Manual
on

Protest Injunctions

Practice, Procedure and Persons Unknown

Yaaser Vanderman

2023
Version 1

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by

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Foreword by
Rt. Hon. Lord Carnwath of Notting Hill,
Justice of the UK Supreme Court from 2012-2020

FOREWORD

I am pleased to welcome this timely new book on protest injunctions. I was a member of the Supreme Court panel which decided *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] 1 WLR 1471 (SC), in which the claimant sought to sue an unidentified hit-and-run driver. This was the first time the Supreme Court or House of Lords had considered the jurisdiction to permit claims to be brought against Persons Unknown and Lord Sumption's judgment, with which I agreed, is now the authoritative statement on when a person can be subject to the court's jurisdiction without having notice of the proceedings. It was not a protest case, but the underlying problem with which we had to deal is fundamentally the same as in cases relating to protest injunctions, which must invariably be directed at Persons Unknown. It is a challenging area of law, liable to confuse and confound legal practitioners let alone their clients.

I first met Yaaser in 2014, when he was a Judicial Assistant at the Supreme Court. Since then I have watched his practice develop successfully in a number of practice areas, including planning, property and human rights. They, and their inter-action, are at the heart of the subject-matter of the present book. As he rightly says in the Preface, there is no other area of law moving so fast. He highlights a succession of recent authorities dealing with such issues as Persons Unknown in protest injunctions, on balancing the rights of those carrying out disruptive protest against the rights of those being disrupted, and on the factors to consider on committal and when to imprison environmental protestors. He also promises regular updates to cover new developments.

I commend this book to all those concerned with obtaining protest injunctions, or defending protest injunctions and indeed the judges deciding whether to grant protest injunctions. It seeks to deal comprehensively with the ever-increasing rules and case law being produced on this topic, and most importantly offers hands-on, practical assistance to all those involved.

Rt. Hon. Lord Carnwath of Notting Hill, Justice of the UK Supreme Court from 2012-2020

November 2022

PREFACE

What?

This is an online book setting out the law on protest injunctions – i.e. when a civil injunction is sought to restrain certain types of protest activity. It seeks to do two things: (1) provide practical know-how to all parties involved in the legal process, an area which can be hard to navigate; and, (2) set out a thorough account of the substantive law by reference to most, if not all, of the reported cases on protest injunctions over the last few years. This book deals specifically with proceedings brought in the High Court.

The law on this area has evolved rapidly. By way of example:

- On the issue of Persons Unknown in protest injunctions, the Court of Appeal has dealt with the issue (including making complete u-turns) in *Ineos Upstream v Persons Unknown* [2019] 4 WLR 100, *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 and *Barking & Dagenham LBC v Persons Unknown* [2022] 2 WLR 946 (CA).
- On human rights, there have been several important decisions on how to balance the rights of those carrying out disruptive protest against the rights of those being disrupted: see *DPP v Ziegler* [2022] AC 408 (SC), *DPP v Cuciurean* [2022] 3 WLR 446 (DC) and *Attorney General's Reference (No. 1 of 2022)* [2022] EWCA Crim 1259.
- On committal applications, several cases have tested the courts' resolve on what factors to consider and when to impose custodial sentences on protestors: see *Cuadrilla Bowland v Persons Unknown* [2020] 4 WLR 29 (CA), *National Highways v Heyatawin* [2021] EWHC 3078 (KB), §49(d) (Dame Victoria Sharp P and Chamberlain J) and *Cuciurean v Secretary of State for Transport* [2021] EWCA Civ 357.

These are just some of the issues discussed further below.

Why?

(1) There is no other area of law moving this fast. In the last 3 years there have been over 20 important cases. Any book published in the usual way would be instantly out-of-date. By staying online, this Manual can and will be regularly updated to account

for any important developments in the law. (2) More than most other areas of law, practical experience is essential. Such practical know-how is at the heart of this Manual.

When?

2023 (v.1) will be the first edition of the Manual. It will be updated online regularly and whenever there is a material development in the law.

Where?

To check whether you are reading the most up-to-date version of the Manual, click here.

How?

I have had considerable experience of advising and acting in cases involving protest injunctions, having been instructed in 11 protest injunctions hearings in 2022 alone. I am indebted to Katharine Holland KC, who was involved in perhaps the first ever protest injunction relating to Persons Unknown in *Hampshire Waste Services* [2004] Env LR 9 (Ch). Without her, this Manual could never have been written. I am also grateful to Myriam Stacey KC, Jude Bunting KC and Admas Habteslasie for reading earlier drafts of this Manual.

Please get in contact with me at yvanderman@landmarkchambers.co.uk if you have any suggestion or think there are any errors or omissions in this Manual.

ABOUT THE AUTHOR

Yaaser Vanderman is a barrister at Landmark Chambers specialising in various areas of law, including public law, human rights, planning law and property law. In addition, he is called to the Bar of Northern Ireland and is on the Attorney General's B Panel of Counsel. He regularly appears in the High Court and Court of Appeal, and has been instructed in 8 cases before the Supreme Court since 2019.

Yaaser Vanderman first worked on protest issues as an LLM student at Harvard Law School in the Human Rights Clinic. The law of protest injunctions is now at the confluence of his practice areas.

Yaaser has been instructed in 11 hearings in protest injunctions in 2022 alone. He has been involved in double that number over the last few years and has also advised extensively on these issues, including in relation to claims brought by:

- Local authorities
- NHS trusts
- Universities
- Park authorities
- Security companies
- Energy companies

More widely, he has been involved in some of the most important recent protest cases, including the Sarah Everard vigil ban during the COVID-19 lockdown and the Supreme Court reference on anti-protest zones outside abortion clinics.

GLOSSARY

Claimant – the party seeking, or having obtained, a protest injunction

Defendant – the party subject to a protest injunction who is prohibited from acting in a certain way

Direct action – a form of protest that seeks to hinder, impede or prevent another person from carrying out a lawful activity

Persons Unknown – Defendants whose identities are unknown

Protect injunction – a form of court order that restrains Defendants from carrying out certain types of protest activity, usually limited to direct action

CONTENTS

1. CAUSES OF ACTION AND RELIEF

(a) Causes of action

1.1 An injunction is a remedy not a cause of action. You may think, therefore, that an underlying substantive cause of action is required before an injunction can be obtained. Until recently, that was the case.[1] This was the position taken, for example, in *National Highways Ltd v Persons Unknown* [2022] EWHC 1105 (KB), §25 (Bennathan J). This must now be wrong following the decision in *Broad Idea International Ltd v Convoy Collateral Ltd* [2022] 2 WLR 703, in which the Privy Council found (by a majority of 4-3) that no underlying cause of action was necessary; the court has the power to grant an injunction where it is just and equitable to do so.

1.2 That said, the court will still only usually exercise this power where there is an underlying cause of action in order to ensure its discretion is exercised consistently and predictably.

1.3 There are a number of causes of action that Claimants have attempted to rely on in the context of protest injunctions:[2]

i. Trespass;

ii. Private nuisance;

iii. Public nuisance;

iv. Economic torts, such as conspiracy to injure by unlawful means;

v. Harassment; and,

vi. Breaches of the criminal law.

1.4 The simplest cause of action, and the one most commonly relied upon, is trespass.[3] All it requires is to show that: (i) an individual is on (and possibly over or under) someone else's land without their consent; and, (ii) the Claimant has better right to occupy the

[1] As Lord Diplock said in *The Siskina* [1979] AC 210 (HL), 254: "*A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court.*"

[2] In addition, public authorities are empowered by statute to obtain injunctions in certain circumstances.

[3] See, generally, *Clerk & Lindsell on Torts* (23rd edn, 2022), Chapter 18.

land.[4] It is actionable without proof of damage and no question of intention or concerns about what is happening on the land arises as long as the physical act of entry was voluntary.[5]

1.5 In this context, the facts grounding the trespass claim will usually support a nuisance claim as well, though nuisance requires damage to be proved.[6]

1.6 In relation to private nuisance, it must be shown that there has been undue and substantial interference with the enjoyment of land.[7] For example, direct action that prevents the Claimant using a right of way it enjoys over another's land may well amount to private nuisance. A further example of private nuisance is where direct action prevents an owner of land accessing that land from an adjoining public highway.[8]

1.7 In relation to public nuisance,[9] this can occur where free passage along a public highway is obstructed or hindered. An owner of land must be able to show that they are specifically affected by it in the sense of suffering substantial inconvenience or damage to an appreciably greater degree than the general public.

1.8 Less straightforward are the economic torts; for conspiracy to injure by unlawful means, the following elements will need to be proved: (i) an unlawful act by the Defendant; (ii) with the intention of injuring the Claimant; (iii) pursuant to an agreement with others; (iv) which injures the Claimant.[10] Other economic torts include: procuring a breach of contract; the tort of intimidation; causing loss by unlawful means; and, conspiracy to injure by lawful means.[11]

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[4] *HS2 v Persons Unknown* [2022] EWHC 2360 (KB), §77 (Knowles J); *Walton Family Estates Limited v GJD Services Ltd* [2021] EWHC 88 (KB), §§35-41 and 49 (Mr Andrew Hochhauser KC); *Manchester Airport v Dutton* [2000] QB 133 (CA), 149-150 (Laws LJ). This includes temporary possession powers granted under primary legislation or other statutory consenting regimes: *HS2 v Persons Unknown* [2022] EWHC 2360 (KB), §75 (Knowles J).

[5] *HS2 v Persons Unknown* [2022] EWHC 2360 (KB), §80 (Knowles J); *Esso Petroleum v Persons Unknown* [2022] EWHC 966 (KB), §19(i) (Ellenbogen J).

[6] See, generally, *Clerk & Lindsell on Torts* (23rd edn, 2022), Chapter 19.

[7] *HS2 v Persons Unknown* [2022] EWHC 2360 (KB), §85 (Knowles J); *Ineos Upstream v Persons Unknown* [2017] EWHC 2945 (Ch), §41 (Morgan J).

[8] *HS2 v Persons Unknown* [2022] EWHC 2360 (KB), §§86-87 (Knowles J); *Cuadrilla Bowland v Persons Unknown* [2020] 4 WLR 29 (CA), §13 (Leggatt LJ); *Ineos Upstream v Persons Unknown* [2017] EWHC 2945 (Ch), §42 (Morgan J).

[9] *HS2 v Persons Unknown* [2022] EWHC 2360 (KB), §§88-90 (Knowles J); *Esso Petroleum v Persons Unknown* [2022] EWHC 966 (KB), §19(ii) (Ellenbogen J); *Ineos Upstream v Persons Unknown* [2017] EWHC 2945 (Ch), §§42-46 (Morgan J).

[10] *Esso Petroleum v Breen* [2022] EWHC 2664 (KB), §21 (HHJ Lickley KC); *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29, §18 (Leggatt LJ).

[11] See *Clerk & Lindsell on Torts* (23rd edn, 2022), Chapter 23.

1.9 As to harassment under the Protection from Harassment Act 1997, it has to be shown that:[12] (i) the Defendant has pursued a course of conduct; (ii) which the Defendant knows or ought to know involves harassment; (iii) of two or more individuals; (iv) by which the Defendant intends to persuade those individuals not to do something which they are entitled to do or to do something which they are not under an obligation to do.[13]

1.10 As to breaches of the criminal law, these cannot in and of themselves support a civil claim for a protest injunction without the highly exceptional course of obtaining the consent of the Attorney General.[14] This is because the Claimant itself would have no civil cause of action.[15] Criminal conduct can, however, support the founding of tortious behaviour – e.g. trespass on the public highway and economic torts.

1.11 Which one (or more) of these causes of action to rely on will depend on the circumstances of the protest and, in particular, what interest the Claimant has in the land on which it is taking place. The important issue here is whether the Claimant has a legal right to occupy the land. That right may exist because, for example, the Claimant owns the land, is a lessee of the land or has a licence to occupy the land. But the Claimant has no right to occupy land which it has leased to a third party, such that no claim in trespass will lie unless the lessee is itself joined as a party to the claim.

1.12 Reliance on economic torts may become necessary when the Claimant has no right to occupy the relevant land. There are two recent examples of this:

i. *Shell UK Oil Products Ltd v Persons Unknown* [2022] EWHC 1215 (KB) (Johnson J): this was an interim injunction application by Shell against environmental protests targeting Shell-branded petrol stations. Although the Claimant sold fossil fuels to the petrol stations, in most cases the Claimant had no legal interest in those parcels of land; the petrol stations themselves were operated by 3rd-party contractors. As a result, the Claimant could not rely on trespass or nuisance: §25.

ii. *Esso Petroleum v Breen* [2022] EWHC 2664 (KB) (HHJ Lickley KC): this was an interim injunction application by Esso against environmental protestors targeting its Southampton-London Pipeline. The Pipeline is 105km in length and runs over a "*tapestry of varying owners and rights over property*": §20. A

[12] Assuming the Claimant is a company – ss.1(1A) and 3A of the Protection from Harassment Act 1997.
[13] See, e.g., *Ineos Upstream v Persons Unknown* [2017] EWHC 2945 (Ch), §50 (Morgan J).
[14] *MBR Acres Ltd v Free the MBR Beagles* [2021] EWHC 2996 (KB), §5 (Nicklin J).
[15] *Gouriet v Union of Post Office Workers* [1978] AC 435 (HL).

conspiracy was alleged to avoid attempting a very detailed and complex exercise in identifying all land interests in all of this land.

1.13 More detail on these cases can be seen at **§5.6 below**.

1.14 The case law confirms that the "*unlawful act*" does not have to be actionable by the Claimant itself (i.e. as opposed to being actionable by 3rd parties) where it consists of criminal conduct or breach of contract.[16] As to *tortious* conduct, HHJ Lickley KC in *Esso Petroleum v Breen* [2022] EWHC 2664 (KB), §§22-27, relied on *Revenue and Customs Commissioners v Total Network SL* [2008] 1 AC 1174 (HL) and *Ineos Upstream v Persons Unknown* [2017] EWHC 2945 (Ch) (Morgan J) to find that the same principle applied.

1.15 Even if a Claimant successfully obtains an (interim) injunction on the basis of conspiracy to injure by unlawful means, it will be more difficult to enforce: in order to succeed on a contempt application, the Claimant will have to prove the elements of *agreement* and *intention*. This is unlike injunctions based on, for example, trespass where there will be no need to prove such elements.

1.16 Protest cases brought on the basis of harassment have recently struggled before the courts. This is because of: the difficulties of formulating the injunction to refer to all of the necessary ingredients of the tort; the lack of clarity to a member of the public of a prohibition on "*harassment*"; the highly context-specific nature of assessing harassment; and the fundamental tension between freedom of speech and silencing expression as amounting to harassment.[17]

(b) Relief

1.17 The main objective of Claimants will invariably be to stop the direct action affecting their land or activities. This means obtaining a possession order or an injunction.

1.18 A possession order is usually the preferred option because of its superior enforcement mechanism; possession orders obtained from the High Court are enforced by High Court Enforcement Officers. They will physically come onto the land and secure possession. But possession orders will only be available if a trespasser has taken

[16] *Shell UK Oil Products Ltd v Persons Unknown* [2022] EWHC 1215 (KB), §27 (Johnson J).
[17] *MBR Acres Ltd v Free the MBR Beagles* [2021] EWHC 2996 (KB), §§92-96 (Nicklin J); *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 417 (KB), §§52-54, 78 (Nicklin J); *Ineos Upstream v Persons Unknown* [2017] EWHC 2945 (Ch), §§152-156 (Morgan J).

possession of the land. Unless protestors have set up an encampment, their presence will generally be too transitory to constitute taking possession of the land.

1.19 More usually, an injunction will have to be sought. The court has a power to grant an injunction (interim or final) where it appears to be just and convenient.[18] Whilst its existence has a deterrent effect in and of itself, the only way of enforcing against breaches of an injunction is to bring committal proceedings for contempt of court. This involves making a committal application to the Court using a specialised procedure and, once a hearing has been listed, seeking to demonstrate that a breach of the injunction has occurred. More detail on contempt and committal proceedings is set out in **Section 10 below**.

1.20 Damages may also be available if a Claimant can demonstrate loss suffered as a result of direct action. In reality, and even if technically sought in the claim form, Claimants rarely press for damages due to a combination of: the extra resources it will take to prove the loss caused by the direct action; the unlikelihood of Defendants actually being in a position to pay damages; and, the potential reputational harm in doing so. If, however, a Claimant has pleaded damages and, having obtained the injunctive relief sought, nevertheless wants to keep the option of seeking damages open, it is possible to ask the Court to stay the damages claim for a specified period of time (often ending when the injunctive relief itself is due to end). The aim is to see how the situation on the ground unfolds before taking further action.

[18] Section 37(1) of the Senior Courts Act 1981.

2. BEFORE BRINGING THE CLAIM

(a) Pre-action process

2.1 Whether a pre-action process is possible before bringing a claim for a protest injunction will depend on how urgent it is. Where an injunction is required urgently, it will be difficult to engage in any, or any meaningful, pre-action correspondence. Where, however, the claim is not as urgent, it will usually be beneficial for all parties to go through some form of pre-action process.

