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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY
[2022] EWHC 874 (QB)



No. QB-2022-BHM-000016

33 Bull Street
Birmingham, B4 6DS

Thursday, 17 March 2022

Before:

THE HONOURABLE MR JUSTICE LINDEN

B E T W E E N :

BALFOUR BEATTY GROUP LIMITED

Claimant

- and -

(1) PERSONS UNKNOWN OBSTRUCTING AND/OR INTERFERING WITH ACCESS TO AND EGRESS FROM LAND KNOWN AS THE BALFOUR BEATTY COMPOUND, OFF THE A51/A519 ROUNDABOUT, SWYNNERTON, ST15 0QS AND SHOWN MARKED IN BLUE AND GREEN ON THE PLAN APPENDED TO THE PARTICULARS OF CLAIM

(2) JAMES TAYLOR (a.k.a "JIMMY KNAGGS", "JAMES KNAGGS" OR "RUN AWAY JIM")

(3) KAREN WILDIN (a.k.a "KAREN WILDING", "KAREN WILDEN" OR "KAREN WILDER")

(4) ANDREW McMASTERS (a.k.a "DREW ROBSON")

(5) I.C. TURNER

(6) LEAH OLDFIELD (a.k.a "LEE OLDFIELD" or "LEIYAH")

(7) SAM HOPKINS

(8) THE INDIVIDUAL WITH THE FIRST NAME "STEPHANIE"
(a.k.a "STEFF" OR THE ALIAS "NETTLE")

Defendants

J U D G M E N T

A P P E A R A N C E S

MR D. SCOTT (instructed by Pinsent Masons LLP) appeared on behalf of the Claimant.

THE SECOND DEFENDANT appeared in Person.

THE THIRD TO EIGHTH DEFENDANTS did not attend and were not represented.

MR JUSTICE LINDEN:

1 This is a judgment in the case of Balfour Beatty Group Limited against eight categories of defendant. It is case number QB-2022-BHM-000016.

Introduction

- 2 This is an application for interim injunctive relief made by the claimant in these proceedings, Balfour Beatty Group Limited (“Balfour Beatty”), against seven defendants who are named and a category of persons unknown which is defined as the first defendant. In broad outline, the claimant is involved as a contractor in construction work on the HS2 project. It seeks to restrain certain activities by opponents of HS2 which have been taking place at a site which it operates known as the Balfour Beatty Site Compound close to the A51/A519 roundabout near Swynnerton in Staffordshire (“the Compound”).
- 3 Mr Daniel Scott appeared for Balfour Beatty, having submitted a helpful skeleton argument in advance of the hearing. Mr Knaggs, who is the second defendant, also submitted a helpful written argument by email on 14 March 2022 which referred, if I may say so, accurately to the most important case law for the purposes of deciding this application. He also set out his case, and in effect that of the other defendants, in relation to the claim and the application. He made oral submissions to the court at the hearing today. Those submissions were made robustly but with courtesy and I am extremely grateful to him for the help that he has given the court in terms of deciding the application and the way that he has represented the cause for which he stands.
- 4 I also received email submissions from a Ms Deborah Mallender and Ms Sally Cakebread dated 17 March 2022 which I have read carefully and have taken into account. They argue,

alongside Mr Knaggs, that the grant of the claimant's application would amount to a breach of their rights under Articles 10 and 11 of the European Convention on Human Rights ("the Convention" or "the ECHR").

5 In coming to a decision on this application, I will make provisional findings. Given the interim nature of the order which is sought, my findings are based on the documentary and photographic evidence which I have received and therefore may be revisited at trial when oral evidence may be given, as appropriate.

Background

6 Proceedings were issued together with this application on 10 February 2022. The claimant's case is set out in its Particulars of Claim and is supplemented by a witness statement which was served in support of its application. There are statements from Mr Michael Fenn, solicitor, dated 9 February 2022, who deals with the question of service. There are statements dated 10 February 2022 from Mr Geoff Smith, a project director employed by the applicant, and Mr Gary Paton who is employed by the applicant as a security manager of the Compound. They deal with the evidential basis for the claimant's case. There is also a second statement from Mr Paton dated 15 March 2022 which updates the court on the question of service and on events at the location since his first witness statement as well as events nearby.

7 Mr Knaggs objected to the admission in evidence of Mr Paton's second witness statement, and I decided in the light of his arguments and those of Mr Scott that I would admit it only in part. The part of the evidence which I have not admitted, at least at this stage, is the part that deals with the activities of the protestors in relation to sites other than the Compound.

I note that the exhibits to the witness statements relied on by the claimant include a substantial amount of social media photographic and video evidence which has been posted by the defendants themselves and which depicts their activities and sets out the aims of their activities and the objective which they have.

