IN THE HIGH COURT OF JUSTICE **Claim No. QB-2019-000616**
KING'S BENCH DIVISION

B E T W E E N :

(1) NUNEATON AND BEDWORTH BOROUGH COUNCIL
(2) WARWICKSHIRE COUNTY COUNCIL

Claimants

-and-

(1) THOMAS CORCORAN
(2) – (53) OTHER NAMED DEFENDANTS
(54) PERSONS UNKNOWN FORMING UNAUTHORISED ENCAMPMENTS WITHIN THE BOROUGH OF NUNEATON AND BEDWORTH

Defendants

AUTHORITY BUNDLE

Local Government Act 1972 c. 70
s. 222 Power of local authorities to prosecute or defend legal proceedings.

Law In Force

Version 5 of 5

25 March 2022 - Present

Subjects
Administrative law; Civil procedure; Criminal procedure; Local government

Keywords
Civil proceedings; Local authorities' powers and duties; Prosecutions; Public inquiries

222.— Power of local authorities to prosecute or defend legal proceedings.

(1) Where a local authority consider it expedient for the promotion or protection of the interests of the inhabitants of their area—

(a) they may prosecute or defend or appear in any legal proceedings and, in the case of civil proceedings, may institute them in their own name, and

(b) they may, in their own name, make representations in the interests of the inhabitants at any public inquiry held by or on behalf of any Minister or public body under any enactment.

(2) In this section "local authority" includes the Common Council [, a corporate joint committee] [1] [and a fire and rescue authority created by an order under section 4A of the Fire and Rescue Services Act 2004] [2] [and the London Fire Commissioner] [3] .

[

(3) In the application of subsection (1) to a corporate joint committee, the reference to the corporate joint committee's area is to be read as a reference to the area specified as the corporate joint committee's area in regulations under Part 5 of the Local Government and Elections (Wales) Act 2021 establishing the corporate joint committee.

] [4]

Notes

1 Words inserted by Corporate Joint Committees (General) (Wales) Regulations 2022/372 Pt 6 reg.20(a) (March 25, 2022)
2 Words inserted by Policing and Crime Act 2017 c. 3 Sch.1(2) para.26 (April 3, 2017)
3 Words substituted by Policing and Crime Act 2017 c. 3 Sch.2(2) para.46 (April 1, 2018)
4 Added by Corporate Joint Committees (General) (Wales) Regulations 2022/372 Pt 6 reg.20(b) (March 25, 2022)

Part XI GENERAL PROVISIONS AS TO LOCAL AUTHORITIES > Legal proceedings > s. 222 Power of local authorities to prosecute or defend legal proceedings.

Senior Courts Act 1981 c. 54
s. 37 Powers of High Court with respect to injunctions and receivers.

Law In Force

Version 2 of 2

22 April 2014 - Present

Subjects
Administration of justice; Civil procedure

Keywords
Appointments; High Court; Injunctions; Jurisdiction; Receivers

37.— Powers of High Court with respect to injunctions and receivers.

(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.

(2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just.

(3) The power of the High Court under subsection (1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction.

(4) The power of the High Court to appoint a receiver by way of equitable execution shall operate in relation to all legal estates and interests in land; and that power—

(a) may be exercised in relation to an estate or interest in land whether or not a charge has been imposed on that land under section 1 of the Charging Orders Act 1979 for the purpose of enforcing the judgment, order or award in question; and

(b) shall be in addition to, and not in derogation of, any power of any court to appoint a receiver in proceedings for enforcing such a charge.

(5) Where an order under the said section 1 imposing a charge for the purpose of enforcing a judgment, order or award has been, or has effect as if, registered under section 6 of the Land Charges Act 1972, subsection (4) of the said section 6 (effect of non-registration of writs and orders registrable under that section) shall not apply to an order appointing a receiver made either—

(a) in proceedings for enforcing the charge; or

(b) by way of equitable execution of the judgment, order or award or, as the case may be, of so much of it as requires payment of moneys secured by the charge.

[

(6) This section applies in relation to the family court as it applies in relation to the High Court.

][1]

5

Notes

1 Added by Crime and Courts Act 2013 c. 22 Sch.10(2) para.58 (April 22, 2014: insertion has effect as SI 2014/954 subject to savings and transitional provisions specified in 2013 c.22 s.15 and Sch.8 and transitional provision specified in SI 2014/954 arts 2(d) and 3)

Part II JURISDICTION > Chapter 002 THE HIGH COURT > Powers > s. 37 Powers of High Court with respect to injunctions and receivers.

6

Town and Country Planning Act 1990 c. 8
s. 55 Meaning of “development” and “new development”.

Law In Force

Version 8 of 8

7 June 2006 - Present

Subjects
Planning

Keywords
Building operations; Development; Development orders; Engineering operations; Material change of use; Mining operations; Planning control; Statutory definition

55.— Meaning of “development” and “new development”.

(1) Subject to the following provisions of this section, in this Act, except where the context otherwise requires, *“development,”* means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.

[

(1A) For the purposes of this Act *“building operations”* includes—

(a) demolition of buildings;

(b) rebuilding;

(c) structural alterations of or additions to buildings; and

(d) other operations normally undertaken by a person carrying on business as a builder.

][1]

(2) The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land—

(a) the carrying out for the maintenance, improvement or other alteration of any building of works which—

(i) affect only the interior of the building, or

(ii) do not materially affect the external appearance of the building,

and are not works for making good war damage or works begun after 5th December 1968 for the alteration of a building by providing additional space in it underground;

(b) the carrying out on land within the boundaries of a road by a [...][2] highway authority of any works required for the maintenance or improvement of the road [but, in the case of any such works which are not exclusively for the maintenance of the road, not including any works which may have significant adverse effects on the environment][3] ;

(c) the carrying out by a local authority or statutory undertakers of any works for the purpose of inspecting, repairing or renewing any sewers, mains, pipes, cables or other apparatus, including the breaking open of any street or other land for that purpose;

(d) the use of any buildings or other land within the curtilage of a dwellinghouse for any purpose incidental to the enjoyment of the dwellinghouse as such;

(e) the use of any land for the purposes of agriculture or forestry (including afforestation) and the use for any of those purposes of any building occupied together with land so used;

(f) in the case of buildings or other land which are used for a purpose of any class specified in an order made by the Secretary of State under this section, the use of the buildings or other land or, subject to the provisions of the order, of any part of the buildings or the other land, for any other purpose of the same class.

[

(g) the demolition of any description of building specified in a direction given by the Secretary of State to local planning authorities generally or to a particular local planning authority.

][4]

[

(2A) The Secretary of State may in a development order specify any circumstances or description of circumstances in which subsection (2) does not apply to operations mentioned in paragraph (a) of that subsection which have the effect of increasing the gross floor space of the building by such amount or percentage amount as is so specified.

(2B) The development order may make different provision for different purposes.

][5]

(3) For the avoidance of doubt it is hereby declared that for the purposes of this section—

(a) the use as two or more separate dwellinghouses of any building previously used as a single dwellinghouse involves a material change in the use of the building and of each part of it which is so used;

(b) the deposit of refuse or waste materials on land involves a material change in its use, notwithstanding that the land is comprised in a site already used for that purpose, if—

(i) the superficial area of the deposit is extended, or

(ii) the height of the deposit is extended and exceeds the level of the land adjoining the site.

(4) For the purposes of this Act mining operations include—

(a) the removal of material of any description—

(i) from a mineral-working deposit;

(ii) from a deposit of pulverised fuel ash or other furnace ash or clinker; or

(iii) from a deposit of iron, steel or other metallic slags; and

(b) the extraction of minerals from a disused railway embankment.

[

(4A) Where the placing or assembly of any tank in any part of any inland waters for the purpose of fish farming there would not, apart from this subsection, involve development of the land below, this Act shall have effect as if the tank resulted from carrying out engineering operations over that land; and in this subsection—

"fish farming" means the breeding, rearing or keeping of fish or shellfish (which includes any kind of crustacean and mollusc);

"inland waters" means waters which do not form part of the sea or of any creek, bay or estuary or of any river as far as the tide flows; and

"tank" includes any cage and any other structure for use in fish farming.

][6]

(5) Without prejudice to any regulations made under the provisions of this Act relating to the control of advertisements, the use for the display of advertisements of any external part of a building which is not normally used for that purpose shall be treated for the purposes of this section as involving a material change in the use of that part of the building.

[...][7]

Notes

1 Added by Planning and Compensation Act 1991 c. 34 Pt I s.13(1) (July 27, 1992 subject to transitional provisions specified in SI 1992/1279 art.3)

2 Word repealed by Planning and Compulsory Purchase Act 2004 c. 5 Sch.9 para.1 (June 7, 2006: repeal came into force on August 6, 2004 as SI 2004/2097 for the purpose of the making of or making provision for secondary legislation; June 7, 2006 as SI 2006/1281 otherwise)

3 Words inserted by Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999/293 Pt IX reg.35(1) (March 14, 1999)

4 Added by Planning and Compensation Act 1991 c. 34 Pt I s.13(2) (November 25, 1991 for the purposes specified in SI 1991/2728; July 27, 1992 otherwise, subject to transitional provisions specified in SI 1992/1279 art.3)

5 Added by Planning and Compulsory Purchase Act 2004 c. 5 Pt 4 s.49(1) (August 6, 2004 in relation to the exercise of powers specified in SI 2004/2097 art.2; May 10, 2006 in relation to England; June 22, 2015 in relation to Wales otherwise)

6 Added by Planning and Compensation Act 1991 c. 34 Pt I s.14(1) (January 2, 1992 subject to transitional provisions specified in SI 1991/2905)

7 Repealed by Planning and Compensation Act 1991 c. 34 Sch.6 para.9 (September 25, 1991)

s. 57 Planning permission required for development.

Law In Force With Amendments Pending

View proposed draft amended version

Version 5 of 6

12 February 2015 - Present

Subjects
Planning

Keywords
Development; Development consent; Development orders; Enforcement notices; Interpretation; Land use; Planning control; Planning permission

57.— Planning permission required for development.

(1) Subject to the following provisions of this section, planning permission is required for the carrying out of any development of land.

[

(1A) Subsection (1) is subject to section 33(1) of the Planning Act 2008 (exclusion of requirement for planning permission etc. for development for which development consent required).

][1]

(2) Where planning permission to develop land has been granted for a limited period, planning permission is not required for the resumption, at the end of that period, of its use for the purpose for which it was normally used before the permission was granted.

(3) Where by a development order [, a local development order [, a Mayoral development order][3] or a neighbourhood development order][2] planning permission to develop land has been granted subject to limitations, planning permission is not required for the use of that land which (apart from its use in accordance with that permission) is its normal use.

(4) Where an enforcement notice has been issued in respect of any development of land, planning permission is not required for its use for the purpose for which (in accordance with the provisions of this Part of this Act) it could lawfully have been used if that development had not been carried out.

(5) In determining for the purposes of subsections (2) and (3) what is or was the normal use of land, no account shall be taken of any use begun in contravention of this Part or of previous planning control.

(6) For the purposes of this section a use of land shall be taken to have been begun in contravention of previous planning control if it was begun in contravention of Part III of the 1947 Act, Part III of the 1962 Act or Part III of the 1971 Act.

(7) Subsection (1) has effect subject to Schedule 4 (which makes special provision about use of land on 1st July 1948).

Notes

1 Added by Planning Act 2008 c. 29 Sch.2 para.35 (March 1, 2010)
2 Words substituted by Localism Act 2011 c. 20 Sch.12 para.3 (November 15, 2011 for the purpose specified in 2011 c.20 s.240(5)(j); January 15, 2012 for purposes specified in SI 2012/57 art.4(1)(h) subject to transitional and savings provisions specified in SI 2012/57 arts 6, 7, 9, 10 and 11; April 6, 2012 otherwise subject to SI 2012/628 arts 9, 12, 13, 16 and 18-20)
3 Words inserted by Infrastructure Act 2015 c. 7 Sch.4(2) para.4 (February 12, 2015 in so far as it confers power to make provision by regulations or development order within the meaning of 1990 c.8; not yet in force otherwise)

Part III CONTROL OVER DEVELOPMENT > Requirement for planning permission > s. 57 Planning permission required for development.

s. 171A Expressions used in connection with enforcement.

Law In Force

Version 3 of 3

25 April 2024 - Present

Subjects
Planning

Keywords
Breach; Enforcement; Interpretation; Planning control; Planning permission
[

171A.— Expressions used in connection with enforcement.

(1) For the purposes of this Act—

(a) carrying out development without the required planning permission; or

(b) failing to comply with any condition or limitation subject to which planning permission has been granted,

constitutes a breach of planning control.

(2) For the purposes of this Act—[

(za) the issue of an enforcement warning notice in relation to land in England under section 172ZA;

][2]

(a) the issue of an enforcement notice (defined in section 172); or

[

(aa) the issue of an enforcement warning notice [in relation to land in Wales under section 173ZA][4] ;

][3]

(b) the service of a breach of condition notice (defined in section 187A),

Constitutes taking enforcement action.

(3) In this Part *"planning permission"* includes permission under Part III of the 1947 Act, of the 1962 Act or of the 1971 Act.

][1]

Notes

1 Added by Planning and Compensation Act 1991 c. 34 Pt I s.4(1) (January 2, 1992 except as it relates to breach of condition notices and subject to transitional provision specified in SI 1991/2905; July 27, 1992 otherwise subject to transitional provisions in SI 1992/1630 art.3)

Notes

2 Added by Levelling-up and Regeneration Act 2023 c. 55 Pt 3 c.5 s.117(2)(a) (April 25, 2024)
3 Added by Planning (Wales) Act 2015 anaw. 4 Pt 7 s.43(3) (March 16, 2016)
4 Words substituted by Levelling-up and Regeneration Act 2023 c. 55 Pt 3 c.5 s.117(2)(b) (April 25, 2024)

s. 187B Injunctions restraining breaches of planning control.

Law In Force

Version 1 of 1

25 November 1991 - Present

Subjects
Planning

Keywords
Breach; Injunctions; Planning control
[

187B.— Injunctions restraining breaches of planning control.

(1) Where a local planning authority consider it necessary or expedient for any actual or apprehended breach of planning control to be restrained by injunction, they may apply to the court for an injunction, whether or not they have exercised or are proposing to exercise any of their other powers under this Part.

(2) On an application under subsection (1) the court may grant such an injunction as the court thinks appropriate for the purpose of restraining the breach.

(3) Rules of court may provide for such an injunction to be issued against a person whose identity is unknown.

(4) In this section *"the court"* means the High Court or the county court."

][1]

Notes

1 Added by Planning and Compensation Act 1991 c. 34 Pt I s.3 (November 25, 1991 for purposes specified in SI 1991/2728 art.2; January 2, 1992 otherwise, subject to transitional provisions specified in SI 1991/2905)

Criminal Justice and Public Order Act 1994 c. 33
s. 60C Offence relating to residing on land without consent in or with a vehicle

Law In Force With Amendments Pending

Version 1 of 2

28 June 2022 - Present

Subjects
Criminal law

Keywords
Defences; Offences; Public order; Sentencing; Unauthorised encampments
[

60C Offence relating to residing on land without consent in or with a vehicle

(1) Subsection (2) applies where—

(a) a person aged 18 or over ("P") is residing, or intending to reside, on land without the consent of the occupier of the land,

(b) P has, or intends to have, at least one vehicle with them on the land,

(c) one or more of the conditions mentioned in subsection (4) is satisfied, and

(d) the occupier, a representative of the occupier or a constable requests P to do either or both of the following—

(i) leave the land;

(ii) remove from the land property that is in P's possession or under P's control.

(2) P commits an offence if—

(a) P fails to comply with the request as soon as reasonably practicable, or

(b) P—

(i) enters (or having left, re-enters) the land within the prohibited period with the intention of residing there without the consent of the occupier of the land, and

(ii) has, or intends to have, at least one vehicle with them on the land.

(3) The prohibited period is the period of 12 months beginning with the day on which the request was made.

(4) The conditions are—

(a) in a case where P is residing on the land, significant damage or significant disruption has been caused or is likely to be caused as a result of P's residence;

(b) in a case where P is not yet residing on the land, it is likely that significant damage or significant disruption would be caused as a result of P's residence if P were to reside on the land;

(c) that significant damage or significant disruption has been caused or is likely to be caused as a result of conduct carried on, or likely to be carried on, by P while P is on the land;

(d) that significant distress has been caused or is likely to be caused as a result of offensive conduct carried on, or likely to be carried on, by P while P is on the land.

(5) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding level 4 on the standard scale, or both.

(6) In proceedings for an offence under this section it is a defence for the accused to show that the accused had a reasonable excuse for—

(a) failing to comply as soon as reasonably practicable with the request mentioned in subsection (1)(d), or

(b) after receiving such a request, entering (or re-entering) the land with the intention of residing there without the consent of the occupier of the land.

(7) In its application to common land, this section has effect—

(a) in a case where the common land is land to which the public has access and the occupier cannot be identified, as if references to the occupier were references to the local authority in relation to the common land;

(b) in a case where P's residence or intended residence without the consent of the occupier is, or would be, an infringement of the commoners' rights and—

(i) the occupier is aware of P's residence or intended residence and had an opportunity to consent to it, or

(ii) if sub-paragraph (i) does not apply, any one or more of the commoners took reasonable steps to try to inform the occupier of P's residence or intended residence and provide an opportunity to consent to it,

as if in subsection (1)(d) after "a constable" there were inserted "or the commoners or any of them or their representative".

(8) In this section-—

"common land" and *"commoner"* have the same meaning as in section 61;

"damage" includes—

(a) damage to the land;

(b) damage to any property on the land not belonging to P;

(c) damage to the environment (including excessive noise, smells, litter or deposits of waste);

"disruption" includes interference with—

(a) a person's ability to access any services or facilities located on the land or otherwise make lawful use of the land, or

(b) a supply of water, energy or fuel;

"land" does not include buildings other than—

(a) agricultural buildings within the meaning of paragraphs 3 to 8 of Schedule 5 to the Local Government Finance Act 1988, or

(b) scheduled monuments within the meaning of the Ancient Monuments and Archaeological Areas Act 1979;

"the local authority" , in relation to common land, has the same meaning as in section 61;

"occupier" means the person entitled to possession of the land by virtue of an estate or interest held by the person;

"offensive conduct" means—

(a) the use of threatening, abusive or insulting words or behaviour, or disorderly behaviour, or

(b) the display of any writing, sign, or other visible representation that is threatening, abusive or insulting;

"vehicle" includes—

(a) any vehicle, whether or not it is in a fit state for use on roads, and includes any chassis or body, with or without wheels, appearing to have formed part of such a vehicle, and any load carried by, and anything attached to, such a vehicle, and

(b) a caravan as defined in section 29(1) of the Caravan Sites and Control of Development Act 1960.

(9) For the purposes of this section a person is to be considered as residing or having the intention to reside in a place even if that residence or intended residence is temporary, and a person may be regarded as residing or having an intention to reside in a place notwithstanding that the person has a home elsewhere.

][1]

Notes

1 Added by Police, Crime, Sentencing and Courts Act 2022 c. 32 Pt 4 s.83(1) (June 28, 2022)

Part V PUBLIC ORDER: UNAUTHORISED ENCAMPMENTS AND COLLECTIVE TRESPASS OR NUISANCE ON LAND > Residing on land without consent in or with a vehicle > s. 60C Offence relating to residing on land without consent in or with a vehicle

s. 60D Offence under section 60C: seizure of property etc

Law In Force

Version 1 of 1

28 June 2022 - Present

Subjects
Criminal law; Police

Keywords
Notice; Offences; Powers of seizure; Public order; Retention; Return of seized property; Unauthorised encampments
[

60D Offence under section 60C: seizure of property etc

(1) If a constable reasonably suspects that an offence has been committed under section 60C, the constable may seize and remove any relevant property that appears to the constable—

(a) to belong to the person who the constable suspects has committed the offence ("P");

(b) to be in P's possession; or

(c) to be under P's control.

(2) *"Relevant property"* means—

(a) a vehicle (wherever located) which, for the purposes of section 60C(1)(b) (in the case of an offence under section 60C(2)(a)) or for the purposes of section 60C(2)(b)(ii) (in the case of an offence under section 60C(2)(b)), the constable suspects P had or intended to have with them, or

(b) any other property that is on the relevant land.

(3) The *"relevant land"* is the land in respect of which a request under section 60C(1)(d) is made.

(4) The relevant chief officer of police may retain any property that has been seized under subsection (1) until the end of the period of three months beginning with the day of the seizure ("the relevant period").

(5) But the relevant chief officer of police ceases to be entitled to retain the property if before the end of the relevant period a custody officer gives written notice to P that P is not to be prosecuted for the offence under section 60C in relation to which the property was seized. (And see subsection (10)).

(6) Subsection (7) applies where before the end of the relevant period proceedings for an offence under section 60C are commenced against P.

(7) Where this subsection applies the relevant chief officer of police may retain the property seized until the conclusion of proceedings relating to the offence (including any appeal) (but see subsection (10)).

(8) Where a chief officer of police ceases to be entitled to retain property under this section the chief officer must, subject to any order for forfeiture under section 60E, return it to the person whom the chief officer believes to be its owner.

(9) If a chief officer of police cannot after reasonable inquiry identify a person for the purposes of subsection (8)—

(a) the chief officer must apply to a magistrates' court for directions, and

(b) the court must make an order about the treatment of the property.

(10) If at any time a person other than P satisfies a chief officer of police that property that is retained by the chief officer under this section—

(a) belongs to the person at that time, and

(b) belonged to them at the time of the suspected offence under section 60C,

the chief officer must return the property to the person.

(11) Subsection (10) does not apply in relation to a vehicle belonging to a person other than P if the chief officer of police reasonably believes that the vehicle was, with the consent of the other person, in P's possession or under P's control at the time of the suspected offence under section 60C.

(12) For the purposes of subsection (6), proceedings are commenced when—

(a) a written charge is issued under section 29(1) of the Criminal Justice Act 2003,

(b) a person is charged under Part 4 of the Police and Criminal Evidence Act 1984, or

(c) an information is laid under section 1 of the Magistrates' Courts Act 1980.

(13) For the purposes of this section—

(a) the relevant chief officer of police is the chief officer of the police force for the area in which the property was seized, and

(b) *"vehicle"* has the same meaning as in section 60C.

]1

Notes

1 Added by Police, Crime, Sentencing and Courts Act 2022 c. 32 Pt 4 s.83(1) (June 28, 2022)

s. 60E Offence under section 60C: forfeiture

Law In Force

Version 1 of 1

28 June 2022 - Present

Subjects
Criminal law; Criminal procedure

Keywords
Forfeiture; Jurisdiction; Offences; Public order; Unauthorised encampments
[

60E Offence under section 60C: forfeiture

(1) A court that convicts a person of an offence under section 60C may order any property to which subsection (2) applies to be forfeited and dealt with in a manner specified in the order.

(2) This subsection applies to any property that—

(a) was seized under section 60D(1), and

(b) is retained by a chief officer of police under that section.

(3) Before making an order for the forfeiture of property the court must—

(a) permit anyone who claims to be its owner or to have an interest in it to make representations, and

(b) consider its value and the likely consequences of forfeiture.

][1]

Notes

1 Added by Police, Crime, Sentencing and Courts Act 2022 c. 32 Pt 4 s.83(1) (June 28, 2022)

s. 61 Power to remove trespassers on land.

Law In Force With Amendments Pending

Version 8 of 9

28 June 2022 - Present

Subjects
Criminal law; Police

Keywords
Police powers and duties; Powers of removal; Trespass to land; Trespassers

England

[

61.— Power to remove trespassers on land.

(1) If the senior police officer present at the scene reasonably believes that two or more persons are trespassing on land and are present there with the common purpose of residing there for any period, that reasonable steps have been taken by or on behalf of the occupier to ask them to leave and—

(a) that any of those persons [—] [1] [

(i) in the case of persons trespassing on land in England and Wales, has caused damage, disruption or distress (see subsection (10));

(ii) in the case of persons trespassing on land in Scotland, has caused damage to the land or to property on the land or used threatening, abusive or insulting words or behaviour towards the occupier, a member of his family or an employee or agent of his, or

] [1]

(b) [in either case,] [2] that those persons have between them six or more vehicles on the land,

he may direct those persons, or any of them, to leave the land and to remove any vehicles or other property they have with them on the land.

(2) Where the persons in question are reasonably believed by the senior police officer to be persons who were not originally trespassers but have become trespassers on the land, the officer must reasonably believe that the other conditions specified in subsection (1) are satisfied after those persons became trespassers before he can exercise the power conferred by that subsection.

(3) A direction under subsection (1) above, if not communicated to the persons referred to in subsection (1) by the police officer giving the direction, may be communicated to them by any constable at the scene.

(4) If a person knowing that a direction under subsection (1) above has been given which applies to him—

(a) fails to leave the land as soon as reasonably practicable, or

(b) having left again enters the land as a trespasser within the [prohibited period] [3] ,

he commits an offence and is liable on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding level 4 on the standard scale, or both.

[

(4ZA) The prohibited period is—

(a) in the case of a person trespassing on land in England and Wales, the period of twelve months beginning with the day on which the direction was given;

(b) in the case of a person trespassing on land in Scotland, the period of three months beginning with the day on which the direction was given.

][4]

(4A) Where, as respects Scotland, the reason why these persons have become trespassers is that they have ceased to be entitled to exercise access rights by virtue of—

(a) their having formed the common purpose mentioned in subsection (1) above; or

(b) one or more of the conditions specified in paragraphs (a) and (b) of that subsection having been satisfied,

the circumstances constituting that reason shall be treated, for the purposes of subsection (4) above, as having also occurred after these persons became trespassers.

(4B) In subsection (4A) above *"access rights"* has the meaning given by the Land Reform (Scotland) Act 2003 (asp 2).

(5) [...]

(6) In proceedings for an offence under this section it is a defence for the accused to show—

(a) that he was not trespassing on the land, or

(b) that he had a reasonable excuse for failing to leave the land as soon as reasonably practicable or, as the case may be, for again entering the land as a trespasser.

(7) In its application in England and Wales to common land this section has effect as if in the preceding subsections of it—

(a) references to trespassing or trespassers were references to acts and persons doing acts which constitute either a trespass as against the occupier or an infringement of the commoners' rights; and

(b) references to *"the occupier"* included the commoners or any of them or, in the case of common land to which the public has access, the local authority as well as any commoner.

(8) Subsection (7) above does not—

(a) require action by more than one occupier; or

(b) constitute persons trespassers as against any commoner or the local authority if they are permitted to be there by the other occupier.

(9) In this section—

[

"common land" means–

(a) land registered as common land in a register of common land kept under Part 1 of the Commons Act 2006; and

(b) land to which Part 1 of that Act does not apply and which is subject to rights of common as defined in that Act;

] [10]

"commoner" means a person with rights of common [as so defined] [10];

"land" [in Scotland] [6] does not include—

(a) buildings other than—[...] [7]

(ii) scheduled monuments within the meaning of the Ancient Monuments and Archaeological Areas Act 1979;

(b) land forming part of—

(i) a highway unless [it is a footpath, bridleway or byway open to all traffic within the meaning of Part III of the Wildlife and Countryside Act 1981, is a restricted byway within the meaning of Part II of the Countryside and Rights of Way Act 2000] [11] or is a cycle track under the Highways Act 1980 or the Cycle Tracks Act 1984; or

(ii) a road within the meaning of the Roads (Scotland) Act 1984 unless it falls within the definitions in section 151(2)(a)(ii) or (b) (footpaths and cycle tracks) of that Act or is a bridleway within the meaning of section 47 of the Countryside (Scotland) Act 1967;

"the local authority", in relation to common land, means any local authority which has powers in relation to the land under [section 45 of the Commons Act 2006] [10];

"occupier" (and in subsection (8) *"the other occupier"*) means—

(a) in England and Wales, the person entitled to possession of the land by virtue of an estate or interest held by him; and

(b) in Scotland, the person lawfully entitled to natural possession of the land;

"property", in relation to damage to property on land, means—

(a) in England and Wales, property within the meaning of section 10(1) of the Criminal Damage Act 1971; and

(b) in Scotland, either—

(i) heritable property other than land; or

(ii) corporeal movable property,

and

"damage" includes the deposit of any substance capable of polluting the land;

"trespass" means, in the application of this section—

(a) in England and Wales, subject to the extensions effected by subsection (7) above, trespass as against the occupier of the land;

(b) in Scotland, entering, or as the case may be remaining on, land without lawful authority and without the occupier's consent; and

"trespassing" and *"trespasser"* shall be construed accordingly;

"vehicle" includes—

(a) any vehicle, whether or not it is in a fit state for use on roads, and includes any chassis or body, with or without wheels, appearing to have formed part of such a vehicle, and any load carried by, and anything attached to, such a vehicle; and

(b) a caravan as defined in section 29(1) of the Caravan Sites and Control of Development Act 1960;

and a person may be regarded for the purposes of this section as having a purpose of residing in a place notwithstanding that he has a home elsewhere.

[

(10) For the purposes of subsection (1)(a)(i)—

"damage" includes—

(a) damage to the land;

(b) damage to any property on the land not belonging to the persons trespassing;

(c) damage to the environment (including excessive noise, smells, litter or deposits of waste);

"disruption" includes an interference with—

(a) a person's ability to access any services or facilities located on the land or otherwise make lawful use of the land, or

(b) a supply of water, energy or fuel;

"distress" means distress caused by—

(a) the use of threatening, abusive or insulting words or behaviour, or disorderly behaviour, or

(b) the display of any writing, sign, or other visible representation that is threatening, abusive or insulting.

]8]9

Scotland

61.— Power to remove trespassers on land.

(1) If the senior police officer present at the scene reasonably believes that two or more persons are trespassing on land and are present there with the common purpose of residing there for any period, that reasonable steps have been taken by or on behalf of the occupier to ask them to leave and—

(a) that any of those persons [—]1 [

(i) in the case of persons trespassing on land in England and Wales, has caused damage, disruption or distress (see subsection (10));

(ii) in the case of persons trespassing on land in Scotland, has caused damage to the land or to property on the land or used threatening, abusive or insulting words or behaviour towards the occupier, a member of his family or an employee or agent of his, or

]1

(b) [in either case,]2 that those persons have between them six or more vehicles on the land,

he may direct those persons, or any of them, to leave the land and to remove any vehicles or other property they have with them on the land.

(2) Where the persons in question are reasonably believed by the senior police officer to be persons who were not originally trespassers but have become trespassers on the land, the officer must reasonably believe that the other conditions specified

in subsection (1) are satisfied after those persons became trespassers before he can exercise the power conferred by that subsection.

(3) A direction under subsection (1) above, if not communicated to the persons referred to in subsection (1) by the police officer giving the direction, may be communicated to them by any constable at the scene.

(4) If a person knowing that a direction under subsection (1) above has been given which applies to him—

(a) fails to leave the land as soon as reasonably practicable, or

(b) having left again enters the land as a trespasser within the [prohibited period] [3] ,

he commits an offence and is liable on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding level 4 on the standard scale, or both.