2.2 A pre-action process is valuable because it allows: (i) the Claimant to allege that certain unlawful conduct is being carried out by protestors, through direct action or otherwise, and to put Defendants on notice that legal action is being contemplated; and, (ii) the Defendants to deny that such conduct is unlawful, to deny that they are responsible for it or to decide to cease their direct action.

2.3 If, during this pre-action process, protestors accept that they have been carrying out direct action or have otherwise been acting unlawfully, but that they will now cease, they will often be asked by the Claimant to make an undertaking to the court in the same terms as the protest injunction ultimately sought. This requires the individual to come to court to give the undertaking in person to the Judge. A breach of the undertaking has the same consequences as a breach of the protest injunction – i.e. it amounts to contempt of court. The benefit of this for the Defendant is that they are not named in any proceedings that are issued, play no part in it, and cannot be liable for any legal costs or to pay any damages if a protest injunction is ultimately granted. The benefit of this for the Claimant is that there are fewer Defendants to proceed against.

(b) Part 7 or 8 claim

2.4 In the protest context, Claimants will often have a choice as to whether to use the procedure set out in Part 7 or Part 8 of the CPR.

2.5 Where there are likely to be substantial disputes of fact, Part 7 should be used.[19]

2.6 In many protest cases, however, there will not be substantial disputes of fact; the usual question is, rather, whether or not the Defendant should be allowed to carry on the activity that they are avowedly (and often publicly) conducting. If that is the case, a

[19] CPR r.8.1(2)(a).

Claimant can use the Part 8 procedure instead. Claimants should be aware, though, that if a court disagrees with their opting for the Part 8 procedure, it may transfer the claim to Part 7 with the potential for significant delay.[20]

2.7 As to the relevant differences between Part 7 and Part 8 claims, one is that a Claimant cannot obtain default judgment when using the Part 8 procedure.[21] This may be particularly relevant in cases where Defendants opt to take no part in proceedings. If the Part 7 procedure is used, following the grant of an interim injunction – and assuming that no acknowledgment of service or defence is served – a Claimant may apply for default judgment rather than having to prepare for a full but unopposed trial. There are other procedural differences. For example, a particulars of claim is required in a Part 7 claim but not a Part 8 claim.

(c) Which High Court Division

2.8 Claimants have a choice as to whether to bring the claim for a protest injunction in: (i) the King's Bench Division or; (ii) the Chancery Division of the High Court. There is no wrong answer as both can deal, and are well equipped to deal, with protest injunctions. It will rarely make a difference to the substantive outcome. In the author's experience, which Division is chosen will usually depend on which one the lawyers are most accustomed to using.

2.9 There are, however, some practical differences which Claimants ought to be aware of.

- Judges in the Chancery Division will tend to have more experience of dealing with property issues whilst Judges in the King's Bench Division will tend to have more experience of dealing with human rights issues.
- Where urgent relief is sought, Claimants may find that one of the Divisions has better availability for an urgent hearing than the other. The Chancery Division in London has a specific Applications List to hear urgent applications as long as they can be dealt with in less than 2 hours.[22] This is located in Court 10 of the Rolls Building and sits each working day during term except for the last day of term. Such an Applications List also exists in Leeds and Manchester, albeit they only sit on Fridays. The King's Bench Division has an Interim Applications Judge but they will only list hearings

[20] *MBR Acres Ltd v Free the MBR Beagles* [2021] EWHC 2996 (KB), §§3-9 (Nicklin J).
[21] CPR r.8.1(5).
[22] The Business and Property Courts of England & Wales - Chancery Guide (2022), §15.16.

likely to take 1 hour or less.[23] Hearings likely to take longer than 1 hour will have to be arranged by the King's Bench listing office. It is good practice, generally, for the Claimant's lawyers to phone the listing offices in both Divisions to see when an urgent hearing can be listed.

- The Divisions have slightly different deadlines for the filing of certain documents. For example, in the Chancery Division, for ordinary applications[24] skeleton arguments should be filed and served by 10am on the working day before the hearing.[25] For heavy applications,[26] they must be served by 12pm two clear days before the hearing.[27] In the King's Bench Division, skeleton arguments should be served and filed by 10am one day before an application hearing and by 10am two days before a trial.[28]

2.10 One exception to the free choice of venues referred to above may be claims for a protest injunction based on harassment. In *Canada Goose UK Retail Ltd v Persons Unknown* [2019] EWHC 2459 (KB), Nicklin J indicated that such claims would have to be brought in the Media and Communications List of the King's Bench Division, pursuant to CPR r.53.1(3)(c): §168.

[23] The King's Bench Guide (2022), §9.56.
[24] Applications listed for a hearing of half a day (2.5 hours) or less: Chancery Guide (2022), §14.26.
[25] Chancery Guide (2022), §14.42.
[26] Applications listed for a hearing of more than half a day: Chancery Guide (2022), §14.44.
[27] Chancery Guide (2022), §14.57.
[28] King's Bench Division Guide (2022), §9.107.

3 URGENCY AND NOTICE

3.1 The type and amount of notice of a hearing given to a Defendant is an important issue in the context of protest injunctions. In light of the requirement set out in s.12(2) of the Human Rights Act 1998, it is also a jurisdictional issue – i.e. the court will simply not have the power to grant the protest injunction if the notice requirements contained within that provision are not satisfied.

3.2 This section sets out the usual position on filing and serving an application notice before considering those instances where urgency is required.

(a) Standard rules and exceptions

3.3 The general rule is that an application notice – for example, for an interim injunction[29] – must be filed and served before being determined.[30] Service must usually be effected at least 3 days before the hearing of the application.[31]

3.4 There are exceptions to this. The correct approach to take will ultimately depend on how urgently the Claimant needs the relief.

3.5 The court can still *hear* an application even if it is served less than 3 days before the hearing if it considers that, in the circumstances, sufficient notice has been given.[32]

3.6 According to the CPR, an application (of any sort) may only be made without serving an application notice in the following, admittedly overlapping, scenarios:[33]

i. Where there is exceptional urgency;

ii. Where the overriding objective is best furthered by doing so;

iii. By consent of all parties;

iv. With the permission of the court;

v. Where there is not sufficient time before a hearing that has already been fixed; or

[29] CPR PD25A, §2.2.
[30] CPR r.23.3(1) and 23.4(1). There are exceptions to this rule where permitted by a rule or practice direction or where the court dispenses with the requirement: CPR r.23.3(2) and 23.4(2). See, generally, *Birmingham City Council v Afsar* [2019] EWHC 1560 (KB), §19 (Warby J).
[31] CPR r.23.7(1).
[32] CPr r.23.7(4); CPR PD23A, §4.1; CPR PD25A, §2.2.
[33] CPR PD23A, §3.

vi. Where a court order, rule or practice direction permits. In the context of interim remedies, a court may permit no notice to be given if it appears that there are good reasons for not giving notice.[34] The Claimant's evidence in support of the application must state the reasons why notice has not been given.[35]

3.7 If no notice or short notice is given in relation to a protest claim, this will usually be because the Claimant considers it needs an injunction urgently. Some of the case law has emphasised how exceptional it is for the court to grant an injunction, particularly where ECHR rights are involved, against a party who has had *no* notice at all.[36] For example, it has been said that, given modern methods of communication, urgency can only be a compelling reason for applying without notice "*if there is simply no time at all in which to give notice*".[37] This point is considered further below.

3.8 Even where full notice cannot be given, short notice should be given unless the circumstances of the application require secrecy.[38]

(b) Levels of urgency

3.9 In the protest context, applications for interim injunctions will often be urgent to a greater or lesser degree. It is important that Claimants correctly assess, and do not overstate, the appropriate level of urgency in their case and, therefore, what steps to take and when.

i. <u>Most urgent</u>

3.10 In cases of the most urgency:

(1) An application may be heard by telephone but only where the Claimant is being represented by barristers or solicitors.[39]

(2) In such a case, the phone number to call will vary depending on whether the application is made between 10am-5pm or outside those hours.[40]

(3) The court will likely require a draft order to be provided by email.[41]

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[34] CPR r.25.3(1).
[35] CPR r.25.3(3).
[36] *Birmingham City Council v Afsar* [2019] EWHC 1560 (KB), §20 (Warby J).
[37] *Birmingham City Council v Afsar* [2019] EWHC 1560 (KB), §53 (Warby J).
[38] CPR PD23A, §4.2.
[39] CPR PD25A, §§4.2 and 4.5(5).
[40] CPR PD25A, §4.5(1).
[41] CPR PD25A, §4.5(3).

(4) Assuming a claim form has not yet been issued, the Claimant must undertake to issue a claim form immediately unless the court gives direction for the commencement of the claim.[42] The claim form should be served with the order for the injunction[43] where possible.[44]

(5) The application notice and evidence in support must be filed with the court on the same or next working day together with two copies of the order for sealing.[45]

ii. Very urgent

3.11 In very urgent cases (but not so urgent that a telephone hearing is required):

(1) An application may be made before a claim form is even issued.[46] The Claimant must undertake to issue a claim form immediately unless the court gives direction for the commencement of the claim.[47]

(2) The application notice, evidence in support and draft order should be filed with the court at least two hours before the hearing if possible.[48] If that is not possible, a draft order should be provided at the hearing and the application notice and evidence filed on the same or next working day.[49]

(3) Except in cases where secrecy is essential, the Claimant should take steps to notify the Defendant informally of the application.[50]

(4) The claim form should be served with the order for the injunction[51] where possible.[52]

[42] CPR PD25A, §4.4(1).
[43] Such an order must refer to the parties as "*the Claimant and Defendant in an Intended Action*": CPR PD25A, §4.4(3).
[44] CPR PD25A, §4.4(2).
[45] CPR PD25A, §4.5(4).
[46] CPR PD25A, §§4.1(2) and 4.4(1).
[47] CPR PD25A, §4.4.
[48] CPR PD25A, §4.3(1).
[49] CPR PD25A, §4.3(2).
[50] CPR PD25A, §4.3(3).
[51] Such an order must refer to the parties as "*the Claimant and Defendant in an Intended Action*": CPR PD25A, §4.4(3).
[52] CPR PD25A, §4.4(2).

iii. Urgent

3.12 In urgent cases (but not those requiring the application to be heard by telephone or before the claim is issued):

(1) In most cases, it ought to be possible to file the application notice, supporting evidence and draft order some days in advance of the hearing, even if not the full 3 clear days before. But the application notice, evidence in support and draft order should be filed with the court at least two hours before the hearing.[53] If that is not possible, a draft order should be provided at the hearing and the application notice and evidence filed on the same or next working day.[54]

(2) Except in cases where secrecy is essential, the Claimant should take steps to notify the Defendant informally of the application.[55]

3.13 In each of these cases, s.12(2) of the Human Rights Act 1998 will need to be satisfied (see discussion below).

(c) Short and informal notice

3.14 Notice is not binary; it operates along a spectrum.

3.15 At one end of the spectrum, a Claimant may seek relief with the other side being left completely in the dark. At the other end, a Defendant may have been given full notice – an application for an interim injunction being served at least 3 clear days' before a hearing.[56]

3.16 Then there are midway options – these are referred to as giving "short notice". This may involve, for example, serving the Defendant the day before the hearing.

3.17 Similarly, service may be said to be "*informal*" in the sense of not being served by the method set out in CPR r.6.3 or in another way sanctioned by the court – e.g pursuant to CPR r.6.15 and/or 6.27. In the modern age, there are numerous ways of doing this, such as sending an email to the Defendants attaching the bundle, skeleton argument and notice of hearing.

[53] CPR PD25A, §4.3(1).
[54] CPR PD25A, §4.3(2).
[55] CPR PD25A, §4.3(3).
[56] CPR r.23.7(1); CPR PD23A, §4.1; CPR PD25A, §2.2.

3.18 The important point to recognise is that, in the court's eyes, there is a significant difference between short notice and no notice at all and, in all but exceptional cases, at least short and informal notice will be required.

(d) Section 12(2) of the Human Rights Act 1998

3.19 The legal significance between no notice, short notice and full notice is codified in s.12(2) of the Human Rights Act 1998, a provision which will inevitably apply to all protest injunctions.

3.20 It states:

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

3.21 This makes the issue of notice a jurisdictional issue,[57] as compared to an issue resting with the discretion of the court, which would otherwise be the case pursuant to rules in the CPR, as referred to above.

3.22 In other words, the Claimant will only be able to justify anything less than full notice as follows:

- No notice – the Claimant must show be able to show there are "*compelling reasons*" why no notice was given. This will usually only be the case if giving notice to the Defendants would enable them to take steps to defeat the very purpose of the injunction or would otherwise lead to severe harm. The mere fact that notice may cause more protestors to turn up or that direct action may escalate in some way will not usually be sufficient. For example, the *White Book* states that:[58]

  > "The court should not entertain an application of which no notice has been given unless either giving notice would enable the defendant to take steps to

[57] *Birmingham City Council v Afsar* [2019] EWHC 1560 (KB), §20 (Warby J).
[58] *White Book* (2022), §25.3.2 (p.848).

defeat the purpose of the injunction (as in the case of a freezing or search order) or there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act (*National Commercial Bank Jamaica Ltd v Olint Corp Ltd (Practice Note)* [2009] UKPC 16; [2009] 1 W.L.R. 1405, PC)."

A good protest example is *Birmingham City Council v Afsar* [2019] EWHC 1560 (KB), in which the Claimant sought an injunction against protests made by parents against the teaching of LGBT issues at a primary school. Warby J strongly criticised the Claimant for proceeding without giving the Defendants any notice at all. He stated, at §53, that, "*Urgency can only be a compelling reason for applying without notice if there is simply no time at all in which to give notice. Modern methods of communication mean that will rarely, if ever, be the case, and it was not the position here.*"

- All practicable steps – this requirement seems to encompass both the timing and method of service. In terms of method, and particularly in relation to Persons Unknown, the Claimant will have to show that it properly sought to bring the fact of the claim/application (as well as the relevant documents) to the attention of the Defendants. This will most obviously involve sending the information to email addresses associated with the Defendants. It may also involve using other types of social media and, depending on the circumstances, affixing notices at the location of the protest. In terms of timing, full notice may not have been given because of the urgency of the clam. In this scenario, the Claimant will have to demonstrate to the court that although the matter was not so urgent or sensitive to engage s.12(2)(b) it was still too urgent or sensitive to permit the full period of notice.

3.23 In *Esso Petroleum v Persons Unknown* [2022] EWHC 966 (KB), §34, the Claimant had sent an email to the Defendants informing them that the hearing would be taking place the following day. Ellenbogen J accepted the Claimant could rely on s.12(2)(b) or, in the alternative, s.12(2)(a) of the Human Rights Act 1998 – i.e. that all practicable steps had been taken to notify the Defendants but, if not, there were compelling reasons why they should not be notified. By contrast, in a separate unreported case that the author was involved in, the Judge found that s.12(2)(a) and (b) were mutually exclusive and that, if some form of notice had been given, the two provisions could not be relied upon in the alternative.

(e) Obligations on Claimant at without notice hearing

3.24 There are a number of obligations on a Claimant both during and after a hearing that has taken place without notice to the Defendant.

3.25 They include the following:

i. Duty of full and frank disclosure.[59] The duty applies even if the Defendant is given short notice.[60] As to factual issues, it requires the Claimant to make full and fair disclosure of those facts which it is material for the court to know. This extends to facts which the Claimant ought to have known if it had made proper inquiries. As to legal issues, the court's attention must be drawn to significant legal and procedural aspects of the case. Failure to comply may lead to injunction being set aside: see *Birmingham City Council v Afsar* [2019] EWHC 1560 (KB), §55 (Warby J) for a case in which this occurred.

ii. Duty to serve the proceedings and injunction on the Defendant as soon as practicable.[61]

iii. Duty to provide notes of the without notice hearing with all expedition. This includes, but is not limited to, the judgment given.[62]

iv. Apply for and obtain a return date for a further hearing where the Defendants can be present on full notice.[63]

[59] *Birmingham City Council v Afsar* [2019] EWHC 1560 (KB), §§21-26 (Warby J); *White Book* (2022), §25.3.5 (p.849).
[60] *White Book* (2022), §25.3.5.1 (p.851).
[61] CPR PD25A, §5.1(2); *White Book* (2022), §25.3.9 (p.852).
[62] *White Book* (2022), §25.3.10 (p.853).
[63] CPR PD25A, §5.1(3).

4 SERVICE

4.1 Service plays a huge part in protest injunctions and getting it right is essential. If Claimants fall down on service it is usually because they cut corners in the rush for seeking urgent injunctive relief. The consequences can be catastrophic for their claim. In *Canada Goose v Persons Unknown* [2020] 1 WLR 2802 (CA), for example, failure properly to serve the claim form on Persons Unknown led not only to refusal of the Claimant's summary judgment application but also to the lifting of the interim injunction: see §§28, 34, 37-54.[64]

(a) Serving the claim

i. General

4.2 Courts are particularly strict when it comes to service of the claim form. This is because service of the originating process is the act by which the Defendant is subjected to the court's jurisdiction. A person simply does not become a party to proceedings until served with a claim form. As Lord Sumption said in *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] 1 WLR 1471 (SC), a case involving a claim sought to be brought against an unknown hit-and-run driver:[65]

> "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."

