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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Royal Courts of Justice
Rolls Building
Fetter Lane
London EC4A 1NL

Date: 24 September 2018

Before :

THE HONOURABLE MR. JUSTICE MARCUS SMITH

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Between :

VASTINT LEEDS B.V.
(a company incorporated under the laws of the Netherlands)

Claimant

- and -

PERSONS UNKNOWN ENTERING OR REMAINING WITHOUT THE CONSENT OF THE CLAIMANT ON LAND AND BUILDINGS COMPRISING PART OF A DEVELOPMENT SITE KNOWN AS THE FORMER TETLEY BREWERY SITE, LEEDS

Defendants

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Ms. Brie Stevens-Hoare, Q.C. (instructed by **Fieldfisher LLP**) for the **Claimant**

Hearing date: 20 July 2018

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Approved Judgment

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

Mr. Justice Marcus Smith:

A. INTRODUCTION

1. The Claimant, Vastint Leeds B.V. ("Vastint"), has the immediate right to possession of a site known as the "Former Tetley Brewery Site" in Leeds. Before me, this property was referred to as the "Estate".

2. By Part 8 proceedings commenced on 30 April 2018 and amended by my order of 4 July 2018, Vastint seeks a final injunction against "persons unknown" enjoining them, without the consent of Vastint, from entering or remaining on the "Site". The Site comprises five discrete portions of land within the overall Estate.

3. By an application notice dated 27 April 2018, Vastint sought interim relief, in broadly similar terms, also against "persons unknown". That relief was granted by Hildyard J on 4 May 2018. Hildyard J's order (which was endorsed with a penal notice) made provision for the service of his order by ensuring that notices were affixed to the perimeter of and entrances to the Site. Personal service was not, however, dispensed with.

4. The interim injunction ran until 4 July 2018, which date was expressed to be the "return date" for the interim injunction. However, Hildyard J's order made clear that the return date was to be treated as the trial of the action, without pleadings or disclosure.[1]

5. The matter next came before me, in the interim applications court, on 4 July 2018. At that hearing, I indicated certain reservations in making a final order on that occasion. I continued the order of Hildyard J until 31 July 2018 or further order, and made clear that the matter should come back to me, for final hearing, before that date. In the event, the final hearing took place on 20 July 2018. This is my judgment on that final hearing.

6. Vastint seeks a *quia timet* injunction against persons unknown. It will be necessary to consider both the rules regarding the grant of final *quia timet* relief (in Section D below) and the rules regarding the joinder as defendants of "persons unknown" (in Section C below). Matters have been complicated by the fact that none of the "persons unknown" have appeared before me, and I have only heard submissions from Vastint. The manner in which I dispose of this matter is described in Section E below.

7. Before considering the rules regarding the grant of final *quia timet* relief and the rules regarding the joinder as defendants of "persons unknown", it is necessary briefly to describe the facts as presented in the evidence before me.[2]

[1] See paragraph 5 of the order of Hildyard J.

[2] The evidence before me comprised: *(i)* witness statement of Daniel Owen Christopher Talfan Davies dated 27 April 2018; *(ii)* witness statement of Michael Denis Cronin dated 27 April 2018; *(iii)* witness statement of Simon Schofield dated 27 April 2018; *(iv)* second witness statement of Daniel Owen Christopher Talfan Davies dated 13 June 2018; *(v)* second witness statement of Michael Denis Cronin dated 13 June 2018; *(vi)* witness statement of Luke Alan Evans dated 13 June 2018; *(vii)* third witness statement of Daniel Owen Christopher Talfan Davies dated 18 July 2018.

B. THE FACTS

8. As much of the Site is unoccupied, Vastint has implemented a number of security measures, including but not limited to fencing on the perimeter of the Site, regular security patrols and weekly inspections of vacant properties.

9. Vastint is unable to eliminate entirely the risk of further trespass to the Site despite the security measures it has put in place.

