Neutral Citation [2020] EWHC 2614 (Ch)

Case No PT-2020-BHM-000017

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
PROPERTY, TRUSTS AND PROBATE LIST

The Birmingham Civil Justice Centre
33 Bull Street
Birmingham B4 6DS

Date: 13 October 2020

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH

BETWEEN:

(1) THE SECRETARY OF STATE FOR TRANSPORT
(2) HIGH SPEED TWO (HS2) LIMITED

Claimants/Applicants

- and -

ELLIOTT CUCIUREAN

Defendant/Respondent

- -

- -

Mr Michael Fry (instructed by **DLA Piper UK LLP**) for the Applicants
Mr Adam Wagner (instructed by **Robert Lizar Solicitors**) for the Respondent

Hearing dates: 30 and 31 July, 17 September and 13 October 2020

- -

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 Order

1. By an order dated 17 March 2020, sealed on 23 March 2020, Andrews J made various orders consequential upon her decision in these proceedings dated 20 March 2020, published under Neutral Citation Number [2020] EWHC 671 (Ch) (respectively, the **Order** and the **Judgment**[1]).

2. The Order, obtained on the application of the above-named Claimants/Applicants (together either the **Claimants** or **HS2**), was directed at four (groups of) defendants (**Defendants**). The second (group of) Defendants, the **Second Defendants**, were defined and identified in the Order as follows:

> "Persons Unknown entering or remaining without the consent of the Claimants on Land at Crackley Wood, Birches Wood and Broadwells Wood, Kenilworth, Warwickshire shown coloured green, blue and pink and edged red on Plan B annexed to the Particulars of Claim."

3. I shall refer to the land described in this definition of the Second Defendants as the **Crackley Land** or the **Land** and the plan identifying this land as **Plan B**. A copy of Plan B, which formed part of the Order and was appended to it, is appended to this Judgment as **Annex 2**. Thus, the Second Defendants are persons defined by reference to their entering upon or remaining on the Land without the Claimants' consent. It appears to be perfectly possible – in these circumstances – to become one of the Second Defendants simply by entering upon the Land absent consent.

4. The other (groups of) Defendants identified in the Order are not relevant to this Judgment, and I consider them no further.

5. The Order contained a penal notice (the **Penal Notice**), headed as such in bold capital letters, in the following terms:

> "**Penal Notice**
>
> If you the within named Defendants or any of you disobey this order you may be held to be in contempt of court and may be imprisoned, fined or have your assets seized.
>
> **Important Notice to the Defendants**
>
> This Order prohibits you from doing the acts set out in this Order. You should read it very carefully. You are advised to consult a solicitor as soon as possible. You have the right to ask the Court to vary or discharge this Order."

6. The Order contains a number of recitals, and then, provides:

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[1] The terms and abbreviations used in this Judgment are listed in **Annex 1** hereto, together with the paragraph number in the judgment in which each term/abbreviation is first used.

(1) By paragraph 1, that the steps taken by the Claimants "to serve the Claim, the Application and the evidence in support on the Defendants shall amount to good and proper service of the proceedings on the Defendants and each of them. The proceedings shall be deemed served on 4 March 2020."

(2) By paragraphs 8, 9 and 10, service of the Order on (amongst others) the Second Defendants is provided for. These paragraphs provide:

> "8. Pursuant to CPR 6.27 and 81.8, service of this Order on the…Second Defendants shall be dealt with as follows:
>
> 8.1 The Claimants shall affix sealed copies of this Order in transparent envelopes to posts, gates, fences and hedges at conspicuous locations around…the Crackley Land.
>
> 8.2 The Claimants shall position signs, no smaller than A3 in size, advertising the existence of this Order and providing the Claimants' solicitors contact details in case of requests for a copy of the Order or further information in relation to it.
>
> 8.3. The Claimants shall email a copy of the Order to the email address helpstophs2@gmail.com.
>
> 8.4 The Claimants shall further advertise the existence of this Order in a prominent location on the websites: (i) https://hs2warwicks.commonplace.is/; and https:/www.gov.uk/government/organisations/high-speed-two-limited, together with a link to download an electronic copy of this Order.
>
> 9. The taking of the steps set out in paragraph 8 shall be good and sufficient service of this Order on the…Second Defendants and each of them. This Order shall be deemed served on those Defendants the date that the last of the above steps is taken, and shall be verified by a certificate of service.
>
> 10. The Claimants shall from time-to-time (and no less frequently than every 28 days) confirm that copies of the orders and signs referred to at paragraphs [8.1] and [8.2][2] remain in place and legible, and, if not, shall replace them as soon as practicable."

(3) By paragraph 3, the Second Defendants (amongst others) were obliged forthwith to give the Claimants vacant possession of all the Crackley Land. By paragraph 7.2, the court declared that "[t]he Claimants are entitled to possession of the Crackley Land and the Defendants have no right to dispossess them and where the Defendants or any of them enter the said land the Claimants shall be entitled to possession of the same."

(4) By paragraph 4, from 4pm on 24 March 2020 – and subject to a "carve-out" in paragraph 5 of the Order considered below – the Second Defendants and each of them were forbidden from entering or remaining upon the Crackley Land.

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[2] The Order refers to paragraphs 7.1 and 7.2, which is an obvious error. The correct references are, as is evident from the face of the Order, clearly the paragraphs I have identified.

(5) Paragraph 5 – the "carve-out" – provided that:

"Nothing in paragraph 4 of this Order:

5.1 Shall prevent any person from exercising their rights over any open public right of way over the Land. These public rights of way shall, for the purposes of this Order, include the "unofficial footpath" between two points of the public footbath "PROW130" in the location indicated on Plan C annexted to the Particulars of Claim and reproduced as an annexe to this Order;

5.2 Shall affect any private rights of access over the Land held by any neighbouring landowner."

(6) The injunction in paragraph 4 of the Order is explicitly an interim injunction, as is made clear by paragraph 6 of the Order, which provides:

"The order at paragraph 4 above shall:

6.1 remain in effect until trial or further order or, if earlier, a long-stop date of 17 December 2020."

(2) This Application

7. This is the application, dated 9 June 2020, of the Claimants to commit the Respondent, Mr Cuciurean, for various breaches of the Order (the **Application**). The Application is supported by a statement of case (the **Statement of Case**) and by an affidavit sworn by a Mr Gary Bovan (**Bovan 1**). The Statement of Case provides as follows:

"18. It is the [Claimants'] case that [Mr Cuciurean] has on at least 17 separate occasions between 4 April 2020 and 26 April 2020 acted in contempt of the Order, by wilfully breaching paragraph 4.2 of the Order by entering on to and remaining on the Crackley Land.

19. The [Claimants] set out in the Schedule to this Statement of Case each of the 17 alleged acts of contempt. Plan E and the Incident Location Photo also identify the location of each act.

20. As set out by the [Claimants] in the **Proceedings**,[3] the protestors (such as [Mr Cuciurean]) are strongly against the HS2 Scheme and, as feared, have not been deterred from seeking to return and trespass on the Crackley Land simply because the Second Defendants were evicted from the Crackley Land and relocated to Camp 2.[4]

21. The conduct of [Mr Cuciurean] is very serious and significant and has resulted in:

[3] These were the proceedings commenced by the Claimants before Andrews J, which resulted in the Order.

[4] **Camp 1** was the protestors' original location, within the Crackley Land. Pursuant to the Order, and as is further described below, the protestors were removed from Camp 1 and relocated to **Camp 2**, which lies on the Southern border of the Crackley Land.

21.1 substantial costs being incurred by the [Claimants] in seeking to ensure compliance with the Order. The costs alone of [High Court Enforcement Group Limited, **HCE**][5] are in the hundreds of thousands of pounds.

21.2 delays to the HS2 Scheme in the region of approximately 6 months;

21.3 serious risks to the health and safety of the [Claimants'] staff and contractors, members of the public and the protestors themselves;

21.4 risks of damage to plant and machinery used by the [Claimants'] contractors to carry out Phase One works; and

21.5 the [Claimants] now incurring further legal fees in seeking to enforce the Order via this application.

22. There is a real risk that if [Mr Cuciurean] is not sanctioned for the breach of the Order that he (and other protestors) will continue to act in contempt of the authority of the court and continue to breach the Order. In the event of continuing delays to works at the Crackley Land the HS2 Scheme will not be prevented, however, the necessary costs to the taxpayer will be substantial and is estimated to be in the hundreds of millions of pounds."

8. Paragraph 18 of the Statement of Case refers to "at least" 17 alleged breaches of the Order said to amount to contempt of court. I am obviously only interested in, and will only take account of, the 17 incidents described in the schedule to the Statement of Case (the **Schedule**). It will be necessary to consider these 17 incidents specifically in due course. For the present, all that needs to be noted is that I shall, in this judgment, refer to them as **Incidents 1 to 17**.

9. Clearly, the background to the Order and to this Application is the **HS2 Scheme**, by which I mean the works for the high speed rail project commonly referred to as HS2. Phase One of the construction of the HS2 Scheme has been sanctioned by – amongst other legislation – the High Speed Rail (London – West Midlands) Act 2017.

10. As is common knowledge, the HS2 Scheme is a highly controversial one, the sanctioning of which has provoked significant public protest, which has resulted in (amongst other things) the Proceedings and the Order. I should make absolutely clear that these are background facts only, of substantial irrelevance to the matters arising out of the Application. More particularly:

(1) I am not concerned with the lawfulness or desirability of the HS2 Scheme. I proceed on the basis that, in a democratic society such as ours, people are in general entitled to protest, and to voice their protest, in relation to matters that move them. Whilst there are limits to the right to protest, those limits are not before me for any kind of determination.

(2) The Claimants – in paragraph 3 of the Statement of Case – quoted from [133] of *Packham v. Secretary of State for Transport*:[6]

[5] As explained in paragraph 9 of the Statement of Case

[6] [2020] EWHC 829 (Admin).

> "…the clearance works were long ago authorised by Parliament and there is a strong public interest in ensuring that, in a democracy, activities sanctioned by Parliament are not stopped by individuals merely because they do not personally agree with them."

This statement was made in connection with an attempt to judicially review and injunct certain clearance works done – or about to be done – in furtherance of the HS2 Scheme. The point is of no relevance to this Application. This Application is concerned only with *(i)* whether the Order has been breached and *(ii)* whether the circumstances of those breaches – if they occurred – are such as to trigger the contempt jurisdiction. These are extremely important questions to do with the consequences of an alleged breach of a court order. Their resolution does not depend on the merits or otherwise of the HS2 Scheme or the extent of a person's right of protest to that Scheme. The rule of law is, in this case, narrowly and importantly engaged in the sense that there is, before me, the question of whether an order of the court – the Order – has been breached.

(3) Mr Wagner, on behalf of Mr Cuciurean, contended that I should tread with particular care, and apply the rules of contempt with particular rigour, because Mr Cuciurean was exercising his fundamental right of free speech. I reject that submission, which was considered and rejected by Andrews J:[7]

> "…the simple fact remains that, other than when exercising the legal rights that attach to public or private rights of way, no member of the public has any right at all to come onto these two parcels of land, even if their motives are simply to engage in peaceful protest or monitor the activities of the contractors to ensure that they behave properly…"

The fact is that Andrews J declared that the Claimants had the right to possess the Crackley Land[8] and she made an order buttressing that right to possess in the form of an interim injunction forbidding the Second Defendants and each of them from entering or remaining upon the Crackley Land. It is the breach of that order that is before me: <u>why</u> the order is breached is irrelevant to the contempt jurisdiction, although it may be relevant to the question of sanction (which is not a matter on which I have been addressed). Thus, whilst I shall of course apply the rigour and care that I would apply in any application to commit, I see no cause for adopting a different or more rigorous standard in the present case.

11. This is, therefore, an application made under CPR 81.4 concerning the enforcement, against Mr Cuciurean, of the Order. No-one – in particular not Mr Cuciurean – sought to dispute the validity of the Order. However, for reasons that I describe more specifically below, Mr Cuciurean contended that the Application must be dismissed.

(3) The hearing of the Application

12. The hearing of the Application was listed for two days, on 30 and 31 July 2020. I received helpful written submissions from both the Claimants and Mr Cuciurean before the hearing, and at the hearing heard – over two very full days – the oral evidence adduced by the parties. This evidence comprised:

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[7] Judgment at [35].

[8] Paragraph 7.2 of the Order.

(1) *The evidence of Mr Bovan on behalf of the Claimants.* Mr Bovan is a High Court Enforcement Officer, who was present on the Crackley Land to execute the writ of possession made pursuant to the Order (the **Writ**).[9] Mr Bovan's evidence was contained in two affidavits, Bovan 1 (sworn 9 June 2020) and **Bovan 2** (sworn 23 July 2020). Mr Bovan gave evidence, for about 3 hours, on 30 July 2020, when he was largely cross-examined (his affidavits being admitted as evidence in-chief). In response to a request from me for a diagrammatic representation of his understanding of the perimeter to the Crackley Land, Mr Bovan produced a plan, which he spoke to briefly at the conclusion of the evidence on 31 July 2020. On his recall, Mr Bovan explained the diagram he had produced (by himself) and was briefly cross-examined on it. At my invitiation, he formalised his evidence in a third affidavit (**Bovan 3**), sworn 14 August 2020.

I found Mr Bovan to be a stolid witness, clearly telling what he considered to be the truth, and doing his best to assist the court.

(2) *The evidence of Mr William Sah on behalf of the Claimants.* Mr Sah is a project engineer retained by the Claimants in connection with the HS2 Scheme. Mr Sah's evidence was contained in an affidavit sworn on 24 July 2020 (**Sah 1**). Mr Sah gave evidence – briefly, for about 30 minutes – on 30 July 2020. Mr Sah's evidence was unsatisfactory. In their written closing submissions, the Claimants suggested that Mr Sah "appeared to be over-awed by the occasion, and failed to come up to proof".[10] I hope and believe that the atmosphere in court was not so difficult for witnesses as this, and certainly all of the other witnesses appeared to give their evidence unimpaired by their surroundings. It appeared to me that Mr Sah simply did not recognise the affidavit he had sworn, and parts of it appeared to have been written for him. Thus, Mr Sah did not recognise – and certainly was unable to give evidence in relation to[11] – a plan exhibited to his statement[12] and a video similarly exhibited.[13] I do not propose to speculate on why Mr Sah was adduced as a witness, but clearly I can place no weight on his evidence.

(3) *The evidence of Mr Cuciurean.* As to this:

(a) Mr Cuciurean gave two witness statements to the court. His first was dated 15 July 2020 (**Cuciurean 1**) and his second bears the date 15 July 2020 (**Cuciurean 2**), but is almost certainly made later than this date.[14]

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[9] As I have described, the Order gave possession of the Crackley Land to the Claimants: see paragraph 3 of the Order and paragraph 6(3) above.

[10] Claimants' written closing submissions at paragraph 34.

[11] Indeed, Mr Sah came close to disowning the evidence, on the basis it was nothing to do with him.

[12] This was the plan at page 4 of the exhibit to Sah 1. The plan – referred to at paragraph 14 of Sah 1 – was provided to Mr Sah by a Mr Maurice Stokes.

[13] See paragraph 9 of Sah 1. The video was again provided by Mr Stokes.

[14] A number of the witness statements given on behalf of Mr Cuciurean were unsigned at the time of the hearing, but all of the witnesses adopted their evidence, and nothing turns on this. Signed statements were subsequently provided by Mr Cuciurean's representatives. However, it does mean that the dates of the statements before me were almost certainly wrong, assuming those dates to refer to the date the statement was made. Nothing turns on this, but I note the formal position for completeness.

(b) Mr Cuciurean gave evidence on his own behalf on 31 July 2020. He was to have given evidence on the previous day, 30 July 2020. It was clear during the course of the afternoon of 30 July 2020 that it would not be possible to complete Mr Cuciurean's evidence on 30 July 2020, if it was commenced after that of Mr Sah which, as I say, was given on on 30 July 2020. Mr Wagner, counsel for Mr Cuciurean suggested that, rather than be in "purdah" overnight, it would be better for Mr Cuciurean to give evidence fresh at the beginning of the next day. That sensible suggestion was adopted by the court.

(c) Mr Cuciurean gave evidence for about three hours, most of this being cross-examination. Mr Cuciurean was a charming, funny but ultimately evasive witness. He was – and is – obviously very much committed to his opposition to the HS2 Scheme, and was willing to place himself (and others) in positions of some danger if that furthered his ends in resisting the HS2 Scheme. One example of this arises in relation to Incident 14. Incident 14 involved Mr Cuciurean climbing the extending arm or boom of a piece of machinery used in connection with the HS2 Scheme, locking himself on to the boom (using a thumb lock) approximately 20 metres above the ground, without (so far as I could see) any form of protective harness. Mr Cuciurean was removed from this position by four specialist climbing officers, using two cherry pickers. Mr Cuciurean was either unable or unwilling to disengage or release the thumb lock, which had to be cut off, resulting in injury to Mr Cuciurean.

(d) For the present, it does not matter whether this conduct amounted to a breach of the Order or constituted some other offence. The latter is a matter falling altogether outside the province of this judgment; the former is a matter that I shall come to. I refer to the incident simply as a rather graphic illustration of Mr Cuciurean's commitment. I consider that Mr Cuciurean would go to very considerable lengths in order to give his objections to the HS2 Scheme as much force as they possibly could have. If such steps involved inconveniencing those carrying forward the Scheme or slowed progress down, then I consider that Mr Cucuirean would regard this as a positive and not a negative.