4.3 This poses no problem for named Defendants, in respect of whom the claim can be served in the usual way as long as their address is known. The position is more difficult for Persons Unknown, in respect of whom alternative service will be required.

ii. Applications for alternative service

4.4 For Persons Unknown, or named Defendants whose whereabouts and address are unknown, a Claimant must obtain an order for service by an alternative method, pursuant to CPR r.6.15 (claim form) and 6.27 (other documents). In order to do so, the Claimant must be able to prove that the proposed method of service can reasonably be expected to bring the proceedings to the attention of the Defendants.[66] Dispensation of

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[64] See also *Canada Goose v Persons Unknown* [2020] 1 WLR 417 (KB), §§138-139 (Nicklin J) as well as *Enfield LBC v Persons Unknown* [2020] EWHC 2717 (KB) (Nicklin J) and *Canterbury CC v Persons Unknown* [2020] EWHC 3153 (KB) (Nicklin J), in which serious criticisms were made of the approach taken by the local authorities, albeit in the context of occupations by travellers.

[65] Repeated in the protest context in *Canada Goose v Persons Unknown* [2020] 1 WLR 2802 (CA), §45.

[66] *HS2 v Persons Unknown* [2022] EWHC 2360 (KB), §144 (Knowles J).

the requirement for service altogether, pursuant to CPR r.6.16, will rarely be acceptable.[67]

4.5 The application for alternative service must be supported with evidence.[68] This evidence must state:

i. The reason why an order is sought. This will be because the Claimant has been unable to identify Persons Unknown and has no other way of serving them.

ii. What alternative method or place is proposed.

iii. Why the Claimant believes that the document is likely to reach the person to be served by the method or at the place proposed.

4.6 In a standard protest context – i.e. a static group of protestors protesting near to the single object of the protest – all or a combination of the following methods will usually be acceptable:

- Fixing a copy in a clear envelope at a prominent position at the site of the protest;
- Uploading the documents to the Claimant's own website;
- Sending the documents to email addresses connected to the protest;
- Sending the documents to social media accounts connected to the protest – e.g. Facebook and Twitter – including to the accounts of those suspected of carrying out the direct action but whose real identity or address is unknown;
- Publicising the fact of the claim in a local/national newspaper.

4.7 Courts will require strict adherence to the terms of any order for alternative service.[69]

4.8 Some difficulties arise where the subject of the protest covers a vast area of land or is a large piece of national infrastructure. In *National Highways Ltd v Persons Unknown* [2022] EWHC 1105 (KB) an injunction was granted against Insulate Britain over thousands of miles of the Strategic Road Network. Bennathan J found that the type of alternative methods set out above were "*completely impracticable when dealing with a vast road network*": §51. The "*absence of any practical and effective method to warn future participants about the existence of the injunction*" essentially meant that service by an alternative method of Persons Unknown was not possible. The solution reached by the Judge was

[67] See, e.g. *HS2 v Persons Unknown* [2022] EWHC 2360 (KB), §143 (Knowles J); *Canada Goose v Persons Unknown* [2020] 1 WLR 2802 (CA), §§48-49, 52.
[68] CPR r.6.15(3).
[69] *MBR Acres Ltd v McGivern* [2022] EWHC 2072 (KB), §78 (Nicklin J).

that anyone arrested would first have to be identified and then served with the order: §52.

4.9 By contrast, in *HS2 v Persons Unknown* [2022] EWHC 2360 (KB), Knowles J found that alternative service of Persons Unknown was acceptable, notwithstanding that the injunction covered the entire HS2 route: §229. The methods of alternative service were extensive, including: advertising the injunction in the Times and Guardian; advertising the injunction within 14 libraries every 10 miles along the route or, if that was not possible, on local parish council notice boards; publicising the order on Twitter and Facebook; and, advertising the order on the HS2 website.

4.10 There were, of course, some factual differences between these two cases but it is difficult to see why alternative service was acceptable in the latter but not the former case.

4.11 The application for alternative service may be made without notice.[70] In fact, such applications in the protest context will almost always be made without notice.

4.12 The application for alternative service will usually be made at the same time as filing the claim. Depending on how urgent the claim is, the application for alternative service can usually be heard within a matter of days and often earlier. It is good practice for the Claimant's lawyers to be in contact with the Court staff in the days running up to filing the claim to see when the Court may have availability to hear the application for alternative service.

4.13 The order granting alternative service has to specify:[71]

(1) The method or place of service;

(2) The date on which the claim form is deemed served; and,

(3) The period for filing an acknowledgement of service, filing an admission or filing a defence.

iii. <u>Snapshot summary - what to do and when</u>

4.14 For Claimants bringing a claim in an ordinary protest case, the following steps will need to be taken.

4.15 First, the Claimant will need to file:

(1) Claim form and draft order;

(2) N244 application notice for an interim injunction and draft order;

[70] CPR r.6.15(3).
[71] CPR r.6.15(4).

(3) N244 application notice for alternative service of the claim form and other documents by an alternative method, and draft order for service by an alternative method;

(4) Witness statements dealing with the main claim, the interim injunction and alternative service. These do not necessarily need to be set out in separate statements.

4.16 Secondly, and once the above documents have been issued, the Claimant will need to obtain an order for their service, in addition to the Response Pack, by an alternative method. This is often obtained following a short hearing.

4.17 Thirdly, the Claimant will then need to serve all of these documents in the manner set out in the order.

(b) Serving the Order

4.18 Once an injunction is granted (interim or final), this will need to be served on both named Defendants and Persons Unknown.

4.19 In relation to named Defendants, the order will generally need to be served personally.[72]

4.20 In relation to Persons Unknown, for the reasons already set out above, Claimants will need to obtain an order for alternative service of the order. Whilst the methods for alternative service can usually mirror the methods used to serve the claim, there is one additional method that courts will usually insist upon. This is the erection of large warning notices around the site of the protest – e.g. A1 to A3 sized posters referring to the High Court proceedings and stating in simple terms what actions the injunction prohibits.

(c) Serving other documents

4.21 It is also important that the initial interim injunction order provides for how future documents are to be served alternatively in order to avoid having to come back before the Court. Such documents will include the application for the return date, further witness statements, skeleton arguments and bundles.

[72] *MBR Acres Ltd v Maher* [2022] 3 WLR 999 (KB), §§98, 105 (Nicklin J). It is possible to apply for an order for alternative service but the court will be slow to grant these: *MBR Acres Ltd v Maher* [2022] 3 WLR 999 (KB), §111 (Nicklin J).

5 INTERIM INJUNCTIONS

5.1 This section explores the circumstances in which a Claimant can obtain an interim protest injunction, including the potential relevance of s.12(3) of the Human Rights Act 1998. It is very rare for a Claimant not to seek an interim injunction in circumstances where it wishes to bring a claim against the activity of protestors. Indeed, an interim injunction will often effectively be end of the claim. This section also sets out the obligations on Claimants both when they are seeking to obtaining an interim protest injunction as well as once they have obtained one.

(a) *American Cyanamid* test

5.2 In order to obtain an interim injunction, a court will consider the following criteria set out in *American Cyanamid Co v Ethicon* [1975] AC 396:

i. Whether there is a serious issue to be tried;

ii. Whether damages would be an adequate remedy for the Claimant or Defendant;

iii. Whether the balance of convenience favours the grant of an interim injunction.

i. Serious issue to be tried

5.3 By this criterion, the Claimant has to show that the merits of its case reaches a certain threshold without having to satisfy the ordinary "balance of probabilities" test. The test has been described as whether there is a real prospect of success or whether the claim is not frivolous or vexatious.

5.4 Due to this threshold not being too high, most claims for protest injunctions satisfy this criterion relatively straightforwardly. This is also because most protest cases are brought on the basis of trespass, and often on private land, a cause of action which tends to be difficult to defend (see **Section 7 – Human Rights**).[73]

5.5 There are, however, exceptions. For example:

- Protest cases brought on the basis of harassment (Protection from Harassment Act 1997) have recently struggled before the courts. This is because of: the difficulties of formulating the injunction to refer to all of the necessary

[73] *MBR Acres Ltd v Free the MBR Beagles* [2021] EWHC 2996 (KB), §92 (Nicklin J).

ingredients of the tort; the lack of clarity to a member of the public of a prohibition on "*harassment*"; the highly context-specific nature of assessing harassment; and the fundamental tension between freedom of speech and silencing expression as amounting to harassment.[74] In some of these cases, interim injunctions have been refused.

- Trespass above the airspace of the Claimant's land is also less straightforward. In *MBR Acres Ltd v Free the MBR Beagles* [2021] EWHC 2996 (KB) (Nicklin J), §§111-115, the Judge found that the claim in trespass against the Defendants' drones being flown over the Claimant's land was uncertain.

5.6 At one time, it was also thought that the courts did not look favourably on protest injunctions based on economic torts, such as conspiracy to injure by unlawful means.[75] This was because it was considered that a Defendant's intention, necessary in order to prove the tort, should not be included within an injunction due to its unknown and ephemeral nature.[76] The Court of Appeal, however, changed its mind in *Cuadrilla Bowland v Persons Unknown* [2020] 4 WLR 29 (CA), §§65-69 (Leggatt LJ). In two recent cases, protest injunctions have been granted to Claimants relying on conspiracy to injure by unlawful means:

(1) *Shell UK Oil Products Ltd v Persons Unknown* [2022] EWHC 1215 (KB) (Johnson J): this was an interim application by Shell against environmental protests targeting Shell-branded petrol stations. Although the Claimant sold fossil fuels to the petrol stations, in most cases the Claimant had no legal interest in those parcels of land; the petrol stations themselves were operated by 3rd-party contractors. As a result, the Claimant could not rely on trespass or nuisance: §25. The inclusion of an intention requirement in the injunction was said to be "*unavoidable*" because of the nature of the tort and that this was "*the inevitable price to be paid for closely tracking the tort*": §46. Relying on objective conduct alone in this instance would lead to a broader prohibition than was justified.

(2) *Esso Petroleum v Breen* [2022] EWHC 2664 (KB) (HHJ Lickley KC): this was an interim application by Esso against environmental protestors targeting its

[74] *MBR Acres Ltd v Free the MBR Beagles* [2021] EWHC 2996 (KB), §§92-96 (Nicklin J); *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 417 (KB), §§52-54, 78 (Nicklin J); *Ineos Upstream v Persons Unknown* [2017] EWHC 2945 (Ch), §§152-156 (Morgan J).
[75] Such torts are usually relied upon (instead of, e.g. trespass) because the Claimant does not have a legal right to occupy the land which is the subject of the direct action.
[76] *Ineos Upstream v Persons Unknown* [2019] 4 WLR 100 (CA), §§39-40 (Longmore LJ).

Southampton-London Pipeline. The Pipeline is 105km in length and runs over a "*tapestry of varying owners and rights over property*": §20. A conspiracy was alleged to avoid attempting a very detailed and complex exercise in identifying all land interests in all of this land. The Judge had no trouble granting an injunction based on this cause of action: §§20-27.

5.7 In fact, as a result of s.12(3) of the Human Rights Act 1998, there have been a number of protest cases where the relatively low threshold of "serious issue to be tried" has, instead, been replaced with the test of whether the Claimant is likely to succeed at trial. This is discussed further below.

ii. Adequacy of damages

5.8 In addition, a Claimant has to show that an award of damages would not be adequate. A Claimant will often be able to surpass this hurdle given:

- There is usually no arguable defence to an allegation of trespass in this context and, if this is the case, the questions of balance of convenience, and damages being an adequate remedy do not arise. The Claimant will *prima facie* be entitled to an interim injunction to restrain trespass.[77]
- The often material and potentially unquantifiable losses that may be suffered by the Claimant.
- The lack of evidence that Defendants will be able to pay such damages.
- Health and safety concerns that can sometimes be relied upon to justify the grant of an interim injunction.

5.9 Again, there are exceptions. For example, in one recent case a Court found that damages *would* be an adequate remedy for trespass by drones above the airspace of the Claimant's land.[78]

[77] *HS2 v Persons Unknown* [2022] EWHC 2360 (KB), §74 (Knowles J); *Patel v WH Smith Ltd* [1987] 1 WLR 853, 861 (Balcombe LJ).
[78] *MBR Acres Ltd v Free the MBR Beagles* [2021] EWHC 2996 (KB), §115 (Nicklin J).

5.10 In some (but not all) cases where a precautionary injunction is sought (see **§5.22 below** on precautionary injunctions), the court has asked, in addition, whether the harm would be "*grave and irreparable*" such that damages would not be adequate.[79]

5.11 The court will also consider whether damages would be an adequate remedy for the Defendant if, at trial, it is found that the interim injunction was wrongly granted. Damages will often be adequate for such Defendants, as their loss will have been their lost chance to protest, for which they can be compensated for.

iii. Balance of convenience

5.12 Assuming a serious issue to be tried and that damages would not be an adequate remedy for the Claimant, a court will have to consider where the balance of convenience lies. This has been described, alternatively, as the balance of justice.

5.13 This will normally involve a detailed consideration of all the circumstances of the case and, ultimately, deciding which party would be least prejudiced if the wrong decision was made at the interim stage.

5.14 In the protest context, the courts have sometimes found the balance to be in favour of the Claimant, relying on the fact that, whereas a Claimant cannot enjoy its property rights in any other way, protest can be continued in one form or another without carrying out the complained of direct action.[80]

(b) Section 12(3) of the Human Rights Act 1998

5.15 Section 12(3) of the Human Rights Act 1998 says the following:

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

[79] *Valero Energy Ltd v Persons Unknown* [2022] EWHC 911 (KB), §20(2) (Bennathan J); *Bromley LBC v Persons Unknown* [2020] 4 All ER 114 (CA), §§35 and 95; *Vastint Leeds BV v Persons Unknown* [2019] 4 WLR 2 (Ch), §31(3) (Marcus Smith J).

[80] *Esso Petroleum v Persons Unknown* [2022] EWHC 966 (KB), §26 (Ellenbogen J); *Balfour Beatty Group Ltd v Persons Unknown* [2022] EWHC 874 (KB), §74 (Linden J); *Secretary of State for Transport* v *Persons Unknown* [2018] EWHC 1404 (Ch), §58 (Barling J).

(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."

5.16 There are two questions: (1) does s.12(3) apply as a matter of course to protest injunctions? (2) if so, what difference does it make.

5.17 On (1), the authorities are not entirely clear. The issue has only been properly considered in a handful of cases. In almost all other cases it has been academic because the Court has granted the protest injunction on the assumption that s.12(3) does apply. In those cases that have considered the issue:

- In *Ineos Upstream v Persons Unknown* [2017] EWHC 2945 (Ch), in the context of environmental protests against a fracking company, Morgan J found that s.12(3) did apply but did not give reasons: §86.
- In *Ineos Upstream v Persons Unknown* [2019] 4 WLR 100, the Court of Appeal proceeded on the assumption that s.12(3) did apply as its application did not form a ground of appeal: §17.
- In *Birmingham City Council v Afsar* [2019] EWHC 1560 (KB), in the context of protests and online abuse by parents against the teaching of LGBT issues at a primary school, Warby J found that s.12(3) did apply: §§57-62. The Defendants in this case had been handing out leaflets as part of their protest and the Claimant in this case sought to prohibit the making of abusive comments on social media. It is possible to argue, therefore, that the type of activities in issue more easily come under the definition of "*publication*" than normal methods of direct action.
- In *National Highways Ltd v Persons Unknown* [2021] EWHC 3081 (KB), in the context of environmental protests by Insulate Britain, Lavender J found that s.12(3) did not apply but gave no reasons for this decision: §41(1).
- In *Esso Petroleum v Persons Unknown* [2022] EWHC 1477 (KB), in the context of environmental protests at Esso sites, Bennathan found that s.12(3) did apply. He considered that "*On one view of the law that provision is not really aimed at protest cases such as this, but there is Court of Appeal authority that it should be taken as applying so, of course, I follow that authority*": §7. He appeared to have been relying on the *Ineos* case.

- In *Shell UK Oil Products Ltd v Persons Unknown* [2022] EWHC 1215 (KB), in the context of environmental protests against sites selling Shell's petrol, Johnson J found that s.12(3) did not apply. His reasons, at §§66-76, constitute the fullest treatment of the issue in the cases so far. He did not consider himself bound by *Ineos Upstream v Persons Unknown* [2019] 4 WLR 100 (CA) because the Court of Appeal proceeded on an assumption rather than deciding the matter for itself.

5.18 The most recent case on this point is *Esso Petroleum v Breen* [2022] EWHC 2664 (KB), §§28-40, where the issue was fully argued. HHJ Lickley KC, having considered the authorities above, agreed with Johnson J in *Shell* that s.12(3) did not apply. He decided that "*acts of trespass etc. in the course of a protest while publicising the protestor's views do not amount to 'publication'.*": §40.

