Manual
on

Protest Injunctions

Practice, Procedure and Persons Unknown

Yaaser Vanderman

2024
Version 2

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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). The Supreme Court has now had the final word in *Wolverhampton CC v London Gypsies & Travellers* [2024] 2 WLR 45.
- 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 few there have been dozens of 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?

This 2024 version (v.2) updates the previous two versions of the Manual, originally released in January 2023. It will be updated online regularly and whenever there is a material development in the law.

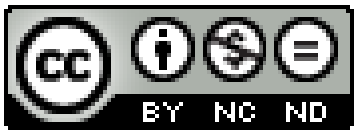
Where?

To check whether you are reading the most up-to-date version of the Manual, as well as for blogposts on more recent decisions, check on www.protestinjunctions.com.

How?

I have had considerable experience of advising and acting in cases involving protest injunctions, having been instructed in approximately dozens of protest injunction matters since 2022. 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 or info@protestinjunctions.com if you have any suggestions or think there are any errors or omissions in this Manual.



ABOUT THE AUTHOR

Yaaser Vanderman is a barrister specialising in various areas of law, including public law, human rights 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 9 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 dozens of protest injunction matters since 2022. 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

Newcomer – as defined by the Supreme Court in *Wolverhampton CC v London Gypsies & Travellers* [2024] 2 WLR 45, §2, Defendants whose identities are unknown by virtue of the fact that they have not yet committed (or threatened to commit) the alleged tort

Protest 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 (and confirmed in *Wolverhampton CC v London Gypsies & Travellers* [2024] 2 WLR 45, §43), 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.[2]

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:[3]

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.

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[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] This has now been followed by the Court of Appeal in *Donovan v Prescott Place Freeholder Ltd* [2024] EWCA Civ 298, §71 (Asplin LJ and Arnold LJ).

[3] In addition, public authorities are empowered by statute to obtain injunctions in certain circumstances: see, e.g. *Wolverhampton CC v Persons Unknown* [2023] EWHC 56 (KB) (Hill J), §§49-60, albeit in the context of street cruising.

1.4 The simplest cause of action, and the one most commonly relied upon, is trespass.[4] 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 land.[5] 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.[6]

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.[7]

1.6 In relation to private nuisance, it must be shown that there has been undue and substantial interference with the enjoyment of land.[8] 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.[9]

1.7 In relation to public nuisance,[10] 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, for example, 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

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[4] See, generally, *Clerk & Lindsell on Torts* (23rd edn, 2022), Chapter 18. A good summary of the trespass, private nuisance and public nuisance causes of action in the protest context can be seen in *Transport for London v Persons Unknown* [2023] EWHC 1038 (KB), §§33-35 (Morris J) and *Esso Petroleum v Persons Unknown* [2023] EWHC 1837 (KB), §60 (Linden J).

[5] *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).

[6] *Fitzwilliam Land Co v Milton* [2023] EWHC 3406 (KB), §§27-31 (Linden J); *HS2 v Persons Unknown* [2022] EWHC 2360 (KB), §80 (Knowles J); *Esso Petroleum v Persons Unknown* [2022] EWHC 966 (KB), §19(i) (Ellenbogen J).

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

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

[9] *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).

[10] *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).

with others; (iv) which injures the Claimant.[11] 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.[12]

1.9 As to harassment under the Protection from Harassment Act 1997, it has to be shown that:[13] (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.[14] The threshold for speech-based harassment is a high one.[15]

1.10 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.[16]

1.11 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. This is because the Claimant itself would have no civil cause of action.[17] Criminal conduct can, however, support the founding of tortious behaviour – e.g. trespass on the public highway and economic torts. Note also the new criminal offences contained in: Part 1 of the Public Order Act 2023, which now criminalises common tactics of direct action, such as locking-on, tunnelling and interfering with the use or operation of key national infrastructure; and, s.78 of the

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[11] *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).
[12] See *Clerk & Lindsell on Torts* (23rd edn, 2022), Chapter 23.
[13] Assuming the Claimant is a company – ss.1(1A) and 3A of the Protection from Harassment Act 1997.
[14] See, e.g., *Ineos Upstream v Persons Unknown* [2017] EWHC 2945 (Ch), §50 (Morgan J).
[15] *MBR Acres Ltd v Free the MBR Beagles* [2022] EWHC 3338 (KB), §64 (Nicklin J).
[16] *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).
[17] *MBR Acres Ltd v Free the MBR Beagles* [2021] EWHC 2996 (KB), §45 (Nicklin J); *Gouriet v Union of Post Office Workers* [1978] AC 435 (HL). But see s.222 of the Local Government Act 1972, which permits local authorities in exceptional circumstances to use civil proceedings to prevent breaches of the criminal law: *North Warwickshire BC v Baldwin* [2023] EWHC 1719 (KB), §§87-95. (Sweeting J).

Police, Crime, Sentencing and Courts Act 2022, which abolished the common law offence of public nuisance and codified a statutory offence of public nuisance.[18]

1.12 Sections 18 and 19 of the Public Order Act 2023 also empower the Secretary of State to bring civil proceedings and obtain protest injunctions with a power of arrest attached. The Secretary of State can do so where he or she reasonably believes that: (a) the conduct is causing or likely to cause serious disruption to national infrastructure or access to any essential goods or service; or, (b) the conduct is having or is likely to have a serious adverse effect on public safety. These provisions have not yet been brought into force.

1.13 Which one (or more) of these causes of action may be relied upon 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 most important question 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.

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

i. *Shell UK Oil Products Ltd v Persons Unknown* [2022] EWHC 1215 (KB) (Johnson J):[19] this was an interim injunction application by Shell against environmental protestors 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* [2023] EWHC 2013 (KB) (Knowles J):[20] this was at the trial of the claim brought by Esso against environmental protestors targeting its Southampton-London Pipeline. The Pipeline is 105km in length and runs over land with a "*complex tapestry*" of land interests: §36. A conspiracy was

[18] As an example of this provision being contravened, see *R v Trowland* [2023] 4 All ER 766 (CA).
[19] See also the subsequent hearing in *Shell UK Ltd v Persons Unknown* [2023] EWHC 1229 (KB), where Hill J came to the same view as Johnson J.
[20] A similar analysis was given at the interim injunction stage by HHJ Lickley KC in *Esso Petroleum v Breen* [2022] EWHC 2664 (KB), §§20-27.

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

1.15 More detail on these cases can be seen at **§6.7 below**.

1.16 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.[21] As to *tortious* conduct, the same principle was found to apply by Knowles J in *Esso Petroleum v Breen* [2023] EWHC 2013 (KB), §68 – agreeing with HHJ Lickley KC's analysis in *Esso Petroleum v Breen* [2022] EWHC 2664 (KB), §§22-27, which itself 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).

1.17 Even if a Claimant successfully obtains an 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.

(b) Relief

1.18 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.

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

1.20 More usually, an injunction will be sought. The court has a power to grant an injunction (interim or final) where it appears to be just and convenient.[22] 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

[21] *Shell UK Oil Products Ltd v Persons Unknown* [2022] EWHC 1215 (KB), §27 (Johnson J).
[22] Section 37(1) of the Senior Courts Act 1981.

a committal application to the Court using a specialised procedure and seeking to prove at a hearing that a breach of the injunction has occurred. More detail on contempt and committal proceedings is set out in **Chapter 10 below**.

1.21 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.

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 various factors, in particular 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 the Defendants on notice that legal action is being contemplated; and, (ii) the Defendants to deny that they are responsible for it, to deny that such conduct is unlawful, or 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, a Claimant may decide not to join them as a Defendant or a Claimant may ask them 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.

2.4 The same process can occur once a claim has been brought.[23] In *National Highways Ltd v Persons Unknown* [2023] EWHC 1073 (KB), in the context of an application to continue an interim injunction and as part of assessing the future risks posed by Defendants, Cotter J said that the Court should offer the opportunity to Defendants to provide a suitable undertaking: §113. He also emphasised that making an undertaking regulates the position going forward such that it would not affect the existing rights and liabilities of the parties to date: §114.

2.5 Breach of an undertaking has the same consequences as a breach of an 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 or that any claim against them is discontinued, they play no part in it, and they cannot be liable for any legal costs or to pay any damages

[23] See, e.g. *Transport for London v Lee* [2023] EWHC 1201 (KB) §§10-13 (Eyre J), *Transport for London v Persons Unknown* [2023] EWHC 1038 (KB), §14 (Morris J) and *Bloor Homes Ltd v Callow* [2022] EWHC 3507 (Ch), §6 (Hugh Sims KC sitting as a Deputy High Court Judge).

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

2.6 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.

2.7 Where there are likely to be substantial disputes of fact, Part 7 should be used.[24]

2.8 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 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.[25]

2.9 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.[26] 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 bring a summary judgment application or prepare for a full but unopposed trial.[27] There are other procedural differences. For example, a Particulars of Claim is required in a Part 7 claim but not in a Part 8 claim.

(c) Which High Court Division

2.10 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 Claimant's lawyers are most accustomed to using.

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[24] CPR r.8.1(2)(a).
[25] *MBR Acres Ltd v Free the MBR Beagles* [2021] EWHC 2996 (KB), §§3-9 (Nicklin J).
[26] CPR r.8.1(5).
[27] Though, in relation to Persons Unknown who are Newcomers, it is difficult to see that default judgment could be granted in light of *Wolverhampton CC v London Gypsies & Travellers* [2024] 2 WLR 45.

2.11 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.[28] 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, sitting in Court 17 of the Royal Courts of Justice, but they will only list hearings likely to take 1 hour or less.[29] 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[30] skeleton arguments should be filed and served by 10am on the working day before the hearing.[31] For heavy applications,[32] they must be served by 12pm two clear days before the hearing.[33] 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.[34]

2.12 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

[28] Including time for pre-reading, oral argument and dealing with consequential points: the Business and Property Courts of England & Wales - Chancery Guide (2022), §15.16.
[29] The King's Bench Guide (2023), §9.56.
[30] Applications listed for a hearing of half a day (2.5 hours) or less: Chancery Guide (2022), §14.26.
[31] Chancery Guide (2022), §14.42.
[32] Applications listed for a hearing of more than half a day: Chancery Guide (2022), §14.44.
[33] Chancery Guide (2022), §14.57.
[34] King's Bench Division Guide (2023), §9.108.

Media and Communications List of the King's Bench Division, pursuant to CPR r.53.1(3)(c): §168.

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. Considering 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 Chapter 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[35] – must be filed and served before being determined.[36] Service must usually be effected as soon as practicable after it is filed and at least 3 days before the hearing of the application.[37]

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.[38]

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:[39]

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

[35] CPR PD25A, §2.2.
[36] 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).
[37] CPR r.23.7(1).
[38] CPR r.23.7(4); CPR PD23A, §4.1; CPR PD25A, §2.2.
[39] 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.[40] The Claimant's evidence in support of the application must state the reasons why notice has not been given.[41]

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.[42] 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*".[43] 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.[44]

(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:

i. An application may be heard by telephone but only where the Claimant is being represented by barristers or solicitors.[45]

ii. 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.[46]

iii. The court will likely require a draft order to be provided by email.[47]

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[40] CPR r.25.3(1).
[41] CPR r.25.3(3).
[42] *Birmingham City Council v Afsar* [2019] EWHC 1560 (KB), §20 (Warby J).
[43] *Birmingham City Council v Afsar* [2019] EWHC 1560 (KB), §53 (Warby J).
[44] CPR PD23A, §4.2.
[45] CPR PD25A, §§4.2 and 4.5(5).
[46] CPR PD25A, §4.5(1).
[47] CPR PD25A, §4.5(3).

iv. 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.[48] The claim form should be served with the order for the injunction[49] where possible.[50]

v. 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.[51]

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.[52] The Claimant must undertake to issue a claim form immediately unless the court gives direction for the commencement of the claim.[53]

(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.[54] 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.[55]

(3) Except in cases where secrecy is essential, the Claimant should take steps to notify the Defendant informally of the application.[56]

(4) The claim form should be served with the order for the injunction[57] where possible.[58]

iii. Urgent

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

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[48] CPR PD25A, §4.4(1).
[49] Such an order must refer to the parties as "*the Claimant and Defendant in an Intended Action*": CPR PD25A, §4.4(3).
[50] CPR PD25A, §4.4(2).
[51] CPR PD25A, §4.5(4).
[52] CPR PD25A, §§4.1(2) and 4.4(1).
[53] CPR PD25A, §4.4.
[54] CPR PD25A, §4.3(1).
[55] CPR PD25A, §4.3(2).
[56] CPR PD25A, §4.3(3).
[57] Such an order must refer to the parties as "*the Claimant and Defendant in an Intended Action*": CPR PD25A, §4.4(3).
[58] CPR PD25A, §4.4(2).

(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.[59] 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.[60]

(2) Except in cases where secrecy is essential, the Claimant should take steps to notify the Defendant informally of the application.[61]

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.[62]

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.

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.

[59] CPR PD25A, §4.3(1).
[60] CPR PD25A, §4.3(2).
[61] CPR PD25A, §4.3(3).
[62] CPR r.23.7(1); CPR PD23A, §4.1; CPR PD25A, §2.2.

(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,[63] 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:[64]

  > "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 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)."

[63] *Birmingham City Council v Afsar* [2019] EWHC 1560 (KB), §20 (Warby J).
[64] *White Book* (2022), §25.3.2 (p.720).

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, the Claimant will have to show that it has 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 claim. 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. The duty of full and frank disclosure.[65] The duty applies even if the Defendant is given short notice.[66] As to factual issues, it requires the Claimant

[65] *Birmingham City Council v Afsar* [2019] EWHC 1560 (KB), §§21-26 (Warby J); *White Book* (2022), §25.3.5 (p.849).
[66] *White Book* (2022), §25.3.5.1 (p.851).

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. A duty to provide notes of the without notice hearing with all expedition. This includes, but is not limited to, the judgment given.[67]

iii. A duty to serve the proceedings and injunction on the Defendant as soon as practicable.[68]

iv. A duty to apply for and obtain a return date for a further hearing where the Defendants can be present on full notice.[69]

3.26 It is important to note that, as set out **below at §5.6(ii)**, all claims and applications against Persons Unknown who are Newcomers will be without notice and so the obligations in (i) and (ii) above will apply at every hearing.

[67] *White Book* (2022), §25.3.10 (p.853).
[68] CPR PD25A, §5.1(2); *White Book* (2022), §25.3.9 (p.852).
[69] 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.[70]

(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:[71]

> "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, who can be served in the usual way as long as their address is known. In relation to Persons Unknown who are Newcomers, the previous position was that alternative service was required to bring the claim to their attention. Following *Wolverhampton CC v London Gypsies & Travellers* [2024] 2 WLR 45, however, it now appears that Newcomers cannot formally be *served*. Instead, Claimants must take steps to *notify* them of the existence of the claim – see **§5.6 and §5.10(12) below**.

ii. Applications for alternative service

4.4 For Defendants (other than Persons Unknown who are Newcomers) 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).