(e) I consider that Mr Cuciurean regarded the Application in exactly the same light. Mr Cuciurean saw the expense and trouble incurred by the Claimants in seeking to make good their Application as a positive and not a negative, and it is my judgement (having watched Mr Cucuirean carefully in the witness box) that in furtherance of this objective he was prepared to be evasive, but not to outright lie to the court.

(f) In short, Mr Cucuirean was a committed opponent of the HS2 Scheme, and I must treat his evidence with considerable caution. However, I do not reject that evidence as that of a liar.

(g) Three of the Incidents (Incidents 14, 16 and 17) have exposed Mr Cuciurean to the potential for separate criminal proceedings.[15] Mr Cucuirean invoked his right against self-incrimination in relation to these incidents and declined to answer certain questions in relation to them.[16] I am satisfied that Mr Cuciurean properly invoked his privilege against self-incrimination, and draw no adverse inference from his failure to answer.

(4) *Other evidence in support of Mr Cuciurean.* The other witnesses who gave evidence on behalf of Mr Cuciurean were all fellow protestors[17] against the HS2 Scheme. The original intention was for all of these witnesses to give evidence in person – as Mr Bovan, Mr Sah and Mr Cuciurean had done[18] - but (late in the day) three witnesses sought permission to give evidence remotely by Skype. More specifically:

(a) Mr Alexander Corcos was interposed as a witness before Mr Cuciurean gave evidence, on 30 July 2020. Mr Corcos is an academic living close to the HS2 Scheme development at the Crackley Land. His exercise regime brought him close to the HS2 Scheme work, but he was not a resident of either of the two camps at which protesters to the HS2 Scheme resided, nor did he regard himself as a part of these protests. However, he was independently concerned about the HS2 Scheme, and filmed and recorded activities on and around the Crackley Land. He made one statement in these proceedings (**Corcos 1**) and gave evidence briefly (for about 30 minutes) on 30 July 2020. He was a clear and careful witness, and I found the video footage exhibited to Corcos 1 particularly helpful in understanding the physical dynamics of the Crackley Land.

The remaining witnesses were called after Mr Cuciurean gave evidence, on 31 July 2020.

(b) Ms Brenda Hillier is, in her own words, opposed to the HS2 Scheme, and gave evidence chiefly in relation to the footpaths ordinarily running across the Crackley Land. Her evidence was contained in one witness statement

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[15] Early in the course of the Application, it was suggested by Mr Cucuirean's solicitors that the substantive determination of the Application should await the outcome of the criminal proceedings. That point was not pursued and the Application was heard, without objection, in the manner I have described.

[16] The existence of related criminal proceedings was always known. The specific question of self-incrimination arose during the course of Mr Cuciurean's evidence. I permitted Mr Wagner, Mr Cuciurean's counsel, and his solicitor, to speak to Mr Cuciurean during the course of his evidence, to determine the extent to which Mr Cuciurean wished to invoke the privilege. The invocation of the privilege was assessed on a question-by-question basis, with Mr Fry, counsel for the Claimants, asking his questions, and Mr Cuciurean invoking his right not to answer individually.

[17] To a greater or lesser extent. All were opposed to the HS2 Scheme: some would not accept the label "protester", and in some cases (but not in others) that would be a fair point to take in the sense that some were not "professional" protestors. I use the term simply to refer generically to people present around the Crackley Land, interested in and opposed to the HS2 Scheme.

[18] This was a hearing during the COVID-19 pandemic, and a socially distanced court room was used, with other interested persons (other members of the legal teams, the press, members of the public) participating by Skype for Business. I should record my great debt to both the court staff and to the parties' legal teams for their considerable assistance in making the trial work as well as it did.

(**Hillier 1**), and Ms Hillier was only briefly cross-examined on it (for less than 5 minutes). I therefore had little time to assess Ms Hillier as a witness, as her evidence was substantially unchallenged by the Claimants. I accept her as an honest witness, doing her best to assist the court.

(c) Mr Hicks has resided at both camps, and is part of the local protests to the HS2 Scheme. The evidence in his first statement (**Hicks 1**) chiefly concerned an incident taking place on 21 April 2020 (Incident 16). Mr Hicks – both in the video footage and before me in court – presented as a massively calm and naturally authoritative figure. He gave evidence for about 10 minutes, and was forthright and clear in his evidence. After the evidential hearings on 30 and 31 July, Mr Hicks submitted a further statement (**Hicks 2**), which was essentially in response to Bovan 3.

(d) Ms Elizabeth Cairns runs her own business, and in her spare time supports the protests against the HS2 Scheme. She did not reside at either camp, but attended both camps from time-to-time. She gave one witness statement (**Cairns 1**) and gave evidence briefly (for about 20 minutes) on 31 July 2020. Although clearly and firmly opposed to the HS2 Scheme, she sought to give her evidence as clearly and fairly as she could, and was obviously an honest and straightforward witness.

(e) Ms Hayley Pitwell sought to give evidence by video–link (Skype for Business). The connection was appalling, and there was no way in which Ms Pitwell's evidence could sensibly be heard. Fortunately, Ms Pitwell's statement (**Pitwell 1**) sought to adduce video footage, and she made no other substantive points. On this basis, I admitted her statement into evidence, but Mr Fry did not have the opportunity of cross-examining her. I do not consider – given the nature of Ms Pitwell's evidence – that the Claimants were in any way prejudiced by this.

(f) Ms Rebecca Beaumont is a photographer, living close to the Crackley Land in Leamington Spa (less than 10 miles from the site). She attended the site, according to her statement, on three occasions. Ms Beaumont was a not particularly satisfactory witness, in that she attempted to portray herself as rather less engaged in the protests against the HS2 Scheme than she in fact was. Although I accept her interest in photography, I do not accept that that was why she was present around the Crackley Land. I do not know why she sought to play down her role as a protestor (for that is what I consider her to have been), but if it was in order to portray herself as a more objective witness, then she did not come across in this way. For the reasons I give later on in this judgment, I consider that I must treat the evidence of <u>all</u> the witnesses with some care: but Ms Beaumont's evidence I consider to have been tendentious and I have approached it with particular caution. Ms Beaumont gave one witness statement (**Beaumont 1**) and was cross-examined upon it for about 20 minutes. I take account of the fact that Ms Beaumont gave evidence by video-link (Skype for Business) and not in court. However, I consider that the quality of her evidence was sufficient for me to reliably make the assessment of her evidence that I have done.

(g) Mr Simon Pook is a solicitor in Robert Lizar Solicitors, the firm retained by Mr Cuciurean. He made a single statement (**Pook 1**) and gave evidence via video-link (Skype for Business). He presented as an entirely clear and straightforward witness, and the concerns that I express in this paragraph have nothing to do with the tenor of his evidence. Mr Pook's evidence post-dated the Incidents, and described a site visit made by him on 1 July 2020. His statement principally concerned the signage around the Crackley Land on that date. My concerns about Mr Pook's evidence are twofold:

(i) First, I am not sure that his was factual evidence at all. Essentially, Mr Pook was seeking to evidence the signage at the Crackley Land at the time the Incidents took place by an *ex post facto* examination. This, as it seems to me, was either expert evidence or irrelevant factual evidence, relating to a point in time that I am not concerned with.

(ii) Secondly, Mr Pook is obviously *parti pris*, being part of the firm whose duty it is to represent Mr Cuciurean.

In these circumstances, I do not consider that I can place much weight on Mr Pook's evidence. But I would wish to stress that this is in no way a criticism of the manner in which Mr Pook gave his evidence (which was for about 20 minutes).

13. With two exceptions – Mr Cuciurean himself and Ms Beaumont – where, for the reasons I have given, I treat their evidence with caution, I have found that all of the witnesses (with the further exception of Ms Pitwell, whose evidence was effectively admitted without examination, for reasons beyond her control) sought to give their evidence honestly and with the intention of doing their best to assist the court. However, I am conscious that the work on the HS2 Scheme and the protests to that Scheme have polarised views and that this inevitably affects how one group regards the other. There is an entirely unsurprising degree of mistrust and wariness, occasionally manifesting itself in violence. Each side is inclined unconsciously to read the worst and not the best into the conduct of the other, and I consider that this will have affected all of the evidence before me, even though I acknowledge (and have so found) that most of the witnesses were trying to help the court as best they could. Nevertheless, this an aspect of the oral evidence that I bear well in mind.

14. In many cases, a judge would draw on contemporaneous documentary evidence to cross-check – and often prefer over – the after-the-event oral evidence that is heard in court. In this case, there is an unsurprising absence of such documentary evidence:

(1) Although I have before me – generally exhibited to the witness statements that I have described – a large number of photographs and diagrams, these are inevitably not capable of presenting a complete contemporary picture of what was going on at the Crackley Land. Diagrams are essentially subjective representations of the views of the person making the diagram. Although it might be said that the camera does not lie (an aphorism I treat with a degree of scepticism in any event), the fact is that the photographs in this case are inevitably a snapshot of what occurred at a specific instant, and from a single

distance and angle. They will lack – inevitably, and without any criticism of the photographer – context.

(2) I was shown, and have admitted into evidence, a great deal of video-footage. Like photographs, such footage lacks context, and must be treated with caution. Inevitably, the camera operator films what he or she wants to record, which will (depending on the skill of the operator) be that person's take of the events being films. Although I have admitted into evidence – with the agreement of all parties – all of the video-evidence, I place more weight on the excerpts that were shown to the witnesses, about which they were asked. Even so, I treat this evidence with care.

15. Two days (30 and 31 July 2020) were set aside for the hearing of the Application. In the event, those days were only sufficient to hear the evidence in the case, and I adjourned the Application to the next two days convenient to the parties and to the court, 17 and 18 September 2020. I should place on the record that this is no criticism of the parties' hearing timetable. The fact is that technical issues arising out of the hearing forum (a socially distanced, "hybrid", hearing involving the attempted streaming of significant portions of video footage) meant that a great deal of time was lost, despite the very considerable efforts of both the legal teams before me and the court staff.

16. At the end of the hearing on 31 July 2020, the limited need for further evidence (Bovan 3 and Hicks 2, which I have described) was discussed, and a timetable for written closing submissions arranged, so that I could read and consider these well-before the resumed hearing on 17 September 2020. On 17 September 2020, I heard (sitting remotely in Birmingham[19]) oral closing submissions, and reserved my judgment. The hearing day scheduled for 18 September 2020 was vacated.

17. A further hearing – 16 October 2020 – was arranged for the hand-down of this Judgment, and any consequential matters.

B. THE RELEVANT LEGAL PRINCIPLES IN GENERAL TERMS

(1) Introduction

18. The breach of an order of the court is an act of contempt of court for which a defendant can be committed.[20] Unsurprisingly, given that the liberty of the subject is potentially at stake, the rules regarding committal are stringent and designed to protect the defendant.

19. This Section seeks to set out the applicable rules in general terms, before considering – in later Sections – whether the Application for committal can succeed in this case. I should stress that these legal principles have been articulated and developed in the context of "traditional" orders, where there is a named – an identified – defendant. This

[19] This was due to the "enhanced" COVID-19 restrictions in force in Birmingham at that time. These did not render an in-person hearing impossible, but did cause me to raise with counsel the (un)desirability of multiple persons physically assembling in Birmingham. The consensus was that oral closings could be as effectively conducted remotely.

[20] CPR 81.4.

case, of course, involves an order against "persons unknown" and Mr Cuciurean contended that the rules applied differently in the context of such orders. This Section does no more than articulate the general rules: the points taken by Mr Cuciurean are considered in later Sections.

(2) The standard of proof

20. The standard of proof on a committal application is the criminal standard of proof, that is to say, beyond reasonable doubt.[21] Rather than, mantra like, to repeat this requirement throughout this judgment, I should stress that this is the standard that I have applied throughout. When I say, in this judgment, that I am satisfied of something or find that something is the case, that means that I am satisfied to or have made a finding at and to the requisite standard.

(3) Requirements regarding the application for committal itself

21. As I have noted, the Application is for committal for breach of a judgment, order or undertaking to do or abstain from doing an act.[22] Such an application is made under CPR 23 and CPR 81.10.

22. The following requirements must be met in relation to such an application:[23]

(1) The application must "set out in full the grounds on which the committal application is made and must identify, separately and numerically, each alleged act of contempt including, if known, the date of each of the alleged acts".[24] The importance of stating precisely and specifically the grounds of contempt was emphasised in *Ocado Group plc v. McKeeve*.[25]

(2) The application notice must contain a prominent notice stating the possible consequences of the court making a committal order.[26]

(3) The written evidence in support of the application must be by way of affidavit.[27]

(4) Unless dispensed with, the committal application must be personally served.[28]

23. I consider whether these requirements are met in Section C below.

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[21] CPR PD 81.9.

[22] The relevant rules are in Section II of CPR 81.

[23] I am adopting the formulation in *Absolute Living Developments Ltd v. DS7 Ltd*, [2018] EWHC 1717 (Ch) at [26].

[24] CPR 81.10(3)(a).

[25] [2020] EWHC 1463 (Ch) at [18] to [36].

[26] CPR PD 81.13.2(4).

[27] CPR 81.10(3)(b).

[28] CPR. 81.10(4).

(4) Procedural pre-conditions regarding the order said to have been breached

24. Not every breach of a judgment, order or undertaking is capable of founding an application under CPR 81.10. There are three requirements that must be satisfied for a breached order to found the basis for an application under CPR 81.10:[29]

(1) Subject to limited exceptions, the order that is said to have been breached must have been endorsed with a penal notice in the requisite form.[30]

(2) The order said to have been breached must have been served personally on the defendant, unless the requirement is dispensed with.[31]

(3) The relevant order must have been served before the end of the time fixed for the doing of the relevant acts.[32] According to its wording, this provision applies only to a mandatory order requiring the doing of an act. The point is that the target of the order must be able – within the time-frame envisaged by the order – to do the act ordered, in order for commital for breach of the order to be sought. There is no similar rule as regard prohibitory orders. That is because – as the wording of the relevant provision makes clear[33] – service is sufficient to put the defendant on notice not to do a certain act, and there is no time needed for compliance. Given that this was a prohibitory and not a mandatory order, it follows that I will only need to note this requirement.

25. I consider these requirements in Section D below.

(5) Substantive requirements

26. Assuming these (important) procedural requirements in relation to the order are met, there are two (what I shall call) substantive requirements:[34]

(1) The order must be clear and unambiguous.[35]

(2) The order must have been breached, and that breach must have been deliberate. It will be necessary to consider, in the context of this case, precisely what "deliberate" means.

27. I consider these requirements in Section E below.

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[29] I am adopting the formulation in *Absolute Living Developments Ltd v. DS7 Ltd*, [2018] EWHC 1717 (Ch) at [28].

[30] CPR 81.9(1).

[31] CPR 81.5 and CPR 81.6.

[32] CPR 81.5(1).

[33] I.e. CPR 81.5(1).

[34] See, generally, *Absolute Living Developments Ltd v. DS7 Ltd*, [2018] EWHC 1717 (Ch) at [30].

[35] *Absolute Living Developments Ltd v. DS7 Ltd*, [2018] EWHC 1717 (Ch) at [30(1)] lists a number of other requirements, which have already been identified. I do not repeat them.

C. PROCEDURAL REQUIREMENTS IN RELATION TO THE APPLICATION

28. I set out the procedural requirements that had to be met in relation to the Application in paragraph 22 above.

29. Turning, then, to the requirements set out in paragraph 22 above:

(1) As to the first requirement described in paragraph 22(1) above:

(a) The Application was made by formal application notice, supported by the Statement of Case. The Statement of Case sets out, with great specificity, the alleged grounds of contempt, in particular in the Schedule which lists the 17 Incidents, each of which is said to constitute a breach of the Order and a contempt of court.

(b) Paragraph 50.2.2 of Mr Cuciurean's written closing submissions asserts that the Claimants are now pleading (or, perhaps more clearly, contending for) a different case to that set out in their Application. Specifically, the Schedule to the Statement of Case sought to identify the location of the various Incidents by reference to certain plans and photographs of the Crackley Land. However, in cross-examination, Mr Bovan accepted that the locations there set out were approximate or rough. Mr Cuciurean contends that this renders the Schedule "inaccurate". It is contended that the Claimants should have applied to amend the Statement of Case and/or the Schedule and – absent such amendment – the Application must fail.

(c) I reject this contention. It is, of course, the case that a respondent to an application for committal is entitled to know, with proper particularity stated in the application for committal, just what the case against him or her is.[36] That is precisely what the Claimants have done. Rather than simply assert that the nature of Mr Cuciurean's alleged contempt is the breach of paragraph 4.2 of the Order, the Claimants have (helpfully and properly) sought to enable Mr Cuciurean to respond in his own defence, by identifying each Incident relied upon with precision.

(d) In due course, I will consider whether the grounds of contempt have, or have not, been made out. But the suggestion that the Application is defective on this ground is hopeless.

I find that the requirement described in paragraph 22(1) above is satisfied.

(2) The Statement of Case, which is part of the application notice, contains a clear and appropriately prominent notice setting out the consequences of the Application. I find that the requirement described in paragraph 22(2) above is satisfied.

[36] *Ocado Group plc v. McKeeve*, [2020] EWHC 1463 (Ch) at [18] to [36].

