



Neutral Citation Number: [2022] EWHC 2708 (KB)

Case No: PT-2022-BHM-000111

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26th October 2022

Before :

MR JUSTICE MARTIN SPENCER

Between :

THREE COUNTIES AGRICULTURAL SOCIETY

Claimants

-and-

PERSONS UNKNOWN AND OTHERS

Defendant

**(1) CAMPAIGN AGAINST THE ARMS TRADE
(CAAT)
(2) SIAN AUBREY**

Interested Persons

Mr Mark Grant for the **Claimant**
Mr Owen Greenhall for the **Interested Persons**

Hearing date: 20th October 2022

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 26th October 2022 at 10.30

1. Three Counties Defence and Security Limited, who trade as Three Counties Defence & Security Group (“3CDSG”) are the organisers of an event known as the Three Counties Defence and Security Expo (“3CDSE”) held annually on land, the Three Counties Showground at Malvern, Worcestershire, WR13 6NW, which is owned by the Claimant. The first 3CDSE was in 2018. It was not held in 2020 because of the pandemic. The next 3CDSE is due to start on 2 November 2022.
2. 3CDSE is presented in conjunction with the Ministry of Defence pursuant to the terms of a Memorandum of Understanding between the MOD and 3CDSG. It attracts over 130 exhibitors and up to 2,000 delegates including senior military personnel from the UK, USA and other NATO countries.
3. The 2021 3CDSE attracted significant protest activity. By this application, the Claimant seeks to curb such activity at the 2022 3CDSE through injunctive relief. The protest activity is described by Mr Richard Morgan, who is both a Director of 3CDSG and also the Claimant’s solicitor, as follows:

“Recognised protestor organisations such as 'Extinction Rebellion' and 'Campaign Against Arms Trade' ("CAAT") have protested at previous 3CDSE events and often garner much of the mainstream media attention. These organisations are also known to widely publicise their actions. They often attend specific "days of action", which includes the duration of 3CDSE, and execute comprehensive and highly disruptive direct action campaigns. Their campaigns often include direct action, logistical and welfare support and complimentary media submissions, guaranteeing local and national media exposure. Such incidents have a significant impact on 3CDSE but make up only a proportion of the overall direct action protest which occurs during the expo. Extinction Rebellion claim that between 60 and 70 protestors attended to represent their organisation in 2021 and that they were joined by around 100 other protestors from several different peace and climate movements.”

4. It is my impression that the majority of protestors against 3CDSE were, in 2021, and are likely to be, in 2022, peaceful, law-abiding and dedicated citizens whose only purpose is to protest against the arms trade. Thus, one of the Interested Parties, Sian Aubrey, describes herself as follows:

“I am a retired teacher for the deaf and volunteer at Citizens Advice. I am a nature group volunteer in my village and have long been associated with the peace movement and in recent years with Extinction Rebellion.”

She goes on to say:

“There are so many reasons that I am opposed to the arms trade and to militarism. I have a love of the earth, and am concerned about the suffering caused to all life by warfare and the climate emergency. My objections are, briefly:

- a) War is not an effective way to solve global problems. The wars in Afghanistan, Iraq and Libya did not provide solutions. Thousands of people died and the countries have ongoing conflict. The wars have increased the risk of terrorism in the UK and worldwide.
- b) Government spending on the military is excessive, at a time when the rich get richer and the poor get poorer. Many of those getting rich are in the arms trade.
- c) Manufacture of weapons, their use in training and in wars makes a massive contribution to greenhouse gas emissions. Scientists for Global Responsibility have explained that a large loophole in the Paris Agreement means governments do not have to provide full data on greenhouse gas emissions by the military. There are also areas of manufacturing that are not included in carbon footprint data provided by the arms industry. There needs to be a shift from manufacturing for the sake of making obscenely huge profits to investment in sustainable technology that will reduce the effects of the global nature and climate crisis.
- d) The government-sanctioned UK arms industry places profit above all else. UK arms are sold to the brutal Saudi regime, in spite of that regime using those weapons to target its own people and for the horrific bombing of The Yemen. Innocent people, including children suffer and die daily because of the arms trade. Protesting at an arms fair is a very effective way of putting my views across to the people at the heart of these problems, that is: those who manufacture, sell, buy and use arms.”

At the injunction hearing, I heard from Ms Kim Holroyde representing Hereford Peace Council who explained that the members of her organisation are non-confrontational, and mainly people who have been with the Hereford Peace Council since its formation in 1980 and who are now aged between 60 and 90, who simply want to be able to gather somewhere safe in close proximity to the delegates who will then be able to see and understand their message. I also heard from Ann Farr, the Chair of Pax Christi, Wales, who explained that her organisation considered themselves entitled to engage in non-violent protest against the arms trade which they consider to be immoral.