10. The existence of unoccupied buildings on the Site gives rise to safety concerns prior to development taking place: some of the buildings are unsafe and structurally unstable, and there are hazardous materials and substances like asbestos on the Site.

11. During each of the three phases of the development of the Site, there will be different or increased safety risks on the Site arising out of work being done on the Estate and/or the Site, for example: (during demolition), unstable structures and hazardous substances; (during remediation) large excavations; and (during construction) risks from equipment and machinery.

12. There have been four incidents of trespass, primarily involving caravans, at the Estate (including, but not solely, in relation to the Site) in 2011, 2016, 2017 and 2018. Recently, persons unknown have triggered alarms at the Site; these alarms have been sufficient to warn off these persons, but these are further cases of trespass or (at least) attempted trespass.

13. There have also been a number of incidents, primarily involving actual or attempted illegal raves, taking place at a site in East London owned by another member of the group of which Vastint is a part (Vastint UK B.V.). In the case of this, East London, site, a final injunction against persons unknown was granted by this court in February 2017.

14. There is an increase in gangs using commercial properties for illegal fly-tipping. No specific instances of professional squatters running fly-tipping operations have been identified, but Vastint has incurred clean-up costs of approximately £25,000 after rubbish and unwanted items were left on the Estate and/or the Site following the four incidents mentioned in paragraph 12 above. Other members of the same corporate group have also suffered delay and incurred clean-up costs as a result of fly-tipping elsewhere.

15. There is an emerging illegal rave culture. No specific instances of proposed or attempted illegal raves at the Site have been identified. Vastint relies upon what happened at the East London site, and newspaper articles commenting on the rise of illegal raves; it considers that an empty warehouse on a part of the site known as the "Asda land" may be an attractive location for illegal raves.

16. On 29 May 2018, a high-profile incident occurred at a development site in Blackburn where 20 caravans and 25 vehicles caused significant damage to the value of £100,000.

17. As at 13 June 2018, it was anticipated that demolition would commence in autumn 2018. Remediation (which remains to be agreed) would then follow either at the end of 2018 or early 2019 and, subject to the progress of the first two phases, construction may commence in autumn 2019. There is no evidence before me regarding the anticipated duration of the construction phase of the works.

18. The position, in light of the evidence, may be described as follows:

(1) Despite Vastint taking a number of measures to ensure the physical integrity of the Site, the threat of trespass remains. That threat is said to emanate from three, specific, sources:

(a) Entry involving caravans, by travellers, seeking to establish a more than temporary, or more than purely transient, occupation of the Site.

(b) Entry of persons organising, involved in, or participating in, raves.

(c) Entry of persons seeking to use the Site for fly-tipping.

(2) The evidence regarding the level of the threat from these sources becomes more exiguous as the three sources, described in the preceding sub-paragraph, are individually considered:

(a) There is evidence of actual past entry onto the Estate and/or the Site involving caravans. I do not consider that it is especially profitable to differentiate between trespass involving the Estate and trespass involving the Site. One (the Site) is a subset of the other (the Estate), and in my judgment, trespass onto the Estate albeit not involving the Site is good evidence of a risk of this sort of trespass to the Site.

(b) There is no evidence of actual past entry onto the Estate or the Site for the purpose of raves. Vastint's concern regarding this particular threat is informed by what has occurred at the East London site of its sister company, combined with the existence of premises on the Site (the Asda land) which are attractive to those organising raves.

(c) There is limited evidence of actual past entry onto other Vastint group properties for the purposes of fly-tipping, and there are cases involving the property of third parties, including third party developers.

(3) In terms of the risks that exist in the case of trespass, these are twofold:

(a) First, there are risks to the health and safety of those trespassing (to whom Vastint owes a limited duty of care) as well as risks to the health and safety of those having to deal with such trespass (which persons will include employees and contractors engaged by Vastint, to whom a rather more extensive duty of care will be owed). Obviously, were injury or worse to be sustained by a person, that is only compensable in damages in the most rudimentary way. It is clearly better that the trespass – and the consequent risk to health and safety – not occur.