(3) The Application is supported by Bovan 1, which an affidavit sworn by Mr Bovan, as I have described, and which was attached to the application notice. I find that the requirement described in paragraph 22(3) above is satisfied.

(4) The Application (meaning the application notice, Statement of Case, Bovan 1 and exhibits) have been served on Mr Cucuirean in the manner described in the affidavit of Mr Robert Shaw, a solicitor in the firm instructed by the Claimants, DLA Piper UK LLP (**Shaw 1**). The content of Shaw 1 was not challenged by Mr Cuciurean. It is evident from Shaw 1 that the Claimants were put to considerable trouble in seeking to serve Mr Cuciurean personally. By this, I do not mean to suggest that Mr Cuciurean was consciously seeking to evade service. However, the fact that Mr Cuciurean was, at this time, continuing his activities as a protester to the HS2 Scheme, and the unfortunate hostility that exists as between those who protest the HS2 Scheme and those who are engaged in it (even if only as process servers) meant that although the Application was ready for service on 19 June 2020,[37] it was only served personally on Mr Cuciurean on 24 June 2020, when Mr Cuciurean attended the hotel at which the process server (Mr Long, an enforcement officer with HCE) was staying.[38] I therefore find that Mr Cuciurean was personally served on 24 June 2020, and that the requirement described in paragraph 22(4) above is satisfied. I should be clear that I consider that Mr Cuciurean had notice of the Application well before this date: I cannot be sure whether he actually received the Application prior to 24 June 2020, but clearly something caused Mr Cuciurean to attend at Mr Long's hotel. Had it been necessary – and it is not – I would have been prepared to dispense with personal service of the Application.

D. PROCEDURAL PRE-CONDITIONS REGARDING THE ORDER SAID TO HAVE BEEN BREACHED

(1) The pre-conditions

30. I set out the procedural pre-conditions that must be met before an application for committal can substantively be entertained in paragraph 24 above.

(2) The first pre-condition

31. So far as the first requirement is concerned (described in paragraph 24(1) above), it was accepted by all, and is clear from the face of the Order, that the Order – at least in the abstract – contains the appropriate penal notice. Had the Order been served personally, this requirement would unequivocally have been satisfied.

32. In his submissions to me, Mr Wagner for Mr Cuciurean contended that the importance of a penal notice was clear given that it is expressly dealt with in a specific rule of the CPR, CPR 81.9(1). I accept this. Mr Wagner's point was that – given the way in which the Order was served (a point I have yet to consider) – CPR 81.9(1) was not satisfied. I propose to consider this point when I consider the question of service on "persons unknown", and it seems to me these points (service and the need for a penal notice) are

[37] See paragraphs 8 and 9 of Shaw 1.

[38] See paragraph 18 and in particular paragraphs 18.8 to 18.10 of Shaw 1.

inextricably linked. Subject, therefore, to this major reservation, which I deal with later, I find that the first pre-condition has been satisfied.

(3) The second pre-condition

(a) The issue stated

33. So far as the second requirement is concerned (described in paragraph 24(2) above), it was common ground, and indeed obvious from the narrative in this judgment, that the Order was not personally served on Mr Cuciurean at the time it was made.

34. If this is a deficiency in the Application, it is not one that I consider can be cured after the event. That is because the contempt jurisdiction must operate prospectively. In other words, the acts said to have been in breach of the Order must, at the very least,[39] have been done after service of the Order. The Incidents all took place between 4 April 2020 and 26 April 2020 and it is common ground that there was no personal service of the Order on Mr Cuciurean during this period – although, as Mr Cuciurean stressed, there could have been.

35. In short, unless the requirement for personal service has been dispensed with, and service properly undertaken in accordance with some form of alternative service, this deficiency is fatal to the Application, which would have to be dismissed on this basis alone. Unless I am satisfied that there has been proper service in advance of the Incidents, I am not going to permit any deficiency to be cured retrospectively. The law clearly sets its face against retrospective rules: and that is all the more important in the contempt jurisdiction, where the liberty of the subject is at stake.

36. Claims against persons unknown have in recent years come before the courts with increasing frequency. The civil legal process, and private law rights, are used in order to control ongoing public demonstrations by a continually fluctuating body of protestors. In *Canada Goose UK Retail Ltd v. Persons Unknown*, the Court of Appeal sounded a cautionary note in relation to such processes:[40]

> "As Nicklin J correctly identified, Canada Goose's problem is that it seeks to invoke the civil jurisdiction of the courts as a means of permanently controlling ongoing public demonstrations by a continually fluctuating body of protesters. It wishes to use remedies in private litigation in effect to prevent what it sees as public disorder. Private law remedies are not well suited to such a task. As the present case shows, what are appropriate permanent controls on such demonstrations involve complex considerations of private rights, civil liberties, public expectations and local authority policies. Those affected are not confined to Canada Goose, its customers and suppliers and protesters. They include, most graphically in the case of an exclusion zone, the impact on neighbouring properties and businesses, local residents, workers and shoppers. It is notable that the powers conferred by Parliament on local authorities, for example to make a public spaces protection order under the Anti-social behaviour, Crime and Policing Act 2014, require the local authority to take into account various matters, including rights of freedom of assembly and expression, and to carry out extensive consultation…The civil justice process is a far blunter instrument intended to resolve disputes between parties to litigation, who have had a fair opportunity to participate in it."

[39] Mr Cuciurean contended that even this was not enough. That is a point I consider later on in this judgment.

[40] [2020] EWCA Civ 303 at [93].

37. *Canada Goose* concerned an injunction in relation to persons demonstrating near a store at 244 Regent Street in London. The present case concerns trespass to land with a defined perimeter in the countryside[41] to which the Claimants have the right of possession, which the court has declared in their favour.[42] They are doing work on that land pursuant to statutory authority, to which (amongst others) Mr Cuciurean objects. As Andrews J made clear in the Judgment, interests of public protest and demonstration are attenuated in this case:[43]

> "…the simple fact remains that, other than when exercising the legal rights that attach to public or private rights of way, no member of the public has any right at all to come onto these two parcels of land, even if their motives are simply to engage in peaceful protest or monitor the activities of the contractors to ensure that they behave properly…"

As I noted earlier, no-one is seeking to enjoin the right of protest or free expression, save where that protest or free expression involves trespass onto the Crackley Land.

38. The Claimants are, therefore, simply asserting, against an unknown body of persons, their right to free enjoyment of their property. True it is that civil proceedings against a fluctuating body of persons are a "blunt instrument", but it is a blunt instrument that must be made to work so that the rights of all interested persons, including the civil rights of property-holders, are properly respected and upheld.[44]

39. The present issue – one of service – concerns the rights not of the Claimants, but of persons like Mr Cuciurean, who have not, in any conventional sense, been made party to these proceedings. Making an order against such persons is, in itself, a serious matter; bringing committal proceedings for breach of such an order even more so. Mr Wagner, on behalf of Mr Cucuirean, stressed the importance of procedural safegards. He was right to do so.

(b) Procedural guidelines

40. The law has recently and helpfully been clarified in a trilogy of cases, *Cameron*, *Cuadrilla* and *Ineos*.[45] These culminated in *Canada Goose*, to which I have already

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[41] I shall come to the definition of the Crackley Land, its perimiter, and how that perimeter was demarcated, in due course. Nothing in this paragraph should be taken as a suggestion that I am assuming that the perimeter was clear.

[42] I.e. by way of the Order.

[43] Judgment at [35].

[44] In this regard, it is worth noting that the Claimants did try to engage non-civil remedies. The description of Incident 1 in the schedule to the Statement of Case states:

"[Mr Cuciurean] appeared intoxicated and refused to leave the Crackley Land. [Mr Cuciurean] was therefore arrested by Enforcement Agents, employed by [HCE], for preventing a High Court Enforcement Officer from carrying out his lawful duty. [Mr Cuciurean] became violent by resisting his arrest and was subsequently restrained using reasonable force and secured on the ground.

Warwickshire Police were contacted. However, due to the lack of available space in custody and available policy units, they refused to attend to take [Mr Cuciurean] into custody. [Mr Cuciurean] was therefore de-arrested at approximately 21:00 by the Enforcement Officer and excorted off the Crackley Land."

[45] The trilogy, fully considered in *Canada Goose*, are: *Cameron v. Hussain*, [2019] UKSC 6; *Cuadrilla Bowland Ltd v. Persons Unknown*, [2020] EWCA Civ 9; *Ineos Upsteam Ltd v. Persons Unknown*, [2019] EWCA Civ 515.

referred. In *Canada Goose*, the Court of Appeal identified three classes of "persons unknown" against whom proceedings might be commenced and against whom injunctions might be sought. Those classes are as follow:

(1) *Category 1.* Anonymous defendants who are identifiable but whose names are unknown, such as squatters occupying property.[46]

(2) *Category 2.* Defendants who are not only anonymous, but who cannot even be identified. A good example of a Category 2 Defendant is a "hit and run" driver.[47]

(3) *Category 3.* People who will or who are highly likely in the future to commit an unlawful civil wrong, against whom a *quia timet* injunction is sought.[48]

41. The present case concerns **Category 3 Defendants**. The Court of Appeal noted at [63] in relation to this category:

"It will be noted that *Cameron* did not concern, and Lord Sumption did not expressly address, a third category of anonymous defendants, who are particularly relevant in ongoing protests and demonstrations, namely people who will or are highly likely in the future to commit an unlawful civil wrong, against whom a *quia timet* injunction is sought. He did, however, refer (at [15]) with approval to *South Cambridgeshire Distict Council v. Gammell*…[49] in which the Court of Appeal held that persons who entered onto land and occupied it in breach of, and subsequent to the grant of, an interim injunction became persons to whom the injunction was addressed and defendants to the proceedings. In that case, pursuant to an order permitting alternative service, the claim form and the order were served by placing a copy in prominent positions on the land."

42. At [64], the Court of Appeal also noted:

"Lord Sumption also referred (at [11]) to *Ineos*, in which the validlty of an interim injunction against "persons unknown", described in terms capable of including future members of a fluctuating group of protesters, was centrally in issue. Lord Sumption did not express disapproval of the case (then decided only at first instance)."

43. It is fair to say that Morgan J, who decided *Ineos* at first instance, expressed a degree of concern about proceedings and orders having this effect.[50] Nevertheless, the Court of Appeal in *South Cambridgeshire Distict Council v. Gammell* was clear:[51]

"…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. Thus in the case of WM she became a person to whom the injunction was addressed and a defendant when she caused her three caravans to be stationed on the land on 20 September 2004. In the case of KG she became both a person to whom the injunction was addressed and the defendant when she

[46] *Canada Goose* at [60].

[47] *Canada Goose* at [60].

[48] *Canada Goose* at [63].

[49] [2005] EWCA Civ 1429.

[50] [2017] EWHC 2945 9 (Ch) at [119].

[51] [2005] EWCA Civ 1429 at [32]. Emphasis added.

caused or permitted her caravans to occupy the site. In neither case was it necessary to make her a defendant to the proceedings later."

44. In short, the identity of a defendant in this, third category, is defined by reference to a person's future act, provided that act is defined with sufficient clarity in the proceedings. Thus, in this case, as I have described, the Second Defendants, were:

"Persons Unknown entering or remaining without the consent of the Claimants on Land at Crackley Wood, Birches Wood and Broadwells Wood, Kenilworth, Warwickshire shown coloured green, blue and pink and edged red on Plan B annexed to the Particulars of Claim."

A person would become a Second Defendant by entering on the Crackley Land without the Claimants' consent.

45. Clearly, this is why Category 3 Defendants have caused a degree of unease. It would be concerning if a person could become party to proceedings, subject to an order and in breach of that order (all at the same time) simply by doing something enjoined by that very order. No doubt for this reason, the Court of Appeal emphasised that, whilst the doing of such an enjoined act might be a necessary condition to becoming a Category 3 Defendant, this was by no means a sufficient condition. Service of the proceedings is a fundamental, and generally anterior, critical requirement;[52] as is service of the order itself in order to commit.[53] The question of service of the order is the matter here specifically in issue. As regards the service of the proceedings, the Court of Appeal said this in *Canada Goose*:[54]

"…it is the service of the claim form which subjects a defendant to the court's jurisdiction. Lord Sumption acknowledged that the court may grant interim relief before the proceedings have been served or even issued, but he described that as an emergency jurisdiction which is both provisional and strictly conditional."

46. In light of this, the Court of Appeal articulated "the following procedural guidelines applicable to proceedings for interim relief against "persons unknown" in protestor cases like the present one":[55]

"(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".

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[52] *Canada Goose* at [61].

[53] Hence the requirement of service of the order, now being considered.

[54] *Canada Goose* at [61].

[55] *Canada Goose* at [82]. The guidance is more general than this, but here we are concerned with a Category 3 Defendant.

(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 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, 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."

(c) The Canada Goose guidelines and service in this case

47. Andrews J has, of course, made the Order, which includes the making of an interim injunction against persons unknown. That Order was made after careful submissions by counsel and a reserved judgment – the Judgment – by Andrews J. The Order includes, as I have described, specific provision for:

(1) Service of the originating proceedings and the application for – amongst other things – the interim injunction: see paragraph 6(1) above.

(2) Service of the Order itself, containing the interim injunction: see paragraph 6(2) above.

48. In each case, the specific service provisions – which were expressly contemplating service on the Second Defendants, a class of persons unknown – did <u>not</u> require personal service, but rather service in accordance with the terms of the Order. However, the Order does not, <u>in terms</u>, state that personal service is to be dispensed with.

49. The Judgment, however, makes clear that the issues regarding service on "persons unknown" were carefully considered by the Judge, with the assistance of counsel.[56] The

[56] The Judgment at [2] states that "Mr Wagner [of counsel, and counsel to Mr Cuciurean in this case]…assisted the Court by drawing attention to points that he considered might have been made by the "persons unknown" trespassing on the...Crackley Land..., who are named as the…Second Defendants and who were not represented at the hearing".

question of the service of the proceedings on the Second Defendants was considered by the Judge at [15] and [16] of the Judgment:

> "15. There is a bespoke procedure for serving trespassers who are "persons unknown" with a claim for possession of the land under CPR 55.6. That procedure was followed by the Claimants' solicitors and the process servers, Mr Finch and Mr Seymour, but additional steps were also taken to bring these proceedings to the attention of anyone likely to have an interest in defending them.I am satisfied that the further steps that were taken, described in the evidence of Ms Jenkins, were both reasonable and sufficient, as evidenced by the fact that Mr Bishp and Mr Rukin [these were the Third and Fourth Defendants, obviously not persons unknown and specifically identified in the proceedings by name] were able to respond to the claim and instruct counsel to represent them.
>
> 16. The Claimants have made an application, to the extent that elements of the claim go beyond a claim for possession, for an order that the steps taken to bring the claim form to the attention of the defendants (including the "persons unknown" defendants) were good alternative service methods pursuant to CPR 6.15 and 6.27. I am satisfied that they were. Quite apart from the fact that these service methods sufficed to bring the proceedings to the attention of the two named defendants, Ms Jenkins' second witness statement confirms that a number of interested parties have sought and obtained copies of the proceedings since the notice was published on the websites to which she refers."

50. Equally, the question of interim injunctive relief against protestors whose identities are unknown was specifically considered, and the Judge expressly referred to the *Canada Goose* guidelines, the Court of Appeal's decision in *Canada Goose* having been handed down on 5 March 2020, a couple of weeks before the Judgment and the Order. The Judge bore these (and other) authorities in mind when making the Order. The Judgment says this (under the heading "The claim for an interim injunction"):

> "30. This proved to be the most controversial aspect of the claim, and at one point I was minded to refuse such relief on the basis that the declaration would suffice to protect the Claimants' interests. However, Mr Roscoe [counsel for the Claimants] made the valid point that an injunction may have a deterrent effect, at least so far as otherwise law-abiding protesters are concerned, and that the difficulties of enforcement which he acknowledged when pressing for declaratory relief have not prevented such relief from being granted by the courts in the past.
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> 31. To the extent that injunctive relief was pursued against Mr Bishop and Mr Rukin personally, there was no evidence that either of these gentlemen was likely to trespass on the land in future if they were required by the Court to give possession back to the Claimants. Mr Wagner [counsel for Mr Bishop] assured me that this was so in the case of his client, and that if I granted an order for possession the only purpose for which Mr Bishop would return would be to assist in the dismantling of the camps and the removal of any structures erected by the protesters. Mr Powlesland [counsel for Mr Rukin], in echoing those assurances, pointed out that Mr Rukin had gone to the trouble of seeking out land that he believed did not belong to the Secretary of State on which to set up the protest site at Crackley, which was a clear indication that he would not deliberately set out to trespass on land to which the Claimants had rights of possession.
>
> 32. I made it very clear to Mr Bishop and Mr Rukin, who were present in court, that if they were found trespassing on the land in future, contrary to those assurances, it would not bode well for them in any contempt proceedings. I did not require any express undertakings to be given in lieu of an injunction because in order to obtain relief of

either sort the Claimants must first establish a real and imminent risk of further torts being committed by the relevant defendant. The Claimants have failed to do so. That being the case, there is no need for either Mr Bishop or Mr Rukin to continue to be named defendants to these proceedings.