5. On the other hand, the evidence shows that some of the protestors at last year's event resorted to unlawful means, including trespass and actionable nuisance, in order to disrupt 3CDSE, as I shall describe in paragraphs 6 and 7 below. A fundamental challenge for the court in an application of this kind is how to balance on the one hand the rights of 3CDSG to hold a lawful and, in the view of many, beneficial event without disruption by illegal means, and the rights of law-abiding, peaceful protestors to demonstrate, on the other hand. Ideally, any injunction will catch only the threatened unlawful activity and exempt from the court's sanction all lawful activity. If protection of the Claimant's rights cannot be achieved without also catching within the net some lawful activity, and an injunction is nevertheless appropriate, then the lawful activity caught needs to be kept to an absolute minimum, and this involves careful and anxious scrutiny of the scope of any injunction granted.

6. In his statement, Mr Morgan describes the actions of some of the anti-3CDSE protestors as follows:

“The Anti-3CDSE Action at previous expos has included (but is not limited to) blocking access to the Three Counties Land, erecting structures on the Three Counties Land in order to block access to and egress from the Three Counties Land, damage to vehicles, trespassing on land, abusive behaviour towards staff and visitors to the Three Counties

Land, obstruction of access, lock-ons to objects and other individuals to obstruct the movement of persons and vehicles and protesting at height.”

Importantly, he asserts that “the over-arching aim of activists at 3CDSE is to disrupt the event and prevent visitors from accessing the site and therefore attending the event.” He points to a poster before the 2021 3CDSE headed “Stop the Arms Fair” and which includes the following: “To join the campaign to stop Three Counties Showground hosting the 3CDSE arms fair, get in touch at ...”. However, as Mr Greenhall, who appeared for the Interested Parties, rightly pointed out, there is an important distinction between trying to persuade public opinion that an event is inappropriate and should not take place, and reverting to unlawful means to achieve that objective. Mr Morgan cites the CAAT [campaign against the arms trade) newsletter as follows:

“We cannot discount the effect of the new Three Counties Campaign Against Arms Trade (3CCAAT) group. We have certainly made our presence felt this year, by communicating with trustees, exhibitors and other users of the showground to ensure that no-one was left in any doubt of local disapproval. around 900 people have signed a petition to oppose the event, including bishops and representatives of charities. 3CCAAT has formed coalitions with national organisations including the Peace Pledge Union, Trident Ploughshare and XR, linking with local protesters from the Hereford Peace Council and Malvern Individuals for Peace. In these times of climate emergency and huge social need, we shall continue to oppose these so-called "Defence and Security" events wherever they occur.”

However, from the legal point of view, there is nothing inherently objectionable in anything said there. On the other hand, Mr Grant for the Claimant, pointed to an interview in the Ledbury Reporter with a spokesperson for Extinction Rebellion, Malvern, Suzanne Savage in which she made it clear that, but for the presence on the showground of a Covid vaccination centre in 2001, they could and would have blocked all the entrances and thereby tried to stop the expo from happening:

“Our reporter spoke to Suzanne Savage from XR Malvern. She said: "It's an amazing turnout of people who understand there's a connection between this military, industrial complex which is responsible for massive conflict and human rights abuses across the

world - there's a connection between that abuse and the climate because the emissions from the military are absolutely sky-rocketing. In Britain our military alone emits enough carbon to equal that of 60 countries.”

She added: "This is an arms and security exposition. We have Lockheed Martin here, we have BAE systems. These are companies that are accused and on trial of human rights abuses across the world. There is absolutely no doubt. It is a security and technology fair. Security is just a euphemism for the military.

On the situation with Covid jabs, she said:

"We knew that the NHS vaccination centre here is closed today to the public so that's why we planned to block this gate. What we didn't know is that they had private bookings from school children. So the minute the doctors who came in to do the vaccinations told us what was happening we moved everything because we stand absolutely with our NHS. It was a deep disappointment to us because we could have stopped this whole arms fair from happening but we let it happen so that the vaccinations could go on and that's really important to us.” (emphasis added)

Mr Grant submitted that, as there will be no vaccination centre at the showground this year, it is a reasonable assumption that the protestors will do all in their power to prevent the expo from going ahead, unless restrained by injunction.

