Neutral Citation Number: [2023] EWHC 1719 (KB)

Case No: QB-2022-001236

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 July 2023

Before :

MR JUSTICE SWEETING

- -

Between :

NORTH WARWICKSHIRE BOROUGH COUNCIL	**Claimant**
- and -	
(1) DAVID BALDWIN	**Defendants**
(2) THOMAS BARBER	
(3) MICHELLE CADET-ROSE	
(4) TIM HEWES	
(5) JOHN HOWLETT	
(6) JOHN JORDAN	
(7) CARMEN LEAN	
(8) ALISON LEE	
(9) AMY PRITCHARD	
(10) STEPHEN PRITCHARD	
(11) PAUL RAITHBY	
(12) HOLLY ROTHWELL	
(13) NO LONGER PURSUED	
(14) JOHN SMITH	
(15) BEN TAYLOR	
(16) JANE THEWLIS	
(17) ANTHONY WHITEHOUSE	
(18) NO LONGER PURSUED	
(19) PERSONS UNKNOWN WHO ARE ORGANISING, PARTICIPATING IN OR ENCOURAGING OTHERS TO PARTICIPATE IN PROTESTS AGAINST THE PRODUCTION AND/OR USE OF FOSSIL FUELS, IN THE LOCALITY OF THE SITE KNOWN AS KINGSBURY OIL TERMINAL, TAMWORTH B78 2HA	
(20) JOHN JORDAN	

-and-

THE ADDITIONAL DEFENDANTS LISTED AT SCHEDULE A TO THIS JUDGMENT

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Jonathan Manning and Charlotte Crocombe (instructed by **North Warwickshire Borough Council, Legal Services**) for the **Claimant**
Stephen Simblet KC (instructed by **Hodge, Jones and Allen Solicitors**) for **Jake Handling (Defendant) and Jessica Branch (Interested Person)**

Hearing dates: 5 May 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on 14 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE SWEETING

MR JUSTICE SWEETING :

Introduction

1. I granted interim injunctive relief to the Claimant while sitting as the interim applications judge during the court vacation. This is my judgment following the return date when I heard oral argument. There were further written submissions after the hearing had taken place.

2. The Claimant is North Warwickshire Borough Council (the "Council"). The Council sought an interim anticipatory injunction, an order for alternative service and a power of arrest. There were both named and unnamed defendants ("persons unknown").

3. The Council is a democratic body controlled by elected Councillors answerable to the people of the borough of North Warwickshire. The borough includes Kingsbury which is a small, but ancient, town and parish situated between Birmingham and Tamworth. Kingsbury lies on the course of the River Tame, a major tributary of the River Trent, and is known, amongst other things, for the Kingsbury Water Park. There are eight statutory sites of special scientific interest in the area, seven local nature reserves and 27 non-statutory sites of local importance. Kingsbury has a primary and secondary school.

4. According to the most recent, although now dated, population census there are nearly 8,000 inhabitants in the parish area. The M42 motorway runs to the west and north of the town and joins the M6 motorway a few miles to the south. To the east of the town is the Kingsbury Oil Terminal ("the Terminal").

The Kingsbury Terminal

5. The Terminal is a complex of individual oil terminals operated by Shell UK Ltd United Kingdom, Oil Pipelines Ltd, Warwickshire Oil Storage Ltd and Valero Energy Ltd. These companies share assets such as fire-fighting systems and have formed a user group to address common issues, particularly in relation to safety. Some parts of the complex are no more than a few hundred metres from the eastern boundary of the town and close to residential areas.

6. The Terminal is described as "multi-fuel"; storing petrol, diesel, heating oils and jet fuel, in some 50 storage tanks. Fuel is supplied by the United Kingdom Oil Pipeline System through pipelines entering the site underground. There are further storage tanks which contain ethanol (biofuel) which is brought in by road. With a storage capacity of around 405 million litres, the terminal is the largest inland oil storage depot in the United Kingdom.

7. The Terminal is an upper tier site for the purposes of the Control of Major Accident Hazards Regulations 2015 ("the 2015 Regulations"). An "upper tier site" is designated a "high risk establishment" by reason of the quantity of dangerous substance stored on site. Emergency access to the Terminal is critical in the event of a "major accident". Regulation 2 of the 2015 Regulations define a "major accident" as: *"An occurrence such as a major emission, fire, or explosion resulting from uncontrolled developments in the course of the operation of any establishment to which these Regulations apply and leading to serious danger to human health or the environment (whether immediate or delayed) inside or outside the establishment and involving one or more dangerous substances"*.

8. The presence of highly flammable products creates a risk of gas vapour igniting if fuel is released and a vapour cloud forms. The nature of that risk is now a matter of experience rather than conjecture. On 11 December 2005 there was major fire at an oil storage facility at the Buncefield Oil Storage Terminal in Hertfordshire. Both the causes and consequences of that fire are public knowledge because it was the subject of a "major incident report". The fire burned for five days, 43 people were injured and about 2,000 were evacuated from their homes. The fire started when fuel escaped from a storage tank and vapour was ignited. The Buncefield terminal is smaller than the Kingsbury site. The need for stringent measures to ensure that a risk of this sort does not eventuate at an oil terminal such Buncefield or Kingsbury is self-evident.

9. At Kingsbury, all employees and contractors entering the Terminal undergo training to ensure that they are aware of the risks of working with hazardous substances and do not do anything which might put them or the wider public in danger. Due to the risk of fire and explosion, electrical equipment such as mobile phones, key fobs and pagers, together with lighters and matches are designated as "controlled items", under an operational plan prepared by the Warwickshire Fire and Rescue Service, and are strictly prohibited within the site perimeter.

10. The boundaries of the sites forming the Terminal complex are fenced with chain link or palisade fencing. Pedestrian access is tightly controlled by turnstile gates. There are locked, hinged gates for tanker access. Visitors and employees are required to have designated passes. Manned security and CCTV are in operation around the clock on each day of the year.

11. The Terminal is a critically important supply point for the Midlands, providing fuel to forecourts, public services and major regional airports, such as Birmingham International and East Midlands. Although incoming fuel is supplied through pipelines (except for additives or biofuels), it is distributed from the Terminal using road tankers. Hundreds of tankers come and go from the Terminal every day. They are allowed access only if they are registered and have gone through a driver and vehicle accreditation process.

Protest at the Terminal

12. Protests began at the Terminal during March 2022 and continued on successive days into April. At the time of the initial injunction application, the protests had been characterised, amongst other things, by protestors:

    a. Gluing themselves to roads so preventing access to the Terminal;

    b. Breaking into the Terminal compounds by sawing through gates and trespassing on private land;

    c. Climbing onto storage tanks containing unleaded petrol, diesel and fuel additives;

    d. Using mobile phones within the Terminal to make video films of their activities including while standing on top of oil tankers and storage tanks and next to fuel transfer equipment;

e. Interfering with oil tankers by climbing onto them and fixing themselves to the roof or by letting air out of their tyres, often once traffic had first been brought to a standstill by protestors glued to the road;

f. Obstructing the public highway and the entrances to the Terminal as well as the slip roads at junction 9 and 10 of the M42, causing tailbacks on the motorway; and

g. Using climbing equipment to abseil from a road bridge to gain access to the Terminal.

13. These activities were highly organised and coordinated, often involving large groups. The police had stopped a group of protestors with a van containing climbing ropes, a large quantity of timber and "lock on" devices, all of which was to be used to build and occupy a structure in a tree. Another group blocked an entrance to the Terminal by lying on mats in the roadway with their hands glued to the ground preventing personnel working at the Terminal from entering or leaving. There were repeated incidents involving the blocking of gates in ways that prevented protestors being removed physically. This not only caused the Terminal, or parts of it to shut, interrupting supplies of fuel but in the event of an incident would have prevented access by emergency services. One of the tactics employed to gain entry to the Terminal was to gather in large numbers at an entrance and "swarm" in when a gate was opened.

Protest on 7th April

14. At half past midnight on the 7th of April a group of protesters approached one of the main Terminal entrances and attempted to glue themselves to the road. When the police were deployed to remove them a second group of some 40 protesters approached the same enclosure from fields to its rear. This second group then used a saw to break through an exterior gate and scaled fences to gain access. Once inside, they locked themselves onto a number of different fixtures including the tops of three large fuel storage tanks containing petrol, diesel and fuel additives, the tops of two fuel tankers and the "floating roof" of a large fuel storage tank. A "floating roof", as its name suggests, is a roof which floats on the surface of stored liquid hydrocarbons. The ignition of liquid fuel or vapour in such a storage tank is again an obvious source of risk to life and health. The protestors used locks and equipment they had brought with them to secure themselves. A complex and challenging policing operation was required using specialist teams working alongside the terminal staff and the fire service to remove the protesters. It took until 5pm in the afternoon to clear all of them from the compound and the roadway, leading to 127 arrests.

Protest on 9th April

15. A significant degree of planning and preparation was evident. On the 9th of April protesters placed a caravan at the side of the road on Piccadilly Way which is the main route running South of the Terminal. The caravan was heavily reinforced with corrugated iron and pallets to prevent entry. About 20 protesters glued themselves to the sides and top of the caravan whilst others attempted to dig a tunnel under the road through a false floor inside. The fact that tunnelling was taking place was disguised by the use of the caravan. Multiple arrests were made but two protesters remained in the tunnel and two remained on top of the caravan until the late afternoon of the following

day. The road remained closed over the entire period while specialist removal teams attended. The Council had to assess the structural integrity of the road which then required expensive repairs and further reinforcement. The road is used by heavily laden oil tankers leaving the terminal as well as local traffic. The collapse of a tunnel as a tanker passed over it courted the risk not only of injury to the driver of the vehicle and anyone nearby, including in the tunnel itself, but also of the escape of its liquid load. Tunnelling activity raised the prospect of inadvertent or deliberate damage to oil pipelines.

16. Planned attempts to break into the Terminal or climb onto vehicles involved groups of protestors congregating at entrance points where the gates had to be opened to allow waiting tankers to enter. Using cutting tools to gain entry elsewhere necessarily involved approaching and standing next to the Terminal fences.

The Local Effect of Protest

17. The protests caused fuel shortages across the West Midlands region. The Council had to give "mutual aid" to Nuneaton and Bedworth Borough Council in order to allow essential statutory services to keep running.

18. The problems faced by the police were summarised in a witness statement from the Assistant Chief Constable, Mr Smith:

> "the scale and duration of the policing operation has been one of the most significant that I have experienced in my career. Large numbers of officers, drawn from right across the force, have been deployed to Kingsbury day and night since the 1st of April. This has meant that we have had to scale down some non-emergency policing services, including those that serve North Warwickshire. Although core policing services have been effectively maintained across the county during this, the protests have undoubtedly impacted on the quality and level of the policing services that we are able to deliver. Officers who may have ordinarily been policing the communities of North Warwickshire, the road networks of North Warwickshire, or supporting victims of crime in North Warwickshire have had to be redeployed to support the policing operation linked to Kingsbury. It has also meant that we have had to bring in additional officers from other regional forces, in addition to more specialist teams such as working at heights teams and protestor removal teams. All of these will come at significant additional costs to the force and ultimately the public of Warwickshire. The impact on the local community has been substantial. There have been almost daily road closures of the roads around the oil terminal which has created disruption and inconvenience. The M42 has also been disrupted on occasions as a result of the protest activity. There has been a significant policing presence since the 1st of April which I am sure has created a level of fear and anxiety for the local community. The policing operation has also extended into unsociable hours, with regular essential use of the police helicopter overnight disrupting sleep. The reckless actions of the protesters has also created increased risk of potential fire or explosion at the site which would likely have catastrophic implications for the local community including the risk of widespread pollution of both the ground, waterways and air. Finally, the actions of the protesters has impacted the supply of fuel to petrol forecourts in the region leading to some shortages, impacting upon not only local residents but the broader West Midlands region."