[

(4ZA) The prohibited period is—

(a) in the case of a person trespassing on land in England and Wales, the period of twelve months beginning with the day on which the direction was given;

(b) in the case of a person trespassing on land in Scotland, the period of three months beginning with the day on which the direction was given.

][4][

(4A) Where, as respects Scotland, the reason why these persons have become trespassers is that they have ceased to be entitled to exercise access rights by virtue of—

(a) their having formed the common purpose mentioned in subsection (1) above; or

(b) one or more of the conditions specified in paragraphs (a) and (b) of that subsection having been satisfied,

the circumstances constituting that reason shall be treated, for the purposes of subsection (4) above, as having also occurred after these persons became trespassers.

(4B) In subsection (4A) above *"access rights"* has the meaning given by the Land Reform (Scotland) Act 2003 (asp 2).

][5]

(5) A constable in uniform who reasonably suspects that a person is committing an offence under this section may arrest him without a warrant.

(6) In proceedings for an offence under this section it is a defence for the accused to show—

(a) that he was not trespassing on the land, or

(b) that he had a reasonable excuse for failing to leave the land as soon as reasonably practicable or, as the case may be, for again entering the land as a trespasser.

(7) In its application in England and Wales to common land this section has effect as if in the preceding subsections of it—

(a) references to trespassing or trespassers were references to acts and persons doing acts which constitute either a trespass as against the occupier or an infringement of the commoners' rights; and

(b) references to *"the occupier"* included the commoners or any of them or, in the case of common land to which the public has access, the local authority as well as any commoner.

(8) Subsection (7) above does not—

(a) require action by more than one occupier; or

(b) constitute persons trespassers as against any commoner or the local authority if they are permitted to be there by the other occupier.

(9) In this section—

"common land" means common land as defined in section 22 of the Commons Registration Act 1965;

"commoner" means a person with rights of common as defined in section 22 of the Commons Registration Act 1965;

"land" [in Scotland] [6] does not include—

(a) buildings other than—[...] [7]

(ii) scheduled monuments within the meaning of the Ancient Monuments and Archaeological Areas Act 1979;

(b) land forming part of—

(i) a highway unless it falls within the classifications in section 54 of the Wildlife and Countryside Act 1981 (footpath, bridleway or byway open to all traffic or road used as a public path) or is a cycle track under the Highways Act 1980 or the Cycle Tracks Act 1984; or

(ii) a road within the meaning of the Roads (Scotland) Act 1984 unless it falls within the definitions in section 151(2)(a)(ii) or (b) (footpaths and cycle tracks) of that Act or is a bridleway within the meaning of section 47 of the Countryside (Scotland) Act 1967;

"the local authority" , in relation to common land, means any local authority which has powers in relation to the land under section 9 of the Commons Registration Act 1965;

"occupier" (and in subsection (8) *"the other occupier"*) means—

(a) in England and Wales, the person entitled to possession of the land by virtue of an estate or interest held by him; and

(b) in Scotland, the person lawfully entitled to natural possession of the land;

"property" , in relation to damage to property on land, means—

(a) in England and Wales, property within the meaning of section 10(1) of the Criminal Damage Act 1971; and

(b) in Scotland, either—

(i) heritable property other than land; or

(ii) corporeal movable property,

and

"damage" includes the deposit of any substance capable of polluting the land;

"trespass" means, in the application of this section—

(a) in England and Wales, subject to the extensions effected by subsection (7) above, trespass as against the occupier of the land;

(b) in Scotland, entering, or as the case may be remaining on, land without lawful authority and without the occupier's consent; and

"trespassing" and *"trespasser"* shall be construed accordingly;

"vehicle" includes—

(a) any vehicle, whether or not it is in a fit state for use on roads, and includes any chassis or body, with or without wheels, appearing to have formed part of such a vehicle, and any load carried by, and anything attached to, such a vehicle; and

(b) a caravan as defined in section 29(1) of the Caravan Sites and Control of Development Act 1960;

and a person may be regarded for the purposes of this section as having a purpose of residing in a place notwithstanding that he has a home elsewhere.

[

(10) For the purposes of subsection (1)(a)(i)—

"damage" includes—

(a) damage to the land;

(b) damage to any property on the land not belonging to the persons trespassing;

(c) damage to the environment (including excessive noise, smells, litter or deposits of waste);

"disruption" includes an interference with—

(a) a person's ability to access any services or facilities located on the land or otherwise make lawful use of the land, or

(b) a supply of water, energy or fuel;

"distress" means distress caused by—

(a) the use of threatening, abusive or insulting words or behaviour, or disorderly behaviour, or

(b) the display of any writing, sign, or other visible representation that is threatening, abusive or insulting.

][8]

Wales

[

61.— Power to remove trespassers on land.

(1) If the senior police officer present at the scene reasonably believes that two or more persons are trespassing on land and are present there with the common purpose of residing there for any period, that reasonable steps have been taken by or on behalf of the occupier to ask them to leave and—

(a) that any of those persons [—][1] [

(i) in the case of persons trespassing on land in England and Wales, has caused damage, disruption or distress (see subsection (10));

(ii) in the case of persons trespassing on land in Scotland, has caused damage to the land or to property on the land or used threatening, abusive or insulting words or behaviour towards the occupier, a member of his family or an employee or agent of his, or

]1

(b) [in either case,]2 that those persons have between them six or more vehicles on the land,

he may direct those persons, or any of them, to leave the land and to remove any vehicles or other property they have with them on the land.

(2) Where the persons in question are reasonably believed by the senior police officer to be persons who were not originally trespassers but have become trespassers on the land, the officer must reasonably believe that the other conditions specified in subsection (1) are satisfied after those persons became trespassers before he can exercise the power conferred by that subsection.

(3) A direction under subsection (1) above, if not communicated to the persons referred to in subsection (1) by the police officer giving the direction, may be communicated to them by any constable at the scene.

(4) If a person knowing that a direction under subsection (1) above has been given which applies to him—

(a) fails to leave the land as soon as reasonably practicable, or

(b) having left again enters the land as a trespasser within the [prohibited period]3 ,

he commits an offence and is liable on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding level 4 on the standard scale, or both.

[

(4ZA) The prohibited period is—

(a) in the case of a person trespassing on land in England and Wales, the period of twelve months beginning with the day on which the direction was given;

(b) in the case of a person trespassing on land in Scotland, the period of three months beginning with the day on which the direction was given.

]4

(4A) Where, as respects Scotland, the reason why these persons have become trespassers is that they have ceased to be entitled to exercise access rights by virtue of—

(a) their having formed the common purpose mentioned in subsection (1) above; or

(b) one or more of the conditions specified in paragraphs (a) and (b) of that subsection having been satisfied,

the circumstances constituting that reason shall be treated, for the purposes of subsection (4) above, as having also occurred after these persons became trespassers.

(4B) In subsection (4A) above *"access rights"* has the meaning given by the Land Reform (Scotland) Act 2003 (asp 2).

(5) [...]

(6) In proceedings for an offence under this section it is a defence for the accused to show—

(a) that he was not trespassing on the land, or

(b) that he had a reasonable excuse for failing to leave the land as soon as reasonably practicable or, as the case may be, for again entering the land as a trespasser.

(7) In its application in England and Wales to common land this section has effect as if in the preceding subsections of it—

(a) references to trespassing or trespassers were references to acts and persons doing acts which constitute either a trespass as against the occupier or an infringement of the commoners' rights; and

(b) references to *"the occupier"* included the commoners or any of them or, in the case of common land to which the public has access, the local authority as well as any commoner.

(8) Subsection (7) above does not—

(a) require action by more than one occupier; or

(b) constitute persons trespassers as against any commoner or the local authority if they are permitted to be there by the other occupier.

(9) In this section—

"common land" means common land as defined in section 22 of the Commons Registration Act 1965;

"commoner" means a person with rights of common as defined in section 22 of the Commons Registration Act 1965;

"land" [in Scotland] [6] does not include—

(a) buildings other than—[...] [7]

(ii) scheduled monuments within the meaning of the Ancient Monuments and Archaeological Areas Act 1979;

(b) land forming part of—

(i) a highway unless [it is a footpath, bridleway or byway open to all traffic within the meaning of Part III of the Wildlife and Countryside Act 1981, is a restricted byway within the meaning of Part II of the Countryside and Rights of Way Act 2000] [12] or is a cycle track under the Highways Act 1980 or the Cycle Tracks Act 1984; or

(ii) a road within the meaning of the Roads (Scotland) Act 1984 unless it falls within the definitions in section 151(2)(a)(ii) or (b) (footpaths and cycle tracks) of that Act or is a bridleway within the meaning of section 47 of the Countryside (Scotland) Act 1967;

"the local authority", in relation to common land, means any local authority which has powers in relation to the land under [section 45 of the Commons Act 2006] [13];

"occupier" (and in subsection (8) *"the other occupier"*) means—

(a) in England and Wales, the person entitled to possession of the land by virtue of an estate or interest held by him; and

(b) in Scotland, the person lawfully entitled to natural possession of the land;

"property", in relation to damage to property on land, means—

(a) in England and Wales, property within the meaning of section 10(1) of the Criminal Damage Act 1971; and

(b) in Scotland, either—

(i) heritable property other than land; or

(ii) corporeal movable property,

and

"damage" includes the deposit of any substance capable of polluting the land;

"trespass" means, in the application of this section—

(a) in England and Wales, subject to the extensions effected by subsection (7) above, trespass as against the occupier of the land;

(b) in Scotland, entering, or as the case may be remaining on, land without lawful authority and without the occupier's consent; and

"trespassing" and *"trespasser"* shall be construed accordingly;

"vehicle" includes—

(a) any vehicle, whether or not it is in a fit state for use on roads, and includes any chassis or body, with or without wheels, appearing to have formed part of such a vehicle, and any load carried by, and anything attached to, such a vehicle; and

(b) a caravan as defined in section 29(1) of the Caravan Sites and Control of Development Act 1960;

and a person may be regarded for the purposes of this section as having a purpose of residing in a place notwithstanding that he has a home elsewhere.

[

(10) For the purposes of subsection (1)(a)(i)—

"damage" includes—

(a) damage to the land;

(b) damage to any property on the land not belonging to the persons trespassing;

(c) damage to the environment (including excessive noise, smells, litter or deposits of waste);

"disruption" includes an interference with—

(a) a person's ability to access any services or facilities located on the land or otherwise make lawful use of the land, or

(b) a supply of water, energy or fuel;

"distress" means distress caused by—

(a) the use of threatening, abusive or insulting words or behaviour, or disorderly behaviour, or

(b) the display of any writing, sign, or other visible representation that is threatening, abusive or insulting.

][8][9]

Notes

1 Added by Police, Crime, Sentencing and Courts Act 2022 c. 32 Pt 4 s.84(3)(a) (June 28, 2022)
2 Words inserted by Police, Crime, Sentencing and Courts Act 2022 c. 32 Pt 4 s.84(3)(b) (June 28, 2022)
3 Words substituted by Police, Crime, Sentencing and Courts Act 2022 c. 32 Pt 4 s.84(4) (June 28, 2022: substitution has effect subject to 2022 c.32 s.84(12))
4 Added by Police, Crime, Sentencing and Courts Act 2022 c. 32 Pt 4 s.84(5) (June 28, 2022: insertion has effect subject to 2022 c.32 s.84(12))
5 Added by Land Reform (Scotland) Act 2003 asp 2 (Scottish Act) Sch.2 para.11 (February 9, 2005)
6 Words inserted by Police, Crime, Sentencing and Courts Act 2022 c. 32 Pt 4 s.84(6)(a) (June 28, 2022)

Notes

7 Repealed by Police, Crime, Sentencing and Courts Act 2022 c. 32 Pt 4 s.84(6)(b) (June 28, 2022)
8 Added by Police, Crime, Sentencing and Courts Act 2022 c. 32 Pt 4 s.84(7) (June 28, 2022)
9 Repealed subject to transitory provisions specified in SI 2005/3495 art.2(2) by Serious Organised Crime and Police Act 2005 c. 15 Sch.17(2) para.1 (January 1, 2006: repeal has effect subject to transitory provisions specified in SI 2005/3495 art.2(2))
10 Amended by Commons Act 2006 c. 26 Sch.5 para.5 (October 31, 2011: amendment has effect as SI 2011/2460 subject to transitional provisions specified in SI 2011/2460 art.3)
11 Words substituted by Countryside and Rights of Way Act 2000 c. 37 Sch.5(II) para.17 (May 2, 2006 as SI 2006/1172)
12 Words substituted by Countryside and Rights of Way Act 2000 c. 37 Sch.5(II) para.17 (May 11, 2006 as SI 2006/1279)
13 Words substituted by Commons Act 2006 c. 26 Sch.5 para.5(c) (September 30, 2021 as SI 2021/1015 art.2(b))

s. 77 Power of local authority to direct unauthorised campers to leave land.

Law In Force

Version 1 of 1

3 November 1994 - Present

Subjects
Criminal law; Local government

Keywords
Local authorities' powers and duties; Powers of removal; Unauthorised campers

77.— Power of local authority to direct unauthorised campers to leave land.

(1) If it appears to a local authority that persons are for the time being residing in a vehicle or vehicles within that authority's area—

(a) on any land forming part of a highway;

(b) on any other unoccupied land; or

(c) on any occupied land without the consent of the occupier,

the authority may give a direction that those persons and any others with them are to leave the land and remove the vehicle or vehicles and any other property they have with them on the land.

(2) Notice of a direction under subsection (1) must be served on the persons to whom the direction applies, but it shall be sufficient for this purpose for the direction to specify the land and (except where the direction applies to only one person) to be addressed to all occupants of the vehicles on the land, without naming them.

(3) If a person knowing that a direction under subsection (1) above has been given which applies to him—

(a) fails, as soon as practicable, to leave the land or remove from the land any vehicle or other property which is the subject of the direction, or

(b) having removed any such vehicle or property again enters the land with a vehicle within the period of three months beginning with the day on which the direction was given,

he commits an offence and is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

(4) A direction under subsection (1) operates to require persons who re-enter the land within the said period with vehicles or other property to leave and remove the vehicles or other property as it operates in relation to the persons and vehicles or other property on the land when the direction was given.

(5) In proceedings for an offence under this section it is a defence for the accused to show that his failure to leave or to remove the vehicle or other property as soon as practicable or his re-entry with a vehicle was due to illness, mechanical breakdown or other immediate emergency.

(6) In this section—

"land" means land in the open air;

"local authority" means—

(a) in Greater London, a London borough or the Common Council of the City of London;

(b) in England outside Greater London, a county council, a district council or the Council of the Isles of Scilly;

(c) in Wales, a county council or a county borough council;

"occupier" means the person entitled to possession of the land by virtue of an estate or interest held by him;

"vehicle" includes—

(a) any vehicle, whether or not it is in a fit state for use on roads, and includes any body, with or without wheels, appearing to have formed part of such a vehicle, and any load carried by, and anything attached to, such a vehicle; and

(b) a caravan as defined in section 29(1) of the Caravan Sites and Control of Development Act 1960;

and a person may be regarded for the purposes of this section as residing on any land notwithstanding that he has a home elsewhere.

(7) Until 1st April 1996, in this section *"local authority"* means, in Wales, a county council or a district council.

s. 78 Orders for removal of persons and their vehicles unlawfully on land.

Law In Force

Version 1 of 1

3 November 1994 - Present

Subjects
Criminal law; Local government

Keywords
Local authorities' powers and duties; Powers of removal; Unauthorised campers; Vehicles

78.— Orders for removal of persons and their vehicles unlawfully on land.

(1) A magistrates' court may, on a complaint made by a local authority, if satisfied that persons and vehicles in which they are residing are present on land within that authority's area in contravention of a direction given under section 77, make an order requiring the removal of any vehicle or other property which is so present on the land and any person residing in it.

(2) An order under this section may authorise the local authority to take such steps as are reasonably necessary to ensure that the order is complied with and, in particular, may authorise the authority, by its officers and servants—

(a) to enter upon the land specified in the order; and

(b) to take, in relation to any vehicle or property to be removed in pursuance of the order, such steps for securing entry and rendering it suitable for removal as may be so specified.

(3) The local authority shall not enter upon any occupied land unless they have given to the owner and occupier at least 24 hours notice of their intention to do so, or unless after reasonable inquiries they are unable to ascertain their names and addresses.

(4) A person who wilfully obstructs any person in the exercise of any power conferred on him by an order under this section commits an offence and is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

(5) Where a complaint is made under this section, a summons issued by the court requiring the person or persons to whom it is directed to appear before the court to answer to the complaint may be directed—

(a) to the occupant of a particular vehicle on the land in question; or

(b) to all occupants of vehicles on the land in question, without naming him or them.

(6) Section 55(2) of the Magistrates' Courts Act 1980 (warrant for arrest of defendant failing to appear) does not apply to proceedings on a complaint made under this section.

(7) Section 77(6) of this Act applies also for the interpretation of this section.

Part V PUBLIC ORDER: UNAUTHORISED ENCAMPMENTS AND COLLECTIVE TRESPASS OR NUISANCE ON LAND > Powers to remove unauthorised campers > s. 78 Orders for removal of persons and their vehicles unlawfully on land.

Police and Justice Act 2006 c. 48
s. 27 Injunctions in local authority proceedings: power of arrest and remand

Partially In Force

Version 3 of 3

22 April 2014 - Present

Subjects
Local government; Police

Keywords
Injunctions; Local authorities' powers and duties; Powers of arrest; Remand

27 Injunctions in local authority proceedings: power of arrest and remand

(1) This section applies to proceedings in which a local authority is a party by virtue of section 222 of the Local Government Act 1972 (c. 70) (power of local authority to bring, defend or appear in proceedings for the promotion or protection of the interests of inhabitants of their area).

(2) If the court grants an injunction which prohibits conduct which is capable of causing nuisance or annoyance to a person it may, if subsection (3) applies, attach a power of arrest to any provision of the injunction.

(3) This subsection applies if the local authority applies to the court to attach the power of arrest and the court thinks that either–

(a) the conduct mentioned in subsection (2) consists of or includes the use or threatened use of violence, or

(b) there is a significant risk of harm to the person mentioned in that subsection.

(4) Where a power of arrest is attached to any provision of an injunction under subsection (2), a constable may arrest without warrant a person whom he has reasonable cause for suspecting to be in breach of that provision.

(5) After making an arrest under subsection (4) the constable must as soon as is reasonably practicable inform the local authority.

(6) Where a person is arrested under subsection (4)–

(a) he shall be brought before the court within the period of 24 hours beginning at the time of his arrest, and

(b) if the matter is not then disposed of forthwith, the court may remand him.

(7) For the purposes of subsection (6), when calculating the period of 24 hours referred to in paragraph (a) of that subsection, no account shall be taken of Christmas Day, Good Friday or any Sunday.

(8) Schedule 10 applies in relation to the power to remand under subsection (6).

(9) If the court has reason to consider that a medical report will be required, the power to remand a person under subsection (6) may be exercised for the purpose of enabling a medical examination and report to be made.

(10) If such a power is so exercised the adjournment shall not be in force–

(a) for more than three weeks at a time in a case where the court remands the accused person in custody, or

(b) for more than four weeks at a time in any other case.

(11) If there is reason to suspect that a person who has been arrested under subsection (4) is suffering from [mental disorder within the meaning of the Mental Health Act 1983] [1] the court shall have the same power to make an order under [section 35 of that Act] [2] (remand for report on accused's mental condition) as the Crown Court has under that section in the case of an accused person within the meaning of that section.

(12) For the purposes of this section–

(a) *"harm"* includes serious ill-treatment or abuse (whether physical or not);

(b) *"local authority"* has the same meaning as in section 222 of the Local Government Act 1972 (c. 70);

(c) *"the court"* means the High Court or [the county] [3] court and includes–

(i) in relation to the High Court, a judge of that court, and

(ii) in relation to [the county] [3] court, a judge [...] [4] of that court.

Notes

1 Words substituted subject to savings/transitional provisions specified in 2007 c.12 Sch.10 para.2 by Mental Health Act 2007 c. 12 Sch.1(2) para.26(a) (November 3, 2008: substitution has effect subject to savings/transitional provisions specified in 2007 c.12 Sch.10 para.2)

2 Words substituted subject to savings/transitional provisions specified in 2007 c.12 Sch.10 para.2 by Mental Health Act 2007 c. 12 Sch.1(2) para.26(b) (November 3, 2008: substitution has effect subject to savings/transitional provisions specified in 2007 c.12 Sch.10 para.2)

3 Words substituted by Crime and Courts Act 2013 c. 22 Sch.9(2) para.44(a) (April 22, 2014: substitution has effect as SI 2014/954 subject to savings and transitional provisions specified in 2013 c.22 s.15 and Sch.8 and transitional provision specified in SI 2014/954 arts 2(c) and 3)

4 Words repealed by Crime and Courts Act 2013 c. 22 Sch.9(2) para.44(b) (April 22, 2014: repeal has effect as SI 2014/954 subject to savings and transitional provisions specified in 2013 c.22 s.15 and Sch.8 and transitional provision specified in SI 2014/954 arts 2(c) and 3)

which they had no jurisdiction to take because they were declining to adjudicate upon a matter upon which it was their duty to adjudicate and thus was a nullity. Upon this basis, to raise the correct question the certificate should be treated as amended so that it reads "Whether upon the dismissal by the justices of an information after they have failed or refused to adjudicate thereupon by declining to receive the evidence desired to be led by the prosecution, the Queen's Bench Divisional Court has power upon an application by the prosecutor for judicial review to quash the acquittal and remit the matter to the justices for rehearing." My Lords, I would answer that amended question in the affirmative on the ground that that dismissal was a nullity (save that in most such cases I do not think it would be necessary for certiorari to issue as well as mandamus).

I would allow this appeal accordingly. I understand all your Lordships agree that the costs of both parties should be paid out of central funds.

LORD BRIDGE OF HARWICH. My Lords, for the reasons given in the speech of my noble and learned friend, Lord Roskill, with which I agree, I would allow the appeal and answer the certified question (as amended) in the affirmative.

Appeal allowed.
Costs of both parties out of central funds.

Solicitors: Wontner & Sons; Downs, Dorking.

S. H.

[HOUSE OF LORDS]

STOKE-ON-TRENT CITY COUNCIL . . . . RESPONDENTS

AND

B & Q (RETAIL) LTD. . . . . APPELLANTS

1984 March 27, 28, 29; May 17

Lord Diplock, Lord Fraser of Tullybelton, Lord Keith of Kinkel, Lord Roskill and Lord Templeman

Local Government—Powers—Action by local authority—Sunday trading in deliberate and flagrant breach of statute—Local authority claiming injunction to restrain further breaches—Whether entitled to injunctive relief—Whether proceedings properly instituted—Shops Act 1950 (14 & 15 Geo. 6, c. 28), ss. 47, 71(1)—Local Government Act 1972 (c. 70), s. 222(1)(a)

The defendants owned two retail shops in the area administered by the plaintiff local authority which they continued to open for trading on Sundays contrary to section 47 of the Shops Act 1950,[1] despite complaints and warnings by the local authority.

[1] Shops Act 1950, s. 71(1): see post, p. 769D.

Before the completion of criminal proceedings they had taken against the defendants, the local authority instituted civil proceedings for an injunction to restrain the defendants from trading in breach of section 47 and applied for an interim injunction, relying on section 222(1) of the Local Government Act 1972.[2] Whitford J. granted an interim injunction. On appeal by the defendants, the Court of Appeal dismissed the appeal.

On appeal by the defendants on the grounds, inter alia, that section 222(1) of the Act of 1972 did not confer upon a local authority power on their own behalf to bring and maintain proceedings of the present nature:—

Held, dismissing the appeal, (1) that on its true construction section 222(1) of the Local Government Act 1972 conferred upon a local authority power to institute and maintain proceedings to enforce obedience to public law within their administration area for the promotion or protection of the interests of the inhabitants and was additional to the power at common law enabling the Attorney-General to proceed in such matters either ex officio or by relator action (post, pp. 766H, 767B, D–E, 773F–G, 774A–B, G—775A).

Gouriet v. Union of Post Office Workers [1978] A.C. 435, H.L.(E.) considered.

(2) That a local authority in carrying out the duty to enforce the provisions of the Shops Act 1950 imposed upon them by section 71, were entitled to use their power under section 222(1) of the Local Government Act 1972 to institute proceedings for injunctive relief where they were satisfied that such relief was the only way to stop deliberate and flagrant flouting of section 47 of the Act of 1950; and that on the evidence it was reasonable to conclude that the defendants would continue deliberately and flagrantly to flout section 47 (post, pp. 766H, 767B, D–E, 776C–E, 777B–D).

Per curiam. (i) Something more than infringement of the criminal law must be shown before the assistance of civil proceedings by way of injunction can be invoked by the local authority. It must be established that the offender is not merely infringing the law but that he is deliberately and flagrantly flouting it (post, pp. 766H—767A, B–C, D–E, F–G, 776B–C, G—777B).

Dictum of Bridge L.J. in *Stafford Borough Council v. Elkenford Ltd.* [1977] 1 W.L.R. 324, 330, C.A. applied.

(ii) The duty imposed on a local authority under section 71(1) of the Shops Act 1950 is first to consider whether the conduct in question prima facie constitutes a contravention of the Act. If so, then they have to consider whether it is necessary to institute and carry on proceedings in respect of that prima facie contravention in order to secure observance of the provisions of the Act and in this connection they are entitled to have regard, in relation to the particular case or cases in question, to the financial consequences of any suggested action. If they decide that it is necessary to do so, then they have a duty to institute and carry on those proceedings (post, pp. 767A–B, D–E, 768G—769B, F).

Dicta of Donaldson L.J. and Webster J. in *Reg. v. Braintree District Council, Ex parte Willingham* (1982) 81 L.G.R. 70, 75, 79, D.C. approved.

Decision of the Court of Appeal [1984] Ch.1; [1983] 3 W.L.R. 78; [1983] 2 All E.R. 787 affirmed.

[2] Local Government Act 1972, s. 222(1): see post p. 773D–E.

The following cases are referred to in their Lordships' opinions:

Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223; [1947] 2 All E.R. 680, C.A.

Attorney-General v. Cockermouth Local Board (1874) L.R. 18 Eq. 172

Attorney-General v. Logan [1891] 2 Q.B. 100, D.C.

Gouriet v. Union of Post Office Workers [1978] A.C. 435; [1977] 3 W.L.R. 300; [1977] 3 All E.R. 70, H.L.(E.)

Hampshire County Council v. Shonleigh Nominees Ltd. [1970] 1 W.L.R. 865; [1970] 2 All E.R. 144

Kent County Council v. Batchelor (No. 2) [1979] 1 W.L.R. 213; [1978] 3 All E.R. 980

Prestatyn Urban District Council v. Prestatyn Raceway Ltd. [1970] 1 W.L.R. 33; [1969] 3 All E.R. 1573

Reg. v. Braintree District Council, Ex parte Willingham (1982) 81 L.G.R. 70, D.C.

Solihull Metropolitan Borough Council v. Maxfern Ltd. [1977] 1 W.L.R. 127; [1977] 2 All E.R. 177

Stafford Borough Council v. Elkenford Ltd. (unreported), 30 July 1976, Oliver J.; [1977] 1 W.L.R. 324; [1977] 2 All E.R. 519, C.A.

Tottenham Urban District Council v. Williamson & Sons Ltd. [1896] 2 Q.B. 353, C.A.

The following additional cases were cited in argument:

Attorney-General v. Bastow [1957] 1 Q.B. 514; [1957] 2 W.L.R. 340; [1957] 1 All E.R. 497

Attorney-General v. Harris [1961] 1 Q.B. 74; [1960] 3 W.L.R. 532; [1960] 3 All E.R. 207, C.A.

Edwards v. Bairstow [1956] A.C. 14; [1955] 3 W.L.R. 410; [1955] 3 All E.R. 48, H.L.(E.)

Hammersmith London Borough Council v. Magnum Automated Forecourts Ltd. [1978] 1 W.L.R. 50; [1978] 1 All E.R. 401, C.A.

Hopson v. Devon County Council [1978] 1 W.L.R. 553; [1978] 1 All E.R. 1205

Institute of Patent Agents v. Lockwood [1894] A.C. 347, H.L.(Sc.)

Thanet District Council v. Ninedrive Ltd. [1978] 1 All E.R. 703

APPEAL from the Court of Appeal.

This was an appeal by the appellants, B & Q (Retail) Ltd., by leave of the House of Lords (Lord Fraser of Tullybelton, Lord Brandon of Oakbrook and Lord Brightman), from an order dated 26 April 1983 of the Court of Appeal (Lawton, Ackner and Oliver L.JJ.) dismissing an appeal by the appellants from an order dated 25 June 1982 of Whitford J. pursuant to a motion by the respondents, Stoke-on-Trent City Council for an interlocutory injunction. Whitford J. granted an injunction until trial or further order restraining the appellants from using or causing or permitting to be used their premises at Waterloo Road, Burslem, Stoke-on-Trent, and at Leek Road, Hanley, Stoke-on-Trent, as a retail do-it-yourself and garden centre on Sundays other than for the purposes of carrying out transactions exempted from the operation of the Shops Act 1950 by section 47 and Schedule 5 to that Act.

The facts are set out in the opinion of Lord Templeman.

Robert Alexander Q.C., *John Samuels Q.C.* and *Nicholas Davidson* for the appellants. This appeal raises an issue concerning a remedy which historically has been very sparingly used in relation to breaches of the criminal law. It is common ground that until the enactment of section 222 of the Local Government Act 1972, local authorities had no greater right to bring proceedings to prevent breaches of the criminal law than had a private individual unless there was some express statutory provision enabling the local authority to do so: see, for example, section 100 of the Public Health Act 1936. In general, it was only the Attorney-General who could bring proceedings in relation to infringements of the public law. The first issue therefore is: whether section 222 of the Local Government Act 1972 confers a jurisdiction similar to that which the Attorney-General has at common law on all local authorities from county councils down to parish councils, and if so in what circumstances that jurisdiction can be exercised and whether, in particular, it can be exercised in the present case. The issue is important both to local authorities and to retailers, who in relation to alleged breaches of section 47 of the Shops Act 1950 are concerned to know whether they are subject to both the criminal and the civil law.

The respondents contend that the power conferred upon a local authority by section 222 to institute civil proceedings in its own name is exercisable in cases where the local authority considers it "expedient for the promotion or protection of the interests of the inhabitants of their area." By contrast, the appellants contend that section 222 did not confer powers which are primarily exercisable only by the Attorney-General. If this submission is rejected, then it is contended that these powers can only be exercised in those categories of case where before the Act of 1972 the Attorney-General would only proceed ex officio or by way of relator proceedings. If the appellants' first contention be accepted, the right to bring proceedings would be at the discretion of the Attorney-General and this would obviate the inconsistencies which prevail at the present moment between local authorities in relation to the enforcement of the provisions of section 47 of the Shops Act 1950. A situation in which in the past the Attorney-General has taken proceedings is where the flouting of the criminal law was met by a statutory penalty which was inadequate. This factor is inapplicable in respect of breaches of section 47 of the Shops Act 1950 where the maximum fine has been increased (with effect from 11 April 1983) by the provisions of sections 37 and 38 of the Criminal Justice Act 1982, and has thus been recently reviewed by Parliament.