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[70] 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.

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

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.[72] Dispensation of the requirement for service altogether, pursuant to CPR r.6.16, will rarely be acceptable.[73]

4.5 The application for alternative service must be supported with evidence.[74] This evidence must state:

i. The reason why an order is sought.

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;[75]
- 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;[76]
- Publicising the fact of the claim in a local/national newspaper.

4.7 Although Courts will require strict adherence to the terms of any order for alternative service,[77] common sense will also prevail. For example, in *Wolverhampton CC v Phelps* [2024] EWHC 139 (KB), the Claimant had to "*Maintain…official road signs*" referring to the injunction. HHJ Emma Kelly found that this imported an obligation to "reasonably

[72] *HS2 v Persons Unknown* [2022] EWHC 2360 (KB), §144 (Knowles J).
[73] 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.
[74] CPR r.6.15(3).
[75] In *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 (CA), §50, the Court of Appeal recognised that posting on social media and attaching copies of documentation at nearby premises would have a greater likelihood of bringing notice of the proceedings to the attention of defendants.
[76] Ibid.
[77] *MBR Acres Ltd v McGivern* [2022] EWHC 2072 (KB), §78 (Nicklin J).

maintain" the road signs: §43. An obligation of result – i.e. that the signage must be present at all times – would be unworkable and contrary to the public interest as it would incentivise the Defendants to remove the signage.

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 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 This apparent disparity was considered by Cotter J in *National Highways Ltd v Persons Unknown* [2023] EWHC 1073 (KB) where he seemed to prefer the approach taken by Knowles J, at least at that further stage of proceedings. Cotter J referred to all the circumstances, including statements made by Just Stop Oil, the media coverage of the orders and the widespread knowledge of the orders, as well as the extent to which Just Stop Oil protestors were in communication with each other. He concluded that it was very unlikely that there were any protestors who would not be aware of the injunction; the "level of constructive knowledge" meant that there were now practical and effective methods of alternative service: §§126-137.[78]

4.12 There have been other cases where the Court has said that the alternative service provisions sought were not such as could reasonably be expected to bring the proceedings to the attention of all Persons Unknown. In *MBR Acres Ltd v Free the MBR*

[78] Such "constructive knowledge" was also referred to by Cavanagh J in *Transport for London v Lee* [2023] EWHC 402 (KB), §§31-32, and this was adopted in *Shell UK Ltd v Persons Unknown* [2023] EWHC 1229 (KB), §205 (Hill J).

Beagles [2022] EWHC 3338 (KB), for example, Nicklin J considered that the method of alternative service sought – posting a copy of the injunction order outside one of the Claimant's site subject to protest – the injunction would catch those who had no previous connection with that site (e.g. those protesting at another site): §72.

4.13 In respect of Persons Unknown who are Newcomers, these authorities must now be viewed with caution following *Wolverhampton CC v London Gypsies & Travellers* [2024] 2 WLR 45. This is because the Supreme Court in that case found that service of such Defendants was not possible as they were not parties to the claim. That said, these authorities may still be useful for the theoretically separate question of whether sufficient *notice* of the claim has been given to Newcomers.

4.14 In *National Highways Ltd v Persons Unknown* [2022] EWHC 3497 (KB), Soole J refused to permit alternative service of the claim on a number of named Defendants sought to be joined to the claim. The Claimant relied, amongst other things, on the time and cost of serving the documents, the difficulty of effecting service on the protestors, and the ability to serve documents electronically. The Judge, however, considered that this was not sufficient in the context of orders which can give rise to committal for contempt; the starting point was that such orders must be served personally. If any difficulties in service arose, individual applications could be made but the mere size of the pool of named Defendants did not in itself justify a general departure from the primary method of service: §§49-51.

4.15 The application for alternative service may be made without notice.[79] In fact, such applications in the protest context will almost always be made without notice.

4.16 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. 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.

4.17 The order granting alternative service has to specify:[80]

(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.

[79] CPR r.6.15(3).
[80] CPR r.6.15(4).

iii. Snapshot summary - what to do and when

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

4.19 First, the Claimant will need to file:

(1) Claim form;

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

(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 interim injunction and alternative service. These do not necessarily need to be set out in separate statements.

4.20 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.

4.21 Thirdly, the Claimant will then need to serve all of these documents in the manner set out in the order for alternative service.

(b) Serving the Order

4.22 Once an injunction is granted (interim or final), this will need to be served.

4.23 In relation to named Defendants, the order will generally need to be served personally.[81]

4.24 In relation to Persons Unknown who are Newcomers, for the reasons already set out above, Claimants will need to take sufficient steps to notify them of the existence of the order. This will usually require, at least, 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.

[81] *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, though in some cases the courts have been slow to grant these: *MBR Acres Ltd v Maher* [2022] 3 WLR 999 (KB), §111 (Nicklin J). See also **§4.14 above** and *National Highways Ltd v Persons Unknown* [2022] EWHC 3497 (KB), §§49-51 (Soole J).

(c) Serving other documents

4.25 It may also be useful for the initial interim injunction order to provide for how future documents are to be served alternatively in order to avoid having to come back before the Court. Such documents may include future applications.

5 PERSONS UNKNOWN AND INTERESTED PERSONS

(a) Introduction to Persons Unknown

5.1 There are two types of Persons Unknown:

i. Individuals whose identities are unknown but who have already committed (or threatened to commit) the alleged tort.

ii. Individuals whose identities are unknown by virtue of the fact that they have not yet committed (or threatened to commit) the alleged tort (referred to as "Newcomers").[82]

5.2 Without the ability to bring proceedings against both types of Persons Unknown, protest injunctions would be of much less value. This is because, in most cases, the Claimant would not know the names of all (or most of) those carrying out (or those who in the future will carry out) the direct action sought to be prohibited. To limit protest injunctions to named Defendants could, therefore, have the effect of insulating from legal action Defendants who: (i) deliberately hide their identities; and, (ii) are part of organisations who have large enough numbers to replace those individuals who have become subject to an injunction with Newcomers, with the effect of frustrating the rights and lawful activities of Claimants.

5.3 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 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*".

[82] In *Wolverhampton CC v London Gypsies & Travellers* [2024] 2 WLR 45, the Supreme Court defined this category as:

> "2…persons who are not identifiable at the time when the order is granted, and who have not at that time infringed or threatened to infringe any right or duty which the claimant seeks to enforce, but may do so at a later date".

5.4 For some years, the Courts struggled with the question of whether, and if so how, Persons Unknown who were Newcomers could be made subject to injunctions. Following *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 (CA) (5 March 2020), 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.

5.5 The issue has been finally resolved in *Wolverhampton CC v London Gypsies & Travellers* [2024] 2 WLR 45,[83] where the Supreme Court was asked to decide whether, and if so, on what basis and subject to what safeguards, the Court had power to grant an injunction against Newcomers. Although a case relating to unlawful encampments of Gypsies and Travellers, the case has much wider implications, including for protest injunctions.

5.6 The Supreme Court decided that Courts did have such a power, albeit subject to certain conditions which are discussed further below. Of importance to its analysis were the following considerations:

i. Injunctions made against Newcomers are a wholly new type of injunction which cannot be fitted into an existing category of injunction; they are, essentially, made against the public at large and potentially embrace the whole of humanity: §§109, 132, 135 and 144.

ii. They are always without notice: §§139, 142, 143(ii), 151, 167, 173, 238(i).

iii. Injunctions against Newcomers are typically neither interim nor final, at least in substance: §§139, 142, 143(vii), 151, 167, 178, 232, 234. Rather, they are sought for their medium- to long-term effect even if time-limited, rather than as a means of holding the ring in an emergency ahead of some later trial process or renewed application in which any defendant is expected to be identified, let alone turn up.

[83] On appeal from *Barking & Dagenham LBC v Persons Unknown* [2022] 2 WLR 946 (CA).

iv. A Newcomer who knowingly breaches the injunction is liable to be held in contempt whether or not they have been served with the proceedings: §132. Such a person could, instead, apply to have the injunction varied or set aside.

v. To prohibit Newcomer injunctions would mean that "*where claimants face the prospect of continuing unlawful disruption of their activities by groups of individuals whose composition changes from time to time, then it seems that the only practical means of obtaining the relief required to vindicate their legal rights would be for them to adopt a rolling programme of applications for interim orders, resulting in litigation without end.*": §138. That would prioritise formalism over substance.

5.7 Notwithstanding this, such injunctions are only to be granted in certain cases, according to the criteria set out in the next section.

(b) Tests to be satisfied for Persons Unknown who are "Newcomers" following *Wolverhampton CC*

5.8 *Wolverhampton CC v London Gypsies & Travellers* [2024] 2 WLR 45 is not a protest injunction case; it involved injunctions sought by local authorities against Gypsies and Travellers for trespass and breach of planning control. In fact, at §235, the Supreme Court went out of its way to say that "*nothing we have said should be taken as prescriptive in relation to Newcomer injunctions in other cases, such as those directed at protesters who engage in direct action*". Nonetheless, in relation to Newcomers (defined at **§5.1 above**), it is likely that many of the same factors adopted by the Supreme Court will apply in the protest context.

5.9 This was the approach taken by Ritchie J in *Valero Energy Ltd v Persons Unknown* [2024] EWHC 134 (KB), the first case to consider *Wolverhampton CC* in detail in the protest context. Ritchie J found that the guidelines at §82 of *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 (see **p.106 below**) remained good law but that *Wolverhampton CC* called for the addition of other factors "*because a final injunction against PUs is a nuclear option in civil law akin to a temporary piece of legislation affecting all citizens in England and Wales for the future so must be used only with due safeguards in place.*": §57.

5.10 In the context of a summary judgment application, Ritchie J stated, at §58, that the 14 factors to be considered were as follows:

(1) **There must be a civil cause of action identified in the claim form and particulars of claim.**

(2) **There must be full and frank disclosure by the Claimant seeking the injunction.**

(3) **There must be sufficient and detailed evidence before the Court. First, the Claimant has to prove that the claim has a realistic prospect of success. Secondly, the Claimant has to prove that any defence has no realistic prospect of success. The Court should not put too much weight on the absence of any evidence or defence from Persons Unknown as the proceedings are without notice; the Court must be alive to any potential defences and the Claimants must set them out and make submissions upon them.** Although Ritchie J did not refer to this aspect of the test, a Claimant seeking a precautionary injunction (which will be most protest cases) also has to prove a sufficiently "*real and imminent risk*" of the tortious conduct occurring (see **§6.29 below**).[84]

In addition, whilst this is the appropriate test for summary judgment applications made pursuant to CPR Part 24, it may not be appropriate, e.g., for applications for interim relief: the usual test at the interim injunction stage is the relatively low bar of whether there is a serious case to be tried (**see §6.4 below**). That is subject to whether "*publication*" is involved, where the Claimant will have to prove that they are "*likely*" to succeed at trial, pursuant to s.12(3) of the Human Rights Act 1998 (see **§6.19 below**). But, given the apparent removal of the distinction between interim and final injunctions in Newcomer cases, it may well be that the "serious case to be tried" bar is no longer appropriate and that greater prospects of success on the merits have

[84] The Supreme Court in *Wolverhampton CC* referred to a "*strong probability*" of a tort occurring and that this will cause "*real harm*": §218.

to be demonstrated. This may depend on whether, at the first hearing, the Claimant is, in effect, applying for final relief without a return hearing.

(4) **There must be a "*compelling justification*" for the injunction against Persons Unknown to protect the Claimant's civil rights, as compared to the usual balance of convenience test usually applied for interim relief** (see **§6.15 below**).

(5) **If ECHR rights are engaged, the Court must take into account the balancing exercise required by the Supreme Court in *DPP v Ziegler* [2021] UKSC 23, and any injunction must be necessary and proportionate to the need to protect the Claimants' right.** On this, see **Chapter 8 below**.

(6) **Damages must not be an adequate remedy.** Although Ritchie J did not refer to it, Claimants will also have to prove that the harm would be "*grave and irreparable*" (see **§6.11 below**).

(7) **Persons Unknown must be clearly and plainly identified by reference to: (i) the tortious conduct to be prohibited (and that conduct must mirror the torts claimed in the Claim Form), and (ii) clearly defined geographical boundaries, if that is possible.** This also presupposes the requirement that it has not been possible to identify any Defendants (see **§5.12ff below**).

(8) **The prohibitions must be set out in clear words and should not be framed in legal technical terms. Any prohibited conduct which is lawful viewed on its own must be made absolutely clear and the Claimant must satisfy the Court that there is no other more proportionate way of protecting its rights or those of others** (see **§9.3ff below**).

(9) **The prohibitions in the final injunctions must mirror the torts claimed (or feared) in the Claim Form** (see **§9.3ff below**).

(10) **The prohibitions in the final injunctions must be defined by clear geographic boundaries, if that is possible** (see **§9.18 below**).

(11) **The duration of the final injunction should be only such as is proven to be reasonably necessary to protect the Claimant's legal rights in the light of the evidence of past tortious activity and the future feared tortious activity** (see **§9.20ff below**)**.** By this finding, Ritchie J accepted the Claimants' submission that the Supreme Court in *Wolverhampton CC*, at §225, was not confining the temporal limit of such injunctions to 1 year in the protest context. On the facts of *Valero* itself, Ritchie J granted a 5-year final injunction with annual reviews.

(12) **The court documents must be served by alternative means which have been considered and sanctioned by the Court. If ECHR rights are engaged, the Claimant must, pursuant to s.12(2) HRA 1998, show that it has taken all practicable steps to notify the Defendants.** The first sentence appears to be a departure from the Supreme Court judgment in *Wolverhampton CC*. In that case, the Supreme Court emphasised that claims brought against Newcomers were, by definition, without notice and that anyone breaching the injunction would be liable for contempt regardless of whether they had been formally served: see §§132, 139, 142, 167(ii), 176-177 and 226. Instead, the Supreme Court stated that:

> "226... in the interests of procedural fairness, we consider that any local authority intending to make an application of this kind must take reasonable steps to draw the application to the attention of persons likely to be affected by the injunction sought or with some other genuine and proper interest in the application (see para 167(ii) above). This should be done in sufficient time before the application is heard to allow those persons (or those representing them or their interests) to make focused submissions as to whether it is appropriate for an injunction to be granted and, if it is, as to the terms and conditions of any such relief."

The difference, then, is between: (i) a Claimant making an application for alternative service, pursuant to CPR 6.15 and 6.27, and obtaining an Order to that effect (see **§4.4ff above**); and, (ii) a Claimant carrying out steps it considers sufficient to bring the application/Order to the notice of Defendants without the Court's sanction. In practice, Claimants will likely

have to follow option (i) anyway where there are any named Defendants for whom they do not have an address or there are identified Persons Unknown. Even if not, it may be beneficial for Claimants to follow option (i) out of an abundance of caution in order to be confident that there is no subsequent dispute about the efficacy of the notification. But, technically, it now appears that option (ii) is sufficient.

