaflets within Outer Exclusion Zone B (but not within the Inner Exclusion Zone) provided that no obstruction occurs other than that which is implicit in handing out leaflets;
>
> (13) Using at any time a Loudhailer [as defined] within the Inner Exclusion Zone and Outer Exclusion Zones or otherwise within 10 metres of the Building Line of the Store;
>
> (14) Using a Loudhailer anywhere within the vicinity of the Store otherwise than for amplification of voice."

13. A plan attached to the order showed the Inner and Outer Exclusion Zones. Essentially those Zones (with a combined width of 7.5 metres) covered roughly a 180-degree radius around the entrance to the store. The Inner Exclusion Zone extended out from the store front for 2.5 metres. The Outer Exclusion Zone extended a further 5m outwards. The Outer Exclusion Zone was divided into Zone A (a section of pavement on Regent Street) and Zone B (a section of pavement in front of the store entrance and part of the carriageway on Regent Street extending to the pavement and the entire carriageway in Little Argyle Street). For all practical purposes, the combined Exclusion Zones covered the entire pavement outside the store on Regent Street and the pavement and entire carriageway of Little Argyle Street outside the entrance to the store.

14. The order permitted the claimant to serve the order on "any person demonstrating at or in the vicinity of the store by handing or attempting to hand a copy of the same to such person and the order shall be deemed served whether or not such person has accepted a copy of this order". It provided for alternative service of the order, stating that "The claimants shall serve this order by the following alternative method namely by serving the same by email to 'contact@surgeactivism.com' and 'info@peta.org.uk'".

15. The order was expressed to continue in force unless varied or discharged by further order of the court but it also provided for a further hearing on 13 December 2017.

16. The order was sent on 29 November 2017 to the two email addresses mentioned in the order: 'contact@surgeactivism.com' and 'info@peta.org.uk'. The claim form and the particulars of claim were also sent to those email addresses.

17. On 30 November 2017 Canada Goose issued an application notice for the continuation of Teare J's order.

18. On 12 December 2017 PETA applied to be joined to the proceedings. It also sought a variation of the interim injunction. On 13 December 2017 Judge Moloney added PETA to the proceedings as a defendant for and on behalf of its employees and members. He adjourned the hearing in relation to all other matters to 15 December 2017, when the issue of the continuation of the interim injunction came before him again.

19. At that hearing PETA challenged paragraphs (10) to (14) of the interim injunction concerning the exclusion zones and use of a loud-hailer on the basis that those prohibitions were a disproportionate interference with the right of the protestors to freedom of expression under Article 10 of the European Convention on Human Rights ("the ECHR") and to freedom of assembly under Article 12 of the ECHR.

20. Judge Moloney continued the interim injunction but varied it by amalgamating Zones A and B in the Outer Exclusion Zone and increasing the number of protestors permitted within the Outer Exclusion Zone to 12 people. He also varied paragraph (14) of Teare J's order, substituting a prohibition on:

> "… using at any time a Loudhailer within the Inner Exclusion Zone and Outer Exclusion Zone… [and] using a Loudhailer anywhere else in the vicinity of the Store (including Regent Street and Little Argyll Street) save that between the hours of 2pm and 8pm a single Loudhailer may be used for the amplification of the human voice only for up to 15 minutes at a time with intervals of 15 minutes between each such use."

21. Judge Moloney's order stated that the order was to continue in force unless varied or discharged by further order of the court, and also provided that all further procedural directions in the claim be stayed, subject to a written notice by any of the parties to the others raising the stay. That was subject to a long-stop requirement that no later than 1 December 2018 Canada Goose was to apply for a case management conference or summary judgment. The order provided that, if neither application was made by that date, the proceedings would stand dismissed and the injunction discharged without further order.

The summary judgment application

22. Regular protests at the store have continued after the grant of the interim injunctions, although none has been on the large scale that occurred before the original injunction was granted. Canada Goose alleges that there have been breaches of those orders.

23. On 29 November 2018 Canada Goose applied for summary judgment against the respondents for a final injunction pursuant to CPR Part 24. The application came before Nicklin J on 29 January 2018. The injunction attached to the application

differed in some respects from the interim injunctions. The prohibitions in paragraphs (1) to (9) were the same but the restrictions applicable to the Zones were different. Only Canada Goose was represented at the hearing. At the invitation of Nicklin J, Mr Michael Buckpitt, junior counsel for Canada Goose, delivered further written submissions after the hearing, including a new description of the Unknown Persons respondents, as follows:

> "Persons who are present at and in the vicinity of 244 Regent Street, London W1B 3BR and are protesting against the manufacture and/or supply and/or sale of clothing made of or containing animal products by Canada Goose UK Retail Limited and are involved in any of the acts prohibited by the terms of this order"

24. Canada Goose says that the further written submissions made clear that it no longer pursued summary judgment against PETA.

25. Nicklin J handed down his judgment on 30 September 2019, the delay being principally due to the sensible decision to wait for the decisions in *Cameron v Liverpool Insurance Co Ltd* [2019] UKSC 6, [2019] 1 WLR 147, and *Ineos Upstream Ltd v Persons Unknown* [2019] EWCA Civ 515, [2019] 4 WLR 100, which we consider in the Discussion section below, and no doubt also due to the need to consider the successive further sets of written submissions on behalf of Canada Goose.

26. Bearing in mind that only one party was represented before him, Nicklin J's judgment is an impressive document. With no disrespect, we shall only give a very brief summary of the judgment, sufficient to understand the context for this appeal.

27. The judgment addressed two main issues: a procedural issue of whether there had been proper service of the proceedings, and a merits issue as to the substance of the application for summary judgment.

28. Nicklin J held that the claim form had not been validly served on the respondents. There had been no service of the claim form by any method permitted by CPR 6.5, and there had been no order permitting alternative service under CPR 6.15. Teare J's order only permitted alternative service of his order. Nicklin J declined to amend Teare J's order under the "slip rule" in CPR 40.12 and he refused to dispense with service of the claim form on the Unknown Persons respondents under CPR 6.16 without a proper application before him.

29. Nicklin J also considered that the description of the Unknown Persons respondents was too broad as, in its original form, it was capable of including protesters who might never even intend to visit the store. Moreover, both in the interim injunctions and in its proposed final form, the injunction was capable of affecting persons who might not carry out any unlawful activity as some of the prohibited acts would not be or might not be unlawful.

30. He was critical of the failure of Canada Goose to join any individual protestors, bearing in mind that Canada Goose could have named 37 protestors and had identified up to 121 individuals. He regarded as a fundamental difficulty that, as the Unknown

Persons respondents were not a homogeneous unit, the court had no idea who in the broad class of Unknown Persons, as defined, had committed or threatened any civil wrong and, if they had, what it was.

31. Nicklin J also considered that the form of the proposed final injunction was defective in that it would capture new future protesters, who would not have been parties to the proceedings at the time of summary judgment and the grant of the injunction.

32. Nicklin J said the following (at [163]), in conclusion on the form of the proposed final injunction:

> "For the reasons I have addressed above, it is not impossible to name the persons against whom relief is sought and, more importantly, the terms of the injunction would impose restrictions on otherwise lawful conduct. Further, the interim injunction (and in particular the size and location of the Exclusion Zones) practically limits the number of people who can demonstrate outside the Store to 12. This figure is arbitrary; not justified by any evidence; disproportionate (in the sense there is no evidence that permitting a larger group would not achieve the same object); assumes that all demonstrators share the same objectives and so could be 'represented' by 12 people; and wrong in principle ... Who is to decide who should be one of the permitted 12 demonstrators? Is it 'first-come-first-served'? What if other protestors do not agree with the message being advanced by the 12 'authorised' protestors?"

33. His conclusion on whether the respondents had a real prospect of defending the claim were stated as follows:

> "164. The Second Defendant (in its non-representative capacity) does have a real prospect of defending the claim. As I have set out above, the present evidence does not show that the Second Defendant has committed any civil wrong. As such, I am satisfied that it has a real prospect of defending the claim.
>
> 165. In relation to the First Defendants, and those for whom the Second Defendant acts in a representative capacity, it is impossible to answer the question whether they have a real prospect of defending the claim because it is impossible to identify who they are, what they are alleged to have done (or threaten to do) and what defence they might advance. Whether any individual Defendant in these classes was guilty of (or threatening) any civil wrong would require an analysis of the evidence of what s/he had done (or threatened) and whether s/he had any defence to resist any civil liability. On the evidence, therefore, I am not satisfied that the Claimants have demonstrated that the Defendants in each of these classes has no real prospect of defending the claim. On the contrary, on the evidence as it stands, it is clear that there are a large number of people caught by the definition of "persons unknown" who

> have not even arguably committed (or threatened) any civil wrong. As there is no way of discriminating between the various Defendants in these categories, it is impossible to identify those against whom summary judgment could be granted (even assuming that the evidence justified such a course) and those against whom summary judgment should be refused."

34. For those reasons, Nicklin J refused the application for summary judgment. He also held that, in view of the failure of the interim injunction to comply with the relevant principles, and also in view of fundamental issues concerning the validity of the claim form and its service, the interim injunction then in force could not continue. He said:

> "I am also satisfied that, applying the principles from *Cameron* and *Ineos*, the interim injunction that is currently in place cannot continue in its current form, if at all. There are fundamental issues that the Claimants need to address regarding the validity of the Claim Form and its service on any defendant. Presently, no defendant has been validly served. Subject to further submissions, my present view is that if the proceedings are to continue, whether or not a claim can be properly maintained against "persons unknown" for particular civil wrongs (e.g. trespass), other civil claims will require individual defendants to be joined to the proceedings whether by name or description and the nature of the claims made against them identified. Any interim relief must be tailored to and justified by the threatened or actual wrongdoing identified in the Particulars of Claim and any interim injunction granted against "persons unknown" must comply with the requirements suggested in *Ineos*."

The grounds of appeal

35. The grounds of appeal are as follows.

> "Ground 1 (Service of the Claim Form): In relation to the service of the Claim Form, the Judge:
>
> Erred in refusing to amend the Order of 29 November 2017, pursuant to CPR 40.12 or the court's inherent jurisdiction, to provide that service by email was permissible alternative service under CPR 6.15; alternatively
>
> Erred in failing to consider, alternatively in refusing to order, that the steps taken by the Appellants in compliance with the undertaking given to Teare J on 29 November 2017 constituted alternative good service under CPR 6.15(2); alternatively
>
> Adopted a procedurally unfair practice in refusing to consider an application to dispense with service of the Claim Form

> under CPR 6.16, alternatively erred in law in refusing to exercise that power of dispensation.
>
> Ground 2 (Description of First Respondents): The Judge erred in law in holding that the Appellants' proposed re-formulation of the description of the First Respondents was an impermissible one.
>
> Ground 3 (Approach to Summary Judgment): In determining whether summary judgment should be granted for a final prohibitory *quia timet* injunction against the First Respondents (as described in accordance with the proposed reformulation) the Judge erred in law in the approach he took. In particular, and without derogating from the generality of this, the Judge:
>
> Erred in concluding that the proper approach was to focus (and focus alone) on the individual evidence of wrongdoing in relation to each identified individual protester (whether or not that individual was formally joined as a party); and/or
>
> Erred in concluding that the Appellants were bound to differentiate, for the purposes of the description of the First Respondents, between those individuals for whom there was evidence of prior wrongdoing (whether of specific acts or more generally) and those for whom there was not; and/or
>
> Erred in concluding that evidence of wrongdoing of some individuals within the potential class of the First Respondents could not form the basis for a case for injunctive relief against the class as a whole.
>
> Ground 4 (Approach to and assessment of the evidence): The judge erred in his approach to alternatively his assessment of the evidence before him, reaching conclusions which he was not permitted to reach."

36. In a "supplemental note" Canada Goose asks that, if the appeal is allowed, the summary judgment application be remitted.

Discussion

Appeal Ground 1: Service

37. The order of Teare J dated 29 November 2017 directed pursuant to CPR 6.15 that his order for an interim injunction be served by the alternative method of service by email to two email addresses, one for Surge (contact@surgeactivism.com) and one for PETA (info@petga.org.uk). There was no provision for alternative service of the claim form and the particulars of claim or of any other document, other than the order itself. In fact, the claim form and the particulars of claim were sent to the same email addresses as were specified in Teare J's order for alternative service of the order itself.

38. Canada Goose submits that it is clear that there was an accidental oversight in the limitation of the provision for alternative service in Teare J's order to the service of the order itself. That is said to be clear from the fact that the order of Teare J records that Canada Goose, through its counsel, had undertaken to the court, on behalf of all the claimants, "to effect email service as provided for below of the Order, the Claim Form and Particulars of Claim and application notice and evidence in support".

39. Canada Goose submits that in the circumstances Nicklin J was wrong not to order, pursuant to CPR 40.12 or the inherent jurisdiction of the court, that Teare J's order should be corrected so as to provide for the same alternative service for the claim form and the particulars of claim as was specified for the order.

40. Canada Goose submits, alternatively, that Nicklin J should have ordered, pursuant to CPR 6.15(2) that the steps already taken to bring the claim form to the attention of the defendants was good service.

41. In the further alternative, Canada Goose submits that Nicklin J should have dispensed with service of the claim form pursuant to CPR 6.16.

42. We do not accept those submissions. Canada Goose can only succeed if Nicklin J, in refusing to exercise his discretionary management powers, made an error of principle or otherwise acted outside the bounds of a proper exercise of judicial discretion. We consider it is plain that he made no error of that kind.

43. CPR 40.12 provides that the court may at any time correct an accidental slip or omission in a judgment or order. It is well established that this slip rule enables an order to be amended to give effect to the intention of the court by correcting an accidental slip, but it does not enable a court to have second or additional thoughts: see, for example, *Bristol-Myers Squibb Co. v Baker Noton Pharmaceuticals Inc (No. 2)* [2001] EWCA Civ 414, [2001] RPC 45.

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

45. Nicklin J was not merely acting within the scope of a proper exercise of discretion in refusing to order pursuant to CPR 6.15(2)) that the steps taken by Canada Goose in compliance with the undertaking of counsel constituted good alternative service; he was, at least so far as the Unknown Persons respondents are concerned, plainly correct in his refusal. The legal context for considering this point is the importance of service of proceedings in the delivery of justice. As Lord Sumption, with whom the other justices of the Supreme Court agreed, said in *Cameron* at [14] the general rule is

that service of the originating process is the act by which the defendant is subjected to the court's jurisdiction; and, at [17]:

> "It is a fundamental principle of justice that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard."

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

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

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

48. The same acute problem for Canada Goose applies to its complaint that Nicklin J wrongly failed to exercise his power under CPR 6.16 to dispense with service of the claim form. It is not necessary to focus on whether Nicklin J was right to raise the absence of a formal application as an obstacle. Looking at the substance of the matter, there was no proper basis for an order under CPR 6.16.

49. Nicklin J referred in his judgment to the evidence that 385 copies of the interim injunction had been served between 29 November 2017 and 19 January 2019, and that they had been served on a total of 121 separate individuals who could be identified (for example, by body-camera footage). The claimants have been able to identify 37 of those by name, although Canada Goose believes that a number of the names are pseudonyms. None of those who can be individually identified or named have been joined to the action (whether by serving them with the claim form or otherwise) even though there was no obstacle to serving them with the claim form at the same time as the order. Moreover, Canada Goose is not just asking for dispensation from service on the 121 individuals who can be identified. It is asking for dispensation from service on any of the Persons Unknown respondents to the proceedings, even if they have never been served with the order and whether or not they know of the proceedings. There is simply no warrant for subjecting all those persons to the jurisdiction of the court.

50. Furthermore, it would have been open to Canada Goose at any time since the commencement of the proceedings to obtain an order for alternative service which would have a greater likelihood of bringing notice of the proceedings to the attention

of protesters 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 protesters and by attaching or otherwise exhibiting copies of the order and of the claim form at or nearby those premises. There is no reason why the court's power to dispense with service of the claim in exceptional circumstances should be used to overcome that failure.

51. Canada Goose says that, in view of the number of orders that have been served on individuals, it is reasonable to conclude that their existence, and likely their terms, will be well known to a far larger class of protester than those served with the order. It also relies on the fact that no person served with the order has made any contact with Canada Goose's solicitors or made any application to the court to vary or discharge the order for to apply to be joined as a party.

52. We have already mentioned, by reference to Lord Sumption's comments in *Cameron*, the importance of service in order to ensure justice is done. We do not consider that speculative estimates of the number of protesters who are likely to know of the proceedings, even though they have never been served with the interim injunction, or the fact that, of the 121 persons served with the order, none has applied to vary or discharge the order or to apply to be joined as a party, can justify using the power under CPR 6.16 in effect to exonerate Canada Goose from failing to obtain an order for alternative service that would have been likely to draw the attention of protesters to the proceedings and their content. Those are not the kind of "exceptional circumstances" that would justify an order under CPR 6.16.

53. In its skeleton argument for this appeal Canada Goose seeks to make a distinction, as regards service, between the Unknown Persons respondents and PETA. Canada Goose points out that Nicklin J recognised, as was plainly the case, that service of the claim form by sending it to PETA's email address had drawn the proceedings to PETA's attention. Canada Goose submits that, in those circumstances, Nicklin J was bound to make an order pursuant to CPR 6.15(2) that there had been good service on PETA or, alternatively, he ought to have made an order under CPR 6.16 dispensing with service on PETA.

54. Bearing in mind that (1) PETA was joined as a party to the proceedings on its own application, (2) Canada Goose says that it informed Nicklin J before he handed down his judgment that judgment was no longer pursued against PETA (which was not mentioned in the proposed final injunction), and (3) Nicklin J reached the conclusion, which is not challenged on this appeal, that there was no evidence that PETA had committed any civil wrong, there would appear to be an air of unreality about that submission. The reason why it has assumed any importance now is because, should the appeal fail as regards Nicklin J's decision on service on the Unknown Persons respondents and PETA, Canada Goose is concerned about the consequences of the requirement in CPR 7.5 that the claim form must be served within four months of its issue. We were not shown anything indicating that the significance of this point was flagged up before Nicklin J as regards PETA. It certainly is not made in the further written submissions dated 28 February 2019 sent on behalf of Canada Goose to Nicklin J on the issue of service. Those submissions concentrated on the question of service on the Unknown Persons respondents. It is not possible to say that in all the circumstances Nicklin J acted outside the limits of a proper exercise of judicial

discretion in failing to order that there had been good service on PETA or that service on PETA should be waived.

55. For those reasons we dismiss Appeal Ground 1.

Appeal Ground 2 and Appeal Ground 3: Interim and Final Injunctions

56. It is convenient to take both these grounds of appeal together. Ground 3 is explicitly related to Nicklin J's dismissal of Canada Goose's application for summary judgment. Appeal Ground 2 appears to be directed at, or at least is capable of applying to, both the dismissal of the summary judgment application and also Nicklin J's discharge of the interim injunction originally granted on 29 November 2017 and continued by the order of Judge Moloney of 15 December 2017. We shall consider, first, the interim injunction, and then the application for a final injunction.

Interim relief against "persons unknown"

57. It is established that proceedings may be commenced, and an interim injunction granted, against "persons unknown" in certain circumstances. That was expressly acknowledged by the Supreme Court in *Cameron* and put into effect by the Court of Appeal in the context of protesters in *Ineos* and *Cuadrilla Bowland Limited v Persons Unknown* [2020] EWCA Civ 9.