(b) Secondly, Vastint may well, in the case of trespass, incur significant costs in dealing with such trespass which (albeit theoretically recoverable from the trespasser) are likely to prove in practice irrecoverable.

(4) In terms of the benefits that an injunction enjoining persons (or a class of person) from entering the Site would confer, these are threefold:

(a) First, it was stressed to me that the effect of a court order, enjoining entry, was (in Vastint's experience) a material one; and that this effect was over-and-above the deterrence provided by Vastint's other measures to maintain the integrity of the Site. In short, an injunction, if granted, would have a real effect in preserving the Site from trespass.

(b) Secondly, Vastint considered that an injunction would not only affect the conduct of potential trespassers, but also would underline the seriousness of the position to the police, who might be more responsive in the case of any trespass in breach of a court order.

(c) Thirdly, given that the order sought by Vastint will be buttressed by a penal notice, Vastint would have easier recourse to the court's contempt jurisdiction. (I say easier because, although both Hildyard J and I ordered service of the interlocutory injunctions in this case by additional means,[3] personal service was not dispensed with. Accordingly, unless personal service is dispensed with, it would be necessary for an order to be personally served on a party in breach, and for the order to continue to be breached, before committal proceedings could be contemplated.)

C. PROCEEDINGS AND ORDERS AGAINST PERSONS UNKNOWN

19. It was established in *Bloomsbury Publishing Group plc v. News Group Newspapers Ltd* [2003] EWHC 1205 (Ch) that following the introduction of the CPR, there was no requirement that a defendant must be named in proceedings against him/her/it, but merely a direction that the defendant should be named (if possible).

20. The naming of a defendant thus ceased to be a substantive requirement for the purpose of issuing proceedings, but rather became a question for the case management of the court. In all the circumstances, is it appropriate that, instead of identifying a defendant by name, for the defendant be identified in some other way?

21. The manner in which a defendant can be identified other than by name will vary according to the circumstances of the particular case. Three particular instances may be described:

(1) *Where there is a specific defendant, but where the name of that defendant is simply not known.* In such a case, it may be appropriate to describe the defendant by reference to an alias, a photograph, or some other descriptor that enables those concerned in the proceedings – including the defendant – to know who is intended to be party to the proceedings.

(2) *Where there is a specific group or class of defendants, some of whom are known but some of whom (because of the fluctuating nature of the group or class or for some other reason) are unknown.* In such a case, the persons unknown are defined by reference to their association with that particular group or class.

(3) *Where the identity of the defendant is defined by reference to that defendant's future act of infringement.* In such a case, the identity of the defendant cannot be

[3] See paragraph 3 above.

immediately established: the defendant is established by his/her/its (future) act of infringement.

22. It is this third class of unknown defendant that is in play here. Accordingly, it is appropriate to pay particular attention to the extent to which the courts have sanctioned the joining of persons to proceedings on this basis.

(1) In *Bloomsbury* itself, the Vice-Chancellor stated as follows:[4]

> "The crucial point, as it seems to me, is that the description used must be sufficiently certain as to identify both those who are included and those who are not. If that test is satisfied then it does not seem to me to matter that the description may apply to no one or to more than one person nor that there is no further element of subsequent identification whether by service or otherwise."

(2) *South Cambridgeshire District Council v. Gammell* [2005] EWCA Civ 1429, the Court of Appeal considered the effect of an injunction granted pursuant to section 187B of the Town and Country Planning Act 1990, which provided for the making of injunctions against persons unknown. The Court of Appeal concluded that a person became a party to proceedings by the very act of infringing the order:[5]

> "…In each of these appeals the appellant became a party to the proceedings when she did an act which brought her within the definition of defendant in the particular case…"

(3) In *Ineos Upstream Ltd v. Persons Unknown* [2017] EWHC 2945 (Ch), Morgan J expressed a degree of concern about orders having this effect,[6] but concluded that (particularly in light of the *South Cambridgeshire* decision)[7] this procedure was now open to claimants in cases outside section 187B of the Town and Country Planning Act 1990.