- 8 The Compound is on land registered at Her Majesty's Land Registry under title number SF521244. It is a temporary site which is approximately four acres in size and comprises twenty-one cabins, a storage building and areas of hardstanding for the parking and storage of plant materials. It is protected by solid, anti-climb hoarding along with CCTV and twenty-four-hour security staff since incidents of trespass and vandalism of plant and equipment in February and March 2021.
- 9 The location was selected because it is conveniently placed for access to the route of the HS2 and has good access to the M6 and the local road network. It is used as a base to store plant, equipment and materials which are then deployed to work sites along the route of HS2 as part of phase 2a of the project. Phase 2a was authorised by the High-Speed Rail (West Midlands-Crewe) Act 2021. It is concerned with the railway line between Fradley in the West Midlands and Crewe.
- 10 The Compound is also a base for the claimant's employees and subcontractors who are engaged in this work. Each day, around 150 to 250 personnel and other licensees attend the Compound. The activities of the site involve approximately 160 vehicle movements into and out of the Compound carrying plant and equipment, but there are also deliveries and collection of fresh water, diesel, waste water and refuse as there are no mains services connected to the Compound.

- 11 The two projects which the Compound serves are, first, a project to deliver ground investigation works so as to provide geotechnical data to support the design and construction of the new railway and any associated infrastructure and, second, a project to create new environmental habitats at 81 sites located between Lichfield and Crewe in advance of the main construction works beginning. The Compound is considered to be of strategic importance to these two projects.
- 12 The layout of the relevant locations for the purposes of this case is helpfully described in the Particulars of Claim and in a plan which is at Annex 1 to the Particulars of Claim. That plan is also proposed to form part of the order for interim relief which the court was invited by the claimant to make.
- 13 The only point of access to the Compound for both vehicles and pedestrians is via the A51 which is a major road running between Chester and Kingsbury, North Warwickshire. A short distance to the east of the roundabout between the A51 and the A519 at Swynnerton is a private access road which runs in a roughly south-westerly direction to the Compound from the A51. I will refer to this as “the Access Way”.
- 14 Where the Access Way joins the A51, there is an area of hardstanding which adjoins the main westbound lane of the A51 which is referred to as “the Bellmouth” because it is shaped like a bell. This area of hardstanding provides space for vehicles which are turning between the Access Way and the A51. There is a set of metal security gates between the Access Way and the Bellmouth which are set back approximately 12 metres from the main carriageway of the A51. At the points where the gates are located, the Bellmouth is approximately 6 metres wide and expands to around 45 metres in breadth where it meets the main carriageway of the A51.

- 15 The claimant pleads, and there was no dispute about this, that it has rights to occupy the Compound and that it has a private right of way over the Access Way and the Bellmouth to the extent that it is on private land pursuant to leases entered into with the owners of the land and dated 23 December 2020.
- 16 The claimant says, and again there was no real dispute about this, that since March 2021 a camp has formed in Bluebell Woods around 350 metres to the east of the Bellmouth and to the north of the A51. It forms a base for activists who oppose HS2 and who take direct action in relation the Compound and other sites as part of their protest activities. It is thought that there are generally around five to ten activists there at a given time, although numbers are thought to increase up to twenty from time to time.
- 17 The activists have built wooden structures including a tree house as part of the camp, and they have dug tunnels apparently to make it more difficult to evict them. They have also put up signs and banners facing the A51 which oppose HS2. It is understood by the claimant that they have been served with an eviction notice which takes effect from 24 March 2022, but the activists have indicated they will resist the eviction and will continue their activities in the area.
- 18 Since October 2021, groups of activists have regularly sought to obstruct access to the Compound and to disrupt the flow of materials, plant and equipment and personnel into and out of the Compound. The claimant's case is that the defendants, together with the first defendant which is a category of persons unknown, have been involved in these activities. The group may be of one or two people or they may number as many as ten. Mr Smith says in his witness statement that their activities take place around two or three times a week. On

the strength of the evidence, it appears to me that they take place in the order of six to eight times per month.

- 19 The pattern of the relevant conduct on the part of the activists has broadly been that people assemble in the Bellmouth for around two hours at a time to prevent vehicles and personnel from coming and going. They stand in the way of vehicles and refuse to move until the police require them to do so, at which point they move away, or they walk slowly in front of vehicles so as to impede their progress.
- 20 The claimant pleads specific acts of obstruction in summary at paragraph 19 of the Particulars of Claim and further at Annex 2 to the Particulars of Claim. Further evidence in relation to this is provided by Messrs Smith and Paton in their witness statements. Mr Paton also gives evidence of further incidents in his second witness statement.
- 21 In this connection, it is relevant to note that the evidence, including the evidence from the social media activities of the activists and the other photographic evidence, shows that although some of the activists do hold placards or banners which bear slogans such as “NHS not HS2”, the activists themselves repeatedly describe their activities as “blocking the gates”. They also describe themselves as engaged in slowing down or delaying the HS2 project and in the disruption of the work of the Compound.
- 22 It is clear that their activities are part of a course of action which is intended to continue and is designed to disrupt the work which is facilitated by the Compound. There are also exultations in the messages posted by the defendants to step up the level of disruption. I highlight this point because in my view the nature and extent of what I accept for present

purposes are protest activities is relevant to the arguments under Articles 10 and 11 of the European Convention on Human Rights, which I will come to in due course.