(13) **Persons Unknown must be given the right to apply to set aside or vary the injunction on shortish notice.**

(14) **Provision must be made for reviewing even a final injunction in the future. The regularity of the reviews depends on the circumstances** (see **§7.13 below**)**.**

(c) When "Persons Unknown" can be restrained

5.10 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.[85] 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.

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

(d) How to define Persons Unknown

5.12 Once a Claimant decides that it wishes to make Persons Unknown a Defendant, they must be defined in the claim form, court orders, etc as precisely as possible.[86] A failure to do so accurately and correctly according to the case law can be disastrous for a

[85] *Ineos Upstream v Persons Unknown* [2019] 4 WLR 100 (CA), §34(2) (Longmore LJ).
[86] *Wolverhampton CC v London Gypsies & Travellers* [2024] 2 WLR 45, §221.

Claimant, with the effect that a class of protestors carrying out direct action is not covered by the injunction.

5.13 The rule is that Persons Unknown must be defined by reference to their conduct which is alleged to be unlawful.[87] 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".[88] This is, presumably, what the Supreme Court had in mind in *Wolverhampton CC v London Gypsies & Travellers* [2024] 2 WLR 45, when it said that Claimants should explore "*the possibility of identifying them as a class by reference to conduct prior to what would be a breach (and, if necessary, by reference to intention)*": §221.

5.14 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.

5.15 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"

5.16 By contrast, the following definition of Persons Unknown in *North Warwickshire BC v Baldwin* [2023] EWHC 1719 (KB) was found to be flawed by Sweeting J, at §145:

> "PERSONS UNKNOWN WHO ARE ORGANISING, PARTICIPATING IN OR ENCOURAGING OTHERS TO PARTICIPATE IN PROTESTS AGAINST THE PRODUCTION AND/OR USE OF FOSSIL FUELS, IN THE LOCALITY OF THE SITE KNOWN AS KINGSBURY OIL TERMINAL, TAMWORTH B78 2HA"

5.17 This was defective on the basis that it did not refer to the conduct which was alleged to be unlawful.

5.18 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"

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

5.19 It should be noted, however, that Constable J in *University of Brighton v Persons Unknown* [2023] EWHC 1485 (KB) – a case involving protests within university premises – required Persons Unknown "*barricading…within the Premises*" not to be defined also by reference to "*the purpose of protesting*". This is best explained as being unnecessary on the facts of the case given that no lawful behaviour could possibly have involved barricading oneself within the university premises.

5.20 Where there is more than one piece of private land (or more than one cause of action in relation to that private land) it is good practice to have multiple Persons Unknown:

> "(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"

5.21 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
>
> (1) PERSONS UNKNOWN WHO, IN CONNECTION WITH CAMPAIGN Z, ERECT STRUCTURES ON, TUNNEL UNDER, LOCK ONTO OR AFFIX THEMSELVES TO PUBLIC LAND Y"

5.22 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"

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

5.24 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.

5.25 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."

5.26 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.

(e) How to identify Persons Unknown

5.27 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.

5.28 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.

5.29 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.

5.30 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.

5.31 In the past, orders have been made by the court without difficulty and, in most instances, without opposition.[89] 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. The same approach was taken by Freedman J in *Transport for London v Lee* [2022] EWHC 3102 (KB), §96(6).

[89] 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).

5.32 It should be noted, however, that the Courts have raised some eyebrows on the power to grant such orders in respect of information and documents not yet in existence – i.e. for future arrests – as well as in relation to people who have been arrested but not yet charged.[90] The strongest statement to date was made in *National Highways Ltd v Persons Unknown* [2023] EWHC 1073 (KB) where Cotter J referred to the "*concern*" caused amongst some High Court Judges by these types of order. Cotter J stated that he was not prepared to continue this aspect of the order in the longer term without understanding the basis upon which it was said that the Court had, or should use, any power to make such an order: §163.

(f) Consequences of identifying Persons Unknown

5.33 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.[91]

5.34 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 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

[90] See, e.g., *Transport for London v Persons Unknown* [2023] EWHC 1038 (KB), §62 (Morris J). No such concerns were voiced by Hill J in *Shell UK Ltd v Persons Unknown* [2023] EWHC 1229 (KB), §§210-219.
[91] *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 (CA), §82(1).

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.

5.35 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 **§5.11 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.

5.36 Even if an individual is identified, however, Claimants still have to do their due diligence. In *MBR Acres Ltd v Free the MBR Beagles* [2022] EWHC 3338 (KB), Nicklin J warned against aggregating the general wrongdoing by unidentified individuals and imputing them to specific identified individuals without looking at what that individual had actually done. Such an approach carried a risk of serious injustice and risked contravening the right to freedom of assembly: §67. Rather, each named Defendant is entitled to a fair adjudication of the claim made, and evidence presented, against them irrespective of the claim against Persons Unknown: §68. Further, in *National Highways Ltd v Persons Unknown* [2023] EWHC 1073 (KB), after various named Defendants had

made submissions at an interim injunction application, Cotter J stated that it would be wrong to treat the Defendants as a homogenous group and that the case against each named Defendant required individual analysis: §108.

5.37 A slightly more relaxed approach appears to have been taken in *Transport for London v Lee* [2022] EWHC 3102 (KB). In that case, the Claimant sought to join named Defendants who had been arrested by the police and whose names had subsequently been provided – i.e. the Claimant was relying on the assertion of the police that they had been acting in breach of the injunction without any supporting information. Although Freedman J had concerns with such an approach, he ultimately joined the named Defendants, particularly in light of the following protections that were available: (i) the Claimants had undertaken to scrutinise, as soon as reasonably practicable after disclosure of information from the police, whether any named Defendant should properly have remained so; and, (ii) any named Defendant was able to apply to discharge or vary the order made against them: §§72-81.

5.38 The failure of a named Defendant to participate in proceedings or make submissions is to be taken as indicating that they have chosen not to challenge the case being asserted against them. It may also give an insight into the intention of the named Defendant as to intention of future conduct.[92] Generally speaking, the courts have emphasised the importance of Defendants actively engaging with proceedings in order to protect and improve their position: *National Highways Ltd v Persons Unknown* [2023] EWHC 1073 (KB) (Cotter J), §119 (Cotter J).

(g) Interested Persons

5.39 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.

5.40 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."

[92] *Transport for London v Lee* [2023] EWHC 1201 (KB) §§27, 34 (Eyre J); *National Highways Ltd v Persons Unknown* [2023] EWCA Civ 182, §41.

5.41 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: (a) they are "*directly affected*" by it; and, (b) they have a good point to raise.[93] Interested Persons can do so by promptly filing and serving an application notice. 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 as if there was a complete rehearing of the matter.[94]

5.42 In *Esso Petroleum v Breen* [2022] EWHC 2600 (KB), Ritchie J set out 7 factors for the Court to consider when determining the nature and degree of an Interested Person's connection to the claim:[95]

(1) Whether the Interested Person will profit from the litigation financially or otherwise.

(2) Whether the Interested Person is controlling the whole or a substantial part of the litigation.

(3) Whether the final decision in the litigation will adversely affect the interested person, whether by way of civil rights, financial interests, property rights or otherwise.

(4) Whether the Interested Person is funding the litigation or the defence thereof.

(5) Whether there is a substantial public interest point or a civil liberties point being raised by the interested person.

(6) The court should take into account the wide or draconian nature of injunctions against unknown persons which may be geographically large or temporarily large or both. There should be a low threshold for Interested Persons to be able to take part in such broad and or wide orders.

(7) The costs risks and difficulties faced by Interested Persons who are affected by orders which they did not instigate.

(8) Any prejudice which would be suffered by the Claimant in granting the Interested Persons their request and refusing to require them to become parties.

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[93] *Shell UK Ltd v Persons Unknown* [2023] EWHC 1229 (KB), §§62-65 (Hill J).
[94] *Shell UK Ltd v Persons Unknown* [2023] EWHC 1229 (KB), §§100-101 (Hill J).
[95] The judgment is not reported but these reported factors are taken from A Hardy, "CPR 40.9: a means for Interested Persons to challenge protest injunctions" - https://tinyurl.com/ye2mmksh (last accessed on 2 July 2023). These factors were relied upon by Hill J in *Shell UK Ltd v Persons Unknown* [2023] EWHC 1229 (KB), §§75-81.

5.43 *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.

5.44 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).

5.45 The most detailed treatment of interested persons in this context can be found in *Shell UK Ltd v Persons Unknown* [2023] EWHC 1229 (KB), where an individual sought to rely on CPR r40.9 to make submissions without being joined as a Defendant. Hill J found that the individual was "*directly effected*" on the basis that: the injunctions may have a chilling effect on her lawful protests; she had specific concerns about the existence, scope and wording of the injunctions; and, that if she breached the injunctions this would affect her financial interests and expose her to the risk of a prison sentence: §§68-69. Hill J also found that the individual had a good point to make: §§73-74. Hill J considered that individuals applying to make submissions under CPR r40.9 were not confined, in cases involving Persons Unknown, to challenging existing orders, as opposed to challenging the grant of further orders: §§88-96.

5.46 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.[96]

[96] 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).

5.47 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.

5.48 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.[97]

5.49 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)

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

5.50 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.

5.51 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).

6 INTERIM INJUNCTIONS

6.1 This Chapter 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 has been 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 may effectively be the end of the claim. This Chapter 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.

6.2 It is important, nonetheless, to remember the Supreme Court's judgment in *Wolverhampton CC v London Gypsies & Travellers* [2024] 2 WLR 45 that injunctions against Persons Unknown who are Newcomers are typically neither interim nor final, at least in substance (see **§5.6(iii) above**). We will have to wait to see how courts interpret this in practice (and see **§6.41 below** for an early example of this). Until then, in cases involving Newcomers only, it may be prudent to consider the points below in concert with the factors adopted in *Valero Energy Ltd v Persons Unknown* [2024] EWHC 134 (KB) by Ritchie J (see **§5.10 above**).

(a) *American Cyanamid* test

6.3 In order to obtain an interim injunction, a court will usually 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. <u>Serious issue to be tried</u>

6.4 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.

6.5 Due to this threshold not being very 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 **Chapter 8 – Human Rights**).[98]

6.6 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 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.[99] 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.

6.7 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.[100] 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.[101] 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-

[98] *MBR Acres Ltd v Free the MBR Beagles* [2021] EWHC 2996 (KB), §92 (Nicklin J).
[99] *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).
[100] 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.
[101] *Ineos Upstream v Persons Unknown* [2019] 4 WLR 100 (CA), §§39-40 (Longmore LJ).

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.

At the subsequent hearing, *Shell UK Ltd v Persons Unknown* [2023] EWHC 1229 (KB), the same arguments were accepted by Hill J: §§121-122, 126-127, 129, 155.

(2) *Esso Petroleum v Breen* [2023] EWHC 2013 (KB) (Knowles J): this was a claim brought by Esso against environmental protestors targeting its Southampton-London Pipeline. The Pipeline is 105km in length and runs over land with a "*complex tapestry*" of land interests: §36. 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: §68.[102]

6.8 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 at **§6.19ff below**.

ii. <u>Adequacy of damages</u>

6.9 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.[103]

[102] Knowles J largely relied on the analysis of HHJ Lickley LJ at the interim injunction stage: *Esso Petroleum v Breen* [2022] EWHC 2664 (KB), §§20-27 (HHJ Lickley KC).
[103] *HS2 v Persons Unknown* [2022] EWHC 2360 (KB), §74 (Knowles J); *Patel v WH Smith Ltd* [1987] 1 WLR 853, 861 (Balcombe LJ).

- 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.

6.10 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.[104]

6.11 In most cases where a precautionary injunction is sought (see **§6.27ff below** on precautionary injunctions), the court also asks, in addition, whether the harm would be "*grave and irreparable*" such that damages would not be adequate.[105] This test originates from *Vastint Leeds BV v Persons Unknown* [2019] 1 WLR 2, where Marcus Smith J stated at §31:

> "(3) When considering whether to grant a quia timet injunction, the court follows a two-stage test: (a) First, is there a strong probability that, unless restrained by injunction, the defendant will act in breach of the claimant's rights? (b) Secondly, if the defendant did an act in contravention of the claimant's rights, would the harm resulting be so grave and irreparable that, notwithstanding the grant of an immediate interlocutory injunction (at the time of actual infringement of the claimant's rights) to restrain further occurrence of the acts complained of, a remedy of damages would be inadequate?" (emphasis added)

6.12 Linden J in *Esso Petroleum v Persons Unknown* [2023] EWHC 1837 (KB), at §§63-64, confessed to some doubts about the structure of the *Vastint* test. He went on to say:

> "63…To my mind they are questions which the Court should consider in applying the test under section 37 Senior Courts Act 1981, namely what is "just and convenient" but they are not threshold tests. I also note that, even taking into account *Vastint*, the editors of Gee on Commercial Injunctions (7th Edition) say at 2-045:
>
> > "*There is no fixed or 'absolute' standard for measuring the degree of apprehension of a wrong which must be shown in order to justify quia timet relief. The graver the likely consequences, and the risk of wrongdoing the more the court will be reluctant*

[104] *MBR Acres Ltd v Free the MBR Beagles* [2021] EWHC 2996 (KB), §115 (Nicklin J).
[105] *Shell UK Ltd v Persons Unknown* [2023] EWHC 1229 (KB), §147 (Hill J); *Transport for London v Lee* [2023] EWHC 1201 (KB), §§20, 40-41 (Eyre J); *Transport for London v Persons Unknown* [2023] EWHC 1038 (KB), §§36 and 43 (Morris J); *Transport for London v Lee* [2022] EWHC 3102 (KB), §65 (Freedman J); *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).

to consider the application as 'premature'. But there must be at least some real risk of an actionable wrong."

64. Where the court is being asked to grant an injunction in circumstances where no tort has been committed or completed it will naturally need to be persuaded that the risks and consequences of not making such an order are sufficiently compelling to grant relief. Where, as in the present case, tortious conduct has taken place but the identity of the tortfeasors is unknown, and relief is sought on a final basis against future tortfeasors who are not a parties and are identified only by description, again the court will be cautious. But it would be surprising if, for example, a court which considered that there was a significant risk of further tortious conduct, but not a strong probability of such conduct, was compelled to refuse the injunction no matter how serious the damage if that conduct then took place."

6.13 Nonetheless, Linden J did not depart from *Vastint* on the basis that the point was not fully argued before him and that, on the facts of the case, he did not need to do so.

6.14 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. Some recent cases have found that damages will not be adequate for such Defendants, as they will have lost the chance to protest, for which specific timing may be very important.[106]

iii. Balance of convenience

6.15 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.

6.16 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.