23. At first sight, the notion that a person, through the very act of infringing an order, becomes: *(i)* a party to the proceedings in which that order was made; *(ii)* bound by that order; and *(iii)* in breach of that order, seems counter-intuitive.

24. However, aside from the fact that the making of such orders is now settled practice, provided the order is clearly enough drawn (a point I revert to below), it actually works extremely well within the framework of the CPR. Until an act infringing the order is committed, no-one is party to the proceedings. It is the act of infringing the order that makes the infringer a party. It follows that – as a non-party – any person affected by the order (provided he or she has not breached it) may apply to set the order aside pursuant to CPR 40.9. CPR 40.9 provides:

> "A person who is not a party but who is directly affected by a judgment or order may apply to have the judgment or order set aside or varied."

Thus, were a person to become aware of such an order, and consider the order improperly made, that person (if "directly affected" by the order) could apply to set it aside without more. It is simply that such a person would have to do so before infringing the order,

[4] At [21]. Affirmed in *Cameron v. Hussain* [2017] EWCA Civ 366 at [50], [53] and [54].
[5] At [32].
[6] At [119].
[7] At [121].

whilst still a non-party. It is entirely right that even court orders wrongly made should be obeyed until set aside or varied, and CPR 40.9 does no more than emphasise the importance of such an approach.[8]

25. In terms of how such an order might be framed, the Vice-Chancellor gave the following guidance in *Hampshire Waste Services Ltd v. Intending Trespassers Upon Chineham Incinerator Site* [2003] EWHC 1738 (Ch):

(1) First, that the description of the defendant should not involve a legal conclusion, such as is implicit in the use of the word "trespass".[9]

(2) Secondly, that it is undesirable to use a description such as "intending to trespass", because that depends on the subjective intention of the individual which is not necessarily known to the outside world, and in particular the claimant, and is susceptible of change".[10]

D. *QUIA TIMET* INJUNCTIONS

26. Gee describes a *quia timet* injunction in the following terms:[11]

"A *quia timet* (since he fears) injunction is an injunction granted where no actionable wrong has been committed, to prevent the occurrence of an actionable wrong, or to prevent repetition of an actionable wrong."

27. The jurisdiction is a preventive jurisdiction and may be exercised both on an interlocutory or interim basis or as a final or perpetual injunction. In this case, of course, a final injunction is sought. That injunction will – if granted – be time-limited to the period the perimeter around the Site is in place.

28. *Hooper v. Rogers* [1975] 1 Ch 43 was a case where the Court of Appeal was considering the circumstances in which a mandatory[12] final *quia timet* injunction was being sought. Russell LJ, with whom Stamp and Scarman LJJ agreed, articulated the circumstances in which such an injunction would be granted:[13]

"In different cases, differing phrases have been used in describing circumstances in which mandatory injunctions and *quia timet* injunctions will be granted. In truth, it seems to me that the degree of probability of future injury is not an absolute standard: what is to be aimed at is justice between the parties, having regard to all the relevant circumstances."

29. Gee, similarly, suggests that the circumstances in which a *quia timet* injunction will be granted are relatively flexible:[14]

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[8] It may be that a person infringing the order – and so a party – could apply under CPR 39.3 to have the order set aside. That, as it seems to me, involves something of a strained reading of CPR 39.3, since at the time the order was made, such a person would not have been a party.
[9] At [9].
[10] As regards the second point, it is worth noting that there have been later cases where subjective states of mind have been used in the order. Morgan J referred to this in *Ineos* at [122]. See, for example, *Sheffield City Council v. Fairhall* [2018] EWHC 1793 (QB).
[11] Gee, *Commercial Injunctions*, 6th ed (2016) at [2-035]. See also *Proctor v. Bayley*(1889) 42 ChD 390 at 398.
[12] In this case, Vastint does not seek a mandatory but a prohibitive injunction.
[13] At 50.
[14] Gee, *Commercial Injunctions*, 6th ed (2016) at [2-035].

