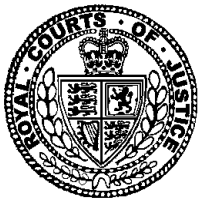

Neutral Citation Number: [2019] EWHC 2459 (QB)

Case No: HQ17D04332

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**MEDIA & COMMUNICATIONS LIST**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 September 2019

**Before** :

**THE HONOURABLE MR JUSTICE NICKLIN**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

**(1) Canada Goose UK Retail Limited**
**(2) James Hayton (for and on behalf the Employees, Security Personnel and Protected Persons pursuant to CPR 19.6)** **Claimants**

**- and -**

**(1) 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**
**(2) People for the Ethical Treatment of Animals (PETA) Foundation** **Defendants**

- - - - - - - - - - - - - - - - - - - - -

**Michael Buckpitt** (instructed by **Lewis Silkin LLP**) for the **Claimants**
**The Defendants** did not attend and were not represented

Hearing date: 29 January 2019

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# Approved Judgment

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

.....

THE HONOURABLE MR JUSTICE NICKLIN

**The Honourable Mr Justice Nicklin :**

1. This judgment is divided into the following sections:

## A. Introduction

2. Canada Goose is an international retail clothing company. The First Claimant is its UK trading arm. On 9 November 2017, it opened a store in London at 244 Regent Street ("the Store"). The Second Claimant is the manager of the Store.

3. Within the range of items sold by Canada Goose are products – particularly coats – manufactured using animal products including fur and/or down. This has made it a target of protests by those who are opposed to the sale of fur and animal products. From its opening, the Store became a focus of protests outside (and occasionally, inside) the premises.

4. On 29 November 2017, the Claimants issued a Claim Form (accompanied by Particulars of Claim) against "Persons unknown", seeking an injunction against them for alleged acts of harassment, trespass and/or nuisance arising from the Protest.

5. On the same date – 29 November 2017 – the Claimants were granted a without notice interim injunction against "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". Limited modifications were made to the terms of the injunction following a hearing on 15 December 2017. At that hearing, the Second Defendant was added as a party – at its request. Since it was granted, the interim injunction has been served on over 300 people who have taken part in the protest. None has been made a party to the proceedings or has sought to be joined to the proceedings.

6. For nearly a year afterwards, the proceedings essentially lay dormant, a stay having been granted in the order of 15 December 2017. The interim injunction has remained in place throughout that period. On 30 November 2018, the Claimants issued an Application Notice seeking summary judgment against the Defendants pursuant to CPR Part 24. That is how the matter came before me. Mr Buckpitt represented the Claimant at the hearing. None of the defendants attended the hearing or was represented.

7. This case has raised important issues in relation to the grant of interim injunctions against "persons unknown" generally and particularly against those engaged in protests.

8. In light of the complicated legal issues that have arisen, it is particularly unfortunate that, as is commonplace with actions against "persons unknown", only the Claimants were represented at the hearing. The Second Defendant was served with the Application Notice, and filed a witness statement indicating that it would not formally oppose the application, but stated that it would be for the Claimants to persuade the Court that it was appropriate to grant the order they sought. That has placed an unusual burden on the Court to ensure that proper regard is paid to the rights of the absent parties which, in this case, include all who fall within the wide definition of "protestor" (see [20(ii)] below).

9. Several issues arose for consideration during the original hearing, some of which Mr Buckpitt had not had an opportunity fully to consider. To avoid any potential unfairness, I gave him an opportunity to provide further written submissions after the hearing. He did so. Since the hearing, there has been some further delay before I have

been able to hand down judgment. This has been caused principally by two important decisions that bear significantly on the issues I have to decide. First, the Supreme Court decision in ***Cameron -v- Liverpool Victoria Insurance Co Ltd*** **[2019] 1 WLR 1471**, then the Court of Appeal decision in ***Boyd -v- Ineos Upstream Limited*** **[2019] 4 WLR 100**. Happily, these decisions have resolved a number of points that had troubled me about this case. Mr Buckpitt has also supplied further written submissions dealing with ***Cameron*** and ***Ineos***, and separate submissions on a point as to service of the proceedings that I raised following the hearing. I am very grateful for the obvious care and thought that has gone into these thorough submissions, and for Mr Buckpitt's assistance throughout this case.

## B. The Claim Form and Particulars of Claim

10. The Claim Form and Particulars of Claim identified the basis on which the Claimants sought injunctions against the Defendants, "persons unknown". The Defendants were identified as follows:

> "… animal rights protestors/activists [who] campaign against the manufacture and/or sale of Animal Products including under the brand "Canada Goose" and campaign against the sale of Animal Products by the First Claimant and seek to persuade members of the public to boycott the Store until the First Claimant ceases the lawful activity of selling Animal Products ('the Campaign')."

11. The acts complained of were described as follows:

> "… the Defendants have taken part in and/or counselled and procured various acts of unlawful harassment and/or trespass and or nuisance against the First and/or Second Claimant and the Protected Persons"

and were particularised in a Schedule of Incidents.

12. In a section headed "*The Legal Basis of each Claimant's claim*", the following torts were identified:

i) trespass;

ii) watching and besetting;

iii) harassment pursuant to the Protection from Harassment Act 1997 (the relevant parts of which are set out in [49] below);

iv) private nuisance (by restricting rights of access/egress and/or causing excessive noise) and public nuisance (by blocking the highway); and

v) conspiracy to injure by unlawful means, the unlawful means being acts constituting offences under:

a) s.241(1) Trade Union and Labour Relations (Consolidation) Act 1992[1]; and/or

b) s.1 Criminal Damage Act 1971[2]; and/or

c) s.137 Highways Act 1980 (set out in [107] below); and/or

d) s.2 Protection from Harassment Act 1997 (set out in [49] below).

13. In their Particulars of Claim, the Claimants acknowledged the freedom of expression and other rights of the "persons unknown":

> "… whilst it is admitted that the Defendants have a right of freedom of expression and of association and a right to demonstrate against the manufacture and sale of Animal Products it is averred that certain of the conduct complained of (and likely to reoccur) is not permitted and/or necessary for the pursuance of such rights".
>
> (emphasis added)

14. The Claimants sought to rely upon Articles 5 (security) and 8 (right to private life and respect for home, which they contend embraces a place of business), and the First Protocol of Article 1 (right to enjoyment of possessions) as justifying the interference with the Defendants' rights of freedom of expression and assembly/demonstration.

15. The Claimants contended that:

> "… it is incumbent on the Court to seek to give effect to each party's rights so far as possible and it is averred that an injunction order in the terms sought achieves such result and is proportionate and appropriate in the circumstances" (emphasis added)

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[1] **Breach of contract involving injury to persons or property.**

(1) A person commits an offence who wilfully and maliciously breaks a contract of service or hiring, knowing or having reasonable cause to believe that the probable consequences of his so doing, either alone or in combination with others, will be—
  (a) to endanger human life or cause serious bodily injury, or
  (b) to expose valuable property, whether real or personal, to destruction or serious injury.

(2) Subsection (1) applies equally whether the offence is committed from malice conceived against the person endangered or injured or, as the case may be, the owner of the property destroyed or injured, or otherwise.

(3) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding level 2 on the standard scale.

[2] **Destroying or damaging property.**

(1) A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence.

(2) A person who without lawful excuse destroys or damages any property, whether belonging to himself or another—
  (a) intending to destroy or damage any property or being reckless as to whether any property would be destroyed or damaged; and
  (b) intending by the destruction or damage to endanger the life of another or being reckless as to whether the life of another would be thereby endangered;

shall be guilty of an offence.

16. The basis of the claim for an injunction was:

> "The Claimants fear that unless restrained… the matters complained of will continue and in particular by reason of the intention to prevent the First Claimant selling Animal Products matters will escalate such that conduct of a similar nature… will occur."

## C. The interim injunction: 29 November 2017

17. The Claimants applied, without notice, for an interim injunction to restrain further acts of harassment, trespass and/or nuisance by the "persons unknown". The application came before Teare J.

18. The Claimants sought – and obtained – an order under CPR 19.6 (the rule is set out in [117] below) to enable the Second Claimant to act in a representative capacity on behalf of "*Protected Persons*" (necessarily so for the harassment claim, as the First Claimant could not bring such a claim in its own right – see [50] below). Protected Persons were defined in the Order as:

> "(a) the employees of the First Claimant and the security personnel working at the Store…;
>
> (b) the Customers of the First Claimant being persons who attend the Store in order to peruse and/or purchase the items for sale…; and
>
> (c) any person visiting or seeking to visit the Store."

19. I would note, here, that the width of categories (b) and (c) of Protected Persons means that there is a large class of further "persons unknown" whose interests are represented by the Second Claimant. Whilst, those in class (a) could be identified (and listed), those in categories (b) and (c) cannot, indeed they are protean. I struggle to see how people in categories (b) and (c), who cannot be identified, and are constantly changing, could be said to have "the same interest" in the claim. Nevertheless, the practical effect of this is that this litigation embraces claims brought by persons who cannot be identified against persons unknown. It might be thought that that was an undesirable state of affairs in any piece of litigation. In a claim in which fundamental human rights are engaged, it forces a level of abstraction and generality that, for the reasons I explain below, makes it practically impossible for the Court to apply the required intense focus on the engaged rights of the parties: ***In re S (A Child) (Identification: Restrictions on Publication)*** **[2005] 1 AC 593** [17]; ***In re Guardian News and Media Ltd*** **[2010] 2 AC 697** [50]-[51]: see discussion in [90]-[99] below. This is not a mechanical exercise to be decided upon the basis of rival generalities: ***RXG -v- Ministry of Justice*** **[2019] EWHC 2026 (QB)** [30] *per* Sharp P.

20. The Judge granted the Claimants an interim injunction. It is necessary for me to set out some of its terms.

    i) As to the basis of the injunction, the order recited:

    > "AND UPON the Court being satisfied that it is <u>appropriate</u> and proportionate on an interim basis to make the Injunction Order below both

at common law and pursuant to sections 3 and 3A of the Protection from Harassment Act 1997".

(emphasis added)

ii) The order contained several definitions, which were important in governing its scope and application:

- "*Demonstrating*" and "*demonstrate*" were defined as embracing "*carrying out any activity including handing out leaflets as part of or in furtherance of the campaign against the production and/or sale and/or supply of Animal Products* [also defined]."

- "*Protestor*" or "*protestors*" were defined as "*any person who demonstrates or intends to demonstrate against the production and/or sale and/or supply of Animal Products by the First Claimant*".

- "*Defendant*" or "*Defendants*" were defined as "*the parties referred to in the heading to this Order including (for the avoidance of doubt) any Protestor or Protestors*".

iii) The operative part of the injunction provided:

"The [First] Defendants and each of them be restrained whether by themselves or by instructing or encouraging any person from:

(1) Assaulting, molesting, or threatening the Protected Persons;

(2) Behaving in a threatening and/or intimidating and/or abusive and/or insulting manner directly at any individual or group of individuals within the definition of "Protected Persons"

(3) Intentionally photographing or filming the Protected Persons with the purpose of identifying them and/or targeting them in connection with protests against the manufacture and/or sale or supply of Animal Products.

(4) Making in any way whatsoever any abusive or threatening electronic communication to the Protected Persons;

(5) Entering the Store;

(6) Blocking or otherwise obstructing the Entrance to the Store;

(7) Banging on the windows of the Store;

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

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

(10) Demonstrating at the Store within the Inner Exclusion Zone;

(11) Demonstrating at the Store within the Outer Exclusion Zone A, save that no more than 3 Protestors may at any one time demonstrate and

> hand out leaflets within the Outer Exclusion Zone A (but not within the Inner Exclusion Zone) provided that no obstruction occurs other than that which is implicit in handing out leaflets.
>
> (12) Demonstrating at the Store within the Outer Exclusion Zone B save that no more than 5 Protestors may at any one time demonstrate and hand out leaflets within Outer Exclusion Zone B (but not within the Inner Exclusion Zone) provided that no obstruction occurs other than that which is implicit in handing out leaflets.
>
> (13) Using at any time a Loudhailer [as defined] within the Inner Exclusion Zone and Outer Exclusion Zones or otherwise within 10 metres of the Building Line of the Store.
>
> (14) Using a Loudhailer anywhere within the vicinity of the Store otherwise than for amplification of voice."

iv) Attached to the injunction order was a plan showing the Inner and Outer Exclusion Zones. Essentially, these zones (with a combined width of 7.5 meters) covered roughly a 180-degree radius around the entrance to the Store. The Inner Exclusion Zone extended out from the Store front for 2.5m. The Outer Exclusion Zone extended a further 5m outwards. The Outer Exclusion Zone was divided into Zone A (a section of pavement on Regent Street) and Zone B (a section of pavement in front of the Store Entrance and part of the carriageway on Regent Street extending to the pavement and the entire carriageway in Little Argyle Street). For all practical purposes, the combined Exclusion Zones covered the entire pavement outside the Store on Regent Street and the pavement and entire carriageway of Little Argyle Street outside the entrance to the Store.

v) Paragraph 4 of the order provided liberty to apply to discharge or vary to anyone affected by the order in the following terms:

> "This Order is made without notice to the Defendants. There is permission to any Protestor not named party to these proceedings to apply to the Court at any time to be added as a named party and permission to any party to this claim or person affected by this Order to apply to vary, discharge or extend this Order but if they wish to do so, they must (save in the case of urgency) give not less than 2 clear days' written notice to all named parties, via the parties' solicitors where solicitors are instructed."

21. The terms of the order had the following effects:

i) The injunction was expressly granted pursuant to ss.3 and 3A Protection from Harassment Act 1997 ("the PfHA") (set out in [49]). As Mr Buckpitt acknowledged, the Claimants regarded this as a key advantage of the injunction because, pursuant to s.3(6) PfHA, breach of a harassment injunction is a criminal offence, rendering the person in breach liable to arrest. I am not convinced that s.3(6) has this effect against "persons unknown" (see discussion in [119]-[126] below), but Mr Buckpitt told me that the police welcomed an injunction in these terms that also provided for "exclusion zones" because it made policing a demonstration easier. I do not have any evidence from the police confirming that.

ii) The width of the definition of "protestor" meant that it captured even a person, standing silently on the pavement outside the Store, holding a placard, or wearing a t-shirt, bearing a message of opposition to the production and/or sale and/or supply of animal products. In other words, it potentially caught people that were not even arguably breaking the civil or criminal law and then subjected them, in particular, to the restrictions imposed by the injunction, in particular paragraphs (2), (10)-(12).

iii) Indeed, subject only to issues of service, any "protestor" could become subject to the terms of the injunction. Such is the width of the definition of this term that, as Mr Buckpitt for the Claimants' accepted, *anyone* who protested against the First Claimant, for example by posting online or by marching up and down a street in Penzance, was captured by the definition of "persons unknown" in the order. The definition of protestor did not require physical presence at the Store.

iv) Any person caught by the wide definition of "protestor" who arrived to demonstrate outside the Store would breach the terms of the injunction (and potentially be liable to punishment for contempt or, the Claimants contended, arrest and prosecution for a breach of s.3(6) PfHA) if s/he joined 3 other "protestors" in Outer Exclusion Zone A or 5 other "protestors" in Outer Exclusion Zone B. That was so even if the existing protestors in those Zones were themselves standing silently each wearing a t-shirt bearing a "protest" slogan or holding a placard with a similar message. If the arriving "protestor" discovered that the maximum permitted number of "protestors" were already within the relevant Exclusion Zones, then s/he would be in breach of the injunction – and, the Claimants contend, liable to arrest – unless s/he stood outside the Exclusion Zones. To demonstrate outside the Store front, avoiding the Exclusion Zones, a person would have to stand in the carriageway on Regent Street. This would apply, as I say, even if both the arriving and existing protestors were not committing (or threatening to commit) any tort or other civil wrong.

22. The Order recited that the Claimants had provided the following undertakings to the Court:

> "(i) to pay any damages which the Defendants sustain as a result of the Injunction Order and which the court considers the Claimants or any of them should pay; and
>
> (ii) to effect email service as provided below of the Order the Claim Form and Particulars of Claim and application notice and evidence in support, as soon as is practicable".

23. As to service of the "persons unknown":

i) Paragraph 2 of the Order permitted the Claimants to serve the Order upon:

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

ii) Paragraph 3 of the Order provided:

> "The Claimants shall serve this Order by the following alternative method namely by serving the same by email to 'contact@surgeactivism.com' and 'info@peta.org.uk'."

24. I note the following:

i) The Claimants had undertaken to "*effect email service as provided for below*" of the Claim Form. The Order had not, however, imposed any requirement on the Claimants (or required from them any undertaking) to serve the Claim Form on the "Persons Unknown"; Paragraph 2 had simply permitted the **order** to be served on people "*demonstrating at or in the vicinity of the Store*".

ii) Paragraph 3 permitted alternative service of the injunction order on the two stated email addresses.

iii) CPR 6.3(1) sets out the methods of permissible service for a Claim Form. Without an order for alternative service, the only method by which the persons unknown could be validly served was by personal service in accordance with CPR 6.5.

iv) Although the Application notice did seek such an order, no order permitting alternative service of the Claim Form was made by the Court in the order of 29 November 2017 or subsequently. In consequence, there has been no compliance with CPR 6.15(4), which requires an order for alternative service to specify: (a) the method or place of service; (b) the date on which the claim form is deemed served; and (c) the period for (i) filing an acknowledgement of service; (ii) filing an admission; or (iii) filing a defence.