19. Mr Smith concluded:

> "I have grave concerns for public safety should the behaviour of the protesters continue in its current form. The Kingsbury site is an extremely hazardous site where the very presence of certain items and clothing on site is restricted because of the potential dangers of explosion or fire. The protesters have had no regard for their own or others safety with actions including the use of mobile phones on site (strictly prohibited), the scaling and locking on to very volatile fuel storage tanks, the tunnelling activity in close proximity to high pressure fuel pipes, and the forced stopping, and then scaling, of fuel tankers on the public highway. Not only does this cause unacceptable levels of risk to themselves and the public, it also puts my officers in significant danger as they have to attempt to remove them from the places they have decided to put themselves."

Earlier Court Orders and the Escalation of Protest Activity

20. An injunction was obtained by Valero Energy Ltd on 21 March 2022 for the part of the Terminal which it occupies (and other sites elsewhere in the country). It did not extend to the highways affected and could not be supported by a power of arrest. That court order and the actions of the Police in carrying out numerous arrests for suspected criminal offences, appeared to have little if any effect. The evidence from the Chief Executive of the Council, Mr Maxey, was that the behaviour of protestors had consistently worsened and become bolder and more dangerous between the 1st and the 11th of April. His evidence referred to a conversation with Mr Briggs the Assistant Chief Fire Officer for Warwickshire Fire and Rescue service in which Mr Briggs, having seen pictures of protesters using phones from the top of tankers, commented:

> "I don't think they have any understanding of the level of risk they are posing to themselves or others through their actions."

21. Mr Maxey regarded the incident of the 7th of April (referred to above) as having changed the position significantly in relation to public safety and the risk of serious environmental pollution. The attempt to tunnel on the 9th of April, given that oil is delivered by underground pipes, was viewed by the Council as marking a serious escalation such that it determined:

> "to use its powers to seek an injunction with a power of arrest to seek to control the locations in which and the manner in which the current protests at the terminal are conducted."

22. The Council were concerned that without effective measures in place there would be a risk of a major accident so that the need to seek an injunction was urgent. Mr Maxey explained the balancing exercise that the Council had sought to carry out and the nature of its concerns in his first witness statement:

> "14. In reaching this conclusion, I have sought to strike a balance between the rights of the protesters and the rights of the community within the North Warwickshire area to be kept safe from the risk of a major emergency at the terminal and to be protected from nuisance, criminality and anti-social behaviour that has characterised these protests.

> 15. My reference to the community within North Warwickshire is a reference to all the people within the borough who are affected in different ways, including staff at the terminal, workers from other companies who attend there for their jobs, local residents, and businesses, all of whom are affected by the disruption. I also include other road users who have been affected by protestors on motorway slip roads and other highways causing blockages by their dangerous activities, members of the emergency services who are required to attend the Terminal on a daily basis and who would be forced to deal with the consequences of fire or explosion there, the protestors themselves whose safety is at risk and all those other members of the public and the borough who are affected by the disruption and whose safety would be compromised by an emergency at the Terminal."

23. In a subsequent witness statement Mr Maxey confirmed that as a public authority the Council faces protests on a range of issues from time to time but had never sought injunctive relief against protestors. He emphasised that the Council had issued the present proceedings because it regarded the actions of protesters as giving rise to "wholly unacceptable risks to public safety and the environment".

The Without Notice Application

24. The application was sought against two categories of defendant. First, named defendants who had come to the attention of the police on arrest; secondly "persons unknown" identified as "persons unknown who are organising, participating in or encouraging others to participate in protests against the production and or use of fossil fuels, in the locality of the site known as Kingsbury Oil Terminal, Tamworth B78 2HA." I consider the definition of this second category of defendant later in this judgment.

25. The application was, broadly, to restrain acts of trespass and or nuisance in the circumstances I have summarised. I concluded that the application was urgent and that an application without notice was justified given the likelihood that further protest would take place over the Easter weekend and that giving formal notice might lead to a further escalation in unlawful conduct. The Council's concerns in this respect proved prescient.

26. As Mr Manning and Ms Crocombe, counsel for the Council, observed in their subsequent written submissions the attachment of a power of arrest (as well as the extent of any exclusion zone and the extension of the injunction to the public highway) was "the subject of considerable judicial scrutiny" at the hearing on the 14th of April. The order made did not prohibit obstruction of the highway which I considered would inevitably involve questions of fact and degree which could not be assessed in advance and would be inappropriate where the injunction was sought, in part, against "persons unknown" supported by a power of arrest.

The Exclusion or "Buffer" Zone

27. The Council sought an exclusion, or "buffer zone" around the Terminal, extending to the boundaries of the town and, in some directions, hundreds of meters from the fences surrounding the Terminal. The rationale was to follow linear features in the landscape which would be easy to identify. However, the effect would also have been to displace protest, including lawful protest, to a considerable distance from the Terminal. In

practice, a buffer zone of this extent would have meant that protest could not take place on the public highway around the Terminal at all; the nearest points outside the exclusion zone being in Kingsbury itself or near a small housing estate to the northeast of the Terminal. The argument for an exclusion zone was predicated upon the fact that there had been organised and determined attempts to breach the perimeter fences together with the significant risks arising from the behaviour of protestors once entry had been obtained. Entering the Terminal by scaling or cutting through fencing necessarily involved approaching or congregating alongside the fences. This was the precursor to the most serious tortious and criminal conduct which the Council was seeking to restrain. The Court's powers to grant interlocutory injunctive relief under section 37 of the Supreme Court Act 1981 are not limited to restraining conduct which is itself tortious or otherwise unlawful (see further below) and may include measures which are necessary to ensure that injunctive relief is effective to protect a legitimate interest of the claimant (see *Burris v Azadani* [195] 1 WLR 1372).

28. In *Thames Cleaning and Support Services Ltd v United Voices of the World* [2016] EWHC 1310 Warby J. (as he then was) made an order incorporating an exclusion zone of 10 metres from the entrance or exists of premises at which protest was taking place in connection with industrial action. He concluded that the actions of protestors were likely to go beyond the limits of lawful protest and had involved incursions onto private land and obstruction and interference with lawful activities, In relation to the exclusion zone, he said at [55]:

> "This seems to me in principle to be a legitimate approach. It is one which has been taken regularly over several years in cases concerned with striking a balance between the protest rights of animal rights campaigners and those of research organisations and their staff. Such an order sets no limit on the kinds of speech that may be used by those involved in a protest. It defines where protest may take place. It is possible to frame an order of this kind which sets clear boundaries, without destroying the essence of the right to protest, which does not depend on location, and without interfering disproportionately with Article 10 and 11 rights: see *Appleby v United Kingdom* (2003) 37 EHRR 38 [47], *Manchester Ship Canal Developments Ltd v Persons Unknown* [2014] EWHC 645 (Ch) [37], where the court was concerned with a protest camp in the vicinity of a fracking site. I am prepared in principle to grant such an order."

29. Another example is *MBR Acres Ltd v Free the MBR Beagles* [2021] EWHC 2996 (QB), 2021 WL 05234982 where the order made provided for an exclusion zone around the immediate entrance to the site outside of which protest was taking place. The central complaint in that case was in relation to the protestors' activities when people entered or left the site.

30. I accepted in the circumstances that an exclusion zone was justified but concluded that it could be limited to five meters from the boundary fences without interfering significantly with lawful protest. An exclusion zone around the entire perimeter was necessary, in my view, because protestors had sought to cut through fences and enter the Terminal at various points. A short distance of this length could easily be estimated and would make the actions of any protestors intent on gaining entry to the Terminal obvious. Because of the relatively isolated nature of the Terminal site an exclusion zone of this extent did not give rise to the concerns identified by the Court of Appeal in *Canada Goose -v- Persons Unknown* [2020] EWCA Civ 303 [93] where an exclusion

zone on a busy shopping street had an inevitable impact on "neighbouring properties and businesses, local residents, workers and shoppers".

31. Although the five metre zone impinged to some extent on the highway, mostly in the vicinity of entrances to individual compounds, the injunction did not prevent the Defendants "from using any public highway within the buffer zone for the purpose of travelling to or from a protest held, or to be held, outside the buffer zone." The individual enclosures are surrounded by privately owned farmland, a military range and railway sidings save where parts of the boundary fencing run along roads. Most of the five metre zone was therefore on private land where there was no right to protest. Protest could only feasibly take place on or close to the public highway, including the verges alongside the metalled roads. The conduct which, for this purpose, the Council sought to prevent, in so far as it did not involve cutting through or climbing over fences, was mainly directed at the entrances to the terminals where vehicles entered and exited and were required to halt so that gates could be opened. I concluded that this could be addressed by the specific prohibitions which the Council sought. Although there was evidence that long tailbacks had been caused on the nearby motorways, I reached the view that this could, if necessary, properly be dealt with through the medium of existing police powers to prevent obstruction of a public highway.

32. In *DPP v Ziegler* [2021] UKSC 23 the Supreme Court, decided by a majority that even a deliberate obstruction which was more than minimal, and prevented other users from using the highway, could constitute lawful protest on the highway and that the proportionality of any interference with the qualified rights under Articles 10 and 11 of the European Convention on Human Rights ("ECHR") would fall to be considered (see further below).

33. In *City of London Corpn v Samede* [2012] PTSR 1624 Lord Neuberger of Abbotsbury MR identified factors which were to be considered in assessing proportionality. The non-exhaustive list included:

> "the extent to which the continuation of the protest would breach domestic law, the importance of the precise location to the protesters, the duration of the protest, the degree to which the protesters occupy the land, and the extent of the actual interference the protest causes to the rights of others, including the property rights of the owners of the land, and the rights of any members of the public."

34. The actions of protestors in this case went well beyond what was being considered in *Ziegler*, in terms of the nature, duration and effect (both actual and potential) of the protest. As I did not accede to the Council's proposal that the injunction should expressly extend to prohibiting obstruction of the highway, the limited exclusion zone in my view struck a fair balance and was a proportionate interference with the exercise of Convention rights. I consider the application of Articles 10 and 11 generally and in relation to other provisions of the injunction later in this judgment.

35. I concluded that a power of arrest was necessary given the significant risk of harm arising from the nature of the protests and that the requirements for interim injunctive relief at a without notice hearing had been met (see further below).

Protest on 22-23rd April

36. Following the granting of the interim injunction there was a serious incident involving an incursion into one of the compounds at the Terminal by two protestors. The police became aware that they had entered the compound at 23.30 on 22nd April. It is not clear how they had done so but plainly it was by stealth given that the Terminal is manned and secured by fencing.

37. When the police attended at the compound, they found two men on the roof of a bay which formed part of a fuel filling station. Both had mobile phones and other items capable of igniting fuel vapour. After a short while one of the protestors came down from the pipework and confirmed to the police that both were aware of the injunction. The remaining protestor stayed in the roof space for several hours before he also came down and was arrested.

38. Some hours later the control room noticed that fuel additive was not being injected into some of the tanks. The fuel bay concerned was closed down and an investigation began. When the CCTV record was examined it showed the protestor who had remained longest tampering with and moving valves. The footage recorded him testing whether valves could be moved by hand and, if they could, trying to move them. He can have had no knowledge of whether what he was doing would lead to an escape of liquid fuel or vapour, or would otherwise have harmful and potentially dangerous effects. As the Claimant subsequently observed, this was precisely the high risk associated with entry to the Terminal that had prompted the application for the injunction.

The Effect of the Injunction

39. The incident of 22-23rd April proved to be the last significant incident before the return date. The Claimant's summary of the position was:

> "After a period of continuing unlawful and dangerous behaviour by protestors, there has more recently been a marked decline in kinds of unlawful behaviour that formed the basis for the claim. In particular, the events of 22-23 April 2022 ...were the last occasion on which the boundaries of the Terminal were breached. The last time the entrances to the terminal were obstructed was on 26 April 2022. The Claimant is not aware of tunnelling activity or other conduct breaching para.1(b) of the Injunction since that date."