6.17 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.[107]

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[106] *Dyer v Webb* [2023] EWHC 1917, §§101-102 (Dexter Dias KC); *Gitto Estates v Persons Unknown* [2021] EWHC 1997 (KB), §27 (Hugh Southey KC).

[107] *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).

6.18 In light of *Wolverhampton CC v London Gypsies & Travellers* [2024] 2 WLR 45, where the Defendants include "Newcomers", courts will now need to consider the elevated test of whether there is a "*compelling justification*" for the injunction (see **§5.10(4) above**).

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

6.19 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.
> …
> (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."

6.20 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.

6.21 On (1), the authorities do not speak with one voice. The issue has only been properly considered in a handful of cases. In almost all 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. The type of activities in issue, therefore, more easily came 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.

- In *Esso Petroleum v Breen* [2022] EWHC 2664 (KB), §§28-40, where the issue was fully argued, HHJ Lickley KC 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.

6.22 These more recent authorities seem not to have been cited to the Court in *MBR Acres Ltd v Free the MBR Beagles* [2022] EWHC 3338 (KB) (Nicklin J) where the Court appeared to find that s.12(3) of the Human Rights Act 1998 applied to all of the protest activity (and not just those relating to placards and slogans): §61. They were also not cited in *National Highways Ltd v Persons Unknown* [2022] EWHC 3497 (KB) (Soole J) where it was assumed that s.12(3) applied: §32(iii).

6.23 In the most recent case to consider the issue - *Shell UK Ltd v Persons Unknown* [2023] EWHC 1229 (KB) – Hill J appeared to agree with Johnson J in *Shell UK Oil Products Ltd v Persons Unknown* [2022] EWHC 1215 (KB). Notwithstanding that, the facts of that specific case involved "*publication*" given that the injunction prohibited writing on any part of a Shell petrol station. Consequently, s.12(3) applied in relation to that element of the case only.

6.24 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 first *American Cyanamid* criterion of "serious issue to be tried".

6.25 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.[108]

6.26 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

6.27 Previously known as *quia timet* injunctions,[109] precautionary protest injunctions prohibit conduct which has either not yet taken place or not yet been carried out by a particular Defendant.

6.28 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 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."

6.29 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.[110] These terms are more flexible than they might appear on first glance.

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[108] *Cream Holdings Ltd v Banerjee* [2005] 1 AC, §15 (Lord Nicholls).
[109] 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*".
[110] *London Borough of Islington v Elliott* [2012] EWCA Civ 56, §29 (Patten LJ).

6.30 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.[111]

6.31 The term "*imminent*" is used in the sense that the remedy sought is not premature.[112] The likely gravity of damage is also an important factor.[113]

6.32 The fact that a named Defendant has not engaged with the claim or the Court will support the argument that he/she will carry out the unlawful acts in the future in the absence of an injunction.[114] In addition, the fact that a Defendant has not given assurances or other evidence that it has no intention to carry out or repeat the impugned conduct will strengthen the case for an injunction.[115]

6.33 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.

6.34 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.[116] There are several recent examples of the Court granting 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).

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[111] *HS2 v Persons Unknown* [2022] EWHC 2360 (KB), §§176-177 (Knowles J).
[112] *Hooper v Rogers* [1975] Ch 43 (CA), 49-50 (Russell LJ).
[113] *Network Rail Infrastructure Ltd v Williams* [2019] QB 601 (CA), §71 (Sir Etherton MR).
[114] *Transport for London v Lee* [2023] EWHC 1201 (KB), §§36 and 38 (Eyre J).
[115] *Esso Petroleum v Persons Unknown* [2023] EWHC 1837 (KB), §67 (Linden J).
[116] The issue is sometimes dealt with as a point going towards proportionality/ whether the protest injunction has clear geographical limits.

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* [2023] EWHC 2013 (KB), Knowles J granted an injunction covering the entire 105km oil pipeline from Southampton to Heathrow that was being upgraded. He rejected the argument that an imminent danger of very substantial damage could not be found in relation to the whole area of the pipeline for the same reasons as those given in the above *HS2* case: §69.[117]

iv. In *Esso Petroleum v Persons Unknown* [2023] EWHC 1837 (KB), where direct action had affected some but not all of the Claimant's sites, Linden J stated, at §70, that "*the essence of anticipatory relief, where it is justified, is that the claimant need not wait until harm is suffered before claiming protection*".

6.35 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

[117] HHJ Lickley at the interim injunction stage (*Esso Petroleum v Breen* [2022] EWHC 2664 (KB)) came to the same conclusion.

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."

6.36 Moreover, in *Transport for London v Lee* [2023] EWHC 1201 (KB), Eyre J granted a final injunction over a number of roads in London, many of which had not yet been targeted by Just Stop Oil. This was because, "*all are locations in London where the blocking of the road will be liable to cause substantial and widespread congestion. They are precisely the kind of location at which such protests have previously occurred and the fact that a particular location has not previously been targeted is not an indication of the absence of risk.*": §33.

6.37 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) Renewing an interim injunction

6.38 Where a Claimant seeks to renew an interim injunction – i.e. extend a previous interim injunction that has already been granted and is soon to expire – the Court is entitled to review any aspect of the merits of the claim and entitlement to the Order sought.[118] In practice, and particularly where there has been no challenge by a Defendant to any element of the claim, the Court will focus its consideration on whether there remains a continuing threat of a real and imminent risk.

6.39 It should be noted that courts have taken differing approaches to whether an interim injunction can be renewed for a length period of time or whether a Claimant ought to progress the claim to its final determination such that directions ought to be set for trial. For example, in both *Esso Petroleum v Persons Unknown* (30 Mar 2023) (unreported) (KB) and *UK Oil Pipelines Ltd v Persons Unknown* (21 Apr 2023) (unreported) (Ch), interim injunctions granted the previous year in relation to environmental protests were sought to be continued. Collins Rice J and Rajah J, respectively, probed the Claimants on what steps had been taken to progress the claim to final determination. Both Courts subsequently made directions/orders effectively requiring the Claimants to bring the claim to trial or otherwise have the claims finally determined in short order. By contrast, on very similar facts, interim injunctions were continued for 12 months in the cases of *Valero Energy v Persons Unknown* (11 Jan 2023) (unreported) (KB) (Soole J), *Exolum v Persons Unknown* (11 Jan 2023) (unreported) (KB) (Soole J), *Navigator Terminals v Persons*

[118] *National Highways Ltd v Persons Unknown* [2023] EWHC 1073 (KB), §64 (Cotter J).

Unknown (28 Apr 2023) (unreported) (KB) (Garnham J), *Essar Oil v Persons Unknown* (11 May 2023) (unreported) (Ch) (HHJ Monty KC) and *Shell UK Ltd v Persons Unknown* [2023] EWHC 1229 (KB) (Hill J).

6.40 There may be some tension between these latter cases and the principle set out in **Chapter 7 below** of a Claimant being required to get on with progressing the claim as rapidly as it can.

6.41 In light of *Wolverhampton CC v London Gypsies & Travellers* [2024] 2 WLR 45, it could now be argued that, in respect of cases involving Newcomers only – where the traditional distinction between interim and final injunctions appears to have been demolished – "renewing an interim injunctions" makes no sense. Rather, all relief obtained could be said to be final relief subject to liberty to any Defendants to apply to set aside the order and subject to regular review from the Court. This was the position in *1 Leadenhall Group London v Persons Unknown* [2024] EWHC 530 (KB) – an urban explorer trespass case – where the claim was against Newcomers only. The Claimants obtained final relief at the first without notice hearing (there being no return date ordered) and, just before the expiry of that injunction two years later, applied for and obtained an extension.

(e) Obligations on the Claimant

6.42 Other than in the scenario already discussed at **§3.24 above**, a Claimant has traditionally had various obligations when obtaining an interim injunction. These include:

i. Giving a cross-undertaking in damages, unless the court orders otherwise.[119] 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.[120] In *Wolverhampton CC v London Gypsies & Travellers* [2024] 2 WLR 45, the Supreme Court has now tantalisingly implied that cross-undertakings may not be necessary in injunctions against Newcomers as they are not technically interim orders and they are "*not in any*

[119] CPR PD25A, §5.1(1). See *Birmingham CC v Afsar* [2019] EWHC 1619 (KB) for the general principles.
[120] *North Warwickshire BC v Baldwin* [2023] EWHC 1719 (KB), §§121-122 (Sweeting J); *Financial Services Authority v Sinaloa Gold plc* [2013] 2 AC 28 (SC), §§30-33 and 41 (Lord Mance). But see *Birmingham CC v Afsar* [2019] EWHC 1619 (KB), §2, where Warby J considered the relevant principles and did require the local authority to give a cross-undertaking.

sense holding the ring until the final determination of the merits of the claim at trial": §234. It did say, however, that this was "*another important issue for another day*".

ii. Progressing the claim. This is considered further, below, in **Chapter 7**.

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.[121] This includes changes in the law that have occurred since the grant of the interim injunction.[122]

Equally, in *MBR Acres Ltd v Free the MBR Beagles* [2022] EWHC 3338 (KB), Nicklin J stated that the Court will keep the terms of any interim injunctions under review – and in appropriate cases make changes to the injunction – to ensure that they are not having an unintended effect: §10. This duty appears to apply to final injunctions just as much as it does to interim injunctions.[123]

[121] *Ineos Upstream v Persons Unknown* [2022] EWHC 684 (Ch), §44 (HHJ Klein); *Enfield LBC v Persons Unknown* [2020] EWHC 2717 (KB), §32 (Nicklin J).
[122] *Enfield LBC v Persons Unknown* [2020] EWHC 2717 (KB), §§27-32 (Nicklin J).
[123] *Barking & Dagenham LBC v Persons Unknown* [2022] 2 WLR 946 (CA), §77.

7 FINAL INJUNCTIONS

7.1 A Claimant who does obtain an interim injunction (and see **§6.2 above** in respect of the position with Newcomers) is bound to get on with progressing the claim as rapidly as it can.[124] A failure to do so can lead to the court striking out the claim form as an abuse of process.

(a) Available procedural options

7.2 A Claimant has several options:

(1) Apply for summary judgment, pursuant to CPR Part 24;

(2) Apply for default judgment, pursuant to CPR Part 12;

(3) Bring the claim to trial; or,

(4) Discontinue the claim.

7.3 As to summary judgment, the Claimant has to demonstrate that the Defendant has no real prospect of successfully defending the claim and that there is no other compelling reason why the case should be disposed of at a trial.[125] Such an application may not usually be made until the Defendant has filed an acknowledgement of service or defence (or the time for doing so has expired).[126] The relevant procedure is set out in CPR r24.4 and PD24, §2.

7.4 In *National Highways Ltd v Persons Unknown* [2022] EWHC 1105 (KB), the Claimant had sought summary judgment against 133 named Defendants as well as Persons Unknown. Bennathan J granted the application against 24 of the named Defendants who had already been found to be in contempt of court for breaching the interim injunctions. But he refused to grant a final injunction against the remaining 109 named Defendants (though he did grant a precautionary interim injunction against them on the same terms). This was on the basis that he was not satisfied that those Defendants had already committed the tort of trespass or nuisance.

7.5 The Court of Appeal overturned this decision that a final injunction could not be granted against the 109 named Defendants.[127] For the grant of a final precautionary injunction, it is not a requirement that the Claimant prove a Defendant has already committed the relevant tort. The essence of this form of injunction is that the tort is *threatened*: §39.

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[124] *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).
[125] CPR r.24.2.
[126] CPR PD24, §2(6).
[127] *National Highways Ltd v Persons Unknown* [2023] EWCA Civ 182.

7.6 *Valero Energy Ltd v Persons Unknown* [2024] EWHC 134 (KB) now represents the most recent judgment dealing with a summary judgment application in a protest context – see **§5.9 above**.

7.7 As to default judgment, a Claimant may not obtain this where they have brought a Part 8 claim.[128] Even in a Part 7 claim, a Claimant may consider that it is inappropriate to make an application for default judgment in a case against Persons Unknown where the Court will not be able to consider the merits of a case.

7.8 As to going to trial, it was previously quite common for a claim never to reach this stage as an interim injunction would have effectively disposed of the proceedings. Indeed, the Court of Appeal in *Barking & Dagenham LBC v Persons Unknown* [2022] 2 WLR 946 (CA) said that "*There is, as I have said, almost never a trial in a persons unknown case, whether one involving protestors or unauthorised encampments.*": §92. The approach appears to have changed subsequently with the Courts emphasising the need to progress claims.[129] Where the claim is against Newcomers only, however, following *Wolverhampton CC v London Gypsies & Travellers* [2024] 2 WLR 45 it appears unlikely that a claim will need to proceed to trial at all.

7.9 It is also possible to seek expedition for trial depending on the circumstances. In *Transport for London v Lee* [2023] EWHC 402 (KB), for example, the Claimants applied for, and were granted, an expedited trial. Cavanagh J found that it was in the public interest for the trial to take place as soon as possible given the importance of the case to the Claimant, the general public and the Defendants. There was no prejudice to the Defendants given that all but one had not taken part: §§15-17.

7.10 Two recent examples of a protest injunction going to trial can be found in *Transport for London v Persons Unknown* [2023] EWHC 1038 (KB) (Morris J), relating to Insulate Britain, and *Transport for London v Lee* [2023] EWHC 1201 (KB) (Eyre J), relating to Just Stop Oil.

7.11 A recent example of a Claimant failing to progress a claim (or discontinue it) can be seen in *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:

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[128] CPR r12.2(b).

[129] See, for example, *Ineos Upstream v Persons Unknown* [2022] EWHC 684 (Ch), §§32 and 60 (HHJ Klein); *Barking & Dagenham LBC v Persons Unknown* [2022] 2 WLR 946 (CA), §108. See, also, **§6.39 above**.

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 material change in circumstances. It did, however, impose a sanction in costs on the Claimant.[130] In the sequel, *Ineos Upstream v Persons Unknown* [2023] EWHC 214 (Ch) (Master Kaye), the Judge did decide to strike out the claim. She considered that, the interim injunctions having been discharged and the claim having been discontinued against the defendants, the proceedings served no useful purpose such that they were abusive: §114. The claim was, therefore, struck out under the Court's inherent power under CPR r 3.3, 3.4 and 3.1(2)(m).

7.12 As set out at **§6.42(iii) above**, there is a duty to keep the situation under review. This appears to apply to final injunctions just as much as it does to interim injunctions.[131] As such, even where a final injunction is made, Claimants must still consider whether they ought to come back to Court following a material change of circumstances.

7.13 This is separate from in-built reviews ordered by Courts to ensure that there remains a continuing threat of direct action. For example, in all of the following cases, final relief was granted in the form of a 5-year injunction but with provision for an annual review:

i. *Transport for London v Persons Unknown* [2023] EWHC 1038 (KB) (Morris J);

ii. *Transport for London v Lee* [2023] EWHC 1201 (KB) (Eyre J);

iii. *Esso Petroleum v Persons Unknown* [2023] EWHC 1837 (KB) (Linden J);

iv. *UK Oil Pipelines Ltd v Persons Unknown* (PT-2022-000303) (Ch) (6 Oct 2023) (unreported) (Mr Simon Gleeson); and,

v. *Valero Energy Ltd v Persons Unknown* [2024] EWHC 134 (KB) (Ritchie J).