58. In *Cameron* the claimant was injured and her car was damaged in a collision with another vehicle. She issued proceedings against the owner of the other vehicle and his insurer. The owner had not in fact been driving the other vehicle at the time of the collision. The claimant applied to amend her claim form so as to substitute for the owner: "the person unknown driving vehicle registration number Y598 SPS who collided with vehicle registration number KG03 ZJZ on 26 May 2013". The Supreme Court, allowing the appeal from the Court of Appeal, held that the district judge had been right to refuse the application to amend and to give judgment for the insurer.

59. Lord Sumption, referred (at [9]) to the general rule that proceedings may not be brought against unnamed parties, and to the express exception under CPR 55.3(4) for claims for possession against trespassers whose names are unknown, and other specific statutory exceptions. Having observed (at [10]) that English judges had allowed some exceptions to the general rule, he said (at [11]) that the jurisdiction to allow actions and orders against unnamed wrongdoers has been regularly invoked, particularly in the context of abuse of the internet, trespasses and other torts committed by protesters, demonstrators and paparazzi. He then referred to several reported cases, including *Ineos* at first instance.

60. Lord Sumption identified (at [13]) two categories of case to which different considerations apply. The first ("Category 1") comprises anonymous defendants who are identifiable but whose names are unknown, such as squatters occupying the property. The second ("Category 2") comprises defendants, such as most hit and run drivers, who are not only anonymous but cannot even be identified. The critical distinction, as Lord Sumption explained, is that a Category 1 defendant is described in a way that makes it possible in principle to locate or communicate with him and to know without further enquiry whether he is the same as the person described in the form, whereas that is not true of the Category 2 defendant.

61. That distinction is critical to the possibility of service. As we have said earlier, by reference to other statements of Lord Sumption in *Cameron*, it is the service of the claim form which subjects a defendant to the court's jurisdiction. Lord Sumption acknowledged that the court may grant interim relief before the proceedings have been served or even issued but he described that as an emergency jurisdiction which is both provisional and strictly conditional.

62. Lord Sumption said (at [15]) that, in the case of Category 1 defendants, who are anonymous but identifiable, and so can be served with the claim form or other originating process, if necessary by alternative service under CPR 6.15 (such as, in the case of anonymous trespassers, attaching copies of the documents to the main door or placing them in some other prominent place on the land where the trespassers are to be found, and posting them if practical through the letterbox pursuant to CPR 55), the procedures for service are well established and there is no reason to doubt their juridical basis. In the case of the Category 2 defendant, such as in *Cameron*, however, service is conceptually impossible and so, as Lord Sumption said (at [26]), such a person cannot be sued under a pseudonym or description.

63. It will be noted that *Cameron* did not concern, and Lord Sumption did not expressly address, a third category of anonymous defendants, who are particularly relevant in ongoing protests and demonstrations, namely people who will or are highly likely in the future to commit an unlawful civil wrong, against whom a *quia timet* injunction is sought. He did, however, refer (at [15]) with approval to *South Cambridgeshire District Council v Gammell* [2005] EWCA Civ 1429, [2006] 1 WLR 658, in which the Court of Appeal held that persons who entered onto land and occupied it in breach of, and subsequent to the grant of, an interim injunction became persons to whom the injunction was addressed and defendants to the proceedings. In that case, pursuant to an order permitting alternative service, the claim form and the order were served by placing a copy in prominent positions on the land.

64. Lord Sumption also referred (at [11]) to *Ineos*, in which the validity of an interim injunction against "persons unknown", described in terms capable of including future members of a fluctuating group of protesters, was centrally in issue. Lord Sumption did not express disapproval of the case (then decided only at first instance).

65. The claimants in *Ineos* were a group of companies and various individuals connected with the business of shale and gas exploration by hydraulic fracturing, or "fracking". They were concerned to limit the activities of protesters. Each of the first five defendants was a group of persons described as "Persons unknown" followed by an unlawful activity, such as "entering or remaining without the consent of the claimants on [specified] land and buildings", or "interfering with the first and second claimants' rights to pass and repass … over private access roads", or "interfering with the right of way enjoyed by the claimants … over [specified] land". The fifth defendant was described as "Persons unknown combining together to commit the unlawful acts as specified in paragraph 10 of the [relevant] order with the intention set out in para 10 of the [relevant] order". The first instance Judge made interim injunctions, as requested, apart from one relating to harassment.

66. One of the grounds for which permission to appeal was granted in *Ineos* was that the first instance judge was wrong to grant injunctions against persons unknown. Longmore LJ gave the lead and only reasoned judgement, with which the other two

members of the court (David Richards and Leggatt LJJ) agreed. He rejected the submission that Lord Sumption's Category 1 and Category 2 defendants were exhaustive categories of unnamed or unknown defendants. He said (at [29]) that it is too absolutist to say that a claimant can never sue persons unknown unless they are identifiable at the time the claim form is issued. He said that Lord Sumption was not considering persons who do not exist at all and will only come into existence in the future. Longmore LJ concluded (at [30]) that there is no conceptual or legal prohibition on suing persons unknown who are not currently in existence but will come into existence when they commit the prohibited tort (who we call "Newcomers").

67. Longmore LJ said (at [31]) that a court should be inherently cautious about granting injunctions against unknown persons since the reach of such an injunction is necessarily difficult to assess in advance. He also referred (at [33]) to section 12(3) of the Human Rights Act 1998 ("the HRA") which provides, in the context of the grant of relief which might affect the exercise of the right to freedom of expression under Article 10 of the ECHR, that no relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed. He said that there was considerable force in the submission that the first instance judge had failed properly to apply section 12(3) in that the injunctions against the fifth defendants were neither framed to catch only those who were committing the tort of conspiring to cause damage to the claimant by unlawful means nor clear and precise in their scope. Having regard to those matters, Longmore LJ said (at [34]) that he would "tentatively frame [the] requirements" necessary for the grant of the injunction against unknown persons, as follows:

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

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

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

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

71. *Cuadrilla* was another case concerning injunctions restraining the unlawful actions of fracking protesters. The matter came before the Court of Appeal on appeal from an order committing the three appellants to prison for contempt of court in disobeying an earlier injunction aimed at preventing trespass on the claimants' land, unlawful interference with the claimants' rights of passage to and from their land and unlawful interference with the supply chain of the first claimant. One of the grounds of appeal was that the relevant terms of the injunction were insufficiently clear and certain to be enforced by committal because those terms made the question of whether conduct was prohibited depend on the intention of the person concerned.

72. The Court of Appeal dismissed the appeal. The significance of the case, for present purposes, is not simply that it followed *Ineos* in recognising the jurisdiction to grant a *quia timet* interim injunction against Newcomers but also that it both qualified and amplified two of the requirements for such an injunction suggested by Longmore LJ ("the *Ineos* requirements"). Although both David Richards LJ and Leggatt LJ had been members of the Court of Appeal panel in *Ineos* and had given unqualified approval to the judgment of Longmore LJ, they agreed in *Cuadrilla* that the fourth and fifth *Ineo*s requirements required some qualification.

73. Leggatt LJ, who gave the lead judgment, with which David Richards LJ and Underhill LJ agreed, said with regard to the fourth requirement that it cannot be regarded as an absolute rule that the terms of an injunction should correspond to the threatened tort and not be so wide that they prohibit lawful conduct. He referred to *Hubbard v Pitt* [1976] 1 QB 142 and *Burris v Azadani* [1995] 1 WLR 1372, which had not been cited in *Ineos*, as demonstrating that, although the court must be careful not to impose an injunction in wider terms than are necessary to do justice, the court is entitled to restrain conduct that is not in itself tortious or otherwise unlawful if it is satisfied that such a restriction is necessary in order to afford effective protection to the rights of the claimant in the particular case.

74. Although the point did not arise for decision in *Cuadrilla*, the point is relevant in the present case in relation to injunctions against persons unknown who are Newcomers because the injunction granted by Teare J and continued by Judge Moloney prohibited

demonstrating within the Inner Exclusion Zone and limited the number of protesters at any one time and their actions within the Outer Exclusion Zone.

75. In *Hubbard v Pitt* [1976] 1 QB 142 the issue was whether the first instance judge had been right to grant an interim injunction restraining named defendants from, in effect, protesting outside the premises of an estate agency about changes in the character of the locality attributed to the assistance given by the plaintiff estate agents. The defendants had behaved in an orderly and peaceful manner throughout. The claim was for nuisance. The appeal was dismissed (Lord Denning MR dissenting). Stamp LJ said (at pp. 187-188) that the injunction was not wider that was necessary for the purpose of giving the plaintiffs the protection they ought to have. Orr LJ said (at p. 190):

> "Mr. Turner-Samuels, however, also advanced an alternative argument that, even if he was wrong in his submission that no interlocutory relief should have been granted, the terms of the injunction were too wide in that it would prevent the defendants from doing that which, as he claimed and as I am for the present purposes prepared to accept, it was not unlawful for them to do, namely, to assemble outside the plaintiffs' premises for the sole purpose of imparting or receiving information. I accept that the court must be careful not to impose an injunction in wider terms than are necessary to do justice in the particular case; but I reject the argument that the court is not entitled, when satisfied that justice requires it, to impose an injunction which may for a limited time prevent the defendant from doing that which he would otherwise be at liberty to do."

76. In *Burris* the defendant had persistently threatened and harassed the plaintiff. The plaintiff obtained an interim injunction preventing the defendant from assaulting, harassing or threatening the claimant as well as remaining within 250 yards of her home. Committal proceedings were subsequently brought against the defendant. On the issue of the validity of the exclusion zone, Sir Thomas Bingham MR, with whom the other two members of the court agreed, said (at pp.1377 and 1380-1381):

> "It would not seem to me to be a valid objection to the making of an "exclusion zone" order that the conduct to be restrained is not in itself tortious or otherwise unlawful if such an order is reasonably regarded as necessary for protection of a plaintiff's legitimate interest … Ordinarily, the victim will be adequately protected by an injunction which restrains the tort which has been or is likely to be committed, whether trespass to the person or to land, interference with goods, harassment, intimidation or as the case may be. But it may be clear on the facts that if the defendant approaches the vicinity of the plaintiff's home he will succumb to the temptation to enter it, or to abuse or harass the plaintiff; or that he may loiter outside the house, watching and besetting it, in a manner which might be highly stressful and disturbing to a plaintiff. In such a situation the court may properly judge that in the plaintiff's interest —

> and also, but indirectly, the defendant's — a wider measure of restraint is called for.

77. Nicklin J, who was bound by *Ineos*, did not have the benefit of the views of the Court of Appeal in *Cuadrilla* and so, unsurprisingly, did not refer to *Hubbard v Pitt*. He distinguished *Burris* on the grounds that the defendant in that case had already been found to have committed acts of harassment against the plaintiff; an order imposing an exclusion zone around the plaintiff's home did not engage the defendant's rights of freedom of expression or freedom of assembly; it was a case of an order being made against an identified defendant, not "persons unknown", to protect the interests of an identified "victim", not a generic class. He said that the case was, therefore, very different from *Ineos* and the present case.

78. It is open to us, as suggested by the Court of Appeal in *Cuadrilla*, to qualify the fourth *Ineos* requirement in the light of *Hubbard* and *Burris*, as neither of those cases was cited in *Ineos*. Although neither of those cases concerned a claim against "persons unknown", or section 12(3) of the HRA or Articles 10 and 11 of the ECHR, *Hubbard* did concern competing considerations of the right of the defendants to peaceful assembly and protest, on the one hand, and the private property rights of the plaintiffs, on the other hand. We consider that, since an interim injunction can be granted in appropriate circumstances against "persons unknown" who are Newcomers and wish to join an ongoing protest, it is in principle open to the court in appropriate circumstances to limit even lawful activity. We have had the benefit of submissions from Ms Wilkinson on this issue. She submits that a potential gloss to the fourth *Ineos* requirement might be that the court may prohibit lawful conduct where there is no other proportionate means of protecting the claimant's rights. We agree with that submission, and hold that the fourth *Ineos* requirement should be qualified in that way.

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

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

why references to intention should not be incorporated into an order or that the inclusion of such references in terms of the injunction in *Cuadrilla* provided a reason not to enforce it by committal.

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

82. Building on *Cameron* and the *Ineos* requirements, it is now possible to set out the following procedural guidelines applicable to proceedings for interim relief against "persons unknown" in protester cases like the present one:

> (1) The "persons unknown" defendants in the claim form are, by definition, people who have not been identified at the time of the commencement of the proceedings. If they are known and have been identified, they must be joined as individual defendants to the proceedings. The "persons unknown" defendants must be people who have not been identified but are capable of being identified and served with the proceedings, if necessary by alternative service such as can reasonably be expected to bring the proceedings to their attention. In principle, such persons include both anonymous defendants who are identifiable at the time the proceedings commence but whose names are unknown and also Newcomers, that is to say people who in the future will join the protest and fall within the description of the "persons unknown".
>
> (2) The "persons unknown" must be defined in the originating process by reference to their conduct which is alleged to be unlawful.
>
> (3) Interim injunctive relief may only be granted if there is a sufficiently real and imminent risk of a tort being committed to justify *quia timet* relief.
>
> (4) As in the case of the originating process itself, the defendants subject to the interim injunction must be individually named if known and identified or, if not and described as "persons unknown", must be capable of being identified and served with the order, if necessary by alternative service, the method of which must be set out in the order.
>
> (5) The prohibited acts must correspond to the threatened tort. They may include lawful conduct if, and only to the extent that, there is no other proportionate means of protecting the claimant's rights.
>
> (6) The terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do. The prohibited acts must not, therefore, be described in terms of a legal cause of action, such as

trespass or harassment or nuisance. They may be defined by reference to the defendant's intention if that is strictly necessary to correspond to the threatened tort and done in non-technical language which a defendant is capable of understanding and the intention is capable of proof without undue complexity. It is better practice, however, to formulate the injunction without reference to intention if the prohibited tortious act can be described in ordinary language without doing so.

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

83. Applying those principles to the present proceedings, it is clear that the claim form is defective and that the injunctions granted by Teare J on 29 November 2017 and continued, as varied, by Judge Moloney on 15 December 2017, were impermissible.

84. As we have said above, the claim form issued on 29 November 2017 described the "persons unknown" defendants as:

> "Persons unknown who are protesters against the manufacture and sale of clothing made of or containing animal products and against the sale of such clothing at Canada Goose, 244 Regent Street, London W1B 3BR".

85. This description is impermissibly wide. As Nicklin J said (at [23(iii)] and [146]), it is capable of applying to person who has never been at the store and has no intention of ever going there. It would, as the Judge pointedly observed, include a peaceful protester in Penzance.

86. The interim injunction granted by Teare J and that granted by Judge Moloney suffered from the same overly wide description of those bound by the order. Furthermore, the specified prohibited acts were not confined, or not inevitably confined, to unlawful acts: for example, behaving in a threatening and/or intimidating and/or abusive and/or insulting manner at any of the protected persons, intentionally photographing or filming the protected persons, making in any way whatsoever any abusive or threatening electronic communication to the protected persons, projecting images on the outside of the store, demonstrating in the Inner Zone or the Outer Zone, using a loud-hailer anywhere within the vicinity of the store otherwise than for the amplification of voice. Both injunctions were also defective in failing to provide a method of alternative service that was likely to bring the attention of the order to the "persons unknown" as that was unlikely to be achieved (as explained in relation to Ground 1 above) by the specified method of emailing the order to the respective email addresses of Surge and PETA. The order of Teare J was also defective in that it was not time limited but rather was expressed to continue in force unless varied or discharged by further order of the court.

87. Although Judge Moloney's order was stated to continue unless varied or discharged by further order of the court, it was time limited to the extent that, unless Canada Goose made an application for a case management conference or for summary

judgment by 1 December 2018, the claim would stand dismissed and the injunction discharged without further order.

88. Nicklin J was bound to dismiss Canada Goose's application for summary judgment, both because of non-service of the proceedings and for the further reasons we set out below. For the reasons we have given above, he was correct at the same time to discharge the interim injunctions granted by Teare J and Judge Moloney.

Final order against "persons unknown"

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 [17]) that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard.

90. In Canada Goose's written skeleton argument for the appeal, it was submitted that *Vastint Leeds BV v Persons Unknown* [2018] EWHC 2456 (Ch), [2019] 4 WLR 2 (Marcus Smith J), is authority to the contrary. Leaving aside that *Vastint* is a first instance decision, in which only the claimant was represented and which is not binding on us, that case was decided before, and so took no account of, the Court of Appeal's decision in *Ineos* and the decision of the Supreme Court in *Cameron*. Furthermore, there was no reference in *Vastint* to the confirmation in *Attorney-General v Times Newspapers* of the usual principle that a final injunction operates only between the parties to the proceedings.

91. That does not mean to say that there is no scope for making "persons unknown" subject to a final injunction. That is perfectly legitimate provided the persons unknown are confined to those within Lord Sumption's Category 1 in *Cameron*, namely those anonymous defendants who are identifiable (for example, from CCTV or body cameras or otherwise) as having committed the relevant unlawful acts prior to the date of the final order and have been served (probably pursuant to an order for alternative service) prior to the date. The proposed final injunction which Canada Goose sought by way of summary judgment was not so limited. Nicklin J was correct (at [159]) to dismiss the summary judgment on that further ground (in addition to non-service of the proceedings). Similarly, Warby J was correct to take the same line in *Birmingham City Council v Afsar* [2019] EWHC 3217 (QB) at [132].

92. In written submissions following the conclusion of the oral hearing of the appeal Mr Bhose submitted that, if there is no power to make a final order against "persons unknown", it must follow that, contrary to *Ineos*, there is no power to make an interim order either. We do not agree. An interim injunction is temporary relief intended to hold the position until trial. In a case like the present, the time between the interim

relief and trial will enable the claimant to identify wrongdoers, either by name or as anonymous persons within Lord Sumption's Category 1. Subject to any appeal, the trial determines the outcome of the litigation between the parties. Those parties include not only persons who have been joined as named parties but also "persons unknown" who have breached the interim injunction and are identifiable albeit anonymous. The trial is between the parties to the proceedings. Once the trial has taken place and the rights of the parties have been determined, the litigation is at an end. There is nothing anomalous about that.

93. As Nicklin J correctly identified, Canada Goose's problem is that it seeks to invoke the civil jurisdiction of the courts as a means of permanently controlling ongoing public demonstrations by a continually fluctuating body of protesters. It wishes to use remedies in private litigation in effect to prevent what is sees as public disorder. Private law remedies are not well suited to such a task. As the present case shows, what are appropriate permanent controls on such demonstrations involve complex considerations of private rights, civil liberties, public expectations and local authority policies. Those affected are not confined to Canada Goose, its customers and suppliers and protesters. They include, most graphically in the case of an exclusion zone, the impact on neighbouring properties and businesses, local residents, workers and shoppers. It is notable that the powers conferred by Parliament on local authorities, for example to make a public spaces protection order under the Anti-social Behaviour, Crime and Policing Act 2014, require the local authority to take into account various matters, including rights of freedom of assembly and expression, and to carry out extensive consultation: see, for example, *Dulgheriu v Ealing London Borough Council* [2019] EWCA Civ 1490, [2020] 1 WLR 609. The civil justice process is a far blunter instrument intended to resolve disputes between parties to litigation, who have had a fair opportunity to participate in it.

94. In addition to those matters, the order sought by Canada Goose on the summary judgment application before Nicklin J (the terms and form of which were not finalised until after the conclusion of the hearing before Nicklin J), suffered from some of the same defects as the interim injunction: in particular, as Nicklin J observed, the proposed order still defined the Unknown Persons respondents by reference to conduct which is or might be lawful.

95. In all those circumstances, Nicklin J having concluded (at [145] and [164]) that, on the evidence before him, PETA had not committed any civil wrong (and, in any event, Canada Goose having abandoned its application for summary judgment against PETA, as mentioned above) he was correct to refuse the application for summary judgment.