40. Mr Maxey made a further statement dated 3rd May in which he commented:

> "The chronology of events at Kingsbury Oil Terminal have moved from unlawful actions, then the granting of the Order and then a move to lawful and legitimate forms of protest. In my opinion the evidence shows that the move to lawful and legitimate forms of protest would not have come about but for the granting of the Order..."

The Return Date

41. On the return date Mr Simblet KC was instructed to represent Jake Handling and Jessica Branch to resist the Council's application to continue the interim injunction until trial and to apply for its discharge. Mr Handling was one of the protestors involved in the incident on 22nd April (referred to above). It was Mr Handling who had been captured on CCTV attempting to open valves. Jessica Branch was not a defendant, had not

protested at the Terminal and did not seek to be made a defendant. She did not appear to have been affected directly by the injunction but, it was said, she might be in future. She wished to make representations about the application for injunctive relief and the importance of the right to protest. The Council did not oppose her doing so and I was assisted by, and grateful for, Mr Simblet's oral submission, and Mr Simblet and Mr Greenhall's submissions in writing. Jessica Branch appears to have instructed, or funded the instruction of, counsel in other cases involving protest. I did not reach any view as to her standing given the absence of objection and that counsel were representing Jake Handling (a named defendant) and making submissions on his behalf which were not identified as being distinct from any made on behalf of Jessica Branch. In those circumstances there was no argument as to whether she fell within CPR 40.9. which had not been raised expressly in the written arguments as a basis for her participation. The Council had served further evidence but with the exception of the witness statement from Jessica Branch's solicitor there was no evidence from any person affected or from any defendant.

Summary of the Defendants' Submissions

42. Mr Simblet made a number of submissions in his initial skeleton argument in relation to whether or not there had been compliance with the obligations placed on those seeking an interim injunction. A number of the suggested deficiencies which he relied upon appear to have been due to the lack of contact details or knowledge of the identity of defendants. As I have indicated, Jessica Branch, whose solicitor provided a witness statement on this point, was not a party and had not protested at Kingsbury and was not therefore in the contemplation of the Council as an affected party. The Council's skeleton argument for the initial hearing dealt with the relevant law and the points that might be made in opposition. The evidence justified the need for urgent relief and the decision not to give formal notice. It explained why it was not possible for the Council to identify the persons concerned or likely to be concerned in the conduct it sought to prohibit, apart from the named defendants. The need for an exclusion zone and a power of arrest was tested in the course of the application. The interpretation of the relevant statutes was discussed and alterations made to the draft order. The note of hearing bears out these observations. I am satisfied that the Council complied with its obligations at the without notice hearing and subsequently.

43. Mr Simblet's written submissions characterised the exclusion zone as a disproportionate interference with Articles 10 and 11 of the ECHR in relation to demonstrations on the public highway. I do not accede to that submission for the reasons already given. I have considered separately (below) whether other provisions of the order interfere with Article 10 and 11 rights.

44. Mr Simblet also argued that:

    a. There was no cause of action pursuant to which the injunction could be granted;

    b. There was no entitlement to a power of arrest as the injunction was not made for the benefit of a person suffering nuisance or annoyance;

    c. The definition of 'Persons Unknown' was too broad and did not comply with *Canada Goose* requirements;

d. The service provisions were inadequate;

e. The order was likely to have a chilling effect on protest.

The Injunction

45. The Council had continued to review the effect of the injunction against the background set out above, including the change in protestor behaviour. As it did not seek to stifle or restrict lawful protest in the five-meter buffer zone, the Council no longer identified any need for such an exclusion zone by the return date. The original order, which the Claimant sought to continue to trial, was amended to remove the exclusion zone. The prohibitions then read as follows:

> "1. The Defendants SHALL NOT (whether by themselves or by instructing, encouraging or allowing any other person):
>
> (a) organise or participate in (whether by themselves or with any other person), or encourage, invite or arrange for any other person to participate in any protest against the production or use of fossil fuels, at Kingsbury Oil Terminal (the "Terminal"), taking place within the areas the boundaries of which are edged in red on the Map attached to this Order at Schedule 1.
>
> (b) in connection with any such protest anywhere in the locality of the Terminal perform any of the following acts:
>
> (i) entering or attempting to enter the Terminal
>
> (ii) congregating or encouraging or arranging for another person to congregate at any entrance to the Terminal
>
> (iii) obstructing any entrance to the Terminal
>
> (iv) climbing on to or otherwise damaging or interfering with any vehicle, or any object on land (including buildings, structures, caravans, trees and rocks)
>
> (v) damaging any land including (but not limited to) roads, buildings, structures or trees on that land, or any pipes or equipment serving the Terminal on or beneath that land
>
> (vi) affixing themselves to any other person or object or land (including roads, structures, buildings, caravans, trees or rocks)
>
> (vii) erecting any structure
>
> (viii) abandoning any vehicle which blocks any road or impedes the passage of any other vehicle on a road or access to the Terminal
>
> (ix) digging any holes in or tunnelling under (or using or occupying existing tunnels under) land, including roads;
>
> (x) abseiling from bridges or from any other building, structure or tree on land or

(xi) instructing, assisting, or encouraging any other person to do any act prohibited by paragraphs (b)(i)-(x) of this Order."

46. The areas referred to as being edged in red under paragraph 1(a) were the areas enclosed by the fenced boundaries of the Terminal. The prohibition at 1(a) therefore referred entirely to protest on private land to which there was no right of access and where, on the evidence, some of the most dangerous conduct had taken place.

47. Paragraph 1(a) in its original form was:

> "1. The Defendants SHALL NOT (whether by themselves or by instructing, encouraging or allowing any other person):
>
> (a) organise or participate in (whether by themselves or with any other person), or encourage, invite or arrange for any other person to participate in any protest against the production or use of fossil fuels, at Kingsbury Oil Terminal (the "Terminal"), taking place within the areas the boundaries of which are edged in red on the Map attached to this Order at Schedule 1, or within 5 metres of those boundaries (edged in red) (the "buffer zone").
>
> For the avoidance of doubt, this prohibition does not prevent the Defendants from using any public highway within the buffer zone for the purpose of travelling to or from a protest held, or to be held, outside the buffer zone."

48. The provisions for alternative service were set out at Schedule 2 and were:

> "1. Service of the Claim Form and this Order shall be effected by
>
> (i) placing signs informing people of
>
> (a) this Claim,
>
> (b) this Order and power of arrest, and the area in which they have effect and
>
> (c) where they can obtain copies of the Claim Form. Order and power of arrest, and the supporting documents used to obtain this Order in prominent locations along the boundary of the buffer zone referred to at para.1 of this Order and particularly outside the Terminal and at the junctions of roads leading into the zone,
>
> (ii) placing a copy prominently at the entrances to the Terminal;
>
> (iii) posting a copy of the documents referred to at para.1(i)(c) above Order on its website, and publicising it using the Claimant's Facebook page and twitter account, and posting on other relevant social media sites including local police social media accounts, and/or.
>
> (iv) any other like manner as the Claimant may decide to use in order to bring the Claim Form and this Order and power of arrest to the attention of the Defendants and other persons likely to be affected.

> 2. If the Claimant intends to take enforcement proceedings against any person in respect of this Order, the Claimant shall, no later than the time of issuing such proceedings, serve on that person,
>
> (i) a copy of the Claim Form and all supporting documents relied on to obtain this Order; and
>
> (ii) a copy of this Order and power of arrest.
>
> 3. The Court will consider whether to join the person served to the proceedings as a named Defendant and whether to make any further Order."

49. Similar provisions for alternative service by the use of notices in conspicuous positions in the area where an injunction applies have been adopted in other "persons unknown" cases involving protest and are necessary if injunctive relief is to be effective. The fact that defendants cannot be identified in advance may constitute a good reason under the provisions of CPR 6.15(1) for the normal provisions for service to be departed from. Given the nature of the Terminal site, in open countryside with limited public routes by which it can be approached, I considered that the methods proposed could reasonably be expected to bring the court's orders to the attention of anyone wishing to protest at the Terminal site: *Cameron -v- Liverpool Victoria Insurance Co Ltd* [2019] 1 WLR 1471 [21]. That would not, of course, prevent an argument that the provisions for alternative service had operated unfairly against anyone facing a committal application for breach of the injunction (*Secretary of State for Transport v Cuciurean* [2020] EWHC 2614 (Ch) [63]). The provision at (iv) was intended to allow the Council to add methods of service of a similar type to those set out at (i-iii) if it emerged that they were likely to bring the order to the attention of those protesting at the Terminal. It followed on from the words "and/or" at (iii). To avoid any confusion as to whether (iv) is an entire alternative to other methods rather than an adjunct, the word "or" should have been avoided.

50. There was no evidence served on behalf of Mr Handling that he did not know of the terms of the injunction. At his committal hearing for breach of the injunction by reason of his participation in the incident on 22-23rd April the evidence established that he was aware of it at that time. This suggested that protestors had quickly became aware of the order as a result of the methods of alternative service used and, no doubt, from others because of the organised nature of the protests.

51. There has been a subsequent order in relation to service, at a hearing of an application to add additional named defendants (in effect persons unknown who had become known to the Council) and to make directions for trial. The provisions for alternative service for these defendants reflect the information the Council has as to whether defendants have a fixed postal address, e-mail addresses or can be contacted via particular websites Where there are no direct methods of contact the order provides for various methods of publicising the application and the supporting documents.

The Legal Framework

The Power of the Council to Seek Injunctive Relief

52. The Council has statutory powers to institute civil proceedings, including seeking injunctive relief to protect its local population, under s.222(1), Local Government Act 1972 ("the 1972 Act"). It also has a general power to do anything which an individual with full capacity can do pursuant to section 1 of the Localism Act 2011.

53. Section 222 of the 1972 Act provides:

> "(1) Where a local authority consider it expedient for the promotion or protection of the interests of the inhabitants of their area—
>
> (a) they may prosecute or defend or appear in any legal proceedings and, in the case of civil proceedings, may institute them in their own name..."

54. It was common ground that this provision does not give rise to a cause of action but gives local authorities the right to seek to protect public rights where such proceedings previously required the consent of central government by way of a relator action brought in the Attorney General's name.

55. Mr Simblet argued that the Council had failed to identify any damage that it had itself suffered or would suffer and that this was a prerequisite to the injunctive relief sought. However, and as he subsequently conceded, proof of special damage is not required in relator actions; nor is it a requirement under section 222 of the 1972 Act. The Council was acting on behalf of the local population to protect it from the potentially serious consequences of the actions of protestors.

56. In *Stoke on Trent CC v B&Q Retail* [1984] A.C. 754, Lord Templeman said, at p.773G:

> "In proceedings instituted to promote or protect the interests of inhabitants generally, special damages are irrelevant and were therefore not mentioned in section 222."

57. Mr Simblet submitted that it was an "insuperable problem" for a claim brought under section 222 of the 1972 Act that the Council does not have a responsibility to enforce the private rights of others by which he meant the owners or operators of the Terminal. I think the short answer to this point is that the Council were not seeking to do so.

58. In the present proceedings the Council took action in order to:

    a. prevent a public nuisance and;

    b. in support of the criminal law.

59. These are recognised bases for relator actions and hence for the exercise of the power conferred by section 222 of the 1972 Act (see, for example, *Worcestershire County Council v Tongue* [2004] EWCA Civ 140).

60. There were two further, similar, factors which Mr Simblet characterised as insurmountable obstacles to the granting of an injunction. These were that there was no one individual who could be said to be continually flouting the criminal law, and that there was no identifiable tortfeasor continuing to act in a way which required restraint. His contention was that it was not possible to aggregate the activities of a number of individuals to produce a composite defendant. I doubt that the premise of this

submission, the absence of an identified individual, is factually correct. Jake Handling, for whom he appeared, had arguably engaged in conduct that was both tortious and criminal, as had other named defendants. Although these are Part 8 proceedings the Council had drafted Particulars of Claim which give details of the conduct of named defendants. No evidence was served disputing the accounts given in the evidence relied on by the Council as to the nature of protest at the Terminal.