- 23 These activities are alleged by the claimant to be acts of actual or attempted nuisance in that they interfered or intended to interfere with the claimant's private right of way and its enjoyment of its relevant property rights. Insofar as the actions of the defendants take place on the public highway, they are alleged to amount to acts of public nuisance which have a particular impact on the claimant and cause it particular loss and damage. The impact of the defendants' activities appears to reflect their aims.
- 24 The claimant pleads that the activities are causing considerable disruption to its operations at the Compound and consequently elsewhere through delays to planned works on the HS2 project. The claimant says that the delays mean that it cannot meet its contractual commitments on time and that this has a knock-on effect on the HS2 project and leads to scheduling issues and increased costs. Personnel using the Compound are delayed. Having to negotiate with and navigate around protestors is causing them stress and creating a risk to the safety of the activists given that the vehicles concerned are often large and carrying heavy construction equipment.
- 25 In addition to this, users of the A51 may be inconvenienced by having to pass queues of vehicles which are stationary on the A51 because they cannot turn off into the Access Way, and the police are spending a good deal of time supervising the activists.
- 26 The claimant is also concerned that levels of disruption are likely to increase given the pattern which has developed at other locations where there are anti-HS2 protests, given the growth in the size of the camp in Bluebell Woods and the increase in the frequency of

incidents of obstruction in the Bellmouth and elsewhere, and given the statements of intent and exultations on social media. Mr Scott, however, very fairly indicated that the application today was put on the basis of the intended continuation of the existing activities rather than any escalation. He indicated that any escalation would, in principle, be capable of being addressed by further applications to the court, if necessary.

- 27 The remedy which the claimant claims is limited to final injunctive relief although it reserves its right to amend to claim damages and to provide further particulars of the losses which it pleads it has suffered. To be clear, the relief sought in the claim and in the application for an interim injunction is limited to preventing the defendants from obstructing or otherwise interfering with the free movement of vehicles or personnel travelling to or from the Compound via the A51 and the Access Way. There is no application to close down the camp at Bluebell Woods - that is the concern of others - or otherwise to prevent the defendants from protesting against HS2.

Service

- 28 The postal address of the defendants is not known to the claimant. In his witness statement dated 9 February 2022, Mr Michael Fenn of Pinsent Masons LLP, who acts for the claimant, explains that the camp in Bluebell Woods has a post box and this has been used to deliver correspondence to the protestors. In the case of the claimant's letter before action dated 6 January 2022, this was placed in the post box and taped to the gates between the Access Way and the Bellmouth. It was proposed that the letter be handed to the activists who assembled at the Bellmouth that day, but the activists indicated they would not accept a copy and left when it appeared to them that copies may be handed to them. The evidence suggests that the steps taken to serve the letter before action on this occasion were sufficient

to draw it to the attention of the protestors because on 8 January 2022 their social media reported delivery of the letter and they posted a copy on the Bluebell Woods Facebook page.

- 29 Mr Paton gives further evidence about service in his second witness statement which is supported by photographs which he exhibits. On 14 February 2022, he attached the legal notice (which is to be found at page 3 of the exhibit to his statement) to the fencing of the gates at the Bellmouth. This notice gives the title and case number of the claim and states that the proceedings are for an injunction to prevent protestors from blockading or obstructing the activities of the claimant at the Compound.
- 30 The relevant court documents including the Claim Form, Particulars of Claim, Application Notice, Draft Order and witness statements are listed in the notice. The documents were not attached to the notice, but the reader was given an email address for the purpose of requesting copies and raising any other queries about the proceedings. The notice advises the defendants or respondents to seek legal advice and invites them to email any queries about the proceedings to an address which is specified. No requests were received, and the CCTV evidence suggests that the notice was removed on or about 23 February 2022 by Mr Knaggs. However, on 7 March 2022, Mr Paton personally reattached the legal notice to the fencing in a prominent position with the key documents also attached in plastic wallets.
- 31 On 22 February 2022 at around 11.40 a.m., Mr Paton delivered the following documents to the post box at the Bluebell Woods Camp. Those documents were a service letter to protestors from Pinsent Masons, the Claim Form, the Application Notice, the sealed Particulars of Claim, the Draft Order and the witness statements of Mr Paton, Mr Smith and Mr Fenn as well as a sealed Order of HHJ Kelly dated 14 February 2022, and a sealed notice of the hearing and, finally, a response pack. The service letter referred to refers back to the

letter before action, attaches a copy of the court documents, and notifies the reader of the date, time and place of the hearing. It also advises the reader that they are free to attend and that they can request an electronic copy of the documents by emailing an address which is provided.