7. What is objectionable is where unlawful means are resorted to in order to pursue legitimate aims, and such unlawful means are described in Mr Morgan’s second statement at paragraph 44:

“ 44.2. Trespass and Obstruction of Access

At the 2021 event, activists entered onto the Three Counties Land without consent in order to block entrances allowing access onto the site and into the event. The objective of such action was clearly to cause disruption and prevent staff and visitors from being able to attend 3CDSE. This involved obstruction of both the Claimant's private right of way and the attendees of 3CDSE's right to access the Three Counties Land and attend the event. The activity involved actual trespass onto the Claimant's land and was not confined to the public highway.

The Claimant has significant concerns that if these incidents of trespass and obstruction of access continue, there is a risk that these activists and/or the Claimant's staff and licensees may be injured. The trespass was combined with other forms of action designed to hinder the removal of the trespassers, as detailed below.

44.3. Lock-ons

This is a form of protest where an individual attaches themselves to an object and/or to other individuals. The purpose of protestor action such as this is to

obstruct the movement of vehicles or staff and/or visitors with the protesting individual's bodies, and to delay their removal via the use of lock-on devices. The individuals who were "locked-on" were in a position where they were trespassing onto the Three Counties Land or unlawfully interfering with the Claimant's private right of way or the 3CDSE attendees' right to access the Three Counties Land. The devices used by protestors at 3CDSE 2021 included the following:

44.3.1. Chains and padlocks

Examples of the use of this form of device include a number of protestors who chained themselves together at the base of the aerial structure (further explained below) and fences and gates. By chaining themselves to each other and various structures or fences, the protestors delayed their removal, thus creating more disruption. The use of this form of protest also created more difficulty for staff and visitors to breach the protestors' obstruction of access, leading to further disruptions for the event.

44.3.2. Elaborate devices manufactured specifically for the purpose

These can often consist of multiple layers of different materials such as different metals, concrete, plastic, bitumen and others. The use of these layers of differing materials is intended to delay the removal of the individual, and may require different cutting equipment to be removed. During 3CDSE in 2021, protestors locked their arms into steel pipes or concrete blocks in an effort to prevent their removal. Not only is this act dangerous and can cause serious injury or harm to the protestors, but the resultant disruption caused was significant due to the need for specialist removal in order to clear the obstruction they had caused.

44.4. Protest at Height

Activists protested at a height whilst on the Three Counties Land to cause maximum disruption through delaying their removal. This is undertaken through an individual positioning themselves on a structure which puts them at a great enough height that they are unable to be removed as easily as with action conducted at ground level. This is sometimes compounded by locking-on or utilising an inherently unstable structure which increases the precariousness of removal. At pages 146-147 of Exhibit RM1 are photos of a structure constructed at one of the entrances to the Three Counties Land. It is clear from these photos that the structure is built to such a height that falling from the structure may cause injury. These structures were erected at several entrances to the site.

The structure used by protestors at 3CDSE is known as a tripod. A tripod is a form of aerial protest where protestors use three poles — in this instance made out of bamboo — to form a tripod platform upon which a protestor can sit. The structure is precarious, and it is difficult and time-consuming to remove the protestor occupying it. As with other forms of aerial protest, tripods require specialist teams to remove the protestor, therefore delaying the removal and increasing the resultant disturbance caused. These tripods are a well-known part of Extinction Rebellion action used to block access to sites around the United Kingdom. As part of this action, some of the protestors involved in locking-on

were locked-on to the base of the bamboo tripod. Screenshots of social media posts including images of the structures located on the Three Counties Land are found at pages 132 and 141 of Exhibit RM1.”

One such screenshot, showing a protestor on a tripod on the Claimant’s land in 2021, is as follows:



8. In the circumstances, the Claimant seeks a precautionary injunction (also known as a “quia timet” injunction) against “Persons Unknown” which, it is claimed, does not seek to prevent lawful and peaceful protest but is aimed at preventing last year’s direct action which amounted to trespass and actionable nuisance.
9. In making this application, Mr Grant relied heavily on the decision of Julian Knowles J in *Secretary of State for Transport v Four Categories of Persons Unknown* [2022] EWHC 2360 (KB) (hereinafter referred to as “HS2”), a decision of 20 September 2022.

As that decision took into account, and analysed, all the relevant authorities on precautionary injunctions against protestors, I consider that I can rely on it and take it as an authoritative statement of the law and the principles to be applied in cases such as this, unless for any reason I consider that Julian Knowles J has misapplied the authorities or otherwise erred in law. I immediately indicate that I do not so consider, but rather I wholly accept all that the judge has stated in that judgment, and it is accordingly unnecessary for me to “reinvent the wheel” and carry out my own full consideration and analysis of the authorities. I am content to cite the relevant paragraphs of the judgment and adopt his analysis justifying those paragraphs as my own. Mr Grant explained that, in the present application, the Claimant has attempted to reproduce the terms of the injunction, including the definition of “Persons Unknown,” as set out in HS2, with appropriate modification as necessary. The evidential basis is, of course, quite different. It follows, therefore, that, in my judgment, assuming I am satisfied that the evidential basis here justifies the relief sought, the Claimant is entitled to that relief in so far as it mirrors the relief sought in HS2.