61. What might be regarded as the point of principle is also, in my view, not maintainable. Both the criminal law and the law of tort have well developed doctrines of joint participation and accessory liability. The common design which was evident in the incidents of 7th and 9th April plainly involved a number of protestors acting together even if they played different parts (see above). The police had made numerous arrests prior to the grant of injunctive relief. The injunction was aimed at preventing and controlling behaviour that gave rise to significant public risk arising from tortious behaviour or the commission of crimes by individuals. There was ample evidence on which to conclude that either the named defendants or persons unknown would continue that behaviour. The Council was not seeking to amalgamate disparate innocent activity to produce a public nuisance or a criminal act. The acts relied upon were of the same type by groups of people acting in combination in the same place.

The Highways Act

62. The Council also relied on its obligations under section 130 of the Highways Act 1980 ("the 1980 Act"), which provides:

> "130. - Protection of public rights.
>
> (1) It is the duty of the highway authority to assert and protect the rights of the public to the use and enjoyment of any highway for which they are the highway authority, including any roadside waste which forms part of it.
> (2) Any Council may assert and protect the rights of the public to the use and enjoyment of any highway in their area for which they are not the highway authority, including any roadside waste which forms part of it.
> (3) Without prejudice to subsections (1) and (2) above, it is the duty of a Council who are a highway authority to prevent, as far as possible, the stopping up or obstruction of—
> (a) the highways for which they are the highway authority, and
> (b) any highway for which they are not the highway authority, if, in their opinion, the stopping up or obstruction of that highway would be prejudicial to the interests of their area.
> (4) Without prejudice to the foregoing provisions of this section, it is the duty of a local highway authority to prevent any unlawful encroachment on any roadside waste comprised in a highway for which they are the highway authority.
> (5) Without prejudice to their powers under section 222 of the Local Government Act 1972 , a Council may, in the performance of their functions under the foregoing provisions of this section, institute legal proceedings in their own name, defend any legal proceedings and generally take such steps as they deem expedient."

63. The potential overlap between s.222 of the 1972 Act and s.130 of the 1980 Act was considered by the Court of Appeal in *Nottingham City Council v Zain* [2001] EWCA Civ 1248 where Schiemann LJ said at [16]:

> "Mr Wise submitted that the existence of the power conferred by s.130(5) of the Highways Act indicated that section 222 was not to be used in such Highways Act cases. I do not consider that s.130(5) in any way diminishes the power which had been conferred by section 222 of the Local Government Act which had been passed 8 years earlier. It does not purport to have that effect. Indeed the opening words of section 130 point in the opposite direction. Furthermore the preconditions which must be fulfilled in relation to the use of the section 222 power - that the authority deem that use to be expedient for the promotion or protection of the interests of the inhabitants of their area - do not need to be fulfilled in relation to the use of the powers conferred by section 130. These are imperfectly overlapping sections and it is not permissible to read down s.222 by reference to s.130(5) of the later Act".

64. The provisions of section 130 of the 1980 Act confer statutory power on the Council, as the local authority but not highway authority for the area, to assert and protect the rights of the public to use the highway and any highway waste (the area that runs alongside the highway) and to prevent any obstruction or encroachment. This section does not appear to me to create a cause of action in itself and that was not the basis on which the application was made but it did mean that the Council could not simply sit on its hands. The latitude that may need to be afforded to lawful protest which causes a temporary obstruction does not extend to the undermining of the highway by tunnelling or the deliberate obstruction of verges, over many hours, by parking caravans on them to facilitate tunnelling.

Public Nuisance

65. In *Nottingham City Council v Zain* [2001] EWCA Civ 1248 Scheimann LJ adopted the definition of public nuisance set out in earlier case law:

> "8...The following passage from the judgement of Romer L.J. in *Attorney−General v PYA Quarries Ltd*. [1957] Q.B. 169 at 184 has generally been accepted as authoritative.
>
> > "I do not propose to attempt a more precise definition of a public nuisance than those which emerge from the textbooks and authorities to which I have referred. It is, however, clear, in my opinion, that any nuisance is "public" which materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects. The sphere of the nuisance may be described generally as "the neighbourhood"; but the question whether the local community within that sphere comprises a sufficient number of persons to constitute a class of the public is a question of fact in every case. It is not necessary, in my judgment, to prove that every member of the class has been injuriously affected; it is sufficient to show that a representative cross−section of the class has been so affected for an injunction to issue."

66. He went on:

> "9. Not everyone however is entitled to sue in respect of a public nuisance. Private individuals can only do so if they have been caused special damage. Traditionally the action has been brought by the Attorney General, either of his own motion, or, as was the situation in the *PYA* case, on the relation of someone else such as a local authority. In *Solihull Council v Maxfern Ltd* [1977] 127, Oliver J. considered the history of the legislative predecessors of s.222 and concluded that the effect of section 222 is to enable a local authority, if it thinks it expedient for the promotion or protection of the interests of the inhabitants of their area, to do that which previously it could not do, namely, to sue in its own name without invoking the assistance of the Attorney General, to prevent a public nuisance. I recognise that in that case the Local Authority was not suing in nuisance but rather was enforcing the criminal law in an area for which it had been given express responsibility, namely the enforcement of the Sunday trading provisions of the Shops Act 1950. Nonetheless I respectfully agree with Oliver J.'s conclusion in relation to suing in nuisance.
>
> 10. Mr Wise who appeared for the respondent rightly submitted that in cases such as the present there was another principle engaged. This was that a local authority, being a creature of statute, could only do that which it was expressly or impliedly empowered to do. However, this principle thus stated is of no assistance when the question at issue is whether s.222 enables a local authority to sue for public nuisance. If the answer to that question is in the affirmative then the principle is satisfied.
>
> 11. There is no doubt that at common law it is a tort to create a public nuisance..."

67. In *PYA* (above) Lord Justice Denning, as he then was, emphasised the role of the Attorney General in defending public rights where the effect of a nuisance would potentially be felt across a community; he said (at p.191):

> "...a public nuisance is a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large."

68. There can be little doubt in my view that a representative cross section of the local community, at least arguably, would be, and had been, affected by the threatened and actual public nuisance that the Council sought to prevent.

69. Mr Simblet submitted that because the Council were not entitled to exercise any legal rights over the Terminal this meant that the land on which they stood could not be "..land or any area, that is properly the subject of a claim in public nuisance." He sought to confine the scope of any claim for injunctive relief to the public highway asserting that the Council had no basis for any claims which went beyond an area to which the public had access.

70. Whilst the obstruction of dedicated roads may be a prevalent example of public nuisance that does not limit the tort to such situations. The tort may be unusual in that it is parasitic on the existence of a crime and vindicates public rather than private rights, but the definition of a public nuisance approved in *Zain* does not preclude activities

taking place on private land from giving rise to a public nuisance; it would be surprising if it did.

71. In *Colour Quest Ltd v Total Downstream UK Plc* [2009] EWHC 540 (Comm); [2009] 2 Lloyd's Rep. 1 (litigation arising out of the Buncefield terminal fire – see above) the explosion for which the defendants were held responsible affected public health over a wide area. The argument that claimants who owned property within the affected area were confined to claims in private nuisance (and not also in public nuisance) was rejected. In *PYA* the relator action arose from the blasting, vibration and dust caused by the operation of a quarry on private land which nevertheless constituted a public nuisance. The person liable for a nuisance is the wrongdoer whether or not they are in occupation of the land on which it arises (*Hall v Beckenham Corp* [1949] 1 K.B. 716).

72. Mr Simblet made additional written submissions following the return date hearing in which he argued that none of the prohibited conduct at paragraph 1(b) of the injunction was capable of amounting to a public nuisance and that this was, in itself, fatal to the relief sought. He gave as an example that "digging a hole" was not a public nuisance and could not therefore be the subject of an injunction obtained to prevent public nuisance. Framing the issue in this way does not seem to me to be a helpful forensic approach. It entirely ignores the significance which attaches to an action as a result of its context. Digging holes on the public highway or land to which the public have access seems to me to be quite capable of constituting a public nuisance; digging holes which undermine the highway all the more so. Equally Mr Simblet did not suggest that digging holes was an intrinsic part of lawful protest.

73. Leaving aside any question as to whether the general proposition is correct as a matter of fact in the present case, given that some of the prohibited conduct is unarguably unlawful and tortious, the submission ignores authority to the opposite effect, that conduct prohibited by an injunction does not have to be unlawful in itself or amount to a tort.

74. In *Burris* Sir Thomas Bingham M.R. said (at 1377 B):

> "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 term (c) of the 28 January 1994 injunction...
>
> 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."

75. A similar observation was made in *Hubbard v Pitt* [1976] QB 142 where Orr L.J said:

> "I accept that the court must be careful not to impose an injunction in wider terms than are necessary to do justice in the particular case; but I reject the argument that the court is not entitled, when satisfied that justice requires it, to impose an injunction which may for a limited time prevent the defendant from doing that which he would otherwise be at liberty to do."

76. On this point both *Burris* and *Hubbard* were approved by the Court of Appeal in *Canada Goose* [78]. In *Caudrilla* Leggatt LJ (as he then was) said [50]:

> "While it is undoubtedly desirable that the terms of an injunction should correspond to the threatened tort and not be so wide that they prohibit lawful conduct, this cannot be regarded as an absolute rule. The decisions of the Court of Appeal in *Hubbard v Pitt* [1976] QB 142 and *Burris v Azadani* [1995] 1 WLR 1372 demonstrate that, although the court must be careful not to impose an injunction in wider terms than are necessary to do justice, the court is entitled to restrain conduct that is not in itself tortious or otherwise unlawful if it is satisfied that such a restriction is necessary in order to afford effective protection to the rights of the claimant in the particular case"

77. In *Canada Goose* the Court of Appeal said [78]:

> "We consider that, since an interim injunction can be granted in appropriate circumstances against "persons unknown" who are Newcomers and wish to join an ongoing protest, it is in principle open to the court in appropriate circumstances to limit even lawful activity."

78. The purpose of the injunction was to prohibit conduct which if unchecked would amount to, or lead to, a public nuisance. It was the threat of significant harm, constituting a public nuisance, which led the Council to act and to seek restrictions which it regarded as necessary to afford effective protection to the public. Whilst the terms of an injunction should in so far as possible prohibit unlawful behaviour it is not the law that an injunction may only prohibit a tortious act; even lawful conduct may be prohibited if there is no other proportionate means of protecting rights. In the context of a threatened public nuisance of this nature and the form that protest had taken is not at all clear how injunctive relief could otherwise be framed effectively.

Public Nuisance as an Offence

79. The tort of public nuisance was until recently also a common law offence but the offence has now been put on a statutory basis. The common law offence was defined in *Archbold: Criminal Pleadings Evidence and Practice* as follows*:*

> "A person is guilty of a public nuisance (also known as common nuisance), who (a) does an act not warranted by law, or (b) omits to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property, morals, or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty's subjects."

80. The fist limb of that definition is plainly engaged where, for example, protestors commit acts of trespass which endanger the life and health of the public.

81. The common law offence was replaced by the statutory offence of intentionally or recklessly causing public nuisance under s. 78 of the Police, Crime, Sentencing and Courts Act 2022 which provides:

> **"78. Intentionally or recklessly causing public nuisance**
>
> (1) A person commits an offence if—

(a) the person—

(i) does an act, or

(ii) omits to do an act that they are required to do by any enactment or rule of law,

(b) the person's act or omission—

(i) creates a risk of, or causes, serious harm to the public or a section of the public, or

(ii) obstructs the public or a section of the public in the exercise or enjoyment of a right that may be exercised or enjoyed by the public at large, and

(c) the person intends that their act or omission will have a consequence mentioned in paragraph (b) or is reckless as to whether it will have such a consequence.