25. Although the Order of Teare J did not expressly state that there had been any consideration of s.12 Human Rights Act 1998 (set out in [65] below), Mr Buckpitt confirmed, and I am satisfied, that the Court was referred to and considered its provisions. The Court will always require to be strictly satisfied that the requirements of s.12 have been observed. Applications for injunctions against "persons unknown" are no exception. In a protestor case, there are many "*practicable steps*" (s.12(2)(a)) that can be taken to notify at least some of the respondents of the application for an injunction. The most obvious expedient being notices informing protestors of the intention to apply for an injunction. Such notices could provide details of the time and place that the application together with details of the order the applicant intends to ask the Court to make.

26. The Claim Form and Particulars of Claim have been served only in the following ways:

i) by email on 29 November 2017 to the Second Defendant;

ii) by email on 29 November 2017 to "contact@surgeactivism.com"; and

iii) by email on 3 December 2017 to Luke Steele (who had contacted the Claimants' solicitors and asked for a copy). Mr Steele appears to have been sent the documents for his information, rather than by way of service upon him as one of the "persons unknown".

27. The Claimants served the Order of 29 November 2017 and the Application Notice seeking the injunction and evidence in support by sending them to the two email addresses (see [23(ii)] above). Because of the size of the attachments, Mr Hayes sent the documents using Mimecast. Although he received confirmation that PETA had accessed the documents on 4 December 2017, no similar confirmation of receipt was received in respect of service on contact@surgeactivism.com. There is therefore no evidence confirming that the Claim Form has been served upon, or has come to the attention of, any person falling within the class of persons unknown who are the First Defendants.

## D. The continuation of the interim injunction: 15 December 2017

28. Teare J directed a further hearing of the Claimants' Application for an interim injunction on 13 December 2017. On 30 November 2017, the Claimants issued an Application Notice seeking the continuation of Teare J's order. In a witness statement dated 12 December 2017, the Second Claimant set out what had happened since the grant of the interim injunction (and exhibited video footage of some protests – which I have watched). He suggested that continuation of the restrictions imposed by the injunction would be "*fair and balanced*" and allowed persons unknown "*to protest and get their message across without causing significant disturbance and harassment to the Claimants, their staff, customers and members of the public*".

29. The Application came before HHJ Moloney QC (sitting as a High Court Judge) on 13 December 2017. The day before, the Second Defendant had issued an application seeking (a) to be joined to the proceedings on behalf of itself and "*its employees and members*", and (b) a variation of the interim injunction.

30. PETA's Application was supported by a witness statement from Mimi Bekhechi, the Director of International Programmes for PETA. She stated that PETA had over 1.2 million members and supporters and operated as a charitable company limited by guarantee. She described the work of PETA as follows:

> "PETA is dedicated to establishing and protecting the rights of all animals, focusing on the four areas in which the largest numbers of animals suffer the most intensely for the longest periods of time: in the food industry, in the clothing trade, in laboratories, and in the entertainment industry… PETA has for the last 21 years carried out lawful, peaceful demonstrations against corporations or institutions whose practices cause animals to suffer. These demonstrations have been instrumental in achieving ground-breaking changes for animals, from the ban on cosmetics testing and fox hunting, to ending the sale of foie gras in all major British supermarkets. The importance of preserving our right to public demonstration can't be overstated…"

She gave particular examples of successes that PETA believed had come about as a result of public demonstrations.

31. Ms Bekhechi stated PETA's approach to demonstrations, and in particular, with reference to the actions of certain protestors outside the Store:

> "While we are aware that many other people and organisations also feel passionately about ending the suffering inflicted on coyotes and geese for Canada Goose's fur trimmed, down filled coats, and regularly demonstrate outside the

> European flagship shop on Regent Street, PETA has no direct involvement with, or control over their actions. PETA has always been and remains committed to achieving its aims by wholly lawful and peaceful means. Not only is this a moral and ethical position taken by the organisation, but we also have many high profile and influential supporters who may well be alienated if PETA were to involve itself in violent or disorderly forms of protest. It is for those reasons that PETA expects the highest standards of behaviour from any persons working for, or representing, the organisation or taking part in a PETA demonstration."

32. PETA sought the variation of Teare J's order on the grounds, explained by Ms Bekhechi, that "*the Exclusion Zones contained in the Court's order prevent PETA from being able to adequately organise in sufficient numbers at the locations of our choosing to inform shoppers… about the cruelty that is involved in the production of Canada Goose's coats.*" In particular, the limit on numbers permitted within the Exclusion Zones, meant that PETA demonstrators who arrived at the Store and found that 8 other protestors were already within the Exclusion Zones, were required to locate themselves either near or even in the carriageway, in areas that might obstruct the free flow of pedestrian traffic or in the vicinity of other retail outlets "*thus causing confusion in the delivery of PETA's message and also unfairly associating those stores with the fur trade and animal cruelty*".

33. PETA also filed a witness statement from Teodora Zglimbea. She was PETA's Outreach Coordinator and, as part of that role, she arranged various demonstrations. Ms Zglimbea stated that PETA maintained good relations with the Metropolitan Police:

> "PETA demonstrations are carefully and professionally conceived, organised and conducted, including very often notifying the Metropolitan police of the date, time and location of our demonstrations so they can arrange any presence they feel is necessary and to provide a productive dialogue and relationship with the Metropolitan Police. As such, PETA have a long standing and good working relationship with the Metropolitan Police, who are always supportive of us exercising our free speech during demonstrations. At no time during my three years with PETA has any PETA employee or authorised volunteer or activist participating in any PETA-sponsored demonstration which I planned, coordinated and/or attended been arrested or acted in any way contrary to the law, and all such personnel have at all times followed the directions of the Metropolitan Police when present at our demonstrations.
>
> It is PETA's standard operating procedure that all PETA staff members and volunteer activists participating in a PETA-sponsored demonstration are instructed to dress appropriately (including wearing a PETA logo t-shirt if requested), to act respectfully toward all members of the public they encounter throughout the demonstration, follow the instructions of the designated PETA staff member responsible for conducting the demonstration and follow the instructions of any police officers present."

34. Ms Zglimbea gave details of four PETA-organised demonstrations at the Store that had taken place:

*9 November 2017*

i) Ms Zglimbea notified the police in advance of the demonstration by email (a copy was exhibited) and gave the officer her mobile telephone number.

ii) The protest started at midday. 14 PETA staff members attended. One was dressed in a large plucked goose costume and the others held signs. They stood shoulder-to-shoulder in a single file line immediately in front of the Store facing towards Regent Street. Some protestors handed out leaflets to passers-by. The demonstration ended at 1pm. There was no obstruction to the entrance to the Store and no loudhailer was used.

iii) The point is made in PETA's evidence that the protestors on this occasion were standing in what is now the Inner Exclusion Zone and would therefore now be prohibited.

*24 November 2017*

iv) Ms Zglimbea again provided advance notification to the police by email. Two police officers attended the demonstration, but simply observed from a distance.

v) The protest started at midday. Ms Zglimbea attended. There were 10 PETA staff members and approximately 20 volunteer activists, holding signs and some handing out leaflets. Nearly all of the protestors stood shoulder-to-shoulder, again in single file, immediately in front of the Store window facing Regent Street. One activist was painted red, wore a coyote mask and had one leg caught in a trap. He was positioned close to the Store entrance but not in a way that obstructed access.

vi) Ms Zglimbea noted apparent confirmation of this in the witness statement of the Second Claimant:

> "The Protest commenced at 12.00. The Store security log confirmed that a group of PETA protestors arrived with approximately 15 individuals and staged a short protest and left the Store at 13.00."

*29 November 2017*

vii) There was a further PETA-organised protest on this date. It was a small-scale event. 4 people attended for the purposes of a photo shoot. It began at midday and ended at 12.15. The protest did not feature in the evidence of the Claimants.

*8 December 2017*

viii) Ms Zglimbea again notified the police of the planned demonstration by email. The event began at midday and ended at 12.20. The protestors were instructed by the police to stay within Exclusion Zone B. The limit on numbers meant that Ms Zglimbea and 3 photographers who were present were required to stand off the pavement and in the road. The police officers advised them to "*mind the traffic*".

35. Ms Zglimbea confirmed that, apart from those 4 demonstrations, none of the other events complained about by the Claimants related to any PETA-sponsored or PETA-organised activities. She stated:

> "… at no time in any of the four demonstrations described above, or generally, has PETA engaged in unlawful or disorderly activities… [T]here is no need to restrict its activities to the extent set out in the terms of the injunction order."

36. At the hearing on 13 December 2017, the Judge joined the Second Defendant to the action and permitted it to represent "*its employees and members*" under CPR 19.6, but adjourned the Claimants' application for a continuation of the interim injunction to 15 December 2017. The Order joining the Second Defendant to the proceedings did not contain any directions as to service of the Claim Form on the Second Defendant (e.g. requiring service by a particular date or dispensing with service) and nor did it contain any directions requiring the Second Defendant to file a defence or acknowledgement of service.

37. The Claimants responded to PETA's evidence in a witness statement dated 14 December 2017 from Geoff Marr, the First Claimant's "Director in Legal", based in Toronto. He stated:

    i) the four PETA protests described by Ms Zglimbea "*were carried out without incident and her summary broadly accords with the Claimants' understanding of what took place*"; but

    ii) nevertheless, the Claimants believed that PETA members had attended other demonstrations and that Ms Zglimbea had attended a large demonstration on 11 November 2017. He provided little by way of further evidence to substantiate that claim.

    Perhaps most importantly, Mr Marr did not suggest that any of those who participated in the PETA demonstrations had acted in any way unlawfully.

38. Mr Marr did however identify an issue to which I will return. He complained that "*it is not understood how an order can be made in respect of general protests that differentiates between the 2nd Defendant and other protestors…*" He confirmed that the Claimants were prepared to agree to some variation of the order which allowed for coordinated protests by PETA "*from time to time*". More generally, Mr Marr indicated that the Claimants would "*not oppose*" a limited variation in the injunction order to permit a demonstration by 15 people, once a week for 2 hours, between 8am to 4pm, Monday to Friday.

39. The matter came back before HHJ Moloney QC on 15 December 2017. At the hearing, Mr Buckpitt represented the Claimants and Andrew Locke represented PETA. PETA sought the variation of the injunction order to modify the Exclusion Zones, alternatively for permission to hold "*controlled demonstrations*" in those zones on notice to the Claimants. PETA also raised an issue as to the use of loudhailers.

40. The Judge gave an *ex tempore* judgment (**[2017] EWHC 3735 (QB)**). In summary:

i) he maintained the restrictions preventing any "protestor" from entering the Inner Exclusion Zone;

ii) he amalgamated Zones A and B in the Outer Exclusion Zone and increased the number of protestors permitted within the Outer Exclusion Zone to 12 people; and

iii) he varied paragraph (14) of Teare J's order (see [20(iii)] above), regarding the use of loudhailers (defined in the order), to prohibit:

> "… using at any time a Loudhailer within the Inner Exclusion Zone and Outer Exclusion Zone… [and] using a Loudhailer anywhere else in the vicinity of the Store (including Regent Street and Little Argyll Street) save that between the hours of 2pm and 8pm a single Loudhailer may be used for the amplification of the human voice only for up to 15 minutes at a time with intervals of 15 minutes between each such use."

41. The Judge, given his experience in the area, was clearly alive to the protestors' rights of freedom of expression and freedom of association. He said [7]:

> "All the restrictions I am invited to consider granting or lifting have the effect, to a greater or lesser extent, of limiting the right of the protestors to free expression under Article 10 of the European Convention on Human Rights and indeed of free assembly under Article 11 of that Convention… So far as the Protection from Harassment Act is concerned, the acts I am asked to restrain or permit are acts which are capable of constituting or contributing to harassment of the customers and staff of [the] claimant company. The restrictions are intended to minimise the opportunity for harassment or the temptation for harassment. But under that Act, those acts, if carried out as part of a principled demonstration would arguably be defensible as reasonable. In other words, under the Protection from Harassment Act not every act of harassment is actionable; it depends ultimately on reasonableness, and I have no doubt that acts otherwise of a harassing nature carried out in the course of lawful demonstration might, depending on the nature and extent of their severity, be entitled to that defence."

42. An order reflecting the Judge's variations to the injunction was drawn up and sealed ("the 15 December 2017 Order"). It remained in force, "*unless varied or discharged by further order of the court*".

43. In terms of case management directions, the 15 December 2017 Order also provided:

i) that "*all further procedural directions*" were stayed unless "*a named party in this Claim gives written notice to the other parties… that such stay of directions should be lifted*"; and

ii) further directions in the event that request to lift the stay was received and a 'long-stop' or default provision in the following terms:

> "Within 21 days of the giving or receipt of written notice to lift the stay (and in any event not later than 4pm on 1 December 2018) the Claimants shall apply for summary judgment and for directions in respect of such application the Claimant being permitted (pursuant to CPR 24.4.1) to make such

> application insofar as by such date no acknowledgement of service or Defence has been filed. If neither such application is made by 1 December 2018 the claim shall stand dismissed and the Injunction will be discharged without further order."

## E. Further steps in the claim

44. The 15 December 2017 Order effectively stayed the proceedings until such time as a "named party" re-activated them, subject to the 'long-stop' requirement that the Claimants were to issue an application for summary judgment/directions. I am not sure who it was envisaged would qualify as a "named party". As the proceedings stood at the date of the 15 December 2017 Order, the only named parties were the Claimants and the Second Defendant.

45. The definitions included in the 15 December 2017 Order (like the Teare J order before that), provided that, in the order:

> "'Defendant' or 'Defendants' shall mean the parties referred to in the heading to this Order including (for the avoidance of doubt) any Protestor or Protestors… [as defined – see [20(ii)] above]"

46. It appears to me unclear whether the 15 December 2017 Order permitted someone served with the order to request the lifting of the stay. On one reading, it did not. The point may not matter, as, in the event, no party (or third party) did seek to lift the stay and so the proceedings lay in their dormant state. That is not to say that there were no important developments. The injunction contained in the 15 December 2017 Order remained in full force and the Claimants took full advantage of the opportunity to serve it on over 300 "protestors" whenever they judged it appropriate. Anyone so served was thereafter bound by the terms of the injunction, albeit s/he was given the opportunity to apply to the Court to vary or discharge it.

47. In a witness statement in support of the application for summary judgment, the Claimant's solicitor, Mr Paul Hayes stated:

> "None of the defendants in this matter have filed a defence or acknowledged service of the proceedings. As regards the First Defendants this is certainly the case (and such Defendants are 'added' every time a copy of the Order is served on them). The Second Defendant applied to be joined as a party to the proceedings, which application was not opposed by the Claimants. The second Defendant has not served a defence and their challenge in the main related to the terms of the Order rather than the making of an injunction…"

48. At the hearing of the Claimants' Application and in response to my questions, Mr Buckpitt gave me information about the number of people who had been served with the injunction and how many of them had been identified by the Claimants. Following the hearing, this evidence has been set out in a further witness statement from Mr Hayes. The evidence is:

    i) Between 29 November 2017 and 19 January 2019, entries in a "security log" recorded that 385 copies of the injunction have been served. That may not represent the actual number of people who have been served because it appears some have been served more than once.

ii) No copies of the Claim Form or a Response Pack have been served on any protestor.

iii) Of the 385 copies of the injunction that the Claimants have records of having been served, 135 have been served in a way that enables the individual to be identified (e.g. from body-camera footage). Removing those who can be identified as having been served more than once, the total number of identifiable individuals served with the injunction is 121.

iv) Of those 121, the Claimants have identified 37 by name, although the Claimants believe that a number of the names are pseudonyms. The entries in the security log suggest that several of the protestors were 'regulars' and who were identified by name.

v) No attempt has been made by the Claimants to join any of these 37 individuals (or the larger group of 121) to this action whether by serving them with the Claim Form or otherwise. Mr Buckpitt told me at the hearing that the reason why this had not been done was the cost and inconvenience of doing so. He suggested that this might be welcomed by the putative defendants as they would then not be exposed to potential liability for costs. The effect, however, is that these proceedings have remained essentially uncontested.

## F. Protection from Harassment Act 1997

49. A significant, if not the principal, basis on which the Claimants bring this claim is alleged harassment by the protestors of the protean class of "Protected Persons" (as defined in the injunction - see [18]). A central issue is therefore what restrictions can be imposed by way of civil injunction to restrain actual or threatened harassment. The key provisions of the PfHA that have a bearing in this case are as follows:

> **s.1 Prohibition of harassment**
> (1) A person must not pursue a course of conduct—
> (a) which amounts to harassment of another, and
> (b) which he knows or ought to know amounts to harassment of the other.
>
> (1A) A person must not pursue a course of conduct —
> (a) which involves harassment of two or more persons, and
> (b) which he knows or ought to know involves harassment of those persons, and
> (c) by which he intends to persuade any person (whether or not one of those mentioned above)—
> (i) not to do something that he is entitled or required to do, or
> (ii) to do something that he is not under any obligation to do.
>
> (2) For the purposes of this section…, the person whose course of conduct is in question ought to know that it amounts to or involves harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.
>
> (3) Subsection (1) or (1A) does not apply to a course of conduct if the person who pursued it shows—
> (a) that it was pursued for the purpose of preventing or detecting crime,

(b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or
(c) that in the particular circumstances the pursuit of the course of conduct was reasonable.

**s.2 Offence of harassment.**

(1) A person who pursues a course of conduct in breach of section 1(1) or (1A) is guilty of an offence.

(2) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding level 5 on the standard scale, or both…

**s.3 Civil remedy.**

(1) An actual or apprehended breach of section 1(1) may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question.