"There is no fixed or "absolute" standard for measuring the degree of apprehension of a wrong which must be shown in order to justify *quia timet* relief. The graver the likely consequences, the more the court will be reluctant to consider the application as "premature". But there must be at least some real risk of an actionable wrong."

30. However, in *London Borough of Islington v. Elliott* [2012] EWCA Civ 56, Patten LJ, with whom Longmore and Rafferty LJJ agreed, formulated an altogether more stringent test:

"29 The court has an undoubted jurisdiction to grant injunctive relief on a *quia timet* basis when that is necessary in order to prevent a threatened or apprehended act of nuisance. But because this kind of relief ordinarily involves an interference with the rights and property of the defendant and may (as in this case) take a mandatory form requiring positive action and expenditure, the practice of the court has necessarily been to proceed with caution and to require to be satisfied that the risk of actual damage occurring is both imminent and real. That is particularly so when, as in this case, the injunction sought is a permanent injunction at trial rather than an interlocutory order granted on *American Cyanamid* principles having regard to the balance of convenience. A permanent injunction can only be granted if the claimant has proved at the trial that there will be an actual infringement of his rights unless the injunction is granted.

30 A much-quoted formulation of this principle is set out in the judgment of Pearson J in *Fletcher v. Bealey* (1884) 28 Ch D 688 at 698 where he first quotes from Mellish LJ in *Salvin v. North Brancepeth Coal Company* (1874) LR 9 Ch App 705 and then adds his own comments that:

> "…it is not correct to say, as a strict proposition of law, that, if the plaintiff has not sustained, or cannot prove that he has sustained, substantial damage, this Court will give no relief; because, of course, if it could be proved that the plaintiff was certainly about to sustain very substantial damage by what the defendant was doing, and there was no doubt about it, this Court would at once stop the defendant, and would not wait until the substantial damage had been sustained. But in nuisance of this particular kind, it is known by experience that unless substantial damage has actually been sustained, it is impossible to be certain that substantial damage ever will be sustained, and, therefore, with reference to this particular description of nuisance, it becomes practically correct to lay down the principle, that, unless substantial damage is proved to have been sustained, this Court will not interfere. I do not think, therefore, that I shall be very far wrong if I lay it down that there are at least two necessary ingredients for a *quia timet* action. There must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended damage will, if it comes, be very substantial. I should almost say it must be proved that it will be irreparable, because, if the danger is not proved to be so imminent that no one can doubt that, if the remedy is delayed, the damage will be suffered, I think it must be shewn that, if the damage does occur at any time, it will come in such a way and under such circumstances that it will be impossible for the Plaintiff to protect himself against it if relief is denied to him in a *quia timet* action."

31 More recently in *Lloyd v. Symonds* [1998] EWCA Civ 511 (a case involving nuisance caused by noise) Chadwick LJ said that:

> "On the basis of the judge's finding that the previous nuisance had ceased at the end of May 1996 the injunction which he granted on 7th January 1997 was *quia timet* . It was an injunction granted, not to restrain anything that the