In *Reg. v. Braintree District Council, Ex parte Willingham* (1982) 81 L.G.R. 70, a group of shop keepers were granted an order of mandamus against their local authority to enforce the provisions of the Shops Act 1950. The decision imposes a very stringent duty on a local authority to enforce the criminal law. In so far as it suggests that there is an absolute duty on a local authority so to do and that it has no discretion whether to take proceedings it ought not to be upheld. This is important for in the present case it was suggested that if the respondents did not bring proceedings they could be the subject of mandamus proceedings on the principle of the *Braintree* case and that they might not recover their costs.

As stated above, the jurisdiction claimed by the respondents is based on the language of section 222 of the Local Government Act 1972. It is accepted by the respondents that the predecessor of that section—section 276 of the Local Government Act 1933—conferred no such power. The critical provision which it is suggested confers the jurisdiction hitherto exercisable only by the Attorney-General is section 222(1) "(*a*) . . . in case of civil proceedings, may institute them in their own name. . . ." The case law subsisting before the Act of 1972 makes it plain that very clear statutory language is necessary in order to confer on local authorities throughout the land jurisdiction relating to a delicate area of the law hitherto vested in the Crown's senior law officer who is amenable to Parliament. The respondents are asking the House to construe the words "in their own name" in section 222(1)(*a*) differently from their construction in section 222(1)(*b*). In paragraph (*b*) the words "in their own name" can only have a procedural connotation.

It is pertinent at this stage to consider the position of local authorities in relation to their power to sue in their own name. Prior to 1972 the ability of local authorities to sue in their own name depended upon the effect of the Local Government Act 1933. The position under this Act was as follows: (i) A "local authority" meant the council of a county, county borough, county district or rural parish: section 305. It is thus the *councils* of these bodies which are treated as the local authority. (ii) Certain of these councils were bodies corporate. These were county councils (section 2(2)); urban and rural district councils (sections 31(2) and 32(2) respectively); and parish meetings or councils (section 47(3) and section 48(2)). The position was different for boroughs. By reason of section 17(1) the municipal corporation of a borough was capable of acting by the council but the council was not made a body corporate. The council consisted of the mayor, aldermen and councillors who exercised the functions of the municipal corporation of the borough (see section 17(2)). Thus the council is required to sue in the name of the "(Lord) mayor, aldermen and burgesses/citizens." See *Halsbury's Laws of England*, 3rd ed., vol. 24 (1958), para. 732; and also *Halsbury's Statutes*, 3rd ed., vol. 19 (1970), para. 409.

The London Government Act 1939 made the councils of metropolitan boroughs bodies corporate: section 17(1)(2). The London Government Act 1963 repealed this legislation and established new London boroughs: section 1(1). These boroughs became corporations by charter: section 1(2). By section 1(6) the councils of such boroughs became local authorities. The councils of these newly created boroughs did not, however, become bodies corporate. They were thus able to sue only in the same manner as other boroughs. The Local Government Act 1972 has the effect that most borough corporations are abolished: see section 1(11); and their former functions are discharged by county and district councils. There is an important exception, however, in that London borough councils continue to exist: see section 8; their constitution and membership is set out in Schedule 2 to the Act. By paragraph 1(2) of Schedule 2 the council of a London borough is not made a body corporate. Under this Act "local authority" includes a "London borough council": section 270. Thus but for the provisions of section 222 these authorities would have

been required to continue to sue in the name of the corporation: contrast section 176 of the London Government Act 1939 where the provision "in their own name" was unnecessary because they were bodies corporate.

The appellants recognise that in a number of cases decided since the coming into force of the Local Government Act 1972 and in dicta in the decision of this House in *Gouriet v. Union of Post Office Workers* [1978] A.C. 435 it has either been held or assumed that the functions of the Attorney-General by virtue of section 222 of that Act have devolved on local authorities. But the more the courts recognise the special nature of the discretion vested in the Attorney-General in this field the less likely is it that it could be transferred to all local authorities save by plain statutory words. For the special nature of the Attorney-General's jurisdiction, see *Gouriet v. Union of Post Office Workers* [1978] A.C. 435, 443, 450E–F, 467E–F, 469, 471, 477D–F, 481 et seq. On the respondents' argument, it could be said that on the facts of the *Gouriet* case [1978] A.C. 435, that the Stoke-on-Trent City Council had a right to sue on behalf of the inhabitants in their area under section 222 of the Local Government Act 1972 to obtain injunctive relief against the Union of Post Office Workers. Such a situation cannot have been envisaged by Parliament: see [1978] A.C. 435, 489B–F, 490, 491D, 494F–H, 497G—498E, 499. In relation to the balancing considerations which have to be taken into account in enforcing the criminal law by civil proceedings the Attorney-General is in a much better position than a local authority. For a summary of the exercise of jurisdiction by successive attorney-generals, see *Gouriet v. Union of Post Office Workers* [1978] A.C. 435, 500F et seq., 507G–H, 510B, G, 513E, 519A–G, 520B, 521C. That case indicates: (1) that one would expect Parliament to use very plain words if it was intended to transfer any aspects of the Attorney-General's discretion in this field to local authorities. (ii) That it was only in very limited circumstances that even the Attorney-General sought an injunction to restrain breaches of the criminal law by civil process. (iii) There are considerable dangers in using the civil law for that purpose. Reliance is also placed on *Institute of Patent Agents v. Lockwood* [1894] A.C. 347, 361–362. To summarise the law relating to the Attorney-General's jurisdiction: (a) It is an exceptional jurisdiction. (b) It is one which is rarely used and appears to be confined to cases where the law has been flouted persistently and the statutory penalties have proved ineffective. An example of its use is *Attorney-General v. Harris* [1961] 1 Q.B. 74. (c) It has generally been used in public health or nuisance or public order cases: see *Gouriet v. Union of Post Office Workers* [1978] A.C. 435, 500, *per* Lord Diplock.

If the respondents be right it would mean that if there was an industrial dispute in a particular area the local authority of that area could bring proceedings under section 222 of the Local Government Act 1972 for injunctive relief to restrain picketing. Section 222 is not tied to the existence of any duty imposed on a local authority under any particular statutory provision.

The case law prior to the enactment of section 222 of the Local Government Act 1972 is important. It was settled law that a local authority wishing to obtain an injunction to restrain a perceived public nuisance

could do so only if the Attorney-General was willing to maintain a relator action on its behalf, unless the authority had itself suffered special damage, or there was some express statutory provision enabling the local authority to do so, as is contained in section 100 of the Public Health Act 1936. This was so notwithstanding the apparently wide words of section 107 of the Public Health Act 1875. In *Tottenham Urban District Council v. Williamson & Sons Ltd.* [1896] 2 Q.B. 353, 355, Kay L.J. said, "The section relied on is section 107; but that does not say that a local authority can take proceedings which no private person can take, and which are unknown to the law. Had that been the intention of the Act I should have expected to find a new remedy, hitherto unknown to the law, stated in explicit terms." The enabling provisions of section 276 of the Local Government Act 1933 did not alter this rule: see *Prestatyn Urban District Council v. Prestatyn Raceway Ltd.* [1970] 1 W.L.R. 33 and *Hampshire County Council v. Shonleigh Nominees Ltd.* [1970] 1 W.L.R. 865. Section 100 of the Public Health Act 1936, which contains explicit words, is still the law. The claim of the present respondents in relation to section 222 of the Act of 1972 is a claim in matters apart from nuisance to bring civil proceedings, inter alia, to restrain breaches of the criminal law. Section 100 would, if they are right, be unnecessary.

As to section 222 of the Local Government Act 1972 (i), the appellants' contention that explicit words are required to confer the jurisdiction for which the respondents contend is supported by the very nature of the Attorney-General's discretion: see *Gouriet v. Union of Post Office Workers* [1978] A.C. 435. (ii) The opening words of the section are not suggested to be sufficient, for those words are to be found in section 276 of the Local Government Act 1933. (iii) The apt words are said to be, "(*a*) . . . in the case of civil proceedings, may institute them in their own name." (iv) Those words do undoubtedly have a procedural effect in relation to London boroughs but they do not have a further effect (a) in relation to London boroughs or (b) in relation to the powers of the Attorney-General. (v) The use of the words "in their own name . . ." in section 222(1)(*a*) militate against the suggestion that they are meant to devolve onto the local authority part of the Attorney-General's functions because that is not their purpose in section 222(1)(*b*).

The general approach to this issue adopted in *Hammersmith London Borough Council v. Magnum Automated Forecourts Ltd.* [1978] 1 W.L.R. 50, 54G–H is correct. If the present respondents be right then section 58(8) of the Control of Pollution Act 1974 was not necessary.

There are a number of statutory offences the breach of which it is the duty of the local authority to prosecute and which are triable on indictment before a jury: see, for example, section 18 of the Trade Descriptions Act 1968, section 7(5) of the Fire Precautions Act 1971 and section 1(4) of the Protection from Eviction Act 1977 all of which prescribe maximum terms of two years' imprisonment for certain offences under those Acts on trial on indictment. On the respondents' argument it would be open to a local authority to apply for an injunction for alleged breaches of the Acts in question and thus deprive the defendants of trial by jury. Further, the following are examples of statutory offences which the local authority may not enforce but which require the consent of the Attorney-General:

sections 4, 19(1) of the Prevention of Oil Pollution Act 1971; section 70(1) of the Race Relations Act 1976, which amended the Public Order Act 1936. If the respondents are right the Attorney-General could withhold his consent for a prosecution but nevertheless a local authority could take proceedings to obtain an injunction.

Contrast *Hopson v. Devon County Council* [1978] 1 W.L.R. 553, 555, where Megarry V.-C. refers to the remedy available there as a "blunt instrument." The function of the Attorney-General, who is accountable to Parliament is far from being a blunt instrument. As to the argument that the penalty by way of a fine is no longer an adequate remedy, this is not valid in view of the recent increases in the amounts that can be imposed: see Criminal Justice Act 1982, sections 38(1), 48.

The most important of the cases relating to the construction of section 222 of the Local Government Act 1972 is *Solihull Metropolitan Borough Council v. Maxfern Ltd.* [1977] 1 W.L.R. 127 which was wrongly decided in so far as it relates to section 222 of the Act of 1972. Oliver J. did not have his attention drawn to an alternative submission, namely, that the words in the section "may institute them in their own name" refer to the London boroughs. Admittedly, section 222(1)(*a*) does have the effect of enabling the London boroughs to sue but that provision should not be given a wider meaning—effecting a radical alteration of the law—to enable local authorities to sue in circumstances where previously only the Attorney-General could bring proceedings. In considering the *Solihull* case it must be remembered that (i) Oliver J. did not have his attention drawn to the fact that prior to section 222 a London borough council, although a local authority, could only sue in the name of the corporation as the mayor and burgesses of the borough; in consequence of section 222 a London borough council can now sue in that name; (ii) the court's attention was not drawn to the circumstance that the relevant words in section 222(1)(*a*) would fall to be construed differently from in section 222(1)(*b*); (iii) as to section 100 of the Public Health Act 1936 if Oliver J. were right then the section would have ended at the words "that nuisance." Further, no weight is given to the opening words of section 100. Section 222 of the Act of 1972 has only one feature of section 100 of the Act of 1936, the use of the expression "in their own name." It does not have either the opening words or the concluding words of section 100. As to subsequent decisions, in *Stafford Borough Council v. Elkenford Ltd.* [1977] 1 W.L.R. 324, the present argument was not advanced. In *Thanet District Council v. Ninedrive Ltd.* [1978] 1 All E.R. 703, *Stafford Borough Council v. Elkenford Ltd.* [1977] 1 W.L.R. 324 was applied, but the question whether the Attorney-General's jurisdiction has devolved on local authorities did not arise for consideration. Finally, *Kent County Council v. Batchelor (No. 2)* [1979] 1 W.L.R. 213 does not assist on the question of jurisdiction.

On the role of the Attorney-General in this field *Attorney-General v. Bastow* [1957] 1 Q.B. 514 is of some importance. There, Devlin J. indicated that the Attorney-General has to take an administrative decision whether or not to take proceedings. Further, the judge doubted whether in that case the criminal law remedies had been exhausted. Moreover, it shows that the Attorney-General does not exercise his jurisdiction lightly.

The respondent authority do not suggest that the existence of their powers under section 222 depend upon whether they have some duty of law enforcement under some other Act. They do not suggest that their right to take the proceedings arises from section 71 of the Shops Act 1950. The existence of this power should not in any sense be weighed against the fact that it can be exercised, for example, against flower sellers obstructing the pavement and tree fellers acting contrary to a tree preservation order. For if the power exists it can operate over a wide area in matters of national interest which in a given case affects the inhabitants of a particular area. It embraces wide ranging considerations including the enforcement of the criminal law by civil proceedings and should not be determined on the basis that it might be convenient for a local authority to have this power. This power historically was vested in the Attorney-General and it should not be held to have devolved upon local authorities in the absence of clear statutory language.

Assuming that the jurisdiction exists, what are the circumstances in which it can be exercised and did they exist on the facts of the present case? Even if it be that Parliament had conferred this power on local authorities it would be unlikely that Parliament intended to extend the ambit of the discretion. Indeed it must be narrower, for local authorities are subject to the principle in *Edwards v. Bairstow* [1956] A.C. 14. See the way in which Oliver L.J. referred to the appellants' argument on this matter in the Court of Appeal [1984] Ch. 1, 32C–33A. Even if this jurisdiction is conferred upon local authorities that does not enable a local authority exercising the discretion to depart from the consistent practice hitherto adopted by holders of the office of Attorney-General exercising this jurisdiction: see *Gouriet v. Union of Post Office Workers* [1978] A.C. 435, 500, *per* Lord Diplock. It is not enough for the local authority to state that there is a general interest in enforcing the law: see [1984] Ch. 1, 26G–H *per* Ackner L.J.

Primary matters of enforcement of the criminal law in relation to breaches of the Shops Act 1950 should be by the performance of the duty imposed by section 71 of that Act which is a duty to prosecute. The interest with which the local authority has to be concerned is the interest of the inhabitants generally: see [1984] Ch. 1, 22G–H, 33D–F. There is no suggestion in the present case that there was here any nuisance, breach of public order or anything other than totally exemplary conduct in the running of the appellants' shops.

In conclusion, there has been no statement from the local authority that the maximum statutory fine was considered to be inadequate to prevent recurrence of the offence with which the appellants have been charged. There is no evidence that the respondents considered that the prosecution of managers would be a deterrent and therefore they did not exhaust all the criminal proceedings envisaged by Parliament. The evidence does not establish that the appellants would in the future deliberately engage in breaches of the criminal law but further establishes that the local authority acted in circumstances well outside those in which the Attorney-General has hitherto acted in exercising his functions in seeking an injunction to prevent breaches of the criminal law. The Attorney-

General would not have sought for injunctive relief before even one criminal prosecution had been successfully brought.

Samuels Q.C. following. The Shops Act 1950 is a consolidation Act. Section 71 of that Act is derived from section 7 of the Shops Act 1911. Section 1 of the Shops (Sunday Trading Restriction) Act 1936 is the origin of section 37 of the Act of 1950. It does not appear that the local authorities before 1972 sought the assistance of the Attorney-General in this field. It would be very surprising therefore if section 222 of the Local Government Act 1972 should give the powers of the Attorney-General to local authorities.

Robert Reid Q.C. and *Nicholas Patten* for the respondents. [Lord Diplock stated that their Lordships only wished to hear the respondents on the issue of jurisdiction.]

By reason of section 71(1) of the Shops Act 1950 a local authority has a duty to enforce the provisions of the Act within its area and this statutory duty can be enforced if necessary by order of mandamus: see *Reg. v. Braintree District Council, Ex parte Willingham*, 81 L.G.R. 70. In that case the local authority failed in their duty for in deciding not to prosecute they took into account factors which they should not have taken into account. It was not wrongly decided.

As to the true construction of section 222 of the Local Government Act 1972, the word "prosecute" in the context embodies both civil and criminal proceedings. The appellants' construction of section 222(1)(*a*) that its purpose is to enable London boroughs to sue in their own name is a difficult construction to maintain because of the connotation. If those words were intended only to refer to London boroughs one would have expected such a provision to be in Schedule 2 and not in Part XI of the Act. By section 1 and Schedule 1 to the London Government Act 1963 the areas of the various London boroughs are set out. The names of the boroughs were created by section 1(2)(3). The language of section 222 of the Act of 1972 is a clear way of conferring the Attorney-General's powers on local authorities when viewed in the light of the history of the previous legislation. The words "may institute proceedings in their own name" are first to be found in section 100 of the Public Health Act 1936 and were meant to circumvent the decision in the *Tottenham* case [1896] 2 Q.B. 353.

In *Prestatyn Urban District Council v. Prestatyn Raceway Ltd.* [1970] 1 W.L.R. 33, 43G–H, Goff J. declined to follow the dictum of Lord Denning M.R. in *Warwickshire County Council v. British Railways Board* [1969] 1 W.L.R. 1117, 1122, on the effect of section 276 of the Local Government Act 1933. That section is in narrower terms than section 222 of the Local Government Act 1972. In *Hampshire County Council v. Shonleigh Nominees Ltd.* [1970] 1 W.L.R. 865 Plowman J. did not add to the observations of Goff J. in the *Prestatyn* case. In the *Hampshire* case it was section 116 of the Highways Act 1959 that was under consideration and it may be if one looks at the section as a whole that the case is not rightly decided. But in any event the words of section 222 of the Local Government Act 1972 are wider than section 116 of the Highways Act 1959 and that case is no assistance in determining the present question.

As to section 100 of the Public Health Act 1936, it would be remarkable if in that section the relevant words were meant to relate merely to unincorporated local authorities for its object was to circumvent the decision in the *Tottenham* case [1896] 2 Q.B. 353. It was not concerned with the entitlement of actions. The appellants contend that relator proceedings are special proceedings, but it does not follow that a local authority should not be entrusted with the powers enjoyed by the Attorney-General in so far as they are relevant to the performance of their duties under the Local Government Act 1972 in the area which they administer. Attention is drawn to the argument for the Attorney-General in the present case in the Court of [1984] Ch. 1, 9, where he said "Section 222 was clearly designed to confer a substantial measure of autonomy on local authorities in respect of law enforcement in their areas. The Attorney-General welcomes that autonomy in regard to the control of those activities generally associated with the local authority jurisdiction."

As to *Hammersmith London Borough Council v. Magnum Automated Forecourts Ltd.* [1978] 1 W.L.R. 50, it was said that if the respondents' argument be correct then section 58(8) of the Control of Pollution Act 1974 was unnecessary. But it is not unknown for Parliament from abundance of caution to insert words in a statutory provision which are superfluous because of section 222 of the Act of 1972. It shows that whatever else section 222 was meant to enact it cannot have been that subsection (1)(*a*) thereof was merely to enable London boroughs to sue in their own name. The same observations apply to section 130(5) of the Highways Act 1980 which is equivalent to section 116 of the Highways Act 1959. Parliament intended in section 130(5) of the Act of 1980 to repeat the object of section 222(1)(*a*) of the Act of 1972. On the appellants' construction it is surprising that Parliament should have used equally obscure words. Section 130(5) of the Highways Act 1980 was meant to meet the observations of Plowman J. in *Hampshire County Council v. Shonleigh Nominees Ltd.* [1970] 1 W.L.R. 865, 875E–F.

The only considered judgment on section 222 of the Local Government Act 1972 is *Solihull Metropolitan Borough Council v. Maxfern Ltd.* [1977] 1 W.L.R. 127. The appellants made three criticisms of this case, namely, that since Oliver J. did not have his attention drawn to the construction placed on section 222(1)(*a*) put forward by the present appellants, he not surprisingly took the only other meaning that could be given to the relevant words. Secondly, that subsection (1)(*b*) gave no help. Thirdly, that the words of subsection (1)(*a*) were not plain enough for the construction that the judge adopted. The respondents, however, contend that the result of the *Solihull* case was a sound and valid result. The first criticism merely states the obvious. The second is of no force since subsection (1)(*b*) is obscure whatever the construction of subsection (1)(*a*). As to the third, the words are plain. The House is invited to uphold the decision and reasoning in that case.

Finally, it is emphasised that the construction now put forward by the appellants in relation to section 222 was not before the Court of Appeal and therefore those judgments do not assist and it is the respondents' contention that the decision by the appellants not to take this point in the Court of Appeal was well founded.

Alexander Q.C. in reply. It is suggested that the words in section 222(1)(*a*) of the Local Government Act 1972, "in the case of civil proceedings may institute them in their own name" apply to enable a local authority to take proceedings in their own name which hitherto required the consent of the Attorney-General. As Kay L.J. observed in *Tottenham Urban District Council v. Williamson & Sons Ltd.* [1896] 2 Q.B. 353, 355, "Had that been the intention of the Act, I should have expected to find the new remedy, hitherto unknown to the law, stated in explicit terms." It was this dictum of Kay L.J. which Plowman J. emphasised in *Hampshire County Council v. Shonleigh Nominees Ltd.* [1970] 1 W.L.R. 865, 876D–E. The only person who has the authority to bring a suit for the infringement of public rights is the Attorney-General: see *London County Council v. Attorney-General* [1902] A.C. 165, 169, *per* Lord Halsbury L.C. which was cited by Lord Wilberforce in *Gouriet v. Union of Post Office Workers* [1978] A.C. 435, 478G. This emphasises that the right is not technical, it is not fictional, but constitutional, for as Lord Wilberforce observed in the same case [1978] A.C. 435, 481D "If Parliament has imposed a sanction (e.g., a fine of £1), without an increase in severity for repeated offences, it may seem wrong that the courts—civil courts—should think fit by granting injunctions, breaches of which may attract unlimited sanctions, including imprisonment, to do what Parliament has not done." It therefore cannot be assumed in the absence of express language that Parliament in section 222 of the Act of 1972 has conferred a power on local authorities to invoke the assistance of the civil courts for breaches or apprehended breaches of the criminal law. It is precisely because of all these considerations that in the *Tottenham* case [1896] 2 Q.B. 353, and all the subsequent cases it has been held that explicit words would be required to change this constitutional position and give, as far as they are concerned, to local authorities, a remedy unknown to the law.

The House is here concerned with the right to bring a civil process to enforce the criminal law. This raises questions of the balancing of matters of great delicacy: see *Gouriet v. Union of Post Office Workers* [1978] A.C. 435, 481, 490, 519. That this factor is involved makes it even more improbable that Parliament would desire that a matter should be left to the discretion of lay bodies. There is no suggestion in any of the authorities, and this applies even in nuisance cases, that the present constitutional position creates problems or difficulties in its administration. There is no evidence that there was a mischief that Parliament intended to remedy. Further, there is no suggestion that the Attorney-General could not work the existing law perfectly satisfactorily: see *Gouriet v. Union of Post Office Workers* [1978] A.C. 435, 500G, *per* Lord Diplock. The respondents do not suggest that section 222 of the Local Government Act 1972 is limited, if the duty exists, to enforcing the criminal law. It is suggested that it could cover all fields of public law where it was deemed expedient to enforce it for the benefit of the inhabitants generally of the area a local authority administers provided the authority does not act ultra vires. It is to be observed that the functions of the local authority are very wide. The courts should not be asked to grant discretionary remedies at the behest of local authorities in relation to matters which might well

attract political criticism and controversy: see *Gouriet v. Union of Post Officer Workers* [1978] A.C. 435, 482D–E.

Scottish legislation appears to be of no assistance in relation to the present issue since (i) all Scottish local authorities are corporate bodies; (ii) there are no relator proceedings in Scotland by the Lord Advocate and (iii) the appellants cannot trace the right of Scottish local authorities to restrain breaches of the criminal law by interdict.

As to section 100 of the Public Health Act 1936, it was suggested that the concluding words of the section are redundant, but the respondents' construction entails also contending that the opening words of the section are redundant. Section 100 of the Act of 1936, however, is still on the statute book but it is now otiose if the respondents' construction of section 222(1)(*a*) of the Act of 1972 be correct. If that be the position one would have expected the earlier section to have been repealed.

As to the *Hammersmith* case [1978] 1 W.L.R. 50, on the respondents' argument the opening words of section 58(8) of the Control of Pollution Act 1974 are redundant. It is noteworthy that that provision mirrors section 100 of the Public Health Act 1936 save that the words "in their own name" are not included. This was wholly unnecessary if the respondents be correct. As to section 130(5) of the Highways Act 1980, on both the appellants' and the respondents' arguments this provision was unnecessary. For on the respondents' argument this provision is subsumed by section 222 of the Local Government Act 1972, and on the appellants' argument it is unnecessary.

It is common ground that the respondents rely solely on the words "in the case of civil proceedings, they may institute them in their own name." But there is no case which holds that those words intended to enlarge the proceedings in which a local authority appear. In the end, the respondents rely entirely on the words "in their own name." But it is not suggested that the very same words in section 222(1)(*b*) enlarge the remedies of a local authority. The respondents contend that if the words "in their own name" were meant to refer merely to London boroughs in section 222(1)(*a*) they would have been placed in the relevant Schedule to the Act. But those words in section 222(1)(*b*) cannot refer to devolving the powers of the Attorney-General on a local authority so as to remove the necessity for a relator action. In conclusion, Parliament had before it in enacting section 222 a line of cases which go back to 1895 which establish that to give a new remedy explicit words are necessary and that in previous legislation of this kind the words which were used were not explicit enough. In those circumstances the House should hold that a constitutional change of the nature contended for by the respondents can only be accomplished where the statutory language leaves no room for doubt.

Their Lordships took time for consideration.

17 May. LORD DIPLOCK. My Lords, the facts of this case are set out in the judgment to be delivered by my noble and learned friend, Lord Templeman, which I have had the advantage of reading in draft. I agree with his reasons for upholding the injunction in this case and dismissing this appeal. I would associate myself with the comments made by him and

by my noble and learned friends, Lord Fraser of Tullybelton and Lord Roskill, upon the caution with which a court should approach the grant of an injunction to prevent infringements of the criminal law for which Parliament has enacted a maximum pecuniary penalty. I also agree with Lord Roskill's observations on certain passages in the ex tempore judgment of the Court of Appeal in *Reg. v. Braintree District Council, Ex parte Willingham* (1982) 81 L.G.R. 70, in reaching what I do not doubt was a correct decision refusing judicial review in that case.

LORD FRASER OF TULLYBELTON. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Templeman, and I agree with it. I wish particularly to associate myself with his view that something more than infringement of the criminal law must be shown before the assistance of civil proceedings, by way of injunction, can be invoked by the local authority. That something more is required in order to establish that the offender is not merely infringing the law but that he is "deliberately and flagrantly flouting it": see *per* Bridge L.J. in *Stafford Borough Council* v. *Elkenford Ltd.* [1977] 1 W.L.R. 324, 330. In the present case the judge was satisfied that the intention of flouting the law had been brought home to the appellant and I am not prepared to differ from his conclusion to that effect.

I agree also with Lord Roskill's observations on *Reg. v. Braintree District Council, Ex parte Willingham*, 81 L.G.R. 70. I would dismiss the appeal.

LORD KEITH OF KINKEL. My Lords, I have had the benefit of reading in draft the speech to be delivered by my noble and learned friend, Lord Templeman. I agree with it, and for the reasons he gives I too would dismiss the appeal.

LORD ROSKILL. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Templeman. I agree with it and for the reasons he gives I would dismiss this appeal. In agreement with both Whitford J. and the Court of Appeal I am clearly of the opinion that an injunction should issue for I see no reason to doubt that were that injunction now discharged Sunday trading in defiance of the Shops Act 1950 might well be resumed in the respondents' area. But I wish to record my particular agreement with the observations of both my noble and learned friends, Lord Fraser of Tullybelton and Lord Templeman, that something more than infringement of the criminal law must be shown before it is proper for a local authority to seek and the court to grant an injunction, thus enabling civil process to be invoked in support of the criminal law with the consequence that more serious penalties might be imposed for breach of an injunction than the Shops Act 1950 allows for breach of the relevant provisions of that statute.

The other matter to which I wish to advert is the decision of the Divisional Court (Donaldson L.J. and Webster J.) in *Reg. v. Braintree District Council, Ex parte Willingham,* 81 L.G.R. 70, a decision discussed in argument before this House. The essential facts of that case were simple. A group of shopkeepers in Witham within that district council's

administrative area sought and obtained an order of judicial review of the council's decision not to prosecute certain persons for alleged Sunday trading in Witham. In his judgment Donaldson L.J. said, at p. 75:

> "So there were two factors plainly operating on the committee's mind, in addition to the factor that this matter ought to be determined: that it was going to be expensive and it was going to be unpopular. Neither of those factors are legitimate factors to be taken into account in terms of the duty which is imposed upon the council under section 71 of the Act of 1950."

Later in his judgment Donaldson L.J. said, at pp. 78–79:

> "But in the present case it is quite clear that the council have taken account of the financial liabilities involved in performing this section 71 duty, which is not a permissible factor to be taken into account, save in the case where there are two ways of enforcing the provisions of the Act of 1950, and one is cheaper than the other. Then of course it is permissible to take it into account. But you cannot escape from the duty merely because it is expensive. That was the first error. The second error was to take account of the fact that the infringing activity (if infringing it is) is very popular in the locality. That, reasonably clearly, did influence the council, although I fully accept that they were advised that they should not allow it to influence them. . . ."

My Lords, I do not doubt that upon the basis that the decision not to prosecute was founded upon the supposed popularity of Sunday trading in Witham, the council were at fault and the judicial review was for that reason properly ordered. But if by his reference in the two passages I have quoted to "expense" and "taking account of financial liabilities" Donaldson L.J. meant that in weighing all the factors before deciding whether or not to prosecute in a particular case or group of cases, a local authority must never take into account the possible financial consequences to their ratepayers of a prosecution, both in the event of its success and of its failure, I respectfully disagree. A local authority charged with the duty of enforcing the Shops Act 1950 cannot of course properly say that it will never carry out its statutory duty because of the expense involved in so doing. Were it to adopt that attitude, I do not doubt that its decision would be subject to judicial review on *Wednesbury* principles. If Donaldson L.J. meant no more than that, I would respectfully agree. But the passages quoted, albeit in an ex tempore judgment, are susceptible of a wider interpretation. I think the duty of a local authority is correctly summarised by Webster J. in the concluding sentences of his judgment, at p. 79:

> "the duty of that authority under section 71(1) is first of all to consider—and these matters may have to be done at the same time, but not necessarily—whether that conduct prima facie constitutes a contravention of the provisions of the Act. If so, then they have to consider whether it is necessary to institute and carry on proceedings in respect of that prima facie contravention in order to secure observance of the provisions of the Act. If they decide that it is

necessary to do so, then they have a duty to institute and carry on those proceedings."