[130] See also the sequel in *Ineos Upstream v Persons Unknown* [2023] EWHC 214 (Ch), in which Master Kaye made a further costs award against the Claimants.

[131] *Barking & Dagenham LBC v Persons Unknown* [2022] 2 WLR 946 (CA), §77.

8 HUMAN RIGHTS

8.1 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 Chapter 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

8.2 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

vi. 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.

vii. 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

viii. 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.

ix. 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."

8.3 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.

8.4 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*."

8.5 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."

8.6 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*".[132]

8.7 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.

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

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

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

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

8.9 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.[133] It is not entirely clear whether Articles 10/11 ECHR are engaged at all in such a situation[134] 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.[135]

8.10 The effect is that in this context a protestor has, at least for all practical purposes, 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

8.11 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.

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[133] *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).

[134] In *Hicks v DPP* [2023] EWHC 1089 (KB), for example, Chamberlain J stated that an argument to the effect that Articles 10/11 ECHR were not engaged at all in these circumstances was "*ambitious*": §46. But he then stated that it was not necessary for him to decide the issue. Also in *DPP v Bailey* [2023] 2 WLR 1140, §57, the Divisional Court stated that "*This is an arid debate in the context of this case, as the end result on either analysis is the same.*"

[135] *DPP v Cuciurean* [2022] 3 WLR 446 (DC), §§44-42.

i. Difference between protest and direct action

8.12 The case law has determined that 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*.

8.13 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 hand.[136] Whereas both can fall within Article 10/11 ECHR,[137] direct action is not at the core of those rights.[138] It will, therefore, be given less weight when balancing the competing rights and interests in play.[139] By contrast, in *Canada Goose v Persons Unknown* [2020] 1 WLR 417 (KB), §§98 and 125 (Nicklin J), the Court was clearly concerned that the protest injunction restrained simple protest.

8.14 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

[136] *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).
[137] 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).
[138] *Esso Petroleum v Persons Unknown* [2023] EWHC 1837 (KB), §57 (Linden J); *Shell UK Ltd v Persons Unknown* [2023] EWHC 1229 (KB), §§176-177 (Hill J); *DPP v Bailey* [2023] 2 WLR 1140 (DC), §§61-62; *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).
[139] *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).

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."

8.15 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:

> "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."

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

8.17 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 not protected by Article 10/11 ECHR.[140]

[140] *Attorney General's Reference (No. 1 of 2022)* [2022] EWCA Crim 1259, §§82, 84-87, 90, 102, 110.

ii. Test to be applied

8.18 When deciding whether to grant a protest injunction (at the interim or final stage), the Court will ask the following questions:[141]

(1) Is what the defendant did in exercise of one of the rights in Articles 10 or 11?

(2) If so, is there an interference by a public authority with that right?

(3) If there is an interference, is it prescribed by law? The relevance of this requirement being that article 10 envisages the right to freedom of expression being subject to such restrictions as are prescribed by law and that article 11 provides that only such restrictions as are prescribed by law shall be placed on the right to freedom of assembly.

(4) If so, is the interference in pursuit of a legitimate aim as set out in paragraph (2) of Article 10 or Article 11?

(5) If so, is the interference 'necessary in a democratic society' such that a fair balance is struck between the legitimate aim and the requirements of freedom of expression and freedom of assembly?

8.19 The analysis is usually focused on the last question, which is in turn answered by considering the following factors:[142]

(1) 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.

(2) Is there a rational connection between the means chosen and the aim in view? A protest injunction restraining direct action will invariably be rationally connected to the aim of protecting the Claimant's A1P1 ECHR rights or other lawful activities.

(3) Are there less restrictive alternative means available to achieve that aim? This is considered further below.

[141] *DPP v Ziegler* [2022] AC 408 (SC), §§16, (Lord Hamblen and Lord Stephens). For a recent application of this test, see *Transport for London v Lee* [2023] EWHC 1201 (KB), §§42-46 (Eyre J).
[142] *DPP v Ziegler* [2022] AC 408 (SC), §§16, 64-65 (Lord Hamblen and Lord Stephens).

(4) 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.

8.20 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

8.21 In some cases, Claimants have successfully argued that less restrictive alternative means do not exist on the bases that: (1) damages would not prevent further protests; (2) prosecutions for criminal offences can only be brought after the event and are, in any event, not a sufficient deterrent; and, (3) other methods of deterring the protests are impractical.[143]

8.22 In other 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.

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

[143] See, e.g., *Transport for London v Lee* [2023] EWHC 1201 (KB) §50 (Eyre J); *Transport for London v Persons Unknown* [2023] EWHC 1038 (KB), §45(3) (Morris J).

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."

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

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

8.26 Nicklin adopted a similar approach in *MBR Acres Ltd v Free the MBR Beagles* [2022] EWHC 3338 (KB) (Nicklin J) where he stated that:

> "76…unless the Claimants can demonstrate a clear case for an injunction, in my judgment it is better to leave any alleged wrongdoing to be dealt with by the police. Officers on the ground are much better placed to make the difficult decisions as to the balancing of the competing rights…"

8.27 Although, this case was based on alleged harassment so, arguably, different issues arose and a more cautious approach was warranted.

8.28 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"

8.29 The same approach was taken in *Esso Petroleum v Breen* [2022] EWHC 2664 (KB) (HHJ Lickley KC) and *Shell UK Ltd v Persons Unknown* [2023] EWHC 1229 (KB), §178 (Hill J).[144]

8.30 In light of the Supreme Court's comments in *In re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2023] AC 505 (SC), however, there must now be some doubt about the approach taken by Bennathan J in *Esso Petroleum v Persons Unknown* [2022] EWHC 1477 (KB) and *Valero Energy Ltd v Persons Unknown* [2022] EWHC 911 (KB). This is because the Supreme Court rejected the point made in *DPP v Ziegler* [2022] AC 408 (SC) that "*Determination of the proportionality of an interference with ECHR rights is a fact-specific*

[144] See also *Shell UK Oil Products Ltd v Persons Unknown* [2022] EWHC 1215 (KB), §60 (Johnson J).

inquiry which requires the evaluation of the circumstances in the individual case": §§28-29 and 66. Rather, it went on to state:[145]

> "30. …the determination of whether an interference with a Convention right is proportionate is not an exercise in fact-finding. It involves the application, in a factual context (often not in material dispute), of the series of legal tests set out at para 24 above, together with a sophisticated body of case law, and may also involve the application of statutory provisions such as sections 3 and 6 of the Human Rights Act , or the development of the common law…"

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

8.31 When deciding how to strike a fair balance between the competing rights, courts will consider a number of factors, including:[146]

(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 importance*": §57.[147] This will not, however, be a "*particularly weighty factor*" to avoid judges simply giving greater protection to views they, themselves, think are important.[148]

(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.[149] In *National Highways Ltd v Persons Unknown* [2021] EWHC 3081 (KB), Lavender J counted

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[145] It should be noted, though, that *In re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2023] AC 505 (SC) itself was a case about the proportionality of a legislative measure.

[146] 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).

[147] See also *Transport for London v Lee* [2023] EWHC 1201 (KB), §52(ii) (Eyre J).

[148] *Transport for London v Lee* [2023] EWHC 1201 (KB), §24 (Eyre J); *City of London v Samede* [2012] 2 All ER 1039 (CA), §41 (Lord Neuberger MR).

[149] *Hicks v DPP* [2023] EWHC 1089 (KB), §§40-43 (Chamberlain J); *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).

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).[150] Freedman J took the same view in *Transport for London v Lee* [2022] EWHC 3102 (KB), where those disrupted by the protests (members of the public using the highway) were not the apparent object of the protest (the Government): §§46, 61.[151] 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.[152] 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.[153]

(5) The extent to which the continuation of the protest would breach domestic law.[154]

(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*

[150] See also *National Highways Ltd v Persons Unknown* [2022] EWHC 1105 (KB), §49 (Bennathan J) and *Transport for London v Persons Unknown* [2023] EWHC 1038 (KB), §45(4) (Morris J).
[151] See also *Transport for London v Lee* [2023] EWHC 1201 (KB), §53(iii) (Eyre J).
[152] Although related, I have separated out factors (3) and (4) as being conceptually different.
[153] See *Transport for London v Lee* [2023] EWHC 1201 (KB), §53(v) (Eyre J); *Transport for London v Persons Unknown* [2023] EWHC 1038 (KB), §45(4) (Morris J); *Transport for London v Lee* [2022] EWHC 3102 (KB), §61 (Freedman J); *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).
[154] See *Transport for London v Lee* [2022] EWHC 3102 (KB), §51 (Freedman J).

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." [155] 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.[156] 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. In *Transport for London v Lee* [2022] EWHC 3102 (KB), although the physical occupation of the roads was quite limited, Freedman J took into account the fact that it caused congestion over a much wider area: §48.

(8) The extent to which the protest interferes with the rights of others.[157] 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*".[158] *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.[159] 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 should be left to the police; such enforcement could only take place after the

[155] See also *Mayor of London v Hall* [2011] 1 WLR 504 (CA), §48 (Lord Neuberger MR).
[156] 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).
[157] 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).
[158] *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23, §43 (Laws LJ).
[159] Contrast *Mayor of London v Hall* [2011] 1 WLR 504 (CA), §49 (Lord Neuberger MR).

event meaning inevitable loss to the Claimant.[160] In *Transport for London v Lee* [2022] EWHC 3102 (KB), Freedman J considered it strongly arguable that the blocking of roads in London by Just Stop Oil had caused substantial and unreasonable interference and disruption to the owner of the land and members of the public trying to use the highway, not to mention risking the life of protestors and emergency services: §§43-44, 61.[161] He referred to the fact that the protests sometimes occurred during the morning rush hour, leading to very large numbers of people being inconvenienced: §50. Freedman J was also concerned about the considerable police time and diversion of police resources that was being caused by the protests: §45.[162] In *Transport for London v Lee* [2023] EWHC 1201 (KB), Eyre J further relied on the anger and frustration caused to others and the risk of consequent disorder: §53(iv). In *Hicks v DPP* [2023] EWHC 1089 (KB), the defendant attended a hospital to question reports in the media that it was overflowing with COVID-19 patients. In a stairwell of the hospital, she abused and threatened health care professionals. The Court found that although her speech was political and so engaged Article 10 ECHR, there was no need to threaten or abuse anyone: §43.

(9) The extent to which the subject of the protest has been through the democratic processes.[163] 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.[164] In *Bloor Homes Ltd v Callow* [2022] EWHC 3507 (Ch), Hugh Sims KC (sitting as a Deputy High Court Judge) relied on the fact that the Claimant had gone through the full planning process in order to fell a tree that the protestors sought to protect: §§35, 39, 42-45.

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[160] See **§§8.22-8.30 above**.
[161] See also the judgment in the final trial of the matter to similar effect: *Transport for London v Lee* [2023] EWHC 1201 (KB), §§52(iv) and 53(i) (Eyre J).
[162] See also *Transport for London v Lee* [2023] EWHC 1201 (KB), §53(ii) (Eyre J).
[163] 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);
[164] In relation to HS2, see also *Balfour Beatty Group Ltd v Persons Unknown* [2022] EWHC 874 (KB), §71 (Linden J).

8.32 Some cases have stated that the peaceful nature of a protest, and the lack of disorder, is also a relevant factor.[165] 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.

[165] *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).

9 SCOPE OF THE INJUNCTION

9.1 In *Valero Energy Ltd v Persons Unknown* [2024] EWHC 134 (KB), §58, Ritchie J set out various requirements relating to the scope of protest injunctions. Although expressly said to refer to injunctions against Persons Unknown, these specific factors apply equally to named Defendants:

> "…
>
> **The terms of injunction**
>
> (9) The prohibitions must be set out in clear words and should not be framed in legal technical terms (like 'tortious' for instance). Further, if and in so far as it seeks to prohibit any conduct which is lawful viewed on its own, this must also be made absolutely clear and the claimant must satisfy the Court that there is no other more proportionate way of protecting its rights or those of others.
>
> **The prohibitions must match the claim**
>
> (10) The prohibitions in the final injunctions must mirror the torts claimed (or feared) in the Claim Form.
>
> **Geographic boundaries**
>
> (11) The prohibitions in the final injunctions must be defined by clear geographic boundaries, if that is possible.
>
> **Temporal limits - duration**
>
> (12) The duration of the final injunction should be only such as is proven to be reasonably necessary to protect the claimant's legal rights in the light of the evidence of past tortious activity and the future feared (quia timet) tortious activity. …"

9.2 This Chapter will consider these requirements in more detail.

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

9.3 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:[166]

> "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]."

9.4 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), and *North Warwickshire BC v Baldwin* [2023] EWHC 1719 (KB), §78 (Sweeting J).

9.5 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."

9.6 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"

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

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

> "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."

9.8 This can be contrasted with a case such as *Esso Petroleum v Breen* [2023] EWHC 2013 (KB), 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, Knowles J accepted the submission that:[167]

> "40… (5)…Any interference with Articles 10 or 11 on the highway which might emerge from the order is minor and (this, ultimately, the Claimant says is what counts) certainly proportionate given what is at stake in this case - where a strategically national important project has been explicitly threatened by persons who mean to stop it."

(b) Terms must be sufficiently clear and precise

9.9 The terms of any injunction must be clear and certain to make it clear what is permitted and what is prohibited.[168]

9.10 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

[167] See also *Esso Petroleum v Breen* [2022] EWHC 2664 (KB), where HHJ Lickley KC came to the same conclusion at the interim injunction stage.
[168] *AG v Punch Ltd* [2003] 1 AC 1046 (HL), §35.

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.

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.[169] 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.

9.11 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?

9.12 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*

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

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.

9.13 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…"

9.14 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?"

9.15 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.

9.16 In *North Warwickshire BC v Baldwin* [2023] EWHC 1719 (KB), Sweeting J found that carrying out the prohibited activity "*in the locality of*" the claimant's site was sufficiently clear: §§149-151.

9.17 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

9.18 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.

9.19 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

9.20 It will be unacceptable for an injunction to have no temporal limit.[170]

9.21 Where an interim injunction has been granted, there are generally now two possibilities:

i. Interim injunctions will often be expressed to be effective "*Until trial or further order*", though this can only be ordered if "*made in the presence of all parties to be bound by it or made at a hearing of which they have had notice*" – i.e. not at without notice hearings.[171] 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 **§6.42(ii) and Chapter 7 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. Similarly, in *Esso Petroleum v Persons Unknown* (30 Mar 2023) (unreported) (KB), the Claimants sought to continue an interim injunction for a further 12 months but Collins Rice J instead made directions for trial to come on within a few months. The interim injunction was only continued for the intervening period. In *UK Oil Pipelines Ltd v Persons Unknown* (21 Apr 2023) (unreported) (Ch) Rajah J took a similar approach by only continuing the interim injunction for a further 6 months.