32 Mr Paton says that hard copy documents had been available at the Compound for distribution since 14 February 2022, and he understands that it has been given to some activists who attended at the Bellmouth, but he has no direct knowledge of this and cannot confirm when and to whom the documents were provided. I therefore do not attach a great deal of weight to this aspect of the evidence.

33 It is clear that these documents and in particular the claim and the application have come to the attention of at least some of the defendants. Mr Knaggs removed the legal notice on 23 February, as I have noted, but there was also a number of posts by Mr Knaggs and on the Bluebell Woods Facebook page on 23 and 24 February 2022 which discuss the application for an injunction and in some cases show photographs of the court documents. They say that an injunction has been applied for, they denounce this as an attempt to prevent peaceful protests, and a breach of the human rights of the protestors. They say that the protestors will attend the hearing and resist the application. They also say that the action will be stepped up as a result. A video Mr Knaggs posted appears to show him with the documents in his hand and it is said by Mr Paton that the documents themselves have been shared online.

34 On 10 March 2022 at around 10.50 a.m., Mr Paton delivered two hard copies of the bundle for the hearing and two electronic copies on USB sticks to the post box in Bluebell Woods. Also on 10 March 2022, a further copy of the legal notice together with the court documents

to which it refers was attached to the gates in plastic wallets. I understand that that set of documents remains where it was put.

35 Mr Scott relied on CPR rule 6.15 to submit that there was good reason to authorise service by a method or at a place not otherwise permitted by the rules. He relies on the fact that the postal addresses of the defendants are not known and that they are difficult to locate with a view to serving them personally given that in most cases their identities have not been ascertainable, and they would, in any event, be unlikely to accept personal service. In the case of the defendants who have been identified, they are also unwilling to accept personal service.

36 Initially, the claimant applied for approval of these methods of service in advance, but that application was not dealt with by the court and the claimant therefore applies, pursuant to rule 6.15(2) and 6.27, for these alternative methods of service to be approved by the court and ordered to be good service. In determining this application, I have considered the terms of the relevant rules and have also taken into account the emphasis in, for example, the decision of the Supreme Court in *Cameron v Liverpool Victoria Insurance Company Limited* [2019] 1 WLR 1471 at [14]-[21] on the importance of service given that it is the basis on which a given person is made subject to the jurisdiction of the court in the proceedings in question. Lord Sumption said that:

“It is a fundamental principle of justice that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard.”

37 He pointed out that the object of all of the methods of service identified in rule 6.3 was to enable the court to be satisfied that the method used either had put the recipient in a position

to ascertain the context of the proceedings or was reasonably likely to enable him to do so within any relevant period of time. Lord Sumption added that:

“...subject to any statutory provision to the contrary, it is an essential requirement for any form of alternative service that the mode of service should be such as can reasonably be expected to bring the proceedings to the attention of the defendant.”

38 These passages were also emphasised by the Court of Appeal in *Canada Goose UK Retail Limited v Persons Unknown* [2020] 1 WLR 2802 (“*Canada Goose*”) in the context of proceedings against Persons Unknown where the risk of service being ineffective is often greater than where the identity of the defendant is known (see paras.45-48). I have also taken account of section 12(2) of the Human Rights Act 1998 in relation to defendants who are not present nor represented. I am satisfied that the claimant has taken all practical steps to notify persons in this category of this application. I am also satisfied that sufficient steps have been taken to constitute good service by the defendants.

Notice of the hearing

39 On the evidence, I am satisfied that the defendants have had ample notice of today’s hearing. Mr Scott has nevertheless confirmed that the claimant’s approach to this application is based on full and frank disclosure, bearing in mind the possibility that there may be defendants who have not had notice of the hearing and that, in any event, the defendants are litigants in person.

The merits of the underlying application for interim relief

40 I begin with the legal framework. As far as the torts alleged in this case are concerned, Mr Scott referred me to the following passage from the judgment of Mummery LJ in *West v Sharp* [1999] 79 PCR 327 at p.332:

“Not every interference with an easement, such as a right of way, is actionable. There must be a substantial interference with the enjoyment of it. There is no actionable interference with a right of way if it can be substantially and practically exercised as conveniently after as before the occurrence of the alleged obstruction. Thus, the grant of a right of way in law in respect of every part of a defined area does not involve the proposition that the grantee can in fact object to anything done on any part of the area which would obstruct passage over that part. He can only object to such activities, including obstruction, as substantially interfere with the exercise of the defined right as for the time being is reasonably required by him.”

41 Mr Scott submitted, and I accept for present purposes, that the “substantial interference” does not have to occur on the land over which the easement runs (see **Gales on the Law of Easements, 21st Edition**, para.13-09). For example, in *Wall v Collins* [2009] EWHC 2100 (Ch) it was held that parking a car on a public highway opposite where a private right of way joined the highway with the result that it was more difficult to turn vehicles into and out of the right of way was an actionable interference. He submitted that this is exactly the kind of interference that is occurring here and is the basis on which the claimant has a cause of action for private nuisance.