33. So far as the claim for injunctive relief against "persons unknown" (including new protesters) is concerned, there is no dispute that, apart from Mr Bishop and Mr Rukin, the previous and current occupiers of the…Crackley Land have not been identified by the Claimants. Both Mr Wagner and Mr Powlesland raised the question whether sufficient steps had been taken by the Claimants to attempt to identify those other persons. There was no evidence, for example, that any of the "persons unknown" referred to in the evidence of Mr Corvin who were encountered by contractors, were asked the simple question "who are you?". That is fair comment, although it may be unrealistic to expect that a protester would answer that question. The group of protesters at the Crackley site comprised a handful of people, and the posts on social media could have been used in an effort to trace them, but it seems that apart from Mr Bishop and Mr Rukin no such effort was made. Indeed, no-one appears to have taken the fairly obvious step of asking Mr Bishop and Mr Rukin to identify them.

34. In light of this, I accept that perhaps the Claimants could have done more to identify the protesters who were in occupation of the protest camps on the two sites; but bearing in mind the evidence of Mr Bishop, in particular, it seems unlikely that any of the existing protesters associated with the camps will engage in any future trespasses. The problem lies with those who did not abide by the Code of Conduct.

35. If an injunction is granted in the short-term, the Claimants know that they will have to do better in terms of identifying those responsible if they are to convert it into a final order In a case such as this, the test for interim relief is a higher one than the standard *American Cyanamid* test for an injunction, because it must be shown that the Claimants are likely to obtain final relief. I consider that they are. In this regard, the simple fact remains that, other than when exercising the legal rights that attach to public or private rights of way, no member of the public has any right at all to come onto these two parcels of land, even if their motives are simply to engage in peaceful protest or monitor the activities of the contractors to ensure that they behave properly. If persons are found trespassing in the future, and those people are identified or are sufficiently capable of being identified by the time of the hearing, then the conditions for final relief will be established.

36. The next thing that the Claimants must establish is that there is a sufficiently real and imminent risk of a tort being committed (in this case, a future trespass or trespasses) to justify *quia timet* relief. Mr Wagner submitted that much of the evidence of past behaviour relied on by the Claimants was contested. So far as the uncontested evidence was concerned – the nails and glass on the roadway, for example – these were isolated incidents for which the protesters at the camp were not responsible. Unlike *Cuadrilla*, this was not a case where committed and experienced protesters were using direct action to disrupt the works every day, by standing in front of truck and so forth. This was a case where peaceful protest camps had attracted one or two unfortunate incidents from outsiders, and going forward, such matters may well resolve. If they did not, it would be open to the Claimants to come back with better evidence.

37. Mr Powesland likewise submitted that so far as the Crackley Land was concerned, the incidents logged on Plan D and referred to in Mr Corvin's evidence were all in the immediate vicinity of the camp. Soe where well in the past, and had not been repeated, whilst others were apparently committed on the public highway. Once the camp has gone, he submitted, there was unlikely to be any risk of repetition.

38. However, as Mr Roscoe pointed out, such control of the land as there was by the responsible element of the protesters will cease with the dismantling of the camps. The problem potentially lies with those of a more militant persuasion who are prepared to do the type of things that Mr Bishop and those associated with him would not do, and have vehemently denied doing in the past, such as the breaking down of fencing or cutting the ties and padlocks on it; the digging up of closed badger setts; and the placing of nails and glass on the access roads. People who are prepared to engage in that sort of behaviour are less likely than the current protesters to make themselves known and less likely to desist in the face of orders for possession and declarations of landowners' rights.

39. I am satisfied that there is enough evidence to demonstrate a real risk of further trespasses on the land in future by persons who are opposed to the HS2 project and that such persons are unlikely to confine their activities in the way in which the peaceful protesters allied to Mr Bishop and Mr Rukin have done in the past.

40. I was initially inclined to take the view that it might be possible to formulate any interim injunction in a more focussed way that would specifically address the type of objectionable (and tortious) behaviour which is a particular cause of concern – breaking down fencing, for example. However, leaving aside the difficulty of proving individual responsibility for such acts, there is a wide variety of conduct that could disrupt the project – someone wandering into an area where soil has been excavated from the woodland for the purpose of replanting, for example. The concept of interference with the work of contrators is far more nebulous than trespass and there is a need to define with clarity precisely what someone is and is not entitled to do. Trespass is a binary and simple tort which is easily defined as entering on another person's land without permission, and therefore it is simple enough to formulate an injunction preventing future trespasses in terms that are clear and unambiguous.

41. Both Mr Wagner and Mr Powlesland raised consideration of whether HS2 had come to equity with clean hands. Reference was made to the evidence that their contractors had felled woodland that was outside the construction boundaries, and to Mr Rukin's evidence of incidents on other sites on the HS2 corridor where, for example, the habitats of nesting birds had been disturbed. Mr Roscoe's response was that the concerns that the Defendants have may well be legitimate concerns shared by the general public, but they have no private rights to protect the trees or the wildlife. There are bodies that do have such rights and they are the appropriate bodies to be policing the matter. There are ecologists who are actively involved in supervising the works, and it would be unrealistic to suggest that a largescale project of this type would not cause some ecological damage. Nevertheless, steps are being taken to mitigate that damage.

42. Like it or not, Mr Roscoe submitted, secure access is needed to the whole of the site in order for the works to be carried out safely. You cannot have people roaming around freely on the site in order to carry out monitoring. As Mr Holland QC observed in the previous HS2 case at [136], "there is not warrant for the court contemplating the commission of torts even if this could be described as "peaceful and non-violent civil disobedience" or "direct action". I respectfully agree.

43. At the end of the day, there is no material distinction to be drawn between the situation in that case and in this, so far as justification exists for granting an interim injunction. That said, I am not prepared to grant the injunction for a period of 2 yesrs as Mr Roscoe initially sought. 9 months should suffice to cover the two key periods of the year within the ecological cycle referred to by Mr Corvin, namely April-May and September-October, and given the Claimants sufficient time to identify the "persons

> unknown" against whom they would seek final injunctive relief. These proceedings should not be allowed to remain unresolved for longer than is necessary.
>
> 44. The Claimants can always seek an extension of time, but at the present time of economic uncertainty, there are many factors which could have an impact on the future of this project. That is yet another reason why I am not prepared to grant an injunction for more than 9 months. Mr Roscoe offered to include in the order a provision requiring the Claimants to inform the Court if something that materially affects the future of the HS2 project arises during the period of the injunction and I consider it would be sensible to do so."

51. It was not contended by Mr Cuciurean that the Order was irregular. Nor did Mr Cuciurean seek to avail himself of his undoubted right under paragraph 15 of the Order to apply to the court at any time (on notice to the Claimants) to vary or discharge it.

52. In these circumstances, it is very difficult to see how the Order has not, of itself, dispensed with the requirement for personal service:

(1) It is quite clear from *Canada Goose* that it is perfectly possible for a person or persons unknown – including Category 3 Defendants, which Mr Cuciurean is – to be joined to proceedings by alternative service and for an interim injunction to be made against such person or persons.

(2) In such a case, the persons unknown must be defined in the originating process by reference to their alleged unlawful conduct. In this case, the Second Defendants are materially defined as those "entering…without the consent of the Claimants [the Crackley Land]". Assuming – for present purposes – that Mr Cuciurean did enter the Crackley Land without the consent of the Claimants, he became a Second Defendant at that instant provided he was properly served with the proceedings.

(3) In this case, the Order expressly provided that the steps taken by the Claimants to serve the claim, the application and the evidence in support should amount to good service, the proceedings being deemed served on 4 March 2020.[57]

(4) Assuming entry by Mr Cuciurean onto the Crackley Land any time after 4 March 2020 (I will, of course, be coming to the Incidents), there is no doubt in my mind that by the operation of the Order, Mr Cuciurean became a Second Defendant at the time when entry was effected.

(5) Paragraph 1 of the Order only made provision for the service of the proceedings and the application pursuant to which the Order was ultimately made. Whether an order should be made, and whether it should contain an interim injunction was – as has been seen from the passages quoted in paragraph 50 above – the subject of careful consideration by the Judge. The Judge determined that it was appropriate to order an interim injunction. She obviously had well in mind the *Canada Goose* guidelines:

[57] See paragraph 1 of the Order, quoted in paragraph 6(1) above.

(a) The injunction in the Order was expressly limited in time, with a long stop date of 17 December 2020.[58]

(b) The injunction was expressly limited in geographical scope, as set out in Plan B appended to the Order.[59]

(c) Service of the Order was expressly provided for. Paragraph 8 of the Order deals with service on the Second Defendants,[60] and provides that "service of this Order on the…Second Defendants shall be dealt with"[61] in the various ways set out in paragraph 8. Paragraph 8 is mandatory, in that service had to be effected in this way. That provision must have been made pursuant to CPR 81.8(2)(b), and it seems to me that an automatic consequence of making an order for alternative service under this provision is that personal service be dispensed with. CPR 81.8(2) provides:

> "In the case of any judgment or order the court may –
>
> (a) dispense with service under rules 81.5 to 81.7 if the court thinks it just to do so; or
>
> (b) make an order in respect of service by an alternative method or at an alternative place".

The court, in paragraph 8 of the Order, was obviously exercising the jurisdiction under CPR 81.8(2)(b). That is clear from the reference to CPR 6.27 and CPR 81.8.[62] The whole point of providing service "by an alternative method"[63] is that the primary method of service is dispensed with, but only to be replaced by a different (and, inferentially, in the circumstances more appropriate) form of service. There is no way that paragraph 8 of the Order can be read as making provision for service by an additional method.

(6) I have yet to consider whether these requirements in the Order were met. Mr Cuciurean's contentions focussed on the point that personal service was a requirement of the Order notwithstanding what I have found to be the effect of CPR 81.8(2)(b) and the relevant provisions of the Order. As to this:

(a) The foregoing analysis was adopted by His Honour Judge Pelling and the Court of Appeal in *Cuadrilla Bowland v. Ellis*[64] and was relied upon by

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[58] See paragraph 6 of the Order, quoted in paragraph 6(6) above.

[59] See paragraphs 2, 3 and 6(4) above, which refer to the relevant parts of the Order.

[60] Quoted in paragraph 6(2) above.

[61] Emphasis supplied.

[62] These are both provisions dealing with service by an alternative method.

[63] Emphasis added.

[64] [2019] E30MA313 at [13] and [14]; [2020] EWCA Civ 9 at [28].

the Claimants in support of their contention that personal service was not a requirement in this case.[65]

(b) Mr Cuciurean's written submissions did not address CPR81.8(2)(b). Rather, reference was made to service not being compliant with CPR81.8(1), which provides:

> "In the case of a judgment or order requiring a person not to do an act, the court may dispense with service of a copy of the judgment or order in accordance with rules 81.5 to 81.7 if it is satisfied that the person has had notice of it –
>
> (a) by being present when the judgment or order was given or made; or
>
> (b) by being notified of its terms by telephone, email or otherwise".

This provision deals with dispensation of service, not the present case of alternative service. It is clearly irrelevant in the present circumstances. The Order, as I have stated, makes provision for alternative service, it does not dispense with service altogether or at all. It might, fairly, be said that the method of alternative service replaces personal service.

53. It follows that Mr Cuciurean's points that he needed to be personally served and that, because he had not been, the Application must fail, are misconceived, and I reject them. Personal service was not required: alternative service was specified in the Order pursuant to CPR81.8(2)(b).

54. Of course, it does not follow from this that the Application must succeed. Mr Wagner, on behalf of Mr Cucuirean, made a number of points related to – but, in the final analysis, different from – the question of service that I have just considered. It will be necessary to consider these points specifically, and I do so in Section D(3)*(e)* below. Before I turn to these points, however, I must satisfy myself that the service requirements stipulated in the Order were complied with.

(d) The service requirements contained in the Order

(i) Compliance

55. It is, of course, necessary that the service requirements in the Order be strictly complied with. I find that they were:

(1) Paragraph 9 of the Order provides that the taking of the steps set out in paragraph 8 would be good and sufficient service of the Order on the Second Defendants. Service would be deemed when the last of those steps had been taken, and needed to be verified by a certificate of service.[66]

(2) The steps taken in order to comply with the service provisions of the Order are set out in a witness statement of a process server, Mr Ian Beim, dated 27 March 2020

[65] See paragraphs 24 and 25 of the Claimants' written opening submissions.

[66] See paragraph 6(2) above.

(**Beim 1**). Mr Beim was not called for cross-examination as the content of his statement was not challenged.

(3) In accordance with the Order, certificates of service were provided. They were before me, and I am satisfied that they show service of the Order in accordance with its terms.

56. I find that the service requirements contained in the Order were complied with. I find that, in accordance with the terms of the Order, service of the Order was effective on 25 March 2020.

(ii) The provisions regarding notice of the Order

57. Notice of the Order was thus provided for in three ways:

(1) On-line by publication on a website: see paragraph 8.4 of the Order.[67]

(2) By email to an email address: see paragraph 8.3 of the Order.[68]

(3) By notice: see paragraphs 8.1 and 8.2 of the Order.[69] It is necessary to explore the nature of these notices in greater detail:

(a) The Order specified two types of notice:

(i) What I shall term an **Injunction Notice**, affixing sealed copies of the Order in transparent envelopes to posts, gates, fences and hedges at conspicuous locations around the Crackley Land.[70]

(ii) What I shall term an **Injunction Warning Notice**, a notice no smaller than A3 size, advertising the existence of the Order, and providing the Claimants' solicitors' contact details in case of requests for a copy of the Order or further information in relation to it.

(b) From the photographic evidence exhibited to Bovan 1, it is clear that Injunction Notices and Injunction Warning Notices were actually placed in the same locations (and that, I infer, was the intention of the Order: the Injunction Warning Notice was intended to advertise the Injunction Notice). Even if this was not the intention of the Order, this was an entirely proper and sensible course: the Injunction Notice is a copy of the Order (on A4 paper) and lacks a degree of visual prominence when affixed in the open air. That lack of visual prominence is made up for by the Injunction Warning Notice, which (whilst twice the size of the Injunction Notice) contains less detail, and a much more stark warning (white lettering on a red background) stating "HIGH COURT INJUNCTION IN

[67] These provisions are all set out in paragraph 6(2) above.

[68] These provisions are all set out in paragraph 6(2) above.

[69] These provisions are all set out in paragraph 6(2) above.

[70] Paragraph 8.1 of the Order.

FORCE" together with the necessary details and a map of the relevant land affected.

(c) I shall come to describe the Crackley Land – and the parts of the Crackley Land most important for the purposes of the Application – in due course. Conservatively, there were seven Injunction Notices and Injunction Warning Notices in the most important parts of the Crackley Land, and more if one considers the Crackley Land as a whole.

(d) In addition to the Injunction Notice and the Injunction Warning Notice, there was a third form of notice, which I shall call a **No Trespass Notice**. The No Trespass Notice – which was not provided for in the Order – stated:

"Trespassers keep out

Private property

This land is in possession of HS2

This is a personal protective equipment zone

Risk of injury from construction activities

Trespassers may be subject to civil/criminal proceedings

24/7 Freephone Community Helpline 08081 434 434"

These notices were large (about twice the size of the A3 Injunction Warning Notices) and again were visually distinctive – white text on a red background.

(e) As I have said, the No Trespass Notices were not ordered, and I was not provided with a map of their locations. However, it was common ground that these notices appeared not only at the perimeter of the Crackley Land, but also inside the perimeter. A person penetrating the Crackley Land, and proceeding within it, would be likely to see multiple No Trespass Notices.

(e) Further points taken by Mr Cucuirean

(i) Introduction

58. As I have noted, Mr Cuciurean's first point, as regards the requirement of service, was that personal service was required: and so, the Order was not properly served. I have rejected that contention, for the reasons already given.

59. However, the Order is no ordinary order and, as I noted in paragraph 54 above, Mr Cuciurean took a number of points <u>related</u> to the question of service but <u>distinct</u> from it. In short, Mr Cuciurean contended that <u>even if</u> (as I have found) there was proper service, the Application must still fail for these (independent) reasons. These points were as follows:

(1) There was a requirement of knowledge of the Order, including knowledge of its terms, operating independently of the requirement of service, that had to be satisfied before the Application could succeed. It was Mr Wagner's contention, on behalf of Mr Cuciurean, that what was required was some knowledge of the Order – going beyond the service requirements contained in the Order – of which I had to be satisfied before acceding to the Application (assuming satisfaction of all other requirements).

(2) There was a requirement that the penal notice in the Order be specifically – and separately – drawn to Mr Cuciurean's attention, and that this had not been done, sufficiently or otherwise.

(3) There was a continuing requirement that the service requirements specified in the Order be complied with. Mr Wagner made the point that the Order, albeit interim, had a duration of months (it had a long-stop date of 17 December 2020[71]) and that the notices put up pursuant to the Order might be subject of physical deterioration or damage (whether accidental or deliberate).

60. I consider these points in turn below.

(ii) An additional requirement of knowledge

61. In the law of contempt, it is very difficult to point to any clear law suggesting that there is a requirement of "knowledge" of the order independent of the requirement that the order be served, and neither Mr Wagner (for Mr Cuciurean) nor Mr Fry (for the Claimants) were able to do so. Of course, the vast majority of the case-law in this area relates to orders where there is a named defendant who is personally served. In such cases, it is very difficult to see how there is space for the existence of a knowledge requirement going beyond personal service. The whole point about personal service is to bring the order to the attention or notice of the person being served. If that person – despite personal service – chooses to pay no heed to the order, by (for instance) immediately binning it, then that sort of unwillingness to engage clearly cannot permit such a person to avoid the consequences of breaching the order (including committal).