My Lords, I see no reason why when considering whether it is necessary to institute and carry on proceedings, the local authority are not entitled to have regard, in relation to the particular case or cases in question, to the financial consequences of any suggested action. If for example there is a serious or doubtful question of law involved which may involve a series of appeals and thus cast a heavy financial burden on ratepayers, whatever the result but especially if the prosecution ultimately fails, I cannot think that the local authority after taking proper legal advice is debarred from taking that factor among others into account before reaching their final decision whether or not it is necessary to institute and carry on proceedings.

LORD TEMPLEMAN. My Lords, the appellants, B & Q (Retail) Ltd., challenge the right of the respondent, Stoke-on-Trent City Council, to bring proceedings to restrain the appellants from trading on Sundays from the appellants' shops in Stoke-on-Trent in breach of the Shops Act 1950.

Section 47 of the Shops Act 1950 provides that, save for certain authorised transactions, every shop in England and Wales shall "be closed for the serving of customers on Sunday." By section 71(1):

> "It shall be the duty of every local authority to enforce within their district the provisions of this Act . . . and for that purpose to institute and carry on such proceedings in respect of contraventions of the said provisions . . . as may be necessary to secure observance thereof."

Section 71(2) directs every local authority to appoint inspectors for the purposes of the Act and provides:

> "An inspector may, if so authorised by the local authority, institute and carry on any proceedings under this Act on behalf of the authority."

I agree with the observations of my noble and learned friend, Lord Roskill, concerning the duty of the local authority under section 71 of the Act.

The appellants' shops at Waterloo Road, Burslem, and Leek Road, Hanley, are within the district of the council. The appellants' shops traded in prohibited articles on Sunday, 11 April 1982, and after a warning from a council representative, again on 18 April. The appellants were warned of legal proceedings on 19 April and traded in prohibited articles on 25 April.

By section 59 of the Shops Act 1950, the occupier of a shop which trades on Sundays in breach of the Act was made liable to a fine of £5 for a first offence and £20 in the case of a second or subsequent offence. By section 31 of the Criminal Justice Act 1972 the penalties were increased to £50 and £200 respectively and those were the maximum penalties for offences up to 11 April 1983. By sections 35 to 48 of the Criminal Justice Act 1982 from 11 April 1983 an occupier of a shop trading in breach of the Shops Act 1950 is liable to a maximum fine of £500 for any offence

and the Home Secretary can by order, subject to a negative resolution by Parliament, increase the maximum penalty to an extent justified by any change in the value of money since July 1977.

In addition to initiating but not completing criminal proceedings which could have resulted in the imposition on the appellants of a fine of £50 for the first offence and £200 for every subsequent offence, the council on 5 May 1982 issued a writ in the Chancery Division of the High Court for an injunction to restrain the appellants from continuing to trade in breach of the Shops Act 1950. On 25 June 1982 Whitford J. in those proceedings granted an interlocutory injunction restraining the appellants until trial of the action or further order from trading in breach of the Shops Act 1950. Against that order the appellants appealed unsuccessfully to the Court of Appeal and now appeal to your Lordships' House.

By the common law of England, a plaintiff can only sue for interference with his private rights, or for interference with a public right whereby he suffers special damage, peculiar to himself. A breach of the Shops Act 1950 does not interfere with the private rights of the council or cause the council special damage and accordingly the council could not at common law bring civil proceedings complaining of any breach of the Shops Act 1950. At common law the Attorney-General may institute proceedings to enforce the terms of a public Act of Parliament and

> "it is not necessary for the Attorney-General to show any injury at all. The legislature is of opinion that certain acts will produce injury, and that is enough. . . ." *per* Sir George Jessel M.R. in *Attorney-General v. Cockermouth Local Board* (1874) L.R. 18 Eq. 172, 178.

The Attorney-General may institute proceedings himself ex officio, and in that event is liable to incur and possibly pay costs. In the alternative the Attorney-General may authorise another person called the relator, to institute proceedings in the name of the Attorney-General and in that event, the relator is liable for costs. But

> "There is, in fact, no difference between an information filed ex officio by the Attorney-General and a proceeding by him at the relation of a third party, except as to costs; . . ." *per* Wills J. in *Attorney-General v. Logan* [1891] 2 Q.B. 100, 103.
>
> "When the Attorney-General proceeds at the relation of a private person or a corporation, he takes the proceeding as representing the Crown, and the Crown through the Attorney-General is really a party to the litigation. It is quite true that when the proceeding is taken at the relation of a subject, the practice is to insert his name in the proceedings as the relator, and to make him responsible for the costs, but I do not think that this practice in any sense makes the relator a party to the proceedings, although he is responsible for the costs . . . the practice of making the relator directly responsible for the costs of the action had its origin not in the protection of the defendant but of the Crown": *per* Vaughan Williams J. in *Attorney-General v. Logan* [1891] 2 Q.B. 100, 106.

At common law therefore the council could not bring proceedings against the appellants to restrain breaches of the Shops Act 1950. The council

could have asked the Attorney-General to take such proceedings at the relation of the council.

> "A relator action . . . is one in which the Attorney-General, on the relation of individuals (who may include local authorities or companies) brings an action to assert a public right. It can properly be said to be a fundamental principle of English law that private rights can be asserted by individuals, but that public rights can only be asserted by the Attorney-General as representing the public. In terms of constitutional law, the rights of the public are vested in the Crown, and the Attorney-General enforces them as an officer of the Crown. And just as the Attorney-General has in general no power to interfere with the assertion of private rights, so in general no private person has the right of representing the public in the assertion of public rights. If he tries to do so his action can be struck out": *per* Lord Wilberforce in *Gouriet v. Union of Post Office Workers* [1978] A.C. 435, 477.

The power of the Attorney-General to institute proceedings to uphold public rights and duties enables the Attorney-General, whether acting ex officio or in relator actions, to invoke the assistance of civil courts in aid of the criminal law. This is an exceptional but well recognised power: see *Gouriet v. Union of Post Office Workers* [1978] A.C. 435, 481. Thus at common law the Attorney-General, at the relation of the council, but only if the Attorney-General in his absolute discretion thought fit, had power to seek an injunction restraining the appellants from committing breaches of the Shops Act 1950 within the area of the council. No such proceedings were however instituted.

Thus far the common law. But Parliament may confer, and undoubtedly has in some instances conferred, limited powers on local authorities to institute and maintain proceedings to ensure compliance with public duties. For certain purposes Parliament has supplemented the power of the Attorney-General to act in the national public interest with a power for a local authority to act in the interests of the public within the area administered by that authority.

Section 107 of the Public Health Act 1875 (38 & 39 Vict. c. 55) provided:

> "Any local authority may, if in their opinion summary proceedings would afford an inadequate remedy, cause any proceedings to be taken against any person in any superior court of law or equity to enforce the abatement or prohibition of any nuisance under this Act, or for the recovery of any penalties from or for the punishment of any persons offending against the provisions of this Act relating to nuisances . . ."

In *Tottenham Urban District Council v. Williamson & Sons Ltd.* [1896] 2 Q.B. 353 the Court of Appeal decided that section 107 did not enable a local authority to bring proceedings in their own name instead of requesting the Attorney-General to allow proceedings to be taken in his name at the relation of the local authority. Kay L.J. said, at p. 354:

> "The ordinary law is, that when any one complains of a public nuisance he must obtain the fiat of the Attorney-General for proceedings by way of information, unless he can show that the nuisance of which he complains is the cause of special damage to himself, and so ground for an action. . . . The section relied on is section 107; but that does not say that a local authority can take proceedings which no private person can take, and which are unknown to the law. Had that been the intention of the Act, I should have expected to find the new remedy, hitherto unknown to the law, stated in explicit terms."

Section 107 of the Public Health Act 1875 was repealed and replaced in an altered form by section 100 of the Public Health Act 1936 in these terms:

> "If in the case of any statutory nuisance the local authority are of opinion that summary proceedings would afford an inadequate remedy, they may *in their own name* take proceedings in the High Court for the purpose of securing the abatement or prohibition of that nuisance, *and such proceedings shall be maintainable notwithstanding that the authority have suffered no damage from the nuisance.*"

Thus Parliament reversed the effect of the decision in *Tottenham Urban District Council v. Williamson & Sons Ltd.* by authorising the local authority, in explicit terms, to take proceedings in their own name and by exempting the local authority from proving that the local authority had suffered special damage from a statutory nuisance in which damage was the essence of the wrongdoing.

By section 116(2) of the Highways Act 1959 a county council might "assert and protect the rights of the public to the use and enjoyment of" any county road in the county. By section 116(5):

> "Without prejudice to their powers under section 276 of the Local Government Act 1933, a council may, in the performance of their functions under the foregoing provisions of this section, institute or defend any legal proceedings and generally take such steps as they deem expedient."

By section 116(6) if a parish council alleged that a county road had been unlawfully stopped up or obstructed then: "it shall be the duty of the council of that district, unless satisfied that the allegations are incorrect, to take proper proceedings accordingly."

In *Hampshire County Council v. Shonleigh Nominees Ltd.* [1970] 1 W.L.R. 865 Plowman J. held that the terms of section 116 were not sufficiently explicit to enable a county council to bring proceedings in their own name. Section 70(1) of the Highways Act 1971 then amended the Highways Act 1959 so that section 116(5) now enables a county council to "institute proceedings *in their own name.*" Similarly section 116(6) now directs the county council: "to take proper proceedings accordingly *and they may do so in their own name.*"

Thus Parliament reversed the effect of the decision of Plowman J. in *Hampshire County Council v. Shonleigh Nominees Ltd.* by authorising the county council to take proceedings in their own name. This express power

makes it impossible for any court to conclude after the 1971 amendments, as Plowman J. concluded prior to those amendments, that the only relevant power available to the county council is power to request the Attorney-General to allow proceedings to be taken in the name of the Attorney-General at the relation of the county council. In proceedings instituted under the Highways Act to assert and protect the rights of the public to use and enjoy roads and highways, special damages are irrelevant and were therefore not mentioned in the amendments to the Highways Act 1959 as they had been mentioned in the alterations to the Public Health Act to which I have referred.

Section 276 of the Local Government Act 1933, to which reference was made in section 116(5) of the Highways Act 1959 provided:

> "Where a local authority deem it expedient for the promotion or protection of the interests of the inhabitants of their area, they may prosecute or defend any legal proceedings."

In *Prestatyn Urban District Council v. Prestatyn Raceway Ltd.* [1970] 1 W.L.R. 33 Goff J. applied the dictum of Kay L.J. in *Tottenham Urban District Council v. Williamson & Sons Ltd.* [1896] 2 Q.B. 353 and decided that the terms of section 276 were not sufficiently explicit to enable a local authority to bring proceedings in their own name.

Section 276 of the Local Government Act 1933 was replaced in an altered form by section 222 of the Local Government Act 1972 which is in these terms:

> "(1) Where a local authority consider it expedient for the promotion or protection of the interests of the inhabitants of their area—(*a*) they may prosecute or defend or appear in any legal proceedings and, *in the case of civil proceedings, may institute them in their own name,* and (*b*) they may, *in their own name* make representations in the interests of the inhabitants at any public inquiry held by or on behalf of any Minister or public body under any enactment."

Thus Parliament reversed the effect of the decision of Goff J. in *Prestatyn Urban District Council v. Prestatyn Raceway Ltd.* [1970] 1 W.L.R. 33 by authorising a local authority to take proceedings in their own name. The terms of section 222 are sufficiently explicit to enable a local authority to bring proceedings in their own name and to contradict the view that the powers of the local authority under section 222 are limited to requesting the Attorney-General to allow proceedings to be instituted in his name at the relation of the local authority. In proceedings instituted to promote or protect the interests of inhabitants generally, special damages are irrelevant and were therefore not mentioned in section 222.

Where Parliament conferred jurisdiction on a local authority in the Public Health Act 1875, the Highways Act 1959, and the Local Government Act 1933, the extent of that jurisdiction was partially emasculated by judicial decision and then restored or extended by the legislature. I can see no justification for emasculating section 222 and Oliver J. declined to do so in *Solihull Metropolitan Borough Council v. Maxfern Ltd.* [1977] 1 W.L.R. 127.

In a powerful argument on behalf of the appellants Mr. Alexander submitted that the conferment on a local authority of power to institute

civil proceedings in aid of public law is a constitutional change which requires even more explicit language than that which is to be found in section 222—presumably an explicit power to institute proceedings otherwise than in the name and with the consent of the Attorney-General. But when Parliament authorised a local authority to institute proceedings "in their own name" Parliament cannot have intended that the local authority should continue to be debarred from instituting proceedings "in their own name" but should be obliged to institute proceedings in the name and with the consent of the Attorney-General. Section 222 does not deprive the Attorney-General of his power to enforce obedience to public law by proceedings ex officio or by relator action. Section 222 confers an additional power on a local authority which is charged with the administration of an area. When the present proceedings were before the Court of Appeal the Attorney-General advised the court that in his view section 222

> "was clearly designed to confer a substantial measure of autonomy on local authorities in respect of law enforcement within their areas. The Attorney-General welcomes that autonomy in regard to the control of those activities generally associated with local authority jurisdiction": see [1984] Ch. 1, 9.

In *Kent County Council v. Batchelor (No. 2)* [1979] 1 W.L.R. 213 section 222 was invoked to restrain a farmer who owned woodland subject to a tree preservation order made by a local authority from damaging or destroying protected trees. This was a typical case in which the local authority was in a better position than the Attorney-General to judge whether it was expedient for the promotion or protection of the interests of the inhabitants of their area that proceedings for an injunction should issue.

Mr. Alexander relied heavily on passages from the speeches in your Lordships' House in *Gouriet v. Union of Post Office Workers* [1978] A.C. 435 which emphasised the important constitutional position of the Attorney-General in enforcing laws on behalf of the public generally and emphasised the unfettered discretion of the Attorney-General to give or withhold his consent to the initiation of relator proceedings. But in that case Viscount Dilhorne made the reservation with which no one quarrelled that:

> "it is the law, and long established law, that save and in so far as the Local Government Act 1972, section 222, gives local authorities a limited power so to do, only the Attorney-General can sue on behalf of the public for the purpose of preventing public wrongs . . ." see [1978] A.C. 435, 494.

The power of the local authorities is of course limited to the promotion or protection of the interests of the inhabitants of their area.

Mr. Alexander submitted that the effect and the only effect of section 222 was to enable a London borough council to sue in their own name. For historical and esoteric reasons, prior to section 222 of the Local Government Act 1972, a London borough council, although a local authority, could only sue in the name of the corporation as the mayor and

burgesses of the borough. The result of section 222 is that a London borough council can now sue in that name. This petty and immaterial alteration in nomenclature could not in my view have been the sole or even an intended object of the differences between section 276 of the Local Government Act 1933 and section 222 of the Local Government Act 1972. A desire to change nomenclature could not in any event have been responsible for inspiring the amendments to the Highways Act 1959 which were effected by the Highways Act 1971 and which correspond to the amendments made to section 276 of the Local Government Act 1933 by section 222 of the Local Government Act 1972.

Mr. Alexander argued that the power conferred by section 222(1)(*b*) of the Local Government Act 1972 for a local authority to make representations at a public inquiry "in their own name" could not have been designed to remove the necessity for a relator action. It is not clear what section 222(1)(*b*) was designed to achieve or whether it in fact created any power which was not exercisable prior to 1972. It may well be that the express power granted by section 222(1)(*b*) for a local authority to make representations in the interests of the inhabitants at any public inquiry was inserted ex abundanti cautela or was designed to emphasise that the local authority could make representations on behalf of the inhabitants generally and not merely on its own behalf and were not obliged to support the views expressed by those inhabitants who themselves appeared at the inquiry. Whatever the reasons for section 222(1)(*b*) the provisions of that paragraph do not shed any light on the true construction of section 222(1)(*a*) and do not contradict the meaning and effect of section 222(1)(*a*) which I have indicated. I agree therefore with the Court of Appeal and Whitford J. that section 222 conferred on the council power in a proper case to institute proceedings in their own name and without resort to the Attorney-General against the appellants. It does not of course follow that the council were justified in seeking or that Whitford J. was justified in granting an injunction in the present case and Mr. Alexander submitted that the injunction ought now to be discharged.

Section 222 requires that a local authority shall only act if they "consider it expedient for the promotion or protection of the interests of the inhabitants of their area." Any exercise by the local authority of this statutory power is subject to the control of judicial review and the application of the principles enunciated in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223. In considering the exercise of their powers the local authority must take into account matters which they ought to take into account, ignore matters which they ought not to take into account and then reach a decision which is not so unreasonable that no reasonable local authority could have come to it. Where the local authority seeks an injunction, the court will consider whether the power was rightly exercised and whether in all the circumstances at the date the application for an injunction is considered by the court, the equitable and discretionary remedy of an injunction should be granted.

In the present case when the council decided to institute proceedings and when Whitford J. decided to grant an interlocutory injunction, the appellant had committed offences under the Shops Act 1950. The council

invoked the assistance of the civil court in aid of the criminal law in order to ensure that the appellants did not commit further offences under the Shops Act 1950. The right to invoke the assistance of the civil court in aid of the criminal law is a comparatively modern development. Where Parliament imposes a penalty for an offence, Parliament must consider the penalty is adequate and Parliament can increase the penalty if it proves to be inadequate. It follows that a local authority should be reluctant to seek and the court should be reluctant to grant an injunction which if disobeyed may involve the infringer in sanctions far more onerous than the penalty imposed for the offence. In *Gouriet v. Union of Post Office Workers* [1978] A.C. 435 Lord Wilberforce said at p. 481, that the right to invoke the assistance of civil courts in aid of the criminal law is "an exceptional power confined, in practice, to cases where an offence is frequently repeated in disregard of a, usually, inadequate penalty . . . or to cases of emergency . . ." In my view there must certainly be something more than infringement before the assistance of civil proceedings can be invoked and accorded for the protection or promotion of the interests of the inhabitants of the area. In the present case the council were concerned with what appeared to be a proliferation of illegal Sunday trading. The council was by section 71 of the Shops Act 1950 charged with the statutory duty of ensuring compliance with the Act. The council received letters from traders complaining of infringements of the Sunday trading legislation by other shops and intimating that the complainants would themselves feel obliged to open on Sundays in order to preserve their trade unless the Act was generally observed. The council could not treat some traders differently from others. The council wrote to warn infringing traders some of whom ceased to trade on Sundays as a result of the warnings. In one case where an ignored warning was followed by the issue of a writ the proceedings resulted in an undertaking to desist. In these circumstances there was ample justification for the council to take the view that it was expedient in the general interests of the inhabitants to take such steps as were necessary to ensure compliance by the appellants with the laws of Sunday trading.

It was said that the council should not have taken civil proceedings until criminal proceedings had failed to persuade the appellants to obey the law. As a general rule a local authority should try the effect of criminal proceedings before seeking the assistance of the civil courts. But the council were entitled to take the view that the appellants would not be deterred by a maximum fine which was substantially less than the profits which could be made from illegal Sunday trading. Delay while this was proved would have encouraged widespread breaches of the law by other traders, resentful of the continued activities of the appellants. The poor trader would be deterred by the threat of a fine; the rich trader would consider breaking the law each Sunday if illegal trading produced profit in excess of the maximum fine and costs. In *Stafford Borough Council v. Elkenford Ltd.* [1977] 1 W.L.R. 324, 330 my noble and learned friend, Lord Bridge of Harwich, then Bridge L.J., said:

> "We have been urged to say that the court will only exercise its discretion to restrain by injunction the commission of offences in breach of statutory prohibitions if the plaintiff authority has first

A shown that it has exhausted the possibility of restraining those breaches by the exercise of the statutory remedies. Ordinarily no doubt that is a very salutory approach to the question, but it is not in my judgment an inflexible rule. The reason why it is ordinarily proper to ask whether the authority seeking the injunction has first exhausted the statutory remedies is because in the ordinary case it is only because those remedies have been invoked and have proved inade-
B quate that one can draw the inference, which is the essential foundation for the exercise of the court's discretion to grant an injunction, that the offender is . . . 'deliberately and flagrantly flouting the law'."

In the present case any doubt about the attitude of the appellants has been resolved by their attitude to the proceedings themselves. Whitford J. concluded that the appellants were proceeding.

C "upon the basis that if an interlocutory injunction be not granted now they would be free to trade . . . they hope, if they are successful in staying the grant of an interlocutory injunction, that they are going to be able to continue to trade in defiance of the provisions of section 47 of the Shops Act 1950."

D Immediately upon the opening of the appeal of the appellants to your Lordships' House, my noble and learned friend, Lord Diplock, inquired whether if the injunction were discharged the appellants intended to resume trading in defiance of the provisions of section 47 of the Shops Act 1950. No answer has been vouchsafed. Whitford J. and the Court of Appeal took the view that on the law and the facts an injunction should issue and I would dismiss this appeal.

E

Appeal dismissed.

Solicitors: Clifford-Turner for Hepherd Winstanley & Pugh, Southampton; Sharpe, Pritchard & Co.

F J. A. G.

G

H

City of London Corp v Bovis Construction Ltd

COURT OF APPEAL, CIVIL DIVISION
O'CONNOR, BINGHAM AND TAYLOR LJJ
18 APRIL 1988

Injunction – Interlocutory – Noise nuisance – Grant of injunction to prevent infringement of criminal law – Defendants managing construction site adjacent to housing estate – Noise from site causing nuisance to residents on estate – Council serving notice requiring defendants to restrict noisy operations at night and on weekends – Defendants contravening notice by carrying out operations at night and on weekends – Council seeking injunction to restrain defendants from contravening notice – Whether necessary for council to prove defendants deliberately and flagrantly flouting law – Whether injunction should be granted – Local Government Act 1972, s 222 – Control of Pollution Act 1974, s 60.

The defendant contractors were the construction managers for the development of a site in the City of London which was bounded on one side by an underground railway line. On the opposite side of the site and separated from it by a street was a housing estate. Residents on the estate complained to the council about the noise nuisance at night and at weekends and the council served a notice under s 60[a] of the Control of Pollution Act 1974 requiring the contractors to restrict operations which caused noise outside the boundaries of the site to the hours of 8 am to 6 pm on weekdays, 8 am to 1 pm on Saturdays and prohibiting all such operations on Sundays and bank holidays. The contractors were permitted to carry out some work on the site outside those hours when the railway authority and the police imposed restrictions on the permissible hours of work for safety and road traffic management reasons. The contractors continued to work on the site outside the permitted hours and the council laid 18 informations against the contractors alleging breaches of the notice. Under s 60(8) of the 1974 Act contravention without reasonable excuse of a notice served under s 60 was a criminal offence for which the contractors were liable to a maximum fine of £2,000 for each offence and a further fine of £50 per day for every day the offence continued. The hearing of the informations was adjourned on several occasions at the request of both parties and in the meantime the contractors continued to contravene the notice by working at weekends outside the permitted hours. The council accordingly issued a writ for an injunction under s 222[b] of the Local Government Act 1972 to restrain the contractors from causing a noise nuisance outside the permitted hours. The judge, having found that nearby residents had been caused the greatest possible inconvenience by the noise at night and at the weekends, granted an interlocutory injunction against the contractors in the

a Section 60, so far as material, provides:

'(1) This section applies to works of the following description, that is to say—(*a*) the erection, construction . . . of buildings, structures or roads . . . (*c*) demolition . . .

(2) Where it appears to a local authority that works to which this section applies . . . are going to be carried out on any premises, the local authority may serve a notice imposing requirements as to the way in which the works are to be carried out . . .

(8) If a person on whom a notice is served under this section without reasonable excuse contravenes any requirement of the notice he shall be guilty of an offence . . .'

b Section 222, so far as material, provides: '(1) Where a local authority consider it expedient for the promotion or the interests of the inhabitants of their area—(*a*) they may prosecute . . . any legal proceedings and, in the case of civil proceedings, may institute them in their own name . . .'

terms of the notice served under s 60 of the 1974 Act. The contractors appealed, contending that an injunction could not be granted to prevent an infringement of the criminal law unless it was first established that the defendant had committed an offence, that the defendant was deliberately and flagrantly flouting the law, neither of which could be established against the contractors until the pending informations had been heard, and that the criminal law provided an inadequate remedy.

Held – The court had jurisdiction to grant an interlocutory injunction under s 222 of the 1972 Act, for the protection or promotion of the interests of the inhabitants of the area, restraining the contravention of a notice served under s 60 of the 1974 Act even though the contravention had not been shown to be a criminal offence. Although something more than mere infringement of the criminal law had to be shown before such an injunction would be granted, the court's discretion was not limited by whether the offender could be shown to be deliberately and flagrantly flouting the law; instead, the essential foundation for the exercise of the court's discretion to grant an injunction was whether when it could be inferred that the defendant's unlawful operations would continue unless and until effectively restrained by the law and that nothing short of an injunction would be effective to restrain those operations. Since the conduct which the local authority sought to restrain was conduct which would have been actionable (if not at the suit of the local authority) in the absence of any statute because it was probably unlawful even if not criminal, since there was clear evidence of persistent and serious conduct which might well amount to contravention of the criminal law and which could be regarded as a public and private nuisance and since it was plain that the service of the notice and the threat of prosecution had proved ineffective to protect the residents, the city council was entitled to the injunction sought, which had been properly made against the contractors as the person responsible for and in control of the carrying out of the works even though the actual nuisance had been caused by sub-contractors on the site. Accordingly, the appeal would be dismissed but since the offence under s 60(8) was the contravention of a s 60 notice 'without reasonable excuse' the injunction would be amended to restrain the contractors from causing a noise nuisance outside the permitted hours without reasonable excuse (see p 709 *d e*, p 710 *b* to *d*, p 711 *b* to *e h* to p 712 *c* and p 714 *g* to p 716 *b h* to p 717 *b*, post).

Notes

For control of noise nuisances on construction sites, see 38 *Halsbury's Laws* (4th edn) paras 438–443.

For the Local Government Act 1972, s 222, see 25 *Halsbury's Statutes* (4th edn) (1990 reissue) 340.

For the Control of Pollution Act 1974, s 60, see 35 *Halsbury's Statutes* (4th edn) 533.

Cases referred to in judgments

A-G (ex rel Hornchurch UDC) v Bastow [1957] 1 All ER 497, [1957] 1 QB 514, [1957] 2 WLR 340.

A-G v Chaudry [1971] 3 All ER 938, [1971] 1 WLR 1614, CA.

A-G (ex rel Manchester Corp) v Harris [1960] 3 All ER 207, [1961] 1 QB 74, [1960] 2 WLR 532, CA.

A-G v Premier Line Ltd [1932] 1 Ch 303.

A-G v Sharp [1931] 1 Ch 121, [1930] All ER Rep 741, CA.

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223, CA.

Gouriet v Union of Post Office Workers [1977] 3 All ER 70, [1978] AC 435, [1977] 3 WLR 300, HL.
Kent CC v Batchelor [1978] 3 All ER 980, [1979] 1 WLR 213.
Runnymede BC v Ball [1986] 1 All ER 629, [1986] 1 WLR 353, CA.
Stafford BC v Elkenford Ltd [1977] 2 All ER 519, [1977] 1 WLR 324, CA; *affg* [1977] 2 All ER 519.
Stoke-on-Trent City Council v B & Q (Retail) Ltd [1984] 2 All ER 332, [1984] AC 754, [1984] 2 WLR 929, HL.
Westminster City Council v Jones (1981) 80 LGR 241.
Wychavon DC v Midland Enterprises (Special Events) Ltd (1986) 86 LGR 83.

Appeal

The defendants, Bovis Construction Ltd, appealed from the order made by Julian Jeffs QC sitting as a deputy judge of the Chancery Division on 22 February 1988 by which he granted the application of the plaintiffs, the City of London Corporation, for an injunction to restrain the defendants from carrying out at Beaufort House, 29–55 Middlesex Street and 15 St Botolph's Street London E1 (the site) construction works and operations ancillary thereto audible at the site boundary at any time on Sundays and bank holidays and outside the permitted hours of 8 am and 6 pm on Mondays to Fridays and 8 am and 1 pm on Saturdays, except where specific requirements as to permissible times and sites of work had been imposed by London Transport for the purpose of maintaining the safety of railway operations or by the City of London Police for the purposes of road traffic management and safety or for the purpose of carrying out of emergency work outside the permitted hours. The facts are set out in the judgment of O'Connor LJ.

Anthony Machin QC and *David Lamming* (instructed by *Masons*) for the defendants.
John Uff QC and *Stephen Bickford-Smith* (instructed by *D W L Butler*, Comptroller and City Solicitor) for the City of London Corp.

Cur adv vult

18 April 1988. The following judgments were delivered.

O'CONNOR LJ. This is an appeal by the defendant, Bovis Construction Ltd (Bovis), against an order made on 22 February 1988 by Mr Julian Jeffs QC, sitting as a deputy judge of the High Court, in the following terms:

> 'The Defendant by itself, its servants, agents or otherwise howsoever be restrained by injunction until after judgment in this action or further order from doing the following acts or any of them that is to say: Carrying out at Beaufort House, 29–55 Middlesex Street and 15 St. Botolph's Street, London, E.1 works of erection, construction, alteration, repair or maintenance of buildings or roads demolition or dredging work of engineering construction whether or not specified in the foregoing and all operations ancillary thereto which are audible at the site boundary (i) at any time on Sundays and Bank Holidays and (ii) at any other time save between the hours of 08.00 and 18.00 on Mondays to Fridays and between the hours of 08.00 and 13.00 on Saturdays provided that work audible beyond the site boundary may be undertaken at any time where (a) specific requirements as to permissible times and sites of work have been imposed by London Transport for the purpose of maintaining the safety of railway operations; and/or (b) specific

requirements as to permissible times of work have been imposed by the City of London Police for the purposes of road traffic management and safety; and further provided that (i) the carrying out of emergency work outside the hours aforesaid shall not be a breach of this injunction; (ii) this injunction shall not take effect before 12 noon on the 29th of February 1988.'

Counsel for Bovis submits that this injunction was to prevent infringement of the criminal law for which Parliament had enacted a maximum pecuniary penalty and that it should not have been granted because (i) the evidence did not establish and the deputy judge has not found that Bovis have infringed the criminal law, (ii) as the criminal proceedings await hearing, the deputy judge should not have found that they do not provide an adequate remedy, (iii) the deputy judge has not found that Bovis were deliberately and flagrantly flouting the law and his assertion that, if necessary, he would so have found cannot be supported on the evidence. They submit that unless these three requirements are established no injunction should go.

In the alternative they submit that the form of injunction prayed and granted is bad for two reasons: (i) Bovis were not and are not carrying out any work at Beaufort House, and (ii) the injunction is wider than what is needed to prevent infringement of the criminal law in question.

Those are the issues.