Appeal Ground 4: Evidence

96. This ground of appeal was not developed by Mr Bhose in his oral submissions. In any event, in the light of our conclusions on the other grounds of appeal, it is not necessary for us to address it.

Conclusion

97. For all those reasons, we dismiss this appeal.

Neutral Citation Number: [2022] EWCA Civ 13

Appeal Nos. See Appendix 1 to [2021] EWHC 1201 (QB)
Case Nos: See Appendix 1 to [2021] EWHC 1201 (QB)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Mr Justice Nicklin
[2021] EWHC 1201 (QB)

Royal Courts of Justice
Strand
London WC2A 2LL

Date: 13/01/2022

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LORD JUSTICE LEWISON
and
LADY JUSTICE ELISABETH LAING

BETWEEN:

(1) London Borough of Barking and Dagenham
(2) Other Local Authorities (listed in Appendix 1 at [2021] EWHC 1201 (QB))

Claimants/Appellants

-and –

(1) Persons Unknown
(2) Other named Defendants (listed in Appendix 1 at [2021] EWHC 1201 (QB))

Defendants/Respondents

-and -

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

(4) High Speed Two (HS2) Limited
(5) Basildon Borough Council

Interveners

Caroline Bolton and Natalie Pratt (instructed by **Sharpe Pritchard LLP and LB Barking & Dagenham Legal Services**) for the **1st, 6th, 11th, 16th, 26th, 28th, 33rd and 34th claimants** (London Borough of Barking and Dagenham, London Borough of Havering, London Borough of Redbridge, Basingstoke and Deane Borough Council and Hampshire County Council, Nuneaton and Bedworth Borough Council and Warwickshire County Council, Rochdale Metropolitan Borough Council, Test Valley Borough Council, and Thurrock Council)

Ranjit Bhose QC and Steven Woolf (instructed by **South London Legal Partnership**) for the **7th and 12th claimants** (London Borough of Hillingdon, and London Borough of Richmond-Upon-Thames)

Nigel Giffin QC and Simon Birks (instructed by **Walsall Metropolitan Borough Council Legal Services**) for the **35th claimant** (Walsall Metropolitan Borough Council)

Mark Anderson QC and Michelle Caney (instructed by **Wolverhampton City Council Legal Services**) for the **36th claimant** (Wolverhampton County Council)

Marc Willers QC, Tessa Buchanan and Owen Greenhall (instructed by **Community Law Partnership**) for the **first three interveners** (London Gypsies and Travellers, Friends, Families and Travellers, and Derbyshire Gypsy Liaison Group)

Richard Kimblin QC (instructed by **Eversheds Sutherland (International) LLP**) for the **4th intervener** (HS2)

Wayne Beglan (instructed by **Basildon Borough Council Legal Services**) for the **5th intervener** (Basildon Borough Council) (making written submissions only)

Tristan Jones (instructed by **the Attorney General**) as **Advocate to the Court**

Hearing dates: 30 November and 1 and 2 December 2021

- -

JUDGMENT

"Covid-19 Protocol:
This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website.
The date and time for hand-down is deemed to be 10:30am, Thursday 13 January 2022."

Sir Geoffrey Vos, Master of the Rolls:

Introduction

1. This case arises in the context of a number of cases in which local authorities have sought interim and sometimes then final injunctions against unidentified and unknown persons who may in the future set up unauthorised encampments on local authority land. These persons have been collectively described in submissions as "newcomers". Mr Marc Willers QC, leading counsel for the first three interveners, explained that the persons concerned fall mainly into three categories, who would describe themselves as Romani Gypsies, Irish Travellers and New Travellers.

2. The central question in this appeal is whether the judge was right to hold that the court cannot grant final injunctions that prevent persons, who are unknown and unidentified at the date of the order (i.e. newcomers), from occupying and trespassing on local authority land. The judge, Mr Justice Nicklin, held that this was the effect of a series of decisions, particularly this court's decision in *Canada Goose UK Retail Ltd. v. Persons Unknown and another* [2020] EWCA Civ 202, [2020] 1 WLR 2802 (*Canada Goose*) and the Supreme Court's decision in *Cameron v. Liverpool Victoria Insurance Co Ltd (Motor Insurers' Bureau Intervening)* [2019] UKSC 6, [2019] 1 WLR 1471 (*Cameron*). The judge said that, whilst interim injunctions could be made against persons unknown, final injunctions could only be made against parties who had been identified and had had an opportunity to contest the final order sought.

3. The 15 local authorities that are parties to the appeals before the court contend that the judge was wrong,[1] and that, even if that is what the Court of Appeal said in *Canada Goose*, its decision on that point was not part of its essential reasoning, distinguishable on the basis that it applied only to so-called protester injunctions, and, in any event, should not be followed because (a) it was based on a misunderstanding of the essential decision in *Cameron*, and (b) was decided without proper regard to three earlier Court of Appeal decisions in *South Cambridgeshire District Council v. Gammell* [2006] 1 WLR 658 (*Gammell*), *Ineos Upstream Ltd v. Persons Unknown and others* [2019] EWCA Civ 515, [2019] 4 WLR 100 (*Ineos*), and *Bromley London Borough Council v Persons Unknown* [2020] EWCA Civ 12, [2020] PTSR 1043 (*Bromley*).

4. The case also raises a secondary question as to the propriety of the procedure adopted by the judge to bring the proceedings in their current form before the court. In effect, the judge made a series of orders of the court's own motion requiring the parties to these proceedings to make submissions aimed at allowing the court to reach a decision as to whether the interim and final orders that had been granted in these cases could or should stand. Counsel for one group of local authorities, Ms Caroline Bolton, submitted that it was not open to the court to call in final orders made in the past for reconsideration in the way that the judge did.

5. In addition, there are subsidiary questions as to whether (a) the statutory jurisdiction to make orders against persons unknown under section 187B of the Town and Country Planning Act 1990 (section 187B) to restrain an actual or apprehended breach of

[1] There were 38 local authorities before the judge.

planning control validates the orders made, and (b) the court may in any circumstances like those in the present case make final orders against all the world.

6. I shall first set out the essential factual and procedural background to these claims, then summarise the main authorities that preceded the judge's decision, before identifying the judge's main reasoning, and finally dealing with the issues I have identified.

7. I have concluded that: (i) the judge was wrong to hold that the court cannot grant final injunctions that prevent persons, who are unknown and unidentified at the date of the order, from occupying and trespassing on land, and (ii) the procedure adopted by the judge was unorthodox. It was unusual insofar as it sought to call in final orders of the court for revision in the light of subsequent legal developments, but has nonetheless enabled a comprehensive review of the law applicable in an important field. Since most of the orders provided for review and nobody objected to the process at the time, there is now no need for further action. (iii) Section 37 of the Senior Courts Act 1981 (section 37) and section 187B impose the same procedural limitations on applications for injunctions of this kind. (iv) Whilst it is the court's proper function to give procedural guidelines, the court cannot and should not limit in advance the types of injunction that may in future cases be held appropriate to make under section 37 against the world.

8. This area of law and practice has been bedevilled by the use of Latin tags. That usage is particularly inappropriate in an area where it is important that members of the public can understand the courts' decisions. I have tried to exclude Latin from this judgment, and would urge other courts to use plain language in its place.

The essential factual and procedural background

9. There were 5 groups of local authorities before the court, although the details are not material. The first group was led by Walsall Metropolitan Borough Council (Walsall), represented by Mr Nigel Giffin QC. The second group was led by Wolverhampton City Council (Wolverhampton), represented by Mr Mark Anderson QC. The third group was led by the London Borough of Hillingdon (Hillingdon), represented by Mr Ranjit Bhose QC. The fourth and fifth groups were led respectively by the London Borough of Barking and Dagenham (Barking) and the London Borough of Havering (Havering), represented by Ms Caroline Bolton. The cases in the groups led by Walsall, Wolverhampton, and Barking related to final injunctions, and those led by Hillingdon and Havering related to interim injunctions.

10. The injunctions granted in each of the cases were in various forms broadly described in the detailed Appendix 1 to the judge's judgment. Some of the final injunctions provided for review of the orders to be made by the court either annually or at other stages. Most, if not all, of the injunctions allowed permission for anyone affected by the order, including persons unknown, to apply to vary or discharge them.

11. It is important to note at the outset that these claims were all started under the procedure laid down by CPR Part 8, which is appropriate where the claimant seeks the court's decision on a question which is unlikely to involve a substantial dispute of fact (CPR 8.1(2)(a)). Whilst CPR 8.2A(1) contemplates a practice direction setting out circumstances in which a claim form may be issued under Part 8 without naming a defendant, no such practice direction has been made (see *Cameron* at [9]). Moreover, CPR 8.9 makes clear that, where the Part 8 procedure is followed, the defendant is not

required to file a defence, so that several other familiar provisions of the CPR do not apply and any time limit preventing parties taking a step before defence also does not apply. A default judgment cannot be obtained in Part 8 cases (CPR 8.1(5)). Nonetheless, CPR 70.4 provides that a judgment or order against "a person who is not a party to proceedings" may be enforced "against that person by the same methods as if he were a party".

12. These proceedings seem to have their origins from 2 October 2020 when Nicklin J dealt with an application in the case of *London Borough of Enfield v. Persons Unknown* [2020] EWHC 2717 (QB) (*Enfield*), and raised with counsel the issues created by *Canada Goose*. Nicklin J told the parties that he had spoken to the President of the Queen's Bench Division (the PQBD) about there being a "group of local authorities who already have these injunctions and who, therefore, may following the decision today, be intending or considering whether they ought to restore the injunctions in their cases to the Court for reconsideration". He reported that the PQBD's current view was that she would direct that those claims be brought together to be managed centrally. In his judgment in *Enfield*, Nicklin J said that "the legal landscape that [governed] proceedings and injunctions against Persons Unknown [had] transformed since the Interim and Final Orders were granted in this case", referring to *Cameron*, *Ineos*, *Bromley*, *Cuadrilla Bowland Ltd v. Persons Unknown* [2020] 4 WLR 29 (*Cuadrilla*), and *Canada Goose*.

13. Nicklin J concluded at [32] in *Enfield* that, in the light of the decision in *Speedier Logistics v. Aadvark Digital* [2012] EWHC 2276 (Comm) (*Speedier*), there was "a duty on a party, such as the Claimant in this case who (i) has obtained an injunction against Persons Unknown without notice, and (ii) is aware of a material change of circumstances, including for these purposes a change in the law, which gives rise to a real prospect that the court would amend or discharge the injunction, to restore the case within a reasonable period to the court for reconsideration". He said that duty was not limited to public authorities.

14. At [42]-[44], Nicklin J said that *Canada Goose* established that final injunctions against persons unknown did not bind newcomers, so that any "interim injunction the Court granted would be more effective and more extensive in its terms than any final order the court could grant". That raised the question of whether the court ought to grant any interim relief at all. The only way that Enfield could achieve what it sought was "to have a rolling programme of applications for interim orders", resulting in "litigation without end".

15. On 16 October 2020, Nicklin J made an order expressed to be with the concurrence of the PQBD and the judge in charge of the Queen's Bench Division Civil List. That order (the 16 October order) recited the orders that had been made in *Enfield,* and that it appeared that injunctions in similar terms might have been made in 37 scheduled sets of proceedings, and that similar issues might arise. Accordingly, Nicklin J ordered without a hearing and of the court's own motion, that, by 13 November 2020, each claimant in the scheduled actions must file a completed and signed questionnaire in the form set out in schedule 2 to the order. The 16 October order also made provision for those claimants who might want, having considered *Bromley* and *Canada Goose*, to discontinue or apply to vary or discharge the orders they had obtained in their cases. The 16 October order stated that the court's first objective was to "identify those local authorities with existing Traveller Injunctions who [wished] to maintain such

injunctions (possibly with modification), and those who [wished] to discontinue their claims and/or discharge the current Traveller Injunction granted in their favour".

16. Mr Giffin and Mr Anderson emphasised to us that they had not objected to the order the court had made. The 16 October order does, nonetheless, seem to me to be unusual in that it purports to call in actions in which final orders have been made suggesting, at least, that those final orders might need to be discharged in the light of a change in the law since the cases in question concluded. Moreover, Mr Anderson expressed his client's reservations about one judge expressing "deep concern" over the order that had been made in favour of Wolverhampton by 3 other judges. By way of example, Jefford J had said in her judgment on 2 October 2018 that she was satisfied, following the principles in *Bloomsbury Publishing Group Ltd v. News Group Newspapers Ltd* [2003] EWHC 1205, [2003] 1 WLR 1633 (*Bloomsbury*) and *South Cambridgeshire District Council v. Persons Unknown* [2004] EWCA Civ 1280 (*South Cambridgeshire*), that it was appropriate for the application to be made against persons unknown.

17. The 16 October order and the completion of questionnaires by numerous local authorities resulted in the rolled-up hearing before Nicklin J on 27 and 28 January 2021, in respect of which he delivered judgment on 12 May 2021. As a result, the judge made a number of orders discharging the injunctions that the local authorities had obtained and giving consequential directions.

18. Nicklin J concluded his judgment by explaining the consequences of what he had decided, in summary, as follows:

    i) Claims against persons unknown should be subject to stated safeguards.

    ii) Precautionary interim injunctions would only be granted if the applicant demonstrated, by evidence, that there was a sufficiently real and imminent risk of a tort being committed by the respondents.

    iii) If an interim injunction were granted, the court in its order should fix a date for a further hearing suggested to be not more than one month from the interim order.

    iv) The claimant at the further hearing should provide evidence of the efforts made to identify the persons unknown and make any application to amend the claim form to add named defendants.

    v) The court should give directions requiring the claimant, within a defined period: (a) if the persons unknown have not been identified sufficiently that they fall within Category 1 persons unknown,[2] to apply to discharge the interim injunction against persons unknown and discontinue the claim under CPR 38.2(2)(a), (b) otherwise, as against the Category 1 persons unknown defendants, to apply for (i) default judgment;[3] or (ii) summary judgment; or (iii) a date to be fixed for the final hearing of the claim, and, in default of compliance,

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[2] This was a reference to the two categories set out by Lord Sumption at [13] in *Cameron*, as to which see [35] below.

[3] As I have noted above, default judgment is not available in Part 8 cases.

that the claim be struck out and the interim injunction against persons unknown discharged.

vi) Final orders must not be drafted in terms that would capture newcomers.

19. I will return to the issues raised by the procedure the judge adopted when I deal with the second issue before this court raised by Ms Bolton.

The main authorities preceding the judge's decision

20. It is useful to consider these authorities in chronological order, since, as the judge rightly said in *Enfield*, the legal landscape in proceedings against persons unknown seems to have transformed since the injunction was granted in that case in mid-2017, only 4½ years ago.

Bloomsbury: judgment 23 May 2003

21. The persons unknown in *Bloomsbury* had possession of and had made offers to sell unauthorised copies of an unpublished Harry Potter book. Sir Andrew Morritt VC continued orders against the named parties for the limited period until the book would be published, and considered the law concerning making orders against unidentified persons. He concluded that an unknown person could be sued, provided that the description used was sufficiently certain to identify those who were included and those who were not. The description in that case [4] described the defendants' conduct and was held to be sufficient to identify them [16]-[21]. Sir Andrew was assisted by an advocate to the court. He said that the cases decided under the Rules of the Supreme Court did not apply under the Civil Procedure Rules: "the overriding objective and the obligations cast on the court are inconsistent with an undue reliance on form over substance" [19]. Whilst the persons unknown against whom the injunction was granted were in existence at the date of the order and not newcomers in the strict sense, this does not seem to me to be a distinction of any importance. The order he made was also not, in form, a final order made at a hearing attended by the unknown persons or after they had been served, but that too, as it seems to me, is not a distinction of any importance, since the injunction granted was final and binding on those unidentified persons for the relevant period leading up to publication of the book.

Hampshire Waste Services Ltd v. Intending Trespassers Upon Chineham Incinerator Site [2003] EWHC 1738, [2004] Env. L. R. 9 (*Hampshire Waste*): judgment 8 July 2003

22. *Hampshire Waste* was a protester case, in which Sir Andrew Morritt VC granted a without notice injunction against unidentified "[p]ersons entering or remaining without the consent of the claimants, or any of them, on any of the incinerator sites … in connection with the 'Global Day of Action Against Incinerators'". Sir Andrew accepted at [6]-[10] that, subject to two points on the way the unknown persons were described, the position was in essence the same as in *Bloomsbury*. The unknown persons had not been served and there was no argument about whether the order bound newcomers as well as those already threatening to protest.

South Cambridgeshire: judgment 17 September 2004

23. In *South Cambridgeshire*, the Court of Appeal (Brooke and Clarke LJJ) granted a without notice interim injunction against persons unknown causing or permitting hardcore to be deposited, or caravans being stationed, on certain land, under section 187B.

24. At [8]-[11], Brooke LJ said that he was satisfied that section 187B gave the court the power to "make an order of the type sought by the claimants". He explained that the "difficulty in times gone by against obtaining relief against persons unknown" had been remedied either by statute or by rule, citing recent examples of the power to grant such relief in different contexts in *Bloomsbury* and *Hampshire Waste*.

Gammell: judgment 31 October 2005

25. In *Gammell*, two injunctions had been granted against persons unknown under section 187B. The first (in *South Cambridgeshire*) was an interim order granted by the Court of Appeal restraining the occupation of vacant plots of land. The second (in *Bromley London Borough Council v. Maughan*) (*Maughan*) was an order made until further order restraining the stationing of caravans. In both cases, newcomers who violated the injunctions were committed for contempt, and the appeals were dismissed.

26. Sir Anthony Clarke MR (with whom Rix and Moore-Bick LJJ agreed) said that the issue was whether and in what circumstances the approach of the House of Lords in *South Bucks District Council v. Porter* [2003] UKHL 26, [2003] 2 AC 557 (*Porter*) applied to cases where injunctions were granted against newcomers [6]. He explained that, in *Porter*, section 187B injunctions had been granted against unauthorised development of land owned by named defendants, and the House was considering whether there had been a failure to consider the likely effect of the orders on the defendants' Convention rights in accordance with section 6(1) of the Human Rights Act 1998 (the 1998 Act) and the European Convention on Human Rights and Fundamental Freedoms (the Convention).

27. Sir Anthony noted at [10] that in *Porter*, the defendants were in occupation of caravans in breach of planning law when the injunctions were granted. The House had (Lord Bingham at [20]) approved [38]-[42] of Simon Brown LJ's judgment, which suggested that injunctive relief was always discretionary and ought to be proportionate. That meant that it needed to be: "appropriate and necessary for the attainment of the public interest objective sought - here the safeguarding of the environment - but also that it does not impose an excessive burden on the individual whose private interests - here the gipsy's private life and home and the retention of his ethnic identity - are at stake". He cited what Auld LJ (with whom Arden and Jacob LJJ had agreed) had said in *Davis v. Tonbridge & Malling Borough Council* [2004] EWCA Civ 194 (*Davis*) at [34] to the additional effect that it was "questionable whether Article 8 adds anything to the existing equitable duty of a court in the exercise of its discretion under section 187B", and that the jurisdiction was to be exercised with due regard to the purpose for which it was conferred, namely to restrain breaches of planning control. Auld LJ at [37] in *Davis* had explained that *Porter* recognised two stages: first, to look at the planning merits of the matter, according respect to the authority's conclusions, and secondly to consider for itself, in the light of the planning merits and any other circumstances, in particular those of the defendant, whether to grant injunctive relief. The question, as Sir Anthony saw it in *Gammell*, was whether those principles applied to the cases in question [12].