5.19 On (2), the effect is that the Claimant has to show they would "likely" succeed at trial. This raises the relatively low threshold that would otherwise apply under the usual first *American Cyanamid* criterion of "serious issue to be tried".

5.20 On the meaning of "likely", this will depend on the circumstances. The question is whether the Claimant's prospects of success at trial are "*sufficiently favourable to justify such an order*" in the circumstances of the case. This will usually require the court to ask whether the relief is more likely than not to be granted at trial but there will be circumstances when a lesser degree of likelihood will suffice.[81]

5.21 In the author's experience, it is relatively rare for the notionally elevated s.12(3) test to make any difference to the outcome.

(c) Precautionary (*quia timet*) injunctions

5.22 Previously known as *quia timet* injunctions,[82] precautionary protest injunctions prohibit conduct which has either not yet taken place or not yet been carried out by a particular Defendant.

5.23 Because precautionary injunctions seek to prohibit conduct that has not yet happened, the courts are more reluctant to grant them. For example, in *Ineos Upstream v Persons*

[81] *Cream Holdings Ltd v Banerjee* [2005] 1 AC §15 (Lord Nicholls).
[82] The Court of Appeal in *Barking & Dagenham LBC v Persons Unknown* [2022] 2 WLR 946, §8, described the use of Latin in this area of law as "*inappropriate*".

Unknown [2019] 4 WLR 100 (CA), the Court of Appeal rejected the idea of granting wide-ranging protest injunctions before the complained-of conduct had even occurred:

> "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."

5.24 In order to be successful, a Claimant will have to show that there is a sufficiently "*real and imminent risk*" of a tort being committed by the Defendant.[83] These terms are more flexible than they might appear on first glance.

5.25 The courts have not sought to gloss the meaning of a "*real*" risk. They have, rather, emphasised the importance of context and doing justice between the parties – i.e. the degree of probability of future injury is not an absolute standard.[84]

5.26 The term "*imminent*" is used in the sense that the remedy sought is not premature.[85] The likely gravity of damage is also an important factor.[86]

5.27 Even if a precautionary injunction satisfies the "*real and imminent risk*" test, its precautionary nature will impact the breadth of the restriction. For example, in *Ineos Upstream v Persons Unknown* [2019] 4 WLR 100 (CA), the Court of Appeal found that restrictions such as blocking the highway to slow down traffic, slow-walking and unreasonably preventing the claimants from accessing a site were "*too wide and too uncertain*" for a *precautionary* injunction: §41.

5.28 A protest injunction may be sought over an entire project or piece of infrastructure, notwithstanding that it occupies or runs over a very large area of land. The fact that direct action has only targeted certain parts of the project at the date of the Claimant's application does not mean that only those parts targeted to date suffer from a "*real and imminent risk*" of tortious conduct.[87] There are several recent examples of the Court

[83] *London Borough of Islington v Elliott* [2012] EWCA Civ 56, §29 (Patten LJ).
[84] *HS2 v Persons Unknown* [2022] EWHC 2360 (KB), §§176-177 (Knowles J).
[85] *Hooper v Rogers* [1975] Ch 43 (CA), 49-50 (Russell LJ).
[86] *Network Rail Infrastructure Ltd v Williams* [2019] QB 601 (CA), §71 (Sir Etherton MR).
[87] The issue is sometimes dealt with as a point going towards proportionality/ whether the protest injunction has clear geographical limits.

granting such an injunction – covering the entire length of a large project or piece of infrastructure – in these circumstances:

i. In *National Highways Ltd v Persons Unknown* [2021] EWHC 3081 (KB), Lavender J granted an injunction across 4,300 miles of the Strategic Roads Network against protests being conducted by Insulate Britain. It was said that this was necessary due to the "*unpredictable and itinerant nature of the Insulate Britain protests*": §24(7).

ii. In *HS2 v Persons Unknown* [2022] EWHC 2360 (KB), Knowles J granted an interim injunction over effectively the whole route of HS2. Given the activities to date and the protestors stated intention, the Judge found that to limit the scope of the injunction until other parts of the route had been affected would be a licence for "*guerrilla tactics*": §177.

iii. In *Esso Petroleum v Breen* [2022] EWHC 2664 (KB), HHJ Lickley KC granted an injunction covering the entire 105km oil pipeline from Southampton to Heathrow that was being upgraded. He found that, on the evidence, if an injunction was not granted over the entire pipeline the protestors would carry out direct action on those areas not covered: §55.

5.29 The same analysis applies to non-contiguous areas of land. For example, in *Esso Petroleum v Persons Unknown* [2022] EWHC 966 (KB) (Ellenbogen J), the Claimant sought a protest injunction over a number of different sites across the country even though a number of those had not actually been affected to date. Ellenbogen J rejected the argument that the injunction should be confined only to those sites had had already been affected. She stated:

> "28…But that is to adopt an excessively granular, artificial approach to the evidence, considered as a whole. So considered, I am satisfied that the risk of infringement of the claimants' rights, absent injunction, is real. Those aligning themselves with one or both campaigns have shown themselves willing to engage in direct action in furtherance of their aims. ER's stated plans include focused economic disruption at an unspecified single fossil fuel target and to block major UK oil refineries this month.
>
> 29. There is no reason to think that the key sites proportionately identified by the claimants will be treated any differently, going forward, from those sites which have been the subject of past direct action. The risk of harm is sufficiently imminent to justify intervention by the court; activity has escalated since the beginning of this month, with all the associated risks to health and safety and the claimants'

operational activities, set out in their evidence. In those circumstances, in particular, there is no legal basis upon which the claimants should be obliged to suffer harm at each of the Sites before the court will grant relief in relation to it."

5.30 There are many examples of the Court adopting this type of reasoning – see, e.g.: *Shell UK Oil Products Ltd v Persons Unknown* [2022] EWHC 1215 (KB), §48 (Johnson J) and *Ineos Upstream v Persons Unknown* [2017] EWHC 2945 (Ch), §§94-95 (Morgan J).

(d) Obligations on the Claimant

5.31 Other than in the scenarios already discussed at **§3.25 above**, a Claimant has various obligations when obtaining an interim injunction. These include:

i. Giving a cross-undertaking in damages, unless the court orders otherwise.[88] The purpose is to ensure that, if the Defendant ends up winning at trial, they can be compensated for the loss suffered as a result of the (wrongly granted) interim injunction. Different considerations may apply for public authorities, particularly where they are seeking a protest injunction in order to be able to exercise statutory functions.[89]

ii. Progressing the claim. A Claimant obtaining an interim injunction is bound to get on with progressing the claim as rapidly as it can.[90] A failure to do so can lead to the court striking out the claim form as an abuse of process.

A recent example of a Claimant failing to do this is *Ineos Upstream v Persons Unknown* [2022] EWHC 684 (Ch) (HHJ Klein). In that case, the court decried the fact that the Claimant had failed, for a number of years, to take steps to obtain a directions hearing following the decision in *Ineos Upstream v Persons Unknown* [2019] 4 WLR 100 (CA). Even on the Claimant's own case, it had taken 7 months to apply for the interim injunction to be discharged following a material change in circumstances: planning permission for the relevant fracking sites having lapsed. The court found that the Claimant had acted improperly in waiting so long. Ultimately, it decided not to strike out the claim but did order the discharge of the interim injunction on the ground of

[88] CPR PD25A, §5.1(1).
[89] *Financial Services Authority v Sinaloa Gold plc* [2013] 2 AC 28 (SC), §§30-33 and 41 (Lord Mance).
[90] *Gee on Commercial Injunctions* (7th edn, 2022), §§24-029 – 24-032 adopted in *Ineos Upstream v Persons Unknown* [2022] EWHC 684 (Ch), §43 (HHJ Klein).

material change in circumstances. It did, however, impose a sanction in costs on the Claimant.

iii. Keeping the situation under review. As the Court of Appeal said in *Barking & Dagenham LBC v Persons Unknown* [2022] 2 WLR 946 (CA), §89, 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.*" Where, for example, a Claimant becomes aware of information which renders incorrect something that was previously said to the court, it is under a duty to tell the court and/or the Defendant of the change.[91] This duty appears to apply to final injunctions just as much as it does to interim injunctions.[92]

[91] *Ineos Upstream v Persons Unknown* [2022] EWHC 684 (Ch), §44 (HHJ Klein); *Enfield LBC v Persons Unknown* [2020] EWHC 2717 (KB), §32 (Nicklin J).
[92] *Barking & Dagenham LBC v Persons Unknown* [2022] 2 WLR 946 (CA), §77.

6 PERSONS UNKNOWN

6.1 Without the ability to bring proceedings against Persons Unknown, protest injunctions would be of little value. This is because, in most cases, the Claimant will not know the names of all (or most or any of) those carrying out the (direct) action sought to be prohibited. To limit protest injunctions to named Defendants would, therefore, have the effect of insulating from legal action Defendants who deliberately hide their identities from and frustrate the rights and lawful activities of Claimants. That said, the courts are also alive to the potentially draconian consequences of granting wide-ranging injunctions which could bite against unsuspecting members of the public exercising their Article 10/11 ECHR rights. This has led Longmore LJ in *Ineos Upstream v Persons Unknown* [2019] 4 WLR 100 (CA), §31, to say 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.*" Similarly, in *Bromley LBC v Persons Unknown* [2020] 4 All ER 114 (CA), §34, the Court of Appeal relied on Article 6 ECHR (right to fair trial) and the principle that the court should hear both sides of an argument in stating that, "*a court should always be cautious when considering granting injunctions against persons unknown*".

6.2 The courts have, at times, struggled to balance these competing interests. The current state of the law is described below.

(a) When Persons Unknown can be a Defendant

6.3 In order to bring a claim against Persons Unknown, the case law suggests it must be "*impossible*" to name the persons who have or will likely commit the tort unless restrained.[93] That is, on its face, a very high bar. But it is unlikely to mean literal "impossibility" given that it may be *possible* to discover an individual's identity but only if vast amounts of time and money are spent, e.g., using private investigators. In the author's experience, Judges will, in fact, consider whether reasonable steps have been taken to discover the identity of an individual.

6.4 *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 417 (KB) (Nicklin J) is the most extreme example of a Claimant failing to join Defendants whose identities it had discovered. In this case, the Court found that the Claimant had wrongly failed to join

[93] *Ineos Upstream v Persons Unknown* [2019] 4 WLR 100 (CA), §34(2) (Longmore LJ).

any individuals as Defendants, notwithstanding that 37 protestors could have been named at the time of the summary judgment application: §§150 and 163.

(b) How to define Persons Unknown

6.5 Once a Claimant decides that it wishes to make Persons Unknown a Defendant, they must be accurately identified in the claim form, court orders, etc. A failure to do so accurately and correctly according to the case law can be disastrous for a Claimant, with the effect that a class of protestors carrying out direct action is not covered by the injunction.

6.6 The rule is that Persons Unknown must be defined by reference to their conduct which is alleged to be unlawful.[94] This is unlike possession proceedings where the CPR requires that unknown defendants trespassing on the Claimant's land simply be referred to as "Persons Unknown".[95]

6.7 The effect is that describing Persons Unknown in protest injunctions is a cumbersome and page-filling exercise. It essentially requires Claimants to repeat the substantive terms of the injunction by reference to each cause of action.

6.8 By way of example, in relation to a trespass claim on private land, Persons Unknown could be described as follows:

> "PERSONS UNKNOWN WHO ENTER OR REMAIN ON LAND X WITHOUT THE CONSENT OF THE CLAIMANT"

6.9 But, in order to avoid a protest injunction catching a broader class of persons than intended, it is generally good practice to refer specifically to the group of protestors being targeted:

> "PERSONS UNKNOWN WHO, IN CONNECTION WITH CAMPAIGN Z, ENTER OR REMAIN ON LAND X WITHOUT THE CONSENT OF THE CLAIMANT"

6.10 Where there is more than one piece of private land (or more than one cause of action in relation to that private land) there will need to be multiple Persons Unknown:

[94] *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 (CA), §82(2).
[95] CPR r.55.3(4).

"(1) PERSONS UNKNOWN WHO, IN CONNECTION WITH CAMPAIGN Z, ENTER OR REMAIN ON LAND X WITHOUT THE CONSENT OF THE CLAIMANT

(2) PERSONS UNKNOWN WHO, IN CONNECTION WITH CAMPAIGN Z, ENTER OR REMAIN ON LAND Y WITHOUT THE CONSENT OF THE CLAIMANT

(3) PERSONS UNKNOWN WHO, IN CONNECTION WITH CAMPAIGN Z, OBSTRUCT OR OTHERWISE INTERFERE WITH THE CLAIMANT'S ACCESS TO ENTRANCE A ON LAND Y"

6.11 Take the situation where the Claimant is seeking to cover both private and public land (e.g. public highway, parkland, etc.) in an injunction. Here, the Claimant would, generally, not be able to restrain the Defendants' mere presence on public land. It would, therefore, be limited to restraining only certain specified types of conduct, such as erecting structures, tunnelling, locking-on, etc. All of these specified types of conduct will need to be included in the definition:

"(1) PERSONS UNKNOWN WHO, IN CONNECTION WITH CAMPAIGN Z, ENTER OR REMAIN ON LAND X WITHOUT THE CONSENT OF THE CLAIMANT

(2) PERSONS UNKNOWN WHO, IN CONNECTION WITH CAMPAIGN Z, ERECT STRUCTURES ON, TUNNEL UNDER, LOCK ONTO OR AFFIX THEMSELVES TO PUBLIC LAND Y"

6.12 In relation to claims brought on the basis of economic torts, the definition of Persons Unknown will be more unwieldy still as it will need to include each element of the tort. For example, as to conspiracy to injure by unlawful means, the injunction in *Shell UK Oil Products Ltd v Persons Unknown* [2022] EWHC 1215 (KB) (Johnson J) described Persons Unknown as follows:

"PERSONS UNKNOWN DAMAGING, AND/OR BLOCKING THE USE OF OR ACCESS TO ANY SHELL PETROL STATION IN ENGLAND AND WALES, OR TO ANY EQUIPMENT OR INFRASTRUCTURE UPON IT, BY EXPRESS OR IMPLIED AGREEMENT WITH OTHERS, IN CONNECTION WITH

ENVIRONMENTAL PROTEST CAMPAIGNS WITH THE INTENTION OF DISRUPTING THE SALE OR SUPPLY OF FUEL TO OR FROM THE SAID STATION"

6.13 Johnson J stated that including the element of subjective intention was unavoidable because of the nature of the tort: §54.

6.14 It is important for Claimants to sense-check their definition of Persons Unknown to make sure that too broad a class of persons is not captured. For example, in *Birmingham City Council v Afsar* [2019] EWHC 1560 (KB), §70 (Warby J), the Claimant was criticised for describing the Fourth Defendant as "*Persons Unknown*", which was described as "*All persons*" except the other Defendants. As the Judge indicated, this description included the Judge himself.

6.15 Further, in *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 (CA), the claimant defined Persons Unknown as follows:

> "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."

6.16 The High Court and Court of Appeal found this impermissibly wide; it was capable of applying to a person who had never been to the location of the protest (the Canada Goose Shop on Regent Street) and no intention of going there: CA, §85.

(c) How to identify Persons Unknown

6.17 Claimants may be able to identify Persons Unknown through their own investigations – social media has provided a way of identifying individuals who would otherwise be entirely anonymous.

6.18 Alternatively, Claimants may apply for third party disclosure orders against the relevant police authority to provide details on individuals who have previously been arrested by the police and, therefore, will have had to reveal their names and addresses. This can be done pursuant to CPR r.31.17(3), which empowers a court to make an order against non-parties where:

i. the documents of which disclosure is sought are likely to support the case of the Claimant or adversely affect the case of one of the other parties to the proceedings; and,

ii. disclosure is necessary in order to dispose fairly of the claim or to save costs.

6.19 These criteria will generally be satisfied when seeking to identify Persons Unknown in the context of protest injunctions; third party disclosure orders have been made against the police in a number of cases.

6.20 In the first instance, Claimants ought to write to the relevant police authority and seek their consent to such an order. Being on the receiving end of such an application, police authorities will usually remain neutral and confirm that they will abide by any order the court makes.

6.21 Generally speaking, the order will be made by the court without difficulty and, in most instances, without opposition.[96] In *Esso Petroleum v Persons Unknown* [2022] EWHC 1477 (KB) (Bennathan J), however, it was argued by Counsel for an Interested Person that such disclosure should not be ordered on the basis that it involved using the powers of the state to assist a private party obtain an injunction. Bennathan J rejected this submission, finding that "*it seems to me best that any evidence that could be used by the claimants to pursue breaches is gathered by the legally regulated and democratically accountable police forces of the United Kingdom.*": §32. It should be noted, however, that the author is aware of a pending case on this issue dealing specifically with the issue of the appropriateness of such orders.