Bovis are the construction managers for a substantial development in the City of London. The site is close to Aldgate Station and is bounded on one side by the Metropolitan railway, and on the other three sides by St Botolph's Street, Middlesex Street and Gravel Lane. On the opposite side of Gravel Lane is the City of London housing estate, Petticoat Square. The main entrance to the new building was to be reached across a forecourt constructed over the railway. London Transport insisted that no work should be done over or within 12 metres of the track save during the time when the current is switched off, that is between 1.30 am and 4.30 am. Demolition and construction sites are notorious generators of noise and the railway restriction meant that in this case nearby residents would not get the relief normally available at night.

Mr Catchpole, the secretary and a director of Bovis, gives this description in his affidavit of 21 January:

'Work on the site commenced in September 1986, and piling began in February 1987 for the construction of an office complex of some 500,000 sq. feet. In order to carry out the works something of the order of 4,500 tonnes of structural steel will be used and that steel will take some 300 lorry deliveries. Furthermore, there is a total of some 20,000 sq. metres of steel cladding which will require some 250 lorry deliveries. The site employs something in the order of 400-500 men by day and about 30 at night. It is I respectfully suggest, by any standards, a very large undertaking. It is a very complicated undertaking. As I have mentioned the Defendant itself is merely managing the site, and carries out none of the physical construction work. It is expected that work will continue through until about September of this year.'

A report to the city council's housing department of 1 May gives a graphic insight into the state of affairs in April 1987:

'At their meeting on Friday 24th April a report was presented to the Housing Committee regarding this particular development and its effect on the tenants at Middlesex Street Estate. The Committee expressed considerable concern upon hearing from Deputy Mrs. Samuel, about the noise nuisance

being caused to the residents on the Estate. Mrs. Samuel explained to the Committee how horrendous the noise nuisance had been particularly over the Easter period. The Committee felt that action needed to be taken and the Environmental Health Officer, Mr. Blake, was instructed to serve a Notice on Bovis Construction limiting their hours of work.'

A notice under s 60 of the Control of Pollution Act 1974 dated 29 April was duly served on Bovis. So far as material the notice reads:

'WHEREAS it appears to the Corporation of London that works to which section 60 of the Control of Pollution Act 1974 applies . . . are being carried out on the premises known as Beaufort House . . . notice is hereby given that the following requirements must be complied with in connection with the carrying out of such works: 1. All works and ancillary operations which are audible at the site boundary, or at such other place as may be agreed with the Council, shall be carried out only between the hours of 0800 and 1800 on Mondays to Fridays and between the hours of 0800 and 1300 on Saturdays and at no time on Sundays and Bank Holidays.'

By the schedule:

'The requirements detailed in Part 1 (above) shall be subject to the following proviso:—Work audible beyond the site boundary may be undertaken at other times only where:—(1) Specific requirements as to permissible times and sites of work have been imposed by London Transport for the purposes of maintaining the safety of railway operations. (2) Specific requirements as to permissible times of work have been imposed by the City of London Police for purposes of road traffic management and safety. The dates and times of such requirements shall be notified in writing to the Medical Officer of Health without delay and before the commencement of such operations . . . if you contravene without reasonable excuse any requirement of this notice you will be guilty of an offence against Part III of the Control of Pollution Act 1974 and on summary conviction will be liable to a fine not exceeding level 5 on the Standard Scale of fines [ie £2,000] together, in any case, with a further fine not exceeding £50 for each day on which the offence continues after conviction.'

The notice had a note telling Bovis that they had a right of appeal against the notice under s 60(7) of the 1974 Act and set out the provisions of reg 5 of the Control of Noise (Appeals) Regulations 1975, SI 1975/2116, which so far as relevant read:

'(2) The grounds on which a person served with such a notice may appeal under the said subsection (7) may include any of the following grounds which are appropriate in the circumstances of the particular case . . . (*e*) that the notice should have been served on some person instead of the appellant, being a person who is carrying out, or going to carry out, the works, or is responsible for, or has control over, the carrying out of the works; (*f*) that the notice might lawfully have been served on some person in addition to the appellant, being a person who is carrying out, or going to carry out, the works, or is responsible for, or has control over, the carrying out of the works, and that it would have been equitable for it to have been so served . . .'

Bovis did not appeal against the notice. From the word go work went on outside the permitted hours so that by 21 May we find Mr Weldon, the chief environmental health officer, writing to Bovis:

'It would appear, and on your own admission, that the notice has been contravened on several occasions and without reasonable excuse. The programme of work submitted dated 5th May, 1987, also obviously shows that further contraventions are likely to occur. In view of your company's disregard of the notice conditions effective from Tuesday, 26th May, 1987, any contravention of the notice conditions will be the subject of an individual report for prosecution and you are reminded that on conviction there is a liability to a fine not exceeding level 5 on the Standard Scale of fines (currently £2,000). In the meantime you are urged to reconsider your construction programme and arrange a meeting at senior level to discuss the implications of this letter.'

On the next day Mr Weldon wrote to Bovis:

'I have been instructed by the Chairman of the Housing Committee to inform you that at the meeting of the Grand Committee today a resolution was made concerning the works that your company is currently carrying out at the Beaufort House site. The resolution is that, should further infringement occur of the conditions contained in the notice dated 29th March [it should be "April"] 1987, served upon you under Section 60 of the Control of Pollution Act 1974, by the Medical Officer of Health under powers delegated to him by the Court of Common Council, then the Corporation of London will seek a prohibitory injunction in the High Court.'

There are two letters of 27 May from Bovis to Mr Weldon. In the first Mr Fitzpatrick, Bovis's production and value engineer, says:

'Bovis Construction Ltd. (Mr. M.J. Fitzpatrick) assured you of their intent to observe the notice as issued and a general discussion follows.'

In the second Mr Pettifer, the divisional managing director, writes:

'I understand that the situation has been fully aired and clear agreement has been reached on the details of our future activities at this development. Obviously your department will stay in close contact with the site and we, in turn, will seek to communicate whenever necessary. Should there be any further cause for concern, you may be assured that this office will act properly and swiftly.'

It was a long noisy summer for those living nearby, and the documents show the city council complaining of repeated contraventions of the notice. On 4 November six informations were laid in respect of alleged breaches in August and September. Before they were served there was a high level meeting on 6 November between the city council officials and Mr Pettifer and Mr Smith, Bovis's project manager. We have a full note of what occurred, and parts of what the Bovis men said is instructive for reasons which will appear later. Mr Pettifer is recorded as saying:

'[Bovis] had tried at all times to co-operate. They were in a difficult position, particularly regarding London Underground Ltd. requiring night work on part of the site. He felt he would probably complain if he lived overlooking the site. [Bovis] had a policy of being a caring contractor and believed that in the main his company had tried to co-operate with the local inhabitants and strongly resented and refuted any suggestion that they had not.'

Mr Smith made the following points:

> 'He virtually lived on site seven days a week and . . . if he were a resident he would complain because it is very noisy indeed; a light sleeper could not sleep . . . For example if a concrete delivery was late [Bovis] had kept pouring after 1800 hours to finish a structure rather than create noise the next day by breaking up the part-finished structure and restarting.'

The informations were served on 11 November for hearing on 19 November, but at the request of Bovis were adjourned until 17 December. No criticism can be made that Bovis should want time to consider six incidents. It does, however, demonstrate that delay is inherent in the exercise of attempts to enforce compliance by prosecuting a contravenor.

The hearing on the 17 December was adjourned to 3 March 1988 at the request of the city council, who had served three more informations dated 23 November and had three more in preparation which were issued on 22 December. They added three more on 8 February, so that on 3 March there were 15 informations for hearing. Bovis asked for an adjournment until 11 March to consider their position, and on 11 March told the court that they were contesting all the cases with an estimated hearing time of four days. The earliest appointment that the court could give for such a hearing was 11 July next, to which date the hearing stands adjourned. To complete this unhappy tale, the city council have added three more informations arising out of incidents on Saturday, 20 February, that is during the hearing of the motion but before the injunction was granted.

We have evidence of what occurred on 20 February in affidavits filed. The concreting contractors were expecting five loads of concrete at 20 minute intervals from 9.00 am for pouring on the twelfth floor. The first load did not arrive until 12.30. Mr Neal, Bovis's senior site manager on duty with the concurrence of Mr Ryan, Bovis's site engineer on duty, took the decision that the work should go on and ordered Dormers to do the work, knowing that the 1.00 pm limit would be substantially overrun. By 2.45 the police were on the scene at the behest of local residents. The police officer gives this description:

> 'I attended 459 Petticoat Square, London E1, premises of Mr A Hartog. I arrived at the premises at 14.40 . . . I noticed that Mr Hartog's flat was on the fourth floor and faced onto the Bovis building site, Beaufort House . . . Mr. Hartog complained to me about the excessive noise coming from the building site and that a court injunction was in force. I noticed that the noise coming from the building site machinery was extremely excessive and noisy, which also created a difficulty in communicating with the complainant [and that is inside the house]. Approximately 10 residents came and complained to me.'

The learned deputy judge had a mass of evidence from which he concluded:

> 'Residents have given evidence which really makes quite shocking reading. One resident walked the streets to avoid the noise. Others were kept awake all night. One felt obliged to leave his house at 5.45 am on a Sunday morning to avoid the noise. I shall not go into more details of this nature but I am quite satisfied on the evidence that I have read that the noise is real and of such an intensity as to cause the greatest possible inconvenience to those who live near this site.'

No one suggests, nor could they suggest, that this finding was other than fully justified.

Against this background I turn to consider the proceedings with which we are concerned. On 12 November 1987 the City Solicitor was given authority to issue proceedings for injunctive relief against Bovis pursuant to powers in s 222 of the Local Government Act 1972 which provides:

> '(1) Where a local authority consider it expedient for the promotion or protection of the interests of the inhabitants of their area—(*a*) they may prosecute or defend or appear in any legal proceedings and, in the case of civil proceedings, may institute them in their own name.'

The writ was issued on 27 November. The statement of claim identified Bovis as 'carrying out or alternatively responsible for or having control over building works' at Beaufort House, recited the s 60 notice, gave particulars of breaches, and then in para 7 pleaded:

> 'By reason of the failure of the Defendant to comply with the Notice and by reason of the failure of the Defendant to heed requests in that regard more fully particularised below and by reason of the limited remedy offered by proceedings before the Magistrates' Court the Plaintiffs are of the opinion that proceedings for an offence under Section 60(8) of the said Act afford an inadequate remedy for the carrying out of works by the Defendant contrary to the requirements of the said Notice.'

It then gave the particulars, which I need not read, and continues:

> '8. The Plaintiffs consider it expedient for the promotion or protection of the interests of the inhabitants of their area that the requirements of the said Notice should be complied with.
>
> 9. Unless restrained by this Court the Defendants threaten and intend to carry out work in contravention of the said Notice.'

The prayer was for the injunction granted.

It will be seen that the city council were invoking the civil jurisdiction of the court to prevent Bovis from contravening the s 60 notice. Contravention is made a criminal offence by s 60(8), which provides:

> 'If any person on whom a notice is served under this section without reasonable excuse contravenes any requirement of the notice he shall be guilty of an offence against this Part of this Act.'

This jurisdiction of the court has been considered by the House of Lords in *Gouriet v Union of Post Office Workers* [1977] 3 All ER 70, [1978] AC 435 and in *Stoke-on-Trent City Council v B & Q (Retail) Ltd* [1984] 2 All ER 332, [1984] AC 754. I turn at once to the speech of Lord Templeman in the latter case, which was a Sunday trading case. He said ([1984] 2 All ER 332 at 341–342, [1984] AC 754 at 775):

> 'Section 222 requires that a local authority shall only act if they "consider it expedient for the promotion or protection of the interests of the inhabitants of their area." Any exercise by the local authority of this statutory power is subject to the control of judicial review and the application of the principles enunciated in *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223. In considering the exercise of their powers the local authority must take into account matters which they ought to take into account, ignore matters which they ought not to take into account and then reach a decision which is not so unreasonable that no reasonable local authority could have come to it. Where the local authority seeks an

injunction, the court will consider whether the power was rightly exercised and whether in all the circumstances at the date the application for an injunction is considered by the court, the equitable and discretionary remedy of an injunction should be granted. In the present case, when the council decided to institute proceedings and when Whitford J decided to grant an interlocutory injunction, the appellants had committed offences under the Shops Act 1950. The council invoked the assistance of the civil court in aid of the criminal law in order to ensure that the appellants did not commit further offences under the 1950 Act. The right to invoke the assistance of the civil court in aid of the criminal law is a comparatively modern development. Where Parliament imposes a penalty for an offence, Parliament must consider the penalty is adequate and Parliament can increase the penalty if it proves to be inadequate. It follows that a local authority should be reluctant to seek and the court should be reluctant to grant an injunction which if disobeyed may involve the infringer in sanctions far more onerous than the penalty imposed for the offence. In *Gouriet v Union of Post Office Workers* [1977] 3 All ER 70 at 83, [1978] AC 435 at 481 Lord Wilberforce said that the right to invoke the assistance of civil courts in aid of the criminal law is "an exceptional power confined, in practice, to cases where an offence is frequently repeated in disregard of a, usually, inadequate penalty . . . or to cases of emergency . . ." In my view there must certainly be something more than infringement before the assistance of civil proceedings can be invoked and accorded for the protection or promotion of the interests of the inhabitants of the area. In the present case the council were concerned with what appeared to be a proliferation of illegal Sunday trading. The council was by s 71 of the 1950 Act charged with the statutory duty of ensuring compliance with the 1950 Act. The council received letters from traders complaining of infringements of the Sunday trading legislation by other shops and intimating that the complainants would themselves feel obliged to open on Sundays in order to preserve their trade unless the 1950 Act was generally observed. The council could not treat some traders differently from others. The council wrote to warn infringing traders some of whom ceased to trade on Sundays as a result of the warnings. In one case where an ignored warning was followed by the issue of a writ the proceedings resulted in an undertaking to desist. In these circumstances there was ample justification for the council to take the view that it was expedient in the general interests of the inhabitants to take such steps as were necessary to ensure compliance by the appellants with the laws of Sunday trading. It was said that the council should not have taken civil proceedings until criminal proceedings had failed to persuade the appellants to obey the law. As a general rule a local authority should try the effect of criminal proceedings before seeking the assistance of the civil courts. But the council were entitled to take the view that the appellants would not be deterred by a maximum fine which was substantially less than the profits which could be made from illegal Sunday trading. Delay while this was proved would have encouraged widespread breaches of the law by other traders, resentful of the continued activities of the appellants. The poor trader would be deterred by the threat of a fine; the rich trader would consider breaking the law each Sunday if illegal trading produced profit in excess of the maximum fine and costs. In *Stafford BC v Elkenford Ltd* [1977] 2 All ER 519 at 528, [1977] 1 WLR 324 at 330 Bridge LJ said: "We have been urged to say that the court will only exercise its discretion to restrain by injunction the commission of offences in breach of statutory prohibitions if the plaintiff authority has first shown that it has exhausted the possibility of restraining

those breaches by the exercise of the statutory remedies. Ordinarily no doubt that is a very salutary approach to the question whether or not the court will grant an injunction in the exercise of its discretion, but it is not in my judgment an inflexible rule. The reason why it is ordinarily proper to ask whether the authority seeking the injunction has first exhausted the statutory remedies is because in the ordinary case it is only because those remedies have been invoked and have proved inadequate that one can draw the inference, which is the essential foundation for the exercise of the court's discretion to grant an injunction, that the offender is . . . 'deliberately and flagrantly flouting the law'." In the present case any doubt about the attitude of the appellants has been resolved by their attitude to the proceedings themselves . . . Immediately on the opening of the appeal of the appellants to your Lordships' House, my noble and learned friend Lord Diplock inquired whether if the injunction were discharged the appellants intended to resume trading in defiance of the provisions of s 47 of the 1950 Act. No answer has been vouchsafed. Whitford J and the Court of Appeal took the view that on the law and the facts an injunction should issue and I would dismiss this appeal.'

I must point out that in the first part of his speech where he reviewed the authorities Lord Templeman dealt with the extent of s 222 of the 1972 Act, and he said ([1984] 2 All ER 332 at 339-340, [1984] AC 754 at 773):

'The terms of s 222 are sufficiently explicit to enable a local authority to bring proceedings in their own name and to contradict the view that the powers of the local authority under s 222 are limited to requesting the Attorney General to allow proceedings to be instituted in his name at the relation of the local authority. In proceedings instituted to promote or protect the interests of inhabitants generally, special damages are irrelevant and were therefore not mentioned in s 222.'

In the *B & Q* case there was no dispute that there had been breaches of the Sunday trading laws although the information laid had not been heard when the injunction was granted. In agreeing with Lord Templeman, Lord Fraser of Tullybelton said ([1984] 2 All ER 332 at 335, [1984] AC 754 at 767):

'I have had the advantage of reading in draft the speech of my noble and learned friend Lord Templeman, and I agree with it. I wish particularly to associate myself with his view that something more than infringement of the criminal law must be shown before the assistance of civil proceedings, by way of injunction, can be invoked by the local authority. That something more is required in order to establish that the offender is not merely infringing the law but that he is "deliberately and flagrantly flouting it": see *Stafford BC v Elkenford Ltd* [1977] 2 All ER 519 at 528, [1977] 1 WLR 324 at 330 per Bridge LJ.'

Relying upon that case, counsel for Bovis submit that before an injunction is ordered to go it must be established that Bovis have committed an offence or offences, that the criminal law provides an inadequate remedy and that they are deliberately and flagrantly flouting the time limits in the notice. They submit that until the informations are heard it cannot be decided whether Bovis have contravened without reasonable excuse and therefore committed an offence, and so far from deliberately and flagrantly flouting the law the evidence is that they are and always have been anxious to obey the terms of the notice, are doing their best to do so but are hampered by the contractual conditions on site.

As to the first submission, they point to what the deputy judge said in his judgment:

> 'It has been put to me that in the present case the local authority has not tried the effect of criminal proceedings; it has not applied s 65 of the Control of Pollution Act 1974 correctly or fully. In my judgment it has. As I have already mentioned, those proceedings have not been effective. I make no findings whatsoever as to whether the case brought under those proceedings is likely to succeed or not to succeed. Defences are available in those cases. The criminal law applies with its particular stringent onus of proof and there are in any event specific defences which I need not go into. They may or may not succeed in the courts but they have certainly not succeeded in removing this nuisance which has been of the gravest nature when viewed from the point of view of the lives of the local residents.'

It is said that this is fatal to the city council's case because, unless an offence is proved, no relief can be given.

In support of the submission that they are not deliberately and flagrantly flouting the notice, Bovis rely on what the deputy judge said:

> 'Having said that, let me say at once that I feel a considerable amount of sympathy with the defendants here. The management of a building site on this very great scale must present very real difficulties. The nature of building works is such that loud noises are produced from time to time. Here a large number of subcontractors are employed and I have no doubt that keeping full control of them and the noise they make is no easy matter. On the other hand, it can be said that the defendants have shown themselves willing to control this noise and have for the most part managed to do so. There have, however, been lapses and some of these lapses have been very serious. I have in mind that only quite recently, since these proceedings started, two more inspectors were appointed to keep control over the matter. It may be that they should have been appointed earlier. But the general history of this nuisance and noise is such that I am quite satisfied that it has occurred in the past and may well recur in the future.'

Then later he said:

> 'It has been urged upon me that Bovis have done everything they can to assist in enforcing the s 60 notice and ameliorating the inevitable result of nuisance by (1) keeping the local authority informed, (2) making the s 60 notice either part of the contract or an instruction under the contract, (3) appointing security officers, and (4) meeting residents, providing secondary glazing and cleaning carpets and keeping residents informed. I am quite sure that there is a great deal of truth in all this but I would observe that the security officers to whom I have already made some brief reference were not appointed until January 1988, after these proceedings commenced, and it seems abundantly clear to me that while no doubt regretting any trouble that has ensued, an attitude of mind that one would expect on behalf of a large and internationally known company and an attitude of mind which is entirely proper, nevertheless there have been continual breaches.'

The council submit that these passages contradict a passage where the learned deputy judge said:

> 'I would in any event be perfectly able and willing on the evidence before me to find that there has in fact been a deliberate and flagrant flouting of the law.'

The topic of deliberately and flagrantly flouting was considered by this court in *Runnymede BC v Ball* [1986] 1 All ER 629, [1986] 1 WLR 353. The defendants were creating a caravan site without planning permission. They ignored enforcement and stop notices. The local authority did not prosecute but brought proceedings under s 222. Purchas LJ cited a passage from the judgment of Talbot J in *Kent CC v Batchelor* [1978] 3 All ER 980 at 986, [1979] 1 WLR 213 at 219 where breaches of a tree preservation order were restrained. The passage cited reads:

> 'I do not consider that it is correct merely to look upon this as if the plaintiffs in these proceedings are seeking only to prevent the defendant from committing further breaches of the tree preservation orders. The plaintiffs here are a local authority who had duties under the Town and Country Planning Acts to protect areas of natural beauty. They fulfilled that duty by making the relevant tree preservation orders. Their duties do not stop at making the orders. In order to preserve those areas of natural beauty in respect of which they made the orders, they must see that they are preserved, and one of the ways of preserving those areas is by enforcing the orders which they have made. It is not just a case of taking action to prevent a criminal offence. It is a case of preventing interference with the areas of natural beauty which they have sought by their tree preservation orders to preserve.'

Purchas LJ continued ([1986] 1 All ER 629 at 637–638, [1986] 1 WLR 353 at 363):

> 'With respect I would adopt the approach of Talbot J in so far as he says that the duty of the council under the planning legislation is not merely to enforce penalties for past offences but is also to do all within their power to ensure through properly observed planning control the natural amenities of their area. This approach is, in my judgment, in accord with the spirit and intent of the speech of Lord Templeman in *Stoke-on-Trent City Council v B & Q (Retail) Ltd* and the other authorities to which reference has been made. In cases where it is necessary to resort to relief at civil law in order to prevent irreparable damage, which might well not be prevented by process in the magistrates' court, then, in my judgment, a local authority should be able to act under s 222 of the 1972 Act. This right should not be restricted to any particular class or classes of infringement, but must depend upon the particular facts of each individual case. Obvious instances where s 222 applies are those cases where the conduct, past and intended, of the offender show that process in the magistrates' court will be inadequate to afford protection to the interests of the local inhabitants ("the deliberate and flagrant flouting cases"). Other circumstances may well arise, eg the failure to avoid fire hazards or the execution of development on land which may well in practice prove irreversible. With great respect to the judge, in limiting the granting of relief to the two categories, i e "inadequate penalty" and "deliberate flouting of the law", in my judgment he fell into error in the following passage from his judgment: "In shop cases, the maximum fine on conviction has been described as 'chicken feed'. In the present case, Parliament has provided for a substantial fine if the defendant is prosecuted. It is not a case of an inadequate penalty nor is it a case of an emergency and if one goes back to the *Stoke-on-Trent* case one has to consider whether there has been a deliberate flouting of the law. The position in the *Stoke-on-Trent* case and *Westminster City Council v Jones* (1981) 80 LGR 241 was that the defendants were breaking the law with

their eyes open for substantial profit and proposed to go on doing it. In the present case the defendants seek only somewhere to put their caravans until some long-term solution has been reached." In the last sentence the judge seems to have overlooked the permanent nature of the developments involved in the defendants' activities. In my judgment the activities of the defendants by whatever phrase they may be described certainly constituted a threat to the proper exercise by the plaintiff of its duties as a local planning authority to protect the interests of the inhabitants of its area. Furthermore on all the evidence available to the plaintiff this was a threat which could not properly be avoided by the remedies provided by s 89 of the 1971 Act. In these circumstances the plaintiff was entitled to sue in its own name for injunctions under s 222 of the 1972 Act as the defendants' conduct, to adapt Lord Templeman's phrase in *Stoke-on-Trent City Council v B & Q (Retail) Ltd*, was "something more than a mere infringement of planning control".'

For my part I would adopt that reasoning and apply it to the present case. The local authority had served the s 60 notice for the protection of the inhabitants affected by the noise nuisance from this site, and it must have been apparent to them that the criminal remedy was not adequate, as they declared in their statement of claim, to protect the tenants.

In his judgment Sir Roger Ormrod said ([1986] 1 All ER 629 at 640, [1986] 1 WLR 353 at 366) that despite what Lord Fraser had said the striking phrase 'deliberately and flagrantly flouting the law' was not part of the ratio of Lord Templeman's speech, and I agree with him.

I think that there is a difference between what I think can be called pure public law cases such as Sunday trading and cases like the present where enforcing the public law notice is no more than a convenient method of protecting the inhabitants of their area from a nuisance. It was submitted that nuisance was the subject matter of s 58 of the Control of Pollution Act 1974 which empowers the local authority to serve a notice requiring abatement or prohibiting occurrence or recurrence of nuisance by noise. Further, s 58(8) provides:

'If a local authority is of opinion that proceedings for an offence under subsection (4) of this section would afford an inadequate remedy in the case of any noise which is a nuisance, they may take proceedings in the High Court . . . for the purpose of securing the abatement, prohibition or restriction of the nuisance, and the proceedings shall be maintainable notwithstanding that the local authority has suffered no damage from the nuisance; but in any proceedings taken in pursuance of this subsection it shall be a defence to prove that the noise was authorised by a notice under section 60 or a consent under section 61 of this Act.'

There are a number of reasons why s 58 is not appropriate for controlling noise from a construction site. The notice has to be served on the person responsible—see s 58(2). But more important, by s 58(5), in proceedings for an offence under the previous subsection in respect of noise caused in the course of a trade or business, it is a defence to prove that the best practical means have been used for preventing or countering the effects of the noise. The presence of s 58(8) is explained because Parliament wished to enable the local authority to take civil proceedings in cases where s 222 of the Local Government Act 1972 might not be available for use. To this extent there may be a wider power for recourse to civil proceedings under s 58 than under s 60, but what is clear is that in giving express power to invoke the civil jurisdiction to secure control of nuisance by noise,

Parliament did not consider it necessary to restrict the grant of relief to cases where it could be shown that the contravener was deliberately and flagrantly flouting the law.

In the present case I have no doubt that the city council were amply justified in concluding that criminal proceedings under s 60(8) were a wholly inadequate remedy for securing compliance with the notice, that is preventing the occurrence of the nuisance by noise afflicting the residents of Petticoat Square. I do not think that it was necessary for them to prove that the contraventions alleged were criminal offences. I agree with counsel for Bovis that the actus reus of the offence created by s 60(8) is 'without reasonable excuse contravening a requirement of the notice'; but once the contravention is proved, unless the circumstances provide the excuse, it must be for Bovis to say what excuse they have. This they have deliberately chosen not to do, reserving disclosure to the hearing of the informations. While I am satisfied that in these circumstances failure to prove that an offence has occurred is no bar to the granting of relief, it is relevant to the form of injunction granted.

In this case there is no doubt and no dispute that as construction managers Bovis were in full control of the site and, properly served with the s 60 notice. It matters not that the actual work of construction was carried out by trade contractors with direct contracts with the client. It is only necessary to look at cl 4.4 of the Bovis agreement. It reads:

> 'To enable the Construction Manager to carry out the Management Services, the Construction Manager shall be deemed to be in possession of the Site and shall be deemed to be in control of the building operations thereon. The Construction Manager shall comply with and shall procure compliance by his employees, agents, sub-contractors and suppliers, by the Trade Contractors and (provided that they are required to comply with the Construction Manager's regulations governing the conduct of work on the Site) by others on the Site with all their respective duties and obligations under and pursuant to Factories Act 1961, Occupiers' Liability Act 1957, Control of Pollution Act 1974, Health and Safety at Work, etc., Act 1974, Public Health Acts 1975 to 1961 and all statutory re-enactments or modifications thereof and any regulations, rules or orders made pursuant thereto and shall indemnify and keep the Client indemnified in respect of any liability, loss, claim or proceedings of whatsoever nature arising out of or in connection with any breach of their said duties and obligations by any of the Construction Manager, his employees, agents, subcontractors or suppliers or any of the Trade Contractors or others on the Site: Provided always that the Construction Manager's liability to indemnify the Client shall be reduced proportionately to the extent that any negligence of the Client or any of the Several Consultants shall have contributed to any such breach. The Construction Manager shall not be liable under this Clause 4.4 for any loss or damage suffered or incurred by the Client by reason of any requirements or conditions imposed by the local authority by any notice or attached to any consent under Sections 60 and/or 61 of Control of Pollution Act 1974, but he shall be liable for any failure to comply or to procure compliance with any such requirements or conditions. And provided further that nothing contained in this Clause 4.4 shall impose on the Construction Manager a liability for failure of any of the Trade Contractor's Designed Works as provided in the Trade Contracts to comply with the said duties and obligations or failure by others on the Site to carry out the design of any permanent works to be carried out by them in accordance with the said duties and

obligations or failure by the Several Consultants to design the Project in accordance with the said duties and obligations.'

I have read the whole of that provision because it really tells us in a nutshell what the position of Bovis was.

The trade contractors, by the terms of their contracts, were bound to comply with instructions from Bovis. It follows that Bovis could and should have prevented contravention. The evidence shows what the court was entitled to consider a repeated contravention. In the context of the effect of contravention, namely exposing the inhabitants to an assault by noise at times when they were entitled to quiet, in my judgment that repeated contravention was enough to satisfy the something more than infringement stipulated by Lord Templeman, and it matters not that Bovis were protesting their desire to comply with the notice. This is an entirely different situation from the Sunday trading and the gipsy caravan cases. Those cases really show that the defendants intended to go on breaking the law despite prosecution or the threat thereof. Bridge LJ did not say that it was essential to establish an intention to flout the law. The facts of the present case demonstrate the need for the court to come to the help of the residents of Petticoat Square. It would be inexplicable to them and an unwarrantable restriction of the power of the court if it were unable to help because it could not be shown that Bovis was deliberately and flagrantly flouting the law in the ordinary sense of that phrase. Work is not done on a building site on Saturday afternoon by accident. If the work contravenes the notice, that is a deliberate contravention, and in my judgment that is enough. The deputy judge was right to hold that this was a proper case for injunctive relief.

I now turn to the form of the injunction. Section 60(5) provides:

> 'A notice under this section shall be served on the person who appears to the local authority to be carrying out, or going to carry out, the works, and on such other persons appearing to the local authority to be responsible for, or to have control over, the carrying out of the works as the local authority thinks fit.'

These categories are not mutually exclusive. A contractor doing all the work on site with direct labour is within all three categories. In this case the city council was fully justified in saying that it appeared to them that Bovis were carrying out the work. The boards on site proclaimed Bovis loud and clear. It was submitted that before serving the notice the city council should have used its powers under s 93 of the 1974 Act to investigate and get information as to the contractual position on site. I do not think they were under any obligation to do this in this case. In any event, I am satisfied that not only did Bovis appear to be the person carrying out the work but they were in fact carrying out the work within the meaning of those words in sub-s (5). The fact that the trade contractors were doing the physical work on site does not operate to exclude Bovis. The very name 'construction manager' spells out their true position. Not only were they in full control, but they were actively participating in the construction of all structures. Their true position is well illustrated by the events of the 20 February to which I have referred earlier in this judgment.