> defendants were doing (then or at the commencement of the proceedings on 20 June 1996), but to restrain something which (as the plaintiff alleged) they were threatening or intending to do. Such an injunction should not, ordinarily, be granted unless the plaintiff can show a strong probability that, unless restrained, the defendant will do something which will cause the plaintiff irreparable harm – that is to say, harm which, if it occurs, cannot be reversed or restrained by an immediate interlocutory injunction and cannot be adequately compensated by an award for damages. There will be cases in which the court can be satisfied that, if the defendant does what he is threatening to do, there is so strong a probability of an actionable nuisance that it is proper to restrain the act in advance rather than leave the plaintiff to seek an immediate injunction once the nuisance has commenced. "Preventing justice excelleth punishing justice" – see *Graigola Merthyr Co Ltd v. Swansea Corporation* [1928] Ch 235 at page 242. But, short of that, the court ought not to interfere to restrain a threatened action in circumstances in which it is satisfied that it can do complete justice by appropriate orders made if and when the threat of nuisance materialises into actual nuisance (see *Attorney-General v. Nottingham Corporation* [1904] 1 Ch 673 at page 677).
>
> …
>
> In the present case, therefore, I am persuaded that the judge approached the question whether or not to grant a permanent injunction on the wrong basis. He should have asked himself whether there was a strong probability that, unless restrained by injunction, the defendants would act in breach of the Abatement Notice served on 22 April 1996. That notice itself prohibited the causing of a nuisance. Further he should have asked himself whether, if the defendants did act in contravention of that notice, the damage suffered by the plaintiff would be so grave and irreparable that, notwithstanding the grant of an immediate interlocutory injunction (at that stage) to restrain further occurrence of the acts complained of, a remedy in damages would be inadequate. Had the judge approached the question on that basis, I am satisfied that he could not have reached the conclusion that the grant of a permanent injunction *quia timet* was appropriate in the circumstances of this case."

31. From this, I derive the following propositions:

(1) A distinction is drawn between final mandatory and final prohibitory *quia timet* injunctions. Because the former oblige the defendant to do something, whilst the latter merely oblige the defendant not to interfere with the claimant's rights, it is harder to persuade a court to grant a mandatory than a prohibitory injunction. That said, the approach to the granting of a *quia timet* injunction, whether mandatory or prohibitory, is essentially the same.

(2) *Quia timet* injunctions are granted where the breach of a claimant's rights is threatened, but where (for some reason) the claimant's cause of action is not complete. This may be for a number of reasons. The threatened wrong may, as here, be entirely anticipatory. On the other hand, as in *Hooper v. Rogers*, the cause of action may be substantially complete. In *Hooper v. Rogers*, an act constituting nuisance or an unlawful interference with the claimant's land had been committed, but damage not yet sustained by the claimant but was only in prospect for the future.

(3) When considering whether to grant a *quia timet* injunction, the court follows a two-stage test:

(a) First, is there a strong probability that, unless restrained by injunction, the defendant will act in breach of the claimant's rights?

(b) Secondly, if the defendant did an act in contravention of the claimant's rights, would the harm resulting be so grave and irreparable that, notwithstanding the grant of an immediate interlocutory injunction (at the time of actual infringement of the claimant's rights) to restrain further occurrence of the acts complained of, a remedy of damages would be inadequate?

(4) There will be multiple factors relevant to an assessment of each of these two stages, and there is some overlap between what is material to each. Beginning with the first stage – the strong possibility that there will be an infringement of the claimant's rights – and without seeking to be comprehensive, the following factors are relevant:

(a) If the anticipated infringement of the claimant's rights is entirely anticipatory – as here – it will be relevant to ask what other steps the claimant might take to ensure that the infringement does not occur. Here, for example, Vastint has taken considerable steps to prevent trespass; and yet, still, the threat exists.

(b) The attitude of the defendant or anticipated defendant in the case of an anticipated infringement is significant. As Spry notes,[15] "[o]ne of the most important indications of the defendant's intentions is ordinarily found in his own statements and actions".

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

(d) The time-frame between the application for relief and the threatened infringement may be relevant. The courts often use the language of imminence, meaning that the remedy sought must not be premature.[16]

(5) Turning to the second stage, it is necessary to ask the counterfactual question: assuming no *quia timet* injunction, but an infringement of the claimant's rights, how effective will a more-or-less immediate interim injunction plus damages in due course be as a remedy for that infringement? Essentially, the question is how easily the harm of the infringement can be undone by an *ex post* rather than an *ex ante* intervention, but the following other factors are material:

(a) The gravity of the anticipated harm. It seems to me that if the some of the consequences of an infringement are potentially very serious and incapable of *ex post* remedy, albeit only one of many types of harm capable of

[15] Spry, *Equitable Remedies*, 9th ed. (2014) at 393.
[16] *Hopper v. Rogers* [1975] 1 Ch 43 at 50.

occurring, the seriousness of these irremediable harms is a factor that must be borne in mind.