(d) Consequences of identifying Persons Unknown

6.22 If an individual carrying out the restrained (or sought to be restrained) direct action is identified – in the sense of their name being discovered – that individual must be joined as a Defendant.[97]

6.23 In a few cases it has been argued by Defendants that the Claimant wrongly failed to join certain named individuals who had been identified by the Claimant. To date, the courts have been cautious before requiring Claimants to join specific individuals where there

[96] See, e.g., *Valero Energy Ltd v Persons Unknown* [2022] EWHC 911 (KB), §44 (Bennathan J); *National Highways Ltd v Persons Unknown* [2022] EWHC 1105 (KB), §53 (Bennathan J).
[97] *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 (CA), §82(1).

is not evidence that they have carried out or intend to carry out the direct action restrained by that specific injunction:

i. *HS2 v Harewood* [2022] EWHC 2457 (KB) ("**Appendices Follow Containing the Approved Transcripts of 4 Decisions Made Extempore During the Hearings**") concerned an order granted by Cotter J which had contained: (a) a protest injunction, which applied to certain named Defendants and Persons Unknown, but in relation to which D33 was not a named Defendant; and, (b) a declaration that that the Claimant was entitled to possession of the land, which did name D33 as a Defendant. A committal application having been brought against him, D33 argued that the protest injunction did not bind him because he was not a named Defendant and but he could also not be a Person Unknown given that he was referred to in the order and so obviously known.

   This argument was rejected by Ritchie J who found that he was a Person Unknown under the terms of the *injunction*. In particular, he was not trespassing on the relevant land at the time the injunction was granted and no-one knew at that time who would become a newcomer for the purpose of that specific injunction: §§32 and 35 of the "*Appendices…Containing the Approved Transcripts of 4 decisions Made Extempore During the Hearings*".

   The Court of Appeal (by a majority) rejected his appeal in *Cuciurean v Secretary of State for Transport* [2022] EWCA Civ 1519. The Defendant had not occupied the relevant land so far and the Claimant could not look into the future to see what the Defendant was going to do in the future: §37. Coulson LJ also stated that the court should not prefer an approach which meant a Claimant was better off naming all possible Defendants in a protest injunction: §42.

   Phillips LJ disagreed; the Defendant was a known person for the purpose of the proceedings and the order and was also known as a person who may subsequently enter the relevant land: §100(i).

ii. In *Esso Petroleum v Persons Unknown* [2022] EWHC 966 (KB) (Ellenbogen J), §30, the Judge accepted the Claimant's argument that there was not the requisite "*causal nexus*" between certain well-known members of Just Stop Oil and the specific direct action being targeted at the Claimant.

6.24 What happens if the Court finds that certain individuals who ought to have been joined were not? The most obvious consequence would appear to be that those specific

individuals would not be covered by the injunction. This is because they would not be named Defendants and they would no longer be Persons Unknown. Except perhaps in extreme circumstances (see **§6.4 above**) – it is difficult to see that the failure to name certain individuals would have a broader impact, such as on the Court's willingness to grant an injunction at all.

6.25 Apart from discovering an individual's name, a Defendant may also be "identified" in the sense of capable of being described by reference to their conduct through a photo, video or other evidence. Until *Barking & Dagenham LBC v Persons Unknown* [2022] 2 WLR 946 (CA), this method of identification was very important. In the period between the judgments in *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 (CA) (5 March 2020) and *Barking & Dagenham LBC v Persons Unknown* [2022] 2 WLR 946 (CA) (13 January 2022), Claimants could only obtain final injunctions against individuals who had already carried out the direct action sought to be restrained; in other words, they would not be able to obtain a final injunction against anyone who was a "newcomer". This meant that being able to identify an individual, if not by name then by their conduct and physical description, was essential. In *Barking & Dagenham LBC v Persons Unknown* [2022] 2 WLR 946 (CA), however, the Court of Appeal reversed the position finding that newcomers could be covered by final injunctions as Persons Unknown: §§92-96, 99. The effect is that this method of identification no longer plays an important part of the process for a Claimant.

7 HUMAN RIGHTS

7.1 The area of protest injunctions is infused with human rights. There is barely a part of the proceedings left untouched by it: its impact being felt just as much in procedural issues (e.g. notice and service) as in substantive ones. This Section deals with the latter. In particular, it considers the tests that will need to be satisfied before a court grants a protest injunction, notwithstanding potential interference with a protestor's ECHR right, as well as how to balance the various competing rights and interests.

(a) The rights in play

7.2 For Defendants, the main rights that will be impacted by a protest injunction will be Articles 10 (freedom of expression) and 11 ECHR (freedom of assembly and association). These state that:

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

others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

7.3 Articles 10 and 11 ECHR are closely related; the case law has treated Article 11 ECHR as a specific manifestation of the broader Article 10 ECHR right. In the protest context, the analysis under both tends to be identical such that courts invariably deal with them together.

7.4 These rights are given strong protection and it is of their very essence that they can affect or disturb others. As Sedley LJ stated in *Redmond-Bate v Director of Public Prosecutions* [2000] HRLR 249 (KB), §20: "*Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having.*"

7.5 For Claimants, the main right that will be impacted by those carrying out direct action will be Article 1 of Protocol 1 ECHR. This states that:

> "(1) 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."

7.6 There is House of Lords authority that "core" public authorities – e.g. governmental organisations – do not themselves enjoy ECHR rights. This is because they cannot be "*victims*", for the purpose of s.7 of the Human Rights Act 1998, as that term is defined in Article 34 ECHR as "*any person, non-governmental organisation or group of individuals*".[98]

7.7 In a series of protest cases, however, the courts seemingly *have* allowed public authorities to rely on their A1P1 ECHR rights (or equivalent common law rights) against protestors. The matter was fully argued in *HS2 v Persons Unknown* [2022] EWHC 2360 (KB). Knowles J appears to have found that he was bound by Court of Appeal authority that even core public authorities can rely on A1P1 ECHR "*and the common law values they reflect*" in a protest injunction case: §§125-129. The reasoning in *Aston Cantlow* was not dealt with.

7.8 For other examples where this approach has been taken, see:

i. *Secretary of State for Transport v Cuciurean* [2022] 1 WLR 3847 (CA), §28 (Lewison LJ);

[98] *Aston Cantlow v Wallbank* [2004] 1 AC 546 (HL), §8 (Lord Nicholls), §45 (Lord Hope), §87 (Lord Hobhouse).

ii. *Olympic Delivery Authority v Persons Unknown* [2012] EWHC 1114 (Ch), §24 (Arnold J); and,

iii. *Olympic Delivery Authority v Persons Unknown* [2012] EWHC 1012 (Ch), §22 (Arnold J).

(b) Private land

7.9 The position is straightforward where a Claimant is alleging trespass on private land; Articles 10/11 ECHR will provide no protection to those protesting on privately owned land or upon publicly owned land from which the public are generally excluded.[99] It is not entirely clear whether Articlse 10/11 ECHR are engaged at all in such a situation but, whether or not they are, the result is the same. A possible exception to this is where it can be said that the bar on access to private property would lead to the essence of the right being destroyed - e.g. where an entire town is controlled by a private body.[100]

7.10 The effect is that in this context a protestor has no rights for the Court to weigh in the balance and a protest injunction will generally be granted as a matter of course.

(c) Public land

7.11 The situation is different where protest injunctions are sought covering land which the public have some legal entitlement to access. This most commonly includes the public highway but can include other types of land, such as park land, and other public spaces, such as Parliament Square. In these instances, courts will have to consider the Article 10/11 ECHR rights of protestors.

i. <u>Difference between protest and direct action</u>

7.12 There is a fundamental difference between simple protest and (peaceful) direct action; unlike the former, the latter involves as its aim the deliberate disruption and frustration of a person's lawful activity. Those seeking to obtain a protest injunction are generally only concerned to stop direct action rather than protest *per se*.

7.13 This distinction is analysed in the case law as the difference between seeking to *persuade*, on the one hand, and seeking to *compel* others to act in a way you desire, on the other

[99] *DPP v Cuciurean* [2022] 3 WLR 446 (DC), §§40-50, relying on *Appleby v UK* (2003) 37 EHRR 38; *Ineos Upstream v Persons Unknown* [2019] 4 WLR 100 (CA), §36 (Longmore LJ).
[100] *DPP v Cuciurean* [2022] 3 WLR 446 (DC), §§44-42.

hand.[101] Whereas both can fall within Article 10/11 ECHR,[102] direct action is not at the core of those rights.[103] It will, therefore, be given less weight when weighing the competing rights and interests in play.[104] By contrast, in *Canada Goose v Persons Unknown* [2020] 1 WLR 417 (KB), §§98, 125, (Nicklin J) the Court was clearly concerned that the protest injunction restrained the conduct of simple protestors.

7.14 There may be some circumstances in which direct action will not be protected by Article 10/11 ECHR. For example, in *Heathrow Airport Ltd v Garman* [2007] EWHC 1957 (KB) (Swift J) a group of protestors threatened to conduct mass disruption at Heathrow airport. The Judge appeared to find that this activity was not protected by Articles 10/11 ECHR:

> "108. Reliance is placed by the Defendants on Articles 10 and 11 of the ECHR, i.e. the rights to freedom of expression and freedom of association. These are, of course, fundamental rights that must be carefully guarded. However, these rights do not entitle ordinary citizens, by means of mass protest or unlawful action, to stop the lawful activities of others.
>
> 109. The activity that is intended by Plane Stupid and others is not a lawful assembly for the purpose of communicating their views to members of the public. Such an assembly always carries the attendant risk of being hijacked by a minority of persons intent on behaving unlawfully. In those circumstances, the rights of the law-abiding majority should plainly not be curtailed. But the position here is very different. The activity intended is not a lawful protest. Its sole purpose is to disrupt the operation of the airport. The actions contemplated may be peaceful in that they involve no violence. They would, however, be designed to interfere with the rights of thousands of people, acting perfectly lawfully, as well as with the lawful activities of an authority responsible for running an operation of vital importance to this country, its international communications and its commercial interests."

7.15 It is possible that this authority, of some vintage in protest injunction terms, simply no longer represents good law. In *Sheffield CC v Fairhall* [2017] EWHC 2121 (KB), however, Males J, in the course of dealing with the issue of whether direct action was protected by Article 10/11 ECHR, endorsed it. He stated that:

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[101] *Shell UK Oil Products Ltd v Persons Unknown* [2022] EWHC 1215 (KB), §§61-62 (Johnson J); *Cuadrilla Bowland v Persons Unknown* [2020] 4 WLR 29 (CA), §94 (Leggatt LJ).
[102] Direct action will tend to engage Article 10/11 ECHR rights: see, e.g., *Sheffield CC v Fairhall* [2017] EWHC 2121 (KB), §§74-80 (Males J).
[103] *Attorney General's Reference (No. 1 of 2022)* [2022] EWCA Crim 1259, §86; *DPP v Cuciurean* [2022] 3 WLR 446 (DC), §§36-37; *Shell UK Oil Products Ltd v Persons Unknown* [2022] EWHC 1215 (KB), §59 (Johnson J); *Balfour Beatty Group Ltd v Persons Unknown* [2022] EWHC 874 (KB), §68 (Linden J).
[104] *DPP v Ziegler* [2022] AC 408 (SC), §§70, 74 (Lord Hamblen and Lord Stephens); *Sheffield CC v Fairhall* [2017] EWHC 2121 (KB), §89(1), (4)-(7) (Males J).

"78. It is not surprising that the extreme activities of the defendants in the Heathrow Airport case were held not to be protected by articles 10 and 11. They appear to have accepted that they supported and encouraged "unlawful direct action" in the pursuit of their objectives: see para 23 of the judgment. However, while the case supports the existence of a distinction between peaceful protest and unlawful direct action, "direct action" is not a term of art and it does not necessarily follow that all activities which may be so described are unlawful. Nor does it follow that every action which constitutes a trespass or is contrary to some provision of domestic criminal law is necessarily outside the scope of the articles. So to hold would be contrary to the decision of the Court of Appeal in *City of London Corpn v Samede* [2012] PTSR 1624 , where the establishment of the Occupy camp outside St Paul's Cathedral was found to be tortious and to involve the commission of a criminal offence, not least because it impeded members of the public in doing what they were lawfully entitled to do: see eg the judgment at first instance [2012] EWHC 34 (QB) at [92]. Despite this, the defendants' article 10 and 11 rights were held to be engaged so that the order for possession sought by the City needed to be justified under paragraph 2 of those articles."

7.16 The effect is that certain types of direct action, even if peaceful, may not be protected by Articles 10/11 ECHR.

7.17 This can be contrasted with protests involving some element of violence to person and property – i.e. "*where the organisers engage in violence, have violent intentions, incite violence or otherwise 'reject the foundations of a democratic society'*" – which are definitely not protected by Article 10/11 ECHR.[105]

ii. <u>Test to be applied</u>

7.18 When deciding whether to grant a protest injunction (at the interim or final stage), the Court will have to ask whether the interference with the Article 10/11 ECHR rights of protestors is "*necessary in a democratic society*". This requires applying the following tests:[106]

- Is the aim sufficiently important to justify interference with a fundamental right? For this purpose, a Claimant will tend to be able to rely on its own A1P1 ECHR right or other lawful activity it is seeking to pursue.
- Is there a rational connection between the means chosen and the aim in view? A protest injunction restraining direct action will invariably be rationally

[105] *Attorney General's Reference (No. 1 of 2022)* [2022] EWCA Crim 1259, §§82, 84-87, 90, 102, 110.
[106] *DPP v Ziegler* [2022] AC 408 (SC), §§64-65 (Lord Hamblen and Lord Stephens).

connected to the aim of protecting the Claimant's A1P1 ECHR rights or other lawful activities.

- Are there less restrictive alternative means available to achieve that aim? This is considered further below.
- Is there a fair balance between the rights of the individual and the general interest of the community, including the rights of others? This is considered further below.

7.19 In practice, it is the last two of these questions which will figure most heavily in the Court's analysis.

iii. Less restrictive alternative means

7.20 In some cases, where a Claimant has sought to restrain direct action on the public highway, Defendants have argued that a protest injunction should not be granted on the bases that: (1) the precise circumstances in which such conduct will take place will vary; and, (2) it should, therefore, be left to the police to strike the right balance on each occasion and determine how to deal with the protest.

7.21 Different judges have taken different approaches to this argument. In *Esso Petroleum v Persons Unknown* [2022] EWHC 1477 (KB), Bennathan J accepted this argument. He stated:

> "28. I do have a concern in cases such as this about banning any blocking of the road flowing from the Supreme Court case law in *Ziegler*. The effect of that decision, it seems to me, is that Parliament and the Supreme Court have brought about a situation where the rights of protestors and the rights of those against whom they protect can be assessed and weighed carefully with knowledge of all the facts. An injunction banning any blocking of any road would have the effect of demolishing that delicate balance. There would be no "lawful excuse" defence to a breach of that order. Protestors whose identities, dispositions and activities were completely unknown to the court when the order was made would be liable to imprisonment.
>
> 29. In my view the better course when dealing with actions by protestors that might be found lawful on a *Ziegler* assessment, is that taken by the claimants in this case allowing this court to leave those matters to the police to enforce and the Magistrates' Court to adjudicate. I should make clear that these observations on the law after *Ziegler* do not seek to encourage individuals to block highways nor to assure anyone that such action can be carried out with impunity. The police have

the power to arrest those they consider to be committing an offence under s.137 of the Highways Act 1980, and the courts have the power to convict them."

7.22 The Judge did go on to state that he was "*not purporting to lay down any sort of immutable rule*": §30.

7.23 Bennathan J also took the same approach in *Valero Energy Ltd v Persons Unknown* [2022] EWHC 911 (KB), §§35-42.

7.24 In other cases, the argument has been rejected. For example, in *Three Counties Agricultural Society v Persons Unknown* [2022] EWHC 2708 (KB), Spencer J stated:

> "25…In particular, I do not consider that it is sufficient to leave the situation on the highway to the duties of the police. The aims of the police (to uphold the criminal law) are not identical to the legitimate aims of the Claimant (to avoid public and private nuisance), and I consider that there would be a real risk, if no order were made, that there would be direct physical — and potentially violent — confrontation which the police would be unable to prevent and a risk to the maintenance of public order. The police are generally reactive rather than proactive and the injunction sought would complement the function of the police in maintaining public order and responding to criminal obstruction of the highway"

7.25 Similarly, in *Esso Petroleum v Breen* [2022] EWHC 2664 (KB) (HHJ Lickley KC) the Interested Persons made the same argument but this was not accepted by the Judge.[107]

iv. <u>Factors to consider as part of fair balance analysis</u>

7.26 When deciding how to strike a fair balance between the competing rights, courts will consider a number of factors, including:[108]

(1) Whether the views giving rise to the protest relate to very important issues and which many would see as being of considerable breadth, depth and relevance. It is rare to find a case where the court finds the issues being protested about do not relate to important issues. In *Shell UK Oil Products Ltd v Persons Unknown* [2022] EWHC 1215 (KB), for example, Johnson J referred to climate change protestors as being "*motivated by matters of the greatest*

[107] See also *Shell UK Oil Products Ltd v Persons Unknown* [2022] EWHC 1215 (KB), §60 (Johnson J).
[108] See *City of London v Samede* [2012] 2 All ER 1039 (CA), §§39-41 (Lord Neuberger MR) and adopted by the Supreme Court in *DPP v Ziegler* [2022] AC 408 (SC), §72 (Lord Hamblen and Lord Stephens).

importance": §57. This will not, however, be a "*particularly weighty factor*" to avoid judges giving greater protection to views they think are important.[109]

(2) Whether the protestors believed in the views they were expressing. Again, it is rare to find a case where a protestor does not believe in the views being expressed.