28. At [28]-[29], Sir Anthony held, as a matter of essential decision, that the balancing exercise required in *Porter* did not apply, either directly or by analogy, to cases where the defendant was a newcomer. In such cases, Sir Anthony held at [30]-[31] that the court would have regard to statements in *Mid-Bedfordshire District Council v. Brown* [2004] EWCA Civ 1709, [2005] 1 WLR 1460 (*Brown*) (Lord Phillips MR, Mummery and Jonathan Parker LJJ) as to cases in which defendants occupy or continue to occupy land without planning permission and in disobedience of orders of the court. The principles in *Porter* did not apply to an application to add newcomers (such as the defendants in *Gammell* and *Maughan*) as defendants to the action. It was, in that specific context, that Sir Anthony said what is so often cited at [32] in *Gammell*, namely:

> In each of these appeals the appellant became a party to the proceedings when she did an act which brought her within the definition of defendant in the particular case. Thus in the case of [Ms Maughan] she became a person to whom the injunction was addressed and a defendant when she caused her three caravans to be stationed on the land on 20 September 2004. In the case of [Ms Gammell] she became both a person to whom the injunction was addressed and the defendant when she caused or permitted her caravans to occupy the site. In neither case was it necessary to make her a defendant to the proceedings later.

29. In dismissing the appeals against the findings of contempt, Sir Anthony summarised the position at [33] including the following: (i) *Porter* applied when the court was considering granting an injunction against named defendants. (ii) *Porter* did not apply in full when a court was considering an injunction against persons unknown because the relevant personal information was, *ex hypothesi*, unavailable. That fact made it "important for courts only to grant such injunctions in cases where it was not possible for the applicant to identify the persons concerned or likely to be concerned". (iii) In deciding a newcomer's application to vary or discharge an injunction against persons unknown, the court will take account of all the circumstances of the case, including the reasons for the injunction, the reasons for the breach and the applicant's personal circumstances, applying the *Porter* and *Brown* principles.

30. These holdings were, in my judgment, essential to the decision in *Gammell*. It was submitted that the local authority had to apply to join the newcomers as defendants, and that when the court considered whether to do so, the court had to undertake the *Porter* balancing exercise. The Court of Appeal decided that there was no need to join newcomers to an action in which injunctions against persons unknown had been granted and knowingly violated by those newcomers. In such cases, the newcomers automatically became parties by their violation, and the *Porter* exercise was irrelevant. As a result, it was irrelevant also to the question of whether the newcomers were in contempt.

31. There is nothing in *Gammell* to suggest that any part of its reasoning depended on whether the injunctions had been granted on an interim or final basis. Indeed, it was essential to the reasoning that such injunctions, whether interim or final, applied in their full force to newcomers with knowledge of them. It may also be noted that there was nothing in the decision to suggest that it applied only to injunctions granted specifically under section 187B, as opposed to cases where the claim was brought to restrain the commission of a tort.

Secretary of State for the Environment, Food and Rural Affairs v. Meier [2009] UKSC 11, [2009] 1 WLR 2780 (*Meier*): judgment 1 December 2009

32. In *Meier*, the Forestry Commission sought an injunction against travellers who had set up an unauthorised encampment. The injunction was granted by the Court of Appeal against "those people trespassing on, living on, or occupying the land known as Hethfelton Wood". The case did not, therefore, concern newcomers. Nonetheless, Lord Rodger made some general comments at [1]-[2] which are of some relevance to this case. He referred to the situation where the identities of trespassers were not known, and approved the way in which Sir Andrew Morritt VC had overcome the procedural problems in *Bloomsbury* and *Hampshire Waste*. Referring to *South Cambridgeshire*, he cited with approval Brooke LJ's statement that "[t]here was some difficulty in times gone by against obtaining relief against persons unknown, but over the years that problem has been remedied either by statute or by rule".[4]

Cameron: judgment 20 February 2019

33. In *Cameron*, an injured motorist applied to amend her claim to join "[t]he person unknown driving [the other vehicle] who collided with [the claimant's vehicle] on [the date of the collision]". The Court of Appeal granted the application, but the Supreme Court unanimously allowed the appeal.

34. Lord Sumption said at [1] that the question in the case was in what circumstances it was permissible to sue an unnamed defendant. Lord Sumption said at [11] that, since *Bloomsbury*, the jurisdiction had been regularly invoked in relation to abuse of the internet, trespasses and other torts committed by protesters, demonstrators and paparazzi. He said that in some of the cases, proceedings against persons unknown were allowed in support of an application for precautionary injunctions, where the defendants could only be identified as those persons who might in future commit the relevant acts. It was that body of case law that the majority of the Court of Appeal (Gloster and Lloyd-Jones LJJ) had followed in deciding that an action was permissible against the unknown driver who injured Ms Cameron. He said that it was "the first occasion on which the basis and extent of the jurisdiction [had] been considered by the Supreme Court or the House of Lords".

35. After commenting at [12] that the CPR neither expressly authorised nor expressly prohibited exceptions to the general rule that actions against unnamed parties were permissible only against trespassers (see CPR Part 55.3(4), which in fact only refers to possession claims against trespassers), Lord Sumption distinguished at [13] between two kinds of case in which the defendant cannot be named: (i) anonymous defendants who are identifiable but whose names are unknown (e.g. squatters), and (ii) defendants, such as most hit and run drivers, who are not only anonymous but cannot even be identified. The distinction was that those in the first category were described in a way that made it possible in principle to locate or communicate with them, whereas in the second category it was not. It is to be noted that Lord Sumption did not mention a third category of newcomers.

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4 Lord Rodger noted also the discussion of such injunctions in Jillaine Seymour, "Injunctions Enjoining Non-Parties: Distinction without Difference" (2007) 66 CLJ 605-624.

36. At [14], Lord Sumption said that the legitimacy of issuing or amending a claim form so as to sue an unnamed defendant could properly be tested by asking whether it was conceptually possible to serve it: the general rule was that service of originating process was the act by which the defendant was subjected to the court's jurisdiction: *Barton v. Wright Hassall LLP* [2018] 1 WLR 1119 at [8]. The court was seised of an action for the purposes of the Brussels Convention when the proceedings were served (as much under the CPR as the preceding Rules of the Supreme Court): *Dresser UK Ltd v. Falcongate Freight Management Ltd* [1992] QB 502 per Bingham LJ at page 523. An identifiable but anonymous defendant could be served with the claim form, if necessary, by alternative service under CPR 6.15, which was why proceedings against anonymous trespassers under CPR 55.3(4) had to be effected in accordance with CPR 55.6 by placing them in a prominent place on the land. In *Bloomsbury*, for example, the unnamed defendants would have had to identify themselves as the persons in physical possession of copies of the book if they had sought to do the prohibited act, namely disclose it to people (such as newspapers) who had been notified of the injunction. Lord Sumption then referred to *Gammell* as being a case where the Court of Appeal had held that, when proceedings were brought against unnamed persons and interim relief was granted to restrain specified acts, a person became both a defendant and a person to whom the injunction was addressed by doing one of those acts. It does not seem that he disapproved of that decision, since he followed up by saying that "[i]n the case of anonymous but identifiable defendants, these procedures for service are now well established, and there is no reason to doubt their juridical basis".

37. Accordingly, pausing there, Lord Sumption seems to have accepted that, where an action was brought against unknown trespassers, newcomers could, as Sir Anthony Clarke MR had said in *Gammell*, make themselves parties to the action by (knowingly) doing one of the prohibited acts. This makes perfect sense, of course, because Lord Sumption's thesis was that, for proceedings to be competent, they had to be served. Once Ms Gammell knowingly breached the injunction, she was both aware of the proceedings and made herself a party. Although Lord Sumption mentioned that the *Gammell* injunction was "interim", nothing he said places any importance on that fact, since his concern was service, rather than the interim or final nature of the order that the court was considering.

38. Lord Sumption proceeded to explain at [16] that one did not identify unknown persons by referring to something they had done in the past, because it did not enable anyone to know whether any particular persons were the ones referred to. Moreover, service on a person so identified was impossible. It was not enough that the wrongdoers themselves knew who they were. It was that specific problem that Lord Sumption said at [17] was more serious than the recent decisions of the courts had recognised. It was a fundamental principle of justice that a person could not be made subject to the jurisdiction of the court without having such notice of the proceedings as would enable him to be heard.[5]

39. Pausing once again, one can see that, assuming these statements were part of the essential decision in *Cameron*, they do not affect the validity of the orders against newcomers made in *Gammell* (whether interim or final) because before any steps could be taken against such newcomers, they would, by definition, have become aware of the

[5] See *Jacobson v. Frachon* (1927) 138 LT 386 per Atkin LJ at page 392 (*Jacobson*).

proceedings and of the orders made, and made themselves parties to the proceedings by violating those orders (see [32] in *Gammell*).

40. At [19], Lord Sumption explained why the treatment of the principle that a person could not be made subject to the jurisdiction of the court without having notice of the proceedings had been "neither consistent nor satisfactory". He referred to a series of cases about road accidents, before remarking that CPR 6.3 and 6.15 considerably broadened the permissible modes of service, but that the object of all the permitted modes of service was to enable the court to be satisfied that the method used either had put the recipient in a position to ascertain its contents or was reasonably likely to enable him to do so. He commented that the Court of Appeal in *Cameron* appeared to "have had no regard to these principles in ordering alternative service of the insurer". On that basis, Lord Sumption decided at [21] that, subject to any statutory provision to the contrary, it was an essential requirement for any form of alternative service that the mode of service should be such as could reasonably be expected to bring the proceedings to the attention of the defendant. The Court of Appeal had been wrong to say that service need not be such as to bring the proceedings to the defendant's attention. At [25], Lord Sumption commented that the power in CPR 6.16 to dispense with service of a claim form in exceptional circumstances had, in general, been used to escape the consequences of a procedural mishap. He found it hard to envisage circumstances in which it would be right to dispense with service in circumstances where there was no reason to believe that the defendant was aware that proceedings had been or were likely to be brought. He concluded at [26] that the anonymous unidentified driver in *Cameron* could not be sued under a pseudonym or description, unless the circumstances were such that the service of the claim form could be effected or properly dispensed with.

Ineos: judgment 3 April 2019

41. *Ineos* was argued just 2 weeks after the Supreme Court's decision in *Cameron*. The claimant companies undertook fracking, and obtained interim injunctions restraining unlawful protesting activities such as trespass and nuisance against persons unknown including those entering or remaining without consent on the claimants' land. One of the grounds of appeal raised the issue of whether the judge had been right to grant the injunctions against persons unknown (including, of course, newcomers).

42. Longmore LJ (with whom both David Richards and Leggatt LJJ agreed) first noted that *Bloomsbury* and *Hampshire Waste* had been referred to without disapproval in *Meier*. Having cited *Gammell* in detail, Longmore LJ recorded that Ms Stephanie Harrison QC, counsel for one of the unknown persons (who had been identified for the purposes of the appeal), had submitted that the enforcement against persons unknown was unacceptable because they "had no opportunity, before the injunction was granted, to submit that no order should be made" on the basis of their Convention rights. Longmore LJ then explained *Cameron*, upon which Ms Harrison had relied, before recording that she had submitted that Lord Sumption's two categories of unnamed or unknown defendants at [13] in *Cameron* were exclusive and that the defendants in *Ineos* did not fall within them.

43. Longmore LJ rejected that argument on the basis that it was "too absolutist to say that a claimant can never sue persons unknown unless they are identifiable at the time the claim form is issued". Nobody had suggested that *Bloomsbury* and *Hampshire Waste* were wrongly decided. Instead, she submitted that there was a distinction between

injunctions against persons who existed but could not be identified and injunctions against persons who did not exist and would only come into existence when they breached the injunction. Longmore LJ rejected that submission too at [29]-[30], holding that Lord Sumption's two categories were not considering persons who did not exist at all and would only come into existence in the future (referring to [11] in *Cameron*). Lord Sumption had, according to Longmore LJ, not intended to say anything adverse about suing such persons. Lord Sumption's two categories did not include newcomers, but "[h]e appeared rather to approve them [suing newcomers] provided that proper notice of the court order can be given and that the fundamental principle of justice on which he relied for the purpose of negating the ability to sue a "hit and run" driver" was not infringed (see my analysis above). Lord Sumption's [15] in *Cameron* amounted "at least to an express approval of *Bloomsbury* and no express disapproval of *Hampshire Waste*". Longmore LJ, therefore, held in *Ineos* that there was no conceptual or legal prohibition on suing persons unknown who were not currently in existence but would come into existence when they committed the prohibited tort.

44. Once again, there is nothing in this reasoning that justifies a distinction between interim and final injunctions. The basis for the decision was that *Bloomsbury* and *Hampshire Waste* were good law, and that in *Gammell* the defendant became a party to the proceedings when she knew of the injunction and violated it. *Cameron* was about the necessity for parties to know of the proceedings, which the persons unknown in *Ineos* did.

Bromley: judgment 21 January 2020

45. In *Bromley*, there was an interim injunction preventing unauthorised encampment and fly tipping. At the return date, the judge refused the injunction preventing unauthorised encampment on the grounds of proportionality, but granted a final injunction against fly tipping including by newcomers. The appeal was dismissed. *Cameron* was not cited to the Court of Appeal, and *Bloomsbury* and *Hampshire Waste* were cited, but not referred to in the judgments. At [29], however, Coulson LJ (with whom Ryder and Haddon-Cave LJJ agreed), endorsed the elegant synthesis of the principles applicable to the grant of precautionary injunctions against persons unknown set out by Longmore LJ at [34] in *Ineos*. Those principles concerned the court's practice rather than the appropriateness of granting such injunctions at all. Indeed, the whole focus of the judgment of Coulson LJ and the guidance he gave was on the proportionality of granting borough-wide injunctions in the light of the Convention rights of the travelling communities.

46. At [31]-[34], Coulson LJ considered procedural fairness "because that has arisen starkly in this and the other cases involving the gipsy and traveller community". Relying on article 6 of the Convention, *Attorney General v. Newspaper Publishing plc* [1988] Ch 333 and *Jacobson*, Coulson LJ said that "the principle that the court should hear both sides of the argument [was] therefore an elementary rule of procedural fairness".

47. Coulson LJ summarised many of the cases that are now before this court and dealt also with the law reflected in *Porter*, before referring at [44] to *Chapman v. United Kingdom* 33 EHRR 18 (*Chapman*) at [73], where the European Court of Human Rights (ECtHR) had said that the occupation of a caravan by a member of the Gypsy and Traveller community was an integral part of her ethnic identity and her removal from the site interfered with her article 8 rights not only because it interfered with her home, but also

because it a□ected her ability to maintain her identity as a gipsy. Other cases decided by the ECtHR were also mentioned.

48. After rejecting the proportionality appeal, Coulson LJ gave wider guidance starting at [100] by saying that he thought there was an inescapable tension between the "article 8 rights of the Gypsy and Traveller community" and the common law of trespass. The obvious solution was the provision of more designated transit sites.

49. At [102]-[108], Coulson LJ said that local authorities must regularly engage with the travelling communities, and recommended a process of dialogue and communication. If a precautionary injunction were thought to be the only way forward, then engagement was still of the utmost importance: "[w]elfare assessments should be carried out, particularly in relation to children". Particular considerations included that: (a) injunctions against persons unknown were exceptional measures because they tended to avoid the protections of adversarial litigation and article 6 of the Convention, (b) there should be respect for the travelling communities' culture, traditions and practices, in so far as those factors were capable of being realised in accordance with the rule of law, and (c) the clean hands doctrine might require local authorities to demonstrate that they had complied with their general obligations to provide su□cient accommodation and transit sites, (d) borough-wide injunctions were inherently problematic, (e) it was sensible to limit the injunction to one year with subsequent review, as had been done in the Wolverhampton case (now before this court), and (f) credible evidence of criminal conduct or risks to health and safety were important to obtain a wide injunction. Coulson LJ concluded with a summary after saying that he did not accept the submission that this kind of injunction should never be granted, and that the cases made plain that "the gipsy and traveller community have an enshrined freedom not to stay in one place but to move from one place to another": "[a]n injunction which prevents them from stopping at all in a defined part of the UK comprised a potential breach of both the Convention and the Equality Act 2010, and in future should only be sought when, having taken all the steps noted above, a local authority reaches the considered view that there is no other solution to the particular problems that have arisen or are imminently likely to arise".

50. It may be commented at once that nothing in *Bromley* suggests that final injunctions against unidentified newcomers can never be granted.

Cuadrilla: judgment 23 January 2020

51. In *Cuadrilla*, the Court of Appeal considered committals for breach of a final injunction preventing persons unknown, including newcomers, from trespassing on land in connection with fracking. The issues are mostly not relevant to this case, save that Leggatt LJ (with whom Underhill and David Richards LJJ substantively agreed) summarised the effect of *Ineos* (in which Leggatt LJ had, of course, been a member of the court) as being that there was no conceptual or legal prohibition on (a) suing persons unknown who were not currently in existence but would come into existence if and when they committed a threatened tort, or (b) granting precautionary injunctions to restrain such persons from committing a tort which has not yet been committed [48]. After further citation of authority, the Court of Appeal departed from one aspect of the guidance given in *Ineos*, but not one that is relevant to this case. Leggatt LJ noted at [50] that the appeal in *Canada Goose* was shortly to consider injunctions against persons unknown.

Canada Goose: judgment 5 March 2020

52. The first paragraph of the judgment of the court in *Canada Goose* (Sir Terence Etherton MR, David Richards and Coulson LJJ) recorded that the appeal concerned the way in which, and the extent to which, civil proceedings for injunctive relief against persons unknown could be used to restrict public protests. On the claimants' application for summary judgment, Nicklin J had refused to grant a final injunction, discharged the interim injunction, and held that the claim form had not been validly served on any defendant in the proceedings and that it was not appropriate to make an order dispensing with service under CPR 6.16(1). The first defendants were named as persons unknown who were protestors against the manufacture and sale at the first claimant's store of clothing made of or containing animal products. An interim injunction had been granted until further order in respect of various tortious activities including assault, trespass and nuisances, with a further hearing also ordered.

53. The grounds of appeal were based on Nicklin J's findings on alternative service and dispensing with service, the description of the persons unknown, and the judge's approach to the evidence and to summary judgment. The appeal on the service issues was dismissed at [37]-[55]. The Court of Appeal started its treatment of the grounds of appeal relating to description and summary judgment by saying that it was established that proceedings might be commenced, and an interim injunction granted, against persons unknown in certain circumstances, as had been expressly acknowledged in *Cameron* and put into effect in *Ineos* and *Cuadrilla*.

54. The court in *Canada Goose* set out at [60] Lord Sumption's two categories from [13] of *Cameron*, before saying at [61] that that distinction was critical to the possibility of service: "Lord Sumption acknowledged that the court may grant interim relief before the proceedings have been served or even issued but he described that as an emergency jurisdiction which is both provisional and strictly conditional" [14]. This citation may have sown the seeds of what was said at [89]-[92], to which I will come in a moment.

55. At [62]-[88] in *Canada Goose*, the court discussed in entirely orthodox terms the decisions in *Cameron, Gammell*, *Ineos*, and *Cuadrilla*, in which Leggatt LJ had referred to *Hubbard v. Pitt* [1976] 1 QB 142 and *Burris v. Azadani* [1995] 1 WLR 1372. At [82], the court built on the *Cameron* and *Ineos* requirements to set out refined procedural guidelines applicable to proceedings for interim relief against persons unknown in protester cases like the one before that court. The court at [83]-[88] applied those guidelines to the appeal to conclude that the judge had been right to dismiss the claim for summary judgment and to discharge the interim injunction.