10. The starting point for the grant of an injunction is s 37(1) of the Senior Courts Act 1981 which provides that the High Court may grant an injunction (whether interlocutory or final) in all cases in which it appears to the court to be just and convenient. Usually, the test to be applied is that laid down in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, namely that there is a serious question to be tried and then whether damages form an adequate remedy and, if not, where the balance of justice lies. Where, however, European Convention rights are engaged, as was made clear in *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100, [44]-[48] (CA) (hereafter “*Ineos*”), in light of s 12(3) of the Human Rights Act 1998, a more stringent test applies and the Court must be satisfied that the Claimants would be likely to obtain an injunction preventing future trespass at trial; not just that there is a serious question to be tried. It is conceded here

that this is the correct test. Given the time-scale, there is no prospect of a trial between the making of this decision and the event itself. In those circumstances, I consider that the question should be: would the Claimants be likely to obtain an injunction at a hypothetical trial taking place between the decision and the 2022 3CDSE.

11. It is further agreed that the applicable guidelines, both procedural and substantive, in cases such as this are those set out by the Court of Appeal in *Canada Goose Canada Goose UK Retail Ltd v Persons Unknown* [2020] EWCA Civ 303, [2020] 1 WLR 2802 (hereinafter “*Canada Goose*”) at paragraph 82:

“(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.

12. As appears from the above, requirements (1), (2) and (4) relate to the definition of persons unknown, which can include newcomers. In the present case, the Defendants are named as follows:

“(1) PERSONS UNKNOWN ENTERING OR REMAINING WITHOUT THE CONSENT OF THE CLAIMANT ON, IN OR UNDER CERTAIN PARCELS OF THE LAND KNOWN AS THE THREE COUNTIES SHOWGROUND, MALVERN, WORCESTERSHIRE SHOWN EDGED IN BLUE ON ANNEX A ANNEXED TO THE PARTICULARS OF CLAIM (“THE THREE COUNTIES LAND”)

(2) PERSONS UNKNOWN OBSTRUCTING AND/OR INTERFERING WITH ACCESS TO AND/OR EGRESS FROM THE THREE COUNTIES LAND BY THE CLAIMANT, ITS AGENTS, SERVANTS, CONTRACTORS, SUB-CONTRACTORS, GROUP COMPANIES, LICENSEES, INVITEES AND/OR EMPLOYEES WITH OR WITHOUT VEHICLES, MATERIALS AND EQUIPMENT WITHOUT THE CONSENT OF THE CLAIMANT

(3) PERSONS UNKNOWN CUTTING, DAMAGING, MOVING, CLIMBING ON OR OVER, DIGGING BENEATH OR REMOVING ANY ITEMS AFFIXED TO ANY TEMPORARY OR PERMANENT FENCING OR GATES ON OR AT THE PERIMETER OF THE THREE COUNTIES LAND, OR DAMAGING OR INTERFERING WITH ANY LOCK OR ANY GATE AT THE PERIMETER OF THE THREE COUNTIES LAND WITHOUT THE CONSENT OF THE CLAIMANT.”

I am satisfied that these three classes of Defendant satisfy the *Canada Goose* requirements. In particular, the Defendants are defined by reference to the unlawful conduct: trespass, in the case of D1, nuisance in the case of D2 and criminal damage/trespass in the case of D3.

13. The salient terms of the proposed injunction are as follows:

“Injunction in force

4. With effect from 23:59 on 30 October 2022, and until the earlier of (i) Further Order; or (ii) 23.59 on 4 November 2022:

- a. the Defendants and each of them are forbidden from entering or remaining upon the Three Counties Land;
- b. the Defendants and each of them are forbidden from obstructing the movement of vehicles, equipment or persons accessing or egressing the Three Counties Land; and
- c. the Defendants and each of them are forbidden from interfering with any fence or gate on or at the perimeter of the Three Counties Land.

5. Nothing in paragraph 4 of this Order:

- a. shall prevent any person from exercising their rights over any open public right of way over the Three Counties Land (shown marked red on the Plan);
- b. shall affect any private rights of access over the Three Counties Land; and
- c. shall prevent any person from exercising their lawful rights over any public highway.