The second criticism of the form of injunction is that the limits of the offence created by s 60(8) are not reflected in the injunction, because there may be reasonable excuse for working outside permitted hours which is not emergency work. In the end I have come to the conclusion that this criticism is well-founded, even though I regard it as unlikely that the commission of an offence will not occur except in an emergency. I have considered how best to vary the wording

and, subject to any submission made by counsel, I would vary the wording of the injunction to restrain Bovis 'from failing without reasonable excuse to comply with para 1 and the schedule (excluding the last sentence thereof) of the s 60 notice dated 29 April 1987'.

For these reasons I would dismiss this appeal.

BINGHAM LJ. I wholly agree with the judgment delivered by O'Connor LJ. I add my own observations on three aspects of the appeal because I regard the issues raised as being of some general importance.

(1) It is accepted by Bovis that they were correctly served with the s 60 notice under s 60(5) of the Control of Pollution Act 1974 as a person appearing to the local authority to be responsible for or to have control over the carrying out of the works on this site. It is plain that Bovis not only appeared to be but were responsible for and in control of the carrying out of the works. For the reasons which O'Connor LJ has given, I am also of opinion that Bovis were a person carrying out the works. The draftsman of the 1974 Act may well have had in mind contractors and subcontractors as persons who would carry out the works and architects and engineers as persons who would be responsible for or in control of carrying them out. I rather doubt if he had in mind a role such as Bovis perform here because such a role, if it then existed at all, was I think rarely encountered. But the evidence here shows that Bovis were to all (except strictly legal) intents and purposes the main contractor and had clear and extensive powers and duties of control. I think that this hybrid role places them squarely within both classes described in sub-s (5). I see no reason to regard these classes as mutually exclusive. I do not, furthermore, think that this subsection lends itself to the drawing of fine distinctions. The purpose of the subsection is very pragmatic: to enable the local authority to control noise on a building site by serving notice on parties who appear to be in a position to stop or abate or restrict the noise. If a party served contends that he is wrongly served, he has a right of appeal. If he does not appeal (as Bovis did not), and if contraventions are thereafter alleged against him, it will be very hard indeed for him to contend successfully that he was not in a position to stop or abate or restrict the noise.

(2) Unreasonable and excessive noise has for very many years been recognised by the common law as capable of amounting to a nuisance. No one living near a major airport or a busy motorway could doubt the common sense underlying the rule. Nor could the occupants of Petticoat Square over the last 18 months. Noise of this order is not merely an inconvenience or distraction; it may gravely prejudice the ordinary conduct of everyday life and even pose a danger to the health of those most closely affected.

Some of the flats in Petticoat Square are very close indeed—just a street's width away—from the Beaufort House development. By the time the s 60 notice was served, it is plain that the City of London's housing committee were very seriously concerned at the noise nuisance to which the occupants of the flats were being subjected. One common councillor described the noise as horrendous. The notice was served with a view to controlling the noise.

It is of course clear that a site such as this cannot be developed without causing a great deal of noise and consequent inconvenience to local residents. Some balance must be struck between their interests and the general desirability of redeveloping sites of great economic value. The balance struck by this s 60 notice was not unduly favourable to the residents. It permitted a considerable level of noise for ten hours each weekday and five hours each Saturday. In addition, because of the exigencies of working near the railway, it permitted work for some

hours in the early morning and, for traffic reasons, provided for the possible unloading of lorries at night and in the early morning. The protection given by the notice to the residents may well, in all the circumstances, have been reasonable, but it was certainly not excessive. Any protection less than the notice afforded would in my view have been plainly inadequate.

Since this was an interlocutory application to the learned deputy judge, no final findings of fact were or can be made. There is, however, evidence which is on its face compelling to suggest that the notice did not in practice give the residents the protection which it should have done. There is evidence of noise at times not permitted by the notice on more than 13 occasions before the injunction was granted (the last being unknown to the deputy judge). Four of these occasions occurred within a six-day period in September. Four more occurred in a fourteen-day period in October to November. If these had been the only occasions of noise to which the residents were subjected, it would have been bearable. But they occurred during the relatively few hours of peace which the residents were intended to enjoy.

It seems to me strongly arguable that by early November 1987 Bovis would have been amenable to action in any one of a number of ways. An individual resident of Petticoat Square could have sued in private nuisance. The Attorney General could have sued in public nuisance either ex officio or on the relation of the local authority or a resident of Petticoat Square. The local authority could have sued in their own name for public nuisance by virtue of s 222 of the Local Government Act 1972 if they considered it expedient for the protection of the interests of the inhabitants of their area. One cannot at this interlocutory stage assert that those claims would necessarily have succeeded, but on the evidence they would appear to have had a very fair prospect of success.

As it was, none of these procedures was invoked. Instead, the local authority decided in late October to issue summonses under s 60(8) alleging contraventions of the s 60 notice. The first summonses were issued on 3 November. Then, on 12 November, in the light of further complaints, the Lord Mayor having ruled that the matter was by its very nature urgent, authority was given to launch the present proceedings. The local authority considered proceedings to be expedient for the protection of the inhabitants of the area, and the authority given was to prosecute proceedings under s 222 of the 1972 Act.

Although, as I have shown, the injunction sought by the local authority under s 222 need not have been an injunction in support of the criminal law, it is quite plain from the proceedings in fact issued that the injunction sought was so framed. It is accordingly argued for Bovis that no such injunction should have been granted because their breaches of the criminal law, even if serious and persistent, did not on the evidence and on the deputy judge's findings amount to 'deliberate and flagrant flouting of the law'. Such deliberate and flagrant flouting must, it is said, be shown before an injunction in support of the criminal law may properly be granted.

The use of this expression in this context appears to have originated with Oliver J in *Stafford BC v Elkenford Ltd* [1977] 2 All ER 519 at 526. He was not, as I understand his judgment, there defining the facts required to be proved before relief (namely an injunction in support of the criminal law) could be granted, but was describing the situation established in evidence before him which plainly justified the grant of relief. In the Court of Appeal, however, Bridge LJ did describe deliberate and flagrant flouting of the law as the essential foundation for the exercise of the court's discretion to grant an injunction in support of the criminal law (see [1977] 2 All ER 519 at 528, [1977] 1 WLR 324 at 330) and this

passage of Bridge LJ's judgment was cited with approval by Lord Templeman in *Stoke-on-Trent City Council v B & Q (Retail) Ltd* [1984] 2 All ER 332 at 342, [1984] AC 754 at 777 and relied on by Lord Fraser of Tullybelton ([1984] 2 All ER 332 at 335, [1984] AC 754 at 767). This is the foundation of Bovis's submission.

It is made plain by the highest authority that the jurisdiction to grant an injunction in support of the criminal law is exceptional and one of great delicacy to be exercised with caution (*Gouriet v Union of Post Office Workers* [1977] 3 All ER 70 at 83, 91, 99, 117, [1978] AC 435 at 481, 491, 500, 521). Where, as in the present case, Parliament has shown a clear intention that the criminal law shall be the means of enforcing compliance with a statute, the reasons for such caution are plain and were fully explained by their Lordships in *Gouriet*. The criminal law should ordinarily be pursued as the primary means of enforcement. The case law shows that the archetypal case in which this jurisdiction is exercised is one in which a criminal penalty has in practice proved hopelessly inadequate to enforce compliance: see, for example, *A-G v Sharp* [1931] 1 Ch 121, [1930] All ER Rep 741, *A-G v Premier Line Ltd* [1932] 1 Ch 303, *A-G (ex rel Hornchurch UDC) v Bastow* [1957] 1 All ER 497, [1957] 1 QB 514, and *A-G (ex rel Manchester Corp) v Harris* [1960] 3 All ER 207, [1961] 1 QB 74.

I do not, however, think that all the decided cases can be brought within that category. In *A-G v Chaudry* [1971] 3 All ER 938, [1971] 1 WLR 1614 there had been no criminal conviction (and no hearing, because an early hearing date could not be obtained) but the defendants were held to be deliberately flouting the law and the risk of grave and irreparable harm was held to justify the grant of an injunction. In *Kent CC v Batchelor* [1978] 3 All ER 980, [1979] 1 WLR 213 an injunction was granted to restrain breaches of tree preservation orders even though such breaches were an offence and there had been no convictions. In *Runnymede BC v Ball* [1986] 1 All ER 629, [1986] 1 WLR 353 there had been no resort to the criminal law but an injunction was granted because of the risk of irreversible damage. The Court of Appeal there regarded cases of flagrant and deliberate flouting as only one category of case, albeit a very important category, in which such injunctions could be granted.

In *Gouriet v Union of Post Office Workers* [1977] 3 All ER 70 at 99, [1978] AC 435 at 500 Lord Diplock expressed the view that injunctions of this kind should not be granted save where the criminal law had manifestly failed or where there was a risk of grave and irreparable harm. Viscount Dilhorne ([1977] 3 All ER 70 at 91–92, [1978] AC 435 at 491) disavowed the suggestion that these were the only types of case in which the civil courts could and should come to the aid of the criminal law by granting injunctions at the instance of the Attorney General.

The guiding principles must, I think, be: (1) that the jurisdiction is to be invoked and exercised exceptionally and with great caution: see the authorities already cited; (2) that there must certainly be something more than mere infringement of the criminal law before the assistance of civil proceedings can be invoked and accorded for the protection or promotion of the interests of the inhabitants of the area: see *Stoke-on-Trent City Council v B & Q (Retail) Ltd* [1984] 2 All ER 332 at 335, 341, [1984] AC 754 at 767, 776 and *Wychavon DC v Midland Enterprises (Special Events) Ltd* (1986) 86 LGR 83 at 87; (3) that the essential foundation for the exercise of the court's discretion to grant an injunction is not that the offender is deliberately and flagrantly flouting the law but the need to draw the inference that the defendant's unlawful operations will continue unless and until effectively restrained by the law and that nothing short of an injunction will be effective to restrain them: see *Wychavon DC v Midland Enterprises (Special Events) Ltd* (1986) 86 LGR 83 at 89.

It is accepted here that if the preliminary condition of s 222 is met the local authority stands in the same position as the Attorney General. It is not, I think, challenged that the preliminary condition of s 222 is met here. So the question is whether the local authority can show anything more (and, I would interpolate, substantially more) than an alleged and unproven contravention of the criminal law, and whether the inference can be drawn that noise prohibited by the notice will continue unless Bovis are effectively restrained by law and that nothing short of an injunction will effectively restrain them.

I am in no doubt that these questions must be answered in favour of the local authority. The conduct which the local authority seek to restrain is conduct which would have been actionable (if not at the suit of the local authority) in the absence of any statute. Even if the conduct were not criminal, it would probably be unlawful. The contrast with the planning and Sunday trading cases is obvious. I see no reason for the court pedantically to insist on proof of deliberate and flagrant breaches of the criminal law when, as here, there is clear evidence of persistent and serious conduct which may well amount to contravention of the criminal law and which may, at this interlocutory stage, be regarded as showing a public and private nuisance. It is quite plain that the service of the notice and the threat of prosecution have proved quite ineffective to protect the residents.

The local authority have issued 18 summonses but, even if convictions are obtained, the delay before the hearing will deprive the residents of Petticoat Square of any but (at best) minimal benefit. The local authority are charged with a power—and perhaps a corresponding duty—to protect their interests if their interests in the present case were left without protection. In my view the deputy judge was entitled to grant an injunction and was right to do so.

(3) The actus reus of the offence created by s 60(8) of the 1974 Act is in my view the contravention of a requirement of the s 60 notice without reasonable excuse. It is not for the defendant to establish reasonable excuse by way of defence (contrast ss 3(4), 59(5) and 61(8) of that Act, for example) but for the prosecutor to establish lack of reasonable excuse as an ingredient of the offence. Since, in my opinion, having regard to the way this claim is made, the injunction should not be wider than the criminal offence as defined in the Act, I agree that the words 'without reasonable excuse' should appear in the injunction. The deputy judge may well have intended to cover this by his proviso dealing with emergencies. Nothing much short of an emergency, unless an event beyond a party's control, could in my view provide a reasonable excuse for contravention in a case such as this.

I would dismiss the appeal, but would (subject to any further submission) amend the terms of the injunction in accordance with the judgment of O'Connor LJ.

TAYLOR LJ. I also agree. Bovis concede that they were in charge of the site and of the carrying out of the work. Mr Machin QC argues that in the terms of s 60(5) of the Control of Pollution Act 1974, although Bovis were responsible for and had control over the works, they were not carrying them out. Therefore, as these civil proceedings are brought on the footing that Bovis were carrying out the works, they should fail in limine. There are two fallacies in this argument.

First, the categories of person in s 60(5) will not always be mutually exclusive. It is possible for a party to be carrying out the works as well as being in control of them and responsible for them.

Secondly, the actus reus of the criminal offence sought here to be prevented by injunction is carrying out the works in contravention of the notice without

reasonable excuse. What must be proved is presence and participation in that offence. Bovis were present on site. They gave instructions as to what work was to be done and when. That, in my view, is sufficient to amount to participation in carrying out the works. True their men did not flex their muscles or soil their hands, but giving instructions or encouragement or failing to stop the contravention of the notice when they had the power and could reasonably be expected to do so is sufficient participation. By way of example, on 20 February 1988 Bovis's senior site manager took the deliberate decision that a late delivery of mixed concrete should be poured, although this could not be completed within the permitted hours and the work was in clear contravention of the notice. To say Bovis were not carrying out those works simply because the contractor's men physically poured the concrete is an artificial and untenable argument.

Next, Mr Machin contended that an injunction in support of the criminal law can only be granted where there is contumacious conduct. He says that there must be 'a deliberate and flagrant flouting of the law', and he contends that that phrase does not apply to Bovis's conduct in this case, because at all times they desired not to contravene the notice.

The history of that phrase was carefully traced by Sir Roger Ormrod in *Runnymede BC v Ball* [1986] 1 All ER 629, [1986] 1 WLR 353, to which my Lords have referred. He implied that deliberate and flagrant flouting of the law was not the sole and essential precedent to the grant of an injunction. Purchas LJ was more specific in the passage which has already been cited in full by O'Connor LJ. The essence of his approach is as follows, and I adopt it:

> 'In cases where it is necessary to resort to relief at civil law in order to prevent irreparable damage, which might well not be prevented by process in the magistrates' court, then, in my judgment, a local authority should be able to act under s 222 of the 1972 Act. This right should not be restricted to any particular class or classes of infringement, but must depend on the particular facts of each individual case. Obvious instances where s 222 applies are those cases where the conduct past and intended of the offender show that process in the magistrates' court will be inadequate to afford protection to the interests of the local inhabitants ("the deliberate and flagrant flouting cases"). Other circumstances may well arise, eg the failure to avoid fire hazards or the execution of development on land which may well in practice prove irreversible. With great respect to the judge, in limiting the granting of relief to the two categories, ie "inadequate penalty" and "deliberate flouting of the law", in my judgment he fell into error . . .'

(See [1986] 1 All ER 629 at 637, [1986] 1 WLR 353 at 363.)

I agree with those words which are in accordance with the opinions of the majority of the House of Lords in *Stoke-on-Trent City Council v B & Q (Retail) Ltd* [1984] 2 All ER 332, [1984] AC 754. Only Lord Fraser in that case said that deliberate and flagrant flouting of the law was required. The rest of their Lordships did not use the phrase, although they did indicate that great caution should be exercised in granting such injunctions and that something more was required than a bare infringement of the criminal law.

In the present case there is something more. The noise resulting from the works constituted not merely a breach of the criminal law but also a nuisance gravely affecting the local inhabitants. Every disturbed night or weekend they suffer involves irreversible damage. The issue of criminal proceedings did not end the breaches. Time would inevitably pass before those proceedings could be heard. Should they be contested (as we have been told they are to be) and should the proceedings succeed, there would still remain the prospect of an appeal by

way of rehearing causing further delay. In those circumstances, it is clear that criminal proceedings were likely to be ineffective to protect the inhabitants, and I am satisfied that the grant of an injunction was therefore appropriate.

For the reasons given by O'Connor and Bingham LJJ, however, I agree that the terms of the injunction should be varied so as to incorporate the phrase 'without reasonable excuse' contained in the statute.

Appeal dismissed.

Mary Rose Plummer Barrister.

Kirklees Metropolitan Borough Council v Wickes Building Supplies Ltd

HOUSE OF LORDS

LORD KEITH OF KINKEL, LORD ACKNER, LORD GOFF OF CHIEVELEY, LORD JAUNCEY OF TULLICHETTLE AND LORD LOWRY

2–5, 9 MARCH, 25 JUNE 1992

Injunction – Interlocutory – Undertaking as to damages – Local authority seeking to restrain Sunday trading – Local authority having power to enforce statute by prosecution or action for injunction – Whether local authority required to give cross-undertaking in damages in proceedings for injunction – Whether Crown immunity from giving cross-undertaking in damages extending to local authority acting in law enforcement capacity – Whether cross-undertaking in damages required under European law to protect retroactive effect of Community law rights – Shops Act 1950, ss 47, 71(1) – Local Government Act 1972, s 222 – EEC Treaty, art 30.

The appellant local authority sought an interlocutory injunction pursuant to s 222[a] of the Local Government Act 1972 restraining the respondent, a do-it-yourself retailer, until trial from trading on Sundays contrary to s 47[b] of the Shops Act 1950. The local authority declined to give a cross-undertaking in damages and the judge granted the injunction without requiring the authority to do so, on the ground that since the local authority was seeking to enforce the law in its area under its statutory powers it was entitled to the same exemption from giving a cross-undertaking in damages as the Crown had when seeking an interlocutory injunction. The respondent appealed to the Court of Appeal against the grant of an interlocutory injunction without a cross-undertaking in damages. The Court of Appeal allowed the appeal on the ground that the judge ought to have required the local authority to give a cross-undertaking in damages before granting the injunction because the special privilege afforded to the Crown not to give such an undertaking did not extend to local authorities and, furthermore, the respondent ought to be protected by a cross-undertaking pending the decision of the European Court which would establish its right to trade on Sunday if the court ruled that

a Section 222, so far as material, is set out at p 723 *d*, post

b Section 47 provides: 'Every shop shall, save as otherwise provided by this Part of this Act, be closed for the serving of customers on Sunday: Provided that a shop may be open for the serving of customers on Sunday for the purposes of any transaction mentioned in the Fifth Schedule to this Act.'

with the approval of the court, there can, it appears to their Lordships, be no finality in that "acceptance" until sentence is passed. In *Reg. v. Emmanuel* (1981) 74 Cr.App.R. 135 where the defendant was charged in the indictment with alternative counts, the judge approved a proposal by the prosecutor to offer no evidence on the more serious charge and to accept a plea of guilty to the less serious. But, on hearing the facts opened, he changed his mind and withdrew his approval. The defendant was rearraigned and the trial proceeded on both counts. The defendant was convicted of the more serious offence. On appeal it was held that there had been no material irregularity in the proceedings. Their Lordships consider that this case was rightly decided.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. They think it right, however, to express their opinion that, in all the circumstances and having regard, in particular, to the lapse of time between trial and the determination of this appeal, it would be wholly appropriate that the death sentence should now be commuted.

Solicitors: Simons Muirhead & Burton; Charles Russell.

S. S.

[HOUSE OF LORDS]

KIRKLEES METROPOLITAN BOROUGH COUNCIL APPELLANTS

AND

WICKES BUILDING SUPPLIES LTD. . . . . RESPONDENTS

1991 April 15, 16, 17; 30 — Dillon, Mann and Beldam L.JJ.

1992 March 2, 3, 4, 5, 9; June 25 — Lord Keith of Kinkel, Lord Ackner, Lord Goff of Chieveley, Lord Jauncey of Tullichettle and Lord Lowry

Local Government—Powers—Action by local authority—Sunday trading—Local authority seeking interlocutory injunction to restrain breaches of statutory prohibition—Whether local authority to be required to give cross-undertaking in damages—Shops Act 1950 (14 Geo. 6, c. 28), s. 47—Local Government Act 1972 (c. 70), s. 222—E.E.C. Treaty (Cmnd. 5179–II), art. 30

The plaintiffs in two cases, a borough council and a district council, brought proceedings under section 222 of the Local Government Act 1972[1], and applied for interlocutory injunctions

[1] Local Government Act 1972, s. 222: see post, p. 268D–E.

to restrain the defendants in each case from using shop premises of theirs for trade on Sundays in breach of section 47 of the Shops Act 1950[2]. The defendants resisted the claim against them on the ground, inter alia, that section 47 was in conflict with article 30 of the E.E.C. Treaty[3] which, as between member states, prohibited quantitative restrictions on imports and all measures having equivalent effect. The plaintiffs indicated they were not prepared to give cross-undertakings in damages as a condition of being granted interlocutory relief, and the judge made the interlocutory order sought without requiring such a cross-undertaking. On appeal by the defendants, the appeals being heard together, the Court of Appeal allowed the appeals and discharged the injunctions, holding that as a matter of domestic law there was no justification for extending to local authorities bringing proceedings under section 222 of the Act of 1972 to enforce the criminal law the privilege enjoyed by the Crown alone of being granted an interlocutory injunction without giving a cross-undertaking as to damages; and that since it had not been established that the defendants had no defence under article 30 of the E.E.C. Treaty a cross-undertaking as to damages should have been given.

On appeal by the borough council:—

Held, allowing the appeal, (1) that there was no rule that the Crown was exempt from giving a cross-undertaking in damages in law enforcement proceedings, but that the court had a discretion not to require the undertaking and that the discretion extended to other public authorities exercising the function of law enforcement in appropriate circumstances; and that subject to the impact of Community law the courts should have exercised that discretion (post, pp. 265C–D, 274B–E, 275C–D, 283F–G).

Stoke-on-Trent City Council v. B. & Q. (Retail) Ltd. [1984] A.C. 754, H.L.(E.) and *F. Hoffmann-La Roche & Co. A.G. v. Secretary of State for Trade and Industry* [1975] A.C. 295, H.L.(E.) applied.

(2) That a requirement that the plaintiffs should give an undertaking had no justification in Community law since any obligation to make good any damage suffered by the defendants in the event of section 47 being found to be in breach of article 30 of the Treaty would fall upon the United Kingdom Government; that accordingly, the question was to be decided on the ordinary principles of English law and it was within the judge's discretion not to require an undertaking in damages; and that in the circumstances, the grant of an interlocutory injunction was fully justified and should be restored (post, pp. 265C–D, 282B–C, G–283A, 283C–D, F–G).

Bourgoin S.A. v. Ministry of Agriculture, Fisheries and Food [1986] Q.B. 716, C.A.; *Reg v. Secretary of State for Transport, Ex parte Factortame Ltd. (No. 2)* (Case C 213/89) [1991] 1 A.C. 603, E.C.J. and H.L.(E.) and *Francovich v. Republic of Italy* (Joined Cases C 6/90 and C 9/90) [1992] I.R.L.R. 84, E.C.J. considered.

[2] Shops Act 1950, s. 47: "Every shop shall, save as otherwise provided by this Part of this Act, be closed for the serving of customers on Sunday: Provided that a shop may be open for the serving of customers on Sunday for the purposes of any transaction mentioned in Schedule 5 to this Act."

[3] E.E.C. Treaty, art. 30: "Quantitative restrictions on imports and all measures having equivalent effect shall . . . be prohibited between member states."

Per curiam. The power to grant injunctions under section 37 of the Supreme Court Act 1981 is a discretionary power which should not be fettered by rules. Thus the existence of an alleged defence to a criminal prosecution is merely a matter to be taken into account in the exercise of the court's discretion when considering whether it is just and convenient that interlocutory relief should be granted (post, pp. 265C–D, 271B–C, 283F–G).

Decision of the Court of Appeal, post, pp. 240A et seq.; [1991] 3 W.L.R. 985; [1991] 4 All E.R. 240 reversed.

The following cases are referred to in the opinion of Lord Goff of Chieveley:

American Cyanamid Co. v. Ethicon Ltd. [1975] A.C. 396; [1975] 2 W.L.R. 316; [1975] 1 All E.R. 504, H.L.(E.)

Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A. (Case 106/77) [1978] E.C.R. 629, E.C.J.

Bourgoin S.A. v. Ministry of Agriculture, Fisheries and Food [1986] Q.B. 716; [1985] 3 W.L.R. 1027; [1985] 3 All E.R. 585, C.A.

City of London Corporation v. Bovis Construction Ltd. (1988) 86 L.G.R. 660, C.A.

Criminal Proceedings v. A. Marchandise (Case C 332/89), The Times, 6 March 1991, E.C.J.

Francovich v. Republic of Italy (Joined Cases C 6/90 and C 9/90) [1992] I.R.L.R. 84, E.C.J.

Gouriet v. Union of Post Office Workers [1978] A.C. 435; [1977] 3 W.L.R. 300; [1977] 3 All E.R. 70, H.L.(E.)

Hoffmann-La Roche (F.) & Co. A.G. v. Secretary of State for Trade and Industry [1975] A.C. 295; [1974] 3 W.L.R. 104; [1974] 2 All E.R. 1128, H.L.(E.)

Newport Borough Council v. Khan (Sabz Ali) [1990] 1 W.L.R. 1185, C.A.

Portsmouth City Council v. Richards (1988) 87 L.G.R. 757, C.A.

Reg. v. Braintree District Council, Ex parte Willingham (1982) 81 L.G.R. 70, D.C.

Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd. (No. 2) (Case C 213/89) [1991] 1 A.C. 603; [1990] 3 W.L.R. 818; [1991] 1 All E.R. 70, E.C.J. and H.L.(E.)

Smith (W.H.) Do-It-All Ltd. v. Peterborough City Council [1991] 1 Q.B. 304; [1990] 3 W.L.R. 1131; [1991] 4 All E.R. 193, D.C.

Stoke-on-Trent City Council v. B. & Q. Plc. [1991] Ch. 48; [1991] 2 W.L.R. 42; [1991] 4 All E.R. 221

Stoke-on-Trent City Council v. B. & Q. (Retail) Ltd. [1984] A.C. 754; [1984] 2 W.L.R. 929; [1984] 2 All E.R. 332, H.L.(E.)

Torfaen Borough Council v. B. & Q. Plc. (Case 145/88) [1990] 2 Q.B. 19; [1990] 2 W.L.R. 1330; [1990] 1 All E.R. 129, E.C.J.

Union Départementale des Syndicats C.G.T. de l'Aisne v. Sidef Conforama (Case C 312/89), The Times, 6 March 1991, E.C.J.

Zuckerfabrik Süderdithmarschen A.G. v. Hauptzollamt Itzehoe (Joined Cases C 143/88 and C 92/89), The Times, 27 March 1991, E.C.J.

The following additional cases were cited in argument in the House of Lords:

Amministrazione delle Finanze dello Stato v. S.p.A. San Giorgio (Case 199/82) [1983] E.C.R. 3595, E.C.J.

Amylum (G.R.) N.V. v. Council and Commission of the European Communities (Joined Cases 116/77, 124/77 and 143/77) [1978] E.C.R. 893, E.C.J.

Attorney-General v. Chaudry [1971] 1 W.L.R. 1614; [1971] 3 All E.R. 938, C.A.

Attorney-General v. Wright [1988] 1 W.L.R. 164; [1987] 3 All E.R. 579

Blackpool Borough Council v. W. H. Smith Do-It-All Ltd. (unreported), 28 July 1987, Walton J.

Coventry City Council v. Woolworths Plc. [1991] 2 C.M.L.R. 3

D. v. National Society for the Prevention of Cruelty to Children [1978] A.C. 171; [1977] 2 W.L.R. 201; [1977] 1 All E.R. 589, H.L.(E.)

Derbyshire County Council v. Times Newspapers Ltd. [1992] Q.B. 770; [1991] 4 All E.R. 795, Morland J.

Deutsche Milchkontor G.m.b.H. v. Federal Republic of Germany (Joined Cases 205/82 to 215/82) [1983] E.C.R. 2633, E.C.J.

Director General of Fair Trading v. Tobyward Ltd. [1989] 1 W.L.R. 517; [1989] 2 All E.R. 266

Firma Molkerei-Zentrale Westfalen/Lippe G.m.b.H. v. Hauptzollamt Paderborn (Case 28/67) [1968] E.C.R. 143, E.C.J.

Hammersmith London Borough Council v. Magnum Automated Forecourts Ltd. [1978] 1 W.L.R. 50; [1978] 1 All E.R. 401, C.A.

Polydor Ltd. v. Harlequin Record Shops Ltd. [1980] 2 C.M.L.R. 413, C.A.

Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd. [1990] 2 A.C. 85; [1989] 2 W.L.R. 997; [1989] 2 All E.R. 692, H.L.(E.)

Rewe-Zentralfinanz A.G. v. Landwirtschaftskammer für das Saarland (Case 33/76) [1976] E.C.R. 1989, E.C.J.

Rochdale Borough Council v. Anders [1988] 3 All E.R. 490

Runnymede Borough Council v. Ball [1986] 1 W.L.R 353; [1986] 1 All E.R. 629, C.A.

Sierbein v. Westminster City Council (1987) 86 L.G.R. 431, C.A.

Smith v. Inner London Education Authority [1978] 1 All E.R. 411, C.A.

Solihull Metropolitan Borough Council v. Maxfern Ltd. (No. 2) (1976) 75 L.G.R. 392

Stafford Borough Council v. Elkenford Ltd. [1977] 1 W.L.R. 324; [1977] 2 All E.R. 519, C.A.

Waverley Borough Council v. Hilden [1988] 1 W.L.R. 246; [1988] 1 All E.R. 807

Wychavon District Council v. Midland Enterprises (Special Event) Ltd. [1988] 1 C.M.L.R. 397

The following cases are referred to in the judgments in the Court of Appeal:

Allen v. Jambo Holdings Ltd. [1980] 1 W.L.R. 1252; [1980] 2 All E.R. 502, C.A.

American Cyanamid Co. v. Ethicon Ltd. [1975] A.C. 396; [1975] 2 W.L.R. 316; [1975] 1 All E.R. 504, H.L.(E.)

Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A. (Case 106/77) [1978] E.C.R. 629, E.C.J.

Attorney-General v. Logan [1891] 2 Q.B. 100, D.C.

Attorney-General v. Wright [1988] 1 W.L.R. 164; [1987] 3 All E.R. 579

City of London Corporation v. Bovis Construction Ltd. (1988) 86 L.G.R. 660, C.A.

Criminal Proceedings v. A. Marchandise (Case C 332/89), The Times, 6 March 1991, E.C.J.

Director General of Fair Trading v. Tobyward Ltd. [1989] 1 W.L.R. 517; [1989] 2 All E.R. 266

Gateshead Metropolitan Borough Council v. Texas Homecare and Great Mills (unreported), 1 November 1988, A. J. Blackett-Ord Q.C.

Hammersmith London Borough Council v. Magnum Automated Forecourts Ltd. [1978] 1 W.L.R. 50; [1978] 1 All E.R. 401, C.A.