[170] *Ineos Upstream v Persons Unknown* [2019] 4 WLR 100 (CA), §43 (Longmore LJ).
[171] CPR PD25A, §5.4.

9.22 A third possibility used to be the Court providing for a longstop date with a regular review mechanism. This was on the basis that interim injunctions against Persons Unknown would sometimes not need to proceed to a final trial at all, there being no identified individual actually defending himself/herself. Following *Wolverhampton CC v London Gypsies & Travellers* [2024] 2 WLR 45, however, the distinction between interim and final injunctions has been removed meaning that this third possibility amounts, in effect, to final relief. The result is that a Claimant will have to prove its case as if a final injunction were being sought.

9.23 For final injunctions, there will generally be a defined end-date with reviews built in.[172]

9.24 In *Wolverhampton CC v London Gypsies & Travellers* [2024] 2 WLR 45, the Supreme Court appeared to suggest that final injunctions against Persons Unknown should never extend for more than a year:

> "225…Similarly, injunctions of this kind must be reviewed periodically (as Sir Geoffrey Vos MR explained in these appeals at paras 89 and 108) and in our view ought to come to an end (subject to any order of the judge), by effluxion of time in all cases after no more than a year unless an application is made for their renewal. This will give all parties an opportunity to make full and complete disclosure to the court, supported by appropriate evidence, as to how effective the order has been; whether any reasons or grounds for its discharge have emerged; whether there is any proper justification for its continuance; and whether and on what basis a further order ought to be made."

9.25 That case involved, however, borough-wide injunctions obtained by local authorities against travellers, a group in relation to which local authorities have various statutory duties. The Supreme Court appeared to accept the situation may be different in the context of protest, stating:

> "(11) Protest cases
> …
> 236… The duration and geographical scope of the injunction necessary to protect the applicant's rights in any particular case are ultimately matters for the judge having regard to the general principles we have explained."

9.26 This was confirmed in *Valero Energy Ltd v Persons Unknown* [2024] EWHC 134 (KB), where Ritchie J granted the Claimants a 5-year final injunction subject to annual review.

9.27 The duration of the injunction will, then, depend on the circumstances.

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[172] See **Chapter 6 above.**

9.28 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.

9.29 Where the Claimant's activity being disrupted is an ongoing process with no defined endpoint, such as its usual commercial activity, it is more difficult to predict what approach a court will take. There have been protest cases in the past where relatively long injunctions have been 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 was difficult to find a case where a protest injunction had been granted for longer than 18 months. That was until *Barking & Dagenham LBC v Persons Unknown* [2022] 2 WLR 946, §108, where the Court of Appeal said that it was good practice to incorporate a periodic review into the order.[173] Since then, the courts appear to have taken a slightly different approach. In *Transport for London v Persons Unknown* [2023] EWHC 1038 (KB) (relating to Insulate Britain), for example, Morris J granted a final injunction for 5 years but with a yearly review by the Court for supervisory purposes: §52. The same approach was taken in four recent cases referred to at **§7.13 above**.

9.30 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).

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

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.[174]

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,[175] 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: (i) the terms of the injunction and whether the conduct complained of amounts to a breach of it;[176] and, (ii) whether to make a committal application 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.

[174] *White Book* (2022), §81.3.8.
[175] *Sheffield City Council v Brooke* [2019] QB 48 (KB), §7 (Males J).
[176] *QRT v JBE* [2022] EWHC 2902 (KB), §47 (Nicklin 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.[177]

(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.[178] 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.[179] The N600 form ought to be used unless there are compelling reasons for not doing so.[180]

ii. Contempt applications must be supported by written evidence given by affidavit or affirmation.[181] 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:

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

(1) The date and terms of the protest injunction alleged to have been breached.[182]

(2) A brief summary of the facts alleged to constitute the contempt, set out numerically in chronological order.[183] This is conventionally done in a separate document headed "Grounds".[184] A Defendant, or the Court of its own motion, may seek to argue that a sufficiently clear summary was not provided in breach of CPR r81.4(2)(h). The test is whether the application notice contains a clear summary, enough to enable the defendant to understand the case which has to be met.[185] *QRT v JBE* [2022] EWHC 2902 (KB) (Nicklin J) is a case where the Judge found the claimant had failed to comply with this requirement, which would justify the Court either dismissing the application entirely or giving the Claimant the opportunity to amend the application: §33. In *Business Mortgage Finance 4 plc v Hussain* [2023] 1 WLR 396 (CA), §89, however, Nugee LJ emphasised the fact that only a "*brief summary*" was required rather than a "*fully particularised pleading*". It was "*more akin to a count on an indictment*".

(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.[186] Previously, in *Re Taray Brokering Ltd* [2022] EWHC 2958 (Ch), the Court confirmed that if a penal notice had not been included on the face of an order (e.g. by mistake), a Claimant could not add a penal notice of its volition; it had to apply to the Court to vary the order: §§15-21. Following amendments to the Civil Procedure Rules,[187] however, from 6 April 2024 it appears that a Claimant will be able to add a penal notice to an order without a further order from the Court.

iv. Unless the court directs otherwise, a contempt application must be served personally on the Defendant.[188] If no objection is made, the application can

[182] CPR r.81.4(2)(b).
[183] CPR r.81.4(2)(h)
[184] *QRT v JBE* [2022] EWHC 2902 (KB), §24 (Nicklin J).
[185] *QRT v JBE* [2022] EWHC 2902 (KB), §29 (Nicklin J); *Business Mortgage Finance 4 plc v Hussain* [2023] 1 WLR 396 (CA), §87 (Nugee LJ).
[186] CPR r.81.4(2)(p).
[187] By rule 11 of the Civil Procedure (Amendment) Rules 2024.
[188] CPR r.81.5(1).

instead be served on the Defendant's legal representative.[189] A Court can, however, dispense with personal service and in *Business Mortgage Finance 4 plc v Hussain* [2023] 1 WLR 396 (CA), §§57-77 and 81-83 (Nugee LJ), a non-protest case, it was held that the Court has power to do this retrospectively at a committal application. It did so in that case due to the fact that the defendant had actual knowledge of the terms of the order.

v. A contempt hearing may take place in the absence of the Defendant.[190]

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.[191] 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 will usually be a directions hearing, particularly where the defendant is a litigant in person, enabling them to be advised of their right to remain silent, the opportunity to seek legal advice and representation, and the availability of legal aid.[192] A proper timetable can then be set down for trial, if the allegation is going to be defended. There is still no requirement for pleadings.[193]

[189] CPR r.81.5(2).
[190] CPR r.81.4(o).
[191] *National Highways v Heyatawin* [2021] EWHC 3078 (KB), §31 (Dame Victoria Sharp P and Chamberlain J).
[192] *QRT v JBE* [2022] EWHC 2902 (KB), §23 (Nicklin J).
[193] *Cuciurean v Secretary of State for Transport* [2022] EWCA Civ 1519, §30 (Coulson LJ).

10.11 The court also has a power to issue a bench warrant to ensure Defendants attend a hearing.[194]

10.12 A Defendant may apply to discharge the committal order by way of a Part 23 application.[195]

10.13 In some cases, a Defendant will be involved in both civil and criminal proceedings at the same time. It is usually inappropriate to adjourn civil proceedings to await the outcome of criminal proceedings. The Court will, however, consider whether the Defendant may be punished twice for the same misconduct and whether the penalty for contempt would be manifestly discrepant with any potential criminal sentence.[196]

(d) Knowledge requirement

10.14 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 will usually have 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 and to provide sufficient notice of the protest injunction, particularly in relation to Persons Unknown, which are likely to come to the attention of Defendants.

10.15 This position was confirmed in *Cuciurean v Secretary of State for Transport* [2021] EWCA Civ 357, where Warby LJ stated:[197]

> "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

[194] CPR r.81.7(2).
[195] CPR r.81.10.
[196] *National Highways Ltd v Lancaster* [2021] EWHC 3080 (KB), §§30-33 (Cotter J).
[197] 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).

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.

…

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..."

10.16 The point was, subsequently, fully argued in *National Highways Ltd v Kirin* [2023] EWHC 3000 (KB) (Soole J). Counsel for the Respondents argued that the Court was not bound by the "*observations in Cuciurean*", that *Cuciurean* was in any event out of step with previous authority, and that notice of an injunction meant knowledge of it: §§16-27. This was rejected by Soole J, who considered that *Cuciurean* was not out of step with previous authority and was binding on him: §17. The same conclusion was reached in *Wolverhampton CC v Phelps* [2024] EWHC 139 (KB) (HHJ Emma Kelly), §49, apparently without the Court being referred to the *Kirin* case.

10.17 There are also cases, however, where the Court will *retrospectively* dispense with the need for service: see **§10.9(iv) above**.

10.18 Knowledge of the order will, however, inevitably be relevant at the stage of determining what sanction to impose.[198] 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**).[199]

(e) Defences

10.19 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.

10.20 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

[198] *Cuadrilla Bowland v Persons Unknown* [2020] 4 WLR 29 (CA), §25 (Leggatt LJ).
[199] *MBR Acres Ltd v McGivern* [2022] EWHC 2072 (KB) (Nicklin J).

not possible.[200] This is because the Defendant did not have the choice whether to commit the relevant act or omission.

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

10.22 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 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.

10.23 Improper collateral purpose: a committal application must not be brought for an improper collateral purpose. There is distinction between a valid application, even where the applicant may be motivated by revenge, and use of Part 81 CPR for an improper collateral purpose, such as a threat in order to secure settlement.[201] Objective factors such as a hopeless application or one involving purely technical breaches are the signs to look for when considering abuse.[202]

(f) Undertakings

10.24 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.

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[200] *Perkier Foods Ltd v Halo Foods Ltd* [2019] EWHC 3462 (KB), §§10-15 (Chamberlain J).
[201] *Fitzwilliam Land Co v Milton* [2023] EWHC 3406 (KB), §21 (Linden J).
[202] *Navigator Equities Ltd v Deripaska* [2022] 1 WLR 3656, §114 (Carr LJ).

10.25 The court will often accept such an undertaking and, thereby, agree to the withdrawal of the contempt application without any sanction being imposed.[203] 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 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..."

10.26 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

[203] *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).

would potentially prevent further litigation, wasted court time and public expense: §22.

10.27 There is no material difference between breaching an undertaking and breaching an injunction.[204] The consequences are exactly the same.

(g) Factual findings

10.28 In *Business Mortgage Finance 4 plc v Hussain* [2023] 1 WLR 396 (CA), §96, Nugee LJ summarised the legal principles applicable to findings of fact in a contempt case. These include the following:

> "(1) Contempt has to be established to the criminal standard of proof: *In re L-W (Enforcement and Committal: Contact)* [2011] 1 FLR 1095, para 34 per Munby LJ.
>
> (2) As in criminal cases, inferences can be drawn but only where the jury (or in this case the judge) is able to exclude all realistic possibilities consistent with the defendant's innocence: *R v Masih (Younis)* [2015] EWCA Crim 477 at [3] per Pitchford LJ.
>
> (3) Where the evidence relied on is entirely circumstantial the court must be satisfied that the facts are inconsistent with any conclusion other than that the contempt has been committed*: Masri v Consolidated Contractors International Co SAL (No 3)* [2011] EWHC 1024 (Comm) at [146] per Christopher Clarke J.
>
> (4) Where a number of contempts are charged it is not right to consider individual heads of contempt in isolation: they are details on a broad canvas, and the individual details of the canvas should be informed by the overall picture, although each head of contempt must still be proved beyond reasonable doubt: *Gulf Azov Shipping Co Ltd v Idisi* [2001] EWCA Civ 21 at [18] per Lord Phillips of Worth Matravers MR.
>
> (5) If after considering the evidence the court concludes that there is more than one reasonable inference to be drawn and at least one of them is inconsistent with contempt, the claimants fail: *Daltel Europe Ltd v Makki* [2005] EWHC 749 (Ch) at [30] per David Richards J, *JSC BTA Bank v Ablyazov (No 8)* [2012] EWHC 237 (Comm) at [8] per Teare J."

(h) Sanctions

10.29 Sanctions for contempt of court are imposed to punish the breach, ensure compliance with court orders and rehabilitate the person in contempt.[205] It has been said, however,

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[204] *QRT v JBE* [2022] EWHC 2902 (KB), §51 (Nicklin J).
[205] *National Highways v Buse* [2021] EWHC 3404 (KB), §28 (Johnson J).

that in civil contempts, as opposed to criminal contempts, punishment is a less significant aim than securing compliance with court orders.[206]

10.30 Where an individual had no knowledge of the relevant injunction, no penalty will be imposed for the purely technical breach. The court has no discretion.[207] But that is not the case where the individual is notified of the injunction whilst the breach is taking place and fails to cease.[208]

10.31 Otherwise, the following factors demonstrate the correct approach to sanctions in protest cases:[209]

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:[210]

(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.

(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.[211]

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[206] *Cuciurean v Secretary of State for Transport* [2022] EWCA Civ 1519, §105 (Edis LJ).
[207] *National Highways Ltd v Kirin* [2023] EWHC 3000 (KB), §§110-111 (Soole J).
[208] *National Highways Ltd v Kirin* [2023] EWHC 3000 (KB), §§150-153 (Soole J).
[209] 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.
[210] *National Highways v Heyatawin* [2021] EWHC 3078 (KB), §49(d) (Dame Victoria Sharp P and Chamberlain J).
[211] In *Ocado Group plc v McKeeve* [2022] Costs LR 1489 there was a dispute as to the relevance of this factor to the question of seriousness. Adam Johnson J, at §15, found that it was relevant.