(2) On such a claim, damages may be awarded for (among other things) any anxiety caused by the harassment and any financial loss resulting from the harassment.

(3) Where—
(a) in such proceedings the High Court or the county court grants an injunction for the purpose of restraining the defendant from pursuing any conduct which amounts to harassment, and
(b) the plaintiff considers that the defendant has done anything which he is prohibited from doing by the injunction,
the plaintiff may apply for the issue of a warrant for the arrest of the defendant.

(4) An application under subsection (3) may be made—
(a) where the injunction was granted by the High Court, to a judge of that court, and
(b) where the injunction was granted by the county court, to a judge of that court.

(5) The judge to whom an application under subsection (3) is made may only issue a warrant if—
(a) the application is substantiated on oath, and
(b) the judge has reasonable grounds for believing that the defendant has done anything which he is prohibited from doing by the injunction.

(6) Where—
(a) the High Court or the county court grants an injunction for the purpose mentioned in subsection (3)(a), and
(b) without reasonable excuse the defendant does anything which he is prohibited from doing by the injunction,
he is guilty of an offence.

(7) Where a person is convicted of an offence under subsection (6) in respect of any conduct, that conduct is not punishable as a contempt of court.

(8) A person cannot be convicted of an offence under subsection (6) in respect of any conduct which has been punished as a contempt of court.

(9) A person guilty of an offence under subsection (6) is liable—
(a) on conviction on indictment, to imprisonment for a term not exceeding five years, or a fine, or both, or
(b) on summary conviction, to imprisonment for a term not exceeding six months, or a fine not exceeding the statutory maximum, or both.

**s.3A Injunctions to protect persons from harassment within section 1(1A).**

(1) This section applies where there is an actual or apprehended breach of section 1(1A) by any person ("the relevant person").

(2) In such a case—
(a) any person who is or may be a victim of the course of conduct in question, or
(b) any person who is or may be a person falling within section 1(1A)(c),
may apply to the High Court or the county court for an injunction restraining the relevant person from pursuing any conduct which amounts to harassment in relation to any person or persons mentioned or described in the injunction.

(3) Section 3(3) to (9) apply in relation to an injunction granted under subsection (2) above as they apply in relation to an injunction granted as mentioned in section 3(3)(a)…

**s.5 Restraining orders on conviction**

(1) A court sentencing or otherwise dealing with a person ("the defendant") convicted of an offence may (as well as sentencing him or dealing with him in any other way) make an order under this section.

(2) The order may, for the purpose of protecting the victim or victims of the offence, or any other person mentioned in the order, from conduct which—
(a) amounts to harassment, or
(b) will cause a fear of violence,
prohibit the defendant from doing anything described in the order.

(3) The order may have effect for a specified period or until further order.

(3A) In proceedings under this section both the prosecution and the defence may lead, as further evidence, any evidence that would be admissible in proceedings for an injunction under section 3.

(4) The prosecutor, the defendant or any other person mentioned in the order may apply to the court which made the order for it to be varied or discharged by a further order.

(4A) Any person mentioned in the order is entitled to be heard on the hearing of an application under subsection (4).

(5) If without reasonable excuse the defendant does anything which he is prohibited from doing by an order under this section, he is guilty of an offence.

(6) A person guilty of an offence under this section is liable—
(a) on conviction on indictment, to imprisonment for a term not exceeding five years, or a fine, or both, or
(b) on summary conviction, to imprisonment for a term not exceeding six months, or a fine not exceeding the statutory maximum, or both.

(7) A court dealing with a person for an offence under this section may vary or discharge the order in question by a further order.

**s.5A Restraining orders on acquittal**

(1) A court before which a person ("the defendant") is acquitted of an offence may, if it considers it necessary to do so to protect a person from harassment by the defendant, make an order prohibiting the defendant from doing anything described in the order.

(2) Subsections (3) to (7) of section 5 apply to an order under this section as they apply to an order under that one.

(3) Where the Court of Appeal allow an appeal against conviction they may remit the case to the Crown Court to consider whether to proceed under this section.

(4) Where—
(a) the Crown Court allows an appeal against conviction, or
(b) a case is remitted to the Crown Court under subsection (3),
the reference in subsection (1) to a court before which a person is acquitted of an offence is to be read as referring to that court.

(5) A person made subject to an order under this section has the same right of appeal against the order as if—
(a) he had been convicted of the offence in question before the court which made the order, and
(b) the order had been made under section 5.

**7. Interpretation of this group of sections.**

(1) This section applies for the interpretation of sections 1 to 5A.
(2) References to harassing a person include alarming the person or causing the person distress.
(3) A "course of conduct" must involve—
(a) in the case of conduct in relation to a single person (see section 1(1)), conduct on at least two occasions in relation to that person, or
(b) in the case of conduct in relation to two or more persons (see section 1(1A)), conduct on at least one occasion in relation to each of those persons.
(3A) A person's conduct on any occasion shall be taken, if aided, abetted, counselled or procured by another—
(a) to be conduct on that occasion of the other (as well as conduct of the person whose conduct it is); and

(b) to be conduct in relation to which the other's knowledge and purpose, and what he ought to have known, are the same as they were in relation to what was contemplated or reasonably foreseeable at the time of the aiding, abetting, counselling or procuring.

(4) "Conduct" includes speech.

(5) References to a person, in the context of the harassment of a person, are references to a person who is an individual.

50. A corporate entity is not a "person" capable of being harassed under the Act: s.7(5) and ***Daiichi UK Ltd -v- Stop Huntingdon Animal Cruelty*** **[2004] 1 WLR 1503**. However, a company may sue in a representative capacity on behalf of employees of the company if that is the most convenient and expeditious way of enabling the court to protect their interests: ***Emerson Developments Ltd -v- Avery*** **[2004] EWHC 194 (QB)** [2].

51. What amounts to harassment is far from straightforward: see the discussion in ***Hourani -v- Thomson*** **[2017] EWHC 432 (QB)** [138]-[146] *per* Warby J:

i) Reference in the PfHA to harassment including alarming the person or causing the person distress is not a definition of the tort; it is merely guidance as to one element of it: [138]. Nor is it an exhaustive statement of the consequences that harassment may involve. Harassment is a persistent and deliberate course of unreasonable and oppressive conduct [139], which is calculated to, and does, cause that person alarm, fear or distress: ***Hayes -v- Willoughby*** **[2013] 1 WLR 935** [1] *per* Lord Sumption.

ii) The behaviour must reach a level of seriousness before it amounts to harassment within the scope of s.1 PfHA; not least because the Act creates both a tort and, by s.2, a crime of harassment: [139]. The authoritative exposition of this point is that of Lord Nicholls in ***Majrowski -v- Guy's and St Thomas's NHS Trust*** **[2007] 1 AC 224** [30]:

> "[Where] the quality of the conduct said to constitute harassment is being examined, courts will have in mind that irritations, annoyances, even a measure of upset, arise at times in everybody's day-to-day dealings with other people. Courts are well able to recognise the boundary between conduct which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable. To cross the boundary from the regrettable to the unacceptable the gravity of the misconduct must be of an order which would sustain criminal liability under section 2."

iii) There must be conduct, on at least two occasions, which is, from an objective standpoint, calculated to cause alarm or distress and oppressive, and unacceptable to such a degree that it would sustain criminal liability: [140] and ***Dowson -v- Chief Constable of Northumbria Police*** **[2010] EWHC 2612 (QB)** [142] *per* Simon J.

iv) The objective nature of the assessment of harassment is particularly important where the complaint is of harassment by publication. In any such case, the claim engages Article 10 of the Convention and, as a result, the Court's duties under ss.2, 3, 6 and 12 Human Rights Act 1998. "*It would be a serious interference with freedom of expression if those wishing to express their own views could be silenced by, or threatened with, claims for harassment based*

> *on subjective claims by individuals that they feel offended or insulted*": ***Trimingham -v- Associated Newspapers Ltd*** **[2012] EWHC 1296 (QB)** [267] *per* Tugendhat J (emphasis added).

52. Injunctions under the PfHA have been made in several cases against protestors. However, the Act was not intended by Parliament to be used to clamp down on the discussion of matters of public interest or upon the rights of political protest and public demonstration: ***Huntingdon Life Sciences Ltd -v- Curtin****, The Times,* 11 December 1997, *per* Eady J.

53. When Article 10 is engaged then the Court must apply an intense focus on the relevant competing rights (see [99] below). Harassment by speech cases are usually highly fact- and context-specific. For example, in ***Merlin Entertainments LPC & Others –v- Cave*** **[2014] EWHC 3036 (QB)** Elizabeth Laing J noted:

> [40] Harassment can take different forms. Where the harassment which is alleged involves statements which a defendant will seek to justify at trial, there may be cases where an interim injunction will be appropriate. These are cases where such statements are part of the harassment which is relied on, but where that harassment has additional elements of oppression, persistence or unpleasantness, which are distinct from the content of the statements. An example might be a defendant who pursues an admitted adulterer through the streets for a lengthy period, shouting '*You are an adulterer*' through a megaphone. The fact that the statement is true, and could and would be justified at trial, would not necessarily prevent the conduct from being harassment, or prevent a court from restraining it at an interlocutory stage…
>
> [41] This means that the real question is whether the conduct complained of has extra elements of oppression, persistence and unpleasantness and therefore crosses the line referred to in the cases. There may be a further question, which is whether the content of the statements can be distinguished from their mode of delivery…[T]he fact that conduct consists of, or includes, the making and repetition of statements which a defendant will seek to justify at trial means that a court must scrutinise very carefully claims that that line has been crossed in any particular case, and ensure that any relief sought, while restraining objectionable conduct, goes no further than is absolutely necessary in interfering with article 10 rights…"
>
> (emphasis added)

54. The megaphone example demonstrates the importance of context. It was potentially harassment because of the element of pursuit. Yet, "*if the respondent used a megaphone to broadcast his remarks in a town square 200 miles away from the applicant, it is hard to see how that conduct would bear the description 'harassment' (in the ordinary sense of that word)*": ***Khan (formerly JMO) -v- Khan (formerly KTA)*** **[2018] EWHC 241 (QB)** [69]. This is just one of the issues that makes defining the terms of any injunction to restrain alleged harassment particularly difficult.

## G. Fundamental principles of civil litigation

55. Civil Litigation in England & Wales is adversarial.

> "English civil courts act *in personam*. They adjudicate disputes between the parties to an action and make orders against those parties only. This is true even in proceedings … against 'persons unknown'. They become parties. What is not permissible is to make an order against a stranger to the action."
>
> ***A-G -v- Newspaper Publishing Plc*** **[1988] Ch 333, 369C** *per* Sir John Donaldson MR.

56. A claimant can bring a claim against a defendant alleging that s/he has committed some wrong. The defendant can admit the claim, in whole or in part, or s/he can deny the claim (or challenge the Court's jurisdiction). Absent an earlier summary determination, or default by one of the parties, any dispute between the parties will be adjudicated upon at a trial at which the Court will consider evidence presented by each party. If the Court finds for the claimant, it will usually enter judgment for the claimant against the defendant and grant the remedies to which it considers the claimant is entitled consequent on the judgment. Subject to any appeal, that brings the litigation to an end. It is in the public interest that there should be finality to litigation: ***Johnson -v- Gore Wood & Co*** **[2002] 2 AC 1, 59A** *per* Lord Millett.

57. The Court will consider claims based on the commission of wrongs in the past, and those based on the claimant's contention that the defendant threatens to commit a wrong against him/her in the future. Where justified, and where the claimant has demonstrated, by evidence, a credible threat that the defendant will act wrongfully unless restrained, the Court has the power to grant an injunction to prevent a defendant from doing the act which the claimant contends would be a civil wrong. The purpose of an interim injunction is usually to protect the position pending the court's final assessment of evidence at a trial. The Court will not normally grant an interim injunction if it considers that the claimant could be adequately compensated in damages if the defendant did commit a civil wrong. Fundamentally, however, the Court will only grant an injunction where it is satisfied that the claimant has a substantive cause of action against the defendant that gives rise to a serious issue to be tried. More onerous requirements may apply in some types of case (e.g. defamation claims and/or those that engage s.12 Human Rights Act 1998).

58. The Civil Procedure Rules provide a comprehensive framework for the commencement of claims and the service of originating process upon defendants. In broad terms, the object is to seek to ensure that defendants to civil claims are given proper notice of the claim that is being made against them and a reasonable opportunity to put forward any defence to the claim. The fact that the Court, exceptionally, permits a claim to be brought against "persons unknown" (see further [59(v)-(xiv)] below) does not lead to the abandonment of this basic principle. There may be practical difficulties in achieving the objective where the identity of the defendant is not presently known, but it does not lessen the obligation to attempt to do so. Even people who shield themselves behind anonymity are to be afforded the basic right, so far as possible, to be given notice that a claim is being made against them and an opportunity to defend themselves.

59. These fundamental principles were clearly articulated in Lord Sumption's judgment in ***Cameron*** [9]-[26], the first case in which the House of Lords or Supreme Court have considered proceedings against "persons unknown". In summary:

*The requirements of service*

i) Justice in legal proceedings must be available to both sides. It is a fundamental principle of justice that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard. In ***Jacobson -v- Frachon*** **(1927) 138 LT 386, 392**, Atkin LJ described the principles of natural justice as follows:

> "Those principles seem to me to involve this, first of all that the court being a court of competent jurisdiction, has given notice to the litigant that they are about to proceed to determine the rights between him and the other litigant; the other is that having given him that notice, it does afford him an opportunity of substantially presenting his case before the court."

ii) Service of originating process is central to domestic litigation procedure and was required long before statutory rules of procedure were introduced following the Judicature Acts of 1873. Different modes of service were permitted, but each had the common object of bringing the proceedings to the attention of the defendant.

iii) CPR 6.15 does not include an express requirement that the method authorised should be likely to bring the proceedings to the person's notice, but "*service*" is defined in the indicative glossary of the CPR as "*steps required by rules of court to bring documents used in court proceedings to a person's attention*". The whole purpose of service is to inform the defendant of the contents of the Claim Form and the nature of the claimant's case: ***Abela -v- Baadarani*** **[2013] 1 WLR 2043** [37] *per* Lord Clarke. Subject to any statutory provision to the contrary, it is an essential requirement for any form of alternative service that the mode of service should be such as can reasonably be expected to bring the proceedings to the attention of the defendant.

iv) CPR 6.16 enables the court to dispense with service of a Claim Form, but it is difficult to envisage the circumstances in which it would be right to dispense with service in circumstances where there was no reason to believe that the defendant was aware of the proceedings. To do so would expose the defendant to a default judgment without having had the opportunity to be heard or otherwise to defend his/her interests.

*Proceedings against persons unknown*

v) A Claim Form may be issued against a named defendant even though, at the time, it is not known where, how or indeed whether s/he can be served. The legitimacy of issuing a Claim Form against an unnamed defendant can properly be tested by asking whether it is conceptually (not just practically) possible to serve it. The court generally acts *in personam*. An action is completely constituted when the Claim Form is *issued*, but it is not until the Claim Form is *served* that the defendant becomes subject to the court's jurisdiction: ***Barton -v- Wright Hassall LLP*** **[2018] 1 WLR 1119** [8]. Under the old RSC, and for the purposes of the Brussels Convention, an English court was "seised" of an action when the writ was served, not when it was issued: ***Dresser UK Ltd -v-***

***Falcongate Freight Management Ltd*** **[1992] QB 502, 523**. The same principles apply to an unserved claim form under the Civil Procedure Rules.

vi) Where it is possible to locate or communicate with the anonymous defendant, and to identify him as the person described in the Claim Form, then it is possible to serve the Claim Form, if necessary, by alternative service under CPR 6.15. In ***Brett Wilson***, for example, alternative service was effected by e-mail to a website which had published the defamatory material. In trespass cases, CPR 55.6 provides that service on the anonymous trespassers must be effected by attaching copies of the documents to the main door or placing them in some other prominent place on the land where the trespassers are to be found.

vii) Nevertheless, the general rule remains that proceedings may not be brought against unnamed parties. Apart from representative actions under CPR 19.6, the only express provision of the CPR that permits claims against an unnamed defendant is CPR 55.3(4), which allows a claim for possession of land to be brought against trespassers whose names are unknown. There are also certain specific statutory exceptions to broadly the same effect, e.g. proceedings for an injunction to restrain "*any actual or apprehended breach of planning controls*" under s.187B Town and Country Planning Act 1990.[3]

viii) The Court has permitted actions, and made orders, against unnamed wrongdoers where the identities of some of the alleged wrongdoers were known. They could be sued both personally and as representing their unidentified associates, e.g. copyright piracy claims: ***EMI Records Ltd -v- Kudhail*** **[1985] FSR 36**.

ix) A wider jurisdiction permitting claims against persons unknown was first recognised in ***Bloomsbury Publishing Group plc -v- News Group Newspapers Ltd*** **[2003] 1 WLR 1633**. Copies of the latest book in the Harry Potter series had been stolen from printers before publication and offered to the press by unnamed persons. An injunction was granted in proceedings against "*the person or persons who have offered the publishers of the Sun , the Daily Mail and the Daily Mirror newspapers a copy of the book Harry Potter and the Order of the Phoenix by J K Rowling or any part thereof and the person or persons who has or have physical possession of a copy of the said book or any part thereof without the consent of the claimants*". The Vice-Chancellor held that a person could be sued by a description, provided that the description was "*sufficiently certain as to identify both those who are included and those who are not*" [21].

x) There are therefore two distinct categories of case in which the defendant cannot be named: (a) anonymous defendants who are identifiable but whose names are

[3] **187B Injunctions restraining breaches of planning control**

(1) Where a local planning authority consider it necessary or expedient for any actual or apprehended breach of planning control to be restrained by injunction, they may apply to the court for an injunction, whether or not they have exercised or are proposing to exercise any of their other powers under this Part.