(3) The importance of the precise location to the protestors.[110] In *National Highways Ltd v Persons Unknown* [2021] EWHC 3081 (KB), Lavender J counted against the Insulate Britain protestors the fact that their protest on the Strategic Road Network was not directed at a specific location: §40(4)(a).[111] In *Ineos Upstream v Persons Unknown* [2017] EWHC 2945 (Ch), §114, it also counted against the protestors that the location of the direct action was chosen merely because it was the best place to interfere with the activities of fracking operators. This can be contrasted with *Westminster CC v Haw* [2002] EWHC 2073 (KB), §21 (Gray J), where the Court found the location of the protest – Parliament Square outside the Houses of Parliament – was appropriate given that its aim was to influence Parliament on its policy towards Iraq. Similarly, in *Valero Energy Ltd v Persons Unknown* [2022] EWHC 911 (KB), §41 (Bennathan J), a specific term of an interim injunction was not granted, in part due to the importance of the location of the protest on the highway.

(4) The extent to which the protestors could still protest even if a protest injunction was granted.[112] In a number of cases, courts have granted protest injunctions and found that the Defendants are still able to make their points in other ways.[113]

(5) The extent to which the continuation of the protest would breach domestic law.

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[109] *City of London v Samede* [2012] 2 All ER 1039 (CA), §41 (Lord Neuberger MR).
[110] *Shell UK Oil Products Ltd v Persons Unknown* [2022] EWHC 1215 (KB), §59 (Johnson J); *Esso Petroleum v Persons Unknown* [2022] EWHC 966 (KB), §22(iv) (Ellenbogen J); *Balfour Beatty Group Ltd v Persons Unknown* [2022] EWHC 874 (KB), §69 (Linden J); *Mayor of London v Hall* [2011] 1 WLR 504 (CA), §49 (Lord Neuberger MR); *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23, §47 (Wall LJ).
[111] See also *National Highways Ltd v Persons Unknown* [2022] EWHC 1105 (KB), §49 (Bennathan J).
[112] Although related, I have separated out factors (3) and (4) as being conceptually different.
[113] See *Esso Petroleum v Breen* [2022] EWHC 2664 (KB), §53(iv) (HHJ Lickley KC); *Shell UK Oil Products Ltd v Persons Unknown* [2022] EWHC 1215 (KB), §59 (Johnson J); *Esso Petroleum v Persons Unknown* [2022] EWHC 966 (KB), §22(iv) (Ellenbogen J); *Balfour Beatty Group Ltd v Persons Unknown* [2022] EWHC 874 (KB), §§69-70 (Linden J); *National Highways Ltd v Persons Unknown* [2021] EWHC 3081 (KB), §40(4)(a) (Lavender J); *Sheffield CC v Fairhall* [2017] EWHC 2121 (KB), §89(7) (Males J); *Mayor of London v Hall* [2011] 1 WLR 504 (CA), §48 (Lord Neuberger MR).

(6) The duration of the protest. In *Sheffield CC v Fairhall* [2017] EWHC 2121 (KB), §88, Males J stated that "*a protest which starts as a legitimate exercise of article 10 or 11 rights may become unlawful if it continues for a more extended period. The more serious the tortious or criminal conduct in question and the greater the impact on the rights of others, the shorter the period is likely to be before the initially legitimate protest becomes unlawful*." [114] Moreover, a court will look at the practical realities of the situation in determining how long the direct action has been continuing for; it will not necessarily be the duration of an individual protest as opposed to the overall length of a course of a campaign of direct action.[115] By contrast, in *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23, §41 (Laws LJ), the fact that the Aldermaston Women's Peace Camp had been taking place each month for over 23 years on the Secretary of State's land without complaint supported the protestors' argument that the camp was not unduly interfering with the Secretary of State's rights.

(7) The degree to which the protestors occupy the land.

(8) The extent to which the protest interferes with the rights of others.[116] This is against a background that "*Rights worth having are unruly things*" and that activities engaging Articles 10/11 ECHR cannot be interfered with merely because they are "*inconvenient or tiresome*".[117] *Westminster CC v Haw* [2002] EWHC 2073 (KB), §21 (Gray J) is a case where the impact on the rights of others was minimal because few people actually used the inner pavements in Parliament Square, the location of the obstruction.[118] Similarly, in *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23, §48 (Wall LJ), there was no evidence that the presence of the Aldermaston Women's Peace Camp was incompatible with the operational requirements of the landowner. By contrast, in many cases the interference with the rights of others has been substantial and the courts have not been persuaded to find that the matter

[114] See also *Mayor of London v Hall* [2011] 1 WLR 504 (CA), §48 (Lord Neuberger MR).
[115] See, e.g. *Balfour Beatty Group Ltd v Persons Unknown* [2022] EWHC 874 (KB), §67 (Linden J); *Ineos Upstream v Persons Unknown* [2017] EWHC 2945 (Ch), §114 (Morgan J); *Sheffield CC v Fairhall* [2017] EWHC 2121 (KB), §89(4) (Males J).
[116] E.g., in relation to highway protests, whether there are alternative routes which can be used: *National Highways Ltd v Persons Unknown* [2021] EWHC 3081 (KB), §40(4)(b) (Lavender J).
[117] *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23, §43 (Laws LJ).
[118] Contrast *Mayor of London v Hall* [2011] 1 WLR 504 (CA), §49 (Lord Neuberger MR).

should be left to the police; such enforcement could only take place after the event meaning inevitable loss to the Claimant.[119]

(9) The extent to which the subject of the protest has been through the democratic processes.[120] In *HS2 v Persons Unknown* [2022] EWHC 2360 (KB), Knowles J relied heavily on the fact that HS2 was the "*culmination of a democratic process*" in granting the protest injunction: §§16-23. Also in relation to protests on HS2, in *DPP v Cuciurean* [2022] 3 WLR 446 (DC), Lord Burnett of Maldon CJ stated Articles 10/11 ECHR "*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*.": §84.[121]

7.27 Some cases have stated that the peaceful nature of a protest, and the lack of disorder, is also a relevant factor.[122] In *DPP v Cuciurean* [2022] 3 WLR 446 (DC), however, Lord Burnett of Maldon CJ appeared to suggest that this was not relevant – "*if the defendant 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.*": §86.

[119] See **§§7.20-7.25 above**.
[120] See *Esso Petroleum v Breen* [2022] EWHC 2664 (KB), §§4-5 (HHJ Lickley KC); *Sheffield CC v Fairhall* [2017] EWHC 2121 (KB), §§90-91 (Males J);
[121] In relation to HS2, see also *Balfour Beatty Group Ltd v Persons Unknown* [2022] EWHC 874 (KB), §71 (Linden J).
[122] *DPP v Ziegler* [2022] AC 408 (SC), §80 (Lord Hamblen and Lord Stephens); *National Highways Ltd v Persons Unknown* [2021] EWHC 3081 (KB), §39(1)-(2) (Lavender J).

8 SCOPE OF THE INJUNCTION

8.1 In *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 (CA), §82, the Court of Appeal set out various requirements relating to the scope of protest injunctions. Although expressly said to refer to interim injunctions, they apply equally to final injunctions:

> "(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."

8.2 This section will consider these requirements in more detail.

(a) Terms must correspond to threatened tort, including lawful conduct if necessary

8.3 Generally, the conduct sought to be prohibited by a protest injunction must be closely tailored to the cause of action relied upon – in other words, it must incorporate and be confined to the ingredients of the relevant tort. For example:

i. In a trespass claim, the injunction must state something along the lines of:

> "The Defendant is prohibited from entering or remaining on the Claimant's land without the Claimant's consent."

ii. In a conspiracy to injure by unlawful means claim, the injunction must state something along the lines of:[123]

[123] Using the example in *Esso Petroleum v Breen* [2022] EWHC 2664 (KB), §59 (HHJ Lickley KC).

"The Defendant must not with any other person with the intention of causing damage to the Claimant by preventing or impeding the construction of the pipeline do [the prohibited conduct]."

8.4 The courts have, however, admitted of some flexibility to this principle. In *Cuadrilla Bowland v Persons Unknown* [2020] 4 WLR 29 (CA), §50, Leggatt LJ accepted that "*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*." This was confirmed in *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 (CA), §§78, 82(5).

8.5 A claim which fell foul of this rule was *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 (CA) itself. The injunction applied for sought to restrain a huge amount of protest activity outside the Canada Goose shop on Regent Street in London. In the course of finding that the interim injunction previously granted was impermissibly wide, the Court of Appeal stated:

"86…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."

8.6 Similarly, *Valero Energy Ltd v Persons Unknown* [2022] EWHC 911 (KB) involved feared direct action on environmental grounds against the Claimant's business importing and processing oil. Whilst granting an injunction prohibiting certain action, Bennathan J refused to include the following terms:

"Blocking, endangering, slowing down, preventing, or obstructing the free passage of traffic onto or along those parts of the Access Roads"

8.7 The Judge decided that, at that moment in time, the injunction should not be granted to catch otherwise lawful conduct:

"40. In *Canada Goose* the Court stated that an injunction can ban what would otherwise be lawful, but the way that proposition was expressed was in qualified [and perhaps even reluctant] terms: *may* include lawful conduct if, and *only to the extent* that, there is *no other proportionate means* of protecting the claimant's rights [emphasis added]. The Court was clearly not expressing a rule that a defendant's otherwise lawful conduct was *irrelevant* to whether an injunction should be granted. The limit of that ruling in *Canada Goose*, it seems to me with respect, is that

the facts of a certain case may require such an order which I, of course, unhesitatingly accept. My conclusion is only that this case, at present, does not."

8.8 This can be contrasted with a case such as *Esso Petroleum v Breen* [2022] EWHC 2664 (KB) (HHJ Lickley KC), in which a protest injunction was granted to prevent direct action against the upgrading of the Claimant's pipeline. Given the potential for the protest injunction to catch lawful conduct, HHJ Lickley KC stated that:

> "57… where potentially lawful conduct might be restrained by the order, the balance comes down firmly in favour of the Claimant given the strategic importance of the pipeline project and the potential to protest peacefully without obstruction of the highway."

(b) Terms must be sufficiently clear and precise

8.9 The terms of any injunction must be clear and certain to make it clear what is permitted and what is prohibited.[124]

8.10 The fullest treatment of the need for clarity and precision in protest injunctions can be found in *Cuadrilla Bowland v Persons Unknown* [2020] 4 WLR 29 (CA), §§54-83 (Leggatt LJ). Although an appeal against a committal order, one of the grounds of appeal was that certain paragraphs of the protest injunction were insufficiently clear and certain. The following main propositions can be taken from the case:

i. There are three types of unclarity, in particular where words are (§§57-58):

- Ambiguous: words having more than one meaning.
- Vague: terms worded in such a way so as to create borderline cases where it is inherently uncertain whether the term applies. It will be unacceptably vague where there is no way of telling with confidence what will fall within its scope and what will not.
- Inaccessible: terms which are convoluted, technical or opaque and, therefore, not readily understandable to Defendants. Where Defendants include Persons Unknown, terms must not be such as to require legal advice to understand.

ii. Whether the terms of a protest injunction are unclear is dependent on context. What may be clear in one situation may be unclear in another: §60.

[124] *AG v Punch Ltd* [2003] 1 AC 1046 (HL), §35.

iii. There is nothing unclear, in principle, about including a requirement of intention in an injunction. It is an ordinary English word to be given its ordinary meaning. *Dicta* to the contrary in *Ineos Upstream v Persons Unknown* [2019] 4 WLR 100 (CA) was wrong: §§63-65, 68-69, 74. In any contempt application, however, a Claimant will still have to prove such intention beyond reasonable doubt. That said, the Court of Appeal has said it is better practice to formulate a prohibition without reference to intention if the tortious act can be described in ordinary language without doing so.[125] It is not clear how this can be squared with cases where the court has positively included a requirement for intention as a further layer of protection for protestors: see, e.g., *National Highways Ltd v Persons Unknown* [2021] EWHC 3081 (KB), §24(6) (Lavender J).

iv. If a term of a protest injunction is not sufficiently clear for any of these reasons, a Defendant should not be held in contempt of court for allegedly breaching it: §59. But this will only be the case if the unclarity itself is material to the alleged breach: §60.

8.11 Context is key. For example, in *Ineos Upstream v Persons Unknown* [2019] 4 WLR 100 (CA), a term of the interim injunction sought to restrain slow walking in front of vehicles with the object of slowing them down and the intention of causing inconvenience and delay. Longmore LJ found that this was impermissibly uncertain (§§40-42): no damage may result and how slow was slow?

8.12 By contrast, in *Cuadrilla Bowland v Persons Unknown* [2020] 4 WLR 29 (CA), the Court of Appeal found that a term of the injunction prohibiting "*blocking or obstructing the highway by slow walking in front of vehicles with the object of slowing them down*" was acceptable. The Court distinguished *Ineos* on the basis that *Ineos* was a "*pure*" precautionary injunction where no direct action had yet taken place. In *Cuadrilla*, however, there was a well-documented history of this sort of conduct which provided a solid basis for the prohibition.

8.13 In *Valero Energy Ltd v Persons Unknown* [2022] EWHC 911 (KB), Bennathan J refused to include the following term in an interim injunction:

> "Blocking, endangering, slowing down, preventing, or obstructing the free passage of traffic onto or along those parts of the Access Roads…"

[125] *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 (CA), §81.

8.14 One of the grounds for doing so was that it lacked clarity. The Judge stated:

> "37…Does a protestor standing at the very edge of the carriageway endanger themselves or a vehicle? Would a large group of noisy protestors proximate to the road cause a cautious tanker driver to slow down?"

8.15 Bennathan J did stress, however, that he was not setting down an immutable rule. Rather, this specific case had not yet developed to the stage where such a prohibition was justified: §42.

8.16 The courts will also consider whether the Defendant was himself/herself clear about what conduct was prohibited and whether it caught him/her. In *Cuciurean v Secretary of State for Transport* [2022] EWCA Civ 1519, for example, a majority of the Court of Appeal found that a plausible alternative construction of the protest injunction – that it did not catch the Defendant – did not make the finding of contempt unjustified: §51. This was because the Defendant himself had always understood that he was caught by the order.

(c) Clear geographical limits

8.17 In most cases a Claimant will be able to define the area covered by the protest injunction without too much difficulty. This is most obviously done by way of a map attached to the injunction which delineates the relevant land on which the injunction bites. It is rare for a claim to become unstuck on this ground.

8.18 There are some cases where it is more difficult. *Sheffield CC v Fairhall* [2017] EWHC 2121 (KB) (Males J) is such an example, where the Defendants were carrying out direct action to prevent the felling of a large number of highway trees throughout Sheffield, which the Claimant was doing in exercise of its statutory duties. This most usually consisted of Defendants standing under a tree to be felled to frustrate its felling. The Claimant obtained an injunction which covered "safety zones" around trees to be felled. In order to make the injunction geographically certain, the injunction provided for fencing to be erected around each tree to be felled, so that Defendants could be clear on where exactly they were and were not allowed to stand.

(d) Clear temporal limits

8.19 It will be unacceptable for an injunction to have no temporal limit.[126]

8.20 In terms of interim injunctions, there are generally three possibilities:

[126] *Ineos Upstream v Persons Unknown* [2019] 4 WLR 100 (CA), §43 (Longmore LJ).

i. Interim injunctions will often be expressed to be effective "*Until trial or further order*". In order to make sure that this temporal limit does not become academic, there are obligations on a Claimant to make sure that steps towards a final trial are taken (see §**5.31 above**).

ii. In some cases, courts will set a short defined temporal limit for the purpose of making sure the final trial comes on quickly. For example, in *Esso Petroleum v Breen* [2022] EWHC 2664 (KB), HHJ Lickley KC granted an interim injunction for 4 months, within which the final trial had to take place. He did not grant it for 15 months as sought, until December 2023, because that would in effect be a final order, the relevant works having been planned to finish by that date: §64.

iii. Because interim injunctions against Persons Unknown will sometimes not proceed to a final trial – there being no identified individual actually defending himself/herself – the court may instead provide for a longstop date with a regular review mechanism. For example, in *HS2 v Persons Unknown* [2022] EWHC 2360 (KB), Knowles J stated:

> "109. So far as keeping the injunction in this case under review is concerned, the draft order provides for a long stop date of 31 May 2023, when it will expire unless renewed… It also provides for yearly reviews around May time (ie roughly the anniversary of the hearing before me) in order 'to determine whether there is a continued threat which justifies continuation of this Order' … and there are the usual provisions allowing for persons affected to apply to vary or discharge it..."