(2) In subsection (1)(b)(i) "serious harm" means—

(a) death, personal injury or disease,

(b) loss of, or damage to, property, or

(c) serious distress, serious annoyance, serious inconvenience or serious loss of amenity.

[…]

(6) The common law offence of public nuisance is abolished.

(7) Subsections (1) to (6) do not apply in relation to-

(a) any act or omission which occurred before the coming into force of those subsections, or

(b) any act or omission which began before the coming into force of those subsections and continues after their coming into force.

(8) This section does not affect—

(a) the liability of any person for an offence other than the common law offence of public nuisance,

(b) the civil liability of any person for the tort of public nuisance, or

(c) the ability to take any action under any enactment against a person for any act or omission within subsection (1)."

82. This change in the law does not affect the position in these proceedings.

Injunctions in Support of the Criminal Law

83. Mr Simblet pointed out that in a number of the cases cited the local authority had a duty to enforce particular statutory provisions such as those relating to Sunday trading; a feature which he said was absent in the present case.

84. That does not seem to me to be a point on which anything turns; public nuisance is itself an offence. In *Zain* Keene LJ commented at [27]:

> "The position therefore is that where a local authority seeks an injunction in its own name to restrain a use or activity which is a breach of the criminal law but not a public nuisance, it may have to demonstrate that it has some particular responsibility for enforcement of that branch of the law. But where it seeks by injunction to restrain a public nuisance, it may do so in its own name so long as it "considers it expedient for the promotion or protection of the interests of the inhabitants" of its area (section 222(1)). That is so even though it is seeking to prevent a breach of the criminal law, public nuisance being a criminal offence."

85. In addition, by section 17 of the Crime and Disorder Act 1998 the Council is in fact under a general statutory duty to exercise its various functions with due regard to the likely effect of the exercise of those functions on, and the need to do all that it reasonably can to prevent, crime and disorder in its area.

86. In his further written submissions Mr Simblet argued that for an injunction to be granted in support of the criminal law "the behaviour prohibited must constitute an actual criminal offence". This was a similar submission to that made in relation to tortious conduct and public nuisance. Mr Simblet illustrated this point by saying that "it is not a crime to enter the terminal". That may questionable since it depends upon the intention of the person doing so and the method of entry. However, there was clearly no lawful entitlement on the part of protestors to enter private property and, on the evidence, offences of aggravated trespass, criminal damage and obstruction of the highway could be made out by reference to the conduct referred to at paragraph 1(b) of the injunction (as Mr Simblet's skeleton argument of 4th May conceded). The court can exercise its jurisdiction to grant an injunction in proceedings instituted under section 222 of the 1972 Act to restrain a breach of the criminal law even if the defendant may have a defence to the alleged crime, since the existence of an alleged defence is not a matter of jurisdiction; see *Kirklees Metropolitan Borough Council v Wickes Building Supplies* Ltd [1992] 3 All ER 717, [1993] AC 227, HL.

87. There seems to me to be no doubt that the criminal law was engaged since the police had arrested large numbers of protestors for criminal offences. The challenges the police faced were described in the evidence. The purpose of the injunction sought was to support the criminal law not to mirror its provisions. If the behaviour prohibited had to "constitute an actual criminal offence" then it would be necessary to set out the elements of the offence including any mental elements in the prohibition. It is, at the very least, not good practice to define prohibited acts by reference to legal concepts or a defendant's intention but, more to the point perhaps, there is no support in the case law for the contention that prohibited conduct has to be restricted in this way where injunctive relief supports the criminal law.

88. In *City of London v Bovis Construction Limited* 1988 WL 622732 [1992] 3 All ER 697, the claimant local authority served a noise control notice under s.60 of the Control of Pollution Act 1974 in relation to unreasonable and excessive noise from a development next to a housing estate. The defendant failed to comply with the notices. Bingham LJ (as he then was) said:

> "It seems to me strongly arguable that by early November 1987 Bovis would have been amenable to action in any one of a number of ways. An individual resident of Petticoat Square could have sued in private nuisance. The Attorney General could have sued in public nuisance either ex officio or on the relation of the local authority or a resident of Petticoat Square. The local authority could have sued in their own name for public nuisance by virtue of section 222 of the Local Government Act 1972 if they considered it expedient for the protection of the interests of the inhabitants of their area. One cannot at this interlocutory stage assert that those claims would necessarily have succeeded, but on the evidence they would appear to have had a very fair prospect of success.
>
> As it was, none of these procedures was invoked. Instead, the local authority decided in late October to issue summonses under section 60(8) alleging contraventions of the section 60 notice. The first summonses were issued on the 3rd November. Then, on the 12th November, in the light of further complaints, the Lord Mayor having ruled that the matter was by its very nature urgent, authority was given to launch the present proceedings. The local authority considered proceedings to be expedient for the protection of the inhabitants of the area, and the authority given was to prosecute proceedings under section 222 of the 1972 Act."

89. In relation to the Court's jurisdiction to grant relief he explained:

> "It is made plain by the highest authority that the jurisdiction to grant an injunction in support of the criminal law is exceptional and one of great delicacy to be exercised with caution (*Gouriet v. Union of Post Office Workers [1978] A.C. 435 at 481, 491, 500, 521*). Where, as in the present case, Parliament has shown a clear intention that the criminal law shall be the means of enforcing compliance with a statute, the reasons for such caution are plain and were fully explained by their Lordships in *Gouriet* . The criminal law should ordinarily be pursued as the primary means of enforcement. The case law shows that the archetypal case in which this jurisdiction is exercised is one in which a criminal penalty has in practice proved hopelessly inadequate to enforce compliance: see, for example, *Attorney General v. Sharp [1931] 1 Ch. 121, Attorney General v. Premier Line Ltd. [1932] 1 Ch. 303, Attorney General v. Barstow [1957] 1 Q.B. 514,* and *Attorney General v. Harris [1961] 1 Q.B. 74*.
>
> I do not, however, think that all the decided cases can be brought within that category. In *Attorney General v. Chaudry [1971] 1 W.L.R. 1614* there had been no criminal conviction (and no hearing, because an early hearing date could not be obtained) but the defendants were held to be deliberately flouting the law and the risk of grave and irreparable harm was held to justify the grant of an injunction. In *Kent County Council v. Batchelor (No. 2) [1979] 1 W.L.R. 213* an injunction was granted to restrain breaches of tree preservation orders even though such breaches were an offence and there had been no convictions. In *Runnymede Borough*

> *Council v. Ball [1986] 1 W.L.R. 353* there had been no resort to the criminal law but an injunction was granted because of the risk of irreversible damage."

90. He summarised the applicable principles as follows:

> "The guiding principles must, I think, be –
>
> (1) that the jurisdiction is to be invoked and exercised exceptionally and with great caution: [..];
>
> (2) that there must certainly be something more than mere infringement of the criminal law before the assistance of civil proceedings can be invoked and accorded for the protection or promotion of the interests of the inhabitants of the area: see the *Stoke-on-Trent* case at 767B, 776C, and *Wychavon District Council v. Midland Enterprises (Special Events) Ltd. [1987] 86 L.G.R. 83 at 87*;
>
> (3) that the essential foundation for the exercise of the court's discretion to grant an injunction is not that the offender is deliberately and flagrantly flouting the law but the need to draw the inference that the defendant's unlawful operations will continue unless and until effectively restrained by the law and that nothing short of an injunction will be effective to restrain them: see the *Wychavon* case at page 89."

91. These principles have been followed and applied in subsequent cases (see *Birmingham City Council v Shafi* [2009] 1 WLR 1961 [33-36] where they were described as having been "broadened" to some extent in so far as injunctions were considered to be in support of the criminal law even where they were obtained pre-emptively of any criminal conduct).

92. As to the application of these principles to the facts of the case in *Bovis,* Bingham LJ observed:

> "It is accepted here that if the preliminary condition of section 222 is met the local authority stands in the same position as the Attorney General. It is not, I think, challenged that the preliminary condition of section 222 is met here. So the question is whether the local authority can show anything more (and, I would interpolate, substantially more) than an alleged and unproven contravention of the criminal law, and whether the inference can be drawn that noise prohibited by the notice will continue unless Bovis are effectively restrained by law and that nothing short of an injunction will effectively restrain them.
>
> I am in no doubt that these questions must be answered in favour of the local authority. The conduct which the local authority seek to restrain is conduct which would have been actionable (if not at the suit of the local authority) in the absence of any statute. Even if the conduct were not criminal, it would probably be unlawful. The contrast with the planning and Sunday trading cases is obvious. I see no reason for the court pedantically to insist on proof of deliberate and flagrant breaches of the criminal law when, as here, there is clear evidence of persistent and serious conduct which may well amount to contravention of the criminal law and which may, at this interlocutory stage, be regarded as showing a public and private nuisance. It is quite plain that the service of the notice and the threat of prosecution have proved quite ineffective to protect the residents.

> The local authority have issued 18 summonses but, even if convictions are obtained, the delay before the hearing will deprive the residents of Petticoat Square of any but (at best) minimal benefit. The local authority are charged with a power – and perhaps a corresponding duty – to protect their interests. It would be lamentable if their interests in the present case were left without protection. In my view the deputy judge was entitled to grant an injunction and was right to do so."

93. In the same case Taylor LJ (as he then was) described the practical limitations of the criminal law:

> "The noise resulting from the works constituted not merely a breach of the criminal law but also a nuisance gravely affecting the local inhabitants. Every disturbed night or weekend they suffer involves irreversible damage. The issue of criminal proceedings did not end the breaches. Time would inevitably pass before those proceedings could be heard. Should they be contested (as we have been told they are to be) and should the proceedings succeed, there would still remain the prospect of an appeal by way of re-hearing causing further delay. In those circumstances, it is clear that criminal proceedings were likely to be ineffective to protect the inhabitants, and I am satisfied that the grant of an injunction was therefore appropriate."

94. In the present case the evidence from the Assistant Chief Constable was:

> "Although large numbers of arrests have been made, the offences for which they can be arrested (obstruction of the highway etc) are generally low level and summary only offences which means the criminal justice options can be limited. We have also utilised bail conditions to try and prevent protesters returning to the site but these have largely proved to be unsuccessful with many of the protesters already being arrested multiple times from the Kingsbury site. Even when protestors breached their bail conditions, unless further arrested for a further substantive offence, they are merely dealt with for the original offence for which they were arrested prior to the bail conditions being set. As stated, these are low level summary offences and therefore charge and remand in custody is not an option open to us."

95. The present case does, in my view, involve the factors identified in *Bovis,* namely a risk of irreversible damage leading to grave and irreparable harm as a result of the deliberate flouting of the law such that nothing short of an injunction would be effective to restrain the conduct giving rise to that risk. The Council did not act precipitously in seeking an injunction. It left the matter in the hands of the police until it became clear that dangerous activity was escalating and those arrested were simply returning to the Terminal site when released under investigation and were not deterred by the prospect of criminal prosecution and the imposition of fines.

Other Remedies

96. Mr Simblet submitted that there were other remedies open to the Council which it was obliged to pursue or which at the very least militated against the granting of injunctive relief. He relied upon *Birmingham City Council v Shafi* [2009] 1 WLR 1961 in which the court held that the local Council should not have applied for an injunction under section 222 rather than applying to a Magistrates Court or the Crown Court for an Anti-

Social Behaviour Order ("ASBO") because the terms of the injunction sought were identical or almost identical to those which could be obtained via an ASBO in circumstances where the criminal law could not be said to be ineffective and where it was unfair to circumvent the criminal standard of proof.

97. However, the court in *Shafi* characterised its decision as a departure from what it accepted were the general principles laid down in *Bovis* and *Stoke on Trent City Council v B&Q Retail Ltd* [1984] AC 754 as the Court of Appeal observed when later considering *Shafi* in *Sharif v Birmingham CC* [2020] EWCA Civ 1488.

