Neutral Citation Number: [2019] EWCA Civ 515

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

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/04/2019

Before:

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

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Between:

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

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- -

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

Hearing dates: 5th & 6th March 2019

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Approved Judgment

Lord Justice Longmore:

Introduction

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

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

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

The Claimants

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

The Defendants

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

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

6. The second defendant is described as:-

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

7. The third defendant is described as:-

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

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

9. The fifth defendant is described as:-

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

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

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

The judgment

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

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

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

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

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

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

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

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

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

4) the fifth defendants were restrained from combining together to

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

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

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

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

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

all with the intention of damaging the claimants.

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

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

This appeal

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

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

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

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

Persons Unknown: the law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Application of the law to this case

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

Width and clarity of the injunctions granted by the judge

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

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

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

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

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

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

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

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

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

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

Geographical and Temporal Limits

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

Section 12(3) of the Human Rights Act

44. Section 12 of the HRA 1998 provides:-

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

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

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

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

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

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

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

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

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

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

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

Disposal

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

Conclusion

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

Lord Justice David Richards:

52. I agree.

Lord Justice Leggatt:

53. I also agree.