6. For the purposes of paragraph 4(b), prohibited acts of obstruction shall include (but not be limited to):

- a. standing, kneeling, sitting or lying or otherwise remaining present on (i) the Three Counties Land or (ii) on a carriageway within 25 metres of any vehicular access to the Three Counties Land via the Gates identified as Brown, Blue, Red, White and Yellow on the Plan (“the Gates”) when any vehicle is attempting to turn into the Three Counties Land or attempting to turn out of the Three Counties Land in a manner which impedes the passage of the vehicle;
- b. digging, erecting any structure or otherwise placing or leaving any object or thing on (i) the Three Counties Land or (ii) on a carriageway within 25 metres of any vehicular access to the Three Counties Land via the Gates which may obstruct the passage of vehicles or persons onto or from the Three Counties Land;
- c. affixing or attaching their person to (i) any fencing or gates on or at the perimeter of the Three Counties Land or (ii) to the surface of a carriageway within 25 metres of any vehicular access to the Three Counties Land via the Gates where it may obstruct the passage of vehicles or persons onto or from the Three Counties Land;
- d. affixing any other object to the Three Counties Land which may obstruct the passage of any vehicle or person to or from the Three Counties Land; and
- e. climbing onto or affixing any object or person to any vehicle on the Three Counties Land.

7. For the purposes of paragraph 4(c) prohibited acts of interference shall include (but not be limited to):

- a. cutting, damaging, moving, climbing on or over, digging beneath, or removing any items affixed to, any temporary or permanent fencing or gate on or on the perimeter of the Three Counties Land;
- b. the prohibition includes carrying out the aforementioned acts in respect of the fences and Gates; and
- c. interference with a gate includes drilling the lock, gluing the lock or any other activities which may prevent the use of the gate.”

The Submissions on behalf of the Interested Parties/Persons Unknown

14. On behalf of the Interested Parties, but also making submissions in relation to Persons Unknown, Mr Greenhall did not object to the injunction against trespassers, but rather concentrated on the proposed injunction in relation to use of the highway. His submissions thus concentrated on the Second Defendants and on paragraphs 4b and 6 of the proposed injunction. He submitted, in outline, that

- an injunction in relation to the highway was unnecessary because the police could be relied upon to enforce the law and prevent conduct which was unlawful, relying on the decision of Bennathan J in *Esso Petroleum Co Limited and another v Persons Unknown* [2022] EWHC 1477 (QB) (hereinafter “*Esso*”);
- the terms of the injunction would prevent perfectly lawful and reasonable conduct by persons who had never previously committed any wrongdoing: he cited, as an example, a short, deliberately obstructive protest in the entrance-mouth of the land such as a group wishing to carry out a 2 minute prayer vigil or a larger march along the road past the entrance-ways to the site;
- deliberately obstructive protest enjoys protection under Articles 10 and 11 ECHR and the court needs to carry out a balancing act which, in this case, should favour the protestors: consideration of the “Ziegler” factors also favours the protestors;
- the definition of “Persons Unknown” in the case of D2 differs from the terms of the prohibited conduct;
- paragraph 5c of the injunction inevitably imports the concept of “reasonableness” which is inherently vague and falls foul of the

decision in *Cuadrilla Bowland Ltd and others v Persons Unknown and others* [2020] EWCA Civ 9.

15. In *Esso*, the Claimants sought a precautionary injunction against protestors from “Just Stop Oil” and “Extinction Rebellion” preventing direct action at a number of their oil terminals. The Claimant in that case did not in fact seek an order preventing actions on the public highways. Bennathan J stated at paragraphs 28 and 29:

“28. I do have a concern in cases such as this about banning any blocking of the road flowing from the Supreme Court case law in *Ziegler*. The effect of that decision, it seems to me, is that Parliament and the Supreme Court have brought about a situation where the rights of protestors and the rights of those against whom they protect can be assessed and weighed carefully with knowledge of all the facts. An injunction banning any blocking of any road would have the effect of demolishing that delicate balance. There would be no "lawful excuse" defence to a breach of that order. Protestors whose identities, dispositions and activities were completely unknown to the court when the order was made would be liable to imprisonment.

29. In my view the better course when dealing with actions by protestors that might be found lawful on a *Ziegler* assessment, is that taken by the claimants in this case allowing this court to leave those matters to the police to enforce and the Magistrates' Court to adjudicate. I should make clear that these observations on the law after *Ziegler* do not seek to encourage individuals to block highways nor to assure anyone that such action can be carried out with impunity. The police have the power to arrest those they consider to be committing an offence under s.137 of the Highways Act 1980, and the courts have the power to convict them.”

Given that the Claimants were not seeking an injunction relating to the highways, these remarks were not essential to the decision in that case, but Mr Greenhall nevertheless relies on them as being persuasive as to the approach I should take in the present case.