62. CPR 81, as I have described, makes provision for service by alternative means. The whole point of this jurisdiction is to enable proper service to be effected by a different means, a means other than personal service. Any judge exercising this jurisdiction – particularly when the order in question is going to bear a penal notice – will be concerned to ensure that whatever method of alternative service is adopted is sufficient to bring to the notice of the persons concerned both *(i)* the existence of the order and *(ii)* either the terms of the order or else the means of knowing the terms of the order.

63. In these circumstances, I approach the question of the need for an additional knowledge requirement – over and above service – in the following way:

(1) The Order in this case is, as I have repeatedly noted, made against persons unknown. Almost inevitably in such cases – and inevitably in the case of Category 3 Defendants – that will involve some dispensation from the obligation

[71] See paragraph 6 of the Order.

of personal service and some form of alternative or substituted service in place of personal service.

(2) Because of the need to have effective service before the order in question is breached, it is inevitable that the question of alternative service be considered when the order is made and not when the breach of the order is brought before the court.

(3) A judge, when considering alternative service must, in the case of persons unknown, bear in mind and apply the guidance of the Court of Appeal in *Canada Goose*. In particular, it is necessary to note the fundamental importance of service, both of the originating proceedings and of the order itself.

(4) Obviously, what ought to be ordered by way of service depends on all the circumstances of the case. It is the judge making the order who is the person best qualified to determine:

(a) Whether service by alternative means is appropriate; and

(b) If so, how such service should be accomplished.

Where such an order is breached, and an application for committal made, the judge hearing that application ought to be slow to second guess the judge who made the order itself, particularly where the judge who made the order has paid due regard to the *Canada Goose* guidance.

(5) In this case, as I have described, Andrews J considered both the service of the originating process and the service of the Order with great care, in light of the *Canada Goose* guidance. The question of alternative service was expressly considered. It seems to me – if I may respectfully say so – that the question of service was gone into extremely thoroughly by the Judge, and that this is precisely the sort of case where the judge making the order ought not to be second-guessed. Matters would be very different if the service provisions either failed to consider the *Canada Goose* guidance or – in light of the circumstances as they stood at the time of the order – failed properly to apply that guidance. Neither of these points pertains here.

(6) This means that I must be slow to re-visit the question of service. But I do not consider that the question of service can be altogether disregarded on an application for committal, no matter how carefully the matter has been considered by the judge making the order. There is no inconsistency between attaching proper weight to the order of the judge making it, and taking account of matters subsequent to the making of the order. The circumstances in which service is in fact effected will always be relevant. Generally speaking, personal service of an order will be sufficient to bring both the existence of the order and the ability to consider its terms to the attention of the person served. But there may be exceptions. Even in the case of personal service, it is possible that (unknown to the applicant for committal) the person served suffers from some lack of capacity, rendering him or her incapable of considering the terms of the order or even the fact that it is an order of the court at all. In such a case – whilst the burden of proving this hypothetical lack of capacity would rest on those representing that

person – it is inconceivable that a court would consider the contempt procedure applicable. What was, on the face of it, good service, would be set aside.[72]

(7) I consider that precisely the same approach must apply in this case. Given that, in the case of Category 3 Defendants, the service provisions in the order will have to deal with the question of notice to an unknown and fluctuating body of potential defendants, there may very well be cases where *(i)* the rules on service may have been complied with, but *(ii)* the person infringing the order knows nothing about even the existence of the order, when infringing it, or that he or she is doing anything wrong. In such a case, provided the person alleged to be in contempt can show that the service provisions have operated unjustly against him or her, the service against that person may be set aside.

(8) I stress that where it can be shown that the service provisions that apply in the case of a given order can be shown to have operated unjustly, this is a matter that goes not merely to sanction (although such matters might also be relevant to sanction). Where the person subject to the order can show that the service provisions have operated unjustly against him or her, then service ought to be set aside and the threat of committal removed altogether. It is not, to my mind, sufficient to say, in such a case, that there is a contempt, but that the punishment ought to be minimal or none.[73]

(9) Mr Wagner contended that such an approach effectively reversed the burden of proof, and required Mr Cuciurean to show he had not been served with the Order. I disagree. The whole point of alternative service is that appropriate alternative means of service are imposed on the claimant, who is obliged to comply with them and to prove (to the requisite standard) that service on the defendant has been effected in this way. This, the Claimants have done, as I have found. There is nothing to prevent Mr Cuciurean from contending that the circumstances in this case are such that service should be set aside because the service provisions operate unjustly against him, even though the *Canada Goose* guidance has been carefully and appropriately considered by Andrews J. But – at this point – the burden is on him.

(10) Mr Wagner did not put Mr Cuciurean's case in this way. He contended that it was for the Claimants to show that some criterion beyond service had been satisfied (although he was unclear as to precisely what that criterion might be), rather than it being for Mr Cuciurean to show that ordinarily proper requirements for service had, in this case, operated unjustly. I reject this argument because it replaces the

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[72] I stress that I was taken to no authority for this point, but it seems to me inevitable when considering how courts generally deal with service. Thus, for instance, where proceedings are served out of the jurisdiction, and that service is found to be (for whatever reason) wrongly based, service is set aside.

[73] In *Cuadrilla Bowland v. Ellis*, [2019] E30MA313 at [14], His Honour Judge Pelling, QC said:

"…If the respondents did not, in fact, know of the terms of the order even though technically the order had been served as directed, then it is highly likely that a court would consider it inappropriate to impose any penalty for the breach…"

I agree. However, one much not overlook the anterior question that it always possible – albeit only in the appropriate case – to set aside service altogether.

very clear rules on service with an altogether incoherent additional criterion for the service of an order.

(11) Although, for the reasons that I have given, I have rejected Mr Wagner's argument, it is nevertheless appropriate to consider whether the circumstances of this case warrant the setting aside of service. I have no doubt that they do not:

(a) Mr Wagner submitted that there were a number of other steps that the Claimants could have taken so as to bring the Order to Mr Cuciurean's notice or attention. For instance, when Mr Cuciurean was in the Claimants' custody or in the presence of agents or employees of the Claimants, it would have been easy to hand Mr Cuciurean a copy of the order and (say) video-tape the event as evidence. That may very well be the case, but it is not the point. This is to suggest an embellishment to the service provisions, not to suggest that service in accordance with the order operated unjustly against Mr Cuciurean.

(b) Mr Wagner submitted that, whilst he could not say that Mr Cuciurean was unaware of the Order (he knew there was an order in existence, but (according to his evidence, thought it related only to the Cubbington Land), he (Mr Cuciurean) was unaware of its terms, and that this was enough to render it unjust to proceed with the committal. I am afraid that I do not accept this contention. It will be necessary – when considering the various Incidents said to amount to a breach of the Order – to make findings as to Mr Cuciurean's knowledge, and I do not intend to anticipate those findings, which at least in part turn on a description of the Incidents themselves. It is sufficient for me to note now that, for the reasons I give later on in this judgment, I am satisfied:

(i) That Mr Cuciurean knew of the existence of the Order.

(ii) That Mr Cuciurean not only knew of the existence of the Order, but of its material terms. The material terms of the Order, to be clear, were not to enter upon the Crackley Land.

Mr Cuciurean came closer to admitting the first point than the second. Certainly, he accepted that there was an order made, but his evidence appeared to be that that order related to land that was not the Crackley Land.

64. For these reasons, I reject the contention that something more than compliance with the service provisions of the Order was required.

(iii) The penal notice

65. CPR 81.9(1) provides that an order to do or not to do an act may only be enforced by the committal process under CPR 81.4 where "there is prominently displayed, on the front of the copy of the judgment or order served in accordance with this Section, a warning to the person required to do or not do the act in question that disobedience to the order would be a contempt of court punishable by imprisonment, a fine or sequestration of assets".

66. It is accepted by all that the Order contains an appropriate penal notice.

67. All that CPR 81.9 requires is that the order be served in accordance with this Section. It was not accepted by Mr Cuciurean that the Order had been served in accordance with the applicable Section (Section II) of CPR 81. However, I am satisfied that it was, for the reasons that I have given. In these circumstances, it is clear that CPR 81.9 has been complied with. There is nothing in this point, which I reject.

(iv) A continuing requirement that the service provisions in the Order be complied with

68. Clearly, the notice given to interested persons by service via email and by posting on a webside will not degrade over time. The same cannot be said of the physical notices – the Injunction Notices and the Injunction Warning Notices that I have described. I quite accept that, over the duration of operation of the Order – a period of months – these Notices might be subject to physical deterioration or damage (whether accidental or deliberate).

69. This contingency was anticipated by Andrews J in paragraph 10 of the Order:

> "The Claimants shall from time-to-time (and no less frequently than every 28 days) confirm that copies of the orders and signs referred to at paragraphs [8.1] and [8.2] remain in place and legible and, if not, shall replace them as soon as reasonably practicable."

70. It is noteworthy that the Order says nothing about the consequences of non-compliance with this provision. It would be possible for an order expressly to provide that, if the notices it stipulates are not replaced as and when necessary during the operation of the order, then service ceases to be effective after the date of that failure to comply.

71. That may be an appropriate order in an appropriate case, but it is <u>not</u> the order made by Andrews J. Clearly, compliance by the Claimants with paragraph 10 of the Order was an important matter. I have no reason to doubt that this part of the Order <u>was</u> complied with by the Claimants, but (as Mr Wagner contended) I do not consider that I can be satisfied <u>to the appropriate standard</u> that the Order was in fact so complied with. For instance, there was not before me any evidence as to the regular inspection of the Injunction Notices and Injunction Warning Notices, nor any evidence of their replacement where Notice were no longer fit for purpose. In these circumstances, it is difficult to be satisfied beyond all reasonable doubt that paragraph 10 of the Order was complied with.

72. If I were required to be satisfied beyond all reasonable doubt that paragraph 10 had been complied with, I would find that it had not been. But I do not consider that to be a necessary or relevant finding for me to make in relation to the Application. The Order does not provide for the automatic setting aside of service where there has been a failure to establish beyond all reasonable doubt that paragraph 10 of the Order has not been complied with. The question, as before, is whether, given that service on Mr Cuciurean was regular and in accordance with the terms of the Order, it would be unjust not to set service aside in all the circumstances. For the following reasons, I consider that service should <u>not</u> be set aside on this basis:

(1) As I have noted, the Order was deemed served on 25 March 2020,[74] pursuant to paragraph 9 of the Order.

(2) The Incidents, as I have noted, all occurred in the period commencing 4 April 2020 and ending 26 April 2020. Thus, assuming an obligation to check the Notices every 28 days, the 28 day period ended on 22 April 2020. Most of the Incidents – although by no means all – fall within the period within which the Claimants were entitled to proceed on the basis that the Notices did not require inspection.

(3) This was Mr Fry's primary point as to why paragraph 10 was an irrelevance, in this case. Although I consider that the point is good as far as it goes, I consider that it misses the reality of the case and the essence of the question that I must ask. The true position is that, the Order having (properly) defined what constitutes service, and the provisions in the Order having been followed, service should not be set aside unless Mr Cucuirean can show – the burden being on him – that the service provisions have operated unjustly against him.

(4) That is not the case here. Clearly, the service provisions were complied with, and (absent a co-ordinated attack on the Injunction Notices and Injunction Warning Notices) they could be expected to survive in readable and usable form throughout the Incidents.

(5) Although the Claimants could not produce evidence of regular inspections and replacements of the Injunction Notices and Injunction Warning Notices, the Claimants did carry out a random spot check of the signage at the Crackley Land on 14 June 2020,[75] and a plan of the Injunction Notices and Injunction Warning Notices present at the site was produced as an exhibit to Bovan 2. This shows a substantial number of notices at the relevant area, perhaps fewer than originally placed, but not materially so. In his evidence, basing himself on this inspection, Mr Bovan stated:[76]

> "I can also confirm that copies of the Order [i.e. Injunction Notices] and A3 Injunction Warning Notice remain in place around the Crackley Land or have been replaced."

Whilst Mr Bovan clearly could not say whether the Notices in question were original or replacement (a point Mr Wagner placed some stress on), the fact is that they were there on 14 June 2020 and had been out there on or before 25 March 2020. I have noted the evidence of Mr Pook – albeit with the reservations identified in paragraph 12(4)(g) above. Mr Pook suggested that when he inspected the site on 1 July 2020, there was a lack of signage. Mr Pook's statement is not especially clear about whether the signs Mr Bovan had identified on 14 June 2020 were no longer present on 1 July 2020. Whatever the position on 1 July 2020, I accept the evidence of Mr Bovan as to the position on 14 June 2020.

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[74] See paragraph 56 above.

[75] Bovan 2 at paragraph 29.

[76] Bovan 2 at paragraph 29.

(6) In all the circumstances, given the presence of the Notices on 25 March 2020 and the presence of the Notices on 14 June 2020, it is difficult to accept – and I do not accept – that there were not Notices on site when the Incidents took place.

73. Thus, I do not consider that Mr Cucuirean has in any way demonstrated that service should be set aside because of an inability to demonstrate – beyond all reasonable doubt – that paragraph 10 of the Order was complied with. For the reasons I have given, I do not consider that it is necessary, in order for the Application to succeed, for strict compliance with paragraph 10 to be shown.

(4) The third pre-condition

74. The third pre-condition does not arise in this case.[77]

E. SUBSTANTIVE REQUIREMENTS

(1) Introduction

75. I turn to the requirements set out in paragraph 26 above. These are that the Order must be clear and unambiguous and that the Order must *(i)* have been breached and *(ii)* that that breach must have been deliberate. I consider these requirements in turn below.

(2) Clear and unambiguous

76. I consider the entirety of the Order to be extremely clear and unambiguous, and will focus on the operative provisions that are most pertinent to this Application. These are, in the first instance, paragraph 4.2 of the Order, which states that the Second Defendants and each of them are forbidden from entering or remaining upon the Crackley Land. The Crackley Land – as I have described – is the land edged red on Plan B, which was annexed to the Order.

77. It is difficult to imagine a more straightforward or clearer provision.

(1) The act enjoined is easy to understand. It is not to enter (or remain upon) certain land.

(2) The land in question is clearly identified as that outlined in red on a plan that is attached to the Order – a copy of which is attached to this judgment as Annex 2.

78. The consequences of breaching the Order are set out in the penal notice that I have already referred to.

79. There is a "carve-out" to paragraph 4 of the Order contained in paragraph 5.1.[78] This provides that nothing in paragraph 4 shall prevent any person from exercising their rights over any open public right of way over the Land. This provision, I find, to be clear and unambiguous on its face. However, it will be necessary to re-visit this provision once the position regarding the footpaths over the Crackley Land has been

[77] For the reason given in paragraph 24(3) above.

[78] Described in paragraph 6(5) above.

explained, for Mr Wagner made a number of submissions in relation to footpaths on behalf of Mr Cuciurean.

80. I am satisfied that the Order is clear and unambiguous.

(3) Breach of the Order

(a) Approach

81. I approach the question of breach of the Order in the following way:

(1) Since all of the Incidents alleged to constitute contempt of court on the part of Mr Cuciurean involve a breach of paragraph 4.2 of the Order (i.e. not to enter upon the Crackley Land), the Incidents can only be understood when once the Crackley Land, certain footpaths on it, and the manner in which its perimeter was protected is understood. These matters are considered in Section E(3)*(b)* below.

(2) Thereafter, in Section E(3)*(c)* below, I describe the various Incidents that underlie the Application, and seek to locate them by reference to my description of the Crackley Land.

(3) I then deal with the various points made by Mr Cuciurean to suggest either that the Order had not, in fact, been breached or that I could not be satisfied, to the appropriate standard, that the Order had been breached. These various points are described and considered in Section E(3)*(d)* below.

My conclusion on the question of breach is stated in Section E(3)*(e)* below.

82. Finally, in Section E(4), I consider the question of deliberation.

(b) The Crackley Land

(i) The Crackley Land generally

83. The Crackley Land, as has been noted, is described by reference to the plan known as Plan B and annexed as such to the Order. It comprises Annex 2 to this Judgment. As can be seen from Annex 2, the Crackley Land is essentially a strip of land running (beginning at its Western tip) South-East. At approximately its halfway point, the strip is bisected by a road (known as Crackley Lane). It can be seen that the red-edging that demarcates the boundary of the Crackley Land runs parallel on either side of Crackley Lane as it bisects the Crackley Land. The Crackley Land is thus not a unitary tract of land, but in fact comprises two tracts of land, both edged red, divided by Crackley Lane.

84. I shall refer to the Crackley Land lying to the West of Crackley Lane as **Crackley Land (West)**. I shall refer to the Crackley Land lying to the Easy of Crackley Lane as **Crackley Land (East)**. It is the latter tract of land – Crackley Land (East) – that we are here concerned with.

(ii) Crackley Land (East)

85. The Incidents are alleged to have involved non-consensual entry upon the land by Mr Cuciurean on the Eastern side of Crackley Lane, that is Crackley Land (East). Although the colours on Plan B signify nothing for the purposes of the Order, they are helpful in identifying specific portions of Crackley Land (East), which I shall use to describe Crackley Land (East) more specifically:

(1) Immediately to the East (or right) of Crackley Lane is a rough square, coloured pink and green on Plan B (the **Square**).

(2) Immediately to the East (or right) of the Square is a portion of land, coloured pale blue on Plan B, in the shape of an isosceles triangle (the **Triangle**).