8.21 For final injunctions, there will generally be a defined end-date. The duration of the injunction will depend on the circumstances.

8.22 Where the Claimant's activity being disrupted is a discrete project, such as construction of a development, it will usually be proportionate to seek an injunction until that project is planned to be complete.

8.23 Where the Claimant's activity being disrupted is an ongoing process with no defined endpoint, such as its usual commercial activity, an injunction in the range of 12 to 18 months is usual. There have been protest cases in the past where longer injunctions were granted. For example, in *Harrods Ltd v McNally* [2018] EWHC 1437 (KB), an injunction was directed at limiting the activities of the protestors objecting to Harrods' policy of selling fur products. Nicol J extended an injunction originally granted in 2013 for a further 5 years. More recently, however, it is difficult to find a case where a protest

injunction has been granted for longer than 18 months. In addition, the courts have stated that it is good practice to incorporate a periodic review into the order.[127]

8.24 On whether a final injunction can be extended before the fixed time limit expires, particularly where there is no liberty to apply to extend, Nicklin J expressed doubts in both *Enfield LBC v Persons Unknown* [2020] EWHC 2717 (KB), §4(b) and *Canterbury CC v Persons Unknown* [2020] EWHC 3153 (KB), §43(h).

[127] *Barking & Dagenham LBC v Persons Unknown* [2022] 2 WLR 946 (CA), §108.

9 INTERESTED PERSONS

9.1 There will often be no Defendants willing or able to contest the grant of a protest injunction. Legal aid is not available and there is the prospect of being liable for the Claimant's costs of bringing the claim. There is, however, another way in which an individual concerned about a protest injunction can make its concerns known to the Court.

9.2 CPR 40.9 states 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."

9.3 Once an order has been granted, therefore, a non-party may apply to have it set aside or varied as long as they can show that they are "*directly affected*" by it. In a number of cases, Judges have found that protestors who would not otherwise be Defendants ought to be allowed to file evidence and make submissions.

9.4 For example, *National Highways Ltd v Persons Unknown* [2022] EWHC 1105 (KB) involved a summary judgment application following the grant of interim injunctions to prevent direct action on the Strategic Road Network by supporters of Insulate Britain. Ms B argued that she ought to be able to make submissions on the basis that people like her, not involved with Insulate Britain, may inadvertently breach the injunctions. Bennathan J made the order under CPR 40.9 because (see §21):

a. Her concern was not fanciful and would amount to being "*directly affected*".

b. In an injunction against Persons Unknown, the Court should adopt a flexible approach for those with a general concern by a person supporting the relevant political cause.

c. A generous view should be taken where the Court would not otherwise be hearing submissions against the injunction.

9.5 Non-parties were also permitted to make submissions in: *Esso Petroleum v Persons Unknown* [2022] EWHC 1477 (KB) (Bennathan J), §§2-5, albeit not expressly by reference to CPR r.40.9; in *Esso Petroleum v Breen* [2022] EWHC 2664 (KB), §11 (HHJ Lickley KC); and, in *Three Counties Agricultural Society v Persons Unknown* [2022] EWHC 2708 (KB), §§14-21 (Spencer J).

9.6 Such non-parties do, however, have to be wary about being liable for a Claimant's costs, particularly if their submissions are broad in scope, cause the Claimant to incur extra

costs and are ultimately unsuccessful. This is because the Court has the power to make a costs order even against non-parties.[128]

9.7 The only qualifications on this power are that, pursuant to CPR r.46.2:

a. The non-party must be added as a party to the proceedings for the purposes of costs only; and,

b. The non-party must be given a reasonable opportunity to attend a hearing at which the Court will consider the matter further.

9.8 The authorities sometimes talk about non-party costs order being "*exceptional*" but the Privy Council in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] 1 WLR 2807 (PC) clarified at §25(1) that, "*exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense*." Instead, the real test is whether in all the circumstances it is just to make the order.[129]

9.9 There does not appear to be any authority on the specific question of costs liability for those participating pursuant to CPR r.40.9. However, in relation to non-parties in general, the Privy Council in *Dymocks* stated the following about third-party funders of litigation:

> "25…(2) Generally speaking the discretion will not be exercised against "pure funders", described in para 40 of *Hamilton v Al Fayed (No 2)* [2003] QB 1175 , 1194 as "those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course". In their case the court's usual approach is to give priority to the public interest in the funded party getting access to justice over that of the successful unfunded party recovering his costs and so not having to bear the expense of vindicating his rights. (3) Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is "the real party" to the litigation, a concept repeatedly invoked throughout the jurisprudence-see, for example, the judgments of the High Court of Australia in the Knight case 174 CLR 178 and Millett LJ's judgment in *Metalloy Supplies Ltd v MA (UK) Ltd* [1997] 1 WLR 1613. Consistently with this approach, Phillips LJ described the non-party underwriters in *T G A Chapman Ltd v Christopher* [1998] 1 WLR 12 , 22 as "the defendants in all but name". (emphasis added)

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[128] s.51(1) and (3) of the Senior Courts Act 1981; *Alden Shipping Co Ltd v Interbulk Ltd* [1986] AC 965, 979-981 (Lord Goff).

[129] *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] 1 WLR 2807 (PC), §25(1).

9.10 To the extent that non-parties act, for all intents and purposes, as Defendants, the reasoning in *Dymocks* is analogous and they may, consequently, be at substantial risk of adverse costs orders.

9.11 Conversely, interested persons may be able to claim their costs if their submissions are accepted. For an example of this, see *Canterbury CC v Persons Unknown* [2020] EWHC 3153 (KB), §§47-50 (Nicklin J).

10 CONTEMPT

10.1 Unlike possession proceedings, the only method of enforcement for breach of a protest injunction is committal for contempt of court – i.e. breach of a court order. This requires the Claimant to make an application to the court seeking to commit a Defendant on the basis that they have breached the injunction. Sanctions can be extremely serious, including imprisonment.

10.2 Over the last few years there has been an explosion in case law on issues arising from contempt applications, most particularly flowing from environmental protests.

(a) Nature of committal proceedings

10.3 The nature of committal proceedings – and its hybrid civil/criminal foundations – was recently valuably discussed in *Sheffield City Council v Brooke* [2019] QB 48 (KB). Males J found that it had more in common with criminal proceedings:

> "58. The application to commit Mr Brooke for contempt has something in common with both civil and criminal proceedings. It arises out of civil proceedings for an injunction which is a civil remedy, albeit that in the present case the injunction was granted (and Mr Brooke's undertaking was given) to restrain conduct which was both criminal … and tortious …. It has been subject to civil rules of procedure and evidence. The contempt proceedings themselves are civil proceedings.
>
> 59. On the other hand, the application is not concerned with financial compensation which is the typical function of civil proceedings. Its purpose is to enforce the order of the court, to punish past breaches of the order and to deter future breaches. The more demanding criminal standard of proof applies and contempt may be punished with a prison sentence, the paradigm example of a criminal sanction. A defendant who was punished for contempt by being sent to prison would not be being punished for committing an obstruction of the highway or for the tort of trespass, neither of which attracts a sanction of imprisonment, but for disobedience to the order of the court, a more serious matter which damages the proper functioning of society. As I indicated at the outset of this judgment, it is critical to the rule of law that the orders of the court should be complied with. The law of contempt therefore represents a vital public interest and invokes the full power of the state to enforce that interest.
>
> 60. In the present case, moreover, the injunction was sought by the council as a public authority in order to enable it to carry out its function as a highway authority. Enforcement of an injunction in such circumstances serves a more obviously public purpose than in the case of a purely private dispute.

61. Applying the test which I have described, I conclude that the objective of the application to commit Mr Brooke is essentially a public objective which has more in common with the objective of criminal proceedings than it does with that of civil proceedings, notwithstanding that as a matter of legal classification the application is classified as civil."

10.4 Due to the draconian power involved – punishing contempt by an order for committal – the power is usually reserved to a Divisional Court (i.e. two or more judges of the Division sitting together). This is subject to exceptions, e.g. where it is considered the power could be properly delegated to a single judge.[130]

10.5 In a contempt application, the burden of proof is on the Claimant to show that the Defendant has, beyond reasonable doubt, intentionally committed an act which is in breach of the protest injunction. If the protest injunction is reasonably susceptible to more than one meaning, the meaning favourable to the Defendant should be adopted,[131] although there may be exceptions. For example, in *Cuciurean v Secretary of State for Transport* [2022] EWCA Civ 1519, Coulson LJ (in the majority) found that any question of doubt should be resolved in the Claimant's favour in circumstances where the Defendant had raised the issue of whether he was caught by protest injunction so late in the day: §52.

10.6 Given the seriousness of committal applications, Claimants must consider carefully whether to make them against individuals who may have inadvertently breached the protest injunction in a trivial or technical way and where no penalty is likely. This is particularly important where Persons Unknown are Defendants, given the potential number of individuals that could accidentally be subject to the protest injunction. A failure to do so may have serious consequences. In *MBR Acres Ltd v McGivern* [2022] EWHC 2072 (KB) (Nicklin J), for example, the Claimants were severely criticised for bringing a committal application against a solicitor who had confirmed in a statement of truth that she was unaware of the protest injunction and whose breach was, at best, technical: §96. As a result, Nicklin J sanctioned the Claimant by making an order requiring the Claimants to obtain the permission of the court before bringing further contempt applications: §§102-104.

[130] *White Book* (2022), §81.3.8.
[131] *Sheffield City Council v Brooke* [2019] QB 48 (KB), §7 (Males J).

(b) Pre-action process

10.7 Before bringing an application for committal, it may be appropriate to send a pre-action letter to the proposed Defendant. This will put the Defendant on notice of the Claimant's intentions and enables the Defendant to obtain legal advice at an early stage. It also gives the Defendant the chance to provide an explanation for, and possible defence of, his or her actions to the Claimant and, thereby, possibly avoid the application being brought in the first place. Claimants may be criticised for not engaging in a pre-action process, particularly if the factual position is not straightforward.[132]

(c) Procedure – CPR Part 81

10.8 The procedure for making a contempt of court application is set out in CPR Part 81. Following criticisms of the old regime, CPR Part 81 was significantly amended from 1 October 2020.[133] Those acquainted with the previous rules must, therefore, familiarise themselves with the new version.

10.9 In summary, the main procedural rules to be aware of are as follows:

i. A contempt application is made by way of a Part 23 application in the proceedings in which the protest injunction, alleged to have been breached, was made.[134] The N600 form ought to be used unless there are compelling reasons for not doing so.[135]

ii. Contempt applications must be supported by written evidence given by affidavit or affirmation.[136] This requirement also appears to apply to evidence filed and served subsequently – i.e. it does not just apply to evidence filed at the same time as the application.

iii. The contempt application must include all of the statements set out in CPR r.81.4(2)(a)-(s) unless they are wholly inapplicable. Of particular importance, it must set out:

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[132] *MBR Acres Ltd v McGivern* [2022] EWHC 2072 (KB), §94 (Nicklin J).
[133] See a discussion on the new CPR 81 in *MBR Acres Ltd v Maher* [2022] 3 WLR 999 (KB), §§53-66 (Nicklin J).
[134] CPR r.81.3(1).
[135] *MBR Acres Ltd v Maher* [2022] 3 WLR 999 (KB), §19 (Nicklin J).
[136] CPR r.81.4(1).

(1) The date and terms of the protest injunction alleged to have been breached.[137]

(2) A brief summary of the facts alleged to constitute the contempt, set out numerically in chronological order.[138]

(3) A penal notice to the effect that the court may punish the defendant by a fine, imprisonment, confiscation of assets or other punishment under the law.[139]

iv. Unless the court directs otherwise, a contempt application must be served personally on the Defendant.[140] If no objection is made, the application can instead be served on the Defendant's legal representative.[141]

v. A contempt hearing may take place in the absence of the Defendant.[142]

vi. In a committal application, a Defendant is entitled to legal aid as of right – i.e. without any assessment of means or whether it is in the interests of justice for representation to be provided. The application must be made to the Legal Aid Agency.[143] But in order to obtain funding for the services of a KC, an additional application must be made to the Court. Such an application was refused in *Esso Petroleum v Breen* [2022] EWCA Civ 1405.

10.10 CPR r.81.7(1) clarifies that the court may make directions as to hearings. The position with listing committal hearings has never been straightforward. Under the old CPR Part 81, service of the application had to be effected at least 14 days before the hearing. That appeared to allow for the possibility of the Defendant having 14 days to obtain legal advice and prepare a defence before the substantive hearing. That would give the Claimant little idea about what the Defendant's case would be and not enough time for a Defendant to mount a proper defence against an allegation with potentially very serious consequences. The new CPR Part 81 has not expressly solved this problem but it has now removed the 14-day requirement. In practice, the effect is that the first hearing can now come on within 14 days and amount to a directions hearing. A proper

[137] CPR r.81.4(2)(b).
[138] CPR r.81.4(2)(h)
[139] CPR r.81.4(2)(p).
[140] CPR r.81.5(1).
[141] CPR r.81.5(2).
[142] CPR r.81.4(o).
[143] *National Highways v Heyatawin* [2021] EWHC 3078 (KB), §31 (Dame Victoria Sharp P and Chamberlain J).

timetable can then be set down for trial, if the allegation is going to be defended. There is still no requirement for pleadings.[144]

10.11 The court also has a power to issue a bench warrant to ensure Defendants attend a hearing.[145]

10.12 A Defendant may apply to discharge the committal order by way of a Part 23 application.[146]

(d) Knowledge requirement

10.13 There is no requirement to show that the Defendant was aware of the terms of a protest injunction in order to prove contempt. All that a Claimant has to do is comply with the service provisions set out in the interim or final injunction; no further knowledge requirement on the part of the Defendant is necessary. This is one reason why it is so important to have robust service provisions, particularly in relation to Persons Unknown, which are likely to come to the attention of the Defendant.

10.14 This position was confirmed in *Cuciurean v Secretary of State for Transport* [2021] EWCA Civ 357, where Warby LJ stated:[147]

> "58. These authorities indicate that (1) in this context "notice" is equivalent to "service" and vice versa ; (2) the Court's civil contempt jurisdiction is engaged if the claimant proves to the criminal standard that the order in question was served, and that the defendant performed at least one deliberate act that, as a matter of fact, was non- compliant with the order; (3) there is no further requirement of mens rea, though the respondent's state of knowledge may be important in deciding what if any action to take in respect of the contempt. I agree also with the Judge's description of the appellant's argument below: "it replaces the very clear rules on service with an altogether incoherent additional criterion for the service of the order." But nor am I comfortable with the notion that service in accordance with an order properly made can be set aside if the respondent shows that it would be "unjust in the circumstances" to proceed. This is not how the Court saw the matter in Cuadrilla, nor is it a basis on which good service can generally be set aside. It also seems to me too nebulous a test.
>
> …

[144] *Cuciurean v Secretary of State for Transport* [2022] EWCA Civ 1519, §30 (Coulson LJ).
[145] CPR r.81.7(2).
[146] CPR r.81.10.
[147] Cited in *MBR Acres Ltd v McGivern* [2022] EWHC 2072 (KB), §70 (Nicklin J) and *MBR Acres Ltd v Maher* [2022] 3 WLR 999 (KB), §§26-28 (Nicklin J).

62. One can perhaps understand the unease referred to by the Judge at the notion that a person may be held in contempt of court even though he is not shown to have had actual knowledge of the relevant order, or its relevant aspects. For my part, I doubt this is a dilemma to which a solution is required. The situation does not seem likely to occur often. And if it does then, as this Court indicated in Cuadrilla, no penalty would be imposed. I do not see that as problematic in principle, especially as this is a civil not a criminal jurisdiction..."

10.15 Knowledge of the order will, however, inevitably be relevant at the stage of determining what sanction to impose.[148] Indeed, there have been occasions where a court has criticised a Claimant for even making a committal application against a Defendant who had been unaware of the protest injunction (see §**10.6 above**).[149]

(e) Defences

10.16 There are very few defences to a committal application if it can be shown that the Defendant did a deliberate act which amounted to a breach of the terms of an order. In this sense, contempt involves strict liability. In some very specific circumstances, however, the following defences can be relied upon, as set out below.

10.17 Impossibility: whilst it is not a defence to show that compliance with an order would be burdensome, inconvenient or expensive, it is a defence to show that compliance was not possible.[150] This is because the Defendant did not have the choice whether to commit the relevant act or omission.