Hoffmann-La Roche (F.) & Co. A.G. v. Secretary of State for Trade and Industry [1975] A.C. 295; [1974] 3 W.L.R. 104; [1974] 2 All E.R. 1128, H.L.(E.)

Reg. v. Goldstein [1983] 1 W.L.R. 151; [1983] 1 All E.R. 434, H.L.(E.)

Reg. v. Licensing Authority Established under Medicines Act 1968, Ex parte Smith Kline & French Laboratories Ltd. (No. 2) [1990] 1 Q.B. 574; [1989] 2 W.L.R. 378; [1989] 2 All E.R. 113, C.A.

Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd. [1990] 2 A.C. 85; [1989] 2 W.L.R. 997; [1989] 2 All E.R. 692, H.L.(E.)

Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd. (No. 2) (Case C 213/89) [1991] 1 A.C. 603; [1990] 3 W.L.R. 818; [1991] 1 All E.R. 70, E.C.J. and H.L.(E.)

Rochdale Borough Council v. Anders [1988] 3 All E.R. 490

Smith (W.H.) Do-It-All Ltd. v. Peterborough City Council [1991] 1 Q.B. 304; [1990] 3 W.L.R. 1131; [1991] 4 All E.R. 193, D.C.

Stoke-on-Trent City Council v. B. & Q. Plc. [1991] Ch. 48; [1991] 2 W.L.R. 42; [1991] 4 All E.R. 221

Stoke-on-Trent City Council v. B. & Q. (Retail) Ltd. [1984] Ch. 1; [1983] 3 W.L.R. 78; [1983] 2 All E.R. 787, C.A.; [1984] A.C. 754; [1984] 2 W.L.R. 929; [1984] 2 All E.R. 332, H.L.(E.)

Stoke-on-Trent City Council v. Toys R Us Ltd. (unreported), 18 October 1990, Sir Nicolas Browne-Wilkinson V.-C.

Torfaen Borough Council v. B. & Q. Plc. (Case 145/88) [1990] 2 Q.B. 19; [1990] 2 W.L.R. 1330; [1990] 1 All E.R. 129, E.C.J.

Union Départementale des Syndicats C.G.T. de l'Aisne v. Sidef Conforama (Case C 312/89), The Times, 6 March 1991, E.C.J.

The following additional cases were cited in argument before the Court of Appeal:

B. & Q. Ltd. v. Shrewsbury and Atcham Borough Council [1990] 3 C.M.L.R. 535

Binns v. Wardale [1946] K.B. 451; [1946] 2 All E.R. 100, D.C.

Bosch (Robert) G.m.b.H. v. Hauptzollamt Hildesheim (Case 135/77) [1978] E.C.R. 855, E.C.J.

Bourgoin S.A. v. Ministry of Agriculture, Fisheries and Food [1986] Q.B. 716; [1985] 3 W.L.R. 1027; [1985] 3 All E.R. 585, C.A.

Gouriet v. Union of Post Office Workers [1978] A.C. 435; [1977] 3 W.L.R. 300; [1977] 3 All E.R. 70, H.L.(E.)

Imperial Tobacco Ltd. v. Attorney-General [1981] A.C. 718; [1980] 2 W.L.R. 466; [1980] 1 All E.R. 866, H.L.(E.)

Newberry v. Cohen's (Smoked Salmon) Ltd. (1956) 54 L.G.R. 343, D.C.

North West Leicestershire District Council v. Gramlo Ltd. (unreported), 13 May 1988; Court of Appeal (Civil Division) Transcript No. 410 of 1988, C.A.

Portsmouth City Council v. Richards (1988) 87 L.G.R. 757, C.A.

Thomas v. Chief Adjudication Officer [1991] 2 Q.B. 164; [1991] 2 W.L.R. 886; [1991] 3 All E.R. 315, C.A.

INTERLOCUTORY APPEALS

KIRKLEES METROPOLITAN BOROUGH COUNCIL v. WICKES BUILDING SUPPLIES LTD.

By a writ dated 17 January 1990 the plaintiff, Kirklees Metropolitan Borough Council, claimed an injunction restraining the defendants, Wickes Building Supplies Ltd. ("Wickes"), whether by themselves, their directors, agents, servants or otherwise howsoever, from using or causing or permitting to be used any premises within the Kirklees area as a retail do-it-yourself trade or business on Sundays except for the purpose of carrying out transactions exempted from the operation of the Shops Act 1950 by section 47 of and Schedule 5 to that Act. By a notice of motion of the same date, the council applied for an interlocutory injunction in the terms of the writ. On 14 May 1990 Mervyn Davies J. [1990] 1 W.L.R. 1237 granted the interlocutory injunctions sought without requiring from the council a cross-undertaking in damages.

By a notice of appeal dated 31 May 1990 the defendants appealed on the grounds, inter alia, that the judge (1) had erred in considering that the serious question to be tried was whether or not the facts were such that section 47 of the Act of 1950 was incompatible with article 30 of the E.E.C. Treaty; he should have held that, in proceedings for an injunction in support of the criminal law, the serious question to be tried was whether the defendants plainly had no defence; (2) should therefore have held that, where the defendants had an arguable defence and in particular a defence based on matters of fact (as was conceded to be the case), the council had not shown that there was a serious question to be tried for the purpose of obtaining an interlocutory injunction; (3) had erred in holding that, although no interlocutory order should be granted if damages would adequately compensate a plaintiff for damage suffered pending trial, that consideration was without effect because the council was not in a position to be compensated in damages; he should have held that there was no evidence of any damage to the council or to anyone else resulting from the defendants' activities; (4) had erred in dealing with the balance of convenience; (5) had erred in holding that he had a discretion to dispense with a cross-undertaking in damages if, as he concluded, the balance of convenience lay in favour of making an order; (6) should have held that *F. Hoffmann-La Roche & Co. A.G. v. Secretary of State for Trade and Industry* [1975] A.C. 295 was distinguishable; and (7), if he had a discretion to dispense with a cross-undertaking, had erred in his exercise of that discretion.

MENDIP DISTRICT COUNCIL v. B. & Q. PLC.

By a writ dated 25 July 1990 the plaintiff, Mendip District Council, claimed an injunction restraining the defendants, B. & Q. Plc. ("B. & Q."), whether by their directors, officers, servants, agents or otherwise howsoever, from opening or causing or permitting to be opened on Sundays their premises at Wirrall Park, Glastonbury, for the serving of customers in breach of section 47 of the Act of 1950. The council sought interlocutory relief in the same terms by a notice of

A motion also dated 25 July 1990. On 1 August 1990 Mummery J. [1991] 1 C.M.L.R. 113 granted the interlocutory injunction sought and did not require from the council a cross-undertaking in damages.

By a notice of appeal dated 14 August 1990, the defendants appealed on the grounds, inter alia, that (1) the judge had been wrong to grant an injunction when the council refused to offer a cross-undertaking in damages; (2) the judge had been wrong to conclude that B there was no serious issue to be determined at trial, and should have held that there was such a serious issue, namely, whether in the exercise of its discretion a civil court ought to entertain an application for or grant an injunction to restrain an alleged breach of the criminal law and thereby deprive the defendants of having the matter tested in a criminal court where (i) two courts of criminal jurisdiction, declining to follow C *Stoke-on-Trent City Council v. B. & Q. Plc.* [1991] Ch. 48, had held that there was or might be a defence to prosecution, and (ii) the evidence disclosed no pressing need for an injunction; (3) the judge's order had failed to protect the defendants' claimed right under article 30 of the E.E.C. Treaty; (4) the judge had failed to give appropriate weight to the existence of a settled practice in relator proceedings and, later, proceedings under section 222 of the Local Government Act 1972, D that a local authority seeking an interlocutory injunction in aid of the criminal law should give a cross-undertaking in damages; and (5) the judge had been wrong to refuse the defendants the opportunity to put in evidence.

The appeals were heard together.

E The facts are stated in the judgment of Dillon L.J.

Andrew Collins Q.C. and *Paul Lasok* for Wickes. Section 47 of the Shops Act 1950 purports to make the opening of shop premises on Sundays for the personal serving of customers a criminal offence, but the Court of Justice of the European Communities has in effect declared F that section 47 is a measure prohibited by article 30 of the E.E.C. Treaty (Cmnd. 5179-II) unless the party relying on section 47 can show that, by way of exception to article 30, section 47 is proportionate to the purpose it seeks to achieve: *Torfaen Borough Council v. B. & Q. Plc.* (Case 145/88) [1990] 2 Q.B. 19, 53C–E. The court is required to examine the object sought to be achieved by section 47 and then decide whether G the section interferes with intra-E.E.C. trade to an extent that is disproportionate to that object, and whether the object could be achieved by an alternative measure which interferes less with that trade.

Unless the proportionality test is satisfied, section 47 cannot provide the foundation for a conviction of Wickes or the basis for injunctive relief under section 222 of the Local Government Act 1972. [Reference was made to *Reg. v. Goldstein* [1983] 1 W.L.R. 151.] The continued H validity or applicability of section 47 is to be decided on a case by case basis until Parliament has considered the matter: *W.H. Smith Do-It-All Ltd. v. Peterborough City Council* [1991] 1 Q.B. 304, 332G–H. The council has not tested in the criminal courts the continued validity or

applicability of section 47 in relation to Wickes and is not prepared to give a cross-undertaking in damages.

It is implicit in *Stoke-on-Trent City Council v. B. & Q. (Retail) Ltd.* [1984] A.C. 754 that an injunction in support of the criminal law should not be granted unless the defendant clearly would have no defence to any criminal prosecution. [Reference was made to *Portsmouth City Council v. Richards* (1988) 87 L.G.R. 757.] At the interlocutory stage, therefore, the council must demonstrate that Wickes plainly would have no defence to a criminal prosecution: see *City of London Corporation v. Bovis Construction Ltd.* (1988) 86 L.G.R. 660, 682. No assertion to that effect is made by the council, nor is any relevant evidence adduced by the council. In *B. & Q. Ltd. v. Shrewsbury and Atcham Borough Council* [1990] 3 C.M.L.R. 535 it was held that article 30 provided a substantial defence to a prosecution under section 47, but the matter is currently pending before the House of Lords on appeal from *Stoke-on-Trent City Council v. B. & Q. Plc.* [1991] Ch. 48.

Contrary to Hoffmann J.'s approach in *Stoke-on-Trent City Council v. B. & Q. Plc.* [1991] Ch. 48, 65H, 69D–F, it is for the court to decide whether proportionality is achieved and the decision must be made on the basis of evidence and not of judicial review-type reasonableness: *Thomas v. Chief Adjudication Officer* [1991] 2 Q.B. 164, 179G and *Torfaen Borough Council v. B. & Q. Plc.* (Case 145/88) [1990] 2 Q.B. 19, 53C–D. Schiemann J. was wrong in his obiter remarks in *W.H. Smith Do-It-All Ltd. v. Peterborough City Council* [1991] 1 Q.B. 304, 341F, 343C–D: see *per* Mustill L.J., at pp. 335D–E, 340B–D.

The decisions in *Union Départementale des Syndicats C.G.T. de l'Aisne v. Sidef Conforama* (Case C 312/89) and *Criminal Proceedings v. A. Marchandise* (Case C 332/89), The Times, 6 March 1991 appear to impose a blanket prohibition on Sunday trading but (a) the legislation in issue in those cases, unlike section 47, applied to all employed persons and not only shop workers; (b) those cases must be taken as deciding that the proportionality test was passed on the facts, and not as impugning the *Torfaen* decision; and (c) the referring courts in those cases do not appear to have made any attempt to quantify the effect on trade of the legislation in issue and to evaluate the objective pursued by that legislation.

The material available to the court at the present stage fails to disclose that the council has any real prospect of succeeding in its claim for a permanent injunction at the trial: *American Cyanamid Co. v. Ethicon Ltd.* [1975] A.C. 396, 408A–B. Moreover, to grant an injunction would in a sense be to usurp the role of Parliament: if the sanction provided by Parliament is inadequate, it is for Parliament to take the appropriate action.

If, however, the council has satisfied the basic conditions for the grant of an injunction, nonetheless no order should be made in the absence of a cross-undertaking in damages given by the council: see *Hammersmith London Borough Council v. Magnum Automated Forecourts Ltd.* [1978] 1 W.L.R. 50. The cross-undertaking is the essential safeguard that normally justifies depriving the defendant of his rights before the respective cases of the plaintiff and defendant have

A been fully heard and determined. In *F. Hoffmann-La Roche & Co. A.G. v. Secretary of State for Trade and Industry* [1975] A.C. 295 it was recognised that there is an exception to the general rule in favour of the Crown where no remedy for the enforcement of the law other than an injunction is available. [Reference was made to *Attorney-General v. Wright* [1988] 1 W.L.R. 164.] In *Rochdale Borough Council v. Anders* [1988] 3 All E.R. 490, Caulfield J. held that the *Hoffmann-La Roche* B case would not prevent him from refusing an injunction to a local authority in the absence of a cross-undertaking.

In principle the exception should not be extended to local authorities in a case such as the present for four reasons. (1) In its capacity of enforcer of the public law the Crown is in a different position from other litigants. Local authorities act for the promotion of the interests of C the inhabitants of their area only: section 222 of the Act of 1972. Even where the plaintiff purports to be acting in order to enforce the law, a cross-undertaking will be required if the defendant can show a strong prima facie case that his conduct is lawful: *Director General of Fair Trading v. Tobyward Ltd.* [1989] 1 W.L.R. 517, 524–525. (2) Parliament has provided a means of enforcement of the Shops Act 1950, namely the criminal law. (3) Unlike the position in the *Hoffmann-La Roche* case, D local authorities have no presumption on which they can rely as to the continued validity of section 47 of the Act of 1950. (4) There were no such enforceable E.E.C. rights at stake in *F. Hoffmann-La Roche & Co. A.G. v. Secretary of State for Trade and Industry* [1975] A.C. 295 as there are in the present case. Such rights must be respected by the courts even where the Crown is the opposing party: *Reg. v. Secretary of* E *State for Transport, Ex parte Factortame Ltd. (No. 2)* (Case C 213/89) [1991] 1 A.C. 603. Article 30 of the E.E.C. Treaty has immediate effect in English law and automatically renders invalid any contrary provisions of English law. The article creates in individuals rights that national courts must protect even where Parliament has not acted so as to discharge the duty imposed by the Treaty: *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.* (Case 106/77) [1978] E.C.R. 629. The F court should decline to exercise its jurisdiction to grant an interim order in aid of the enforcement of disputed legislative measures: *Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd.* [1990] 2 A.C. 85, 141H–142A.

As to the balance of convenience, (1) there can be no conceivable loss to the council if Wickes wins at the trial, but there is ample G evidence of financial loss to Wickes if an interlocutory injunction is granted; and (2) to refuse the relief sought would not deprive section 47 of its legal effect, but would merely limit the council to the means of enforcement (criminal prosecution) envisaged by Parliament in the Act of 1950. The balance of convenience is therefore against the grant of relief. Mervyn Davies J. [1990] 1 W.L.R. 1237, 1243–1244, misdirected himself on that issue since much of what he said cannot stand with the H decisions in *Torfaen Borough Council v. B. & Q. Plc.* (Case 145/88) [1990] 2 Q.B. 19 and *Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd. (No. 2)* (Case C 213/89) [1991] 1 A.C. 603. His exercise of his discretion is therefore open to question.

Three observations are relevant to the exercise of the discretion. (1) Section 47 of the Act of 1950 and Schedule 5 to the Act taken together are full of anomalies which cannot be justified: see *Binns v. Wardale* [1946] K.B. 451, 456–457, 460 and *Newberry v. Cohen's (Smoked Salmon) Ltd.* (1956) 54 L.G.R. 343, 344–345. (2) There is no question of Wickes deliberately flouting the criminal law without any colour of justification. (3) It is clear that the application for interlocutory relief has been made not because that relief is the only way of ensuring respect for what the council believes to be the law, but because the council does not wish to be obliged to compensate Wickes for infringing Wickes' rights if the council loses at the trial.

John Samuels Q.C., *Gerald Barling Q.C.* and *Nicholas Davidson* for B. & Q. There is the greatest difference between a serious challenge to a provision of the law (which the present case is) and contumacious disregard of that provision (which it is not). B. & Q. adopt the argument for Wickes but, in relation to domestic law, two particular points call for elaboration.

(1) Mummery J. [1991] 1 C.M.L.R. 113, 118 was wrong to hold that the district council must succeed at the trial and, therefore, there was no serious issue to be tried. Some criminal courts have declined to follow the decision in *Stoke-on-Trent City Council v. B. & Q. Plc.* [1991] Ch. 48. It is not open to the High Court in a civil action to be satisfied that conduct is criminal if criminal courts have said that they are not so satisfied, since the High Court would thereby usurp the functions of the criminal courts and render the administration of justice chaotic: *Imperial Tobacco Ltd. v. Attorney-General* [1981] A.C. 718, 742, 746, 752. It would be improper for the High Court in such circumstances to grant a permanent injunction restraining the conduct in question, and wrong for it to grant a declaration having similar effect: *North West Leicestershire District Council v. Gramlo Ltd.* (unreported), 13 May 1988; Court of Appeal (Civil Division) Transcript No. 410 of 1988.

(2) Since the mid-19th century and until the 1970s the applicant for an injunction, including the relator in a relator action, had been required to offer a cross-undertaking in damages as the price of the grant of the injunction: *F. Hoffmann-La Roche & Co. A.G. v. Secretary of State for Trade and Industry* [1975] A.C. 295, 360–363. Any special rule relating to the Crown depended on the dignity of the Crown. When section 222 of the Act of 1972 was enacted, Parliament, had it intended to free local authorities from the burden of having to give cross-undertakings, would have done so. However, starting with *Rochdale Borough Council v. Anders* [1988] 3 All E.R. 490, a judicial view has developed that in certain circumstances a local authority can be excused from giving the cross-undertaking, and injunctions without cross-undertakings have been granted to local authorities: see, e.g. *Gateshead Metropolitan Borough Council v. Texas Homecare and Great Mills* (unreported), 1 November 1988. What started as an exception should not degenerate into a rule. There is no warrant in the *Hoffmann-La Roche* case, or justification in principle, for the departure from the general rule, given that the purpose of interlocutory relief is to preserve the status quo and prevent irreparable damage to either party before the merits have been finally

A determined. There is even less justification where the defendant has offered to comply until trial with what the plaintiff says is the law, subject to the giving of a cross-undertaking.

Barling Q.C. following. Where an E.E.C. provision confers rights on individuals and has direct effect, the courts of a member state have a duty to set aside any incompatible national legislative measure and must do so with "unrestricted retroactive effect so as to prevent the rights in B question from being in any way adversely affected:" see *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.* (Case 106/77) [1978] E.C.R. 629, 643, 644–645. That principle applies not only where the E.E.C. right has been conclusively established, but also, on an interim basis, where there is a genuine claim to such a right: *Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd. (No. 2)* (Case C 213/89) C [1991] 1 A.C. 603, 643–644. B. & Q. have a serious claim that section 47 of the Act of 1950 is incompatible with the rights conferred by article 30 of the E.E.C. Treaty: similar issues have gone to the House of Lords on appeal from *Stoke-on-Trent City Council v. B. & Q. Plc.* [1991] Ch. 48. [Reference was also made to *W.H. Smith Do-It-All Ltd. v. Peterborough City Council* [1991] 1 Q.B. 304.] If B. & Q. in due course establish an E.E.C. right without having obtained a cross- D undertaking, that right will have been unprotected in the meantime and the *Simmenthal* principle breached. The position is much clearer than that in *Ex parte Factortame Ltd. (No. 2)*, where a cross-undertaking would have been meaningless since damages would not have provided an adequate remedy. [Reference was made to *Bourgoin S.A. v. Ministry of Agriculture, Fisheries and Food* [1986] Q.B. 716.]

E *Union Départementale des Syndicats C.G.T. de l'Aisne v. Sidef Conforama* (Case C 312/89) and *Criminal Proceedings v. A. Marchandise* (Case C 332/89), The Times, 6 March 1991 do not affect the decision in *Torfaen Borough Council v. B. & Q. Plc.* (Case 145/88) [1990] 2 Q.B. 19, 53, para. 16 that in the present context the English court is to decide the issue of proportionality on the relevant evidence. Far from casting doubt on the *Torfaen* case those decisions expressly pray in aid the F judgment in that case. [Reference was made to *Robert Bosch G.m.b.H. v. Hauptzollamt Hildesheim* (Case 135/77) [1978] E.C.R. 855.]

Stuart Isaacs Q.C. and *Timothy Straker* for the borough council and *Stuart Isaacs Q.C.* and *Neil Calver* for the district council. At the very lowest, the councils have established that there is a serious issue to be tried, on the footing that the defendants' conduct was unlawful; but the G central issue in the appeals is the cross-undertaking in damages.

A cross-undertaking is normally required as the price of the grant of an interlocutory injunction, but the purpose of the requirement is to protect any right that the defendant may have. The present cases are special in that the defendants have no defence to the actions and no rights that require protection, because the relevant law has already been unequivocally determined against them. In *Stoke-on-Trent City Council* H *v. B. & Q. Plc.* [1991] Ch. 48 Hoffmann J. gave full consideration to *W.H. Smith Do-It-All Ltd. v. Peterborough City Council* [1991] 1 Q.B. 304 and resolved, in a sense wholly against the defendants, the question of the proportionality of section 47. Unless and until it is overturned on

appeal this decision represents the law: see *Stoke-on-Trent City Council v. Toys R Us Ltd.* (unreported), 18 October 1990. The reasonableness of a measure and its proportionality do not necessarily involve separate tests.

Union Départementale des Syndicats C.G.T. de l'Aisne v. Sidef Conforama (Case C 312/89) and *Criminal Proceedings v. A. Marchandise* (Case C 332/89), The Times, 6 March 1991 are also decisions against the defendants. That they are decisions of the full European Court of Justice, rather than a chamber of the court, shows that (a) the point for decision was considered important and (b) the *Torfaen* decision was felt to be not wholly satisfactory. In the *Conforama* and *Marchandise* cases it was held that the prohibition in article 30 "does not apply to national legislation prohibiting the employment of staff on Sundays," but there was no mention of the rider in the *Torfaen* decision [1990] 2 Q.B. 19, 53F–G: "where the restrictive effects on Community trade which may result therefrom do not exceed the effects intrinsic to rules of that kind." The reason for the omission of the rider was that the full court accepted the argument of the Advocate General that in the *Torfaen* case the court was wrong to leave the question of proportionality to be decided on a factual basis by the national courts. Thus, the full court has, on material which is no different in relevant respects from that in the *Torfaen* case, (a) adjudged that proportionality is purely a question of law for the European Court of Justice and (b) given a ruling on that question which destroys the purported defence of the defendants. See, also, *Reg. v. Goldstein* [1983] 1 W.L.R. 151 for the meaning and effect of article 30 as a question of E.E.C. law.

If the defendants' submissions in relation to the *Conforama* and *Marchandise* cases are right, the consequence will be the anomalies (1) that English and Welsh prosecutors will be in a more disadvantageous position than French and Belgian ones and (2) that prosecutors other than in England, Wales, France and Belgium will still not know on what basis they are to proceed. The councils do not attempt to justify the illogicalities in Schedule 5 to the Act of 1950, but there are similar illogicalities in the national legislation under consideration in the *Conforama* and *Marchandise* cases and such illogicalities are in any event not material in the present context.

Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A. (Case 106/77) [1978] E.C.R. 629 is irrelevant to the cases since the defendants have no E.E.C. right. That case does not decide that there is no discretion to grant an interlocutory injunction in the absence of a cross-undertaking. The effect of the defendants' submissions is to ignore the two-stage approach referred to by Lord Goff of Chieveley in *Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd. (No. 2)* (Case C 213/89) [1991] 1 A.C. 603, 672, since if a cross-undertaking in damages is automatically required, one cannot ever get beyond the first stage. The defendants' submissions are tantamount to the assertion that *Ex parte Factortame Ltd. (No. 2)* was wrongly decided.

Section 71 of the Act of 1950 imposes an obligation on local authorities to secure observance of section 47, but the only means of securing such observance envisaged by section 71 are criminal proceedings.

The power to enforce such observance in civil proceedings is conferred by section 222 of the Act of 1972 read in conjunction with section 71: *Stoke-on-Trent City Council v. B. & Q. (Retail) Ltd.* [1984] Ch. 1, 22–23, 26, 32 and [1984] A.C. 754, 755. In enforcing the criminal law by way of section 222 the local authority exercises a jus publicum function since (1) it seeks no private advantage, (2) the costs of the proceedings are met by public funds raised out of taxation, and (3) the proceedings affect members of the public who are not parties. The local authority's jurisdiction in this regard is not simply an extension to the relator jurisdiction, and its law enforcement function is indistinguishable from that of the Crown: *Stoke-on-Trent City Council v. B. & Q. (Retail) Ltd.* [1984] A.C. 754, 771, 773; *Gouriet v. Union of Post Office Workers* [1978] A.C. 435, 481, 494 and *F. Hoffmann-La Roche & Co. A.G. v. Secretary of State for Trade and Industry* [1975] A.C. 295, 341, 350–352, 360–365, 371.

It is not correct that the cross-undertaking can only be dispensed with where an injunction is the only available remedy: see the *Hoffmann-La Roche* case [1975] A.C. 295, 364E–F. Even if that is wrong, a cross-undertaking can be dispensed with where, as here, an injunction is the only *effective* remedy: see e.g. *Portsmouth City Council v. Richards* (1988) 87 L.G.R. 757.

The councils adopt what Mervyn Davies J. [1990] 1 W.L.R. 1237, 1246D–H said about *Hammersmith London Borough Council v. Magnum Automated Forecourts Ltd.* [1978] 1 W.L.R. 50. Hoffmann J.'s statement in *Attorney-General v. Wright* [1988] 1 W.L.R. 164, 166C–E about the Crown's law enforcement function in injunction proceedings applies equally to local authorities. As to *Director General of Fair Trading v. Tobyward Ltd.* [1989] 1 W.L.R. 517, local authorities will be deterred from taking enforcement proceedings if cross-undertakings are required. The reasoning of Caulfield J. in *Rochdale Borough Council v. Anders* [1988] 3 All E.R. 490, 493B, is inherently contradictory: cf. *Gateshead Metropolitan Borough Council v. Texas Homecare and Great Mills* (unreported), 1 November 1988. In any event, the *Rochdale Borough Council* case is distinguishable from the present case on the facts. *City of London Corporation v. Bovis Construction Ltd.*, 86 L.G.R. 660 supports the councils' case.

[DILLON L.J. You need not deal with the argument based on *Imperial Tobacco Ltd. v. Attorney-General* [1981] A.C. 718.]

As to the exercise of discretion, the following additional matters are material. (1) Even in a private law action a full cross-undertaking in damages is not always required: *Allen v. Jambo Holdings Ltd.* [1980] 1 W.L.R. 1252. (2) Not only pecuniary damage but also the wider damage to the inhabitants of the councils' areas should be taken into account. (3) It cannot be right that a local authority which applies for an injunction is in a worse position than one which brings a prosecution: a prosecutor is not required to give a cross-undertaking in damages. (4) The criminal remedy of local authorities is at present being stultified since there has been a clear trend to adjourn prosecutions.

Lasok replied.

Samuels Q.C. replied.

Cur. adv. vult.

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30 April. The following judgments were handed down.

DILLON L.J. The court has before it two interlocutory appeals which raise the same issue. One is an appeal by the defendants in the first action, Wickes Building Supplies Ltd. ("Wickes"), against an order of Mervyn Davies J. of 14 May 1990 [1990] 1 W.L.R. 1237 whereby he granted the plaintiff in that action, Kirklees Metropolitan Borough Council, an injunction restraining Wickes until judgment or further order from using or causing or permitting to be used any premises within the Kirklees area as a retail do-it-yourself centre or for the purpose of any other retail trade or business on Sundays except for the purpose of carrying out transactions exempted from the operation of section 47 of the Shops Act 1950 by Schedule 5 to that Act. That injunction applies in particular to premises of Wickes at Huddersfield and Dewsbury.

The other appeal is an appeal by the defendants in the second action, B. & Q. Plc. ("B. & Q."), against an order of Mummery J. of 1 August 1990 [1991] 1 C.M.L.R. 113 whereby he granted the plaintiff in that action, Mendip District Council, an injunction restraining B. & Q. until judgment or further order from opening or causing or permitting to be opened on Sundays B. & Q.'s premises at Wirrall Park, Glastonbury, for the serving of customers in breach of section 47 of the Shops Act 1950.

The special factor in these two appeals which distinguishes them from the numerous other Sunday trading cases which have previously come before this court is that Mervyn Davies J. decided that it was appropriate to grant the injunction without requiring the usual cross-undertaking in damages from the plaintiff council. Mummery J. in the *Mendip* case followed the decision of Mervyn Davies J. We were told by counsel that since the decision of Mervyn Davies J., the judges of the Chancery Division have granted as many as 100 interlocutory injunctions to local authorities to restrain Sunday trading without requiring those authorities to give cross-undertakings in damages.

The criminal and civil courts in this country have had to deal for quite a few years past with the enforcement of section 47 at the suit of local authorities in England or Wales against retailers, and in particular retailers owning chains of do-it-yourself shops, which object to keeping their shops closed on Sundays. The Scottish courts have not been troubled by the problem since there is no comparable legislation in force in Scotland. Latterly the retailers have asserted, as a defence to claims to enforce section 47 whether in the criminal or civil courts, that section 47 is contrary to article 30 of the E.E.C. Treaty and is thus void and unenforceable. Article 30 provides, in now familiar wording: "Quantitative restrictions on imports and all measures having equivalent effect shall . . . be prohibited between member states." It is common ground that article 30 creates rights in those injured by its infringement which are directly enforceable in the national courts of the member states of the Community.

There has already been one decision of the Court of Justice of the European Communities in relation to section 47. That was in *Torfaen*

Borough Council v. B. & Q. Plc. (Case 145/88) [1990] 2 Q.B. 19 on a reference by the Cwmbran Magistrates' Court in the course of criminal proceedings against B. & Q. in that court. The decision of the Court of Justice in the *Torfaen* case has also been considered by the Court of Justice in two further cases, both heard and decided together, *Union Départementale des Syndicats C.G.T. de l'Aisne v. Sidef Conforama* (Case C 312/89) and *Criminal Proceedings v. A. Marchandise* (Case C 332/89), The Times, 6 March 1991, in which the court upheld the validity of the Sunday trading restrictions of France and Belgium.

The actual ruling of the Court of Justice in the *Torfaen* case was [1990] 2 Q.B. 19, 53:

> "article 30 of the E.E.C. Treaty must be interpreted as meaning that the prohibition which it lays down does not apply to national rules prohibiting retailers from opening their premises on Sunday where the restrictive effects on Community trade which may result therefrom do not exceed the effects intrinsic to rules of that kind."