56. It is worth recording the guidelines for the grant of interim relief laid down in *Canada Goose* at [82] as follows:

> (1) The "persons unknown" defendants in the claim form are, by definition, people who have not been identified at the time of the commencement of the proceedings. If they are known and have been identified, they must be joined as individual defendants to the proceedings. The "persons unknown" defendants must be people who have not been identified but are capable of being identified and served with the proceedings, if necessary by alternative service such as can reasonably be expected to bring the proceedings to their attention. In principle, such persons include both anonymous defendants who are identifiable at the time the

proceedings commence but whose names are unknown and also Newcomers, that is to say people who in the future will join the protest and fall within the description of the "persons unknown".

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

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

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

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

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

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

57. The claim form was held to be defective in *Canada Goose* under those guidelines and the injunctions were impermissible. The description of the persons unknown was also impermissibly wide, because it was capable of applying to persons who had never been at the store and had no intention of ever going there. It would have included a "peaceful protester in Penzance". Moreover, the specified prohibited acts were not confined to unlawful acts, and the original interim order was not time limited. Nicklin J had been bound to dismiss the application for summary judgment and to discharge the interim injunction: "both because of non-service of the proceedings and for the further reasons … set out below".

58. It is the further reasons "set out below" at [89]-[92] that were relied upon by Nicklin J in this case that have been the subject of the most detailed consideration in argument before us. They were as follows:

89. A final injunction cannot be granted in a protester case against "persons unknown" who are not parties at the date of the final order, that is to say Newcomers who have not by that time committed the prohibited acts and so do not fall within the description of the "persons unknown" and who have not been served with the claim form. There are some very limited circumstances, such as in *Venables v. News Group Newspapers Ltd* [2001] Fam 430 [*Venables*], in which a final injunction may be granted against the whole world. Protester actions, like the present proceedings, do not fall within that exceptional category. The usual principle, which applies in the present case, is that a final injunction operates only between the parties to the proceedings: *Attorney-General v. Times Newspapers Ltd* [1992] 1 AC 191, 224 [*Spycatcher*]. That is consistent with the fundamental principle in *Cameron* (at [17]) that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard.

90. In Canada Goose's written skeleton argument for the appeal, it was submitted that *Vastint Leeds BV v. Persons Unknown* [2018] EWHC 2456 (Ch), [2019] 4 WLR 2 (Marcus Smith J), is authority to the contrary. Leaving aside that *Vastint* is a first instance decision, in which only the claimant was represented and which is not binding on us, that case was decided before, and so took no account of, the Court of Appeal's decision in *Ineos* and the decision of the Supreme Court in *Cameron*. Furthermore, there was no reference in *Vastint* to the confirmation in [*Spycatcher*] of the usual principle that a final injunction operates only between the parties to the proceedings.

91. That does not mean to say that there is no scope for making "persons unknown" subject to a final injunction. That is perfectly legitimate provided the persons unknown are confined to those within Lord Sumption's Category 1 in *Cameron*, namely those anonymous defendants who are identifiable (for example, from CCTV or body cameras or otherwise) as having committed the relevant unlawful acts prior to the date of the final order and have been served (probably pursuant to an order for alternative service) prior to the date. The proposed final injunction which Canada Goose sought by way of summary judgment was not so limited. Nicklin J was correct (at [159]) to dismiss the summary judgment on that further ground (in addition to non-service of the proceedings). Similarly, Warby J was correct to take the same line in *Birmingham City Council v. Afsar* [2019] EWHC 3217 (QB) at [132].

92. In written submissions following the conclusion of the oral hearing of the appeal Mr Bhose submitted that, if there is no power to make a final order against "persons unknown", it must follow that, contrary to *Ineos*, there is no power to make an interim order either. We do not agree. An interim injunction is temporary relief intended to hold the position until trial. In a case like the present, the time between the interim relief and trial will enable the claimant to identify wrongdoers, either by name or as anonymous persons within Lord Sumption's Category 1. Subject to any appeal, the trial determines the outcome of the litigation between the parties. Those parties include not only persons who have been joined as named parties but also "persons unknown" who have breached the interim injunction and are identifiable albeit anonymous. The trial is between the parties to the

proceedings. Once the trial has taken place and the rights of the parties have been determined, the litigation is at an end. There is nothing anomalous about that.

The reasons given by the judge

59. The judge began his judgment at [2]-[5] by setting out the background to unauthorised encampment injunctions derived mainly from Coulson LJ's judgment in *Bromley*. At [6], the judge said that the central issue to be determined was whether a final injunction granted against persons unknown was subject to the principle that final injunctions bind only the parties to the proceedings. He said that *Canada Goose* held that it was, but the local authorities contended that it should not be. It may be noted at once that this is a one-sided view of the question that assumes the answer. The question was not whether an assumed general principle derived from *Spycatcher* or *Cameron* applied to final injunctions against persons unknown (which if it were a general principle, it obviously would), but rather what were the general principles to be derived from *Spycatcher*, *Cameron* and *Canada Goose*.

60. At [10]-[25], the judge dealt with three of the main cases: *Cameron*, *Bromley* and *Canada Goose*, as part of what he described as the "changing legal landscape".

61. At [26]-[113], the judge dealt in detail with what he called the Cohort Claims under 9 headings: assembling the Cohort Claims and their features, service of the claim form on persons unknown, description of persons unknown in the claim form and in CPR 8.2A, the [mainly statutory] basis of the civil claims against persons unknown, powers of arrest attached to injunction orders, use of the interim applications court of the Queen's Bench Division (court 37), failure to progress claims after the grant of an interim injunction, particular Cohort Claims, and the case management hearing on 17 December 2020: identification of the issues of principle to be determined.

62. On the first issue before him (what I have described at [4] above as the secondary question before us), the judge stated his conclusion at [120] to the effect that the court retained jurisdiction to consider the terms of the final injunctions. At [136], he said that it was legally unsound to impose concepts of finality against newcomers, who only later discovered that they fell within the definition of persons unknown in a final judgment. The permission to apply provisions in several injunctions recognised that it would be fundamentally unjust not to afford such newcomers the opportunity to ask the court to reconsider the order. A newcomer could apply under CPR 40.9, which provided that: "[a] person who is not a party but who is directly affected by a judgment or order may apply to have the judgment or order set aside or varied".

63. On the second and main issue (the primary issue before us), the judge stated his conclusion at [124] that the injunctions granted in the Cohort Claims were subject to the *Spycatcher* principle (derived from page 224 of the speech of Lord Oliver) and applied in *Canada Goose* that a final injunction operated only between the parties to the proceedings, and did not fall into the exceptional category of civil injunction that could be granted against the world. His conclusion is explained at [161]-[189].

64. On the third issue before him (but part of the main issue before us), the judge concluded at [125] that if the relevant local authority cannot identify anyone in the category of persons unknown at the time the final order was granted, then that order bound nobody.

65. The judge stated first, in answer to his second issue, that the court undoubtedly had the power to grant an injunction that bound non-parties to proceedings under section 37. That power extended, exceptionally, to making injunction orders against the world (see *Venables***)**. The correct starting point was to recognise the fundamental difference between interim and final injunctions. It was well-established that the court could grant an interim injunction against persons unknown which would bind all those falling within the description employed, even if they only became such persons as a result of doing some act after the grant of the interim injunction. He said that the key decision underpinning that principle was *Gammell*, which had decided that a newcomer became a party to the underlying proceedings when they did an act which brought them within the definition of the defendants to the claim. The judge thought that there was no conceptual difficulty about that at the interim stage, and that *Gammell* was a case of a breach of an interim injunction. At [173], the judge stated that *Gammell* was not authority for the proposition that persons could become defendants to proceedings, after a final injunction was granted, by doing acts which brought them within the definition of persons unknown. He did not say why not. But the point is, at least, not free from doubt, bearing in mind that it is not clear whether Ms Maughan's case, decided at the same time as *Gammell*, concerned an interim or final order.

66. At [174], the judge suggested that a claim form had to be served for the court to have jurisdiction over defendants at a trial. Relief could only be granted against identified persons unknown at trial: "[i]t is fundamental to our process of civil litigation that the Court cannot grant a final order against someone who is not party to the claim". Pausing there, it may be noted that, even on the judge's own analysis, that is not the case, since he acknowledged that injunctions were validly granted against the world in cases like *Venables*. He relied on [92] in *Canada Goose* as deciding that a person who, at the date of grant of the final order, is not already party to a claim, cannot subsequently become one. In my judgment, as appears hereafter, that statement was at odds with the decision in *Gammell*.

67. At [175]-[176], the judge rejected the submission that traveller injunctions were "not subject to these fundamental rules of civil litigation or that the principle from *Canada Goose* is limited only to 'protester' cases, or cases involving private litigation". He said that the principles enunciated in *Canada Goose*, drawn from *Cameron*, were "of universal application to civil litigation in this jurisdiction". Nothing in section 187B suggested that Parliament had granted local authorities the ability to obtain final injunctions against unknown newcomers. The procedural rules in CPR PD 20.4 positively ruled out commencing proceedings against persons unknown who could not be identified. At [180] the judge said that, insofar as any support could be found in *Bromley* for a final injunction binding newcomers, *Bromley* was not considering the point for decision before Nicklin J.

68. The judge then rejected at [186] the idea that he had mentioned in *Enfield* that application of the *Canada Goose* principles would lead to a rolling programme of interim injunctions: (i) On the basis of *Ineos* and *Canada Goose*, the court would not grant interim injunctions against persons unknown unless satisfied that there were people capable of being identified and served. (ii) There would be no civil claim in

which to grant an injunction, if the claim cannot be served in such a way as can reasonably be expected to bring the proceedings to an identified person's attention. (iii) An interim injunction would only be granted against persons unknown if there were a sufficiently real and imminent risk of a tort being committed to justify precautionary relief; thereafter, a claimant will have the period up to the final hearing to identify the persons unknown.

69. The judge said that a final injunction should be seen as a remedy flowing from the final determination of rights between the claimant and the defendants at trial. That made it important to identify those defendants before that trial. The legitimate role for interim injunctions against persons unknown was conditional and to protect the existing state of affairs pending determination of the parties' rights at a trial. A final judgment could not be granted consistently with *Cameron* against category 2 defendants: i.e. those who were anonymous and could not be identified.

70. Between [190]-[241], Nicklin J considered whether final injunctions could ever be granted against the world in these types of case. He decided they could not, and discharged those that had been granted against persons unknown. At [244]-[246], the judge explained the consequential orders he would make, before giving the safeguards that he would provide for future cases (see [17] above).

The main issue: Was the judge right to hold that the court cannot grant final injunctions that prevent persons, who are unknown and unidentified at the date of the order (i.e. newcomers), from occupying and trespassing on local authority land?

Introduction to the main issue

71. The judge was correct to state as the foundation of his considerations that the court undoubtedly had the power under section 37 to grant an injunction that bound non-parties to proceedings. He referred to *Venables* as an example of an injunction against the world, and there is a succession of cases to similar effect. It is true that they all say, in the context of injuncting the world from revealing the identity of a criminal granted anonymity to allow him to rehabilitate, that such a remedy is exceptional. I entirely agree. I do not, however, agree that the courts should seek to close the categories of case in which a final injunction against all the world might be shown to be appropriate. The facts of the cases now before the court bear no relation to the facts in *Venables* and related cases, and a detailed consideration of those cases is, therefore, ultimately of limited value.

72. Section 37 is a broad provision providing expressly that "the High Court may by order (whether interlocutory or final) grant an injunction … in all cases in which it appears to the court to be just and convenient to do so". The courts should not cut down the breadth of that provision by imposing limitations which may tie a future court's hands in types of case that cannot now be predicted.

73. The judge in this case seems to me to have built upon [89]-[92] of *Canada Goose* to elevate some of what was said into general principles that go beyond what it was necessary to decide either in *Canada Goose* or this case.

74. First, the judge said that it was the "correct starting point" to recognise the fundamental difference between interim and final injunctions. In fact, none of the cases that he relied

upon decided that. As I have already pointed out, none of *Gammell*, *Cameron* or *Ineos* drew such a distinction.

75. Secondly, the judge said at [174] that it was "fundamental to our process of civil litigation that the Court cannot grant a final order against someone who is not party to the claim". Again, as I have already pointed out, no such fundamental principle is stated in any of the cases, and such a principle would be inconsistent with many authorities (not least, *Venables*, *Gammell* and *Ineos*). The highest that *Canada Goose* put the point was to refer to the "usual principle" derived from *Spycatcher* to the effect that a final injunction operated only between the parties to the proceedings. The principle was said to be applicable in *Canada Goose*. Admittedly, *Canada Goose* also described that principle as consistent with the fundamental principle in *Cameron* (at [17]) that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard, but that was said without disapproving the mechanism explained by Sir Anthony Clarke in *Gammell* by which a newcomer might become a party to proceedings by knowingly breaching a persons unknown injunction.

76. Thirdly, the judge suggested that the principles enunciated in *Canada Goose*, drawn from *Cameron*, were "of universal application to civil litigation in this jurisdiction". This was, on any analysis, going too far as I shall seek to show in the succeeding paragraphs.

77. Fourthly, the judge said that it was important to identify all defendants before trial, because a final injunction should be seen as a remedy flowing from the final determination of rights between identified parties. This ignores the Part 8 procedure adopted in unauthorised encampment cases, which rarely, if ever, results in a trial. Interim injunctions in other fields often do protect the position pending a trial, but in these kinds of case, as I say, trials are infrequent. Moreover, there is no meaningful distinction between an interim and final injunction, since, as the facts of these cases show and *Bromley* explains, the court needs to keep persons unknown injunctions under review even if they are final in character.

78. With that introduction, I turn to consider whether the statements made in [89]-[92] of *Canada Goose* properly reflect the law. I should say, at once, that those paragraphs were not actually necessary to the decision in *Canada Goose*, even if the court referred to them at [88] as being further reasons for it.

[89] of *Canada Goose*

79. The first sentence of [89] said that "a final injunction cannot be granted in a protester case against "persons unknown" who are not parties at the date of the final order, that is to say Newcomers who have not by that time committed the prohibited acts and so do not fall within the description of the "persons unknown" and who have not been served with the claim form". That sentence does not on its face apply to cases such as the present, where the defendants were not protesters but those setting up unauthorised encampments. It is nonetheless very hard to see why the reasoning does not apply to

unauthorised encampment cases, at least insofar as they are based on the torts of trespass and nuisance. I would be unwilling to accede to the local authorities' submission that *Canada Goose* can be distinguished as applying only to protester cases.

80. *Canada Goose* then referred at [89] to "some very limited circumstances" in which a final injunction could be granted against the whole world, giving *Venables* as an example. It said that protester actions did not fall within that exceptional category. That is true, but does not explain why a final injunction against persons unknown might not be appropriate in such cases.

81. *Canada Goose* then said at [89], as I have already mentioned, that the usual principle, which applied in that case, was that a final injunction operated only between the parties to the proceedings, citing *Spycatcher* as being consistent with *Cameron* at [17]. That passage was, in my judgment, a misunderstanding of [17] of *Cameron*. As explained above, [17] of *Cameron* did not affect the validity of the orders against newcomers made in *Gammell* (whether interim or final) because before any steps could be taken against such newcomers, they would, by definition, have become aware of the proceedings and of the orders made, and made themselves parties to the proceedings by violating them (see [32] in *Gammell*). Moreover at [63] in C*anada Goose*, the court had already acknowledged that (i) Lord Sumption had not addressed a third category of anonymous defendants, namely people who will or are highly likely in the future to commit an unlawful civil wrong (i.e. newcomers), and (ii) Lord Sumption had referred at [15] with approval to *Gammell* where it was held that "persons who entered onto land and occupied it in breach of, and subsequent to the grant of, an interim injunction became persons to whom the injunction was addressed and defendants to the proceedings". There was no valid distinction between such an order made as a final order and one made on an interim basis.

82. There was no reason for the Court of Appeal in *Canada Goose* to rely on the usual principle derived from *Spycatcher* that a final injunction operates only between the parties to the proceedings. In *Gammell* and *Ineos* (cases binding on the Court of Appeal) it was held that a person violating a "persons unknown" injunction became a party to the proceedings. *Cameron* referred to that approach without disapproval. There is and was no reason why the court cannot devise procedures, when making longer term persons unknown injunctions, to deal with the situation in which persons violate the injunction and makes themselves new parties, and then apply to set aside the injunction originally violated, as happened in *Gammell* itself. Lord Sumption in *Cameron* was making the point that parties must always have the opportunity to contest orders against them. But the persons unknown in *Gammell* had just such an opportunity, even though they were held to be in contempt. *Spycatcher* was a very different case, and only described the principle as the usual one, not a universal one. Moreover, it is a principle that sits uneasily with parts of the CPR, as I shall shortly explain.

[90] of *Canada Goose*

83. In my judgment both the judge at [90] and the Court of Appeal in *Canada Goose* at [90] were wrong to suggest that Marcus Smith J's decision in *Vastint Leeds BV v. Persons Unknown* [2018] EWHC 2456 (Ch) (*Vastint*) was wrong. There, a final injunction was granted against persons unknown enjoining them from entering or remaining at the site of the former Tetley Brewery (for the purpose of organising or attending illegal raves). At [19]-[25], Marcus Smith J explained his reasoning relying

on *Bloomsbury*, *Hampshire Waste*, *Gammell* and *Ineos* (at first instance: [2017] EWHC 2945 (Ch)). At [24], he said that the making of orders against persons unknown was settled practice provided the order was clearly enough drawn, and that it worked well within the framework of the CPR: "[u]ntil an act infringing the order is committed, no-one is party to the proceedings. It is the act of infringing the order that makes the infringer a party". Any person a□ected by the order could apply to set it aside under CPR 40.9. None of *Cameron*, *Ineos*, or *Spycatcher* showed *Vastint* to be wrong as the court suggested.

[91] of *Canada Goose*

84. In the first two sentences of [91], *Canada Goose* seeks to limit persons unknown subject to final injunctions to those "within Lord Sumption's Category 1 in *Cameron*, namely those anonymous defendants who are identifiable (for example, from CCTV or body cameras or otherwise) as having committed the relevant unlawful acts prior to the date of the final order and have been served (probably pursuant to an order for alternative service) prior to [that] date". This holding ignores the fact that *Canada Goose* had already held that Lord Sumption's categories did not deal with newcomers, which were, of course, not relevant to the facts in *Cameron*.

85. The point in *Cameron* was that the proceedings had to be served so that, before enforcement, the defendant had knowledge of the order and could contest it. As already explained, *Gammell* held that persons unknown were served and made parties by violating an order of which they had knowledge. Accordingly, the first two sentences of [91] are wrong and inconsistent both with the court's own reasoning in *Canada Goose* and with a proper understanding of *Gammell*, *Ineos* and *Cameron.*

86. In the third sentence of [91], the court in *Canada Goose* said that the proposed final injunction which Canada Goose sought by way of summary judgment was objectionable as not being limited to Lord Sumption's category 1 defendants, who had already been served and identified. As I have said, that ignores the fact that the court had already said that Lord Sumption excluded newcomers and the *Gammell* situation.