42 Mr Scott pointed out that the defendants are also preventing the claimant from accessing the A51 (i.e. the public highway) from the Access Way. He submitted that arguably this in itself is also a private nuisance (see **Clark & Lindsell on Torts, 23rd Edition**, para.19-180). He submits that whether or not it is, the actions of the defendants constitute a public nuisance which is actionable by the claimant given that the continued obstruction causes the claimant particular damage over and above the damage caused to the public at large (see **Clark & Lindsell on Torts**, para.19-181) and the first instance decision in *Boyd & Anor. v*

Ineos Upstream Limited & Ors. [2017] EWHC 2945 (Ch) and *R v Rimmington and Goldstein* [2006] 1 AC 459 at [7] and [44]). Mr Scott submitted that the claimant therefore has a cause of action in public nuisance.

43 Mr Scott accepted that this is a case in which Articles 10 and 11 of the European Convention on Human Rights are engaged. They provide as follows:

“Article 10: Freedom of expression

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

Article 11: Freedom of assembly and association

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

44 In relation to Article 10 of the European Convention on Human Rights, s.12 of the Human Rights Act 1998 provides so far as material:

“Freedom of expression

- (1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
- (2) ...
- (3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.
- (4) The court must have particular regard to the importance of the Convention right to freedom of expression...”

45 As far as s.12(3) is concerned, “likely” means “more likely than not” (see *Cream Holdings Limited v Banerjee & Ors.* [2005] 1 AC 253). “Publication” is not restricted to commercial publication; it applies to any method of communication that would engage Article 10 including protest slogans and placards displayed in person or online (see *Birmingham City Council v Afsar & Ors.* [2019] EWHC 1560 (QB) at [60]-[61]).

46 Section 12 therefore requires a modification of the *American Cyanamid* principles which would normally apply in relation to an application for an interim prohibitory injunction. In the present context, this means that I should have particular regard to Article 10 when deciding whether there is a seriously arguable case that the activities of the defendants amount to a substantial interference with the claimant’s property rights and whether their actions amount to a public nuisance.

47 I should also have particular regard to the effect of the defendants’ Article 10 rights of any injunction which I order, albeit taking into account that it would be granted on an interim rather than a final basis. To the extent that any interim injunction would restrain publication by the defendants, that is the communication of their ideas for use or argument, I should only grant it if I am satisfied that the claimant is more likely than not to obtain such an order

at trial. I should also have regard to the defendants' rights under Article 11 and of course to the rights and freedoms of the claimant and its personnel.

48 In relation to Articles 10 and 11 of the Convention and the balancing exercise which is required to be carried out, I have been referred by Mr Knaggs to the decision of the Supreme Court in *Director of Public Prosecutions v Ziegler* [2021] 3 WLR 179 (“*Ziegler*”). He told me that the defendants' activities were informed by what the Supreme Court decided in *Ziegler*, and it is therefore important to consider what was in fact decided in that case. In *Ziegler*, the defendants were charged with the offence of obstructing the highway contrary to s.137 of the Highways Act 1980 (“the 1980 Act”). They accepted that they had obstructed the highway when they lay in the road to a conference centre where an arms fair was taking place. This had blocked traffic approaching the centre for ninety minutes, albeit the lane leading away from the centre was not blocked. Mr Scott described this as a symbolic action on their part.

49 The protestors in *Ziegler* contended that they had not acted “without lawful excuse” and therefore had not committed any offence. The district judge acquitted them on the basis that the prosecution had not proved that they had acted without lawful excuse. The divisional court allowed an appeal by the prosecution, but the Supreme Court reversed the divisional court's decision. The relevant part of the Supreme Court's decision unanimously held that it was clear from the case law of the European Court of Human Rights that intentional action by protestors to disrupt the activities of others even with an effect that was more than *de minimis* did not automatically lead to the conclusion that any interference with such rights was proportionate for the purposes of Articles 10 and 11 of the Convention. Rather, there had to be an assessment of the facts in each individual case to determine whether the

interference was necessary in a democratic society for the purposes of Articles 10(2) and 11(2).

50 Deliberate physically obstructive conduct by protestors was therefore capable of constituting a “lawful excuse” for the purpose of s.137 of the 1980 Act even where the impact of the obstruction on other highway users was more than *de minimis* and prevented them from passing along the highway. Whether it did constitute a lawful excuse depended on whether convicting them of the offence of obstructing the highway was a proportionate response to their activities and therefore compatible with Articles 10 and 11.