(2) On an application under subsection (1) the court may grant such an injunction as the court thinks appropriate for the purpose of restraining the breach.

(3) Rules of court may provide for such an injunction to be issued against a person whose identity is unknown.

(4) In this section "the court" means the High Court or the county court.

unknown, e.g. squatters who are identifiable by their location, although they cannot be named; and (b) defendants who are not only anonymous but cannot even be identified, e.g. most hit-and-run drivers. The distinction is that in the first category the defendant is described in a way that makes it possible in principle to locate or communicate with him and to know without further inquiry whether he is the same as the person described in the claim form, whereas in the second category it is not.

xi) In some cases, *quia timet* injunctions have been granted against "persons unknown", where the defendants could be identified only as those persons who might in future commit the relevant acts. However, the grant of interim relief before the proceedings have been served (or even issued) is the exercise of an emergency jurisdiction and is both provisional and strictly conditional.

xii) Nevertheless, this jurisdiction has regularly been invoked and, recently, there has been a significant increase in its use, principally in abuse of internet cases and trespasses (and other torts) committed by demonstrators and paparazzi.

xiii) In proceedings against "persons unknown" where the Court grants an injunction to restrain specified acts, a person can become both a defendant and a person to whom the injunction was addressed by doing one of those acts: ***South Cambridgeshire District Council -v- Gammell*** **[2006] 1 WLR 658** [32]. In the case of anonymous, but identifiable defendants, these procedures for service are now well established, and there is no reason to doubt their juridical basis.

xiv) Defining an unknown person by reference to something that he has done in the past does not identify anyone. It is impossible to know whether any particular person is the one referred to and there is no way of bringing the proceedings to his/her attention. The impossibility of service in such a case is due not just to the fact that the defendant cannot be found but also to the fact that it is not known who the defendant is. The problem is conceptual, and not just practical. It is not enough that the wrongdoer him/herself knows who s/he is.

60. The following provisions of the CPR seek to achieve these objectives:

i) Unless, in exceptional circumstances, the Court dispenses with service under CPR 6.16, a defendant does not become a party to the proceedings until s/he is served with the Claim Form.

ii) When Particulars of Claim are served, they must be accompanied by what is called the 'Response Pack', which includes the Acknowledgement of Service form that the defendant is required to complete and return with 14 days of service: CPR 7.8 and 10.2. In the Acknowledgement of Service, the defendant must indicate whether s/he admits the claim (in whole or in part) or whether s/he disputes the claim.

iii) Where the claimant serves the Claim Form, the claimant must file a certificate of service within 21 days of service of the Particulars of Claim, unless all defendants to the proceedings have filed acknowledgements of service within that time: CPR 6.17(2)(a).

iv) A defendant who has been served with a Claim Form and Particulars of Claim is liable to have judgment in default entered against him/her if s/he has not filed an Acknowledgement of Service or Defence within the required period: CPR 12.3(1).

v) To obtain default judgment, a claimant must file a certificate of service (see [60(iii)] above): CPR 6.17(2)(b).

vi) Without the Court's permission (or unless a Practice Direction otherwise permits), a claimant cannot apply for summary judgment against a defendant until s/he has filed an acknowledgement of service or defence: CPR 24.4(1).

61. The CPR imposes time limits – separate from any period of limitation – on the bringing of a claim.

i) CPR 7.5 requires a claimant to complete the necessary step to effect whichever method of service of the Claim Form is used "*before midnight on the calendar day four months after the date of issue of the Claim Form*".

ii) Under CPR 7.6, a claimant can apply to extend the period for service of the Claim Form under CPR 7.5. Such an application must generally be made within the permitted 4-month period: CPR 7.6(2). If made after the period has expired, the claimant must show that s/he has "*taken all reasonable steps to comply with rule 7.5 but has been unable to do so*" and that s/he "*has acted promptly in making the application*": CPR 7.6(3)(b) and (c).

## H. Interim injunctions

62. Interim injunctions to restrain the threatened commission of a civil wrong are still known by the Latin as *quia timet* injunctions.

63. In ***Islington London Borough Council -v- Elliott*** **[2012] EWCA Civ 56** [31], Patten LJ identified the governing principles, including:

i) When considering whether to grant a *quia timet* injunction, a two-stage test is applied:

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?

ii) When assessing, at the first-stage, whether the claimant has shown a "strong probability", the relevant factors include:

a) If the threatened wrong is entirely anticipated, it is relevant to ask what other steps the claimant could take to ensure that the infringement does not occur.

b) The attitude of the defendant or anticipated defendant in the case of an anticipated infringement is significant. One of the most important indications of the defendant's intentions is ordinarily found in his own statements and actions.

c) Of course, where acts that may lead to an infringement have *already* been committed, it may be that the defendant's intentions are less significant than the natural and probable consequences of his or her act.

d) The time-frame between the application for relief and the threatened infringement may be relevant and the application must not be premature.

iii) As to the second stage, it is necessary to ask: if no *quia timet* injunction is granted, how effective will an interim injunction (plus and award of damages subsequently) be as a remedy for that infringement? The following other factors are material:

a) The gravity of the anticipated harm. If the consequences of an infringement are potentially very serious and incapable of remedy later, the seriousness of these irremediable harms is a factor that must be borne in mind.

b) The distinction between mandatory and prohibitory injunctions.

## I. s.12 Human Rights Act 1998

64. When considering whether to grant an interim injunction, the Court will usually apply the well-established test from ***American Cyanamid -v- Ethicon Ltd (No.1)*** **[1975] AC 396**: (a) is there a serious issue to be tried? (b) would damages be an adequate remedy? (c) does the balance of convenience favour the grant of an injunction?

65. A more exacting test is required in certain types of case. Where the injunction sought may interfere with freedom of expression, the test is not that under ***American Cyanamid*** but that provided in s.12(3) Human Rights Act 1998. s.12 provides:

> **12 Freedom of expression.**
>
> (1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
>
> (2) If the person against whom the application for relief is made ("the respondent") is neither present nor represented, no such relief is to be granted unless the court is satisfied—
>
> (a) that the applicant has taken all practicable steps to notify the respondent; or

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

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

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

(a) the extent to which—

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

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

(b) any relevant privacy code.

(5) In this section—

"court" includes a tribunal; and

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

66. "*Likely*" in s.12(3) means "*more likely than not*": ***Cream Holdings Ltd -v- Banerjee* [2005] 1 AC 253**. Warby J summarised the position for the Court at the interim stage in ***YXB -v- TNO* [2015] EWHC 826 (QB)** [9]:

> "The test that has to be satisfied by the claimant on any application for an injunction to restrain the exercise of free speech before trial is that he is 'likely to establish that publication should not be allowed': [s.12(3)]. This normally means that success at trial must be shown to be more likely than not: ***Cream Holdings*** … In some cases it may be just to grant an injunction where the prospects of success fall short of this standard; for instance, if the damage that might be caused is particularly severe, the court will be justified in granting an injunction if the prospects of success are sufficiently favourable to justify an order in the particular circumstances of the case: see ***Cream*** at [19], [22]. But ordinarily a claimant must show that he will probably succeed at trial, and the court will have to form a provisional view of the merits on the evidence available to it at the time of the interim application."

67. "*Publication*" in s.12(3) is not restricted to commercial publication; it applies to any method of communication that would engage Article 10: ***Birmingham City Council -v- Afsar* [2019] EWHC 1560** [60]-[61] *per* Warby J.

> "In the law of defamation, '*publication does not mean commercial publication, but communication to a reader or hearer other than the claimant*': ***Lachaux -v- Independent Print Ltd* [2019] 3 WLR 18** [18] (Lord Sumption). This

> is generally true of the torts associated with the communication of information, sometimes known as 'publication torts', and the related law (see the discussion in ***Aitken -v- DPP*** **[2016] 1 WLR 297** [41]-[62]). Parliament must be taken to have legislated against this well-established background. Section 12(3) applies to any application for prior restraint of any form of communication that falls within Article 10 of the Convention... [T]here can be no doubt as to the materiality of s.12(3) in this case. It contains a statutory prohibition on the grant of a pre-trial injunction which interferes with freedom of expression, unless the Court is satisfied that the claimant is likely to obtain a final injunction…"

## J. Persons unknown: the need for precision in the terms of any injunction and that its terms only restrain wrongdoing

68. The Court of Appeal's decision in ***Ineos*** considered the application of two important principles when applications are made for interim injunctions against persons unknown: (1) the need for precision in the terms of any order; and (2) the need to ensure that the order restrains only unlawful conduct.

69. If a claimant cannot define the relief sought with a sufficient degree of precision (e.g. the extent of an area of land or the confidential information alleged to be protected), then the injunction is likely to be refused: ***Lawrence David Ltd -v- Ashton*** **[1989] 1 FSR 87, 95** *per* Balcombe LJ:

> "I have always understood it to be a cardinal rule that any injunction must be capable of being framed with sufficient precision so as to enable a person enjoined to know what it is he is to be prevented from doing. After all, he is at risk of being committed for contempt if he breaks an order of the court. The inability of the plaintiffs to define, with any degree of precision, what they sought to call confidential information or trade secrets militates against an injunction of this nature. That is indeed a long-recognised practice."

70. A civil wrong can be committed (or threatened) by one or more people whose identity is not known to the putative claimant. The Court will not lightly allow justice and the rule of law to be thwarted by the inability immediately to identify the wrongdoer. But it is axiomatic that the Court requires evidence (to the required standard) that the person, against whom an injunction is sought, has done (or is threatening to do) something unlawful, and that the terms of any injunction will restrain only conduct which is unlawful. If these requirements are not met, the injunction will usually be refused. Consistent with the principles identified in ***Elliott*** (see [63] above) the Court does not grant injunctions 'to be on the safe side'.

71. ***Ineos*** was a claim against demonstrators. The claimants were 10 companies who were involved in fracking in the UK. They obtained injunctions, without notice, against "persons unknown" who were (or were expected to become) protesters at various fracking sites. The injunctions were granted to prevent various acts, including trespass and criminal damage. At first instance, Morgan J had declined to order injunctions based on apprehended harassment under the Protection from Harassment Act 1997, "*largely because of the lack of clarity of that term for the purposes of being included in an injunction*": ***Ineos*** [102].

72. Two named defendants, who had been joined to the proceedings in order to challenge the injunctions, appealed to the Court of Appeal contending that, at first instance, the

Court had failed adequately (or at all) to apply s.12(3) Human Rights Act 1998 (the terms of which are set out in [65] above).

73. The various defendants (or categories of defendant) in ***Ineos*** were identified as follows:

i) The first defendant:

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

ii) The second defendant:

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

iii) The third defendant:

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

iv) The fourth defendant:

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

v) The fifth defendant:

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

vi) The sixth and seventh defendants were Mr Boyd and Mr Corré. Morgan J did not grant any relief against them. Nevertheless, they sought, and were granted, permission to appeal the orders made against "persons unknown" and made submissions on behalf of the "persons unknown" against whom an injunction had been granted.

74. The Court of Appeal allowed the appeal, discharged the injunctions against the third and fifth defendants and remitted the claims against the others for the High Court to consider if, and if so in what terms, any interim order should be made against the first and second defendants, respectively those alleged to be guilty of trespass and those interfering with access to the sites: [50].

75. Longmore LJ (with whom David Richards and Leggatt LJ agreed) was concerned as to the width or and clarity of the terms in which the injunctions had been granted. That

was particularly so because the orders interfered with the protestors' Convention rights of freedom of expression (Article 10) and peaceful assembly (Article 11). As to the importance of the latter, he quoted Professor Dicey's *Law of the Constitution* (10th edition, 1959) [36], which the Judge considered continued to represent the common law [37]:

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

76. In ***Ineos***, the focus was on torts other than harassment. The Court noted that an injunction to prohibit trespass "*can be framed in clear and precise terms*" [37]. Indeed, injunctions directed at "persons unknown" concerning the unlawful occupation of land are relatively straightforward. Once the applicant's right to exclude or remove people from the land is established, and the land clearly defined, the issue of whether the person is or would be committing a civil wrong is binary and usually easily resolved: is the "person unknown" on the land or not?

77. ***Ineos*** demonstrated the complexity of defining other instances of alleged wrongdoing sufficiently clearly in an injunction against persons unknown. The focus was on the difficulties of framing injunctions based on obstruction of the highway. However, Longmore LJ's identification and discussion of these issues is of general application to injunctions against persons unknown:

> [39] Those important points about the width and the clarity of the injunctions are critical when it comes to considering the injunctions relating to public rights of way and the supply chain in connection with conspiracy to cause damage by unlawful means. They are perhaps most clearly seen in relation to the supply chain. The judge has made an immensely detailed order (in no doubt a highly laudable attempt to ensure that the terms of the injunction correspond to the threatened tort) but has produced an order that is, in my view, both too wide and insufficiently clear. In short, he has attempted to do the impossible. He has, for example, restrained the fifth defendants from combining together to commit the act or offence of obstructing free passage along a public highway (or to access to or from a public highway) by … slow walking in front of the vehicles with the object of slowing them down and with the intention of causing inconvenience and delay or … otherwise unreasonably and/or without lawful authority or excuse obstructing the highway with the intention of causing inconvenience and delay, all with the intention of damaging the claimants.
>
> [40] As Ms Williams pointed out in her submissions, … there are several problems with a *quia timet* order in this form. First, it is of the essence of the

> tort that it must cause damage. While that cannot of itself be an objection to the grant of *quia timet* relief, the requirement that it cause damage can only be incorporated into the order by reference to the defendants' intention which, as Sir Andrew Morritt said in [***Hampshire Waste Services Ltd -v- Intending Trespassers upon Chineham Incinerator Site*** **[2004] Env LR 9** [9]], depends on the subjective intention of the individual which is not necessarily known to the outside world (and in particular to the claimants) and is susceptible of change and, for that reason, should not be incorporated into the order. Secondly, the concept of slow walking in front of vehicles or, more generally, obstructing the highway may not result in any damage to the claimants at all. Thirdly, slow walking is not itself defined and is too wide: how slow is slow? Any speed slower than a normal walking speed of two miles per hour? One does not know. Fourthly, the concept of 'unreasonably' obstructing the highway is not susceptible of advance definition. It is, of course, the law that for an obstruction of the highway to be unlawful it must be an unreasonable obstruction (see ***DPP -v- Jones*** **[1999] 2 AC 240**), but that is a question of fact and degree that can only be assessed in an actual situation and not in advance. A person faced with such an injunction may well be chilled into not obstructing the highway at all. Fifthly, it is wrong to build the concept of 'without lawful authority or excuse' into an injunction since an ordinary person exercising legitimate rights of protest is most unlikely to have any clear idea of what would constitute lawful authority or excuse. If he is not clear about what he can and cannot do, that may well have a chilling effect also.
>
> [41] Many of the same objections apply to the injunction granted in relation to the exclusion zones shaded purple on the plans annexed to the order… The defendants are restrained from (a) blocking the highway when done with a view to slowing down or stopping traffic; (b) slow walking; and (c) unreasonably; and/or without lawful authority or excuse preventing the claimants from access to or egress from any of the sites. These orders are likewise too wide and too uncertain in ambit to be properly the subject of *quia timet* relief.
>
> [42] Mr Alan Maclean QC for the claimants submitted that the court should grant advance relief of this kind in appropriate cases in order to save time and much energy later devoted to legal proceedings after the events have happened. But it is only when events have happened which can in retrospect be seen to have been illegal that, in my view, wide-ranging injunctions of the kind granted against the third and fifth defendants should be granted. The citizen's right of protest is not to be diminished by advance fear of committal except in the clearest of cases, of which trespass is perhaps the best example."

78. The injunction in the present case, targeting as it does alleged "harassment" by the protestors, is *a fortiori*. Harassment injunctions against protestors raise much more complicated issues. The subject matter of the action is not a property right. The issue is not binary. Whether someone is guilty of harassment and, if so, whether s/he has a defence under s.1(3) PfHA is a complicated and inherently fact specific decision (see the discussion in [51]-[54] above). It for these reasons that Morgan J refused to grant relief against alleged harassment in ***Ineos*** (see [71] above). The same problem presented itself in relation to obstruction of the highway: see underlined passage in

***Ineos*** [40] above. A *quia timet* interim injunction which prohibits the respondent from "*carrying out a course of conduct amounting to harassment*" falls foul of the objection identified by Longmore LJ in [39]-[40]. There can be (and often is) reasonable disagreement between lawyers as to what amounts to harassment (see [51] above). The terms of an injunction should not leave it to a layperson to make that difficult assessment him/herself, on pain of imprisonment if s/he gets it wrong. The position is not saved if the prohibition continues "*... including in particular the following acts*" which are then specified. The order must specify the particular acts, clearly and unambiguously, which the court is prohibiting.

79. As to the lawfulness of granting injunctions against "persons unknown", Longmore LJ reviewed ***Cameron*** and concluded that Lord Sumption had given express approval to ***Bloomsbury Publishing***: [26]-[29]. He held that, "*there is no conceptual or legal prohibition on suing persons unknown who are not currently in existence but will come into existence when they commit the prohibited tort*": [30]. However, Longmore LJ emphasised that courts should be "*inherently cautious about granting injunctions against unknown persons since the reach of such an injunction is necessarily difficult to assess in advance*": [31].