87. The court in *Canada Goose* then approved Nicklin J at [159] in his judgment in *Canada Goose*, where he said this:

> 158. Rather optimistically, Mr Buckpitt suggested that all these concerns could be adequately addressed by the inclusion of a provision in the final order permitting any newcomers to apply to vary or discharge the final order.
>
> 159. Put bluntly, this is just absurd. It turns civil litigation on its head and bypasses almost all of the fundamental principles of civil litigation: see paras 55—60 above. Unknown individuals, without notice of the proceedings, would have judgment and a final injunction granted against them. If subsequently, they stepped forward to object to this state of affairs, I assume Mr Buckpitt envisages that it is only at this point that the question would be addressed whether they had actually done (or threatened to do) anything that would justify an order being made against them. Resolution of any factual dispute taking place, one assumes, at a trial, if necessary. Given the width of the class of protestor, and the anticipated rolling programme of serving the "final order" at future protests, the court could be faced with an

unknown number of applications by individuals seeking to "vary" this "final order" and possible multiple trials. This is the antithesis of finality to litigation.

88. This passage too ignores the essential decision in *Gammell*.

89. As I have already said, there is no real distinction between interim and final injunctions, particularly in the context of those granted against persons unknown. Of course, subject to what I say below, the guidelines in *Canada Goose* need to be adhered to. Orders need to be kept under review. For as long as the court is concerned with the enforcement of an order, the action is not at end. A person who is not a party but who is directly affected by an order may apply under CPR 40.9. In addition, in the case of a third-party costs order, CPR 46.2 requires the non-party to be made party to the proceedings, even though the dispute between the litigants themselves is at an end. In this case, as in *Canada Goose,* the court was effectively concerned with the enforcement of an order, because the problems in *Canada Goose* all arose because of the supposed impossibility of enforcing an order against a non-party. Since the order can be enforced as decided authoritatively in *Gammell*, there is no procedural objection to its being made. The CPR contain many ways of enforcing an order. CPR 70.4 says that an order made against a non-party may be enforced by the same methods as if he were a party. In the case of a possession order against squatters, the enforcement officer will enforce against anyone on the property whether or not a newcomer. Notice must be given to all persons against whom the possession order was made and "any other occupiers": CPR 83.8A. Where a judgment is to be enforced by charging order CPR 73.10 allows "any person" to object and allows the court to decide any issue between any of the parties and any person who objects to the charging order. None of these rules was considered in *Canada Goose*. In addition, in the case of an injunction (unlike the claim for damages in *Cameron*), there is no possibility of a default judgment, and the grant of the injunction will always be in the discretion of the court.

90. The decision of Warby J in *Birmingham City Council v. Afsar* [2019] EWHC 3217 (QB) at [132] provides no further substantive reasoning beyond [159] of Nicklin J.

Paragraph [92] of *Canada Goose*

91. The reasoning in [92] is all based upon the supposed objection (raised in written submissions following the conclusion of the oral hearing of the appeal) to making a final order against persons unknown, because interim relief is temporary and intended to "enable the claimant to identify wrongdoers, either by name or as anonymous persons within Lord Sumption's Category 1". Again, this reasoning ignores the holding in *Gammell*, *Ineos* and *Canada Goose* itself that an unknown and unidentified person knowingly violating an injunction makes themselves parties to the action. Where an injunction is granted, whether on an interim or a final basis for a fixed period, the court retains the right to supervise and enforce it, including bringing before it parties violating it and thereby making themselves parties to the action. That is envisaged specifically by point 7 of the guidelines in *Canada Goose*, which said expressly that a persons unknown injunction should have "clear geographical and temporal limits". It was suggested that it must be time limited because it was an interim and not a final injunction, but in fact all persons unknown injunctions ought normally to have a fixed end point for review as the injunctions granted to these local authorities actually had in some cases.

92. It was illogical for the court at [92] in *Canada Goose* to suggest, in the face of *Gammell*, that the parties to the action could only include persons unknown "who have breached the interim injunction and are identifiable albeit anonymous". There is, as I have said, almost never a trial in a persons unknown case, whether one involving protesters or unauthorised encampments. It was wrong to suggest in this context that "[o]nce the trial has taken place and the rights of the parties have been determined, the litigation is at an end". In these cases, the case is not at end until the injunction has been discharged.

The judge's reasoning in this case

93. In my judgment, the judge was wrong to suggest that the correct starting point was the "fundamental difference between interim and final injunctions". There is no difference in jurisdictional terms between the grant of an interim and a final injunction. *Gammell* had not, as the judge thought, drawn any such distinction, and nor had *Ineos* as I have explained at [31] and [44] above. It would have been wrong to do so.

94. The judge, as it seems to me, went too far when he said at [174] that relief could only be granted against identified persons unknown at trial. He relied on *Canada Goose* at [92] as deciding that a person who, at the date of grant of the final order, is not already party to a claim, cannot subsequently become one. But, as I have said, that misunderstands both *Gammell* and *Ineos*. *Ineos* itself made clear that Lord Sumption's two categories of defendant in *Cameron* did not consider persons who did not exist at all and would only come into existence in the future. *Ineos* held that there was no conceptual or legal prohibition on suing persons unknown who were not currently in existence but would come into existence when they committed the prohibited tort.

95. I agree with the judge that there is no material distinction between an injunction against protesters and one against unauthorised encampment, certainly insofar as they both involve the grant of injunctions against persons unknown in relation to torts of trespass or nuisance. Nor is there any material distinction between those cases and the cases of urban exploring where judges have granted injunctions restraining persons unknown from trespassing on tall buildings (for example, the Shard) by climbing their exteriors (e.g. *Canary Wharf Investments Ltd v. Brewer* [2018] EWHC 1760 (QB) and *Chelsea FC v. Brewer* [2018] EWHC 1424 (Ch)). One of those cases was an interim and one a final injunction, but no distinction was made by either judge.

96. As I have explained, in my judgment, the judge ought not to have applied [89]-[92] of *Canada Goose*. Instead, he ought to have applied *Gammell* and *Ineos. Bromley* too had correctly envisaged the possibility of final injunctions against newcomers. The judge misunderstood the Supreme Court's decision in *Cameron*.

The doctrine of precedent

97. We received helpful submissions during the hearing as to the propriety of our reaching the conclusions already stated. In particular, we were concerned that *Cameron* had been misunderstood in the ways I have now explained in detail. The question, however, was, even if *Cameron* did not mandate the conclusions reached by the judge and [89]-[92] of *Canada Goose*, whether this court would be justified in refusing to follow those paragraphs. That question turns on precisely what *Gammell*, *Ineos* and *Canada Goose* decided.

98. In *Young v. Bristol Aeroplane Co Ltd* [1944] KB 718 (*Young*), three exceptions to the rule that the Court of Appeal is bound by its previous decisions were recognised. First, the Court of Appeal can decide which of two conflicting decisions of its own it will follow. Secondly, the Court of Appeal is bound to refuse to follow a decision of its own which cannot stand with a subsequent decision of the Supreme Court, and thirdly, the Court of Appeal is not bound to follow a decision of its own if given without proper regard to previous binding authority.

99. In my judgment, it is clear that *Gammell* decided, and *Ineos* accepted, that injunctions, whether interim or final, could validly be granted against newcomers. Newcomers were not any part of the decision in *Cameron*, and there is and was no basis to suggest that the mechanism in *Gammell* was not applicable to make an unknown person a party to an action, whether it occurred following an interim or a final injunction. Accordingly, a premise of *Gammell* was that injunctions generally could be validly granted against newcomers in unauthorised encampment cases. *Ineos* held that the same approach applied in protester cases. Accordingly, [89]-[92] of *Canada Goose* were inconsistent with *Ineos* and *Gammell*. Moreover, those paragraphs seem to have overlooked the provisions of the CPR that I have mentioned at [89] above. For those reasons, it is open to this court to apply the first and third exceptions in *Young*. It can decide which of *Gammell* and *Canada Goose* it should follow, and it is not bound to follow the reasons given at [89]-[92] of *Canada Goose*, which even if part of the court's essential reasoning, were given without proper regard to *Gammell*, which was binding on the Court of Appeal in *Canada Goose*.

100. This analysis is applicable even if [89]-[92] of *Canada Goose* are taken as explaining *Gammell* and *Ineos* as being confined to interim injunctions. The Court of Appeal can, in that situation, refuse to follow its second decision if it takes the view, as I do, that [89]-[92] of *Canada Goose* wrongly distinguished *Gammell* and *Ineos* (see *Starmark Enterprises Ltd v. CPL Distribution Ltd* [2001] EWCA Civ 1252, [2002] Ch. 306 at [65]-[67] and [97]).

Conclusion on the main issue

101. For the reasons I have given, I would decide that the judge was wrong to hold that the court cannot grant final injunctions that prevent persons, who are unknown and unidentified at the date of the order (newcomers), from occupying and trespassing on local authority land.

The guidance given in *Bromley* and *Canada Goose* and in this case by Nicklin J

102. We did not hear detailed argument either about the guidance given in relation to interim injunctions against persons unknown at [82] of *Canada Goose* (see [56] above), or in relation to how local authorities should approach persons unknown injunctions in unauthorised encampment cases at [99]-[109] in *Bromley* [see [49] above). It would, therefore, be inappropriate for me to revisit in detail what was said there. I would, however, make the following comments.

103. First, the court's approach to the grant of an interim injunction would obviously be different if it were sought in a case in which a final injunction could not, either as a matter of law or settled practice, be granted. In those circumstances, these passages must, in view of our decision in this case, be viewed with that qualification in mind.

104. Secondly, I doubt whether Coulson LJ was right to comment that: (i) there was an inescapable tension between the article 8 rights of the Gypsy and Traveller community and the common law of trespass, and (ii) the cases made plain that the Gypsy and Traveller community have an enshrined freedom not to stay in one place but to move from one place to another.

105. On the first point, it is not right to say that either "the gipsy and traveller community" or any other community has article 8 rights. Article 8 provides that "[e]veryone has the right to respect for his private and family life, his home and his correspondence". In unauthorised encampment cases, unlike in *Porter* (and unlike in *Manchester City Council v. Pinnock* [2010] UKSC 45, [2011] UKSC 6, [2011] 2 AC 104), newcomers cannot rely on an article 8 right to respect for their home, because they have no home on land they do not own. They can rely on a private and family life claim to pursue a nomadic lifestyle, because *Chapman* decided that the pursuit of a traditional nomadic lifestyle is an aspect of a person's private and family life. But the scheme of the HRA 1998 is individualised. It is unlawful under section 6 for a public authority to act incompatibly with a Convention right, which refers to the Convention right of a particular person. The mechanism for enforcing a Convention right is specified in section 7 as being legal proceedings by a person who is or would be a victim of any act made unlawful by section 6. That means, in this context, that it is when individual newcomers make themselves parties to an unauthorised encampment injunction, they have the opportunity to apply to the court to set aside the injunction praying in aid their private and family life right to pursue a nomadic lifestyle. Of course, the court must consider that putative right when it considers granting either an interim or a final injunction against persons unknown, but it is not the only consideration. Moreover, it can only be considered, at that stage, in an abstract way, without the factual context of a particular person's article 8 rights. The landowner, by contrast, has specific Convention rights under article 1 protocol 1 to the peaceful enjoyment of particular possessions. The only point at which a court can test whether an order interferes with a particular person's private and family life, the extent of that interference, and whether the order is proportionate, is when that person comes to court to resist the making of an order or to challenge the validity of an order that has already been made.

106. Secondly, it is not, I think, quite clear what Coulson LJ meant by saying that the Gypsy and Traveller community had an enshrined freedom to move from one place to another. Each member of those communities, and each member of any community, has such a freedom in our democratic society, but the communities themselves do not have Convention rights as I have explained. Individuals' qualified Convention rights must be respected, but the right to that respect will be balanced, in short, against the public interest, when the court considers their challenge to the validity of an unauthorised encampment injunction binding on persons unknown. The court will also take into account any other relevant legal considerations, such as the duties imposed by the Equality Act 2010.

107. Nothing I have said should, however, be regarded as throwing doubt upon Coulson LJ's suggestions that local authorities should engage in a process of dialogue and communication with travelling communities, undertake, where appropriate, welfare and equality impact assessments, and should respect their culture, traditions and practices. I would also want to associate myself with Coulson LJ's suggestion that

persons unknown injunctions against unauthorised encampments should be limited in time, perhaps to one year at a time before a review.

108. It will already be clear that the guidance given by the judge in this case at [248] (see [18] above) requires reconsideration. There are indeed safeguards that apply to injunctions sought against persons unknown in unauthorised encampment cases. Those safeguards are not, however, based on the artificial distinction that the judge drew between interim and final orders. The normal rules are applicable, as are the safeguards mentioned in *Bromley* (subject to the limitations already mentioned at [104]-[106] above), and those mentioned below at [117]. There is no rule that an interim injunction can only be granted for any particular period of time. It is good practice to provide for a periodic review, even when a final order is made. The two categories of persons unknown referred to by Lord Sumption at [13] in *Cameron* have no relevance to cases of this kind. He was not considering the position of newcomers. The judge was wrong to suggest that directions should be given for the claimant to apply for a default judgment. Such judgments cannot be obtained in Part 8 cases. A normal procedural approach should apply to the progress of the Part 8 claims, bearing in mind the importance of serving the proceedings on those affected and giving notice of them, so far as possible, to newcomers.

The secondary question as to the propriety of the procedure adopted by the judge to bring the proceedings in their current form before the court

109. In effect, the judge made a series of orders of the court's own motion requiring the parties to these proceedings to make submissions aimed at allowing the court to reach a decision as to whether the interim and final orders that had been granted in these cases could or should stand. Counsel for one group of local authorities, Ms Caroline Bolton, submitted that it was not open to the court to call in final orders made in the past for reconsideration in the way that the judge did.

110. In my judgment, the procedure adopted was highly unusual, because it was, in effect, calling in cases that had been finally decided on the basis that the law had changed. We heard considerable argument based on the court's power under CPR 3.1(7), which gives the court a power "to vary or revoke [an] order". This court has recently said that the circumstances which would justify varying or revoking a final order would be very rare given the importance of finality (see *Terry v. BCS Corporate Acceptances* [2018] EWCA Civ 2422 at [75]).

111. As it seems to me, however, we do not need to spend much time on the process which was adopted. First, the local authorities concerned did not object at the time to the court calling in their cases. Secondly, the majority of the injunctions either included provision for review at a specified future time or express or implied permission to apply. Thirdly, even without such provisions, the orders in question would, as I have already explained, be reviewable at the instance of newcomers, who had made themselves parties to the claims by knowingly breaching the injunctions against unauthorised encampment.

112. In these circumstances, the process that was adopted has ultimately had a beneficial outcome. It has resulted in greater clarity as to the applicable law and practice.

The statutory jurisdiction to make orders against person unknown under section 187B to restrain an actual or apprehended breach of planning control validates the orders made

113. The injunctions in these cases were mostly granted either on the basis of section 187B or on the basis of apprehended trespass and nuisance, or both.

114. Section 187B provides that: (1) Where a local planning authority consider it necessary or expedient for any actual or apprehended breach of planning control to be restrained by injunction, they may apply to the court for an injunction, whether or not they have exercised or are proposing to exercise any of their other powers under this Part. (2) On an application under subsection (1) the court may grant such an injunction as the court thinks appropriate for the purpose of restraining the breach. (3) Rules of court may provide for such an injunction to be issued against a person whose identity is unknown. (4) In this section "the court" means the High Court or the county court.

115. CPR 8APD.20 provides at [20.1]-[20.6] in part as follows: 20.1 This paragraph relates to applications under – (1) [section 187B]; 20.2 An injunction may be granted under those sections against a person whose identity is unknown to the applicant. … 20.4 In the claim form, the applicant must describe the defendant by reference to – (1) a photograph; (2) a thing belonging to or in the possession of the defendant; or (3) any other evidence. 20.5 The description of the defendant under paragraph 20.4 must be sufficiently clear to enable the defendant to be served with the proceedings. (The court has power under Part 6 to dispense with service or make an order permitting service by an alternative method or at an alternative place). 20.6 The application must be accompanied by a witness statement. The witness statement must state – (1) that the applicant was unable to ascertain the defendant's identity within the time reasonably available to him; (2) the steps taken by him to ascertain the defendant's identity; (3) the means by which the defendant has been described in the claim form; and (4) that the description is the best the applicant is able to provide.

116. In the light of what I have decided as to the approach to be followed in relation to injunctions sought under section 37 against persons unknown in relation to unauthorised encampment, the distinctions that the parties sought to draw between section 37 and section 187B applications are of far less significance to this case.

117. In my judgment, sections 37 and 187B impose the same procedural limitations on applications for injunctions of this kind. In either case, the applicant must describe any persons unknown in the claim form by reference to photographs, things belonging to them or any other evidence, and that description must be sufficiently clear to enable persons unknown to be served with the proceedings, whilst acknowledging that the court retains the power in appropriate cases to dispense with service or to permit service by an alternative method or at an alternative place. These safeguards and those referred to with approval earlier in this judgment are as much applicable to an injunction sought in an unauthorised encampment cases under section 187B as they are to one sought in such a case to restrain apprehended trespass or nuisance. Indeed, CPR 8APD.20 seems to me to have been drafted with the objective of providing, so far as possible, procedural coherence and consistency rather than separate procedures for different kinds of cases.

118. There is, therefore, no need for me to say any more about section 187B.

Can the court in any circumstances like those in the present case make final orders against all the world?

119. As I have said, Nicklin J decided at [190]-[241] that final injunctions against persons unknown, being a species of injunction against all the world, could never be granted in unauthorised encampment cases. For the reasons I have given, I take the view that he was wrong.

120. I have already explained the circumstances in which such injunctions can be granted at [102]-[108]. Beyond what I have said, however, I take the view that it is extremely undesirable for the court to lay down limitations on the scope of as broad and important a statutory provision as section 37. Injunctions against the world have been granted in the type of case epitomised by *Venables*. Persons unknown injunctions have been granted in cases of unauthorised encampment and may be appropriate in some protester cases as is demonstrated by the authorities I have already referred to. I would not want to lay down any further limitations. Such cases are certainly exceptional, but that does not mean that other categories will not in future be shown to be proportionate and justified. The urban exploring injunctions I have mentioned are an example of a novel situation in which such relief was shown to be required.

121. I conclude that the court cannot and should not limit in advance the types of injunction that may in future cases be held appropriate to make under section 37 against the world.

Conclusions

122. The parties agreed four issues for determination in terms that I have not directly addressed in this judgment. They did, however, raise substantively the four issues I have dealt with.

123. I have concluded, as I indicated at [7] above, that the judge was wrong to hold that the court cannot grant final injunctions against unauthorised encampment that prevent newcomers from occupying and trespassing on land. Whilst the procedure adopted by the judge was unorthodox and unusual in that he called in final orders for revision, no harm has been done in that the parties did not object at the time and it has been possible to undertake a comprehensive review of the law applicable in an important field. Most of the orders anyway provided for review or gave permission to apply. The procedural limitations applicable to injunctions against person unknown are as much applicable under section 37 as they are to those made under section 187B. The court cannot and should not limit in advance the types of injunction that may in future cases be held appropriate to make under section 37 against the world.

124. I would allow the appeal. I am grateful to all counsel, but particularly to Mr Tristan Jones, whose submissions as advocate to the court have been invaluable. Counsel will no doubt want to make further submissions as to the consequences of this judgment. Without pre-judging what they may say, it may be more appropriate for such matters to be dealt with in the High Court.