16. Mr Greenhall submitted that the lower threshold applicable where there has been previous wrongdoing applies only to named or known Defendants, but not to the wide category of Persons Unknown, otherwise everyone, even those who had never committed a tort in the past – including the Interested Parties – would be “tarred with

the same brush”.

17. Mr Greenhall further submitted that the application for a Possession Order in relation to the Claimant’s land is not appropriate where a party – here the Claimant – is not out of possession. I reject that submission: there were clear acts of trespass in 2021 and any such repeated acts in relation to 3CDSE 2022 would immediately entitle the Claimant to an order of possession, and such an order is accordingly appropriate. I consider that it is no bar to the granting of such an order on the occasion of the granting of an interim injunction that, if the terms of the injunction are complied with, the order for possession will never in fact become necessary. It is conceded that Articles 10 and 11 ECHR do not assist the Defendants in relation to the allegations of trespass.

18. In relation to the highway, Mr Greenhall submitted that the verge of a highway remains part of the highway even if constituting land owned by the Claimant, and there is a right to protest on the highway. That is a right which is protected by Articles 10 and 11 ECHR which provide

“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 integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, 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.”

19. Mr Greenhall submitted that whether the right to protest on the highway is exceeded in any given case is fact-specific: see *DPP v Ziegler* [2021] UKSC 23 at paragraphs 59 and 70:

“59. Determination of the proportionality of an interference with ECHR rights is a fact-specific enquiry which requires the evaluation of the circumstances in the individual case.

...

70. It is clear from those authorities that intentional action by protesters to disrupt by obstructing others enjoys the guarantees of articles 10 and 11, but both disruption and whether it is intentional are relevant factors in relation to an evaluation of proportionality. Accordingly, intentional action even with an effect that is more than *de minimis* does not automatically lead to the conclusion that any interference with the protesters’ articles 10 and 11 rights is proportionate. Rather, there must be an assessment of the facts in each individual case to determine whether the interference with article 10 or article 11 rights was “necessary in a democratic society”.

In relation to the present case, Mr Greenhall submitted that the evidence in the present case is insufficient to justify a precautionary injunction. He pointed to the lack of any clear, avowed intention on the part of the protestors showing an intention to prevent 3CDSE 2022 going ahead by any means possible. In 2021, there was no physical violence and although there was an impact on traffic – dealt with by the police – there was no interference with public order.

20. The engagement of Articles 10 and 11 ECHR give rise to what have been called the

“*Ziegler* questions”, derived from paragraphs 16 and 58 of that decision, which are as follows:

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

Question e can be sub-divided into a number of further questions, as follows:

- a. Is the aim sufficiently important to justify interference with a fundamental right?
- b. Is there a rational connection between the means chosen and the aim in view?
- c. Are there less restrictive alternative means available to achieve that aim?
- d. Is there a fair balance between the rights of the individual and the general interest of the community, including the rights of others?

21. Although the Claimant is not a public authority so that question b should, it appears, be answered in the negative, the parties agreed that the *Ziegler* questions should nevertheless be asked in determining where the right balance lies in deciding whether to grant an injunction. Mr Greenhall submitted that the *Ziegler* factors fall in favour of the protestors in this case, and in particular the court should uphold and respect the autonomy of the protestors and their right to choose where to demonstrate.

The Claimant’s Submissions

22. As stated, Mr Grant, for the Claimant, relied heavily on the judgment in *HS2*. In granting the injunction sought in that case, Julian Knowles J made the following observations which are relied upon by the Claimant in this case, adopted as appropriate to the facts of this case:

[paragraph 12] “The injunction would prevent the Defendants from: entering or remaining upon HS2 Land; obstructing or otherwise interfering with vehicles accessing it or leaving it; interfering with any fence or gate at its perimeter.”

[paragraph 15] “It should also be understood that the injunction that is sought will not prohibit lawful protests. That is made clear in the recitals in the Draft Injunction: ... and upon the Claimants confirming that this Order is not intended to prohibit lawful protest which does not involve trespass upon the HS2 Land and does not block, slow down, obstruct or otherwise interfere with the Claimants access to or egress from the HS2 Land.”

Mr Grant submits that, in precisely the same way the recitals to the Order sought by the Claimant here makes it clear that it will not prohibit lawful protest.

[paragraph 81] “A protestor's rights under Articles 10 and 11 of the ECHR, even if engaged in a case like this, will not justify continued trespass onto private land or public land to which the public generally does not have a right of access ... There is no right to undertake direct action protest on private land”

[paragraph 86] “The unlawful interference with the claimant's right of access to its land via the public highway, where a claimant's land adjoins a public highway, can be a private nuisance: *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29, [13]; and can be an unlawful interference with one or more of the claimant's rights of way over land privately owned by a third party: *Gale on Easements*, 13-01.”