51 At paras.58-59 of their judgment on the merits of the arguments under Articles 10 and 11, Hamblen and Stephens JJSC said that the determination of the proportionality of an interference with Convention rights is a fact-specific enquiry which requires evaluation of the circumstances in the particular case. They agreed with the divisional court that the following five questions required to be addressed in a case of this sort:

- “(1) Is what the defendant did in exercise of one of the rights in Articles 10 or 11?
- (2) If so, is there an interference by a public authority with that right?
- (3) If there is an interference, is it ‘prescribed by law’?
- (4) If so, is the interference in pursuit of a legitimate aim as set out in para.(2) of Article 10 or Article 11, for example the protection of the rights of others?
- (5) If so, is the interference ‘necessary in a democratic society’ to achieve that legitimate aim?”

52 At para.64 of its judgment in *Ziegler*, the divisional court said:

“That last question will in turn require consideration of the well-known set of sub-questions which arise in order to assess whether an interference is proportionate:

- (1) Is the aim sufficiently important to justify interference with a fundamental right?

- (2) Is there a rational connection between the means chosen and the aim in view?
- (3) Are there less restrictive alternative means available to achieve that aim?
- (4) Is there a fair balance between the rights of the individual and the general interest of the community, including the rights of others?"

53 At para.72, Hamblen and Stephens JJSC said that:

“A non-exhaustive list of the factors normally to be taken into account in an evaluation of proportionality was set out at para.39 of the judgment of Lord Neuberger of Abbotsbury MR in *City of London Corpn v Samede* (see para.17 above). The factors included ‘the extent to which the continuation of the protest would breach domestic law, the importance of the precise location to the protesters, the duration of the protest, the degree to which the protesters occupy the land, and the extent of the actual interference the protest causes to the rights of others, including the property rights of the owners of the land, and the rights of any members of the public’. At paras.40-41 Lord Neuberger identified two further factors as being: (a) whether the views giving rise to the protest relate to ‘very important issues’ and whether they are “views which many would see as being of considerable breadth, depth and relevance”; and, (b) whether the protesters ‘believed in the views they were expressing’. In relation to (b) it is hard to conceive of any situation in which it would be proportionate for protesters to interfere with the rights of others based on views in which the protesters did not believe.”

54 The particular factors which led the Supreme Court to conclude that on the facts of the *Ziegler* case the district judge had reached a permissible conclusion that the protestors had had a reasonable or lawful excuse were the peaceful nature of the protest; the fact that the defendants’ actions did not give rise either directly or indirectly to any form of disorder; the fact that the defendants did not commit any criminal offences other than obstructing the highway; the fact that the defendants’ actions were carefully targeted and were aimed only at obstructing vehicles heading to the arms fair; the fact that the protest related to a matter of general concern; the limited duration of the protest; the absence of any complaint about the defendants’ conduct; and the defendants’ longstanding commitment to opposing the arms trade.

55 However, in the light of Mr Knaggs' arguments, I think it is important to note that:

- (a) The Supreme Court emphasised that each case turns on its facts.
- (b) The view of the Supreme Court was merely that the district judge had reached a permissible view about how the balance between the competing rights which were in play should be struck in that particular case.
- (c) An approach which involves reading across from the facts of *Ziegler* is therefore unsound particularly if only some of the factual features of the *Ziegler* case are present.
- (d) I note that *Ziegler* was also concerned with an interference with the protestors' Convention rights which took the form of criminal liability and therefore sanction, whereas I am concerned at this stage with injunctive relief pending trial in a civil action and therefore arguably a less intrusive form of interference.

56 I also note that although an obstruction of the highway in the course of a demonstration does not fall outside the scope of the Convention, the fact and extent of any obstruction caused may well be a relevant factor at the stage of assessing whether any interference with the Article 10 or 11 rights is necessary and proportionate.

57 At para.53 of the judgment of the divisional court in the *Ziegler* case, this was explained in the following way:

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

58 In *Ziegler*, at para.67 the Supreme Court also highlighted the statement of the European Court of Human Rights in *Kudrevicius v Lithuania* [2015] 62 EHRR 34 that:

“Physical conduct purposely obstructing traffic and the ordinary course of life in order to *seriously disrupt the activities carried out by others* is not at the core of that freedom as protected by Article 11...”

59 Disruptive conduct is not determinative of proportionality, but it may have implications for the fact-sensitive assessment which is required to be carried out.

Submissions

60 Mr Knaggs submitted that HS2 is a costly project that will cause environmental damage by destroying countless woodlands despite what he describes as the COP26 ruling to halt all deforestation. He and his fellow protestors have been protesting for years up and down the line, he says, to try and stop this. He says that the protestors have been conducting what he argues are short, proportionate, lawful, peaceful protests for up to two hours at a time which keep disruption to a minimum. They also, he says, allow pedestrians through and are willing to let vehicles through, as he puts it, on merit. When I asked him what he meant by “on merit”, he told me that they might permit a vehicle to pass through if the driver had a dental appointment or if his or her partner was in labour. It was clear to me from his answer therefore that the protestors, when they assemble, viewed themselves as policing who could and who could not make use of the Access Way.