Lord Justice Lewison:

125. I agree.

Lady Justice Elisabeth Laing:

126. I also agree.

Hilary Term
[2019] UKSC 6
On appeal from: [2017] EWCA Civ 366

JUDGMENT

Cameron (Respondent) *v* Liverpool Victoria Insurance Co Ltd (Appellant)

before

Lord Reed, Deputy President
Lord Sumption
Lord Carnwath
Lord Hodge
Lady Black

JUDGMENT GIVEN ON

20 February 2019

Heard on 28 November 2018

Appellant
Stephen Worthington QC
Patrick Vincent

(Instructed by Keoghs LLP)

Respondent
Benjamin Williams QC
Ben Smiley
Anneli Howard
(Instructed by Bond Turner Solicitors)

Intervener
(Motor Insurers' Bureau)
Tim Horlock QC
Paul Higgins
(Instructed by Weightmans LLP (Liverpool))

LORD SUMPTION: (with whom Lord Reed, Lord Carnwath, Lord Hodge and Lady Black agree)

1. The question at issue on this appeal is: in what circumstances is it permissible to sue an unnamed defendant? It arises in a rather special context in which the problem is not uncommon. On 26 May 2013 Ms Bianca Cameron was injured when her car collided with a Nissan Micra. It is common ground that the incident was due to the negligence of the driver of the Micra. The registration number of the Micra was recorded, but the driver made off without stopping or reporting the accident to the police and has not been heard of since. The registered keeper of the Micra was Mr Naveed Hussain, who was not the driver but has declined to identify the driver and has been convicted of failing to do so. The car was insured under a policy issued by Liverpool Victoria Insurance Co Ltd to a Mr Nissar Bahadur, whom the company believes to be a fictitious person. Neither Mr Hussain nor the driver was insured under the policy to drive the car.

The statutory framework

2. The United Kingdom was the first country in the world to introduce compulsory motor insurance. It originated with the Road Traffic Act 1930, which was part of a package of measures to protect accident victims, including the Third Parties (Rights Against Insurers) Act 1930. The latter Act entitled a person to claim directly against the insurer where an insured tortfeasor was insolvent. But it was shortly superseded as regards motor accidents by the Road Traffic Act 1934, which required motor insurers to satisfy any judgment against their insured and restricted the right of insurers to rely as against third parties on certain categories of policy exception or on the right of avoidance for non-disclosure or misrepresentation. The statutory regime has become more elaborate and more comprehensive since 1934, but the basic framework has not changed.

3. The current legislation is Part VI of the Road Traffic Act 1988. As originally enacted, it sought to give effect to the first three EEC Motor Insurance Directives, 72/166/EEC, 84/5/EEC and 90/232/EEC. It was subsequently amended by statutory instruments under the European Communities Act 1972 to reflect the terms of the Fourth, Fifth and Sixth Motor Insurance Directives 2000/26/EC, 2005/14/EC and 2009/103/EC. The object of the current legislation is to enable the victims of negligently caused road accidents to recover, if not from the tortfeasor then from his insurer or, failing that, from a fund operated by the motor insurance industry. Under section 143 of the Act of 1988 it is an offence to use or to cause or permit any other person to use a motor vehicle on a road or other public place unless there is in force

a policy of insurance against third party risks "in relation to the use of the vehicle" by the particular driver (I disregard the statutory provision for the giving of security in lieu of insurance). Section 145 requires the policy to cover specified risks, including bodily injury and damage to property. Section 151(5) requires the insurer, subject to certain conditions, to satisfy any judgment falling within subsection (2). This means (omitting words irrelevant to this appeal)

> "judgments relating to a liability with respect to any matter where liability with respect to that matter is required to be covered by a policy of insurance under section 145 of this Act and either -
>
> > (a) it is a liability covered by the terms of the policy or security …, and the judgment is obtained against any person who is insured by the policy … or
> >
> > (b) it is a liability … which would be so covered if the policy insured all persons …, and the judgment is obtained against any person other than one who is insured by the policy…"

The effect of the latter subsection is that an insurer who has issued a policy in respect of the use of a vehicle is liable on a judgment, even where it was obtained against a person such as the driver of the Micra in this case who was not insured to drive it. The statutory liability of the insurer to satisfy judgments is subject to an exception under section 152 where it is entitled to avoid the policy for non-disclosure or misrepresentation and has obtained a declaration to that effect in proceedings begun within a prescribed time period. But the operation of section 152 is currently under review in the light of recent decisions of the Court of Justice of the European Union.

4. Under section 145(2), the policy must have been issued by an "authorised insurer". This means a member of the Motor Insurers' Bureau: see sections 95(2) and 145(5). The Bureau has an important place in the statutory scheme for protecting the victims of road accidents in the United Kingdom. Following a recommendation of the Cassell Committee, which reported in 1937 (Cmnd 5528/1937), the Bureau was created in 1946 to manage a fund for compensating victims of uninsured motorists. It is a private company owned and funded by all insurers authorised to write motor business in the United Kingdom. It has entered into agreements with the Secretary of State to compensate third party victims of road accidents who fall through the compulsory insurance net even under the enlarged coverage provided by section 151(2)(b). This means victims suffering personal injury or property damage caused by (i) vehicles in respect of which no policy of insurance has been

issued; and (ii) drivers who cannot be traced. These categories are covered by two agreements with the Secretary of State, the Uninsured Drivers Agreement and the Untraced Drivers Agreement respectively. The relevant agreement covering Ms Cameron's case was the 2003 Untraced Drivers Agreement. It applied to persons suffering death, bodily injury or property damage arising out of the use of a motor vehicle in cases where "it is not possible … to identify the person who is or appears to be liable": see clause 4(d). The measure of indemnity under this agreement is not always total. Under clause 10, there is a limit to the Bureau's liability for legal costs; and under clause 8 the indemnity for property damage is subject to a modest excess (at the relevant time £300) and a maximum limit corresponding to the minimum level of compulsory insurance (at the relevant time £1,000,000). The Bureau assumes liability under the Uninsured Drivers Agreement in cases where the insurer has a defence under the provisions governing avoided policies in section 152. But under article 75 of the Bureau's articles of association, each insurer binds itself to meet the Bureau's liability to satisfy a judgment in favour of the third party in such cases. In 2017, there were 17,700 concluded applications to the Motor Insurers' Bureau by victims of untraced drivers.

5. It is a fundamental feature of the statutory scheme of compulsory insurance in the United Kingdom that it confers on the victim of a road accident no direct right against an insurer in respect of the underlying liability of the driver. The only direct right against the insurer is the right to require it to satisfy a judgment against the driver, once the latter's liability has been established in legal proceedings. This reflects a number of features of motor insurance in the United Kingdom which originated well before the relevant European legislation bound the United Kingdom, and which differentiate it from many continental systems. In the first place, policies of motor insurance in the United Kingdom normally cover drivers rather than vehicles. Section 151(2)(b) of the Act (quoted above) produces a close but not complete approximation to the continental position. Secondly, the rule of English insurance law is that an insurer is liable to no one but its insured, even when the risks insured include liabilities owed by the insured to third parties. Subject to limited statutory exceptions, the third party has no direct right against the insurer. Thirdly, even the insured cannot claim against his liability insurer unless and until his liability has been ascertained in legal proceedings or by agreement or admission. The Untraced Drivers Agreement assumes that judgment cannot be obtained against the driver if he cannot be identified, and therefore that no liability will attach to the insurer in that case. This is why it is accepted as a liability of the Motor Insurance Bureau. On the present appeal, Ms Cameron seeks to challenge that assumption. Such a challenge is usually unnecessary. It is cheaper and quicker to claim against the Bureau. But for reasons which remain unclear, in spite of her counsel's attempt to explain them, Ms Cameron has elected not to do that.

The proceedings

6. Ms Cameron initially sued Mr Hussain for damages. The proceedings were then amended to add a claim against Liverpool Victoria Insurance for a declaration that it would be liable to meet any judgment obtained against Mr Hussain. The insurer served a defence which denied liability on the ground that there was no right to obtain a judgment against Mr Hussain, because there was no evidence that he was the driver at the relevant time. Ms Cameron's response was to apply in the Liverpool Civil and Family Court to amend her claim form and particulars of claim so as to substitute for Mr Hussain "the person unknown driving vehicle registration number Y598 SPS who collided with vehicle registration number KG03 ZJZ on 26 May 2013." District Judge Wright dismissed that application and entered summary judgment for the insurer. Judge Parker dismissed Ms Cameron's appeal. But a further appeal to the Court of Appeal was allowed by a majority (Gloster and Lloyd Jones LJJ, Sir Ross Cranston dissenting): [2018] 1 WLR 657.

7. Gloster LJ delivered the leading judgment. She held that the policy of the legislation was to ensure that the third-party victims of negligent drivers received compensation from insurers whenever a policy had been issued in respect of the vehicle, irrespective of who the driver was. In her judgment, the court had a discretion to permit an unknown person to be sued whenever justice required it. Justice required it when the driver could not be identified, because otherwise it would not be possible to obtain a judgment which the issuer of a policy in respect of the car would be bound to satisfy. The majority considered it to be irrelevant that Ms Cameron had an alternative right against the Motor Insurance Bureau. She had a right against the driver and, upon getting judgment against him, against the insurer. In principle she was entitled to choose between remedies. Sir Ross Cranston dissented. He agreed that there was a discretion, but he did not consider that justice required an action to be allowed against the unknown driver when compensation was available from the Motor Insurance Bureau. Accordingly, the Court of Appeal (i) gave Ms Cameron permission to amend the claim form so as to sue the driver under the above description; (ii) directed under CPR 6.15 that service on the insurer should constitute service on the driver and that further service on the driver should be dispensed with; and (iii) gave judgment against the driver, as described, recording in their order that the insurer accepted that it was liable to satisfy that judgment.

Suing unnamed persons

8. Before the Common Law Procedure Act 1852 abolished the practice, it was common to constitute actions for trespass with fictional parties, generally John (or Jane) Doe or Roe, in order to avoid the restrictions imposed on possession proceedings by the forms of action. "Placeholders" such as these were also occasionally named as parties where the identity of the real party was unknown, a

practice which subsists in the United States and Canada. After the disappearance of this practice in England, the extent of any right to sue unnamed persons was governed by rules of court. The basic rule before 1999 was laid down by the Court of Appeal in 1926 in *Friern Barnet Urban District Council v Adams* [1927] 2 Ch 25. The Friern Barnet District Council had a statutory right to recover the cost of making up Alexandra Road from the proprietors of the adjoining lands, but in the days before registered title reached Friern Barnet it had no way of discovering who they were. It therefore began proceedings against a named individual who was not concerned and "the owners of certain lands adjoining Alexandra Road, … whose names and addresses are not known to the plaintiffs." The judge struck out these words and declined to order substituted service by affixing copies of the writ to posts on the relevant land. The Court of Appeal dismissed the appeal. They held that there was no power to issue a writ in this form because the prescribed form of writ required it to be directed to "C D of, etc in the County of …" (p 30).

9. When the Civil Procedure Rules were introduced in 1999, the function of prescribing the manner in which proceedings should be commenced was taken over by CPR Part 7. The general rule remains that proceedings may not be brought against unnamed parties. This is implicit in the limited exceptions contemplated by the Rules. CPR 8.2A provides that a practice direction "may set out circumstances in which a claim form may be issued under this Part without naming a defendant." It is envisaged that permission will be required, but that the notice of application for permission "need not be served on any other person". However, no such practice direction has been made. The only express provision made for proceedings against an unnamed defendant, other than representative actions, is CPR 55.3(4), which permits a claim for possession of property to be brought against trespassers whose names are unknown. This is the successor to RSC Order 113, which was introduced in order to provide a means of obtaining injunctions against unidentifiable squatters, following the decision of Stamp J in *In re Wykeham Terrace, Brighton, Sussex, Ex p Territorial Auxiliary and Volunteer Reserve Association for the South East* [1971] Ch 204, that they could not be sued if they could not be named. In addition, there are specific statutory exceptions to broadly the same effect, such as the exception for proceedings for an injunction to restrain "any actual or apprehended breach of planning controls" under section 187B of the Town and Country Planning Act 1990. Section 187B(3) provides that "rules of court may provide for such an injunction to be issued against a person whose identity is unknown." The Rules are supplemented by a practice direction which deals with the administrative steps involved. CPR 7A PD4.1 provides that a claim form must be headed with the title of the proceedings, which "should state", among other things, the "full name of each party".

10. English judges have allowed some exceptions. They have permitted representative actions where the representative can be named but some or all of the class cannot. They have allowed actions and orders against unnamed wrongdoers where some of the wrongdoers were known so they could be sued both personally

and as representing their unidentified associates. This technique has been used, for example, in actions against copyright pirates: see *EMI Records Ltd v Kudhail* [1985] FSR 35. But the possibility of a much wider jurisdiction was first opened up by the decision of Sir Andrew Morritt V-C in *Bloomsbury Publishing Group Plc v News Group Newspapers Ltd* [2003] 1 WLR 1633. The claimant in that case was the publisher of the *Harry Potter* novels. Copies of the latest book in the series had been stolen from the printers before publication and offered to the press by unnamed persons. An injunction was granted in proceedings against "the person or persons who have offered the publishers of "The Sun", the "Daily Mail" and the "Daily Mirror" newspapers a copy of the book *Harry Potter and the Order of the Phoenix* by J K Rowling or any part thereof and the person or persons who has or have physical possession of a copy of the said book or any part thereof without the consent of the claimants." The real object of the injunction was to deter newspapers minded to publish parts of the text, who would expose themselves to proceedings for contempt of court by dealing with the thieves with notice of the order. The Vice-Chancellor held that the decision in *Friern Barnet Urban District Council v Adams* had no application under the Civil Procedure Rules; that the decision of Stamp J in *In re Wykeham Terrace* was wrong; and that the words "should state" in CPR 7A PD4.1 were not mandatory, but imported a discretion to depart from the practice in appropriate cases. In his view, a person could be sued by a description, provided that the description was "sufficiently certain as to identify both those who are included and those who are not" (para 21).

11. Since this decision, the jurisdiction has regularly been invoked. Judging by the reported cases, there has recently been a significant increase in its use. The main contexts for its exercise have been abuse of the internet, that powerful tool for anonymous wrongdoing; and trespasses and other torts committed by protesters, demonstrators and paparazzi. Cases in the former context include *Brett Wilson LLP v Persons Unknown* [2016] 4 WLR 69 and *Smith v Unknown Defendant Pseudonym "Likeicare"* [2016] EWHC 1775 (QB) (defamation); *Middleton v Person Unknown* [2016] EWHC 2354 (QB) (theft of information by hackers); *PML v Persons Unknown* [2018] EWHC 703 (QB) (hacking and blackmail); *CMOC v Persons Unknown* [2017] EWHC 3599 (Comm) (hacking and theft of funds). Cases decided in the second context include *Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator Site* [2004] Env LR 9; *Ineos Upstream Ltd v Persons Unknown* [2017] EWHC 2945 (Ch); *UK Oil and Gas Investments Plc v Persons Unknown* [2018] EWHC 2253 (Ch). In some of these cases, proceedings against persons unknown were allowed in support of an application for a quia timet injunction, where the defendants could be identified only as those persons who might in future commit the relevant acts. The majority of the Court of Appeal followed this body of case law in deciding that an action was permissible against the unknown driver of the Micra who injured Ms Cameron. This is the first occasion on which the basis and extent of the jurisdiction has been considered by the Supreme Court or the House of Lords.

12. The Civil Procedure Rules neither expressly authorise nor expressly prohibit exceptions to the general rule that actions against unnamed parties are permissible only against trespassers. The prescribed forms include a space in which to designate the claimant and the defendant, a format which is equally consistent with their being designated by name or by description. The only requirement for a name is contained in a practice direction. But unlike the Civil Procedure Rules, which are made under statutory powers, a practice direction is no more than guidance on matters of practice issued under the authority of the heads of division. As to those matters, it is binding on judges sitting in the jurisdiction with which it is concerned: *Bovale Ltd v Secretary of State for Communities and Local Government* [2009] 1 WLR 2274. But it has no statutory force, and cannot alter the general law. Whether or not the requirement of CPR 7A PD4.1 that the claim form "should state" the defendants' full name admits of a discretion on the point, is not therefore the critical question. The critical question is what, as a matter of law, is the basis of the court's jurisdiction over parties, and in what (if any) circumstances can jurisdiction be exercised on that basis against persons who cannot be named.

13. In approaching this question, it is necessary to distinguish between two kinds of case in which the defendant cannot be named, to which different considerations apply. The first category comprises anonymous defendants who are identifiable but whose names are unknown. Squatters occupying a property are, for example, identifiable by their location, although they cannot be named. The second category comprises defendants, such as most hit and run drivers, who are not only anonymous but cannot even be identified. The distinction is that in the first category the defendant is described in a way that makes it possible in principle to locate or communicate with him and to know without further inquiry whether he is the same as the person described in the claim form, whereas in the second category it is not.

14. This appeal is primarily concerned with the issue or amendment of the claim form. It is not directly concerned with its service, which occurs under the rules up to four months after issue, subject to extension by order of the court. There is no doubt that a claim form may be issued against a named defendant, although it is not yet known where or how or indeed whether he can in practice be served. But the legitimacy of issuing or amending a claim form so as to sue an unnamed defendant can properly be tested by asking whether it is conceptually (not just practically) possible to serve it. The court generally acts in personam. Although an action is completely constituted on the issue of the claim form, for example for the purpose of stopping the running of a limitation period, the general rule is that "service of originating process is the act by which the defendant is subjected to the court's jurisdiction": *Barton v Wright Hassall LLP* [2018] 1 WLR 1119, para 8. The court may grant interim relief before the proceedings have been served or even issued, but that is an emergency jurisdiction which is both provisional and strictly conditional. In *Dresser UK Ltd v Falcongate Freight Management Ltd* [1992] QB 502, the Court of Appeal held that, for the purposes of the Brussels Convention (the relevant

provisions of the Brussels Regulation are different), an English court was "seised" of an action when the writ was served, not when it was issued. This was because of the legal status of an unserved writ in English law. Bingham LJ described that status, at p 523, as follows:

> "it is in my judgment artificial, far-fetched and wrong to hold that the English court is seised of proceedings, or that proceedings are decisively, conclusively, finally or definitively pending before it, upon mere issue of proceedings, when at that stage (1) the court's involvement has been confined to a ministerial act by a relatively junior administrative officer; (2) the plaintiff has an unfettered choice whether to pursue the action and serve the proceedings or not, being in breach of no rule or obligation if he chooses to let the writ expire unserved; (3) the plaintiff's claim may be framed in terms of the utmost generality; (4) the defendant is usually unaware of the issue of proceedings and, if unaware, is unable to call on the plaintiff to serve the writ or discontinue the action and unable to rely on the commencement of the action as a lis alibi pendens if proceedings are begun elsewhere; (5) the defendant is not obliged to respond to the plaintiff's claim in any way, and not entitled to do so save by calling on the plaintiff to serve or discontinue; (6) the court cannot exercise any powers which, on appropriate facts, it could not have exercised before issue; (7) the defendant has not become subject to the jurisdiction of the court."

The case was decided under the Rules of the Supreme Court. But Bingham LJ's statement would be equally true (mechanics and terminology apart) of an unserved claim form under the Civil Procedure Rules.

15. An identifiable but anonymous defendant can be served with the claim form or other originating process, if necessary by alternative service under CPR 6.15. This is because it is possible to locate or communicate with the defendant and to identify him as the person described in the claim form. Thus, in proceedings against anonymous trespassers under CPR 55.3(4), service must be effected in accordance with CPR 55.6 by attaching copies of the documents to the main door or placing them in some other prominent place on the land where the trespassers are to be found, and posting them if practical through the letter box. In *Brett Wilson LLP v Persons Unknown*, *supra*, alternative service was effected by email to a website which had published defamatory matter, Warby J observing (para 11) that the relevant procedural safeguards must of course be applied. In *Smith v Unknown Defendant Pseudonym "Likeicare"*, *supra*, Green J made the same observation (para 11) in another case of internet defamation where service was effected in the same

way. Where an interim injunction is granted and can be specifically enforced against some property or by notice to third parties who would necessarily be involved in any contempt, the process of enforcing it will sometimes be enough to bring the proceedings to the defendant's attention. In *Bloomsbury Publishing Group*, for example, the unnamed defendants would have had to identify themselves as the persons in physical possession of copies of the book if they had sought to do the prohibited act, namely disclose it to people (such as newspapers) who had been notified of the injunction. The Court of Appeal has held that where proceedings were brought against unnamed persons and interim relief was granted to restrain specified acts, a person became both a defendant and a person to whom the injunction was addressed by doing one of those acts: *South Cambridgeshire District Council v Gammell* [2006] 1 WLR 658, para 32. In the case of anonymous but identifiable defendants, these procedures for service are now well established, and there is no reason to doubt their juridical basis.