(3) The **Remaining Portion** comprises the remaining Crackley Land (East), that is all parts of Crackley Land (East) apart from the Square and the Triangle.

(iii) The physical nature of the perimeter of Crackley Land (East)

86. It is necessary to describe the manner in which the perimeter or boundary of Crackley Land (East) was demarcated. In large part, the basis for my findings in this regard is the evidence of Mr Bovan and Mr Hicks, both of whom provided helpful evidence enabling me to understand the nature of the perimeter, as well as the video evidence that was adduced before me. In order to understand the physical perimeter, it is necessary to refer to **Annex 3** to this Judgment, which constitutes a marked-up version of Plan B at Annex 2. The marking up, to be clear, has been done by me, based upon the evidence I have heard. More specifically:

(1) Annex 3 shows a line (running from Point 1 to Point 2) which bisects the Remaining Portion of Crackley Land (East). I stress that this line is roughly drawn, and makes no claims to particular accuracy. It is not necessary in order to understand the physical geography for the line to be precisely drawn.

(2) The line between Point 1 and Point 2 represents a line of **Heras fence panels**. Heras fence panels are forms of temporary, heavy duty, wire-mesh fencing in the form of panels, capable of being linked together. They are, thus, capable of being moved. Generally speaking, they are footed by large concrete blocks, out of which the feet of the Heras fence panel can be lifted.

(3) As part of the development of the HS2 Scheme on the Crackley Land, the contractors employed or retained by the Claimants often fenced off portions within the Crackley Land, using Heras fence panels. This fencing was, I stress, intended to be internal to the Crackley Land and did not seek to demarcate any boundary of or perimeter to the Crackley Land. Rather, the purpose of such internal fencing was to isolate from third parties those specific areas where work was being done or to protect equipment from such third parties. Of course, one might say that since these enclosures were all within the Crackley Land, such enclosures were unnecessary: the only persons present on the Crackley Land would be those present with the consent of the Claimants. That would, however, be wrong. As the Judgment of Andrews J makes clear, in addition to Mr Bishop and Mr Rukin (the individually named defendants to the Proceedings), there were

trespassers on the Crackley Land against whom such internal barriers might be needed:

> "11. The Claimants accepted, as do I, that Mr Bishop's activities as a concerned local resident have been genuine and sincere, and that at all times he has acted responsibly and peacefully. He is seen as a very important moderating influence, who has forged a good relationship with the HS2 representatives.
>
> 12. Mr Rukin has a wider agenda, in that he is the Campaign Manager of "Stop HS2" which, as its name suggests, is opposed to the project in principle. However, so far as the occupation of the Cubbington Land[79] and Crackley Land is concerned, Mr Rukin supports Mr Bishop's evidence that this is aimed at protecting the ancient woodland and observing and recording HS2 Ltd and their contractors' operations with a view to reporting any illegal activities to the relevant authorities. He denies that he or anyone associated with him or the camps has been responsible for litter or any anti-social behaviour on the land.
>
> 13. Unfortunately, the evidence of Ms Jenkins and Mr Corvon-Czarnodolski…on behalf of the Claimants indicates that not all trespassers on the Cubbington Land and Crackley Land are so well-behaved. People have carried out damage to the Heras fencing which is used to demarcate the land, in some areas pulling it down and abusing workmen who have taken in panels to repair it; nails and glass have been placed on roads used by construction traffic, and some people have actively blocked access to the sites or erected structures on them which have impeded the work."

In these circumstances, it is easy to understand why such internal fencing, intended to protect on-going works or equipment, might be necessary. I shall refer to such fencing as ***Ad Hoc* Fencing**, as it was moved according to the work going on. Its defining positive characteristic is that it was intended to protect on-going works; its defining negative characteristic is that *Ad Hoc* Fencing was <u>not</u> intended to demarcate the boundary or perimeter of the Crackley Land.

(4) The Heras fence panels running from Point 1 to Point 2 are to be differentiated from other types of *Ad Hoc* Fencing. This particular fence-line (which I shall refer to as the **Internal Boundary**) is significant because the land to the East (or right) of the Internal Boundary – designated by the letter B in Annex 3 (**Area B**) – was unfenced and comprised essentially open space. The perimeter of Area B was marked by No Trespass Notices,[80] but there was no fencing of any sort. The Internal Boundary thus:

(a) Merely constituted an internal perimeter or boundary <u>within</u> Crackley Land (East). It was not intended to demarcate the edge of the Crackley Land.

(b) However, the Internal Boundary was significant because it constituted a part of the <u>physical</u> boundary of the Crackley Land. A person approaching

[79] This was the other tract of land with which the Judgment was concerned. I have, generally, omitted reference to the Cubbington Land in this judgment, as it is not directly relevant to the Incidents.

[80] There were some Injunction Notices and some Injunction Warning Notices also.

> the Internal Boundary through Area B would be on Crackley Land and – absent the consent of the Claimants – would be a trespasser on the land. However – apart from the Notices – there would be no physical demarcation of the boundary until the Internal Boundary was reached.

87. Thus, Area B is a portion of Crackley Land East, largely without perimeter fencing. The only physical perimeter (apart from Notices) was the Internal Boundary running along its Western flank, and dividing Area B from the other part of Crackley Land (East), **Area A**.

88. The Internal Boundary was moved at least once during the period of the Incidents, on 21 April 2020, when the Internal Boundary was moved Eastwards by a couple of meters, so as to enlarge Area A of the Crackley Land (East) and correspondingly reduce Area B of the Crackley Land (East).

89. Area A, in contrast to Area B, was fenced. It is important to describe the nature of this fencing. I shall do so by describing the perimeter of Area A in a clockwise fashion, starting at **Point 1,** which identifies the starting point of the Internal Boundary, and is marked as such on Annex 3. Taking this as the starting point, the perimeter of Area A was as follows:

(1) *Point 1 to* ***Point 2***. This is the Internal Boundary, which comprised, as I have stated, Heras fence panels.

(2) *Point 2 to* ***Point 3***. (I have not marked anything other than Points 1 and 2 on the map at Annex 3. To do so would lend a spurious specificity to what is intended to be a more broadbrush description of the physical geography.) This was intended to comprise part of Crackley Land (East)'s external boundary, and consisted of Heras fence panels. Point 3 was located around the Eastern tip of the Triangle.

(3) *Point 3 to* ***Point 4***. This was a continuation of Crackley Land (East)'s external boundary, and consisted of boarding or hoardings about 3 metres high (the **Hoarding Fence**). The Hoarding Fence ran substantially along the bottom edge of the Triangle, ending roughly at the Western tip of the Triangle, where the Triangle abuts the Square. The Hoarding Fence was intended to offer some sort of visual and sound protection to the residents of the farms located to the South of the Triangle. It was on this land South of the Triangle – not part of the Crackley Land – that the protestors to the HS2 Scheme had their camp (i.e., Camp 2).

(4) *Point 4 to* ***Point 5***, *Point 5 to* ***Point 6***, *Point 6 to* ***Point 7***. These three boundaries represent three sides of the Square, the middle boundary (Points 5 to Point 6) being the boundary running along Crackley Lane. These boundaries comprised Heras fence panels.

(5) *Point 7 to* ***Point 8***. This is part of the Northern boundary of Crackley Land (East), essentially opposite to and running parallel with the Hoarding Fence between Point 3 and Point 4. The perimeter was marked by a post and wire fence (the **Post and Wire Fence**).

(6) *Point 8 to Point 1*. The final stretch of the Northern boundary, terminating with the beginning of the Internal Boundary at Point 1 again comprised Heras fence panels.

90. I should stress that it is unnecessary to be more precise about the geographic location of Points 1 to 8. They are intended to enable better description of the Incidents to which I will come. It is also worth stressing that the demarcation between different fence lines – clear in my description – will have been less clear to the person walking around the Crackley Land. Thus, for example, the Internal Boundary (Point 1 to Point 2) comprised Heras fence panels, as did the external boundaries on either side, namely Point 2 to Point 3 and Point 8 to Point 1. I am not suggesting that it would have been possible to differentiate between these parts of the perimeter of Area A: the perimeter would simply have been a series of Heras fence panels. I do not consider that such inability to differentiate is in any way material to the matters considered in this judgment.

(iv) Footpaths

91. The public right of way known as **PROW165X** runs in part across the Crackley Land. It bisects the Crackley Land (East) running from South to North. Insofar as it crosses Crackley Land (East) it begins (at its Southern-most point) at a point between Point 1 and Point 2. It then runs roughly along the Eastern edge of the Triangle and across a part of the Square to its end (at least so far as material for present purposes) at Cryfield Grange Road on the Northern edge of Crackley Land (East), roughly at Point 7.

92. The Claimants sought to close PROW165X. The reason for this was that protestors were using PROW165X to access the Crackley Land. This is described by Mr Bovan in Bovan 2:

> "18 As described at paragraph 19 of my first affidavit, on 26 March 2020 steps were taken by myself and HCE to enforce the Writ and evict the protestors in Camp 1 on the Crackley Land. While we successfully removed 18 persons on the ground, this was not without difficulties and 5 protestors managed to scale trees at height on the Crackley Land and remained there until 3 April 2020.
>
> 19 4 of these 5 protestors at height had managed to enter onto the Crackley Land (without permission) during the process of eviction by walking on to the PROW and climbing over or under existing wooden fences. If it had not been for the PROW being open there would only have been 1 protestor in the trees at height.
>
> 20 Other protestors were also standing on the PROW during the course of the eviction, some of whom were: *(i)* shouting and being verbally abusive to my team and [me]; *(ii)* at times spitting on my team and [me]; *(iii)* failing and/or refusing to maintain a social distance of at least 2 metres in accordance with COVID-19 Government guidelines; and *(iv)* supplying the protestors at height in the trees with food and water.

I accept this statement of events.

93. It was common ground that:

(1) The Claimants had the statutory power to close PROW165X pursuant to powers conferred under the High Speed Rail (London – West Midlands) Act 2017.

(2) The Claimants' power was exerciseable only on consultation with the relevant local authority, which in this case was Warwickshire County Council (and only that authority). The purpose of the consultation was to ensure public safety and, so far as reasonably practicable, to reduce public inconvenience.

(3) The Claimants did so consult. However, that consultation stated, as I find, that a diversion would be in place before PROW165X was closed. In its consultation, the Claimants identified, on a plan, the route of a temporary diversion, which I shall term a temporary public right of way or **TPROW**.[81]

(4) The planned route of the TPROW was disclosed to Warwickshire County Council, which itself noted that "HS2 have confirmed that at no point will [PROW165X] be closed without the diversion being in place". The TPROW proposed is shown on the plan at **Annex 4** to this judgment. As to this:

(a) For the purposes of orientation, at the bottom left-hand corner of Annex 4, Birches Wood Farm can be seen. Above Birches Wood Farm, one can see the Hoarding Fence that runs between Point 3 and Point 4 marked as a fine red line. The Heras fence panels comprising Point 2 to Point 3 are to the right of the Hoarding Fence, marked as a green line. Other Heras fence panels – which were intended to enclose the TPROW, and to which I shall come – are also marked as a green line.

(b) The route of PROW165X is clearly marked. The part to be closed is marked by a thick red line. The TPROW constitutes a diversion from the closed part of PROW165X. Essentially, the diverted part of PROW165X – which roughly runs along the hypoteneuse of a triangle – is replaced by the TPROW, which runs along the other two sides of that triangle. The first side of that triangle runs parallel to the Hoarding Fence (at about 2-3 metres distance – the **Strip**), and then cuts across the Crackley Land away from the Hoarding Fence so as to rejoin the undiverted part of PROW165X, which then runs on to Cryfield Grange Road.

(c) Apart from the entrance point on the Southern boundary of the Crackley Land, which I shall return to, the TPROW was closed off from the rest of the Crackley Land by Heras fence panels running along either side of the TPROW. Although these enclosures to the TPROW are not fully disclosed in the diagram, I am satisfied that this was the case.[82] Thus, there were Heras fence panels running along either side of the TPROW intended:

(i) To prevent persons on the TPROW from leaving it;

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[81] I should be clear that whether this was a public right of way is a matter of controversy that I will have to consider. Mr Bovan used the term TPROW, which I adopt without prejudice to my consideration of this question.

[82] This was clear from the evidence of Mr Bovan in Bovan 2 (in particular, paragraph 13 of Bovan 2) and the video evidence that I saw. I put my understanding to counsel in the course of oral closing submissions, and neither party dissented from this explanation.

(ii) To ensure that the TPROW was only accessed from the Southern starting point of PROW165X described in paragraph 91 above. Thus, the Heras fence panels were intended to prevent persons joining the TRPOW midway rather than at the Southern starting point of PROW165X.

Clearly, these measures were intended to ensure that the TPROW was only used to pass and repass along its length, and to prevent entrance or exit from that length save at its start and end points. I shall refer to the Heras fence panels running along both sides of the TPROW as the **TPROW Fencing**.

94. PROW165X was closed on 26 March 2020.[83] Although the intention was that the TPROW would be made available to the public, it never was. Mr Bovan explained the position in Bovan 2:

> "21 I thus took the decision that the only way to complete a safe eviction (for both the protestors, HCE staff, [HS2's] contractors and site security) and secure the Crackley Land under the powers afforded to me as the authorised High Court Enforcement Officer under the Writ to close [PROW165X]. This was done by placing metal heras fencing across the top and bottom sections of the PROW to prevent further access.
>
> 22 Following the eviction on 26 March 2020, it was then the intention of the [Claimants] to open the TPROW. However, while we considered opening the TPROW on a couple of occasions, I never considered it feasible to do so due to the recurrent (almost daily) incursions on to the Crackley Land (and the TPROW) by protestors.
>
> 23 The TPROW was therefore never opened. It remained closed between the dates (4 April 2020 to 26 April 2020) on which the [Claimants] assert that [Mr Cuciurean] breached the Order.
>
> 24 The protestors were regularly informed by myself, enforcement officers from HCE and [the Claimants'] contractors that the TPROW was closed and had not been opened."

PROW165X was re-opened on 23 June 2020 (well after the Incidents were over).[84] The TPROW never opened.[85]

95. It was, therefore, the Claimants' position that Mr Cuciurean had no right – during the period in which the Incidents took place – to be on either PROW165X or the TPROW. This was disputed by Mr Cuciurean, and it will be necessary to consider the arguments advanced by both sides on this point.

(v) Gaps in the perimeter

96. It would be wrong to give the impression that the physical boundary surrounding Area A of the Crackley Land (East) was impregnable. Mr Hicks gave evidence that there was – at least for substantial parts of the period during which the Incidents occurred – a gap

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[83] Bovan 2 at paragraph 21.

[84] Bovan 2 at paragraph 17.

[85] Bovan 2 at paragraph 23.

in the Heras fence panels between Point 2 and Point 3 – that is the external perimeter between the Internal Boundary fencing and the Hoarding Fence.

97. Mr Hicks' evidence was supported by that of Mr Cuciurean, who made clear in the course of his cross-examination that he entered what the Claimants contend was the Crackley Land not by climbing over the Hoarding Fence (or, at least, not always) but by going around it, which was easier.

98. I should make clear that I accept this evidence. Specifically, I accept that there were times when Mr Cuciurean may have – instead of climbing over the Hoarding Fence – gone around it. Where that may have been the case, I indicate as much in my description of the Incidents below. Equally, where I am satisfied that Mr Cuciurean did climb the Hoarding Fence, I say so.

99. I conclude that there was from time-to-time a gap in the Heras fence panels between Point 2 and Point 3, very roughly at around the point where PROW165X and the TPROW were intended to start at the Southern border of the Crackley Land. I find that the gap was created by unknown third parties. I do not consider that it would have existed without the intervention of such third parties. It was Mr Bovan's evidence, which I accept, that the Claimants closed the Southern end of PROW165X/the TPROW and that the Claimants would not have permitted a gap in the Heras fence panels of the perimeter of Area A. That, of course, does not mean that such a gap did not exist. I find that:

(1) From time-to-time, such a gap did exist; and

(2) It was a gap created by the actions of unknown persons not comprising the Claimants or agents under their control.

(c) The Incidents

100. The Incidents are described in detail in the Schedule. Although the Schedule lists 17 different Incidents, a number of these occurred in very close temporal succession. Thus, for example, Incidents 1, 2, 3, 4 and 5 occurred between 8:30pm and 12:25am on 4 and 5 April 2020. It is necessary to bear in mind this closeness in time, simply because it is (in my view) a little unrealistic (if technically accurate) to say that in the night of 4/5 April 2020 there were five Incidents. In reality, there was a single, but sustained, attempt to penetrate what the Claimants contend was the Crackley Land.

101. The table below sets out a chronology of the relevant Incidents, and seeks to place each of them in context and to describe their salient details as I have found them on the evidence, according to the requisite standard. There was, in fact, remarkable little difference between the parties in terms of the description of events as set out in the Schedule: where such differences have arisen, I have resolved them in my narrative. In general terms, I seek to describe the Incidents by reference to my foregoing description of the Crackley Land. I should make clear that these findings of fact are expressly without prejudice to Mr Cuciurean's contention that the borders of the Crackley Land – as manifested by the physical border I have described – do not match the land edged red as described in Plan B, which was attached to the Order and which appears here as Annex 2 to this judgment. More particularly:

(1) One of Mr Cuciurean's contentions, which I consider below, was that there was a mismatch between the land edged red on Plan B (which was the land that Mr Cuciurean was injuncted from entering: the "Crackley Land") and the physical demarcation of the perimeters of what the Claimants contended was the Crackley Land, those perimeters having been put in place by the Claimants.