61 Mr Knaggs said that the protestors wished to continue their activities as it is within their human rights to do so. He said that this is public land and that this was the only feasible safe place for them to protest. He argued that given the disruption which will be caused by climate change, any disruption caused by the protestors is proportionate. He advanced a number of ways in which he said the claimant could mitigate the impact of the activities of the protestors. For example, he said by developing other access routes to the site, or working from other sites, or changing patterns of work so that the busier points in the day occurred at other times than when the protestors were present. I am bound to say that I did not find any of these suggestions convincing.

62 Mr Knaggs says the police have been in attendance and have made no arrests at any protests. There is some evidence of eight arrests, but I will proceed on the basis that Mr Knaggs' position is to be treated as correct, for present purposes at least. Mr Knaggs said that he also worries that by stifling peaceful protests some may attempt to be party to more excessive measures in order to be heard. He also says that the protestors are relying on the decision of *Ziegler* in the Supreme Court which he says demonstrates that their activities are proportionate and therefore lawful.

Discussion

63 I start with Articles 10 and 11 of the ECHR. For present purposes, I will assume that the defendants are exercising rights under Articles 10 and 11 when they carry out their activities. That being so, the interim order which the claimant seeks would, if granted, at least in principle infringe the defendants' rights under these articles. Such an interference would be prescribed by law given that it would be an order of the court, with jurisdiction under s.37 of the Senior Courts Act 1981, made as a result of the application of the domestic law of tort and the principles applicable to the grant of interim injunctions.

64 Such an order would have to be in pursuit of one of the legitimate aims specified in part (2) of Articles 10 and 11 and it would have to be necessary in a democratic society, that is to say proportionate. Here, there is no real issue that the injunction sought by the claimant would have a legitimate aim, namely at least the protection of the rights and freedoms of others, that is to say the protection of the claimant's use and enjoyment of its property rights and its pursuit of its lawful business as well as the rights of others whose working lives or

whose use of the highway are affected by the defendants' activities. It is also said by the claimant to be in the interests of public safety and the prevention of disorder.

65 The issue is as to the proportionality of the proposed order or, putting it another way, any order which I may make should be proportionate. In considering that question, I have regard to the *Bank Mellat* questions referred to at para.64 of the judgment of the divisional court in *Ziegler*. First, is the aim of any such order sufficiently important to justify interference with the fundamental right? The answer to that question is yes. Second, is there a rational connection between the means chosen and the aim in view? The answer to that question is yes; the aim is to prevent the blocking of the gates between the Bellmouth and the Access Way pending trial and the proposed means are an interim injunction which has this effect. Third, are there less restrictive alternative means available to achieve that aim? The answer to this question is no. Without such an injunction, the defendants will continue to block the gates on a regular basis and therefore cause the disruption complained of. Fourth, is there a fair balance between the rights of the individual or individuals and the general interest of the community, including the rights of others if an order is made? This seems to me to be the real issue in the present case. I accept that the defendants' concerns are serious as opposed to trivial, and I approach the application on that basis but without expressing any views as to the merits of their arguments about HS2 one way or the other. This is not a case in which the application for interim relief could succeed on the basis that the issues in relation to HS2 are trivial or not worthy of public consideration.

66 For present purposes, I will also proceed on the basis that the activists are sincere and that their concerns are deeply felt based upon longstanding views about the cost and environmental impact of HS2. I also accept that the activities are peaceful at least in the sense that the defendants are not physically threatening or violent and that they move aside

when required to do so by the police. However, there has been little or no public disorder in part because of the forbearance of the claimant and its personnel who sometimes choose not to use the gates when the defendants are assembled there and who have not taken steps to confront them or steps which might put the safety of anyone at risk.

67 I also accept that the disruption each day is for a relatively short period of time, that is in the order of one to two hours, but it is at this point that the defendants' reliance on *Ziegler* as a template for what is and is not lawful protest is, in my view, clearly misplaced. Unlike in the *Ziegler* case, the present case is not concerned with a one-off demonstration. It is concerned with a concerted series of actions which are designed to disrupt the claimant's activities and, as a consequence, HS2. The degree of disruption has to be viewed in the context of the blocking of the gates being a regular and relatively frequent occurrence with the high likelihood that it will continue.

68 I also think that it is important that the aspects of the defendants' activities which are sought to be prevented involve a high degree of compulsion and a low degree of persuasion in the sense that the aim of the protestors is to block the gates so as to prevent the claimant and their operatives from doing the work in question, or at least to impede their ability to do so. These activities are only to a very limited extent concerned with the communication of views and ideas. They are not at the core of the freedom which Articles 10 and 11 seek to protect.