16. One does not, however, identify an unknown person simply by referring to something that he has done in the past. "The person unknown driving vehicle registration number Y598 SPS who collided with vehicle registration number KG03 ZJZ on 26 May 2013", does not identify anyone. It does not enable one to know whether any particular person is the one referred to. Nor is there any specific interim relief such as an injunction which can be enforced in a way that will bring the proceedings to his attention. The impossibility of service in such a case is 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. The problem is conceptual, and not just practical. It is true that the publicity attending the proceedings may sometimes make it possible to speculate that the wrongdoer knows about them. But service is an act of the court, or of the claimant acting under rules of court. It cannot be enough that the wrongdoer himself knows who he is.

17. This is, in my view, a more serious problem than the courts, in their more recent decisions, have recognised. Justice in legal proceedings must be available to both sides. 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. The principle is perhaps self-evident. The clearest statements are to be found in the case law about the enforcement of foreign judgments at common law. The English courts will not enforce or recognise a foreign judgment, even if it has been given by a court of competent jurisdiction, if the judgment debtor had no sufficient notice of the proceedings. The reason is that such a judgment will have been obtained in breach of the rules of natural justice *according to English notions*. In his celebrated judgment in *Jacobson v Frachon* (1927) 138 LT 386, 392, Atkin LJ, after referring to the "principles of natural justice" put the point in this way:

> "Those principles seem to me to involve this, first of all that the court being a court of competent jurisdiction, has given notice to the litigant that they are about to proceed to determine the rights between him and the other litigant; the other is that having given him that notice, it does afford him an opportunity of substantially presenting his case before the court."

Lord Atkin's principle is reflected in the statutory provisions for the recognition of foreign judgments in section 9(2)(c) of the Administration of Justice Act 1920 and section 8(1) and (2) of the Foreign Judgments (Reciprocal Enforcement) Act 1933, as well as in article 45(1)(b) of the Brussels I Regulation (Recast), Regulation (EU) No 1215/2012.

18. It would be ironic if the English courts were to disregard in their own proceedings a principle which they regard as fundamental to natural justice as applied to the proceedings of others. In fact, the principle is equally central to domestic litigation procedure. Service of originating process was required by the practice of the common law courts long before statutory rules of procedure were introduced following the Judicature Acts of 1873 and 1875. The first edition of the Rules of the Supreme Court, which was promulgated in 1883, required personal service unless an order was made for what was then called substituted (now alternative) service. Subsequent editions of the rules allowed for certain other modes of service without a special order of the court, notably in the case of corporations, but every mode of service had the common object of bringing the proceedings to the attention of the defendant. In *Porter v Freudenberg* [1915] 1 KB 857 a specially constituted Court of Appeal, comprising the Lord Chief Justice, the Master of the Rolls and all five Lords Justices of the time, held that substituted service served the same function as personal service and therefore had to be such as could be expected to bring the proceedings to the defendant's attention. The defendants in that case were enemy aliens resident in Germany during the First World War. Lord Reading CJ, delivering the judgment of the court, said at p 883:

> "Once the conclusion is reached that the alien enemy can be sued, it follows that he can appear and be heard in his defence and may take all such steps as may be deemed necessary for the proper presentment of his defence. If he is brought at the suit of a party before a court of justice he must have the right of submitting his answer to the court. To deny him that right would be to deny him justice and would be quite contrary to the basic principles guiding the King's courts in the administration of justice."

It followed, as he went on to observe at pp 887-888, that the court must

> "take into account the position of the defendant the alien enemy, who is, according to the fundamental principles of English law, entitled to effective notice of the proceedings against him. … In order that substituted service may be permitted, it must be clearly shown that the plaintiff is in fact unable to effect personal service and that the writ is likely to reach the defendant or to come to his knowledge if the method of substituted service which is asked for by the plaintiff is adopted."

The principle stated in *Porter v Freudenberg* was incorporated in the Rules of the Supreme Court in the revision of 1962 as RSC Order 67, rule 4(3). This provided:

> "Substituted service of a document, in relation to which an order is made under this rule, is effected by taking such steps as the court may direct to bring the document to the notice of the person to be served."

This provision subsequently became RSC Order 65, rule 4(3), and continued to appear in subsequent iterations of the Rules until they were superseded by the Civil Procedure Rules in 1999.

19. The treatment of the principle in the more recent authorities is, unfortunately, neither consistent nor satisfactory. The history may be summarised as follows:

(1) *Murfin v Ashbridge* [1941] 1 All ER 231 arose out of a road accident caused by the alleged negligence of a driver who was identified but could not be found. The case is authority for the proposition that while an insurer may be authorised by the policy to defend an action on behalf of his assured, he was not a party in that capacity and could not take any step in his own name. In the course of considering that point, Goddard LJ suggested at p 235 that "possibly" service on the driver might have been effected by substituted service on the insurers. *Porter v Freudenberg* was cited, but the point does not appear to have been argued.

(2) In *Gurtner v Circuit* [1968] 2 QB 587, the driver alleged to have been responsible for a road accident had emigrated and could not be traced. He was thought to have been insured, but it was impossible to identify his insurer. The plaintiff was held not to be entitled to an order for substituted service on another insurer who had no relationship with the driver. Lord Denning MR thought (pp 596-597) that the affidavit in support of the

application was defective because it failed to state that the writ, if served on a non-insurer, was likely to reach the defendant. But he suggested that substituted service might have been effected on the real insurer if it had been identified. Diplock LJ thought (p 605) that it might have been effected on the Motor Insurers' Bureau. *Porter v Freudenberg* was not cited, and the point does not appear to have been argued.

(3) In *Clarke v Vedel* [1979] RTR 26, the question was fully argued by reference to all the relevant authorities in the context of the Road Traffic Acts. A person had stolen a motor cycle, collided with the plaintiffs, given a fictitious name and address and then disappeared. He was sued under the fictitious name he had given, and an application was made for substituted service on the Motor Insurance Bureau. The affidavit in support understandably failed to state that that mode of service could be expected to reach the driver. The Court of Appeal proceeded on the assumption (p 32) that there was "no more reason to suppose that [the writ] will come to his notice or knowledge by being served on the Motor Insurance Bureau than by being served on any one else in the wide world." But it declined to treat the dicta in the above cases as stating the law. Stephenson LJ considered (p 36), on the strength of the dicta in *Murfin v Ashbridge* and *Gurtner v Circuit*, that

> "there may be cases where a defendant, who cannot be traced and, therefore, is unlikely to be reached by any form of substituted service, can nevertheless be ordered to be served at the address of insurers or the Bureau in a road accident case. The existence of insurers and of the Bureau and of these various agreements does create a special position which enables a plaintiff to avoid the strictness of the general rule and obtain such an order for substituted service in some cases."

But he held (p 37) that

> "This is a case in which, on the face of it, substituted service under the rule is not permissible and the affidavit supporting the application for it is insufficient. This fictitious, or, at any rate, partly fictitious defendant cannot be served, so Mr Crowther is right in saying that he cannot be sued … I do not think that Lord Denning MR or Diplock LJ or Salmon LJ or Goddard LJ had anything like the facts of this case in mind; and whatever the cases in which the exception to the general rule should be applied, in my judgment this is not one of them."

In his concurring judgment, Roskill LJ (pp 38-39) approved the statement in the then current edition of the *Supreme Court Practice* that "[t]he steps which the court may direct in making an order for substituted service must be taken to bring the document to the notice of the person to be served," citing *Porter v Freudenberg* in support of it.

(4) 20 years later, another division of the Court of Appeal reached the opposite conclusion in *Abbey National Plc v Frost (Solicitors' Indemnity Fund Ltd intervening)* [1999] 1 WLR 1080. The issue was the same, except that the defendant was a solicitor insured by the Solicitors Indemnity Fund pursuant to a scheme managed by the Law Society under the compulsory insurance provisions of the Solicitors Act 1974. The claimant sued his solicitor, who had absconded and could not be found. The Court of Appeal made an order for substituted service on the Fund. Nourse LJ (with whom Henry LJ and Robert Walker LJ agreed) distinguished *Porter v Freudenberg* on the ground that it was based on the practice of the masters of the Supreme Court recorded in the *White Book* at the time; and *Clarke v Vedel* on the ground that the policy of the statutory solicitors' indemnity rules required a right of substituted service on an absconding solicitor. RSC Order 65, rule 4(3) was held to be purely directory and not to limit the discretion of the court as to whether or in what circumstances to order substituted service. Nourse LJ held that RSC Order 65 did not require that the order should be likely to result in the proceedings coming to the defendants' attention.

20. The current position is set out in Part 6 of the Civil Procedure Rules. CPR 6.3 provides for service by the court unless the claimant elects to effect service himself. It considerably broadens the permissible modes of service along lines recommended by Lord Woolf's reports on civil justice. But the object of all the permitted modes of service, as his final report made clear, was the same, namely to enable the court to be "satisfied that the method used either had put the recipient in a position to ascertain its contents or was reasonably likely to enable him to do so within any relevant time period": see *Access to Justice, Final Report* (1996), Ch 12, para 25. CPR 6.15, which makes provision for alternative service, provides, so far as relevant:

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

> of the defendant by an alternative method or at an alternative place is good service."

CPR 6.15 does not include the provision formerly at RSC Order 65, rule 4(3). But it treats alternative service as a mode of "service", which is defined in the indicative glossary appended to the Civil Procedure Rules as "steps required by rules of court to bring documents used in court proceedings to a person's attention." Moreover, sub-paragraph (2) of the rule, which is in effect a form of retrospective alternative service, envisages in terms that the mode of service adopted will have had that effect. Applying CPR 6.15 in *Abela v Baadarani* [2013] 1 WLR 2043 Lord Clarke of Stone-cum-Ebony (with whom the rest of this court agreed) held (para 37) that "the whole purpose of service is to inform the defendant of the contents of the claim form and the nature of the claimant's case." The Court of Appeal appears to have had no regard to these principles in ordering alternative service of the insurer in the present case.

21. In my opinion, subject to any statutory provision to the contrary, it is an essential requirement for any form of alternative service that the mode of service should be such as can reasonably be expected to bring the proceedings to the attention of the defendant. *Porter v Freudenberg* was not based on the niceties of practice in the masters' corridor. It gave effect to a basic principle of natural justice which had been the foundation of English litigation procedure for centuries, and still is. So far as the Court of Appeal intended to state the law generally when it observed in *Abbey National Plc v Frost* that service need not be such as to bring the proceedings to the defendant's attention, I consider that they were wrong. An alternative view of that case is that that observation was intended to apply only to claims under schemes such as the solicitors' compulsory insurance scheme, where it was possible to discern a statutory policy that the public should be protected against defaulting solicitors. If so, the reasoning would apply equally to the compulsory insurance of motorists under the Road Traffic Acts, as indeed the Court of Appeal held in the present case. That would involve a narrower exception to the principle of natural justice to which I have referred, and I do not rule out the possibility that such an exception might be required by other statutory schemes. But I do not think that it can be justified in the case of the scheme presently before us.

22. In the first place, the Road Traffic Act scheme is expressly based on the principle that as a general rule there is no direct liability on the insurer, except for its liability to meet a judgment against the motorist once it has been obtained. To that extent, Parliament's intention that the victims of negligent motorists should be compensated *by the insurer* is qualified. No doubt Parliament assumed, when qualifying it in this way, that other arrangements would be made which would fill the compensation gap, as indeed they have been. But those arrangements involve the provision of compensation not by the insurer but by the Motor Insurers' Bureau. The availability of compensation from the Bureau makes it unnecessary to suppose

that some way must be found of making the insurer liable for the underlying wrong when his liability is limited by statute to satisfying judgments.

23. Secondly, ordinary service on the insurer would not constitute service on the driver, unless the insurer had contractual authority to accept service on the driver's behalf or to appoint solicitors to do so. Such provisions are common in liability policies. I am prepared to assume that the policy in this case conferred such authority on the insurer, although we have not been shown it. But it could only have conferred authority on behalf of the policy-holder (if he existed), and it is agreed that the driver of the Micra was not the policy holder. Given its contingent liability under section 151 of the Road Traffic Act 1988, the insurer no doubt has a sufficient interest to have itself joined to the proceedings in its own right, if it wishes to be. That would authorise the insurer to make submissions in its own interest, including submissions to the effect that the driver was not liable. But it would not authorise it to conduct the defence on the driver's behalf. The driver, if sued in these proceedings, is entitled to be heard in his own right.

24. Thirdly, it is plain that alternative service on the insurer could not be expected to reach the driver of the Micra. It would be tantamount to no service at all, and should not therefore have been ordered unless the circumstances were such that it would be appropriate to dispense with service altogether.

25. There is a power under CPR 6.16 "to dispense with service of a claim form in exceptional circumstances." It has been exercised on a number of occasions and considered on many more. In general, these have been cases in which the claimant has sought to invoke CPR 6.16 in order to escape the consequences of some procedural mishap in the course of attempting to serve the claim form by one of the specified methods, or to confer priority on the English court over another forum for the purpose of the Brussels Regulation, or to affect the operation of a relevant limitation period. In all of them, the defendant or his agents was in fact aware of the proceedings, generally because of a previous attempt by the claimant to serve them in a manner not authorised by the Rules. As Mummery LJ observed, delivering the judgment of the Court of Appeal in *Anderton v Clwyd County Council (No 2)* [2002] 1 WLR 3174, para 58, service was dispensed with because there was "no point in requiring him to go through the motions of a second attempt to complete in law what he has already achieved in fact." In addition, I would accept that it may be appropriate to dispense with service, even where no attempt has been made to effect it in whatever manner, if the defendant has deliberately evaded service and cannot be reached by way of alternative service under CPR 6.15. This would include cases where the defendant is unidentifiable but has concealed his identity in order to evade service. However, a person cannot be said to evade service unless, at a minimum, he actually knows that proceedings have been or are likely to be brought against him. A court would have to be satisfied of that before it could dispense with service on that basis. An inference to that effect may be easier to draw in the case of hit and

run drivers, because by statute drivers involved in road accidents causing personal injury or damage to another vehicle must either "stop and, if required to do so by any person having reasonable grounds for so requiring, give his name and address and also the name and address of the owner and the identification marks of the vehicle", or else report the incident later. But the mere fact of breach of this duty will not necessarily be enough, for the driver may be unaware of his duty or of the personal injury or damage or of his potential liability. No submission was made to us that we should treat this as a case of evasion of service, and there are no findings which would enable us to do so. I would not wish arbitrarily to limit the discretion which CPR 6.16 confers on the court, but I find it hard to envisage any circumstances in which it could be right to dispense with service of the claim form in circumstances where there was no reason to believe that the defendant was aware that proceedings had been or were likely to be brought. That would expose him to a default judgment without having had the opportunity to be heard or otherwise to defend his interests. It is no answer to this difficulty to say that the defendant has no reason to care because the insurer is bound to satisfy a judgment against him. If, like the driver of the Micra, the motorist was not insured under the policy, he will be liable to indemnify the insurer under section 151(8) of the Road Traffic Act. It must be inherently improbable that he will ever be found or, if found, will be worth pursuing. But the court cannot deny him an opportunity to be heard simply because it thinks it inherently improbable that he would take advantage of it.

26. I conclude that a person, such as the driver of the Micra in the present case, who is not just anonymous but cannot be identified with any particular person, cannot be sued under a pseudonym or description, unless the circumstances are such that the service of the claim form can be effected or properly dispensed with.

The European law issue

27. Mr Williams QC, who appeared for Ms Cameron, submitted that this result was inconsistent with the Sixth Motor Insurance Directive 2009/103/EC, and that the Road Traffic Act 1988 should be read down so as to conform with it. The submission was pressed with much elaboration, but it really boils down to two points. First, Mr Williams submits that the Directive requires a direct right against the insurer on the driver's underlying liability, and not simply a requirement to have the insurer satisfy a judgment against the driver. Secondly, he submits that recourse to the Motor Insurers' Bureau is not treated by the Directive as an adequate substitute. Neither point appears to have been raised before the Court of Appeal, for there is no trace of them in the judgments. Before us, they emerged as Mr Williams' main arguments. I propose, however, to deal with them quite shortly, because I think it clear that no point on the Directive arises.

28. Article 3 of the Directive requires member states to ensure that civil liability in respect of the use of vehicles is covered by insurance, and article 9 lays down minimum amounts to be insured. Recital 30 states:

> "The right to invoke the insurance contract and to claim against the insurance undertaking directly is of great importance for the protection of victims of motor vehicle accidents … In order to facilitate an efficient and speedy settlement of claims and to avoid as far as possible costly legal proceedings, a right of direct action against the insurance undertaking covering the person responsible against civil liability should be extended to victims of any motor vehicle accident."

Effect is given to this objective by article 18, which provides:

> "Article 18
>
> **Direct Right of Action**
>
> Member states shall ensure that any party injured as a result of an accident caused by a vehicle covered by insurance as referred to in article 3 enjoys a direct right of action against the insurance undertaking covering the person responsible against civil liability."

29. I assume (without deciding) that article 18 requires a direct right of action against the insurer in respect of the underlying wrong of the "person responsible" and not just a liability to satisfy judgments entered against that person. It is a plausible construction in the light of the recital and the reference to Directive 2000/26/EC. However, Ms Cameron is not trying in these proceedings to assert a direct right against the insurer for the underlying wrong. Her claim against the insurer is for a declaration that it is liable to meet any judgment against the driver of the Micra. Her claim against the driver is for damages. But the right that she asserts against him on this appeal is a right to sue him without identifying him or observing rules of court designed to ensure that he is aware of the proceedings. Nothing in the Directive requires the United Kingdom to recognise a right of that kind. Indeed, it is questionable whether it would be consistent with article 47 of the Charter of Fundamental Rights regarding the fairness of legal proceedings.

30. Mr Williams' second point is in reality a reiteration of the first. It is based on article 10 of the Directive, which requires member states to ensure that there is a

"national bureau" charged to pay compensation for "damage to property or personal injuries caused by an unidentified vehicle or a vehicle for which the insurance obligation provided for in article 3 has not been satisfied." The submission is that the Directive requires that recourse to the Bureau, as the relevant body in the United Kingdom, should be unnecessary in a case like this, because the Micra was identified. It was only the driver who was unidentified. This is in effect a complaint that the indemnity available from the Motor Insurers' Bureau under the Untraced Drivers Agreement, which extends to untraced drivers whether or not the vehicle is identified, is wider than the Directive requires. In reality, the complaint is not about the extent of the Bureau's coverage, which unquestionably extends to this case. The complaint is that it is the Bureau which is involved and not the insurer. But that is because the insurer is liable only to satisfy judgments, which is Mr Williams' first point. It is true that the measure of the Bureau's indemnity is slightly smaller than that of the insurer (because of the excess for property damage and the limited provision for costs). But in that respect it is consistent with the Directive.

Disposal

31. I would allow the appeal, set aside the order of the Court of Appeal, and reinstate that of District Judge Wright.