98. Although Mr Simblet's submissions proceeded on the basis that an ASBO was one of the "relevant powers" available to the Council, that form of order was abolished under the provisions of the Anti-Social Behaviour, Crime and Policing Act 2014 ("the 2014 Act"), the gap being filled by civil injunctions and Criminal Behaviour Orders ("CBO"). The relief sought in this case is not identical to that which could be achieved by way of a CBO (which can only be made following conviction) nor are the conditions at all similar to those which led to the decision in *Shafi*.

99. As far as a CBO was concerned, Bean LJ said in *Sharif*:

> "41...Even assuming (without deciding) that a CBO is an appropriate order to be made on conviction for a motoring offence such as dangerous driving or racing on the highway, it could only be made against an individual who had been prosecuted and convicted of an offence, a process which might well take several months. The purpose of the injunction was to prevent future nuisances, not to impose penalties for past ones.
>
> 42. Judge Worster and Judge McKenna were well entitled to conclude, in the words of Bingham LJ's third criterion in *Bovis*, that car cruising in the Birmingham area would continue unless and until effectively restrained by the law and that nothing short of an injunction would be effective to restrain them. I regard this as a classic case for the grant of an injunction."

100. For similar reasons in *Runnymede Borough Council v Ball and others* [1986] 1 All ER 629 the Court of Appeal decided that a local authority was entitled to seek a civil remedy under s.222 of the 1972 Act without first exhausting the processes of the criminal law.

101. *Sharif* expressly considered and rejected the argument that an injunction should not have been granted to prohibit street cruising when there was an alternative remedy available to a Council of itself making a "public spaces protection order" ("PSPO") under Part 4 of the 2014 Act. Although Mr Simblet pointed out that in *Dulgheriu v LB Ealing* [2019] EWCA Civ 1490, such an order was made to regulate protest, that case did not involve any consideration of whether or not a local authority was bound to use a PSPO rather than seek injunctive relief. It is effectively silent on the point for which Mr Simblet sought to recruit it.

102. At [34] in *Sharif* the Court of Appeal noted:

> "In *Birmingham City Council v James* [2014] 1 WLR 23; [2013] EWCA Civ 552 Jackson LJ observed that there are many situations in which, on the facts, two

different pre-emptive orders are available and that there is no "closest fit" principle which cuts down the court's statutory powers to make pre-emptive orders. He advised at [31] that "in future cases the Court of Appeal should not be invited to trawl through the legislation in some quest for the closest fit". *In Mayor of London v Hall* [2011] 1 WLR 504; [2010] EWCA 817 this court upheld the grant of an injunction restraining protestors from occupying Parliament Square, in aid of the enforcement of byelaws which provided for a modest financial penalty only and had proved ineffective: see per Lord Neuberger MR at [52]-[57]."

103. In fact, the Council had, in the present case, considered whether a PSPO would be a satisfactory alternative to an injunction and had decided that it would not be. It gave its reasons in the evidence of its chief executive. It rejected such an order as an alternative because, as Mr Maxey explained, a PSPO requires consultation and publicity before it can be made. That was likely to take many weeks whereas the need for injunctive relief was urgent. In addition, the only penalties for breach are financial, being a penalty of a fine (to a maximum of £1,000) or a fixed penalty notice; neither of which the Council considered would be an adequate deterrent in the circumstances. These reasons were then summarised in the Particulars of Claim.

104. Mr Simblet referred to the case of *L v Chief Constable of Merseyside* [2006] 1 WLR 375 for the principle that "that public powers must be exercised in accordance with the purpose of the statute" suggesting that it supported his submission that the Council was required to make a PSPO order rather than seeking an injunction. That case concerned the operation of two sections of the same statute, the Children Act 1989, which allows the court to make an emergency protection order ("EPO") under section 44 and gives the police a power to remove children who are in need of emergency protection under section 46. The court's conclusion was that "where a police officer knows that an EPO is in force, he should not exercise the power of removing a child under section 46, unless there are compelling reasons to do so" [36].

105. I do not consider that a decision concerning the operation of a statutory scheme within a single piece of legislation supports the conclusion that Parliament must have intended that local authorities are obliged to make orders themselves rather than seeking an order from the court or that the court is, in turn, required to decline to give injunctive relief.

106. Mr Simblet said of the Council's decision not to proceed by way of PSPO: "Essentially, Mr Maxton [sic] is, as [sic] no more than an officer in a small local authority, asking the Court to over- ride what Parliament has decided should be the pre-conditions before prohibitions on the use of public spaces are imposed, or the sanctions that Parliament considers appropriate for breach. That is far from sufficient."

107. The more accurate characterisation of the situation might be that protestors had taken it upon themselves to decide the level of significant risk and public nuisance to which the local community of Kingsbury and those working at or visiting the Terminal or using the roads leading to it, should be exposed. Parliament has given the local authority a range of powers and duties in those circumstances. There is nothing in the authorities cited before me to suggest that the Council was obliged to pursue a PSPO, or any other alternative remedy, rather than seek an injunction.

Power of Arrest

108. Section 27, Police and Justice Act 2006 ("the 2006 Act") permits the court to attach a power of arrest to injunctions made under s.222 of the 1972 Act where the conditions in that section are met. It provides:

> "(1) This section applies to proceedings in which a local authority is a party by virtue of section 222 of the Local Government Act 1972 (power of local authority to bring, defend or appear in proceedings for the promotion or protection of the interests of inhabitants of their area).
>
> (2) If the court grants an injunction which prohibits conduct which is capable of causing nuisance or annoyance to a person it may, if subsection (3) applies, attach a power of arrest to any provision of the injunction.
>
> "(3) This subsection applies if the local authority applies to the court to attach the power of arrest and the court thinks that either–
>
> > (a) the conduct mentioned in subsection (2) consists of or includes the use or threatened use of violence, or
> >
> > (b) there is a significant risk of harm to the person mentioned in that subsection.
>
> (4) Where a power of arrest is attached to any provision of an injunction under subsection (2), a constable may arrest without warrant a person whom he has reasonable cause for suspecting to be in breach of that provision."

109. Parliament therefore intended that a power of arrest could be added to an injunction obtained by a local authority under section 222 of the 1972 Act in the most serious cases where there was the use or threat of violence or a risk of harm of a high order. This contrasts with the position of a private litigant and reflects the duties of a local authority to protest the interests of the inhabitants of its area. A police officer making an arrest is required to have reasonable cause for suspicion that an arrested person is in breach of a provision of the order; equivalent therefore to an arrest for a criminal offence. Anyone arrested has to be brought before the court within 24 hours.

110. The Council did not make its application for a power of arrest on the basis that there was any threatened use of violence but under subsection 3(b), relying on "a significant risk of harm" occurring to local inhabitants and those present at or the vicinity of the Terminal as a result of conduct capable of causing nuisance or annoyance. The first question is therefore whether there was a significant risk of harm. This is a high threshold requirement, no doubt intended as an important control on the attachment of a power of arrest. In so far as this refers to a significant risk of harm to classes of individuals, including those living nearby in Kingsbury, working at or visiting the Terminal or using public roads I consider that the answer must, undoubtedly, be in the affirmative for the reasons I have set out earlier.

111. Mr Simblet's submission was that the Council was not "entitled to a power of arrest, specifically the injunction was not made for the benefit of a person suffering nuisance or annoyance". He did not elaborate further on this argument. To begin with, I consider it does not reflect the wording of section 27 of the 2006 Act which applies where a local authority is bringing proceedings to protect the inhabitants of its area from conduct

"capable" of causing nuisance or annoyance, giving rise to a "significant risk" of harm. This involves an assessment by the court of the potential consequences of the conduct which it is sought to prohibit.

112. Although the statute refers to "a person" I do not conclude that this restricts section 27 to a single or named person rather than a group or class of persons who can be shown to be at significant risk of harm. In such a case the greater will, by definition, include the lesser. It would be an odd result if there was such a restriction given that section 27 of the 2006 Act is specific to the power exercisable under section 222 of the 1972 Act which is concerned with the protection of the "interests of inhabitants".

113. CPR 65.9 sets out the procedural requirements where a power of arrest is sought under the 2006 Act. In accordance with the rules, a power of arrest was sought in the Particulars of Claim and the application. It was supported by written evidence. Although rule 69.5(3) requires personal service that is expressed to apply to an application made on notice, which this was not.

114. In *LB Barking and Dagenham* [2021] EWHC 1201 (QB) Nicklin J. expressed misgivings about the attachment of a power of arrest to injunctions against persons unknown [79]. This was in the context of orders made in respect of unauthorised encampments by travellers where meeting the requirements of section 27(3) of the 2006 Act was always likely to be difficult. In practice it is not unusual for a power of arrest to be attached to orders obtained by local authorities against persons unknown where there are proper grounds for concluding there is a risk of significant harm.

115. In *Croydon London Borough Council v Persons Unknown* [2016] EWHC 3018 (QB) a power of arrest pursuant to s.27 of the 2006 Act was attached to an injunction where "street cruising" had already led to injury and death, appeared to be worsening and had not been controlled by other means. *Sharif* was also a street cruising case where the power of arrest was attached to an order made in respect of anyone participating as the driver or rider of, or passenger in, a vehicle. The power of arrest attached to the interim injunction in *Afsar* related to three named defendants and persons unknown (as Mr Manning who was counsel in that case confirmed). In *London Borough of Hackney v Persons Unknown* [2020] EWHC 1900 (QB) a power of arrest was attached to parts of an interim injunction made to prevent various forms of anti-social behaviour which were said to amount to the tort of public nuisance and to have been taking place in the London Fields park. In *Thurrock Council -v- Adams* [2022] EWHC 1324 a power of arrest under section 27 was attached to an injunction made in respect of named defendants and persons unknown where protestors had been intercepting tankers leaving fuel terminals. Some of the potential harms described in that case arise from similar conduct and attendant risk to that identified by the Council in the present case.

Injunctive Relief

116. Section 37(1) of the Senior Courts Act 1981 provides that the High Court may grant an interlocutory or final injunction where it appears to the court to be just and convenient.

117. Because the application is for interim precautionary relief the test to be applied is set out in *American Cyanamid v Ethicon* [1975] AC 396. The usual test is:

a. is there a serious question to be tried? (the Claimant does not have to prove its case on an application for an interim injunction)

b. (if so) would damages be an adequate remedy for a party injured by the grant of, or failure to grant, an injunction?

c. (if not) where does the balance of convenience lie?

118. In cases where wrongs have already been committed as opposed to merely threatened the evidential threshold for establishing that conduct will continue unless restrained, may as a matter of common sense, at least, be lower (*Secretary of State for Transport and HS2 limited v Persons Unknown* [2019] EWHC 1437 (Ch) [122 to 124]; *Secretary of State for Transport v Four Categories of Persons Unknown* [2022] EWHC 2360 (KB) [96]). The purpose of the injunction will be to prevent the repetition of conduct from which a real risk of imminent unlawful harm can reasonably be apprehended so that a precautionary remedy is required. There was clear evidence of such a risk in this case given the prior actions of protestors. The injunction sought may have been precautionary, but it was founded upon evidence of a pattern of behaviour which was likely to continue.

119. As far as the requirements in *American Cyanamid* are concerned, they are, in my view, clearly satisfied. The Council has a strong case that the protests have involved the conduct described in the evidence and the Particulars of Claim, much of it captured in video recordings. There is a serious issue to be tried as to whether this conduct was unlawful and amounted to a public nuisance. I consider that the Council is likely to obtain injunctive relief at trial, so satisfying the requirements of section 12 of the Human Rights Act (see further below). The risk of serious harm to individuals and the environment is significant and damages would not be an adequate remedy given the risk of irreparable harm. As to any lesser harm or financial loss, there was no suggestion that protestors had the means to satisfy an award of damages.

120. The balance of convenience favours the grant of injunctive relief. The defendants are not deprived of the opportunity to protest lawfully. Peaceful protest has taken place after the injunction was granted. The risks to public health and safety if injunctive relief is not granted are grave. The fact that protest has continued at the Terminal suggests that the injunction has not had, and is not likely to have, a chilling effect. There was no evidence to suggest otherwise.