[paragraph 91] “In relation to remedy, the starting point, if not the primary remedy in most cases, will be an injunction to bring the nuisance to an end: *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, 322-323, per A L Smith LJ; *Hunter v Canary Wharf Ltd* [1997] AC 655, 692 per Lord Goff; *Lawrence v Fen Tigers Ltd and others* [2014] AC 822, [120]-[124] per Lord Neuberger. In that case his Lordship said at [121] (discussing when and whether damages rather than an injunction for nuisance should be granted):

"I would accept that the prima facie position is that an injunction should be granted, so the legal burden is on the defendant to show why it should not."

[paragraph 108 (a)] “The Court undoubtedly has the power under s 37 of the SCA 1981 to grant final injunctions that bind non-parties to the proceedings”.

[paragraph 108 (c)] “There is no real distinction between interim and final injunctions in the context of injunctions granted against persons unknown. While the guidance regarding identification of persons unknown in *Canada Goose* was given in the context of an application for an interim injunction, the same principles apply in relation to the grant of final injunctions.”

[paragraph 176] “Given the evidence that the protesters' stated intention is to protest wherever, and whenever, along HS2's route, I am satisfied there is the relevant imminent risk of very substantial damage”.

[paragraph 180] “I think my conclusion is consistent with this approach, and also to that taken by the judges in the National Highways cases, where the claimants could not specifically say where the next road protests were going to occur, but could only say that there was a risk they could arise anywhere, at any time because of the protesters' previous behaviour. That uncertainty did not defeat the injunctions”.

[paragraph 187] “I accept (and as is clear from the evidence I have set out) that the activists involved in this case are a rolling and evolving group. The 'call to arms' from D17 that I set out earlier was a clear invitation to others, who had not yet become involved in protests – and hence by definition were not known - to do so. The group is an unknown and fluctuating body of potential defendants. It is not effective to simply include named defendants. It is therefore necessary to define the persons unknown by reference to the consequence of their actions, and to include persons unknown as a defendant”.

[paragraph 196] “I am satisfied there would be no unlawful interference with Article 10 and 11 rights because, in summary: (a) there is no right of protest on private land, and much, although not all, or what protesters have been doing has taken place on such land; and (b) there is no right to cause the type and level of disruption which would be restrained by the order; (c) to the extent that protest takes place on the public highway, or other public land, the interference represented by the injunction is proportionate”.

[paragraph 201] “The Claimants' have common law and A1P1 rights over the HS2 Land, as I have explained. The interference in question pursues the legitimate aims: of preventing violence and intimidation; reducing the large expenditure of public money on countering protests; reducing property damage; and reducing health and safety risks to protesters and others arising from the nature of some of the protests”.

[paragraph 212] “I conclude that the aim pursued by the Claimants in making this application is sufficiently important to justify interference with the Defendants' rights under Articles 10 and 11, especially as that interference will be limited to what occurs on public land, where lawful protest will still be permitted. Even if the interference were more extensive, I would still reach the same conclusion”.

[paragraph 214] “Third, there are no less restrictive alternative means available to achieve that aim. As to this, an action for damages would not prevent the disruption caused by the protests. The protesters are unlikely to have the means to pay damages for losses caused by further years of disruption, given the sums which the Claimants have had to pay to date. Criminal prosecutions are unlikely to be a deterrent, and all the more so since many defendants are unknown. By contrast, there is some evidence that injunctions and allied committal proceedings have had some effect: see APOC, [7]”.

[paragraph 216] “Fourth, taking account of all of the factors which I have identified in this judgment, I consider that the injunction sought strikes a fair balance between the rights of the individual protestors and the general right and interests of the Claimants and others who are being affected by the protests, including the national economy. As to this:

- (a) on the one hand, the injunction only prohibits the defendants from protesting in ways that are unlawful. Lawful protest is expressly not prohibited. They can protest in other ways, and the injunction expressly allows this. Moreover, unlike the protest in Ziegler, the HS2 protests are not directed at a specific location which is the subject of the protests.”

[paragraph 217] “Finally, drawing matters together and looking at the same matters in terms of the general principles relating to injunctions:

- a. I am satisfied that it is more likely than not that the Claimants would establish at trial that the Defendants' actions constitute trespass and nuisance and that they will continue to commit them unless restrained. There is an abundance of evidence that leads to the conclusion that there is a real and imminent risk of the tortious behaviour continuing in the way it has done in recent years across the HS2 Land. I am satisfied the Claimants would obtain a final injunction.
- b. Damages would not be an adequate remedy for the Claimants. They have given the usual undertakings as to damages.
- c. The balance of convenience strongly favours the making of the injunction.”