(2) In other words, Mr Cuciurean contended that the Claimants had not established and/or he was not actually on the Crackley Land. He might have penetrated the physical perimeter (this Mr Cuciurean rarely denied), but in doing so he did not infringe the land edged in red on Plan B and so did not breach the Order.

I consider this point below. For the purposes of describing the Incidents, however, it is inevitable that I refer to the physical perimeter using the term the "Crackley Land". I do so, in order to make findings as to what Mr Cuciurean did. I stress that these findings are not necessarily findings that the Order was breached (even though I refer to Mr Cuciurean entering (for example) the "Crackley Land"). That is because I have yet to consider and determine the point made by Mr Cuciurean that there was a mismatch between Plan B and the physical perimeter. The table below must be read with that important qualification in mind:

Date	**Occurrence**
17 March 2020	The Order was granted by Andrews J.
24 March 2020	The injunction under the Order came into force from 4:00pm and the Writ is issued.
25 March 2020	The date of service of the Order, pursuant to its terms.
26 March 2020	Eviction action pursuant to the Writ took place on the Crackley Land. Camp 1 was closed down; and Camp 2 commenced effective operation.
26 March 2020	PROW165X is closed.
4 April 2020	Mr Cuciurean arrived at Camp 2. Incidents 1 to 4 took place during the evening of 4 April 2020. Incident 5 – which is related – took place in the early hours of 5 April 2020.
8:30pm	**Incident 1** Mr Cucuirean entered Area A of Crackley Land (East) either by climbing the Hoarding Fence or by going round it through a gap in the Heras fence panels between Point 2 and Point 3. Mr Cuciurean entered the Strip between the Hoarding Fence and the TPROW Fencing. He unclipped one of the Heras fence panels comprising the TPROW Fencing and entered on to the TPROW. He was asked to leave, and was told that he was on land in breach of an order of the court. He refused to leave, was restrained and arrested. He was then "de-arrested", when it was clear that Warwickshire police would not attend. Mr Cuciurean was released at about 9:00pm.
9:35pm	**Incident 2** Mr Cucuirean entered Area A of Crackley Land (East) either by climbing the Hoarding Fence or by going round it through a gap in the

	Heras fence panels between Point 2 and Point 3. He walked in the Strip between the Hoarding Fence and the TPROW Fencing. He did not enter upon the TPROW. His activities were monitored by the Claimants' agents. When they sought to approach him, he retreated back over the Hoarding Fence.
10:45pm	**Incident 3** Mr Cuciurean entered Area A of the Crackley Land, traversing the Strip between the Hoarding Fence and the TPROW Fencing. He did not enter upon the TPROW. His movements were monitored by two of the Claimants' enforcement officers. Through the TPROW Fencing, Mr Cuciurean was told he was trespassing. Mr Cuciurean exited the Crackley Land by climbing over the Hoarding Fence and returning to Camp 2.
11:25pm	**Incident 4** This Incident took place at the perimeter of Crackley Land (East) between Points 2 and 3. A Heras fence panel was pulled over by protestors. It was later retrieved and re-installed. Mr Cuciurean was one of the protestors detained but not arrested. Mr Cuciurean and the others were released and returned to Camp 2. I am not satisfied so that I am sure that Mr Cuciurean himself was involved in physically pulling down the Heras fence panel. That would, in my judgment, have involved entering upon the Crackley Land. However, Mr Cuciurean may have been supporting others whilst standing outside the Crackley Land. I am not satisfied so that I am sure that Mr Cuciurean was on the Crackley Land.
5 April 2020	Although Incident 5 formed part of the pattern of Incidents taking place on 4 April, it occurred after midnight. Incidents 6, 7 and 8 occurred later on that day.
00:25am	**Incident 5** Mr Cuciurean and two other protestors were reported as being by the Heras fence panels between Points 2 and 3. That would not necessarily have involved entering the Crackley Land. Mr Cuciurean then climbed the Hoarding Fence (between Points 3 and 4), and approached the TPROW Fencing, walking on the Strip, but he did not enter the TPROW. The protestors were reminded that they were on the Claimants' land, although I have insufficient evidence as to the exact words used. Two of the Claimants' enforcement officers removed a Heras fence panel from the TPROW Fencing in order to arrest Mr Cuciurean. Mr Cucuirean retreated to Camp 2.
10:52am	**Incident 6** Mr Cuciurean removed the clips from a Heras fence panel forming part of the perimeter between Points 2 and 3, and removed the panel from the fence line abutting the Hoarding Fence. He (with others) entered upon the Crackley Land. Mr Bovan informed Mr Cuciurean that he was on the Crackley Land. Mr Bovan attempted to reinstate the Heras fence panel that had been removed, and the protestors (including Mr Cuciurean) left the Crackley Land and returned to Camp 2.

10:55am	**Incident 7** Mr Cuciurean and other protestors entered the Crackley Land at the same place – and by the same means – as in Incident 6. Mr Bovan again attempted to reinstate the Heras fence panel, and the protestors (including Mr Cucuirean) again retreated to Camp 2.
11:25am	**Incident 8** Incident 8 was very similar to Incidents 6 and 7, albeit that this Incident involved the removal of <u>two</u> Heras fence panels from the perimeter between Points 2 and 3. Attempts were made to restore the perimeter fence panels, which was met by resistance from the protesters, including Mr Cuciurean. The protestors took Heras fence panels intended to fill the gap created back to Camp 2. There was a subsequent further attempt by Mr Cuciurean to enter upon the Crackley Land in the same way. Mr Cuciurean was repelled by the Claimants' officers, but not detained.
7 Apr 2020	Incidents 9, 10 and 11 all took place on 7 April 2020.
12:24pm	**Incident 9** The Schedule describes this as a "specimen example of repeated acts of contempt". Incident 9 concerned Mr Cuciurean climbing the Post and Wire Fence on the Northern border of the Crackley Land between Points 7 and 8. It is said that Mr Cuciurean did this on a daily basis, in order to distract the Claimants' staff or to facilitate others entering the Land or to examine the fences for weaknesses. I am satisfied that Incident 9 took place, as described. However, I am not prepared to include it as a "specimen example", and it must stand alone. Equally, I am not satisfied as to Mr Cuciurean's precise motives in entering the Crackley Land here.
1:32pm	**Incident 10** Mr Cuciurean entered Area A of Crackley Land (East) either by climbing the Hoarding Fence or by going round it through a gap in the Heras fence panels between Point 2 and Point 3. He walked in the Strip between the Hoarding Fence and the TPROW Fencing. He did not enter upon the TPROW. Mr Cuciurean and another protestor attempted to remove Heras fence panels and the footers that keep them upright. When approached by the Claimants' enforcement officers, they left the Crackley Land and returned to Camp 2.
1:39pm	**Incident 11** Mr Cuciurean entered Area A of Crackley Land (East) either by climbing the Hoarding Fence or by going round it through a gap in the Heras fence panels between Point 2 and Point 3. He walked in the area between the Hoarding Fence and the TPROW Fencing and penetrated the TPROW Fencing, entering upon the TPROW.
14 April 2020	Incidents 12 and 13 took place on 14 April 2020.
2:33pm	**Incident 12** Incident 12 is *mutatis mutandis* the same as Incident 9.

1:58pm[86]	**Incident 13** Mr Cucuirean entered Area A of Crackley Land (East) either by climbing the Hoarding Fence or by going round it through a gap in the Heras fence panels between Point 2 and Point 3. He walked in the Strip between the Hoarding Fence and the TPROW Fencing. He did not enter upon the TPROW.
15 April 2020	
11:50am	**Incident 14** This is the Incident described in paragraph 12(3)(c) above, where Mr Mr Cuciurean penetrated *Ad Hoc* Fencing within the Crackley Land (East) and locked himself to the boom of a machine used by the Claimants for the HS2 works.
17 April 2020	
15:24pm	**Incident 15** Mr Cuciurean and other persons penetrated *Ad Hoc* Fencing on the Crackley Land (East).
21 Apr 2020	
10:40am	**Incident 16** Mr Cuciurean, one of a group of around 12 protestors, penetrated *Ad Hoc* Fencing on the Crackley Land (East). Mr Cuciurean was asked to leave on several occasions and warned of arrest. He resisted removal from the site, and was arrested. There was interference with the works going on in relation to the HS2 Scheme, and those works were disrupted.
26 Apr 2020	
7:30am	**Incident 17** Mr Cuciurean and four other protestors climbed trees on Crackley Land (East). They were warned that they were trespassing by Mr Bovan and asked to climb down. They declined to do so, and specialist climbers had to be deloyed by the Claimants to remove them, using "cherry pickers". There was interference with the works going on in relation to the HS2 Scheme, and those works were disrupted.

102. I am satisfied, so that I am sure, that all of the Incidents that I have described, with the exception of Incident 4, took place on what the Claimants contend was the Crackley Land. Whether these findings are sufficient to amount to findings that the Order was breached depends upon Mr Cuciurean's contention that what the Claimants said was Crackley Land was not, in fact, the land identified in the Order. So far as Incident 4 is concerned, I am not satisfied that it has been established that Mr Cuciurean was even on land that the Claimants contended was Crackley Land.

[86] The timing of this Incident in the Schedule appears to be out of chronological sequence. I do not consider that anything turns on this.

(d) Points taken by Mr Cuciurean

(i) Introduction

103. Mr Cuciurean contended that he was not in breach of the Order – notwithstanding the facts that I have found – for the following reasons:

(1) The boundaries of the Crackley Land were wrongly demarcated and did not reflect the Crackley Land defined in the Order – namely, the land identified as edged in red on Plan B.

(2) The boundaries of the Crackley Land were, in any event, unclear and confusing.

(3) Mr Cuciurean had a licence to enter upon the Crackley Land.

I shall consider each of these points in turn in the following paragraphs.

(ii) The boundaries of the Crackley Land were wrongly demarcated

104. It is clear – and Mr Cuciurean did not contest – that the Order defines the geographical scope of the Crackley Land (by reference to Plan B) and that if Mr Cuciurean entered upon the Crackley Land so defined, Mr Cuciurean will have breached the Order.

105. Mr Cuciurean's point was that it was incumbent upon the Claimants to prove that Mr Cuciurean's actions – as I have described them in the Incidents above – took place on the Crackley Land as defined in the Order and not merely on land that the Claimants asserted to be Crackley Land falling within the Order.

106. It seems to me that this must be right. I consider – contrary to the submissions of the Claimants – that I must be satisfied to the criminal standard that Mr Cuciurean breached the Order, which means that I must be satisfied (so that I am sure) that Mr Cuciurean entered land that he was enjoined from entering by the Order, namely the land "edged in red on Plan B".[87]

107. It was to deal with this point that the Claimants adduced the evidence of Mr Sah. Mr Sah's evidence (in part) addressed the question of how the Claimants caused the physical perimeter of the Crackley Land to be established by reference to GPS measurements. I shall not refer in any detail to the evidence of Mr Sah. That is because – for the reasons given in paragraph 12(3) above – I do not consider that I can place any weight on Mr Sah's evidence.

108. Mr Cuciurean's point was that the evidence of Mr Sah was the only evidence to support the contention that the physical perimeter and the trespass signs were actually on the red-edged land and that – since I could not be satisfied in relation to the evidence of Mr Sah – the Application must fail. In his written closing submissions, Mr Wagner on behalf of Cuciurean submitted that:[88]

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[87] The Order also refers to the colours on the plan, but these are all within the red-edging, and add nothing to the definition of the geographical scope of the Land.

[88] At paragraph 49.6.

> "There is therefore no authoritative evidence before the Court as to the precise land boundaries, and certainly not enough to prove those boundaries to the criminal standard of proof."

109. I accept – as I have already noted – that Mr Sah's evidence cannot be relied upon. However, I do not consider that the point made by Mr Cuciurean is, without more, correct. It is necessary to consider the Incidents – and their geographical location – in greater detail:

(1) I have, in the course of this judgment, attempted to describe the physical perimeter of Crackley Land (East) in some detail, so that the location of the Incidents may be understood. It is very clear that this is far easier to do in the case of Area A than Area B. That is because – as I have described – the perimeter of Area B is largely without perimeter fencing, whereas Area A is entirely fenced in.

(2) It follows that Incidents occurring in Area B – or Incidents where it is not clear, from the Schedule, whether they took place within Area A or Area B – are far harder to give a precise location to, compared to those Incidents were a precise penetration of the physical perimeter has been shown.

(3) Thus, there is, to my mind, a very sharp distinction to be drawn between Incidents 14, 15, 16 and 17 and the other Incidents (with the exception of Incident 4, which I do not consider involved entry on the Crackley Land, even as understood by the Claimants).

(4) Incidents 14, 15, 16 and 17 all have a vagueness to them which has not enabled me to pin down, in my findings in relation to these Incidents, a very precise geographic location. All of the Incidents are (in the evidence before me) detached from the physical geography of the site, as I have described it, such that I do not consider that I can (to the requisite standard) conclude that the Incidents took place on the Crackley Land <u>as defined in the Order</u>. I am quite sure that the Claimants consider that these Incidents took place on the Crackley Land, but that is not enough. Although the Schedule was accompanied by plans purporting to show the actual location of all of the Incidents, Mr Bovan had to accept that this was no more than a rough indicator of location.

(5) Although I appreciate that Mr Cuciurean did not advance any positive case as to location, but only put the Claimants to proof, I do not consider that the Claimants have met that standard in relation to Incidents 14, 15, 16 and 17.[89]

(6) Matters are very different as regards the remaining Incidents (excepting Incident 4, which I shall not refer to again). These Incidents can be pinned down to a precise geographic location, as I have described. It is thus possible to state – as I have stated – that the perimeter of Area A was breached in a very specific way.

(7) Of course, this does not preclude the possibility that there is a mismatch between the physical perimeter of Area A, as I have described it, and the demarcation of

[89] There was, between the parties, debate as to whether expert evidence as to the geographical ambit of the Crackley Land was required. The Claimants did not consider that such evidence was necessary, and Mr Cuciurean never pursued an application to adduce expert evidence himself.

the Crackley Land as set out in the Order. However, on the evidence before me, I consider the possibility of such a mismatch to be within the realms of the theoretical. I consider that the Claimants have established, to the requisite standard, that these Incidents (1 to 3 and 5 to 13) did involve a breach of the Order. It seems to me that Mr Cuciurean's case involves an assertion that the Claimants have been exercising possessory rights over someone else's land in a most aggressive way and in circumstances where one would expect – if that were the case – clear challenge to the exercise of those rights by those whose interests were being usurped. More specifically:

(a) The physical boundaries that I have described were up at the time of Andrews J's Judgment and Order.[90] If there was a serious argument that the Claimants were operating on land to which they had no claim, then that argument would have been articulated before Andrews J. As she noted in her Judgment, one of the purposes of the defendants before her was to monitor the conduct of the Claimants, so as to ensure they did not act unlawfully.[91]

(b) Equally, it is unlikely in the extreme that neighbouring landowners would permit the erection, on their land, of barriers like the Hoarding Fence without objection, particularly given the controversial nature of the HS2 Scheme.

(c) Nor do I consider that the Claimants would dare to pursue the aggressive vindication of their rights (erecting barriers and notices; ejecting persons; arresting them; diverting and closing footpaths) without being very sure that they were acting clearly within their rights.

(8) If Mr Cuciurean had mounted a positive case that the Claimants had overreached, then of course that case would have to be considered by me and determined. But no evidence has been advanced by Mr Cuciurean in this regard, and the Claimants have simply been put to proof. Such a course is absolutely within Mr Cuciurean's rights, and I take the burden and standard of proof – which rests on the Claimants – extremely seriously. But, in the case of Incidents 1 to 3 and 5 to 13, I am satisfied that that burden has been met taking all of the evidence before me into account.

I have used the term "aggressive" in describing the Claimants' vindication of its rights. By this, I do not mean to suggest anything disproportionate or wrong in the Claimants' conduct. The importance of the term lies in the overtness of the Claimants' conduct. This was not a case where the Claimants were, hidden from sight, asserting their rights. Given this overtness, some form of pushpack would be inevitable if the Claimants' were asserting rights that they did not have.

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[90] See, for instance, [13] of the Judgment, referring to the Heras fences.

[91] See [9] of the Judgment in relation to the Crackley Land.

(iii) The boundaries of the Crackley Land were unclear

110. It was contended that the boundaries of the Crackley Land were unclear. A great deal of the evidence adduced by Mr Cuciurean (including in particular the evidence described in paragraph 12(4) above) went to this point. Thus, it was suggested that the Injunction Notices and Injunction Warning Notices were not present; that the multiple layers of No Trespass Notices were confusing; that the agents of the Claimants were unclear as to the boundaries they were patrolling; that the fence lines – in particular the Internal Boundary and the *Ad Hoc* Fencing – were confusing; and that much more could have been done to clarify the position.

111. I do not accept this evidence. It seems to me that once the conclusion has been reached that the physical perimeter around Area A matched the land edged in red defined in the Order, there was little or no scope for misunderstanding the perimeter of the Crackley Land. The suggestion that the boundaries of the Crackley Land were unclear to the protestors in general, and to Mr Cuciurean in particular, rather misstates the purpose of the protests and the purpose of Mr Cuciurean's conduct at the Crackley Land. Mr Cuciurean was not an unknowing roamer of the countryside, accidently coming across the Hoarding Fence and deciding to climb it. He was – as he fully acknowledged – a committed opponent of the HS2 Scheme and his conduct and commitment must be seen in that light. Mr Cuciurean was not, by some terrible mistake that could have been avoided if only the Claimants had been clearer, penetrating the perimeter of the Crackley Land several times in one night (Incidents 1 to 5). He was doing so because (as I have noted) he was seeking to lend as much force to his objections to the HS2 Scheme as he could, by inconveniencing the Claimants as much as possible.