Undertaking in Damages

121. A local authority seeking an interlocutory injunction under s.222 of the 1972 Act will not necessarily be required to give an undertaking in damages, when exercising a law enforcement function in the public interest (*Kirklees MBC v Wickes Building Supplies Ltd* [1993] A.C. 227). I was referred to the decision of Warby J. (as he then was) in *Birmingham City Council v Afsar* [2019] EWHC 1619 (QB) in support of the contention that such an undertaking was necessary. The decision in that case was, however, expressed to be made in "the particular circumstances" and turned on the fact that the action was not being taken on behalf of the public at large but rather a section or some sections of the public; the main beneficiaries being teachers, other staff and pupils at the school to which the injunction related. In *FSA v Sinaloa Gold plc & others* [2013] UKSC 11 at Lord Mance observed [31]:

> "Different considerations arise in relation to law enforcement action, where a public authority is seeking to enforce the law in the interests of the public generally, often in pursuance of a public duty to do so, and enjoys only the resources which have been assigned to it for its functions. Other than in cases of misfeasance in public office, which require malice, and cases of breach of the Convention rights within section 6(1) of the Human Rights Act 1998, it remains the case that English law does not confer a general remedy for loss suffered by administrative law action. That is so, even though it involves breach of a public law duty. In the present context, the fact that an injunction is discharged, or that the court concludes after hearing extended argument that it ought not in the first place to have been granted, by no means signifies that there was any breach of duty on the public authority's part in seeking it."

122. I do not consider that the Council should be required to give a cross undertaking in damages in the present circumstances where it is seeking to restrain conduct which has potentially catastrophic consequences.

Human Rights Act 1998

123. Where s12(3) of the Human Rights Act 1998 ("HRA") is engaged a modified version of the *American Cyanimide* test applies. Section 12, of the HRA provides:

> "(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression. […]
> (3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed."

124. Thus, the Council must establish that it would be likely to obtain the injunction sought at trial not just that there is a serious question to be tried (*Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100). The submissions made addressed this question on the basis that "likely" means more likely than not (as the House of Lords in *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253 said would be the normal position). The approach in *Ineos* applies in a case where the question of restraint of publication arises.

125. The word 'publication' in section 12(3) has been interpreted widely in this context to apply to any restraint on a communication which engages Article 10 rights (see B*irmingham City Council v Afsar* [2019] EWHC 1560 (QB) at [60-61]). The Council's position was nevertheless that s12(3) did not apply because the injunction did not relate to publication but, if it did, the evidence demonstrated that the Council is "likely" in the relevant sense to obtain the desired relief at trial. Notwithstanding the Council's primary position my attention was properly drawn to s.12(3) at the initial hearing. I do not need to determine any issue as to publication at this stage as I am satisfied that the Council would obtain injunctive relief at trial.

126. A Claimant must also satisfy section 12(2) of the 1998 Act in relation to notice:

> "(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."

127. The Council did seek to notify informally those who had been arrested by the police and whose details they had been given on the day before the without notice hearing but the overriding concern expressed by Mr Maxey was that a full inter parties hearing, before an order was in force, would lead to more dangerous activities in the period before the matter came to court. I accepted when granting the original injunction that these concerns were justified, that the matter was urgent and that the Council had taken all practicable steps in those circumstances to notify named defendants, and alternatively, that there were compelling reasons why there should not have been notification.

Freedom of Assembly and Expression – Articles 10 and 11

128. The Council accepted that the application affected the rights of the protesters under Article 10 and, arguably, so long as protest was peaceful, under Article 11 of the ECHR, so that the Council had to show that any interference with those rights was justified.

129. Articles 10 and 11 are qualified rights subject to restrictions prescribed by law which are necessary in a democratic society. Those restrictions may be necessary, amongst other things, for reasons of public safety, to protect the health and rights of others and to prevent disorder or crime (they may also have to be balanced against the right to property protected by Article 1 of the first protocol, 'A1P1').

130. Article 10 provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. …
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of…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…"

131. Article 11 provides:

> "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others…
>
> 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… 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…"

132. The Supreme Court considered the application of Articles 10 and 11 ECHR in relation to protests which involve obstruction of the highway in the case of *DPP v Ziegler* [2021] UKSC 23.

133. In that case the defendant protesters were charged with obstructing the highway contrary to section 137 of the Highways Act 1980. Their protest consisted of obstructing the road by lying across it and locking themselves to structures so that it was difficult for police to remove them. Whilst they accepted that they had caused an obstruction to the highway, they argued that they had not done so 'without lawful excuse' because, amongst other things, they were exercising their rights under Articles 10 and 11. The Supreme Court set out the questions which had to be addressed in those circumstances:

> "a. Is what the defendant did in exercise of one of the rights in Articles 10 or 11?
>
> b. If so, is there an interference by a public authority with that right?
>
> c. If there is an interference, is it 'prescribed by law'?
>
> d. If so, is the interference in pursuit of a legitimate aim as set out in paragraph (2) of Articles 10 and 11, for example the protection of the rights of others?
>
> e. If so, is the interference 'necessary in a democratic society' to achieve that legitimate aim?

134. Question e can be sub-divided into a number of further questions:

> 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?

135. The answers to questions a to b (above) are not in issue. Interference with the Defendants' rights is prescribed by law under section 37 of the Senior Courts Act 1981 in so far as the Council is entitled to seek a precautionary injunction on the basis of the causes of action discussed above. The interference is in pursuit of legitimate aims set out in Articles 10 and 11; the prevention of crime and disorder and the protection of the health and rights of others. It was accepted by the Council that the protests relate to a "matter of general concern". The question of whether in this country and globally we should go further and faster in eliminating reliance on fossil fuels in order to tackle climate change may be the defining issue of our age and underlines the importance of the fundamental right to protest. These proceedings are not however the forum in which government policy on this issue falls to be examined. It is trite to say that extreme forms of protest are more likely to attract attention but that does not in itself justify them. The methods employed in protest have to be balanced against the rights of others in a democratic society. Whilst disruption and inconvenience may to some extent be inevitable there must also, inevitably, be boundaries. The *Zielger* questions relate to protests on highways where it is well established that Articles 10 and 11 are engaged but even here a balance has to be struck. There is no right to protest on privately owned land or on public land from which the public are generally excluded (See *DPP v Cuciurean* [45]) and there is no absolute right to engage in protest which threatens the health and safety of others.

136. The aim of preventing a public nuisance posing a grave risk to local inhabitants and the environment was sufficiently important to justify interference with the right to protest. There is a rational connection between the terms of the injunction and that aim. Each of the prohibitions can be explained and justified by reference to that aim and there were no less restrictive means available. The injunction does not prevent protest, as was apparent after it came into effect. The terms of the injunction do, in my view, strike a fair balance between the rights of the individual protesters and the general interest of the community. The injunction does not prevent lawful protest.

137. Mr Simblet relied in his written and oral submissions on the case of *Regina (Laporte) v Chief Constable of Gloucestershire Constabulary* [2002] UKHL 55 which he argued "represents a decision, at the highest level, supportive of the principle that protest, even disruptive protest is lawful and the court cannot prevent it unless there is a clear necessity to do so." I agree with Mr Simblet that this case does emphasise the importance of the entitlement to exercise rights under Articles 10 and 11 by protesting but, as the formulation of his proposition also recognises, restrictions in the manner in which these rights are exercised may be imposed where that is necessary. I disagree with the bald assertion that disruptive protest is necessarily lawful. Beyond this however I did not find the case to be of great assistance. The factual circumstances in *Laporte* were very different. The police stopped and turned back three coaches carrying protestors travelling from London to demonstrate at an air base in Gloucestershire. The police did not seek an order from the court. They sought to exercise a power to take steps short of arrest to prevent a breach of the peace in circumstances where any such breach was not sufficiently imminent to justify arrest. Their actions were premature and indiscriminate and as such represented a disproportionate restriction on rights under Articles 10 and 11. They prevented anyone on the coaches from protesting. There is no suggestion in the judgments that the protests to which the coaches were travelling are examples of disruptive but nevertheless lawful protest; the reverse is the case, there had been instances of serious unlawful protest which had led to measures being put in place to ensure that peaceful protest could take place and disruptive protest prevented. Lord Carswell summarised the position [103]:

> "The situation which the police faced at Fairford was difficult and delicate. Incursions into the base had taken place in the recent past and it was clear that extreme protesters were ready to commit further damage, quite possibly extending to acts of serious sabotage. With the commencement of the war with Iraq, the risk of damage to the operation of the base and the concomitant likelihood that the US military forces at the base might react strongly to attempts at trespass, there was a real prospect that unless matters were handled with great care very serious consequences could result. The Gloucestershire police very creditably formed an elaborate plan designed to allow considerable opportunity to peaceful protesters to exercise liberty of speech and assembly, while putting in place plans to prevent disruptive and potentially damaging behaviour carrying a threat to the safety of the base."

Applications against Persons Unknown

138. The ability of the court to grant an injunction against 'persons unknown' has been recognised for at least two decades. In *Bloomsbury Publishing Group v News Group Newspapers* [2003] 1 WLR 1633, such an injunction was obtained to prevent any use being made of a Harry Potter novel that had been stolen ahead of its publication date.

Protests involving trespass were similarly restrained in *Hampshire Waste Services v Persons Intending to Trespass and/or Trespassing upon Incinerator Sites* [2003] EWHC 1738 (Ch) notwithstanding that the threatened trespass had not occurred and that the defendants could only be identified by reference to the conduct injuncted. In such cases a person becomes a party once they commit the prohibited act knowing of the injunction (*South Cambridgeshire District Council v. Gammell* [2005] EWCA Civ 1429). They are within the jurisdiction of the court because they can be identified, other than by name, and served by alternative means if necessary (*Cameron v Liverpool Victoria Insurance Co Ltd* [2019] UKSC 6; [2019] 1 WLR 147).

139. The principles which apply to injunctions against 'persons' unknown in the context of the wider range of activities that might be involved in protest were set out in *Boyd v Ineos Upstream* [2019] EWCA Civ 515, and further elaborated on and developed in *Canada Goose Retail Limited v Persons Unknown* [2020] EWCA Civ 303 and then in *Barking and Dagenham London Borough Council v Persons Unknown* [2021] EWCA Civ 13. In the latter case the Court of Appeal invoked the exceptional grounds identified in *Young v. Bristol Aeroplane Co Ltd* [1944] KB 718 for departing from its earlier decision in *Canada Goose.*

140. The central issue of difference between the two cases was one of principle in relation to "newcomers"; whether it should be possible for newcomers to be in breach of a final injunction in circumstances where they were not aware of or party to the proceedings at which the injunction was made and were, by definition, not in a position to be heard in those proceedings.

141. However, contrary to the Council's submissions before me, the departure from *Canada Goose* in *Barking and Dagenham* was not complete in so far as *Canada Goose* gave guidance, at [82], in relation to interim injunctions against 'persons unknown". Indeed paragraph 82 was set out in full and endorsed at [56] of the Court of Appeal's judgment in *Barking and Dagenham*. The Master of the Rolls introduced those guidelines as follows [55]:

> "At [62]-[88] in *Canada Goose*, the court discussed in entirely orthodox terms the decisions in *Cameron, Gammell, Ineos*, and *Cuadrilla*, in which Leggatt LJ had referred to *Hubbard v. Pitt* [1976] 1 QB 142 and *Burris v. Azadani* [1995] 1 WLR 1372. At [82], the court built on the *Cameron* and *Ineos* requirements to set out refined procedural guidelines applicable to proceedings for interim relief against persons unknown in protester cases like the one before that court. The court at [83]-[88] applied those guidelines to the appeal to conclude that the judge had been right to dismiss the claim for summary judgment and to discharge the interim injunction."

142. I do not therefore accept the Council's argument that: "The fact that the Court of Appeal, in *Barking*, did not specifically identify para.[82] in *Canada Goose* as erroneous does not mean that that passage escapes the overall rulings or logic of the *Barking* decision."