80. The Court of Appeal considered that there was "*considerable force*" in the submission that an injunction against the fifth defendants (alleged to be those conspiring to cause damage to the claimants by unlawful means) should not have been granted because its terms were neither framed to catch only those who were committing the tort, nor clear or precise in their scope: [33].

81. Longmore LJ suggested that, on an application for an injunction against persons unknown, the applicant was required to demonstrate that [34]:

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

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

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

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

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

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

82. The importance of requirement (iv) has been recognised in earlier cases.

    i) In ***Stone & Another -v- WXY (person or persons unknown responsible for pursuing and/or taking photographs of the Claimants outside their home and in other places during March to May 2010)*** **[2012] EWHC 3184 (QB)** [16], Eady J considered the terms of an injunction in a case that concerned alleged

harassment of the claimants by paparazzi photographers. The proposed wording of the order sought to prohibit photographs of the claimants being taken "*in other places*". As that would have included conduct that would not (or not clearly) be a tort, and the Claimants had disavowed a claim in respect of photographs of them taken in public elsewhere, these words could not be included.

ii) In ***R-v- Smith*** **[2013] 1 WLR 1399**, a case that did not engage Articles 10 or 11, the Court made a restraining order, pursuant to s.5A PfHA (set out in [49] above), against a defendant in criminal proceedings following his acquittal of an offence under s.1 PfHA. Toulson LJ noted [30]

> "… the power to make an order under section 5A is circumscribed by the important words "necessary … to protect a person from harassment by the defendant". The word "necessary" is not to be diluted. To make an order prohibiting a person who has not committed any criminal offence from doing an act which is otherwise lawful, on pain of imprisonment, is an interference with that person's freedom of action which could be justified only when it is truly necessary for the protection of some other person."

83. At the hearing, and before the Court of Appeal's decision in ***Ineos*** was available, Mr Buckpitt relied upon ***Burris -v- Azadani*** **[1995] 1 WLR 1372** as demonstrating that injunctions could be granted that included restraint of conduct that was not unlawful. In that case, the defendant had persistently threatened and harassed the claimant, by making uninvited nocturnal visits to her home. The claimant obtained an interim injunction from the County Court restraining the defendant from, inter alia, assaulting, harassing or threatening her or communicating with her. The terms of the order prohibited him from entering or remaining within 250 yards of her home. The defendant did not seek to challenge or vary the terms of the order but repeatedly acted in breach of it. In committal proceedings brought by the claimant, a suspended custodial sentence was imposed on him. On two subsequent occasions he cycled along the road past the claimant's home in breach of the order. In fresh committal proceedings, the judge rejected the defendant's contention that the County Court had no jurisdiction to impose the term excluding him from the vicinity of the plaintiff's home. The defendant appealed, contending it was wrong in principle for an injunction to restrain activity which was not unlawful.

84. Sir Thomas Bingham MR said, at p 1377:

> "If an injunction may only properly be granted to restrain conduct which is in itself tortious or otherwise unlawful, that would be a conclusive objection to [the part of the injunction that prohibited the defendant from coming or remaining within 250 yards of the plaintiff's home address], since it is plain that Mr Azadani would commit no tort nor otherwise act unlawfully if, without more, he were to traverse Mandrake Road without any contact or communication with Miss Burris, exercising his right to use the public highway peacefully in the same way as any other member of the public. I do not, however, think that the court's power is so limited. A Mareva injunction granted in the familiar form restrains a defendant from acting in a way which is not, in itself, tortious or otherwise unlawful. The order is made to try and ensure that the procedures of the court are in practice effective to achieve their ends. The court recognises a need to protect the legitimate interests of those who have invoked its jurisdiction… It would not seem to me to

> be a valid objection to the making of an 'exclusion zone' order that the conduct to be restrained is not in itself tortious or otherwise unlawful if such an order is reasonably regarded as necessary for protection of a plaintiff's legitimate interest".

Further, at p 1380:

> "Neither statute nor authority in my view precludes the making of an 'exclusion zone' order. But that does not mean that such orders should be made at all readily, or without very good reason. There are two interests to be reconciled. One is that of the defendant. His liberty must be respected up to the point at which his conduct infringes, or threatens to infringe, the rights of the plaintiff. No restraint should be placed on him which is not judged to be necessary to protect the rights of the plaintiff. But the plaintiff has an interest which the court must be astute to protect. The rule of law requires that those whose rights are infringed should seek the aid of the court, and respect for the legal process can only suffer if those who need protection fail to get it. That, in part at least, is why disobedience to orders of the court has always earned severe punishment. Respect for the freedom of the aggressor should never lead the court to deny necessary protection to the victim."

85. Similarly, Schiemann LJ said, at p 1381:

> "I agree with the judgment delivered by Sir Thomas Bingham MR. As he points out, there are in these cases two interests to be reconciled - that of the plaintiff not to be harassed and that of the defendant to be allowed to move freely along the highway. An exclusion zone order interferes with the latter in order to secure the former. On its face it forbids what are lawful actions. The defendant has rendered himself liable to such an order because of his previous harassing behaviour. None the less a judge imposing such an order must be careful not to interfere with the defendant's rights more than is necessary in order to protect the plaintiff's."

86. ***Burris*** was not cited to the Court of Appeal in ***Ineos***. I would distinguish ***Burris*** on the grounds: (1) that the defendant had already been found to have committed acts of harassment against the plaintiff; and (2) that an order imposing an exclusion zone around the claimant's home did not engage the defendant's rights of freedom of expression or freedom of assembly. It was also a case of an order being made against an identified defendant, not "persons unknown", to protect the interests of an identified 'victim', not a generic class. The case is therefore very different from ***Ineos*** and the present case.

87. More generally, the Court must "*keep a watchful eye on claims brought against persons unknown, to guard against any abuse of the facility to bring claims in this way*": ***GYH -v- Persons Unknown* [2017] EWHC 3360 (QB)** [10] *per* Warby J. In ***Brett Wilson LLP*** Warby J also emphasised that in cases against "persons unknown", "*the relevant procedural safeguards must of course be applied*" [11]. Specifically, the Judge noted the difficulties that can arise in ensuring that the unknown defendants have been duly served with the proceedings, and with any application for interim or final relief.

88. Some of those difficulties presented themselves in ***Kerner -v- WX*** **[2015] EWHC 178 (QB)**, a harassment case in which the claimant lacked an immediate method of serving the "person(s) unknown". Warby J required the claimant to provide an undertaking that she would apply to the court, within 3 months, for further directions if she had been unable to identify the defendant.

[6] The purpose of requiring this undertaking is to ensure that the interim order I make today does not by default become in effect a permanent one, because the defendants cannot be traced. There are ways of bringing to a conclusion an action against persons unknown who cannot be traced. The general issue is addressed in paragraph 41 of the Master of the Rolls' ***Practice Guidance*** **[2012] 1 WLR 1003** as part of a section headed "Active Case Management":

> "Where an interim non-disclosure order, whether or not it contains derogations from open justice, is made, and return dates are adjourned for valid reasons on one or more occasions, or it is apparent, for whatever reason, that a trial is unlikely to take place between the parties to proceedings, the court should either dismiss the substantive action, proceed to summary judgment, enter judgment by consent, substitute or add an alternative defendant, or direct that the claim and trial proceed in the absence of a third party (***XJA -v- News Group Newspapers*** **[2010] EWHC 3174 (QB)** at [13]; ***Gray -v- UVW*** **[2010] EWHC 2367 (QB)** at [37]; ***Terry -v- Persons Unknown*** **[2010] EMLR 400** at [134]-[136])."

[7] This guidance relates to actions involving interim non-disclosure orders which affect the Convention right to freedom of expression. Active case management in accordance with this guidance is of particular importance in cases of that kind. The injunctions in this case do not include non-disclosure provisions. However, they do relate to the activities of individuals who are involved with the news media and some at least of the principles that apply in non-disclosure cases are applicable on that account. It is in any event inconsistent with modern litigation principles for the court to allow an interim order to remain in place with the case otherwise "going to sleep".

89. In my judgment, these principles apply with equal force to this case.

## K. Demonstrations: the Human Rights context

90. The "right to protest" is one of the deeply embedded rights of the common law. Under the Convention, the right to protest is protected by the rights of freedom of expression and freedom of assembly. These are rights possessed by each citizen, whether exercised alone or with others. Labels may be applied, such as "fracking protestors", but care must be taken not to assume that all in the identified group share the same objectives or use the same methods of protesting.

91. Article 10 provides:

> (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or

> morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

92. Article 11 provides:

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

93. Articles 10 and 11 are 'qualified rights'; restrictions can be placed on the exercise of those rights to protect other identified interests.

94. To a greater or lesser extent, and depending upon the particular facts in each case, the countervailing "rights of others" likely to arise in protest cases are usually Article 8 (privacy) and Article 1 of the First Protocol ("A1P1") (protection of property/possessions). The criminal law, its enforcement by the police and powers granted to local authorities also have an important role to play in controlling demonstrations, particularly those that raise public order issues (see [100]-[104] below).

95. Article 8 provides:

> (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, 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.

96. A1P1 provides:

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

97. In ***DPP -v- Ziegler*** **[2019] 2 WLR 1451**, the Divisional Court (Singh LJ and Farbey J) described the engaged Convention rights as follows:

> [48] The right to freedom of expression in article 10 of the ECHR is one of the essential foundations of a democratic society. This has long been recognised by the European Court of Human Rights. It has been recognised by the courts of this country, both before and since the introduction of the HRA. It has also been recognised by the highest courts of other democratic societies, for example in the United States, where freedom of speech and freedom of assembly are protected by the First Amendment to the US Constitution.
>
> [49] The jurisprudence, which is too well known to require citation here, discloses the following essential bases for the importance of the right to freedom of expression:
>
> (1) It is important for the autonomy of the individual and his or her self-fulfilment. It is clear that the right extends far beyond what might ordinarily be described as 'political' speech and includes, for example, literature, films, works of art and the development of scientific ideas. It is also clear that the right protects not only expression which is acceptable to others in society (perhaps the majority) but also that which may disturb, offend or shock others.
>
> (2) It is conducive to the discovery of truth in the 'marketplace of ideas'. History teaches that what may begin as a heresy (for example the idea that the earth revolves around the sun) may end up as accepted fact and indeed the orthodoxy.
>
> (3) It is essential to the proper functioning of a democratic society. A self-governing people must have access to different ideas and opinions so that they can effectively participate in a democracy on an informed basis.
>
> (4) It helps to maintain social peace by permitting people a 'safety valve' to let off steam. In this way it is hoped that peaceful and orderly change will take place in a democratic society, thus eliminating, or at least reducing, the risk of violence and disorder.
>
> [50] It is also clear from the jurisprudence of the European Court of Human Rights (like that of other democratic societies such as the United States) that the right to freedom of expression goes beyond what might traditionally be regarded as forms of 'speech'. It is thus not confined, for example, to writing or speaking as such. It can include other types of activity, even protests which take the form of 'impeding the activities of which they disapprove': see ***Hashman -v- United Kingdom*** **(1999) 30 EHRR 241** [28]. In that passage the court cited its earlier judgment in ***Steel -v- United Kingdom*** **(1998) 28 EHRR 603** [92], where the court said:
>
> > 'the first and second applicants were arrested while protesting against a grouse shoot and the extension of a motorway respectively. It is true that these protests took the form of physically impeding the activities of which the applicants disapproved, but the court considers none the less that they constituted expressions of opinion within the meaning

> of article 10. The measures taken against the applicants were, therefore, interferences with their right to freedom of expression.'

98. In a democratic society, those who demonstrate seek to effect change in several ways. For example, to campaign for changes to the law, to persuade other citizens to support their cause or to persuade others to cease activities or modify their behaviour. History provides many examples of individuals whose powerful advocacy achieved significant change, but almost without exception, those individuals could not have succeeded alone. They depended upon inspiring the support of others, often in large numbers. In demonstrations and protests, as in democracy more widely, numbers matter. As an exercise of democratic autonomy and self-fulfilment, each individual must be permitted to add his/her voice in support of a cause, for example by signing a petition to Parliament or by joining a demonstration. It is not for a public authority to determine what number of demonstrators is "enough" or "sufficient". To impose such a limit would effectively curtail the democratic rights of those who wished to demonstrate but who fell outside the permitted number. Further, if the number of demonstrators were to be restricted, who would set the limit, on what basis, and how are those "permitted" to demonstrate to be chosen?

99. As to the assessment of competing human rights, I would summarise the principles as follows:

i) Freedom of expression (*a fortiori* when part of lawful protest) is one of the core rights protected by the Convention. It "*constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment*": ***R (Lord Carlile) -v- Secretary of State for the Home Department*** **[2015] AC 945** [13], quoting ***Sürek and Özdemir -v- Turkey*** **(1999) 7 BHRC 339**.

ii) The qualifications in Article 10(2) must therefore be "*construed strictly and the need of any restrictions must be established convincingly*": *ibid*.

iii) Any interference with the Article 10/11 rights must:

a) be prescribed by law;

b) be necessary in a democratic society (necessity being "*convincingly established*"); and

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

iv) "Necessary" means that the interference complained of corresponded to a "*pressing social need*"; it is not synonymous with "*indispensable*" but neither has it the flexibility of such expressions as "*admissible*", "*ordinary*", "*useful*", "*reasonable*" or "*desirable*": ***Handyside -v- United Kingdom*** **(1976) 1 EHRR 737** [48]; ***R -v- Shayler*** **[2003] 1 AC 247** [23]. Something that is merely "*expedient*" cannot be described as "*necessary*".

v) When Convention rights come into conflict, the approach to be adopted is as set out in ***In re S*** [17]:

a) neither Article has as such precedence over the other;

b) an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary;

c) the justifications for interfering with or restricting each right must be taken into account; and

d) the proportionality test must be applied to each.

vi) When the Court considers whether an interference with a fundamental right is proportionate, it adopts a three-stage analysis:

a) First, whether the objective which is sought to be achieved — the pressing social need — is sufficiently important to justify limiting the fundamental right.

b) Second, whether the means chosen to limit that right are rational, fair and not arbitrary.

c) Third, whether the means used impair the right as minimally as is reasonably possible; in other words, could a lesser measure be used to achieve the legitimate aim.

***R -v- Shayler*** [60]-[61]

vii) Article 10 protects not only 'information' or 'ideas' that are favourably received, or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb: ***Sunday Times -v- United Kingdom (No.2)*** **(1991) 14 EHRR 229** [50]; ***Kudrevičius -v- Lithuania*** **(2016) 62 EHRR 34** [145]. In the memorable words of Sedley LJ (***Redmond-Bate -v- DPP*** **[2000] HRLR 249** [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."

Applied to Article 11 rights, a freedom to demonstrate inoffensively, in an 'approved' manner, or upon terms suggested by the subject of the demonstration (e.g. no more than 15 people, protesting once a week for up to 2 hours), might not be thought to have much value either. In ***Lashmankin -v- Russia*** **(2019) 68 EHRR 1** [405] the ECtHR held that the right to freedom of assembly includes the right to choose the time, place and manner of conduct of the assembly, within the limits established in Article 11(2), and observed [412] (relying upon ***Kudrevičius*** [145]):

> "Freedom of assembly as enshrined in Article 11 of the Convention protects a demonstration that may annoy or cause offence to persons opposed to the ideas or claims that it is seeking to promote … Any measures interfering with freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles - however shocking and

> unacceptable certain views or words used may appear to the authorities - do a disservice to democracy and often even endanger it …"

viii) Article 11 protects the right to "peaceful assembly". It applies to all gatherings except those where the organisers and participants have an intention to incite violence or otherwise reject the foundations of a democratic society. An individual protestor does not lose the right to freedom of peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration if the individual in question remains peaceful in his or her own intentions or behaviour: ***Kudrevičius*** [92]-[94].

ix) An obstruction of the highway in the course of a demonstration does not fall outside the scope of the Convention, but the fact and extent of any obstruction caused may well be a relevant factor at the stage of assessing whether any interference with the Article 10/11 rights is necessary and proportionate: ***Kudrevičius*** [98]; and ***Ziegler*** [52]-[53]:

> "One reason for this is that the essence of the rights in question is the opportunity to persuade others. In a democratic society it is important that there should be a free flow of ideas so that people can make their own minds up about which they accept and which they do not find persuasive. However, persuasion is very different from compulsion. Where people are physically prevented from doing what they could otherwise lawfully do, such as driving along a highway to reach their destination, that is not an exercise in persuasion but is an act of compulsion. This may not prevent what is being done falling within the concept of expression but it may be highly relevant when assessing proportionality under paragraph 2 of articles 10 and 11".

## L. Demonstrations: public order and the role of the police and local authorities

100. The evidence in the current case shows that there have been few arrests by the police of demonstrators prior to the grant of the injunction. I was told at the hearing that the Claimants know of no prosecutions of any protestors. Evidence before Teare J suggested that the cost of policing the demonstrations was around £108,000. Of course, individuals and companies are entitled to pursue such private law remedies as are available to them and to seek interim injunctions where appropriate, but this case (and ***Ineos*** and ***Astellas*** – see [119] below) perhaps demonstrate the difficulties and limits of trying to fashion civil injunctions into quasi-public order restrictions.

101. When considering whether it is *necessary* to impose civil injunctions (even if they can be precisely defined and properly limited to prohibit only unlawful conduct) the Court must be entitled to look at the overall picture and the extent to which the law provides other remedies that may be equally if not more effective.