(b) The distinction between mandatory and prohibitory injunctions.

E. DISPOSITION

(1) Strong probability of a breach of Vastint's rights, unless the defendant is restrained

32. Applying the two-stage test as I have described it, Vastint labours under the considerable disadvantage that it cannot, with any specificity at all, identify the persons likely to trespass on its property. Of course, I accept entirely that this court has jurisdiction to permit proceedings and make orders, even final orders, against "persons unknown", who are only defined by reference to their future acts.[17] But, I must recognise, as a strong indicator against the granting of an injunction, that Vastint lacks altogether any evidence regarding the attitude of the anticipated defendants.

33. On the other hand, Vastint has taken careful and responsible steps to secure the Site and to prevent trespass on it. Despite these measures, as I have described,[18] there has been actual past entry onto the Estate and/or the Site involving caravans. A future incursion by caravans may very well occur; it is impossible to say when. I consider that, as regards this threatened infringement of Vastint's rights, that the first stage of the test has been made out, and that there is a strong probability that, unless restrained by injunction, there will be a future infringement of Vastint's rights by way of trespass.

34. As regards the entry of persons organised, involved in or participating in raves, the evidence amounts to a combination of: *(i)* this having happened on another site owned by the Vastint group in East London; *(ii)* there being a building suitable for, and attractive to the organisers of, raves on the Site; and *(iii)* various attempts unlawfully to access the Site which do not appear to be related to caravans. With some hesitation, I conclude that there is a strong probability that, unless restrained by injunction, Vastint's rights will be infringed by such persons.

35. The evidence as regards fly-tipping is exiguous at best: in relation to the Estate, it is speculation, and there is no evidence of a substantial risk of infringement beyond the assertion that this is something at goes on at (development) sites elsewhere in England and Wales.

(2) Gravity of resulting harm

36. The harm that Vastint envisages as arising out of an act of trespass has been described in paragraph 18(3) above. It is clear that the risks to health and safety (to trespassers, staff and contractors) that Vastint has identified are serious risks to life and limb that ought, if possible, to be avoided.

37. Additionally, there are the significant costs that Vastint would incur in the case of removing trespassers from the Site. Although I accept that, in theory, such costs are compensable in damages, this court should look to the reality of the situation, and

[17] See paragraphs 21-24 above.
[18] See paragraph 18(2) above.

recognise that such costs – in theory recoverable from the trespassers – are unlikely ever to be recovered.[19]

38. I am satisfied that the second limb of the test is met.

(3) The appropriate order in this case

39. For the reasons I have given, it is appropriate to grant a *quia timet* injunction in respect of threatened incursions by:

(1) Persons seeking to establish a more than temporary or more than purely transient occupation of the Site.

(2) Persons organising, involved in, or participating in raves.

40. Vastint contended for an order in the following terms:

"Those Defendants who are not already in occupation of [the Site][20] must not enter or remain on Site without the written consent of [Vastint]…"

The duration of the order is time-limited to the period in which the perimeter surrounding the Site is in place.

41. The precise formulation of the order is a matter to be considered by Vastint in light of this judgment. However, as drafted, the order extends to <u>any</u> person entering the Site without the written consent of Vastint. I do not consider such an order to be workable, satisfactory or appropriate. Because this directly affects the scope of the order I am prepared to make, it is necessary that I should say why I have come to this view:

(1) As I pointed out in argument, as framed, this order would involve police officers and other public authorities entering the property in the lawful execution of their duties being in breach of the order. Vastint has sought to deal with this by a recital to the order, whereby Vastint acknowledges "that this order does not apply to police officers, fire fighters, paramedics or others properly forming part of an emergency service related to the protection of or health and welfare of the public". Aside from the fact that this is quite a vague formulation, it is inappropriate for so important a "carve out" to feature in a recital to an order. So far as I can see, a police officer entering the Site in the execution of his lawful duty would be in breach of the order; it is simply that Vastint, by its recital, would be in difficulty in enforcing the order.