69 Linked to this point, the ability to protest in front of as opposed to in the vicinity of the security gates between the Access Way and the Bellmouth may be critical to the defendants' ability to achieve the objective of blocking the gates, but it is not critical to any attempt to persuade those who attend the Compound or motorists who use the A51 to the activists'

point of view. I also accept that the activities of the defendants cause a high degree of disruption to the claimant's rights and freedoms. On the other hand, the proposed injunction would not prevent any protest at all, it would merely prevent the obstruction and impeding of the use of the Access Way and the Bellmouth.

70 Mr Scott pointed out that it is possible for protestors to stand to the side of the Bellmouth and protest, as some have indeed done. The injunction, as currently framed, will not prevent them from continuing to do so. The defendants' activities also give rise to a risk to the safety of users of the Bellmouth and the Access Way, who may include pedestrians, as well as to the defendants themselves, and they are a source of stress and inconvenience to drivers and other personnel seeking to come and go.

71 I take into account the fact that the police have not arrested anyone, but the police of course are concerned with the enforcement of the criminal law. In any event, they have different concerns and priorities to the concerns and priorities of the claimant and those who wish to use the Access Way and the Bellmouth. The fact that there have been no arrests is, in my view, likely to be at least in part because personnel trying to enter or leave the Compound have not chosen to enter into confrontations with the protestors. I also think that it cannot be irrelevant in deciding what is necessary in a democratic society that the work which the defendants seek to disrupt is work which has been approved by an act of Parliament in accordance with our existing democratic processes.

72 Having balanced the various considerations and assessed the competing arguments in relation to Articles 10 and 11, I am satisfied that there is a serious issue to be tried as to whether the defendants are committing the torts of private and/or public nuisance. Indeed, I accept that there is a strong case that the relevant conduct of the defendants is tortious.

73 I am also satisfied that damages would not be an adequate remedy in this case. Damages are not claimed, but more to the point they would be very difficult to quantify and even if they were quantified the chances of enforcing them against the defendants seems low.

74 As far as the balance of convenience more generally is concerned, it seems to me that the proportionate approach, applying Articles 10 and 11, is to grant an interim injunction which prevents the claimants from obstructing or interfering with the use of the Bellmouth, the gates and the Access Way but which does not materially affect their ability to express their views on the subject of HS2. As Mr Scott rightly submitted, there is no other way to protect the property rights of the claimant and the rights of others whose interest the claimant represents. The order does not prevent the defendants from exercising their right to freedom of expression and assembly, albeit it limits the ways in which they may exercise those rights.

Relief against persons unknown

75 I turn then to the question of relief against persons unknown. The procedural requirements in relation to this type of order were set out by the Court of Appeal in *Canada Goose*, which said at para.82:

“Building on *Cameron* and the *Ineos* requirements, it is now possible to set out the following procedural guidelines applicable to proceedings for interim relief against ‘persons unknown’ in protester cases like the present one:

- (1) The ‘persons unknown’ defendants in the claim form are, by definition, people who have not been identified at the time of the commencement of the proceedings. If they are known and have been identified, they must be joined as individual defendants to the proceedings. The ‘persons unknown’ defendants must be people who have not been identified but are capable of being identified and served

with the proceedings, if necessary by alternative service such as can reasonably be expected to bring the proceedings to their attention. In principle, such persons include both anonymous defendants who are identifiable at the time the proceedings commence but whose names are unknown and also Newcomers, that is to say people who in the future will join the protest and fall within the description of the 'persons unknown'.

- (2) The 'persons unknown' must be defined in the originating process by reference to their conduct which is alleged to be unlawful.
- (3) Interim injunctive relief may only be granted if there is a sufficiently real and imminent risk of a tort being committed to justify *quia timet* relief.
- (4) As in the case of the originating process itself, the defendants subject to the interim injunction must be individually named if known and identified or, if not and described as 'persons unknown', must be capable of being identified and served with the order, if necessary by alternative service, the method of which must be set out in the order.
- (5) The prohibited acts must correspond to the threatened tort. They may include lawful conduct if, and only to the extent that, there is no other proportionate means of protecting the claimant's rights.
- (6) The terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do. The prohibited acts must not, therefore, be described in terms of a legal cause of action, such as trespass or harassment or nuisance. They may be defined by reference to the defendant's intention if that is strictly necessary to correspond to the threatened tort and done in non-technical language which a defendant is capable of understanding and the intention is capable of proof without undue complexity. It is better practice, however, to formulate the injunction without reference to intention if the prohibited tortious act can be described in ordinary language without doing so.
- (7) The interim injunction should have clear geographical and temporal limits. It must be time limited because it is an interim and not a final injunction. We shall elaborate this point when addressing Canada Goose's application for a final injunction on its summary judgment application."

76 I have dealt with the question of whether an interim order should, in principle, be made. I agree with Mr Scott that this is not a true *quia timet* injunction given that the arguably tortious conduct has been going on for some time, but in any event there is no dispute that the defendants will continue their activities unless restrained by the court. The other

principles relate to drafting and I will apply them when I turn to consider the terms of the order.

CERTIFICATE

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