102. The police play an essential and important role in striking the appropriate balance between facilitating lawful demonstration and preventing activities that are unlawful. Consistent with the proper respect for the Article 10/11 rights (see [99(viii)] above), it is only those engaged upon or intent on violence (or other criminal activity) who are liable to arrest and removal, leaving others to demonstrate peacefully. The police have

available an extensive array of resources and powers to keep protests within lawful bounds, including:

i) their presence; often itself a deterrent to unlawful activities;

ii) the power of arrest, in particular for breach of the peace, harassment, public order offences (under Public Order Act 1986), obstruction of the highway (see [107] below), criminal damage, aggravated trespass (contrary to s.68 Criminal Justice and Public Order Act 1994) and assault;

iii) the use of dispersal powers under Part 3 of the Anti-social Behaviour Crime and Policing Act 2014;

iv) the imposition of conditions on public assembly under s.14 Public Order Act 1986; and/or

v) an application for a prohibition of trespassory assembly under s.14A Public Order Act 1986.

103. Selected and proportionate use of these powers, adjudged to be necessary and targeted at particular individuals, by police officers making decisions based on an assessment 'on-the-ground', is immeasurably more likely to strike the proper balance between the demonstrators' rights of freedom of expression/assembly and the legitimate rights of others, than a Court attempting to frame a civil injunction prospectively against unknown "protestors".

104. Parliament has also provided local authorities powers to make public space protection orders which can restrict the right to demonstrate. Chapter 2 of the Anti-Social Behaviour, Crime and Policing Act 2014 empowers local authorities to make such orders if the conditions in s.59 are met: see ***Dulgheriu -v- London Borough of Ealing*** **[2019] EWCA Civ 1490**.

## M. The other causes of action relied upon by the Claimants

105. Although I consider that the focus of this case has been harassment (not least for the reasons identified in [21(i)] above), I should briefly identify and consider the other causes of action relied upon by the Claimants.

### *(1) Trespass*

106. An injunction based on the claim of trespass would be straightforward. The First Claimant is entitled to exclude anyone from its property, including protestors. Whether, in any individual case, an interim injunction is justified requires an application of the principles identified in ***Elliott*** (see [63] above).

### *(2) Obstruction of the highway*

107. s.137(1) Highways Act 1980 provides:

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

108. Obstruction of the highway gives the First Claimant only an indirect cause of action on the basis that the alleged obstruction amounts to a nuisance. There is an obvious tension between those exercising a right to demonstrate and obstruction of the highway. Almost by definition, those using the highway to demonstrate are likely to cause some obstruction of it, and in this respect, Mr Buckpitt relied on authorities that would support that conclusion: e.g. ***Hirst and Agu -v- Chief Constable of West Yorkshire* (1987) Cr. App R 143**.

109. It is now clear that this tension is to be resolved by interpreting "lawful excuse" in s.137(1) compatibly with Articles 10 and 11 of the Convention. The Divisional Court explained how this was to be achieved in ***Ziegler***:

> [62] … [I]n circumstances where there would be a breach of articles 10 or 11, such that an interference would be unlawful under section 6(1) of the HRA, a person will by definition have 'lawful excuse'. Conversely, if on the facts there is or would be no violation of the Convention rights, the person will not have the relevant lawful excuse and will be guilty (subject to any other possible defences) of the offence in section 137(1).
>
> [63] That then calls for the usual inquiry which needs to be conducted under the HRA. It requires consideration of the following questions:
>
> (1) Is what the defendant did in exercise of one of the rights in articles 10 or 11?
>
> (2) If so, is there an interference by a public authority with that right?
>
> (3) If there is an interference, is it 'prescribed by law'?
>
> (4) If so, is the interference in pursuit of a legitimate aim as set out in paragraph 2 of article 10 or article 11, for example the protection of the rights of others?
>
> (5) If so, is the interference 'necessary in a democratic society' to achieve that legitimate aim?
>
> [64] That last question will in turn require consideration of the well-known set of sub-questions which arise in order to assess whether an interference is proportionate:
>
> (1) Is the aim sufficiently important to justify interference with a fundamental right?
>
> (2) Is there a rational connection between the means chosen and the aim in view?
>
> (3) Are there less restrictive alternative means available to achieve that aim?
>
> (4) Is there a fair balance between the rights of the individual and the general interest of the community, including the rights of others?

> [65] In practice, in cases of this kind, we anticipate that it will be the last of those questions which will be of crucial importance: a fair balance must be struck between the different rights and interests at stake. This is inherently a fact-specific inquiry. (emphasis added)

110. Mr Buckpitt argued that standing and handing out leaflets on the pavement is an obstruction *per se*. This is so whether a person does so alone or with others. He submits, the greater the numbers the greater the obstruction. He submitted that, before the injunction was granted on 29 November 2017, there had been instances where the highway was obstructed. He drew a distinction between obstructions that had been caused by the protesters' lawful exercise of their Convention rights and those caused by unlawful activities.

111. For present purposes, I do not need to resolve this issue. I simply note that the problem confronting the Claimants is that, as the Court stated in ***Ziegler***, the issue is inherently fact-specific to be determined, protestor by protestor, incident by incident. It requires an assessment of what any individual protestor did, where, for how long, for what purpose, and to what effect? I regard it as practically impossible, carrying out the required analysis (summarised in ***Ziegler*** [63]-[64]), to frame restrictions prospectively, by way of civil injunction, against persons unknown, which discriminate between lawful exercise of Article 10/11 rights and unlawful obstruction of the highway.

112. Insofar as the claim for public nuisance is based upon obstruction of the highway, it is dependent upon the same factual analysis and my conclusion is the same.

*(3) Watching and besetting*

113. This was the first time that I had come across this 'tort'. Given that one of the drivers for the PfHA was the problem of stalking, I was sceptical as to (a) the parameters of this cause of action; and (b) whether it had survived the enactment of the PfHA. Mr Buckpitt submitted that the cause of action does remain, albeit the act of merely being present outside of premises is likely no longer actionable in itself. He relied upon ***J Lyons & Sons -v- Wilkins*** **(1899) 1 Ch 255, 256**, where Lindley MR stated:

> "The truth is that to watch or beset a man's house with a view to compel him to do or not to do what is lawful for him not to do or to do is wrongful and without lawful authority unless some reasonable justification for it is consistent with the evidence. Such conduct seriously interferes with the ordinary comfort of human existence and ordinary enjoyment of the house beset, and such conduct would support an action on the case for a nuisance at common law ... Proof that the nuisance was 'peace-ably to persuade other people' would afford no defence to such an action. Persons may be peaceably persuaded provided the method employed to persuade is not a nuisance to other people."

114. I do not need to consider whether this 'tort' still exists and if so in what form. If it does, I am satisfied that it would fall to be construed in a Convention-compliant manner in the same way as the Divisional Court approached obstruction of the highway in ***Ziegler***. Fundamentally, the Claimants face the same problem. As Mr Buckpitt accepts, not all 'watching and besetting' is unlawful. Whether it is will depend upon an assessment of the particular facts. In reality, I am doubtful that this adds anything to the other causes of action relied upon by the Claimants.

*(4) Private nuisance*

115. This presents the same problems for the Claimants; whether any individual has committed a private nuisance is again fact-sensitive. As the evidence demonstrates, only a handful of people have been using a loud-hailer and causing allegedly excessive noise. The claim that entry to/exit from the Store has been restricted raises factual issues similar to the question of obstruction of the highway.

*(5) Conspiracy to injure by unlawful means*

116. There appear to me to be formidable hurdles in the way of a claim of 'conspiracy' when none of the alleged conspirators has been identified. How can the Court even begin to assess whether two or more individuals have combined in furtherance of some object without, at least, being able to identify them sufficiently (even if they cannot be named) to know what each individual is alleged to have done? Even then, the Claimants would still have to show that commission of the relevant act by each individual was unlawful. As the above analysis demonstrates, harassment and obstruction of the highway are inherently fact-sensitive. Whilst criminal damage is a more realistic candidate for "unlawful means", the evidence discloses very few instances of alleged criminal damage and then only by a very small number of individuals. Mr Buckpitt has not advanced alleged offences of criminal damage (or breaches of s.241(1) Trade Union and Labour Relations (Consolidation) Act 1992) as a realistic basis for an injunction against "persons unknown".

## N. Representative parties

117. In this case, as I have already noted, two of the named parties are acting also in a representative capacity: the Second Claimant has been permitted to represent various "*protected persons*" (see [18]); and the Second Defendant represents its "*employees and members*" (see [36]). Permission to act in these representative capacities was granted by the Court under CPR 19.6, which provides (so far as material):

> "(1) Where more than one person has the same interest in a claim –
>
> (a) the claim may be begun; or
>
> (b) the court may order that the claim be continued,
>
> by or against one or more persons who have the same interest as representatives of any other persons who have that interest.
>
> (2) The court may direct that a person may not act as a representative.
>
> (3) Any party may apply to the court for an order under paragraph (2).
>
> (4) Unless the court otherwise directs any judgment or order given in a claim in which a party is acting as a representative under this rule –
>
> (a) is binding on all persons represented in the claim; but
>
> (b) may only be enforced by or against the person who is not a party to the claim with the permission of the court…

118. It is important to note that the "persons unknown", as the First Defendants, are *not* sued in a representative capacity. They are sued as a class of persons defined in the title to the action. Every member of the class, subject to issues of service, is notionally a personal defendant and faces a claim that s/he is guilty of one or more of the torts identified in [12] above. S/he is unknown, presently, but *ex hypothesi*, subsequently his/her name could be added to the list of defendants as the protestors are identified.

119. The choice whether to sue defendants as "persons unknown" or to sue one or more defendants in a representative capacity for the members of the class has certain consequences. In ***Astellas Pharma Ltd and others -v- Stop Huntingdon Animal Cruelty and the Animal Liberation Front*** **[2011] EWCA Civ 752**, the Court of Appeal considered the enforcement of a harassment injunction in a claim brought against the defendant in a representative capacity. The Deputy Judge had refused to grant the claimant permission (under CPR 19.6(4)(b)) to enforce an injunction against the individuals who defendant represented. The Claimant appealed.

120. In echoes of this case, the claimants had sought summary judgment and a final injunction restraining various persons, identified in the draft order it had submitted as "protestors", from pursuing a course of conduct amounting to the harassment of various people described as "protected persons". As the claim against the defendant was proceeding as a representative action, the claimants also sought an order directing that the injunction be enforceable against all protestors as defined in the order.

121. The Judge made an order in the very wide terms sought by the claimants restraining the "protestors" from harassing the "protected persons", from demonstrating within 100 yards of their homes or any premises occupied by them and from conducting protests in certain specified areas. But he refused permission to enforce the order against all protestors because he considered that it would be unjust to make an order against unidentified persons without giving them an opportunity to be heard and without giving some consideration to their individual circumstances.

122. As was made clear by the claimants before the Judge, their principal aim was to ensure that the police, whose responsibility it is in the interests of public order to supervise and control demonstrations of the kind contemplated by the injunction, were able to enforce it by exercising the power of arrest in respect of an offence under s.3(6) PfHA (see [49] above).

123. Dismissing the claimants' appeal, Moore-Bick LJ gave the main judgment for the Court of Appeal (with whom Rimer and Ward LJJ agreed) and held, as follows (emphasis added):

> [14] The term 'Protestors' as used in these orders is very broadly defined. It includes not only the defendants themselves and those acting in concert with them who have notice of the terms of the orders, but also
>
> > 'any other person who is protesting against
> >
> > – the conduct of experimentation on live animals by Huntingdon Life Sciences or the Astellas Group; [or]

> – the business relationship between the Astellas Group and any animal research organisation … ‘
>
> whether he or she has notice of the order or not.

[15] The width of the order seems to have been the main factor that led the judge to refuse the appellants' application to include the additional paragraph mentioned above or to give permission to enforce them against Protestors in general. In response to a submission from Mr. Lawson-Cruttenden that any person bound by the decision was to be regarded as a ‘defendant’ for the purposes of s.3(6) of the Act the judge pointed out that rule 19.6 makes a clear distinction between an order's being binding on a person who is not a party to the proceedings and its being enforceable against him….

[16] Mr. Lawson-Cruttenden submitted that on the correct interpretation of ss.3A and 3(6) of the Act the expression ‘the defendant’ in s.3(6) includes any ‘relevant person’ mentioned in s.3A(2) and that since all Protestors are ‘relevant persons’, they are necessarily also defendants for the purposes of that section. In my view, however, that is not right. s.3A(1) simply gives a victim of an actual or apprehended course of conduct falling within s.1(1A) , or a third party at whom such conduct is ultimately directed, the right to apply to the court for an injunction to restrain the person in question (‘the relevant person’) from engaging in or continuing to engage in that course of conduct. The statute naturally envisages that that person will be identifiable and will therefore be a defendant to the claim for an injunction. s.3(6) applies in such a case in the same way as in the case of simple harassment contrary to s.1(1). In my view the reference to ‘the relevant person’ in s.3A(1) has nothing to do with the correct interpretation of the word ‘defendant’ in s.3(6).

[17] … Having recognised the concern of the claimant to clarify scope of s.3(6), [the Judge] declined to meet it by giving permission under rule 19.6 to enforce the injunction against unnamed persons without their individual circumstances having been considered by the court…

[18] … Mr. Lawson-Cruttenden submitted that the judge should have included the additional paragraph in the order, or should at least have given them permission to enforce the order against the Protestors in general, in order to dispel any doubt about the right of the police to exercise their powers of arrest in relation to an offence under s.3(6) . That, of course, turned in part on the meaning of ‘the defendant’ as used in that subsection, but the meaning of s.3(6) was not in issue before the judge. The only question he had to decide was whether in the exercise of his discretion he should include the additional paragraph in the order or otherwise give the appellants permission to enforce it against all Protestors. …

[19] Whether the word ‘defendant’ in s.3(6) of the Act includes a person who is bound by an order made in representative proceedings, despite the court's refusal to give permission for it to be enforced against him, is one that may arise for decision in other proceedings, probably of a criminal nature. There is clearly quite a strong argument for saying not only that the word ‘defendant’ has a clearly established meaning of its own but also that

because s.3(6) is penal in nature it ought to be construed narrowly. If that is right, it would be necessary for the court to order that an individual protestor be joined as a defendant to the action in order to bring him within the reach of that subsection. However, as Teare J. pointed out in ***SmithKline Beecham -v- Greg Avery*** **[2007] EWHC 948 (QB)**, it is possible that the section might be given a broader interpretation in order to achieve the purposes of the legislation. Mr. Lawson-Cruttenden made it clear that one of the purposes of bringing this appeal was to obtain an authoritative decision on the interpretation of section 3(6), but the issue does not arise on these appeals and like Teare J. I prefer not to express a concluded opinion on it. However, the judge assumed that a protestor would, or at any rate might, fall within section 3(6) if the court had given permission under rule 19.6(4)(b) for the order to be enforced against him, so it cannot be said that it was a matter which he failed to take into account when exercising his discretion.

[20] The nearest that Mr. Lawson-Cruttenden came to identifying an error on the judge's part was in his submission that these orders were likely to be of little practical value to the appellants if he did not do all in his power to ensure that they could be effectively enforced by the police using their powers of arrest. I have some sympathy with the appellants on this score because intimidation by animal rights protestors is a very real threat which has proved difficult to control. However, against that the judge had to balance the potential injustice to unidentified protestors of giving permission to enforce the orders against them, possibly by criminal process, without considering their individual circumstances. The judge was well aware, as were judges in previous similar cases, of the difficulties facing organisations in the position of the appellants, but the main sticking point in this as in other cases proved to be the extreme width of the order. In my view the judge was entitled to reach the conclusion that it was not appropriate or in the interests of justice either to include in his order the additional paragraph sought by the appellants or to give permission to enforce the order against persons who were unidentified at the time and who might not have become aware of its terms when they committed the acts which would amount to a breach of it.

[21] By way of an alternative argument Mr. Lawson-Cruttenden submitted that by naming SHAC and ALF as defendants the appellants were in fact bringing proceedings against all members of those organisations, who were sufficiently identified by the fact of their membership, and that it would be anomalous to draw a distinction between those who are formally defendants and those who, although not defendants, are nonetheless bound by the order. In support of that submission he relied on the decision of Sir Andrew Morritt VC. in ***Bloomsbury Publishing Group Ltd -v- News Group Newspapers Ltd***.

[22] In my view that argument cannot succeed in the present case. Rule 19.6(4) draws a distinction between those who are defendants and those who are not and Irwin J.'s order makes it quite clear that the proceedings in this case were to continue as representative proceedings. It does not seem to have occurred to anyone at the time that order was made that individual members of SHAC and ALF might already be parties to the action and the order is inconsistent with that being the case. I doubt very much whether it is possible to join as defendants all current members of an unincorporated association

> simply by naming the association itself as a defendant, but in any event the argument does not advance matters as far as the present appeals are concerned. The submission was made partly in an attempt to obtain from this court a decision that all those who are described as Protestors in the order are amenable to prosecution under s.3(6) of the Act because they are defendants. That was not an issue before the judge and is not an issue that arises on the appeal, but the argument must fail in any event for the reasons I have just given.
>
> [23] Finally, if all else failed, Mr. Lawson-Cruttenden applied to join as defendants unknown persons falling within the definition of Protestors. The application was made very much as an afterthought and was not fully argued. It raises difficult questions of law and I do not think that it would be right for this court to entertain it on appeal. If such an application is to be made, it must, in my view, be made to the High Court.