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

(11) The impact on police resources.[212]

(12) 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*".[213] 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.[214] But the more disproportionate or extreme the protest action, the less obvious is the justification for reduced culpability and more lenient sentencing.[215] Moreover, the courts have sometimes found that what may have started out as a dialogue has turned into a monologue from the Defendant.[216] The conscientious motives of a protestor act do not act as a licence to flout court orders with impunity.[217] 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. As part of this, the court will keep in mind the desirability of keeping offenders, and in particular first-time offenders, out of prison.[218]

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

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[212] *North Warwickshire BC v Shatford* [2022] EWHC 2570 (KB) (HHJ Kelly), §§22-23.
[213] *Jockey Club Racecourses Ltd v Kidby* [2023] EWHC 2643 (Ch), §24 (Miles J); *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).
[214] *National Highways Ltd v Kirin* [2023] EWHC 3000 (KB) (Soole J), §§117 and 148; *National Highways v Heyatawin* [2021] EWHC 3078 (KB), §53 (Dame Victoria Sharp P and Chamberlain J).
[215] *R v Trowland* [2023] 4 All ER 766 (CA), §50.
[216] *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).
[217] *AG v Crosland* [2021] 4 WLR 103 (SC), §47.
[218] *SRA v Khan* [2022] EWHC 45 (Ch), §52(3) (Leech J).

serious contumacious flouting of a court order.[219] The maximum sentence is two years' imprisonment.[220] A person committed to prison for contempt is entitled to unconditional release after serving half of the sentence.[221] If a custodial sentence is imposed, a fine can[222] but should not generally be imposed in addition, particularly if the Defendant has no way of paying the fine.[223]

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:[224]

- 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; 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

[219] *National Highways v Heyatawin* [2021] EWHC 3078 (KB), §49(e) (Dame Victoria Sharp P and Chamberlain J).
[220] Section 14(1) of the Contempt of Court Act 1981.
[221] Section 258(2) of the Criminal Justice Act 2003.
[222] *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.
[223] *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).
[224] *Esso Petroleum v Breen* [2022] EWCA Civ 1405, §§15, 46 (Coulson LJ).

being suspended, although this will of course depend on all the other circumstances.[225]

ix. Citation of other cases to compare penalties is generally inappropriate in contempt cases because they vary so widely in context and fact.[226]

x. Prison conditions – i.e. how full they are – may also be taken into account in reducing the custodial penalty.[227]

xi. Although there is no requirement to reduce a custodial sentence to reflect a period already spent in custody following arrest, the Court may do so.[228]

10.32 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:

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

10.33 This approach was criticised by the Court of Appeal as being "*too granular*", involving "*arbitrary*" multipliers and inviting comparison between different cases: §49.[229] 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 critique 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.

[225] *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.
[226] *Esso Petroleum v Breen* [2022] EWCA Civ 1405, §12 (Coulson LJ).
[227] *National Highways Ltd v Lancaster* [2021] EWHC 3080 (KB), §50 (Cotter J).
[228] *National Highways Ltd v Lancaster* [2021] EWHC 3080 (KB), §51 (Cotter J). The sentence was reduced on this basis in *North Warwickshire BC v Shatford* [2022] EWHC 2570 (KB) (HHJ Kelly), §29.
[229] See also *Cuciurean v Secretary of State for Transport* [2022] EWCA Civ 1519, §94 (Coulson LJ).

10.34 The courts have differed on whether time spent on remand in parallel criminal proceedings ought to mitigate the sentence. In *Jockey Club Racecourses Ltd v Kidby* [2023] EWHC 2643 (Ch), Miles J considered that it did: §27. But in *National Highways Ltd v Kirin* [2023] EWHC 3000 (KB), Soole J found that this was not the right course to take: §120.

10.35 Traditionally, courts took the position that 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 on what sentence should actually be imposed; that was thought to be a matter between the Court and the Defendant.[230] More recently, however, the Court of Appeal has said that there is nothing improper about Claimants remaining partial or suggesting to the Judge the length of imprisonment that should be imposed. This is on the bases that private parties have a proper private interest in the outcome of the application, their lawyers are duty-bound to act on their clients' instructions, and that if they had to act impartially it may discourage Claimants from pursuing such applications contrary to the public interest.[231]

(i) Costs

10.36 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.[232] Similarly, even where a contempt application is only successful on one of multiple grounds, the Court will not generally make an issues-based costs order. The question will be who, in the event, was ultimately the successful party.[233]

10.37 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.[234]

10.38 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

[230] *Rehbeim v Isufai* [2005] EWCA Civ 1046, §20 (Ward LJ), §§25-26 (Smith LJ).
[231] *Navigator Equities Ltd v Deripaska* [2022] 1 WLR 3656 (CA), §§135-138 (Carr LJ); *Business Mortgage Finance 4 plc v Hussain* [2023] 1 WLR 396 (CA), §131 (Arnold LJ).
[232] *Secretary of State for Transport v Cuciurean* [2022] 1 WLR 3847 (CA), §50.
[233] *Ocado Group plc v McKeeve* [2022] Costs LR 1489 (Ch), §§54-61 (Adam Johnson J).
[234] *Secretary of State for Transport v Cuciurean* [2022] 1 WLR 3847 (CA), §55 (Lewison LJ).

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.[235]

10.39 The means of the Defendant will generally not be relevant to this assessment.[236] 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.[237]

(j) Appeals

10.40 Parties may appeal decisions made on contempt applications.[238]A decision from the High Court can be appealed to the Court of Appeal.[239] A contemnor does not need permission to appeal.[240] A decision from the Divisional Court can only be appealed to the Supreme Court.[241] Where an appeal to the Supreme 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.[242]

10.41 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.[243] In relation to appealing against a sentence for contempt, the appeal court will be reluctant to interfere with such a decision and will generally only do so if the judge made an error of principle, took into account

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[235] *Secretary of State for Transport v Cuciurean* [2022] 1 WLR 3847 (CA), §§53, 64. See *Fitzwilliam Land Co v Milton* [2023] EWHC 3406 (KB), §§97-100 (Linden J), for an example of no order to costs being made, despite the claimant being successful, on account of the facts that: the claimants had acted disproportionately in prosecuting one of the alleged breaches; the claimants made the contempt application without giving the defendant a warning that further breaches would result in proceedings; and, there were significant delays in bringing the application.
[236] *Secretary of State for Transport v Cuciurean* [2022] 1 WLR 3847 (CA), §§53, 65; *National Highways Ltd v Lancaster* [2021] EWHC 3080 (KB), §64 (Cotter J).
[237] *Secretary of State for Transport v Cuciurean* [2022] 1 WLR 3847 (CA), §§58-60, 64(b).
[238] Section 13 of the Administration of Justice Act 1960.
[239] *National Highways Ltd v Lancaster* [2021] EWHC 3080 (KB), §57 (Cotter J).
[240] *Business Mortgage Finance 4 plc v Hussain* [2023] 1 WLR 396 (CA), §§5-6 (Nugee LJ).
[241] Section 13(2)(b)-(c) of the Administration of Justice Act 1960.
[242] Section 1(2) of the Administration of Justice Act 1960; *National Highways v Buse* [2021] EWHC 3404 (KB), §61 (Johnson J).
[243] CPR r.52.21. See *Cuciurean v Secretary of State for Transport* [2022] EWCA Civ 1519, §56 (Coulson LJ).

immaterial factors or failed to take into account material factors, or reached a decision which was outside the range of decisions reasonably open to him/her.[244]

[244] *Financial Conduct Authority v McKendrick* [2019] 4 WLR 65 (CA), §37.

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 Persons Unknown* [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."

3. In *Valero Energy Ltd v Persons Unknown* [2024] EWHC 134 (KB), in the context of injunctions against Newcomers, Ritchie J stated:

> "58. **(A) Substantive Requirements**
>
> **Cause of action**
>
> (1) There must be a civil cause of action identified in the claim form and particulars of claim. The usual quia timet (since he fears) action relates to the fear of torts such as trespass, damage to property, private or public nuisance, tortious interference with trade contracts, conspiracy with consequential damage and on-site criminal activity.
>
> **Full and frank disclosure by the Claimant**
>
> (2) There must be full and frank disclosure by the Claimant (applicant) seeking the injunction against the PUs.
>
> **Sufficient evidence to prove the claim**
>
> (3) There must be sufficient and detailed evidence before the Court on the summary judgment application to justify the Court finding that the immediate fear is proven on the balance of probabilities and that no trial is needed to determine that issue. The way this is done is by two steps. Firstly stage (1), the claimant has to prove that the claim has a realistic prospect of success, then the burden shifts to the defendant. At stage (2) to prove that any defence has no realistic prospect of success. In PU cases where there is no defendant present, the matter is considered ex-parte by the Court. If there is no evidence served and no foreseeable realistic defence, the claimant is left with an open field for the evidence submitted by him and his realistic prospect found at stage (1) of the hearing may be upgraded to a balance of probabilities decision by the Judge. The Court does not carry out a mini trial but does carry out an analysis of the evidence to determine if it the claimant's evidence is credible and acceptable. The case law on this process is set out in more detail under the section headed "The Law" above.
>
> **No realistic defence**
>
> (4) The defendant must be found unable to raise a defence to the claim which has a realistic prospect of success, taking into account not only the evidence put before the Court (if any), but also, evidence that a putative PU defendant might reasonably be foreseen as able to put before the Court (for instance in relation to the PUs civil rights to freedom of speech, freedom to associate, freedom to protest and freedom to pass and repass on the highway). Whilst in National Highways the absence of any defence from the PUs was relevant to this determination, the Supreme Court's ruling in Wolverhampton enjoins this Court not to put much weight on the lack of any served defence or defence evidence in a PU case. The nature of the proceedings are "ex-parte" in PU cases and so the Court must be alive to any potential defences and the Claimants must set them out and make submissions upon them. In my judgment this is not a "Micawber" point, it is a just approach point.

Balance of convenience – compelling justification

(5) In interim injunction hearings, pursuant to American Cyanamid v Ethicon [1975] AC 396 , for the Court to grant an interim injunction against a defendant the balance of convenience and/or justice must weigh in favour of granting the injunction. However, in PU cases, pursuant to Wolverhampton, this balance is angled against the applicant to a greater extent than is required usually, so that there must be a "compelling justification" for the injunction against PUs to protect the claimant's civil rights. In my judgment this also applies when there are PUs and named defendants.

(6) The Court must take into account the balancing exercise required by the Supreme Court in DPP v Ziegler [2021] UKSC 23 , if the PUs' rights under the European Convention on Human Rights (for instance under Articles 10(2) and 11(2)) are engaged and restricted by the proposed injunction. The injunction must be necessary and proportionate to the need to protect the Claimants' right.

Damages not an adequate remedy

(7) For the Court to grant a final injunction against PUs the claimant must show that damages would not be an adequate remedy.

(B) Procedural Requirements

Identifying PUs

(8) The PUs must be clearly and plainly identified by reference to: (a) the tortious conduct to be prohibited (and that conduct must mirror the torts claimed in the Claim Form), and (b) clearly defined geographical boundaries, if that is possible.

The terms of injunction

(9) The prohibitions must be set out in clear words and should not be framed in legal technical terms (like "tortious" for instance). Further, if and in so far as it seeks to prohibit any conduct which is lawful viewed on its own, this must also be made absolutely clear and the claimant must satisfy the Court that there is no other more proportionate way of protecting its rights or those of others.

The prohibitions must match the claim

(10) The prohibitions in the final injunctions must mirror the torts claimed (or feared) in the Claim Form.

Geographic boundaries

(11) The prohibitions in the final injunctions must be defined by clear geographic boundaries, if that is possible.

Temporal limits - duration

(12) The duration of the final injunction should be only such as is proven to be reasonably necessary to protect the claimant's legal rights in the light of the evidence of past tortious activity and the future feared (quia timet) tortious activity.

Service

(13) Understanding that PUs by their nature are not identified, the proceedings, the evidence, the summary judgment application and the draft order must be served by alternative means which have been considered and sanctioned by the Court. The applicant must, under the Human Rights Act 1998 S.12(2) , show that it has taken all practicable steps to notify the respondents.

The right to set aside or vary

(14) The PUs must be given the right to apply to set aside or vary the injunction on shortish notice.

Review

(15) Even a final injunction involving PUs is not totally final. Provision must be made for reviewing the injunction in the future. The regularity of the reviews depends on the circumstances. Thus such injunctions are "Quasi-final" not wholly final."

Index of cases

Chronological list

30. *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] 1 WLR 1471 (SC) ……...20 Feb 2019
31. *Financial Conduct Authority v McKendrick* [2019] 4 WLR 65 (CA)……...28 Mar 2019
32. *Ineos Upstream v Persons Unknown* [2019] 4 WLR 100 (CA) ……..3 Apr 2019
33. *Secretary of State for Transport* v *PU* [2019] EWHC 1437 (Ch) (David Holland KC) 16 May 2019
34. *Birmingham City Council v Afsar* [2019] EWHC 1560 (KB) (Warby J) ……..18 Jun 2019
35. *Birmingham CC v Afsar* [2019] EWHC 1619 (KB) (Warby J)……25 Jun 2019
36. *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 417 (KB) (Nicklin J)...20 Sep 2019
37. *Perkier Foods Ltd v Halo Foods Ltd* [2019] EWHC 3462 (KB) ……16 Dec 2019
38. *Bromley LBC v Persons Unknown* [2020] 4 All ER 114 (CA) ……...21 Jan 2020
39. *Cuadrilla Bowland v Persons Unknown* [2020] 4 WLR 29 (CA) ……. 23 Jan 2020
40. *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 (CA) ……...5 Mar 2020
41. *Enfield LBC v Persons Unknown* [2020] EWHC 2717 (KB) (Nicklin J) ……..2 Oct 2020
42. *Canterbury CC v Persons Unknown* [2020] EWHC 3153 (KB) (Nicklin J) ……30 Oct 2020
43. *Walton Family Estates Limited v GJD Services Ltd* [2021] EWHC 88 (KB) (Mr Andrew Hochhauser KC) ……...21 Jan 2021
44. *UK Oil & Gas v Persons Unknown* [2021] EWHC 599 (Ch) (Falk J) ……9 Feb 2021
45. *Cuciurean v Secretary of State for Transport* [2021] EWCA Civ 357……..16 Mar 2021
46. *AG v Crosland* [2021] 4 WLR 103 (SC) ……...10 May 2021
47. *DPP v Ziegler* [2022] AC 408 (SC) ……25 Jun 2021
48. *Gitto Estates v Persons Unknown* [2021] EWHC 1997 (KB) (Hugh Southey KC)…..…13 Jul 2021
49. *Broad Idea International Ltd v Convoy Collateral Ltd* [2022] 2 WLR 703 (PC) ……4 Oct 2021
50. *MBR Acres Ltd v Free the MBR Beagles* [2021] EWHC 2996 (KB) (Nicklin J) …….10 Nov 2021
51. *National Highways Ltd v Persons Unknown* [2021] EWHC 3081 (KB) (Lavender J)…17 Nov 2021
52. *National Highways v Heyatawin* [2021] EWHC 3078 (KB) (Dame Victoria Sharp P and Chamberlain J) ……17 Nov 2021
53. *Navigator Equities Ltd v Deripaska* [2022] 1 WLR 3656 (CA)……30 Nov 2021
54. *National Highways v Buse* [2021] EWHC 3404 (KB) (Johnson J) ……15 Dec 2021
55. *Barking & Dagenham LBC v Persons Unknown* [2022] 2 WLR 946 (CA) ……13 Jan 2022
56. *Balfour Beatty Group Ltd v Persons Unknown* [2022] EWHC 874 (KB) (Linden J) ….17 Mar 2022
57. *Ineos Upstream v Persons Unknown* [2022] EWHC 684 (Ch) (HHJ Klein) ……25 Mar 2022
58. *HS2 v Maxey* [2022] EWHC 1010 (KB) (Linden J) ……28 Mar 2022