[paragraph 230] “I reject the suggestion the injunction will have an unlawful chilling effect, as D6 in particular submitted. There are safeguards built-in, which I have referred to and do not need to mention again. It is of clear geographical and temporal scope. Injunctions against defined groups of persons unknown are now commonplace, in particular in relation to large scale disruptive protests by groups of people, and the courts have fashioned a body of law, much of which I have touched on, in order to address the issues which such injunctions can raise, and to make sure they operate fairly.”

Discussion

23. Given what occurred in 2021, it is clear that an injunction to prevent trespass upon the Claimant's land is appropriate and needed to prevent similar unlawful conduct by protestors this year. Indeed, Mr Greenhall does not strongly contest otherwise. The real question for me to decide is whether that part of the Order sought relating to the highway should be granted or whether the injunction would seriously stifle the legitimate and lawful right of protestors to protest against the arms trade by “picketing” the delegates and generally making their views known, peacefully and in a non-confrontational

manner on the highway and verges in the vicinity of the entrances to the land. As agreed between the parties, my decision should strike a balance between these rights of the protestors and the rights of the Claimant to access and egress its land, which includes the rights of the Claimant's lawful visitors, namely the exhibitors at, and delegates to, 3CDSE 2022.

24. In considering this question, I have taken into account the fact that the Claimant has listened to, and been sensitive to, the objections on behalf of the Interested Parties and has modified the terms of the injunction sought in order to try and meet those objections. I am satisfied that the terms of the Order now sought are a genuine attempt on the part of the Claimant to seek the minimum injunction which protects its rights while preserving the rights of the protestors. I am further satisfied that, unless restrained, some of the protestors, at least, will try to prevent access to, and egress from, the showground by actions amounting to public and private nuisance and thereby to prevent the event from occurring: this was the avowed intention last year, and was only modified because the land was also being used as a vaccination centre, which will not be an inhibiting factor this year.

25. Furthermore, the Order sought closely mirrors the Order made by Julian Knowles J in *HS2* and the objections on behalf of the Interest Parties are similar to, or in places identical with, the objections made in that case and which were rejected by the judge. So too here, for the same reasons, I reject the objections to this injunction. In particular:

- The group of protestors is an unknown and fluctuating body of potential defendants. It is not effective simply to include named defendants. It is therefore necessary to define the persons unknown by reference to the consequence of their actions, and to include persons unknown as a defendant;
- I am satisfied there would be no unlawful interference with Article 10 and 11

rights: to the extent that protest takes place on the public highway, or other public land, the interference represented by the injunction is proportionate;

- The Claimants has common law and A1P1 rights over the showground. The interference in question pursues the legitimate aims of: preventing intimidation (whilst allowing lawful and peaceful protest), allowing the Claimant's visitors to enter and leave the land safely and without undue interference and reducing health and safety risks to protesters and others arising from the nature of some of the protests;
- There are no less restrictive alternative means available to achieve the desired aim. Thus, an action for damages would not prevent the disruption caused by the protests. The protesters are unlikely to have the means to pay damages for losses caused by serious disruption to 3CDSE 2022.
- In particular, I do not consider that it is sufficient to leave the situation on the highway to the duties of the police. The aims of the police (to uphold the criminal law) are not identical to the legitimate aims of the Claimant (to avoid public and private nuisance), and I consider that there would be a real risk, if no order were made, that there would be direct physical - and potentially violent - confrontation which the police would be unable to prevent and a risk to the maintenance of public order. The police are generally reactive rather than proactive and the injunction sought would complement the function of the police in maintaining public order and responding to criminal obstruction of the highway;
- I consider that the injunction sought strikes a fair balance between the rights of the individual protesters and the general right and interests of the Claimant;
- I am satisfied that it is more likely than not that the Claimants would establish at a notional trial between now and 3CDSE 2022 that the Defendants' actions constitute trespass and nuisance and that they will continue to commit them unless restrained. There is evidence that leads to the conclusion that there is a

real and imminent risk of the tortious behaviour continuing in the way it did in 2021 and a real risk of it escalating therefrom. I am satisfied that

- the Claimant would obtain a final injunction.
- Damages would not be an adequate remedy for the Claimant (they have given the usual undertakings as to damages).
- The balance of convenience favours the making of the injunction.

26. I shall, in the circumstances, make the Order sought by the Claimant in the terms sought as modified in the course of Mr Grant's submissions.