124. The parameters of the appeal meant that the Court did not have to consider, directly, the effect of, and impact on, the protestors' Article 10 rights, but Moore-Bick LJ did observe [35]:

> "Among the matters which will call for consideration by the Court is how to balance the conflict between the rights of the claimants under Article 8 of the EHCR calling for respect to their private life and home and the rights of the protesters to free expression under Article 10. Careful consideration may have to be given to the exact description of the persons unknown and precisely what activities are covered by the order to distinguish that from lawful protest… [The] cases show that difficult issues arise from seeking to join unknown defendants and to enforce injunctions against them."

125. In my judgment, Moore-Bick LJ's analysis has a bearing on several issues in this case. Perhaps most importantly, as the current case is brought against "persons unknown", not on any representative basis but as individuals, the safeguard provided by CPR 19.6(4)(b) does not apply. The Claimants have argued that the consequence of that is that *anyone* served with the injunction who fell within the broad definition of "protestor", and without having been a defendant in the proceedings, would be *prima facie* liable to arrest if s/he broke its terms (whether or not s/he read it – see [23(i)] above). The hypothetical silent tee-shirt-wearing "protestor", who had been served with the injunction (as amended on 15 December 2017) and who joined 12 other silent tee-shirt-wearing "protestors" in the Exclusion Zone, would be liable to arrest under s.3(6) PfHA, it is argued. Worse, subject only to whether s/he had a "reasonable excuse" for non-compliance, the issue in any criminal prosecution would not be whether s/he had been guilty of harassment, but whether s/he has broken the terms of the injunction. The unlucky 13th silent tee-shirt wearing protestor would be liable to be arrested, prosecuted and, if convicted, punished with up to 5 years in prison. It hardly needs saying, but such a consequence would require the most compelling justification, if indeed it could be justified.

126. In ***Astellas***, the Court of Appeal clearly thought that to arrive at that position was wrong, because (referring to the underlined passages from the judgment quoted above):

i) the PfHA envisaged that the defendant in any criminal proceedings under s.3(6) would have been an identifiable defendant in the civil proceedings in which the injunction was granted: [16];

ii) arguably, an individual protestor had to be joined as a named defendant to the civil proceedings in order to bring him within the reach of s.3(6): [19]; and

iii) it was wrong in principle, and potentially unjust, to subject an unidentified protestor to potential criminal sanction without considering his/her individual circumstances; *a fortiori* where the prohibition in the injunction was extremely wide: [20].

## O. Application for summary judgment: 30 November 2018

127. In accordance with the 'long-stop' provision in the 15 December 2017 Order, on 30 November 2018, the Claimants issued an Application Notice seeking summary judgment on their claim pursuant to CPR Part 24. It was supported by a witness statement of the Second Claimant dated 29 November 2018.

128. In summary, the Claimants sought:

i) judgment against the First Defendant – "persons unknown" – and PETA (and the persons for whom PETA acted in a representative capacity); and

ii) a final injunction, modified in limited respects from the 15 December 2017 Order.

129. In his witness statement, Mr Hayton set out his understanding that the Court could deal with the matter by way of summary judgment and that this course had been adopted "*in other cases concerning similar protests against other retailers*" and that. "*in simple terms*", the interim order would be made a final order. The witness statement contained the following sentence:

> "The Claimants believe that on the evidence the Defendants have no real prospect of defending this claim and the Claimants know of no other reason why the disposal of the claim should await trial."

This, of course, is a necessary averment before the Court could grant summary judgment (see CPR 24.2).

130. I need to resolve three issues:

i) on the basis of the evidence, have the Claimants shown that the Defendants have no real prospect of defending this claim?

ii) is there any other reason why disposal of this claim should await trial?

iii) should the Court grant a final injunction and, if so, in what terms?

## P. Evidence

131. The Claimants have relied on evidence as to the nature and extent of the protests that had taken place both before and after the grant of the injunction on 29 November 2017. Principally, this was provided in witness statements from the Second Claimant together with video footage and photographs.

132. From that body of evidence, Mr Buckpitt has placed particular reliance on several incidents of alleged harassment, summarised in chronological order:

i) 9 Nov 2017: Member of staff insulted whilst on break and words "*fur hag*" posted on Instagram.

ii) 10 Nov 2017: Male protestor entered the Store and said to member of staff "*imagine if I killed you and plucked the fur from your face*".

iii) 11 Nov 2017: 400 protestors outside the Store which had to be locked shut. One protestor enters the Store and stares at security guard at close quarters.

iv) 14 Nov 2017: Protestor follows 2 young adults into H&M – language and conduct alleged to be offensive and threatening.

v) 14 Nov 2017: Stickers placed on people's backs, "*I'm an arsehole, I wear fur*".

vi) 18 Nov 2017: 300 protestors in attendance, 5 of whom were arrested. Alleged assault on male victim and two small children in tears. Reports from customers that they had been hit and kicked entering the Store. Member of staff called "*bitch*" and "*murderer*". Alleged intimidation of other customers.

vii) 24 Nov 2017: 100 protestors estimated to be in attendance. Police declare major incident. 300 customers taken into the Store for their own safety, then evacuated and the Store was locked for 2 hours.

viii) 9 Dec 2017: Member of the public called a "*fur hag*".

ix) 14 Jan 2018: Protestor allegedly antagonistic to family with 9-year-old child and suggests setting her pompom alight.

x) 15 Mar 2018: Protestor enters the store and later allegedly threatens to knock out a security officer.

xi) 18 Apr 2018: Doors of the Store closed in response to an alleged threat to 'rush' the Store.

xii) 30 Jun 2018: Member of staff allegedly subjected to insults (including homophobic comments).

xiii) 8 Nov 2018: Member of public allegedly abused for wearing fur hat – protestor appears to try and grab it.

xiv) 23 Nov 2018: Protestors' abuse of lady with fur jacket calling her a "*fur hag*" and surrounding her companion.

xv) 29 Dec 2018: A family with young children and couple with a lady in wheelchair leave the Store via side door but are pursued and subjected to abuse.

xvi) 12 Jan 2019: A man with 4-year-old son is told, in son's presence, "*if you shop in that store you are a murdering cunt*". He is pursued when leaving and hit with a stuffed coyote. There is a brawl and punches are thrown. Customer allegedly kicked by another protestor. Police called, child in tears.

133. I also have considered the evidence that was filed by PETA earlier in the proceedings (see [30]-[35] above).

134. My assessment of the evidence is as follows:

i) The Claimants have identified three main occasions – 11, 18 and 24 November 2017 – on which the sheer number of protestors seriously impacted upon the operation of the Store. The police were present on each of these occasions, sometimes in force, and on one occasion 5 arrests were made. On at least one occasion, the police appear to be filming the demonstration. It appears from the video footage that the police had closed off one lane of the carriageway on Regent Street on 18 November 2017.

ii) In one incident, on 18 November 2017, a female protestor can be seen shouting at a 'customer' who indicated that he intended to return to the Store to make a purchase. The protestor then removes a container of red liquid from her handbag and tips it over the 'customer'. The police intervened immediately, but in his witness statement, Mr Hayton states that he understands that this incident was staged by the individuals involved. Although this was apparently a stunt, there is evidence of incidents where paint or dye has been thrown on customers, which (if done deliberately) would appear to constitute assault and/or criminal damage. There have also been incidents of criminal damage. On 4/5 November 2018, the front doors and windows of the Store were vandalised with comments "*Don't shop here*" and "*We sell cruelty*" painted onto the windows and red paint thrown over the front door. It is not clear on the evidence whether these incidents were reported to the police.

iii) There is evidence of the commission of criminal offences by certain individual protestors, including offences of violence: see e.g. incidents on 18 November 2017, 15 March 2018 and 12 January 2019. All three incidents were reported to the police.

iv) Whilst there have been isolated incidents of aggression towards people entering and leaving the store, the video evidence tends to indicate that the majority simply ignored the protestors and their efforts to hand them leaflets or engage in conversation. One customer responded to a protestor's comments directed towards him by saying, "*No, you're just bullying people*". Most interactions between members of the public and demonstrators comfortably fall within the "*irritations and annoyances*" of daily life described by Lord Nicholls in ***Majrowski*** (see [51(ii)] above). Very few could, even arguably, be said to have crossed the line to conduct towards any individual that was "*oppressive and unacceptable*". Police officers intervened to calm the situation in incidents that flared up into more significant altercations. There is evidence of some of the

protestors being assaulted by members of the public. Mr Buckpitt has made the point that most of these incidents took place after the injunction was in place.

v) Objectively judged, the pursuit of the two people into H&M might have been intimidating and unpleasant, but it is not clear to me (a) whether this amounted to the commission of any criminal offence; and/or (b) whether the conduct would have been restrained by the injunction as the evidence does not demonstrate that one or both of the pursued individuals fell within the definition of a Protected Person. It appears, however, that the two individuals were laughing at their pursuer (he repeatedly refers to this fact whilst shouting at them), so I cannot assess whether the individuals were in fact intimidated or harassed by what took place. Generally, they appeared to ignore him.

vi) There is evidence of incidents of trespass in the Store on several occasions. For example, on 30 December 2017 – after the grant of the injunction – there is video evidence of a protestor (identified by Mr Hayton by name) entering the store and then standing on a display stand with a banner reading "*Canadians Against Fur*". She then shouted at people in the Store: "*You're buying dogs, you're wearing dogs, these animals were caught in a leg hold trap. This is torture, I am ashamed that you are selling this absolute torture in England. Absolute torture…*" She did not comply with requests by security officers to leave the Store, so she was removed. Mr Hayton says that the individual was arrested by the police for aggravated trespass, but subsequently 'de-arrested'. It is not clear from the evidence whether the individual had been served with the injunction before or after the incident. Although her name is known by the Claimants, no attempt has been made to join her to the proceedings. On 11 October 2018, two protestors entered the Store and left leaflets in the pockets of some coats and on a changing room floor. They shouted generally at customers and staff about animal cruelty and suffering, but did not make any threats. They were escorted from the Store by security staff.

vii) There are other individual protestors who are named in the evidence of Mr Hayton and details given of their allegedly unlawful conduct (including incidents set out in [132] above). None of these individuals has been made a defendant to the proceedings.

viii) Whether the balance of the incidents identified in [132] above amounted to breaches of the civil or criminal law would depend upon an assessment of the evidence relating to each particular incident.

ix) In his statement, the Second Claimant has identified efforts by "Surge Activism" to coordinate protests, but I do not consider that, overall, the evidence demonstrates that the protestors as a group are acting (or being coordinated) as a single group, indeed there is evidence that groups of protestors argue amongst themselves. Whilst the protestors may share a common objection to animal cruelty, the evidence does not support a conclusion that there is any general agreement about the methods of protest to be deployed (the evidence of PETA's approach being the best example of this). Whilst some protests/protestors may have been coordinated by "Surge Activism", the evidence suggests that, within the protestor group, there are some who have joined the protest as individuals not as part of any wider group. Many placards that can be seen on the video

appear to be home-made rather than the product of any mass-production. Some placards bear confrontational messages, others are inoffensive: "*Choose Love, Go Vegan*"; all are comfortably within the width of freedom of expression. The extent of involvement of, and the acts carried out by, individual protestors varies significantly. The video evidence suggests that the vast majority of the protestors are not engaging in any of the acts of violence or aggression identified in [132] above. The people acting in this way are a small minority. In the video evidence, most protestors can be seen standing on the pavement holding placards. Some occasionally join in with the chanting, others remain silent.

x) The Claimants have included in their evidence incidents which are trivial. For example, Mr Hayton complaints about an incident, on 10 November 2018, when protestors had erected an "*open coffin on a mock headstone… with a [toy] coyote head protruding from the coffin*". I have reviewed the photographic and video evidence of this coyote coffin. There was a suggestion that this amounted to a public order offence. I struggle to see how a stuffed toy in a small makeshift coffin atop a mock headstone could constitute such an offence, or indeed any offence. Mr Hayton also complained about the protestors chalking murals onto the pavement. Originally, the Claimants had sought to extend the terms of the final injunction to include a prohibition on chalk murals, but that has not been pursued.

xi) The evidence does not disclose any wrongdoing by PETA or its members or representatives at any of the demonstrations.

xii) The evidence also suggests that there has been police presence on every occasion on which there has been a large number of protestors present. The Claimants complained that the police response was ineffective and/or deficient on 12 and 18 November 2017 and on one occasion the Store had to be closed for several hours. Although the occasions when the protestors numbered in the hundreds no doubt presented challenges, the video evidence does not suggest that the police lost control of any of the demonstrations. On the contrary, the evidence shows the police acting professionally (and apparently in good humour), in control of the situation, maintaining a proper balance between the protestors' rights to demonstrate and the rights of others (including the Claimants and their customers) and acting when necessary. Apart from a single incident of protestors shoving of a line of police officers at the height of the demonstration, the video evidence does not show any violence being used or threatened against the police. I have little doubt that the Metropolitan Police, in particular, have substantial experience of policing demonstrations; maintaining public order whilst paying due regard to the important rights of freedom of expression and freedom of assembly. The video evidence in this case supports that conclusion. There is no suggestion that the police lack powers to deal effectively with any of the matters about which the Claimants complain.

xiii) I have been referred to some letters/emails from three unidentified staff members who complain that they have felt harassed, but no witness statement has been provided from any individual employee or customer (or potential customer) to support a claim that s/he has been subjected to unlawful activity.

xiv) The Claimants have provided no evidence as to any economic impact on the First Claimant caused by the protests. It is not possible, therefore, to assess whether and, if so, to what extent there has been interference with the First Claimant's A1P1 rights, still less whether any interference is necessary or proportionate.

135. On the basis of the evidence as a whole, Mr Buckpitt submitted:

> "The written and video evidence obtained before the [injunction was granted], reveals scenes which are quite shocking. Hundreds of protestors pushing back and forth with on occasions hundreds of police officers present. Sirens sounding and entry to the Store blocked. That is how it was when there was no order. That is how it will be if no order is made. As a matter of certainty. In these circumstances, it is respectfully submitted that not only is this Court equipped and able to make an order, but it is obliged to make an order that ensures that there is no such repetition, and which gives proper protection to [the Claimants'] rights, whilst ensuring that meaningful and effective protests may continue to take place."

136. The fundamental problem with this submission is it treats the "protestors" as a single class, not as individuals. Injunctive relief is then sought to be justified against the entire class by reference to the worst behaviour of a small minority of the individuals within it. This is the wrong approach (see [99(viii)] above). It leads unjustifiably to the interference with the right of protest of individuals who are doing nothing wrong.

## Q. Discussion

137. In most summary judgment applications, the Court would usually start with an assessment of whether the applicant had demonstrated, on the evidence, that the defendant had no real prospect of defending the claim. However, in this case, the procedural complications of this case mean that I should first consider the issue of whether this case is amenable to summary judgment or whether there are reasons why the resolution of the claim should await a trial.

*Service of the Claim Form*

138. For the reasons set out in paragraphs [24], [26]-[27] and [48], the Claim Form has not been validly served on *any* defendant in these proceedings. No order for substituted service has been made and there has been no service by any of the methods permitted by CPR 6.5. The Claim Form has only been effectively served on the Second Defendant (the organisation), in the sense that there is evidence that the contents of the Claim Form have come to the attention of the Second Defendant. The Second Defendant, in any event, positively sought to be joined to the proceedings, albeit the order joining the Second Defendant contained no directions for service of the Claim Form (see [36] above).

139. The Claimants' solicitor's assessment of the issue of service of the Defendants (see [47] above) is flawed in two respects:

i) Whilst it may be correct that none of the defendants has filed a defence or acknowledgement of service, the failure validly to serve the Claim Form means that no defendant has been placed under any obligation to do so.

ii) The suggestion that defendants within "persons unknown" as the First Defendants were 'added' each time a copy of the injunction order was served on them is not correct. Only service of a Claim Form (by a permitted method) or an order dispensing with the requirement to serve the Claim Form can make someone a defendant to a civil claim. A person served with the injunction was bound by its terms and, subject to whether that person fell within the definition of "protestor", may have fallen within the definition of the "persons unknown" identified as the First Defendants.

140. In written submissions submitted after the hearing, Mr Buckpitt appeared to recognise that there had not been valid service of the Claim Form in accordance with the provisions of the CPR. However, he contended that an application for an order for alternative service had been included within the Claimants' without-notice application for an injunction on 29 November 2017. At the hearing, the Claimants gave an undertaking to effect service by email of the Order the Claim Form and Particulars of Claim and application notice and evidence in support (see [22(ii)] above). Mr Buckpitt accepts that, he submits in error, the Order of 29 November 2017 provided only for alternative service of the Order and not the Claim Form (see [23] above). He contends that this error was a 'slip', albeit the fault lay not with the Court but was contained in the draft that was provided. He acknowledges that, for a valid order for alternative service to be made, the requirements of CPR 6.5(4) must also be observed (see [24(iv)] above). He argues that the 29 November 2017 Order should be amended under the 'slip rule' (CPR 40.12) to correct these defects.