10.18 Defence of another: acting in defence of another can be a defence to an application for contempt of court.

10.19 In *Sheffield City Council v Brooke* [2019] QB 48 (KB), a protestor had managed to climb over Heras fencing and remain in a safety zone within which a tree was about to be felled. Security guards attempted to remove this protestor with force. The Defendant then deliberately broke down the Heras fencing making up the safety zone, before entering the safety zone, in order to reach and defend the protestor. This was a breach of the protest injunction, which had prevented individuals entering such safety zones. Males J found that defence of another was capable of providing a defence to an application to commit for contempt: §48. The action taken by the Defendant must be reasonable, the reasonableness of the action taken being judged objectively by reference

[148] *Cuadrilla Bowland v Persons Unknown* [2020] 4 WLR 29 (CA), §25 (Leggatt LJ).
[149] *MBR Acres Ltd v McGivern* [2022] EWHC 2072 (KB) (Nicklin J).
[150] *Perkier Foods Ltd v Halo Foods Ltd* [2019] EWHC 3462 (KB), §§10-15 (Chamberlain J).

to the circumstances as subjectively believed by the Defendant: §52. He did warn, however, that "*a court will need to look carefully and on occasion sceptically at claims made by defendants that it was necessary to intervene*": §49.

(f) Undertakings

10.20 Even after a contempt application has been made, it is possible for the Claimant to decide not to pursue the matter to a contested hearing. This will usually only be the case where the Defendant accepts he/she has breached the protest injunction, apologises for that breach and undertakes to the court not to carry out further breaches of the protest injunction. If the Claimant is content with this, it can seek to withdraw the application. This approach must, ultimately, be accepted by the court.

10.21 The court will often accept such an undertaking and, thereby, agree to the withdrawal of the contempt application without any sanction being imposed.[151] But sometimes the court does so reluctantly. In *HS2 v Maxey* [2022] EWHC 1010 (KB), the parties sought a consent order whereby the Defendant apologised to the court for acting in contempt and undertook not to do so again. Linden J ultimately granted the consent order but not before saying the following:

> "17. The terms of the proposed consent order suggest a highly pragmatic approach on the part of the claimant having regard to its particular interests and priorities. This is understandable. The court also generally encourages the parties to resolve their differences by agreement if they can. However, the interests and priorities of the parties are not the only relevant consideration in this type of application, given that the court is seized of the fact that its orders were breached by the defendants. Although committal applications for breach of an order are brought by the beneficiary of the order which was breached, and although that party's views as to whether a proposed outcome is satisfactory in terms of ensuring compliance with the order in question and redress for any harm which has been done are relevant, there is also a strong public interest in the court deterring disobedience to its orders and upholding the rule of law.
> …
> 20. The breaches of the relevant orders by all of the defendants in the present case, and especially the first defendant, were particularly serious. They were well aware of the orders which had been made and, in the case of the first defendant, had the benefit of competent legal advice throughout. What made their failures to comply so serious was the fact that they put their lives and the lives of others at a very high degree of risk. It was extremely dangerous for anyone to be down there in makeshift and poorly-constructed tunnels but they also subjected the CST officers

[151] *HS2 v Harewood* [2022] EWHC 2457 (KB) ("**Appendices Follow Containing the Approved Transcripts of 4 Decisions Made Extempore During the Hearings"**), §§51, 58-61 (Ritchie J).

to that risk. Particularly in the case of the first and second defendants, they also heightened that risk by reckless behaviour in obstructing attempts to remove them from the network of tunnels.

21. Initially, I was therefore very doubtful that I should approve the proposed consent order and invited counsel to explain why I should do so. They then addressed arguments to me which I have accepted..."

10.22 These arguments included the facts that: there was substantial compliance with the order within a relatively short time; the Claimant was slow to proceed with the application for committal; there was no evidence of similar activities by the Defendants since that time; the Defendants made sincere apologies and had given clear undertakings; the Claimant considered that these undertakings were sufficient; and, it would potentially prevent further litigation, wasted court time and public expense: §22.

(g) Sanctions

10.23 Sanctions for contempt of court are imposed to punish the breach, ensure compliance with court orders and rehabilitate the person in contempt.[152] It has been said, however, that in civil contempts, as opposed to criminal contempts, punishment is a less significant aim than securing compliance with court orders.[153]

10.24 The following factors demonstrate the correct approach to sanctions in protest cases:[154]

i. The court should adopt an approach analogous to that in criminal cases where the Sentencing Council's Guidelines require the court to assess the seriousness of the conduct by reference to the offender's culpability and the harm caused, intended or likely to be caused. This includes consideration of the following:[155]

(1) Whether there has been prejudice as a result of the contempt, and whether that prejudice is capable of remedy.

(2) The extent to which the contemnor has acted under pressure.

(3) Whether the breach of the order was deliberate or unintentional.

[152] *National Highways v Buse* [2021] EWHC 3404 (KB), §28 (Johnson J).
[153] *Cuciurean v Secretary of State for Transport* [2022] EWCA Civ 1519, §105 (Edis LJ).
[154] I have adopted the factors set out by the Supreme Court in *AG v Crosland* [2021] 4 WLR 103 (SC), §44, and expanded them by reference to other case law.
[155] *National Highways v Heyatawin* [2021] EWHC 3078 (KB), §49(d) (Dame Victoria Sharp P and Chamberlain J).

(4) The degree of culpability.

(5) Whether the Defendant was placed in breach by reason of the conduct of others.

(6) Whether the Defendant appreciated the seriousness of the breach.

(7) Whether the Defendant has cooperated, for example by providing information.

(8) Whether the Defendant has admitted his contempt and has entered the equivalent of a guilty plea.

(9) Whether a sincere apology has been given.

(10) The Defendant's previous good character and antecedents.

(11) Any other personal mitigation.

ii. A more benign sentence will ordinarily be justified for protestors carrying out acts of civil disobedience as compared to "*ordinary law-breakers*".[156] As well as there being a moral difference between these two groups, this is also on the basis that conscious objectors are capable of engaging in a dialogue with the court with a view to mending their ways.[157] However, the courts have sometimes found that what may have started out as a dialogue has turned into a monologue from the Defendant.[158] Moreover, the conscientious motives of a protestor act do not act as a licence to flout court orders with impunity.[159] In *Cuciurean v Secretary of State for Transport* [2022] EWCA Civ 1519, §75, Coulson LJ stated that:

> "A protestor, no matter how conscientious he or she believes themselves to be, cannot keep ignoring the court's orders, and then expect some sort of discount in the sanction to be applied every time they are dealt with for contempt."

iii. In light of its determination of seriousness, the court must first consider whether a fine would be a sufficient penalty.

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[156] *National Highways v Buse* [2021] EWHC 3404 (KB), §30 (Johnson J); *National Highways v Heyatawin* [2021] EWHC 3078 (KB), §50 (Dame Victoria Sharp P and Chamberlain J); *AG v Crosland* [2021] 4 WLR 103 (SC), §47; *Cuadrilla Bowland v Persons Unknown* [2020] 4 WLR 29 (CA), §§97-98 (Leggatt LJ).
[157] *National Highways v Heyatawin* [2021] EWHC 3078 (KB), §53 (Dame Victoria Sharp P and Chamberlain J).
[158] *HS2 v Harewood* [2022] EWHC 2457 (KB), §155 (Ritchie J), confirmed in *Cuciurean v Secretary of State for Transport* [2022] EWCA Civ 1519, §74 (Coulson LJ).
[159] *AG v Crosland* [2021] 4 WLR 103 (SC), §47.

iv. If the contempt is so serious that only a custodial penalty will suffice, the court must impose the shortest period of imprisonment which properly reflects the seriousness of the contempt. This is likely to be the case where there has been serious contumacious flouting of a court order.[160] The maximum sentence is two years' imprisonment.[161] A person committed to prison for contempt is entitled to unconditional release after serving half of the sentence.[162] If a custodial sentence is imposed, a fine can[163] but should not generally be imposed in addition, particularly if the Defendant has no way of paying the fine.[164]

v. Due weight should be given to matters of mitigation, such as genuine remorse, previous positive character and similar matters.

vi. Due weight should also be given to the impact of committal on persons other than the contemnor, such as children or vulnerable adults in their care.

vii. There should be a reduction for an early admission of the contempt to be calculated consistently with the approach set out in the Sentencing Council's Guidelines on Reduction in Sentence for a Guilty Plea.

viii. Once the appropriate term has been arrived at, consideration should be given to suspending the term of imprisonment. A court can suspend a sentence pursuant to its inherent powers.

In deciding whether to suspend a sentence, the Sentencing Council's Guideline on the "Imposition of Community and Custodial Sentences states that:[165]

- It would not be appropriate to suspend a custodial sentence where: the Defendant presents a risk/danger to the public; an appropriate punishment can only be achieved by immediate custody; or, there is a history of poor compliance with court orders.
- It may be appropriate to suspend a custodial sentence where; there is a realistic prospect of rehabilitation; strong personal mitigation;

[160] *National Highways v Heyatawin* [2021] EWHC 3078 (KB), §49(e) (Dame Victoria Sharp P and Chamberlain J).
[161] Section 14(1) of the Contempt of Court Act 1981.
[162] Section 258(2) of the Criminal Justice Act 2003.
[163] *White Book* (2022), §81.9.1. In *Cuciurean v Secretary of State for Transport* [2022] EWCA Civ 1519, §109, Edis LJ said that, "*It may well be that orders for a committal to prison and a fine are rare and confined to cases of people with very substantial assets who show themselves to be prepared to lose their liberty but may be more concerned about those assets.*": §111.
[164] *Esso Petroleum v Breen* [2022] EWCA Civ 1405, §§85-86 (Coulson LJ); *Cuciurean v Secretary of State for Transport* [2022] EWCA Civ 1519, §93 (Coulson LJ).
[165] *Esso Petroleum v Breen* [2022] EWCA Civ 1405, §§15, 46 (Coulson LJ).

or where immediate custody will result in significant harmful impact upon others. In the author's experience, a genuine apology to the Court will usually result in a sentence of imprisonment being suspended, although this will of course depend on all the other circumstances.[166]

ix. Citation of other cases to compare penalties is generally inappropriate in contempt cases because they vary so widely in context and fact.[167]

10.25 In terms of how long a custodial sentence should be, assuming the custody threshold has been passed, there is no Sentencing Council Guideline to assist. The courts have, occasionally, attempted to come up with a methodology of their own. In *Esso Petroleum v Breen* [2022] EWCA Civ 1405, the Judge at first instance had imposed a sentence of 112 days imprisonment, using the following calculation:

$$\frac{\text{5 days for each day the Defendant remained on the relevant land in breach of the order (5x16 days) + 21 days for each of 5 aggravating factors}}{\text{40\% discount for mitigation}}$$

10.26 This approach was criticised by the Court of Appeal as being "*too granular*", involving "*arbitrary*" multipliers and inviting comparison between different cases: §49.[168] That said, the sentence of 112 days was not found to be excessive and one that the Judge was entitled to impose: §53. A similar criticism as to methodology likely also applies to the approach adopted in *HS2 v Harewood* [2022] EWHC 2457 (KB), §§100, 119, 136, 170 where Ritchie J imposed 7 days' custody for every day the Defendants had spent tunnelling under the HS2 development.

10.27 Whereas Counsel for the Claimant should make submissions to the court on the extent of its powers and the guidelines set out above, Counsel should not make submissions

[166] *National Highways v Heyatawin* [2021] EWHC 3078 (KB), §65 (Dame Victoria Sharp P and Chamberlain J). But see *Esso Petroleum v Breen* [2022] EWCA Civ 1405, §67 (Coulson LJ), where this was not the case when an apology was made part way through the committal hearing.
[167] *Esso Petroleum v Breen* [2022] EWCA Civ 1405, §12 (Coulson LJ).
[168] See also *Cuciurean v Secretary of State for Transport* [2022] EWCA Civ 1519, §94 (Coulson LJ).

on what sentence should actually be imposed; that is a matter between the Court and the Defendant.[169]

(h) Costs

10.28 In general, the approach to an award of costs in a contempt case involving breach of a protest injunction is the same as in other civil proceedings – i.e. costs should follow the event.[170] This general approach is tempered to some extent; because of the relevance of Article 10 and 11 ECHR, the court must be satisfied that the award of costs does not amount to a breach of those rights – it must be necessary in a democratic society for the protection of the rights of the Claimant and maintaining the authority of the judiciary.[171]

10.29 Awarding the Claimant its reasonable costs will usually be proportionate in order to compensate it, at least partially, for the legal costs incurred in vindicating its own rights, and maintaining the rule of law and the authority of the court. This is in circumstances where the balance between conflicting rights has already been struck by the terms of the protest injunction and the Defendant has, nonetheless, decided to breach that order.[172]

10.30 The means of the Defendant will generally not be relevant to this assessment.[173] If, however, there is evidence that the Defendant will be completely unable to pay the costs award, this may be relevant in determining whether there is a rational connection between the aim of compensating the Claimant and making a costs award. It will be up to the Defendant to provide satisfactory evidence as the court will not undertake an inquisitorial function to discover the relevant information.[174]

(i) Appeals

10.31 Parties may appeal decisions made on contempt applications.[175]A decision from the High Court can be appealed to the Court of Appeal. A decision from the Divisional Court can only be appealed to the Supreme Court.[176] Where an appeal to the Supreme

[169] *Rehbeim v Isufai* [2005] EWCA Civ 1046, §20 (Ward LJ), §§25-26 (Smith LJ).
[170] *Secretary of State for Transport v Cuciurean* [2022] 1 WLR 3847 (CA), §50.
[171] *Secretary of State for Transport v Cuciurean* [2022] 1 WLR 3847 (CA), §55 (Lewison LJ).
[172] *Secretary of State for Transport v Cuciurean* [2022] 1 WLR 3847 (CA), §§53, 64.
[173] *Secretary of State for Transport v Cuciurean* [2022] 1 WLR 3847 (CA), §§53, 65.
[174] *Secretary of State for Transport v Cuciurean* [2022] 1 WLR 3847 (CA), §§58-60, 64(b).
[175] Section 13 of the Administration of Justice Act 1960.
[176] Section 13(2)(b)-(c) of the Administration of Justice Act 1960.

Court is made from the Divisional Court, permission to appeal must be obtained and it must be certified that a point of law of general public importance is involved.[177]

10.32 Such an appeal will be a review rather than a re-hearing, such that the appeal court will only interfere if satisfied that the decision was wrong or unjust because of a serious procedural or other irregularity.[178]

[177] Section 1(2) of the Administration of Justice Act 1960; *National Highways v Buse* [2021] EWHC 3404 (KB), §61 (Johnson J).
[178] CPR r.52.21. See *Cuciurean v Secretary of State for Transport* [2022] EWCA Civ 1519, §56 (Coulson LJ).

Guidelines from Court

1. In *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802, §82, the Court of Appeal set out the following procedural guidelines applicable to proceedings for interim relief against Persons Unknown:

> "(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."

2. In *Shell UK Oil Products Ltd v PU* [2022] EWHC 1215 (KB), Johnson J stated:

> "23. The injunction is sought on an interim basis before trial, rather than a final basis after trial. It is sought against "persons unknown". It is sought on a precautionary basis to restrain anticipated future conduct. It interferes with freedom of assembly and expression. For these reasons, the law imposes different tests that must all be satisfied before the order can be made. The claimant must demonstrate:
>
> (1) There is a serious question to be tried: *American Cyanamid v Ethicon* [1975] AC 396 per Lord Diplock at 407G.
>
> (2) Damages would not be an adequate remedy for the claimant, but a cross-undertaking in damages would adequately protect the defendants, or
>
> (3) The balance of convenience otherwise lies in favour of the grant of the order: *American Cyanamid* per Lord Diplock at 408C-F.
>
> (4) There is a sufficiently real and imminent risk of damage so as to justify the grant of what is a precautionary injunction: *Islington London Borough Council v Elliott* [2012] EWCA Civ 56 per Patten LJ at [28], *Ineos Upstream Ltd v Persons Unknown* [2019] EWCA Civ 515 [2019] 4 WLR 100 per Longmore LJ at [34], *Canada Goose UK Retail Limited v Persons Unknown* [2020] EWCA Civ 303 [2020] 1 WLR 2802 per Sir Terence Etherton MR at [82(3)].
>
> (5) The prohibited acts correspond to the threatened tort and only include lawful conduct if there is no other proportionate means of protecting the claimant's rights: *Canada Goose* at [78] and [82(5)].
>
> (6) The terms of the injunction are sufficiently clear and precise: *Canada Goose* at [82(6)].
>
> (7) The injunction has clear geographical and temporal limits: *Canada Goose* at [82(7)] (as refined and explained in *Barking and Dagenham LBC v Persons Unknown* [2022] EWCA Civ 13 per Sir Geoffrey Vos MR at [79] - [92]).
>
> (8) The defendants have not been identified but are, in principle, capable of being identified and served with the order: *Canada Goose* at [82(1)] and [82(4)].
>
> (9) The defendants are identified in the Claim Form (and the injunction) by reference to their conduct: *Canada Goose* at [82(2)].
>
> (10) The interferences with the defendants' rights of free assembly and expression are necessary for and proportionate to the need to protect the claimant's rights: articles 10(2) and 11(2) of the European Convention on Human Rights ("ECHR"), read with section 6(1) of the Human Rights Act 1998.
>
> (11) All practical steps have been taken to notify the defendants: section 12(2) of the Human Rights Act 1998.
>
> (12) The order does not restrain "publication", or, if it does, the claimant is likely to establish at trial that publication should not be allowed: section 12(3) of the Human Rights Act 1998."

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