112. In short, whilst I do not consider that the Claimants could (within reason[92]) have been any clearer about the perimeter of Area A, it is my settled view that even if additional steps had been taken to publicize the Area A perimeter, those steps would have made no difference to Mr Cuciurean's conduct.

113. I should add, by way of postscript, that I consider the clarity or otherwise of the boundaries of the Crackley Land to be a matter essentially irrelevant to the outcome of the Application. It seems to me that either Mr Cuciurean entered upon the Crackley Land or he did not. If he did – as I have concluded he did – he was in breach of the Order.

(iv) A licence was granted to Mr Cuciurean to cross the Crackley Land

114. This contention has, as I understand it, two bases: the first is what Mr Cuciurean suggested was the unlawful failure to open the TPROW; the second arises out of paragraph 30 of Bovan 2, which states:

> "…This access across the Crackley Land was tolerated by the [Claimants] as the entirety of the Crackley Land was not required for all times for Phase One works. I have also been informed by employees of LM (the contractor employed by the Second [Claimant]) that there would be a significant and disproportionate cost to fence the entire perimeter…"

[92] It would, of course, have been possible – but economically mad – to have encircled the Crackley Land with an insurmountable barrier.

115. It is convenient to deal with the second point first. It is evident that Mr Bovan is here describing the Claimants' attitude in relation to the unfenced part of Crackley Land (East), what I have termed Area B.[93] I regard the contention that the Claimants were – by reason of the unfenced nature of Area B – consenting to trespasses of the sort described in Incidents 1 to 3 and 5 to 13 as unarguable.[94] In these Incidents, Mr Cuciurean was obviously entering upon land where he was not welcome, and where his presence was quite the reverse of being consented to. He was, in these Incidents, either driven from the land, escorted off it or arrested. The suggestion that his presence was or had been consented to – or even tolerated – is fanciful.

116. Although it is immaterial to the outcome, it seems to me necessary to state that the mere passage and re-passage of persons across Area B cannot, of itself, be enough to establish consent on the part of the Claimants to such passage and re-passage. As Mr Bovan described, the Crackley Land is a large tract of land, which cannot (economically) be completely fenced in. The mere fact that trespass is easily possible in no way means it is permitted.

117. I turn, then, to the question of whether the conduct of the Claimants in relation to PROW165X and TPROW can give rise to any kind of justification for the Incidents (by which I mean Incidents 1 to 3 and 5 to 13) so as to avoid the conclusion that Mr Cuciurean was in breach of the Order. As to this:

(1) The starting point must be the terms of the Order itself, and the relevant part of the Order is paragraph 5.1. As I have described,[95] conduct which would otherwise be an infringement of paragraph 4.2 of the Order (entry upon the Crackley Land) is not an infringement where a person is exercising his or her rights of way over any open public right of way over the land.[96]

(2) It is clear – and not contested – that PROW165X was lawfully closed.[97] Mr Cuciurean contended that the consequence of this was that the TPROW was open and that the Claimants, by their conduct, improperly closed it. As a result, Mr Cuciurean contended, he was entitled to be on the TPROW and was entitled to use "self-help" remedies if (as was the case) the Claimants blocked the access to the TPROW.[98]

(3) I consider that these contentions to be basically misconceived and wrong. They can provide no justification for what would otherwise be a breach of the Order. My reasons for reaching this conclusion are multiple. In the first place, in none of the Incidents did Mr Cuciurean actually seek to use the TPROW. By this, I mean he never sought to pass or re-pass along it from its Southern starting point

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[93] See paragraph 87 above, where the limited perimeter fencing is described.

[94] These are the Incidents where I have concluded that there was – to the requisite standard – entry upon the Crackley Land and therefore – absent consent of the Claimants – a breach of the Order.

[95] See paragraph 6(5) above.

[96] My emphasis. Andrews J had well in mind the power in the Claimants to close public rights of way.

[97] See paragraphs 93(1) and 94 above.

[98] See paragraph 94 above, which describes the manner in which the TPROW was kept closed by the Claimants.

between Point 1 and Point 2.[99] Instead, he either climbed or circumvented the Hoarding Fence (an unjustifiable entry onto the Crackley Land) and entered upon the Strip between the perimeter and the TPROW Fencing (another unjustifiable entry onto the Crackley Land) and (from time to time) scaled the TPROW Fencing (which is not passage or re-passage along the TPROW). In short, Mr Cuciurean was not exercising his right over a public right of way – even assuming, in his favour, that the TPROW was a public right of way within the meaning of paragraph 5.1 of the Order.

(4) On behalf of Mr Cuciurean, it was suggested that the obstruction, by the Claimants, of the access point to the TPROW justified "self-help" in the form of the Incidents I have described. I reject this contention. Whilst I accept – assuming the TPROW to have been open or unlawfully not opened – Mr Cuciurean might have been justified in circumventing the obstruction and entering at the lawful point, that did not justify surmounting or circumventing the Hoarding Fence, thereby gaining access to land (i.e. the Strip) that – on no view – constituted the TPROW (or any right of way).[100]

(5) Moreover, I do not consider that the TPROW was ever open in the sense that a right of way was conferred on the public. The position was that PROW165X was closed, and no footpath was opened to replace it. I accept that this may very well have been a breach of the Claimants' public law powers under High Speed Rail (London – West Midlands) Act 2017. I shall – without deciding the point – assume that the terms of the Claimants' consultation with Warwickshire Country Council[101] were such that it was (in the public law sense) unlawful for the Claimants to close PROW165X without opening the TPROW. Making that assumption in Mr Cuciurean's favour, this might have given him the right to review juducially the Claimants' decision to close PROW165X. But it could in no way confer upon him the right to pass or repass in any way along the TPROW.

118. For these reasons, I do not consider that the exception to paragraph 4 of the Order, contained in paragraph 5.1, was engaged.

(e) Conclusion on breach

119. For all these reasons, the Order, which was clear and unambiguous, was breached by Mr Cucuirean when he committed Incidents 1 to 3 and 5 to 13.

(4) Deliberation

120. Deliberation refers to the mental element or *mens rea* in civil contempt. Proudman J helpfully set out the matters that have to be established where contempt by breach of an order is alleged in *FW Farnsworth Ltd v.* Lacy:[102]

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[99] See paragraphs 91 and 93(4) above.

[100] The reliance on *Stacey v. Sherrin*, (1913) 29 TLR 555 was, for this reason, misconceived.

[101] See paragraph 93 above.

[102] [2013] WHC 3487 (Ch) at [20].

"A person is guilty of contempt by breach of an order only if all the following factors are proved to the relevant standard: (a) having received notice of the order the contemnor did an act prohibited by the order or failed to do an act required by the order within the time set by the order; (b) he intended to do the act or failed to do the act as the case may be; (c) he had knowledge of all the facts which would make the carrying out of the prohibited act or the omission to do the required act a breach of the order. The act constituting the breach must be deliberate rather than merely inadvertent, but an intention to commit a breach is not necessary, although intention or lack of intention to flout the court's order is relevant to penalty."

121. The *mens rea* or mental element for civil contempt (which this Application is concerned with) is considered in *Arlidge*, which both parties before me relied upon:[103]

"12-93 Warrington J expressed the principle in *Stancomb v. Trowbridge UDC*:

> "If a person or a corporation is restrained by injunction from doing a particular act, that person or corporation commits a breach of the injunction and is liable for process of contempt, if he or it in fact does the act, and it is no answer to say that the act was not contumacious in the sense that, in doing it there was no direct intention to disobey the order."

That this expresses the true position has since been confirmed by the Court of Appeal and also by the House of Lords in *Heatons Transport (St Helens) Ltd v. TGWU*, in *Director Genral of Fair Trading v. Pioneer Concrete (UK) Ltd* and in *M: M v. Home Office, Re*. Motive is immaterial to the question of liability.

12-94 What was traditionally required was to demonstrate that the alleged contemnor's *conduct* was intentional (in the sense that what he actually did, or omitted to do, was not accidental); and secondly that he knew the facts which rendered it a breach of the relevant order or undertaking. He must normally be shown at least in the case of a mandatory order to have been notified of its existence. By reason of CPR 81.8(1) in the case of a prohibitory order, the court may dispense with service of a copy of the order if satisfied that the person had been present when the judgment was given or the order made. As Christopher Clarke J explained in *Masri v. Consolidated Contractors* "it would not…be just to exercise a contempt jurisdiction against a defendant who had not had notice of the order in order to be able to comply with it". This will not necessarily, however, in itself demonstrate that the alleged contemnor actually knows of the order. The problem was highlighted by Eveleigh LJ in *Z Ltd v. A-Z and AA-LL*:

> "In the great majority of cases the fact that a person does an act which is contrary to the injunction after having notice of its terms will almost inevitably mean that he is knowingly acting contrary to those terms. However, where a corporation is concerned, it may be a difficult matter to determine when a corporation is said to be acting knowingly."

12-95 Yet there is no need to go so far as to show that the respondent *realised* that his conduct would constitute a breach, or even that he had read the order. This means that liability for civil contempt has been treated as though it were strict; that is to say, not depending upon establishing any specific intention either to breach the terms of the order or to subvert the administration of justice in general."

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[103] Londono (ed), *Arlidge, Eady & Smith on Contempt*, 5th ed (2017) (omitting footnotes and references).

122. Thus, the element of "deliberation" is actually a very attenuated requirement, which in reality requires no more than that the alleged contemnor do the acts that constitute a breach of the order with deliberation, as opposed to by accident or unconsciously. The low standard of the mental element is very well illustrated by the decision of Jacob J in *Adam Phones Ltd v. Gideon Goldschmidt*,[104] where the Jacob J nevertheless (albeit with some reluctance) considered a contempt to be established even where the contemnor had thought he was obeying the court's order:

> "The claimant says that provided that Gideon intended to do what he did, that is enough to prove contempt. It is no defence to say "I thought was obeying the order" if in fact you were wrong.
>
> The claimant relies upon what was said by Mr Justice Millett in *Spectravest v. Aperknit*:
>
> > "To establish contempt of court, it is sufficient to prove that the defendant's conduct was intentional and that he knew of all the facts which made it a breach of the order. It is not necessary to prove that he appreciated that it did breach the order.
> >
> > Authority for this conclusion may be found in *Heatons Transport (St. Helen's) Ltd v Transport & General Workers' Union*, [1973] AC 15 at 108-110, and *Mileage Conference Group of the Tyre Manufacturers' Conference Ltd's Agreement* [1966] 1 WLR 1137. In the first of those cases, Lord Wilberforce described as contempt conduct which was "neither casual nor accidental and unintentional". That phrase was carefully chosen and repeated several times. It clearly describes only two alternatives, not three. Conduct which is deliberate but unintentional, in the sense in which that word was used by Mrs Giret, cannot be brought within Lord Wilbeforce's formula.
> >
> > In the Mileage case, the defendants had given undertakings to the court not to enter into a particular agreement or any agreement "to the like effect". The question whether one agreement is of like effect to another is a question of fact and degree, as the court expressly held. The court, nevertheless, held that a contempt had been established. At 1162 the court said:
> >
> > "We conclude, therefore, that the breaches of undertaking here were contempts of court, even though it were to be shown that they were things done, reasonably and despite all due care and attention, in the belief, based on legal advice, that they were not breaches."
> >
> > A little later on he said:
> >
> > "Questions as to the bona fides of the persons who are in contempt, and their reasons, motives and understandings in doing the acts which constitute the contempt of court, may be highly relevant in mitigation of the contempt. *Bona fide* reliance on legal advice, even though the advice turns out to have been wrong, may be relevant and sometimes very important as mitigation. The extent of such mitigation must, however, depend upon the circumstances of the particular case, and the evidence adduced."
>
> The cases referred to by Millett J support his conclusion. It is also the generally received view, see e.g. the Supreme Court Practice 1999 paragraph 45/5/5:
>
> > "It is no answer to say that the Act was not contumacious in the sense that, in doing it, there was no direct intention to disobey the order".

[104] [2000] FSR 163 at 170-171.

123. Although Jacob J considered contrary authority, and expressed the view that "it is appropriate for the mental element of contempt of court to be reconsidered by a higher court",[105] his conclusion was that the law as stated by Millett J and cited by him was the law he was bound to apply.[106] That remains the position in this case.

124. I am satisfied that Mr Cuciurean breached the Order deliberately, in that he consciously and deliberately entered the Crackley Land. That is all the Order enjoined. In case I am wrong about the attenuated nature of the requirement of deliberation, I should make clear the following findings:

(1) Mr Cuciurean obviously entered the Crackley Land wilfully, intending to enter upon land where he knew he should not be. I consider his conduct in crossing the Area A perimeter in the way he did in Incidents 1 to 3 and 5 to 13 to demonstrate a subjective understanding that he was trespassing on another's land, and that he was doing so in the face of a clear determination on the part of the Claimants that he should not do so.

(2) I consider that Mr Cuciurean entered upon the Crackley Land with the subjective intention to further the HS2 protest, and to inhibit or thwart the HS2 Scheme to the best of his ability.

(3) I find that he did so in knowledge of the Order. I cannot say that he knew the full terms of the Order. Mr Cuciurean may very well have taken the course of adopting wilful blindness of its terms. But in light of the events described in this judgment, I conclude that Mr Cuciurean fully understood the terms of paragraph 4.2 of the Order, namely that he was not to enter upon the Crackley Land.

F. CONCLUSIONS

125. For all these reasons, I am satisfied that of the alleged grounds of contempt described in Statement of Case and in the Schedule thereto, Incidents 1 to 3 and 5 to 13 are made out to the requisite standard, and that Mr Cucuirean has breached the Order and is in contempt of court in these respects.

126. At the hearing at which I heard the parties' helpful closing submissions on 17 September 2020, it was agreed that if (as I have found) Mr Cuciurean was in contempt of court, his counsel, Mr Wagner, would wish some time to consider points in mitigation. That is, of course, entirely right.

127. I have listed this matter for hearing on 16 October 2020, when I propose formally to hand down this judgment (subject to any typographical corrections the parties may have). However, it should be noted that this judgment was circulated to the parties, in draft, on 2 October 2020, so as to enable Mr Cuciurean and his legal team to consider it.

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[105] At 172.

[106] At 172.

ANNEX 1

TERMS USED IN THE JUDGMENT

(footnote 1 in the judgment)

TERM	PARAGRAPH IN THE JUDGMENT IN WHICH THE TERM IS FIRST USED
Ad Hoc Fencing	§86(3)
Annex 1	§1 (footnote 1)
Annex 2	§3
Annex 3	§86
Annex 4	§93(4)
Application	§7
Area A	§87
Area B	§85(4)
Beaumont 1	§12(4)(f)
Beim 1	§55(2)
Bovan 1	§7
Bovan 2	§12(1)
Bovan 3	§12(1)
Cairns 1	§12(4)(d)
Camp 1	§7 (footnote 4)
Camp 2	§7 (footnote 4)
Category 3 Defendants	§41
Claimants	§2
Corcos 1	§12(4)(a)
Crackley Land	§3
Crackley Land (East)	§84
Crackley Land (West)	§84
Cuciurean 1	§12(3)(a)
Cuciurean 2	§12(3)(a)
Defendants	§2
HCE	§7 (in quotation)
Heras fence panels	§86(2)

Hicks 1	§12(4)(c)
Hicks 2	§12(4)(c)
Hillier 1	§12(4)(b)
Hoarding Fence	§89(3)
HS2	§2
HS2 Scheme	§10(1)
Incident(s)	§8
Injunction Notice	§57(3)(a)(i)
Injunction Warning Notice	§57(3)(a)(ii)
Internal Boundary	§86(4)
Judgment	§1
Land	§3
No Trespass Notice	§57(3)(d)
Order	§1
Penal Notice	§5
Pitwell 1	§12(4)(e)
Plan B	§3
Point 1	§89
Point 2	§89(1)
Point 3	§89(2)
Point 4	§89(3)
Point 5	§89(4)
Point 6	§89(4)
Point 7	§89(4)
Point 8	§89(5)
Pook 1	§12(4)(g)
Post and Wire Fence	§89(5)
Proceedings	§7 (in quotation)
PROW165X	§91
Remaining Portion	§85(3)
Sah 1	§12(2)
Schedule	§8
Second Defendants	§2
Shaw 1	§29(4)

Square	§85(1)
Statement of Case	§7
Strip	§93(4)(b)
TPROW	§93(3)
TPROW Fencing	§93(4)(c)
Triangle	§85(2)
Writ	§12(1)

ANNEX 2

"PLAN B": THE PLAN OF THE CRACKLEY LAND ATTACHED TO THE ORDER

(paragraph 3 in the judgment)

ANNEX 3

"PLAN B" MARKED UP FOR THE PURPOSE OF THIS JUDGMENT

(paragraph 86 in the judgment)

ANNEX 4

THE PLAN SHOWING THE INTENDED DIVERSION OF PROW165X TO A TPROW

(paragraph 93(4) in the judgment)