90. *Ineos Upstream v Persons Unknown* [2023] EWHC 214 (Ch) (Master Kaye)……...8 Feb 2023
91. *National Highways Ltd v Persons Unknown* [2023] EWCA Civ 182……..……..23 Feb 2023
92. *Transport for London v Lee* [2023] EWHC 402 (KB) (Cavanagh J)……..24 Feb 2023
93. *Esso Petroleum v Persons Unknown* (30 Mar 2023) (unreported) (KB)…...……..…30 Mar 2023
94. *UK Oil Pipelines Ltd v Persons Unknown* (unreported) (Ch) (Rajah J)……..…....21 Apr 2023
95. *Navigator Terminals v Persons Unknown* (unreported) (KB) (Garnham J..……..28 Apr 2023
96. *Transport for London v Persons Unknown* [2023] EWHC 1038 (KB) (Morris J)…...…3 May 2023
97. *National Highways Ltd v Persons Unknown* [2023] EWHC 1073 (KB) (Cotter J)……...5 May 2023
98. *Hicks v DPP* [2023] EWHC 1089 (KB) (Bean LJ and Chamberlain J)……....9 May 2023
99. *Essar Oil v Persons Unknown* (unreported) (Ch) (HHJ Monty KC)…….…….....11 May 2023
100. *Shell UK Ltd v Persons Unknown* [2023] EWHC 1229 (KB) (Hill J)……..……23 May 2023
101. *Transport for London v Lee* [2023] EWHC 1201 (KB) (Eyre J)……...…….26 May 2023
102. *University of Brighton v PU* [2023] EWHC 1485 (KB) (Constable J)……. 16 Jun 2023
103. *Dyer v Webb* [2023] EWHC 1917 (KB) (Dexter Dias KC)……10 Jul 2023
104. *North Warwickshire BC v Baldwin* [2023] EWHC 1719 (KB) (Sweeting J)……14 Jul 2023
105. *Esso Petroleum v Persons Unknown* [2023] EWHC 1837 (KB) (Linden J)……18 Jul 2023
106. *R v Trowland* [2023] 4 All ER 766 (CA)……..31 Jul 2023
107. *Esso Petroleum v Breen* [2023] EWHC 2013 (KB) (Knowles J)……..31 Aug 2023
108. *UK Oil Pipelines Ltd v Persons Unknown* (PT-2022-000303) (Ch) (6 Oct 2023) (unreported) (Mr Simon Gleeson)……...6 Oct 2023
109. *Jockey Club Racecourses Ltd v Kidby* [2023] EWHC 2643 (Ch) (Miles J)…….11 Oct 2023
110. *National Highways Ltd v Kirin* [2023] EWHC 3000 (KB) (Soole J)……..…30 Oct 2023
111. *Wolverhampton CC v London Gypsies & Travellers* [2024] 2 WLR 45……29 Nov 2023
112. *Fitzwilliam Land Co v Milton* [2023] EWHC 3406 (KB) (Linden J)……..8 Dec 2023
113. *Valero Energy Ltd v Persons Unknown* [2024] EWHC 134 (KB) (Ritchie J)…….....26 Jan 2024
114. *Wolverhampton CC v Phelps* [2024] EWHC 139 (KB) (HHJ Emma Kelly)..……...29 Jan 2024
115. *1 Leadenhall Group London v Persons Unknown* [2024] EWHC 530 (KB)……8 Mar 2024
116. *Donovan v Prescott Place Freeholder Ltd* [2024] EWCA Civ 298…….27 Mar 2024

Alphabetical list

1. *1 Leadenhall Group London v Persons Unknown* [2024] EWHC 530 (KB)
2. *American Cyanamid Co v Ethicon* [1975] AC 396 (HL)
3. *Aston Cantlow v Wallbank* [2004] 1 AC 546 (HL)
4. *Attorney General's Reference (No. 1 of 2022)* [2022] EWCA Crim 1259
5. *AG v Crosland* [2021] 4 WLR 103 (SC)
6. *AG v Punch Ltd* [2003] 1 AC 1046 (HL)
7. *Balfour Beatty Group Ltd v Persons Unknown* [2022] EWHC 874 (KB) (Linden J)
8. *Barking & Dagenham LBC v Persons Unknown* [2022] 2 WLR 946 (CA)
9. *Birmingham City Council v Afsar* [2019] EWHC 1560 (KB) (Warby J)
10. *Birmingham CC v Afsar* [2019] EWHC 1619 (KB) (Warby J)
11. *Bloor Homes Ltd v Callow* [2022] EWHC 3507 (Ch) (Hugh Sims KC)
12. *Broad Idea International Ltd v Convoy Collateral Ltd* [2022] 2 WLR 703 (PC)
13. *Bromley LBC v Persons Unknown* [2020] 4 All ER 114 (CA)
14. *Business Mortgage Finance 4 plc v Hussain* [2023] 1 WLR 396 (CA)
15. *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] 1 WLR 1471 (SC)
16. *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 417 (KB) (Nicklin J)
17. *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 (CA)
18. *Canterbury CC v Persons Unknown* [2020] EWHC 3153 (KB) (Nicklin J)
19. *City of London v Samede* [2012] 2 All ER 1039 (CA)
20. *Cream Holdings v Bannerjee* [2005] 1 AC 253 (HL)
21. *Cuadrilla Bowland v Persons Unknown* [2020] 4 WLR 29 (CA)
22. *Cuciurean v Secretary of State for Transport* [2021] EWCA Civ 357
23. *Cuciurean v Secretary of State for Transport* [2022] EWCA Civ 1519
24. *Donovan v Prescott Place Freeholder Ltd* [2024] EWCA Civ 298
25. *DPP v Bailey* [2023] 2 WLR 1140 (DC)
26. *DPP v Cuciurean* [2022] 3 WLR 446 (DC)
27. *DPP v Ziegler* [2022] AC 408 (SC)
28. *Dyer v Webb* [2023] EWHC 1917 (KB) (Dexter Dias KC)
29. *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] 1 WLR 2807 (PC)
30. *Enfield LBC v Persons Unknown* [2020] EWHC 2717 (KB) (Nicklin J)

31. *Essar Oil v Persons Unknown* (11 May 2023) (unreported) (Ch) (HHJ Monty KC)
32. *Esso Petroleum v Persons Unknown* [2022] EWHC 966 (KB) (Ellenbogen J)
33. *Esso Petroleum v Persons Unknown* [2022] EWHC 1477 (KB) (Bennathan J)
34. *Esso Petroleum v Breen* [2022] EWHC 2664 (KB) (HHJ Lickley KC)
35. *Esso Petroleum v Breen* [2022] EWCA Civ 1405
36. *Esso Petroleum v Breen* [2023] EWHC 2013 (KB) (Knowles J)
37. *Esso Petroleum v Persons Unknown* (30 Mar 2023) (unreported) (KB) (Collins Rice J)
38. *Esso Petroleum v Persons Unknown* [2023] EWHC 1837 (KB) (Linden J)
39. *Exolum v Persons Unknown* (11 Jan 2023) (unreported) (KB) (Soole J)
40. *Financial Conduct Authority v McKendrick* [2019] 4 WLR 65 (CA)
41. *Financial Services Authority v Sinaloa Gold plc* [2013] 2 AC 28 (SC)
42. *Fitzwilliam Land Co v Milton* [2023] EWHC 3406 (KB) (Linden J)
43. *Gitto Estates v Persons Unknown* [2021] EWHC 1997 (KB) (Hugh Southey KC)
44. *Gouriet v Union of Post Office Workers* [1978] AC 435 (HL)
45. *Hampshire Waste Services* [2004] Env LR 9 (Ch)
46. *Harrods Ltd v McNally* [2018] EWHC 1437 (KB)
47. *Heathrow Airport Ltd v Garman* [2007] EWHC 1957 (KB) (Swift J)
48. *Hicks v DPP* [2023] EWHC 1089 (KB) (Bean LJ and Chamberlain J)
49. *Hooper v Rogers* [1975] Ch 43 (CA)
50. *HS2 v Maxey* [2022] EWHC 1010 (KB) (Linden J)
51. *HS2 v Harewood* [2022] EWHC 2457 (KB) (Ritchie J)
52. *HS2 v Persons Unknown* [2022] EWHC 2360 (KB) (Knowles J)
53. *In re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2023] AC 505 (SC)
54. *Ineos Upstream v Persons Unknown* [2017] EWHC 2945 (Ch) (Morgan J)
55. *Ineos Upstream v Persons Unknown* [2019] 4 WLR 100 (CA)
56. *Ineos Upstream v Persons Unknown* [2022] EWHC 684 (Ch) (HHJ Klein)
57. *Ineos Upstream v Persons Unknown* [2023] EWHC 214 (Ch) (Master Kaye)
58. *Jockey Club Racecourses Ltd v Kidby* [2023] EWHC 2643 (Ch) (Miles J)
59. *London Borough of Islington v Elliott* [2012] EWCA Civ 56
60. *Manchester Airport v Dutton* [2000] QB 133 (CA)
61. *Mayor of London v Hall* [2011] 1 WLR 504 (CA)

62. *MBR Acres Ltd v Free the MBR Beagles* [2021] EWHC 2996 (KB) (Nicklin J)
63. *MBR Acres Ltd v Maher* [2022] 3 WLR 999 (KB) (Nicklin J)
64. *MBR Acres Ltd v McGivern* [2022] EWHC 2072 (KB) (Nicklin J)
65. *MBR Acres Ltd v Free the MBR Beagles* [2022] EWHC 3338 (KB) (Nicklin J)
66. *National Highways v Heyatawin* [2021] EWHC 3078 (KB) (Dame Victoria Sharp P and Chamberlain J)
67. *National Highways Ltd v Lancaster* [2021] EWHC 3080 (KB) (Cotter J)
68. *National Highways Ltd v Persons Unknown* [2021] EWHC 3081 (KB) (Lavender J)
69. *National Highways v Buse* [2021] EWHC 3404 (KB) (Johnson J)
70. *National Highways Ltd v Persons Unknown* [2022] EWHC 1105 (KB) (Bennathan J)
71. *National Highways Ltd v Persons Unknown* [2022] EWHC 3497 (KB) (Soole J)
72. *National Highways Ltd v Persons Unknown* [2023] EWCA Civ 182
73. *National Highways Ltd v Persons Unknown* [2023] EWHC 1073 (KB) (Cotter J)
74. *National Highways Ltd v Kirin* [2023] EWHC 3000 (KB) (Soole J)
75. *Navigator Equities Ltd v Deripaska* [2022] 1 WLR 3656 (CA)
76. *Navigator Terminals v Persons Unknown* (28 Apr 2023) (unreported) (KB) (Garnham J)
77. *Network Rail Infrastructure Ltd v Williams* [2019] QB 601 (CA)
78. *North Warwickshire BC v Shatford* [2022] EWHC 2570 (KB) (HHJ Kelly)
79. *North Warwickshire BC v Baldwin* [2023] EWHC 1719 (KB) (Sweeting J)
80. *Ocado Group plc v McKeeve* [2022] Costs LR 1489 (Ch) (Adam Johnson J)
81. *Olympic Delivery Authority v Persons Unknown* [2012] EWHC 1012 (Ch) (Arnold J)
82. *Olympic Delivery Authority v Persons Unknown* [2012] EWHC 1114 (Ch) (Arnold J)
83. *Patel v WH Smith Ltd* [1987] 1 WLR 853 (CA)
84. *Perkier Foods Ltd v Halo Foods Ltd* [2019] EWHC 3462 (KB)
85. *QRT v JBE* [2022] EWHC 2902 (KB) (Nicklin J)
86. *R v Trowland* [2023] 4 All ER 766 (CA)
87. *Re Taray Brokering Ltd* [2022] EWHC 2958 (Ch) (HHJ Pearce)
88. *Redmond-Bate v Director of Public Prosecutions* [2000] HRLR 249 (KB)
89. *Rehbeim v Isufai* [2005] EWCA Civ 1046
90. *Revenue and Customs Commissioners v Total Network SL* [2008] 1 AC 1174 (HL)
91. *Secretary of State for Transport* v *Persons Unknown* [2018] EWHC 1404 (Ch) (Barling J)

92. *Secretary of State for Transport* v *Persons Unknown* [2019] EWHC 1437 (Ch) (David Holland KC)
93. *Secretary of State for Transport v Cuciurean* [2022] 1 WLR 3847 (CA)
94. *Sheffield City Council v Brooke* [2019] QB 48 (KB) (Males J)
95. *Sheffield CC v Fairhall* [2017] EWHC 2121 (KB) (Males J)
96. *Shell UK Oil Products Ltd v Persons Unknown* [2022] EWHC 1215 (KB) (Johnson J)
97. *Shell UK Ltd v Persons Unknown* [2023] EWHC 1229 (KB) (Hill J)
98. *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23
99. *Three Counties Agricultural Society v Persons Unknown* [2022] EWHC 2708 (KB) (Spencer J)
100. *Transport for London v Lee* [2022] EWHC 3102 (KB) (Freedman J)
101. *Transport for London v Lee* [2023] EWHC 402 (KB) (Cavanagh J)
102. *Transport for London v Persons Unknown* [2023] EWHC 1038 (KB) (Morris J)
103. *Transport for London v Lee* [2023] EWHC 1201 (KB) (Eyre J)
104. *UK Oil & Gas v Persons Unknown* [2021] EWHC 599 (Ch) (Falk J)
105. *UK Oil Pipelines Ltd v Persons Unknown* (21 Apr 2023) (unreported) (Ch) (Rajah J)
106. *UK Oil Pipelines Ltd v Persons Unknown* (PT-2022-000303) (Ch) (6 Oct 2023) (unreported) (Mr Simon Gleeson)
107. *University of Brighton v Persons Unknown* [2023] EWHC 1485 (KB) (Constable J)
108. *Valero Energy Ltd v Persons Unknown* [2022] EWHC 911 (KB) (Bennathan J)
109. *Valero Energy v Persons Unknown* (11 Jan 2023) (unreported) (KB) (Soole J)
110. *Valero Energy Ltd v Persons Unknown* [2024] EWHC 134 (KB) (Ritchie J)
111. *Vastint Leeds BV v Persons Unknown* [2019] 4 WLR 2 (Ch) (Marcus Smith J)
112. *Walton Family Estates Limited v GJD Services Ltd* [2021] EWHC 88 (KB) (Mr Andrew Hochhauser KC)
113. *Westminster CC v Haw* [2002] EWHC 2073 (KB) (Gray J)
114. *Wolverhampton CC v Persons Unknown* [2023] EWHC 56 (KB) (Hill J)
115. *Wolverhampton CC v London Gypsies & Travellers* [2024] 2 WLR 45
116. *Wolverhampton CC v Phelps* [2024] EWHC 139 (KB) (HHJ Emma Kelly)