143. The *Canada Goose* guidance in relation to interim injunctions against "persons unknown", at [82] is:

> "(1) The "persons unknown" defendants in the claim form are, by definition, people who have not been identified at the time of the commencement of the proceedings. If they are known and have been identified, they must be joined as individual defendants to the proceedings. The "persons unknown" defendants must be people who have not been identified but are capable of being identified and served with the proceedings, if necessary by alternative service such as can reasonably be expected to bring the proceedings to their attention. In principle, such persons include both anonymous defendants who are identifiable at the time the proceedings commence but whose names are unknown and also Newcomers, that is to say people who in the future will join the protest and fall within the description of the "persons unknown".
>
> (2) The "persons unknown" must be defined in the originating process by reference to their conduct which is alleged to be unlawful.
>
> (3) Interim injunctive relief may only be granted if there is a sufficiently real and imminent risk of a tort being committed to justify quia timet relief.
>
> (4) As in the case of the originating process itself, the defendants subject to the interim injunction must be individually named if known and identified or, if not and described as "persons unknown", must be capable of being identified and served with the order, if necessary by alternative service, the method of which must be set out in the order.
>
> (5) The prohibited acts must correspond to the threatened tort. They may include lawful conduct if, and only to the extent that, there is no other proportionate means of protecting the Claimant's rights.
>
> (6) The terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do. The prohibited acts must not, therefore, be described in terms of a legal cause of action, such as trespass or harassment or nuisance. They may be defined by reference to the defendant's intention if that is strictly necessary to correspond to the threatened tort and done in non-technical language which a defendant is capable of understanding and the intention is capable of proof without undue complexity. It is better practice, however, to formulate the injunction without reference to intention if the prohibited tortious act can be described in ordinary language without doing so.
>
> (7) The interim injunction should have clear geographical and temporal limits. It must be time limited because it is an interim and not a final injunction.

144. As to the second of these requirements Mr Manning on behalf of the Council, contended that the description used was lawful and appropriate and that alternative descriptions were not likely to aid comprehensibility but were apt to mislead. He pointed out that the evidence of Mr Maxey, served for the return date indicated that the police had taken particular care to draw the prohibitions in the order to the attention of protesters before seeking to exercise any power of arrest. No protester could conceivably be in breach of the terms of the injunction or susceptible to arrest unless they had breached one of the specific prohibitions.

145. However the present description of persons unknown, set out earlier in this judgment, identifies that class of defendant simply by participation in the protests against fossil fuels at the Terminal. It does not, on its face, meet the requirements set out in *Canada Goose.*

146. As far as paragraphs 1, 3, 4, and 5 are of the *Canada Goose* guidance are concerned I consider that the order meets these requirements for the reasons given earlier in this judgment.

147. As far as the clarity of the prohibitions is concerned, paragraph 1a of the prohibitions relates to the fenced Terminal land on which there is no right to protest and where protest would give rise to very significant risks. The area concerned is delineated by a map. The prohibited activity is clear.

148. The prohibitions at paragraph 1(b) relate to acts which have been preparatory to attempts to enter the Terminal or are themselves capable of amounting to a public nuisance in the context in which they have occurred. They are expressed in ordinary language. They reflect the evidence as to the activities of protesters at the Terminal. They are similar to prohibitions which have been put in place in other cases involving protest because the methods employed to protest have been similar in those cases (see by way of recent examples *Thurrock* (above), *Three Counties Agricultural Society v Persons Unknown*: [2022] EWHC 2708 (KB), *Transport for London v Lee*, [2022] EWHC 3102 (KB), 2022 WL 16609167). The restraints are not a ban on protest they are limitations on where and how protest can be carried on. The conduct restrained is not an essential or intrinsic part of lawful protest. The disruption caused was not simply incidental to lawful protest but was deliberate and, because it was targeted at an oil terminal and oil tankers, involved significant risks of harm. The entrances to the Terminal have been a particular flashpoint where there has been deliberate swarming and obstruction. Protestors who lock themselves together and on to structures or glue themselves to roads form a barrier that cannot be quickly removed. Interference with the operation of the Terminal in these circumstances was not a transient part of protest but the intended consequence. For obvious reasons unimpeded access to the Terminal by the Fire Service and other emergency services is essential at all times. To the extent that there may be interference with lawful activities the restrictions are proportionate and necessary to prevent a public nuisance and in support of the criminal law.

149. The layout of the site entrances and roads do not lend themselves to the use of an exclusion zone of the sort employed in *Afsar*. The geographical restriction to the "locality" was it was submitted a term commonly found in injunctive relief and statute. A number of the prohibitions could in any event only relate to conduct at or next to the Terminal entrances or structures. In *Manchester v Lawler* 31 HLR 119, the Court of Appeal considered the term "locality" in contempt proceedings following an injunction granted under section 152(1) of the Housing Act 1985 which provides:

> "The High Court or a county court may, on an application by a local authority, grant an injunction prohibiting a person from
>
> (a) engaging in or threatening to engage in conduct causing or likely to cause a nuisance or annoyance to a person residing in, visiting or otherwise engaging in a lawful activity in residential premises to which this section applies or in the locality of such premises

> […]
>
> (c) entering residential premises to which this section applies or being found in the locality of any such premises."

150. Judge LJ (as he then was) said:

> "it is unnecessary to repeat the terms of s 152 in this judgement, but a rapid glance at the section demonstrates that the word "locality" recurs. It was plainly used deliberately. Moreover section 152(7) provides for the grant of an injunction "under" that is, in the terms of the section. Although wide the statutory language is not imprecise. In this context "locality" is an ordinary, readily understood English word without specialised or refined meaning. The operation of the section is flexibly linked to a geographical place."

151. The operation of the prohibitions is in my view sufficiently geographically identified. The terms of an interim injunction may be kept under review by the court and changes made to the terms of the order if they are having an unintended effect or are leading to contempt applications for trivial infringements (*MBR Acres Ltd v Free the MBR Beagles*, [2022] EWHC 3338 (KB), 2022 WL 17835649. There is nothing to suggest that this is the case here.

152. The interim order was expressed to "continue until the hearing of the claim unless previously varied or discharged by further Order of the Court". It provided for reconsideration at a hearing. Directions for trial have now been given and a trial window identified with the intention that the case will be heard once the result of the appeal to the Supreme Court in *Barking & Dagenham* is known. The claim will not be left in abeyance and the order is therefore subject to a temporal limit. I consider that an interim injunction in the form of the present order is appropriate and necessary and that on the evidence before the court the Council appears more likely than not to succeed at trial in obtaining injunctive relief.

153. Although there is a persons unknown defendant to the claim the description of persons unknown does not comply with the guidance in *Canada Goose.* The claim form and orders will require amendment. That was the course taken in *Afsar* and *MBR* where there were similar, and other, deficiencies but where the interim injunctions were continued. If that cannot be done by agreement then the Court will need to determine the precise terms on application by the Council.

154. The application to discharge the order is accordingly refused and subject to the changes required as a result of this judgment the interim order will remain in place to trial.

SCHEDULE A

(21) THOMAS ADAMS
(22) MARY ADAMS
(23) COLLIN ARIES
(24) STEPHANIE AYLETT
(25) MARCUS BAILIE
(26) MAIR BAIN
(27) JEREMY BAYSTON
(28) PAUL BELL
(29) PAUL BELL
(30) SARAH BENN
(31) RYAN BENTLEY
(32) DAVID ROBERT BERKSHIRE
(33) MOLLY BERRY
(34) GILLIAN BIRD
(35) RACHEL JANE BLACKMORE
(36) PAUL BOWERS
(37) KATE BRAMFITT
(38) SCOTT BREEN
(39) ALICE BRENCHER
(40) EMILY BROCKLEBANK
(41) TOMMY BURNETT
(42) TEZ BURNS
(43) GEORGE BURROW
(44) JADE CALLAND
(45) OLWEN CARR
(46) CAROLINE CATTERMOLE
(47) IAN CAVE
(48) MICHELLE CHARLESWORTH
(49) ZOE COHEN
(50) JONATHAN COLEMAN
(51) PAUL COOPER
(52) CLARE COOPER
(53) JEANINIE DONALD-MCKIM
(54) KATHRYN DOWDS
(55) JANINE EAGLING
(56) STEPHEN EECKELAERS
(57) SANDRA ELSWORTH
(58) HOLLY JUNE EXLEY
(59) CAMERON FORD
(60) WILLIAM THOMAS GARRATT-WRIGHT
(61) ELIZABETH GARRATT-WRIGHT
(62) ALASDAIR GIBSON
(63) ALEXANDRA GILCHRIST
(64) STEPHEN GINGELL
(65) CALLUM GOODE
(66) KATHRYN GRIFFITH
(67) FIONA GRIFFITH
(68) JOANNE GROUNDS

(69) ALAN GUTHRIE
(70) DAVID GWYNE
(71) SCOTT HADFIELD
(72) SUSAN HAMPTON
(73) JAKE HANDLING
(74) FIONA HARDING
(75) GWEN HARRISON
(76) DIANA HEKT
(77) ELI HILL
(78) JOANNA HINDLEY
(79) ANNA HOLLAND
(80) BEN HOMFRAY
(81) JOE HOWLETT
(82) ERIC HOYLAND
(83) REUBEN JAMES
(84) RUTH JARMAN
(85) STEPHEN JARVIS
(86) SAMUEL JOHNSON
(87) INEZ JONES
(88) CHARLOTTE KIRIN
(89) JENNIFER KOWALSKI
(90) JERARD LATIMER
(91) CHARLES LAURIE
(92) PETER LAY
(93) VICTORIA LINDSELL
(94) EL LITTEN
(95) EMMA MANI
(96) RACHEL MANN
(97) DAVID MANN
(98) DIANA MARTIN
(99) LARCH MAXEY
(100) ELIDH MCFADDEN
(101) LOUIS MCKECHNIE
(102) JULIA MERCER
(103) CRAIG MILLER
(104) SIMON MILNER-EDWARDS
(105) BARRY MITCHELL
(106) DARCY MITCHELL
(107) ERIC MOORE
(108) PETER MORGAN
(109) RICHARD MORGAN
(110) ORLA MURPHY
(111) JOANNE MURPHY
(112) GILBERT MURRAY
(113) CHRISTIAN MURRAY-LESLIE
(114) RAJAN NAIDU
(115) CHLOE NALDRETT
(116) JANE NEECE
(117) DAVID NIXON
(118) THERESA NORTON

(119) RYAN O TOOLE
(120) GEORGE OAKENFOLD
(121) NICOLAS ONLAY
(122) EDWARD OSBOURNE
(123) RICHARD PAINTER
(124) DAVID POWTER
(125) STEPHANIE PRIDE
(126) HELEN REDFERN
(127) SIMON REDING
(128) MARGARET REID
(129) CATHERINE RENNIE-NASH
(130) ISABEL ROCK
(131) CATERINE SCOTHORNE
(132) JASON SCOTT-WARREN
(133) GREGORY SCULTHORPE
(134) SAMUEL SETTLE
(135) VIVIENNE SHAH
(136) SHEILA SHATFORD
(137) DANIEL SHAW
(138) PAUL SHEEKY
(139) SUSAN SIDEY
(140) NOAH SILVER
(141) JOSHUA SMITH
(142) KAI SPRINGORUM
(143) ANNE TAYLOR
(144) HANNAH TORRANCE BRIGHT
(145) JANE TOUIL
(146) JESSICA UPTON
(147) ISABEL WALTERS
(148) CRAIG WATKINS
(149) SARAH WEBB
(150) IAN WEBB
(151) ALEX WHITE
(152) WILLIAM WHITE
(153) SAMANTHA WHITE
(154) LUCIA WHITTAKER-DE-ABREU
(155) EDRED WHITTINGHAM
(156) CAREN WILDEN
(157) MEREDITH WILLIAMS
(158) PAMELA WILLIAMS