141. Although CPR 40 BPD §4.2 permits an application to correct an error in an order to be made informally, I am not prepared to make any on this basis for the following reasons:

i) A court will only grant an order for alternative service where it is satisfied that the proposed method of service can reasonably be expected to bring proceedings to the attention of the defendant – see [59(iii)] above. Service on the email address contact@surgeactivism.com could not reasonably have been expected to bring the proceedings to the attention of anyone other than the person who accessed that email address (or, at best, to the attention of others in the same group). There could be no reasonable expectation that this method would bring the proceedings to the attention of the wide class of person defined as the "persons unknown". Although not known at the time the 29 November 2017 order was made, there is no evidence that sending the Claim Form (or any of the other documents) to that email address did lead to it coming to the attention of anyone (see [27] above).

ii) The 'slip rule' enables the Court to correct errors where orders do not properly reflect the orders made by the Court. There is an important distinction between orders that the Court *did* make, but were not correctly recorded, and orders a party considers the Court *should have made* but were not. The slip rule allows correction of the former, not the latter. On the available evidence, I cannot be satisfied that this was simply a slip. The order did not include provisions in compliance with CPR 6.15(4). I do not have a transcript of the hearing, but I have been provided with the solicitor's note. The issue of alternative service of the Claim Form is not addressed. Mr Buckpitt submits that by accepting the undertaking regarding service (see [22(ii)] above), Teare J was satisfied that use of the "Surge Activism" email address was appropriate. I do not accept this.

If the Court had addressed the issue of alternative service, then the requirements of CPR 6.15(4) would have been considered. That would have focused attention on the artificiality of service of the Claim Form via the proposed alternative method as an effective means of bringing the contents of the Claim Form to the attention of all those in the category of the "persons unknown".

iii) Any application to amend the 29 November 2017 Order under the slip rule can only fairly be considered and determined with the benefit of a transcript of the hearing and, in light of CPR 40 BPD §4.4, arguably ought to be considered by Teare J.

142. Mr Buckpitt's fallback position was that the Court ought to dispense with service of the Claim Form on the First Defendants pursuant to CPR 6.16. I am not prepared to make any such order without a proper Application Notice. Given the principles identified in [59(iv)] above, it would appear to me that the Claimants would face significant obstacles in persuading the Court to grant any such order.

143. There is a further issue that may need to be addressed by the Claimants. The period of validity of the Claim Form is four months from issue: CPR 7.5 (see [61] above). Prima facie, that period has expired. In his written submissions, Mr Buckpitt has acknowledged this issue. He contends, however, that the effect of the stay granted by the Order of 15 December 2017 was to suspend the operation of this 4-month time limit. I am sceptical that this is correct. A stay of proceedings is conceptually distinct from an extension of time that would otherwise be required under the rules.

*Who are the defendants against whom the Court would grant judgment?*

144. In his witness statement in support of the application for summary judgment, Mr Hayton stated that the Claimants believed that the defendants have no real prospect of defending the claim (see [129] above). I am not sure to what extent Mr Hayton thought carefully about these words. Had he done so, two fairly fundamental questions may have presented themselves:

i) who are the "defendants"? and

ii) how can it be said that all or any of them have no real prospect of defending the claim?

145. Indeed, if Mr Hayton had focused particularly on PETA (simply in its non-representative capacity), how could it be said that PETA had no real prospect of defending the claim? On the basis of the – essentially uncontradicted – evidence of its protest activities (filed before the 15 December 2017) hearing (see [30]-[35] above), the conclusion might be reached that, far from PETA having no real prospect of defending the claim, the Claimants had no real prospect of succeeding with it. My conclusion, based on the evidence presented to the Court, is that the Claimants cannot show that PETA has done anything unlawful (see [134(xi)] above).

146. Then there is the issue of who are the "defendants" caught by the First Defendant "persons unknown". Leaving to one side, for the moment, the fact that no-one in this category has been validly served with the Claim Form, the class of people potentially captured as "persons unknown" was not homogenous. Nothing in the operative

definition of protestor required or assumed any wrongdoing on his/her part. If the Court granted judgment against the whole class of "persons unknown" it would capture in the net, indiscriminately, the 'guilty' and the 'innocent' with no way of distinguishing between them. It is fundamentally wrong in principle to grant judgment in a civil claim against a person when the Court is not satisfied s/he has committed or is threatening to commit any civil wrong.

147. In submissions following the hearing, Mr Buckpitt suggested that these concerns could be addressed by "persons unknown" being redefined as:

> "Persons who are present at and in the vicinity of 244 Regent Street, London W1B 3BR and are protesting against the manufacture and/or supply and/or sale of clothing made of or containing animal products by Canada Goose UK Retail Limited and are involved in any of the acts prohibited by the terms of this order ('Protestors')."

148. In my judgment, although this may address the point of demonstrators in Penzance (see [21(iii)] above), it does not define the class of person unknown by their wrongdoing. A form of wording that defined "persons unknown" by reference to their presence (without consent) in the Store would isolate people who are arguably guilty of trespass, but defining the group on the basis of an individual's involvement "*in any of the acts prohibited by the terms of this order*" is not acceptable. The fundamental problem in the terms of the order is that they include prohibitions on acts that are not unlawful *per se*.

149. These are the unavoidable consequences of utilising the expedient of suing "persons unknown" without making any attempt to discriminate between those against whom there is evidence of wrongdoing and those against whom there is not. Mr Buckpitt advanced an argument that the Claimants have had no choice but to proceed in this way because it is the only way in which they can protect their lawful interests. Indeed, he went to far as to suggest that, "*not only is [the] Court equipped and able to make an order, but it is obliged to make an order that ensures that there is no [repetition of the acts complained of], and which gives proper protection to [the Claimants'] rights*". The Claimants have used the language of expediency to justify the order made against "persons unknown": e.g. that it is "*appropriate*" to make the injunction – [15] and [20(i)] above; that the terms of the injunction were "*fair and balanced*" – [28] above; and that there was no way of differentiating between protestors who broke the law and those who did not – [38] above. The imposition of an order that interfered with the protestors' Article 10/11 rights required to be justified as necessary, not just expedient. Applying the principles identified in [98]-[99] above, the restrictions placed on demonstrations in the injunction are neither necessary nor proportionate.

150. In any event, I reject the submission that an injunction in the terms sought against "persons unknown" is the only effective way of protecting the Claimants' rights. The Claimants have chosen not to join as a defendant a single individual protestor from the hundreds that the Claimants judged should be served with the injunction. That is so despite the fact that the Claimants could have named 37 protestors and identified up to 121. The identities of the alleged tortfeasors may have been "unknown" when the interim injunction was first granted, but that is not the position now. Many have been identified by name, others could readily be identified on the video and/or body-camera footage as alleged "wrongdoers" and, if necessary, given a pseudonym

(e.g. "Demonstrator 38 – the man shown in the footage at time code xx.xx holding the loud-hailer"). It is only if this is done that the Court can begin the task of assessing whether each of the alleged wrongdoers can be shown to have committed any civil wrong. This is the fundamental process of discriminating between those against whom there is, and against whom there is not, evidence of wrongdoing. The Claimants legitimate interests can also be protected by the powers available to the police and/or local authority (see [100]-[104] above).

151. As Lord Sumption made clear in ***Cameron*** (see [59(xi)] above), the grant of *quia timet* interim injunctions against "persons unknown" is the exercise of an emergency jurisdiction which is provisional and strictly conditional:

i) It is provisional because the party seeking the injunction will be expected to take all practical steps to identify the alleged wrongdoers so that they can have an opportunity, if they wish, to defend themselves. The continuation of an injunction against "persons unknown" can only be justified for as long as it remains practically impossible to identify the alleged wrongdoers.

ii) It is conditional upon the Court being satisfied that there is a sufficiently real and imminent risk of a tort being committed to justify *quia timet* relief; that it is impossible to name the persons who are likely to commit the tort unless restrained; that it is possible to give effective notice of the injunction; and that the terms of the injunction correspond to the threatened tort and are not so wide that they prohibit lawful conduct – see ***Ineos*** [29], [34].

152. Mr Buckpitt has relied upon the decision in ***Vastint Leeds BV -v- Persons Unknown*** **[2019] 4 WLR 2** as authority for the proposition that *quia timet* relief can be granted by final injunction. I accept that, but ***Vastint*** appears to me to meet the requirements set out by Lord Sumption. ***Vastint*** was a trespass case, not involving protest or alleged harassment (see [76] above).

153. In their written submissions, the Claimants have provided the following explanation for not joining any individual protestor as a defendant to the claim:

> "To join all potential Defendants, with all the commitment, responsibilities and risks that that involves, is unnecessary and disproportionate, and contrary to the overriding objective. The fact that the Claimants have not sought out and named individuals should not be viewed in a negative light, rather it is reflective of a 'light touch' approach, reflected also in no steps having been taken by the Claimants (thus far) in respect of those breaches that have occurred. The Claimants have been clear in their evidence that the right to protest is acknowledged and respected. They do not intend to stifle protest. All that they seek are limited, necessary, restrictions on this in a very confined area (the exclusion zones) to ensure public order and that the competing rights of the Claimants and members of the public are safeguarded. As is submitted below, these competing rights deserve at least equal respect.
>
> Indeed, to single out specific individuals and make them parties, with the attendant costs risks they would then bear, would if anything be 'heavy handed'. It would be likely to have a chilling effect on other protestors. That is not, and has never been the Claimants' wish: all they wish is to be able to continue their lawful business activities, whilst respecting the rights of protesters to make clear their competing views."

154. The wish not to act in a 'heavy handed' or disproportionate way is both understandable and laudable. However, I do not accept that this justifies the failure to join individual defendants. If the Claimants wish to alleviate any anxiety that might be felt by an individual defendant as to his/her potential costs' liability, then that could readily be achieved in other ways (e.g. an assurance as to enforcement of any order for costs). There is a critical difference between a 'light touch' to litigation and a failure properly to observe the fundamental requirements of adversarial civil litigation. It was not "unnecessary" or "disproportionate" to join individual defendants. On the contrary, where they could be identified, it is essential if any judgment, or any sort of relief, is to be granted against them. Otherwise, the action simply remains in a state of suspended animation, unable to be progressed to a conclusion, but with an interim injunction order remaining in full force.

155. The justification for any order against "persons unknown" in this case could only be made out if the "protestors" could properly be regarded as a homogenous unit, all of whom are guilty of, or complicit in, the wrongful acts about which complaint is made. Once this proposition is rejected – as it must be – in favour of an assessment of the alleged wrongdoing of each protestor separately, the Claimants' claim simply disintegrates. Returning to the fundamental question, it is impossible to identify against whom the Court would or could enter judgment. It cannot be granted against the entire class of "persons unknown". First, the Court has no idea against how many people it would be granting judgment (or who they are), but more fundamentally, it has no idea who in the class had committed (or threatened) any civil wrong and, if s/he had, what it was. That is before any consideration of what if any remedy should be granted consequent on the judgment in any particular case. Although the Claimants are not claiming damages, consideration of this remedy serves to demonstrate how unreal the Claimants' submission is. Suppose, despite all the procedural obstacles, the Court nevertheless granted judgment against "persons unknown" and ordered payment of damages of £100,000. What possible justification could there be for a protestor who had committed no civil wrong being made liable to pay some or all of the damages ordered by the Court?

156. If this were not sufficient for the Court to conclude that summary judgment could not be entered in this case, consideration of what would happen after judgment had been granted produces results that are so extraordinary as to leave no doubt, not only that it is not appropriate to grant summary judgment, but that it would be wrong to do so.

157. I asked Mr Buckpitt what the Claimants intended to do with any final injunction if they were granted summary judgment. He confirmed that the Claimants planned to continue serving this "final injunction" on new protestors attending future demonstrations ("the newcomer(s)"). These, he submitted, once served, became Defendants and immediately bound by this "final order", despite the fact that:

    i) the relevant alleged wrong had been committed *after* the Court had granted a final judgment against the "persons unknown" which did not include the newcomer;

    ii) the newcomer had been not been served with the original claim and so had been given no opportunity to advance any defence before s/he was bound by the "final order";

iii) the Court had made no adjudication on whether what the newcomer was alleged to have done was a tort (or otherwise unlawful) and, if so, justified an injunction being granted against him/her; and

iv) service of the Order alone did not make the newcomer a "defendant"; only service of a Claim Form could achieve that (on the assumption that it was even possible to add new Defendants to a claim in which the Court had already entered judgment and granted a "final order").

158. Rather optimistically, Mr Buckpitt suggested that all these concerns could be adequately addressed by the inclusion of a provision in the "final order" permitting any newcomers to apply to vary or discharge the "final order".

159. Put bluntly, this is just absurd. It turns civil litigation on its head and bypasses almost all of the fundamental principles of civil litigation – see [55]-[60] above. Unknown individuals, without notice of the proceedings, would have judgment and a 'final injunction' granted against them. If subsequently, they stepped forward to object to this state of affairs, I assume Mr Buckpitt envisages that it is only at this point that the question would be addressed whether they had actually done (or threatened to do) anything that would justify an order being made against them. Resolution of any factual dispute taking place, one assumes, at a trial, if necessary. Given the width of the class of protestor, and the anticipated rolling programme of serving the 'final order' at future protests, the Court could be faced with an unknown number of applications by individuals seeking to 'vary' this 'final order' and possible multiple trials. This is the antithesis of finality to litigation.

160. This state of affairs arises because the Claimants have made no effort to narrow the class of persons unknown in a way that enables them to be identified (even if not named) and for a decision to be made, on an assessment of the evidence, whether each person has committed (or is threatening to commit) a civil wrong.

161. In my judgment, in this case, the Claimants were required to identify the individuals against whom they were pursuing their claim and make then defendants to the proceedings as promptly as practicable. The majority of the individual protestors captured on the video footage are not people against whom the Claimants could maintain any claim that would have any real prospect of success. If the Claimants had addressed this point, they would have excluded these people as possible defendants. These people should not be left to be swept up into the definition of "persons unknown" on the basis of expediency or want of a more discriminating approach.

162. I reject Mr Buckpitt's suggestion that by refusing summary judgment the Court would be failing in its duty. On the contrary, I am quite satisfied that summary judgment must be refused. The Claimants are not left without remedy. The Court is simply insisting that the Claimants should bring forward claims against identifiable individuals that are, so far as practicable, capable of being resolved in accordance with the Court's established procedures for deciding civil claims. The evidence in this case demonstrates that this is neither unachievable nor unreasonable. 37 people have been identified by name, more still can be identified by description from the video or other evidence. Ultimately, when this is done, the Court could adjudicate whether these people have committed any civil wrong (or might do if not restrained) and, if so, what remedy should be granted against them. The Court's resources and its orders are thereby targeted only

at those against whom there is evidence of actual or threatened wrongdoing. Perhaps most importantly, it avoids the imposition, by injunction, of restrictions on the Convention rights of people, against whom there is no evidence of actual or likely wrongdoing; restrictions that are therefore neither necessary nor proportionate.

163. Mr Buckpitt submitted that a final injunction substantially in the terms of the interim injunction would meet the requirements suggested by the Court of Appeal in ***Ineos*** [34]. I disagree. For the reasons I have addressed above, it is not impossible to name the persons against whom relief is sought and, more importantly, the terms of the injunction would impose restrictions on otherwise lawful conduct. Further, the interim injunction (and in particular the size and location of the Exclusion Zones) practically limits the number of people who can demonstrate outside the Store to 12. This figure is arbitrary; not justified by any evidence; disproportionate (in the sense there is no evidence that permitting a larger group would not achieve the same object); assumes that all demonstrators share the same objectives and so could be 'represented' by 12 people; and wrong in principle (see [98] above). Who is to decide who should be one of the permitted 12 demonstrators? Is it 'first-come-first-served'? What if other protestors do not agree with the message being advanced by the 12 'authorised' protestors?

*Do the defendants have a real prospect of defending the claim?*

164. The Second Defendant (in its non-representative capacity) does have a real prospect of defending the claim. As I have set out above, the present evidence does not show that the Second Defendant has committed any civil wrong. As such, I am satisfied that it has a real prospect of defending the claim.

165. In relation to the First Defendants, and those for whom the Second Defendant acts in a representative capacity, it is impossible to answer the question whether they have a real prospect of defending the claim because it is impossible to identify who they are, what they are alleged to have done (or threaten to do) and what defence they might advance. Whether any individual defendant in these classes was guilty of (or threatening) any civil wrong would require an analysis of the evidence of what s/he had done (or threatened) and whether s/he had any defence to resist any civil liability. On the evidence, therefore, I am not satisfied that the Claimants have demonstrated that the defendants in each of these classes has no real prospect of defending the claim. On the contrary, on the evidence as it stands, it is clear that there are a large number of people caught by the definition of "persons unknown" who have not even arguably committed (or threatened) any civil wrong. As there is no way of discriminating between the various defendants in these categories, it is impossible to identify those against whom summary judgment could be granted (even assuming that the evidence justified such a course) and those against whom summary judgment should be refused.

## R. Decision

166. For the reasons I have set out, I refuse the Claimants' application for summary judgment.

167. I am also satisfied that, applying the principles from ***Cameron*** and ***Ineos***, the interim injunction that is currently in place cannot continue in its current form, if at all. There are fundamental issues that the Claimants need to address regarding the validity of the Claim Form and its service on any defendant. Presently, no defendant has been validly

served. Subject to further submissions, my present view is that if the proceedings are to continue, whether or not a claim can be properly maintained against "persons unknown" for particular civil wrongs (e.g. trespass), other civil claims will require individual defendants to be joined to the proceedings whether by name or description and the nature of the claims made against them identified. Any interim relief must be tailored to and justified by the threatened or actual wrongdoing identified in the Particulars of Claim and any interim injunction granted against "persons unknown" must comply with the requirements suggested in ***Ineos***.

168. Finally, the case number of this claim suggests that it has already been allocated to the Media & Communications List, but if it has not, and subject to any submissions the Claimants wish to make, it appears to me that the issues raised in the claim mean that it should be allocated to the Media & Communications List. I note that, when the modifications to CPR Part 53 come into force from 1 October 2019, claims like this, that include claims for harassment by speech, must be issued in the Media & Communications List of the Queen's Bench Division (CPR 53.1(3)(c)).