(2) Clearly, the Site is being developed. That will involve large numbers of persons <u>legitimately</u> working on the Site. I anticipate that the identity of the persons so involved will fluctuate over time, with existing members of this group leaving it, and new members joining it. As the order is drafted, each such person will require Vastint's written consent to be on the Site in order to avoid their being in breach of the order. I have not been addressed on the workability of this. Suffice it to say that

[19] See *Hampshire Waste Services Ltd v. Intending Trespassers Upon Chineham Incinerator Site* [2003] EWHC 1738 (Ch), where such irrecoverable costs (as well as safety risks) were taken into account).
[20] It is unclear to me what the purpose of the words "who are not already in occupation of the Site" is.

I have considerable concerns, and I do not consider that the order, as drafted, meets the criteria framed by the Vice-Chancellor and set out in paragraph 22(1) above..

(3) As framed, the order applies to any person entering the Site without Vastint's written consent, subject to the recital that I have described. Its ambit is not confined to the two classes of unknown defendants in respect of whom I have found there to be a substantial risk that they will infringe Vastint's property rights. It extends to any trespasser. I consider that *quia timet* injunctive relief must be tailored to the threat that is feared and should not be wider than is strictly necessary to deal with this threat.

42. Resisting a narrower order than the one it put forward, Vastint made a number of points:

(1) First, it was suggested that the order as drafted followed the suggested form of words of the Vice-Chancellor in *Hampshire Waste Services Ltd v. Intending Trespassers Upon Chineham Incinerator Site* [2003] EWHC 1738 (Ch). That is not, in fact, the case. The wording suggested by the Vice-Chancellor was as follows:

> "Persons entering or remaining without the consent of the claimants, or any of them, on any of the incinerator sites at [the addresses were then set out] in connection with the "Global Day of Action Against Incinerators" [or similarly described event] on or around 14 July 2003."[21]

The Vice-Chancellor sought to target his order to the class of defendant constituting the threat to the claimants' rights: the order in the present case must do the same.

(2) Secondly, it was suggested that it might not be possible to define, with sufficient clarity, the "persons unknown" to whom the order was directed and/or that such narrow drafting would give rise to argument about whether a given person had or had not infringed the order. There are two answers to this point:

(a) First, as a matter of principle, it seems to me that unless the ambit of the order can clearly be drawn, so that it is clear, it ought not to be granted. I do not consider, in this case, that an appropriate order cannot be drafted.

(b) Secondly, for the reason given in paragraph 41 above, the draft order as framed by Vastint is itself unsatisfactorily clear, because I am satisfied that Vastint has given insufficient consideration as to how written consent to be present on the Site will be given to the large and fluctuating workforce that will be properly present on the Site.

(3) Thirdly, it was suggested that singling out specific classes of unknown defendants might suggest that for all other persons, not so identified, this court was somehow sanctioning the tort of trespass. I do not accept that. Anyone entering the Site without consent will be a trespasser: it is simply that, as regards those unknown defendants identified by the order, particular (and very serious) consequences attach should they breach the order.

[21] At 199. Emphasis added.

(4) Final matters

43. When the matter was before me on 4 July 2018, I extended the interim relief granted by Hildyard J until 31 July 2018 or further order. Given the date on which this Judgment is being circulated in draft (26 July 2018), and given the work that needs to be done in relation to the order, it is appropriate that I extend the interim relief to 30 September 2018 or further order, so that a properly drafted final order can be put in place before then.

44. Finally, the interim orders made by Hildyard J and myself made provision for service by additional means, but did not dispense with personal service. This was described to me as an additional safeguard for persons infringing the order, in that committal proceedings could not be commenced against infringing parties without personal service. Given the narrower class of defendant to which the final order I envisage will apply and given the importance of proper enforcement of the order in case of breach, it is appropriate that process envisaged for bringing these proceedings and the orders made pursuant to these proceedings to the attention of potential defendants should constitute the only form of service, and that personal service be dispensed with.