In paragraph 16 of the judgment, at p. 53, it is stated that the question whether the effects of specific national rules do in fact remain within the limits permissible in relation to article 30 is a question of fact to be determined by the national court. That ruling in the *Torfaen* case has been interpreted by the Court of Justice in paragraph 10 of its judgment in the *Conforama* case and in the corresponding paragraph, paragraph 11, of its judgment in the *Marchandise* case as follows:

> "In the *Torfaen* judgment the court ruled, in relation to similar national legislation prohibiting the opening of retail shops on Sundays, that such a prohibition was not compatible with the principle of the free movement of goods provided for in the Treaty unless any obstacle to Community trade thereby created did not exceed what was necessary in order to ensure the attainment of the objective in view and unless that objective was justified with regard to Community law."

By way of apparent contrast to the ruling in the *Torfaen* case, however, the actual ruling of the Court of Justice in the *Conforama* case, at paragraph 13, and the *Marchandise* case, at paragraph 14, was:

> "the prohibition contained in article 30 of the Treaty, properly construed, does not apply to national legislation prohibiting the employment of staff on Sundays . . ."

Mr. Isaacs has, consequently, submitted that by its decisions in the *Conforama* and *Marchandise* cases the Court of Justice has tacitly rejected the view expressed in paragraph 16 of the judgment in the *Torfaen* case. It follows therefore, he says, that the application of article 30 is a matter of Community law for the Court of Justice and that the decisions in the *Conforama* and *Marchandise* cases upholding the French and Belgian Sunday trading laws necessarily involve that article 30 does not apply to section 47. He submits therefore that this court should deal with these appeals on the footing that Wickes and B. & Q. have no European law defence to the claims against them.

I do not regard it as at all clear that the Court of Justice has resiled, as Mr. Isaacs suggests, from the view expressed in paragraph 16 in its judgment in the *Torfaen* case. There is nothing on the face of the judgments in the *Conforama* and *Marchandise* cases to explain why the actual decisions in those cases are worded differently from the wording of the decision in the *Torfaen* case. If therefore it was necessary to reach a conclusion on these submissions of Mr. Isaacs in order to dispose of the present appeals, I should feel bound to direct a fresh reference to the Court of Justice.

Mr. Isaacs takes the further point that the issues of European law as to the application of *Torfaen Borough Council v. B. & Q. Plc.* (Case 145/88) [1990] 2 Q.B. 19 on which Wickes and B. & Q. seek to rely have been decided in favour of local authorities by Hoffmann J. in a final, as opposed to interlocutory, judgment in *Stoke-on-Trent City Council v. B. & Q. Plc.* [1991] Ch. 48. He points out that that judgment was referred to by Sir Nicolas Browne-Wilkinson V.-C. in *Stoke-on-Trent City Council v. Toys R Us Ltd.* (unreported), 18 October 1990, as a definitive judgment so far as courts at first instance are concerned. The judgment of Hoffmann J. is however the subject of a leap-frog appeal to the House of Lords which is due to be heard in May 1991, and it is not for this court to attempt to predict the decision of the House of Lords.*

We must therefore approach these interlocutory appeals on the footing that it is possible that the House of Lords may take a different view of the law from that of Hoffmann J. and/or that the Court of Justice may give a further ruling which is contrary, in its application to section 47, to the submissions of Mr. Isaacs as to the effect of the decisions in *Union Départementale des Syndicats C.G.T. de l'Aisne v. Sidef Conforama* (Case C 312/89) and *Criminal Proceedings v. A. Marchandise* (Case C 332/89), The Times, 6 March 1991. In saying this, I am comforted by the well known observations of Sir Robert Megarry V.-C. as to the open-and-shut case which turned out not to be so, etc.

It was submitted for Wickes and B. & Q. that so long as E.E.C. law has not been finally determined against them they have an arguable defence to any prosecution for Sunday trading which might be brought against them under the Shops Act 1950, and that therefore it is wrong and inappropriate for the plaintiff councils to invoke the civil law and relief by way of injunction in civil proceedings against them. On the view I take on the issues as to the cross-undertaking in damages it is unnecessary to consider that submission.

The issues as to the cross-undertaking are fundamental because the two councils made it plain in the courts below and again in argument in this court that they are not prepared to give any cross-undertaking in damages. If therefore this court is of the view that the judges below were wrong to dispense with the cross-undertaking, these appeals must be allowed and the injunctions granted at first instance must be discharged.

* *Reporter's note.* On 20 May 1991 the House of Lords made a reference of certain questions to the Court of Justice of the European Communities.

A The history of the cross-undertaking in damages is conveniently set out by Lord Diplock in his speech in *F. Hoffmann-La Roche & Co. A.G. v. Secretary of State for Trade and Industry* [1975] A.C. 295, 360E–361H. Its importance is further underlined in Lord Diplock's speech in *American Cyanamid Co. v. Ethicon Ltd.* [1975] A.C. 396, 407–409. As Lord Diplock stated in the *Hoffmann-La Roche* case, at p. 360F, by the end of the 19th century, "the insertion of such an undertaking in all B orders for interim injunctions granted in litigation between subject and subject had become a matter of course."

Even in *Allen v. Jambo Holdings Ltd.* [1980] 1 W.L.R. 1252, where an interlocutory injunction had been obtained by a legally aided plaintiff who had very few assets to support the cross-undertaking and the defendants applied, albeit unsuccessfully, for the injunction to be C discharged on the ground of the plaintiff's impecuniosity, the cross-undertaking was given for what it was worth. So far as my own experience goes, it was the universal practice, as between subjects, to require the cross-undertaking however overwhelmingly strong the plaintiff's case might appear to be, since it was not the function of the court, hearing an application for an interlocutory injunction, to anticipate the outcome of the trial. A plaintiff who was not willing to give the D cross-undertaking could not obtain an interlocutory injunction; he would have to press for a speedy trial without interim relief, or, if circumstances permitted, obtain a judgment under R.S.C., Ord. 14, or a default judgment or judgment on admissions.

There was however an exception in favour of the Crown. It was the practice, before the Crown Proceedings Act 1947, not to require the E cross-undertaking as to damages from the Crown, when the Crown obtained an interlocutory injunction. The reasons for that practice are examined by the House of Lords in *F. Hoffmann-La Roche & Co. A.G. v. Secretary of State for Trade and Industry* [1975] A.C. 295. In that case their Lordships, affirming the decision of this court, held, according to the summary at p. 296, that in a case where the Crown sought by injunction to enforce what was prima facie the law of the land, the F person against whom it sought the injunction was required to show very good reason why the Crown should be required to give the cross-undertaking as a condition of being granted the injunction.

In the first of the appeals before us, Mervyn Davies J. [1990] 1 W.L.R. 1237 extended the Crown's exemption recognised in the *Hoffmann-La Roche* case to cases where a local authority as plaintiff is seeking under G statutory powers to enforce within its area what is claimed to be the law. That course was followed by Mummery J. [1991] 1 C.M.L.R. 113 in the second appeal, and by other judges in numerous other cases, as already mentioned. Mervyn Davies J. may have thought that he was merely exercising his discretion in the particular case before him, but what he has in fact done is to lay down a new principle of law. This court is therefore fully entitled to consider whether that new principle is justified, as a matter H of domestic law or in the context of European law.

I consider European law first. It is now clear, and accepted by both sides from the decisions of the Court of Justice in *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.* (Case 106/77) [1978] E.C.R. **98**

629 and *Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd. (No. 2)* (Case C 213/89) [1991] 1 A.C. 603 that where a provision of national legislation is in conflict with a requirement of Community law, the national court, having a duty to give effect to that requirement of Community law, has immediate power to override the national legislative provision, and does not have to await the setting aside of that provision by legislative or other constitutional means or by specific decision of the Court of Justice: see paras. 13 to 26 of the *Simmenthal* decision, at pp. 643–645.

The examination by the Court of Justice in the *Simmenthal* decision was to ascertain what consequences flowed from the direct applicability of a provision of Community law in the event of incompatibility with a legislative provision of a member state: see para. 13, p. 643. The conclusion in para. 25, at pp. 644–645, was that the setting aside of the incompatible legislative provision of the member state "must in every case have unrestricted retroactive effect so as to prevent the rights in question from being in any way adversely affected."

It is the duty of the national court to ensure the legal protection which persons derive from the direct effect of provisions of Community law: see para. 19 of the decision in *Ex parte Factortame Ltd. (No. 2)* [1991] 1 A.C. 603, 643–644.

If therefore Wickes and B. & Q. are right that section 47 of the Shops Act 1950 is incompatible with article 30 of the E.E.C. Treaty and is thereby overridden, they have a current right to open their stores for Sunday trading, and it is the duty of the national courts to protect that right. If there is no cross-undertaking, the right to trade on Sunday will, assumedly, be established at the trial, but without the unrestricted retroactive effect required by the *Simmenthal* case. In that event, Wickes and B. & Q. will have been adversely affected by having been restrained by injunctions from Sunday trading pending the trial, without any compensation. On the facts that is clearly proved.

Consequently, in my judgment, the court is under European law bound to require cross-undertakings in damages from the plaintiff councils if interlocutory injunctions to restrain Sunday trading until judgment or further order are to be granted. That in itself leads to the conclusion that these appeals must be allowed, since the cross-undertakings are not forthcoming. On this aspect the courts below had, and this court has, no discretion.

I am however further of the view that, even as a matter of domestic law, Mervyn Davies J. [1990] 1 W.L.R. 1237 was wrong to extend to local authorities the Crown immunity from giving a cross-undertaking in damages which was upheld in *F. Hoffmann-La Roche & Co. A.G. v. Secretary of State for Trade and Industry* [1975] A.C. 295.

The present, and similar, proceedings are brought by local authorities under section 222 of the Local Government Act 1972 which provides:

> "(1) Where a local authority consider it expedient for the promotion or protection of the interests of the inhabitants of their area—
> (*a*) they may prosecute or defend or appear in any legal proceedings and, in the case of civil proceedings, may institute them in their own name . . ."

Before the enactment of that section, a local authority could not bring civil proceedings for an injunction in its own name. It could only come to court for such relief as the relator in a relator action brought by the Attorney-General. But though a relator action was always brought to enforce public rights or public law, it was accepted practice, never challenged, that if an interlocutory injunction was sought the relator, although not the Attorney-General, must give the usual cross-undertaking in damages. So equally after section 222 was enacted, local authorities which instituted proceedings in their own names for injunctions habitually gave the cross-undertakings if they obtained interlocutory injunctions.

If a contrary rule is now to apply, is it only to apply when a local authority is seeking to enforce the law as declared in a public and general Act of Parliament, or in a statutory instrument made under a public and general Act of Parliament? Or is it to extend to the enforcement of provisions in a local Act of Parliament, of which there are many promoted by local authorities, or provisions in the local authority's own byelaws? If the dispensation extends so far, does it also extend to statutory corporations, such as those established to run the nationalised industries? These have a duty to provide services in the public interest, and some such as British Rail may need to obtain injunctions to protect those services in the public interest. Moreover, some statutory corporations have statutory powers to make and enforce byelaws which are binding on the public. Privately owned companies such as water companies which acquired formerly nationalised undertakings on privatisation may have similar powers.

The position of the Crown has, in my judgment, always been regarded as exceptional, and is still to be so regarded: see *Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd.* [1990] 2 A.C. 85 in so far as the House of Lords there overruled the majority decision of this court in *Reg. v. Licensing Authority Established under Medicines Act 1968, Ex parte Smith Kline & French Laboratories Ltd. (No. 2)* [1990] 1 Q.B. 574. I see no need to extend, and no sufficient justification for extending, to local authorities the special privilege of the Crown not to give a cross-undertaking as to damages when it obtains an interlocutory injunction. That privilege, as upheld in the *Hoffmann-La Roche* case, was a privilege of the Crown alone.

In my judgment, Mervyn Davies J. misdirected himself on this point, and on this ground also I would allow these appeals.

The cross-undertaking is exacted as a matter of elementary fairness when an interlocutory injunction is granted in advance of the determination of the parties' rights at a trial. No doubt local authorities would the more readily start proceedings to enforce this, that or the other law and apply for interlocutory injunctions to that end if they knew that if they failed at the trial to establish infringement, and so the injunctions should never have been granted, they would still be free from all liability to compensate the other party for loss occasioned by the injunction wrongly granted. They would be similarly encouraged if they knew that if they failed they would not have to pay the costs of the other party, but that has never been the law. Moreover, it is for the legislature, and not the courts, to yield, if so minded, to the threat of

the local authorities that unless they are accorded the privileged position of the Crown in relation to the cross-undertaking, they will not perform their duty under section 71 of the Shops Act 1950 to enforce section 47, if it is valid under Community law, by the only means of enforcement which has proved effective, sc. by injunction.

MANN L.J. I gratefully adopt the description of the circumstances giving rise to these two interlocutory appeals which has been given by Dillon L.J. The appeals raise only one question. It is this. Were the judges in the courts below correct in principle when they exercised their discretion so as to grant interim injunctions to the plaintiff councils without those plaintiffs having first given an undertaking in damages? The question is so confined because each defendant would have submitted to an injunction until trial or order had the undertaking been given. The question raises issues of some general importance.

The practice of refusing an interim injunction where a plaintiff refuses to give an undertaking in damages is of long standing. To require an undertaking is the usual course where it would afford protection to the defendant against loss sustained by him in refraining from doing what he may (however improbably) establish he was entitled to do. There is no dispute but that an undertaking would protect the defendants against loss caused by the closure of their shops on Sundays. Had that not been so, then other matters would have arisen for consideration in that there would have had to be struck a balance of convenience having regard to all the circumstances of the case. Examples of such a process are *Allen v. Jambo Holdings Ltd.* [1980] 1 W.L.R. 1252, where an undertaking had been given by a plaintiff who was impecunious, and *Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd. (No. 2)* (Case C 213/89) [1991] 1 A.C. 603 where an undertaking would have had no effective meaning.

Mervyn Davies J. departed from the usual course in the *Kirklees* case and gave his reasons for departure [1990] 1 W.L.R. 1237, 1246–1247:

> "In my view I do have . . . a discretion [to dispense with an undertaking]. I say that because if the practice of exacting an undertaking is not applied as of course against the Crown as a condition of the grant of an interlocutory injunction in a law enforcement action then the practice ought not to be applied as of course against a local authority when the local authority engages in its law enforcement duties."

Mummery J. in the *Mendip* case understandably thought it appropriate that he should follow Mervyn Davies J. in what was an indistinguishable situation: see [1991] 1 C.M.L.R. 113, 118, para. 16. We were told that over 100 interim injunctions in restraint of Sunday trade have now been granted in the Chancery Division on a similar basis.

Section 222(1) of the Local Government Act 1972 enables a local authority to institute legal proceedings in its own name where it "consider[s] it expedient for the promotion or protection of the interests of the inhabitants of [its] area." This provision enables a local authority

A to seek an injunction to restrain breaches of an enactment, and in particular of section 47 of the Shops Act 1950: see *Stoke-on-Trent City Council v. B. & Q. (Retail) Ltd.* [1984] A.C. 754. I need not pause upon the criteria which it must satisfy before final relief can be granted: see as to these, *City of London Corporation v. Bovis Construction Ltd.* (1988) 86 L.G.R. 660, 682, *per* Bingham L.J. Until the enactment of section 222(1) a local authority could not (special provision apart) B enforce for the public good in its own name a statutory or other provision, but had to secure the authority of the Attorney-General to institute proceedings in his name at its relation. Relator actions at the instance of local authorities were not uncommon. In proceeding at the relation of a local authority in order to enforce the law, the Attorney-General was exercising his right to act on behalf of the Crown as parens C patriae in order to restrain wrongful conduct which injuriously affected the public. If an interim injunction was sought in a relator action then an undertaking in damages was required from the relator: see *F. Hoffmann-La Roche & Co. A.G. v. Secretary of State for Trade and Industry* [1975] A.C. 295, 363F, *per* Lord Diplock. There are many reported instances of local authorities giving such undertakings, and that this was the price of interim relief in a relator action was never D questioned even although the authority was not a party to the proceedings: see *Attorney-General v. Logan* [1891] 2 Q.B. 100, 106.

Once it had become established that the Act of 1972 enabled local authorities to apply for the restraint of unlawful conduct, they turned to consider whether applications for interim relief in actions to enforce section 47 need be supported by an undertaking in damages. The first E reported case is *Rochdale Borough Council v. Anders* [1988] 3 All E.R. 490, where Caulfield J. refused an injunction in the absence of an undertaking. In *Gateshead Metropolitan Borough Council v. Texas Homecare and Great Mills* (unreported), 1 November 1988, His Honour A. J. Blackett-Ord sitting as a judge of the High Court at Newcastle said that the practice of the court varied. He granted an injunction without an undertaking on substantially the same ground as that F subsequently relied on by Mervyn Davies J. in the *Kirklees* case [1990] 1 W.L.R. 1237. The ground equates the local authority's position with that of the Crown when bringing a "law enforcement action."

The position of the Crown in regard to an undertaking was considered by the House of Lords in *F. Hoffmann-La Roche & Co. A.G. v. Secretary of State for Trade and Industry* [1975] A.C. 295. The House G decided that since the Crown Proceedings Act 1947 allowed the recovery of damages by action against the Crown, the former practice of never requiring a cross-undertaking from the Crown was one which could be examined. The result of that examination was that there was no longer any reason in an action to enforce a private law right why the Crown should not have to pay the price for interim relief which was ordinarily paid by the subject. However, the action before the House was not an H action to enforce a private law right. The interim relief was claimed in an action for an injunction to enforce a statutory order with which compliance was by statute "enforceable by civil proceedings by the Crown for an injunction . . .:" Monopolies and Restrictive Practices

(Inquiry and Control) Act 1948, section 11(2). The House of Lords held that in such an action an undertaking ought not ordinarily to be required. Lord Reid said, at p. 341:

> "this is a case in a different and novel field. No doubt it was thought that criminal penalties were inappropriate as a means of enforcing orders of this kind, and the only method of enforcement is by injunction. Dealing with alleged breaches of the law is a function of the Crown (or of a department of the executive) entirely different in character from its function in protecting its proprietary right. It has more resemblance to the function of prosecuting those who are alleged to have committed an offence. A person who is prosecuted and found not guilty may have suffered serious loss by reason of the prosecution but in general he has no legal claim against the prosecutor. In the absence of special circumstances I see no reason why the Crown in seeking to enforce orders of this kind should have to incur legal liability to the person alleged to be in breach of the order."

Lord Morris of Borth-y-Gest, at p. 351H, drew attention to the character of the proceedings as being that of law enforcement. Lord Diplock said, at p. 364:

> "even before the passing of the Crown Proceedings Act 1947 the fact that the suit was brought to enforce jus publicum was not of itself sufficient to displace the ordinary rule that a defendant was entitled to the usual undertaking in damages as a condition of the grant of any interlocutory injunction against him, though the undertaking was exacted from the relator and not from the Crown on whose behalf the Attorney-General was the nominal plaintiff in the suit. I see no reason since the passing of that Act why a rigid rule that the Crown itself should *never* be required to give the usual undertaking in damages should be retained in those law enforcement actions where the Crown now sues without a relator.
>
> "Nevertheless, the converse does not follow that in this type of action the court in granting an interim injunction ought *always* to require an undertaking as to damages from the Crown. A relator owes no duty to the public to initiate any law enforcement action. He does not usually do so unless he or a section of the public which he represents has some special interest to protect, in enforcing that particular law, that is not shared by the public at large. Even if he has no special interest—and it is not essential that he should—his action nevertheless is that of an officious, though well-meaning, bystander who is not content merely to stand by. When, however, a statute provides that compliance with its provisions shall be enforceable by civil proceedings by the Crown for an injunction, and particularly if this is the only method of enforcement for which it provides, the Crown does owe a duty to the public at large to initiate proceedings to secure that the law is not flouted, and not simply to leave it to the chance that some relator may be willing to incur the expense and trouble of doing so.

A "I agree therefore with all your Lordships that the practice of exacting an undertaking in damages from the Crown as a condition of the grant of an interlocutory injunction in this type of law enforcement action ought not to be applied as a matter of course, as it should be in actions between subject and subject, in relator actions, and in actions by the Crown to enforce or to protect its proprietary or contractual rights. On the contrary, the propriety of
B requiring such an undertaking from the Crown should be considered in the light of the particular circumstances of the case."

In the light of the speeches in the *Hoffmann-La Roche* case, there is no doubt that in an action by the Crown to enforce by the prescribed method the terms of a statute or other provision, the court can depart
C from ordinary practice and not require a cross-undertaking unless the circumstances are such that one ought to be required. A real doubt as to the validity of the statute or other provision might be such a circumstance. On the basis that a local authority is in the same position as the Crown, Mervyn Davies and Mummery JJ. thought there were no circumstances requiring an undertaking in the cases before them. Whether or not there were, was extensively discussed before us, but there was no occasion for
D the discussion if the basis is unsound.

If a local authority seeking to enforce the law by civil action is to be regarded as being in the same position as the Crown, then the effect of section 222(1) of the Act of 1972 will have been to open the possibility of the authority securing interim relief without giving the undertaking which would have been required of it as a matter of course in a relator
E action. This change will have altered the position of those against whom the provisions of, for example, the Act of 1950, are sought to be enforced by civil action, and will have altered it to their detriment by depriving them of a customary protection (as to the general value of which see *Hammersmith London Borough Council v. Magnum Automated Forecourts Ltd.* [1978] 1 W.L.R. 50, 55A, *per* Lord Denning M.R.).

I see no reason for such a surprising change. It was pressed upon us
F that local authorities were now performing law enforcement functions of their own. As a general proposition that is unexceptionable, but it by no means follows that the Crown and a local authority should be equated in regard to the requirement of an undertaking. The decision in the *Hoffmann-La Roche* case is not about law enforcement actions in general. It is specifically about actions by the Crown under a statute
G providing a prescribed means of law enforcement. The decision may extend to proceedings to enforce a public right brought by the Attorney-General ex officio, and in *Attorney-General v. Wright* [1988] 1 W.L.R. 164, 166G, Hoffmann J. held that it did. Nevertheless, in my judgment, and granted the consequence to which I have referred, there is no reason to extend the decision in regard to the Crown to some or all actions by a local authority under section 222(1) of the Act of 1972. I
H say "some or all" for there is no perceptible limitation. I express no opinion upon the case where a local or other public authority brings a civil action under a statute which prescribes that action as being the only method of enforcing a law which it is obliged to enforce. Suffice to say

such a case might be closer to the reasoning of Lord Diplock in *F. Hoffmann-La Roche & Co. A.G. v. Secretary of State for Trade and Industry* [1975] A.C. 295 and would require a consideration of *Director General of Fair Trading v. Tobyward Ltd.* [1989] 1 W.L.R. 517.

It was suggested that unless a local authority is ordinarily not to be required to give an undertaking, the authority might be deterred from exercising its *power* to take civil proceedings in aid of its *duty* to enforce the criminal law under section 71 of the Act of 1950 for fear of the consequences of ultimately being proved wrong. An argument based upon an apprehended pusillanimity is not in my view sufficient to displace the ordinary practice. The root of any problem there may be is the notorious inadequacy of the fines imposable in the prescribed enforcement process. I believe that before 1972 most actions at the relation of a local authority, and after 1972 most section 222 actions to enforce a public right, have been actions where the process of prosecution has had, or may have, no deterrent effect. Adequacy of penalty in any context is a consideration for the legislature.

The two cases under appeal are cases where, for the reasons which I have given, the ordinary practice should have been followed and an undertaking required. The councils refused, and still refuse, to give an undertaking, and accordingly in my judgment the injunctions should not have been granted.

There is a second reason in my judgment why the injunctions must be discharged. The defendants claim that article 30 of the E.E.C. Treaty confers upon them the right to open their shops for the serving of customers on Sunday notwithstanding section 47 of the Act of 1950. Article 30 is an article which has direct effect, and is one to which a national court must give effect notwithstanding any conflicting provisions of national legislation: see *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.* (Case 106/77) [1978] E.C.R. 629. Whether the article 30 claim is well-founded is in dispute. Similar claims have been, and are to be, considered by the courts here and by the Court of Justice of the European Communities. In *Torfaen Borough Council v. B. & Q. Plc.* (Case 145/88) [1990] 2 Q.B. 19, 53 the Court of Justice (Sixth Chamber) ruled:

> "article 30 of the E.E.C. Treaty must be interpreted as meaning that the prohibition which it lays down does not apply to national rules prohibiting retailers from opening their premises on Sunday where the restrictive effects on Community trade which may result therefrom do not exceed the effects intrinsic to rules of that kind."

The determination of whether effects on trade exceed the effects which are intrinsic was said to be a matter for the national courts: see p. 53D. In *Stoke-on-Trent City Council v. B. & Q. Plc.* [1991] Ch. 48 Hoffmann J. applied the *Torfaen* case and decided that section 47 was not disproportionate. Accordingly it did not conflict with article 30 which therefore did not confer a right upon the trader. The judge gave a certificate under section 12(1) of the Administration of Justice Act 1960, and the Appeal Committee of the House of Lords subsequently allowed

A a petition by the trader for leave to appeal: see p. 74. The appeal is shortly to be heard.

National courts are obliged to protect rights conferred by European law which have direct effect: see the *Simmenthal* case. There is here an asserted right under the E.E.C. Treaty. It is not a groundless assertion, as is adequately demonstrated by the willingness of the House of Lords to entertain it. The existence of the right now awaits the decision of the B House or of the Court of Justice upon any reference made by the House or upon a reference which has already been made by a stipendary magistrate sitting at Reading. If the right is established, then it must be established with unrestricted retrospective effect: see the *Simmenthal* case [1978] E.C.R. 629, 644–645, para. 25. To grant an interim injunction without the protection (which here would be adequate) of an undertaking C in damages would preclude effective retrospective effect if the right is ultimately established for there would be no recompense for the period of inhibition. Mr. Isaacs sought to avoid the conclusion which must inevitably follow from this proposition by arguing that the full Court of Justice has recently developed the ruling by its Sixth Chamber in the *Torfaen* case by ruling that provisions similar to section 47 of the Act of 1950 are not in conflict with article 30, and that accordingly it is now D conclusively determined that Sunday traders have no right derived from article 30: see *Union Départementale des Syndicats C.G.T. de l'Aisne v. Sidef Conforama* (Case C 312/89) and *Criminal Proceedings v. A. Marchandise* (Case C 332/89), The Times, 6 March 1991.

It is by no means clear to me whether and to what extent the *Torfaen* case has been developed. The answer can be given only in the E future by the Court of Justice. As matters are, it follows from my proposition that if interim relief is to be granted the court must (not "may") require that there be the protection afforded by an undertaking. The protection was, and is, not offered. It cannot be imposed, and accordingly here is a second ground (not argued below) why the injunction should not have been granted.

I would allow both appeals.

F

BELDAM L.J. I, too, am grateful to Dillon L.J. for his description of the origin and history of these two appeals, which I gratefully adopt. I also agree that the result of the appeals turns upon the question whether in the circumstances of the two cases under appeal it was just and convenient to grant the councils an interlocutory injunction, G notwithstanding that they were unwilling or unable to give an undertaking to pay any damages occasioned by the making of the order should the defendants succeed at trial.

There is no doubt in my mind that the councils satisfied the criteria for showing that the grant of an injunction was necessary if they were to fulfil their duty of enforcing section 47 of the Shops Act 1950. I am satisfied that, in the words of Bingham L.J. in *City of London* H *Corporation v. Bovis Construction Ltd.*, 86 L.G.R. 660, 682, the councils laid the essential foundation for the grant of such an injunction in showing that the defendants would continue to open their stores for trade on Sundays unless and until they were effectively restrained from

doing so and that nothing short of an injunction would be effective for this purpose.

There remains the question whether, since the ruling of the Court of Justice of the European Communities in *Torfaen Borough Council v. B. & Q. Plc.* (Case 145/88) [1990] 2 Q.B. 19, the defendants' conduct was unlawful. Since that ruling, the defendants have argued that to prove a breach of section 47 an enforcing local authority must satisfy the requirement of proportionality by adducing evidence directed to the three issues identified by Lord Diplock in *Reg. v. Goldstein* [1983] 1 W.L.R. 151, 154. The defendants say that evidence is available to them which, if accepted, would lead at least to the conclusion that the councils had not satisfied the burden of proving that any obstacle to Community trade created by section 47 did not exceed what was necessary to ensure the attainment of the objective of section 47. Upon the assumption that the objective was that identified by the Advocate General in the *Torfaen* case, the requirement of proportionality remained to be satisfied.

The councils raised two answers to the defendants' arguments. The first was that no issue of fact to which evidence needed to be directed remained for the court. It was not for the Court of Justice to rule on the compatibility of a national provision with the E.E.C. Treaty; the court's function was to provide the national court with all the criteria for the interpretation of Community law which would enable the national court to assess that compatibility for the purpose of giving judgment in the case before it. Either on the basis relied upon by Schiemann J. in *W.H. Smith Do-It-All Ltd. v. Peterborough City Council* [1991] 1 Q.B. 304 that no evidence was required because the answer was obvious, or upon the basis of the reasoning of Hoffmann J. in *Stoke-on-Trent City Council v. B. & Q. Plc.* [1991] Ch. 48, the court could be satisfied that section 47 was not incompatible with article 30.

It is unnecessary to consider whether the difficulties raised by the terms of the Court of Justice's judgment in *Torfaen Borough Council v. B. & Q. Plc.* (Case 145/88) [1990] 2 Q.B. 19 can be resolved in either of these ways for the decision in *Stoke-on-Trent City Council v. B. & Q. Plc.* [1991] Ch. 48 is shortly to be reviewed by the House of Lords.

The second answer given by the councils is that those difficulties have disappeared as a result of the rulings of the Court of Justice in *Union Départementale des Syndicats C.G.T. de l'Aisne v. Sidef Conforama* (Case C 312/89) and *Criminal Proceedings v. A. Marchandise* (Case C 332/89), The Times, 6 March 1991. In those cases the court was asked to rule on French and Belgian legislation prohibiting the employment of workers in retail shops on Sunday which had comparable effect to section 47 of the Shops Act 1950. The court, after referring to its judgment in the *Torfaen* case, stated, in paragraph 12 of the *Conforama* decision and paragraph 13 of the *Marchandise* decision:

> "It must further be stated that the restrictive effects on trade which may stem from such rules do not seem disproportionate to the aim pursued,"

and in paragraphs 13 and 14, respectively:

> "In answer to the first question submitted it must therefore be held that the prohibition contained in article 30 of the Treaty, properly

A construed, does not apply to national legislation prohibiting the employment of staff on Sundays . . ."

I do not think it is open to this court to use the answer given by the Court of Justice to a question referred to it under article 177 on different legislation and in different cases to modify the criteria for interpretation of Community law as it applies to section 47 of the Shops B Act 1950. Nor is it appropriate to do so on an application for interlocutory relief. There is, on the basis of the ruling in the *Torfaen* case, a serious question to be tried whether in the cases of the defendants the councils can satisfy the test that the restrictive effects on trade stemming from section 47 are not disproportionate to the aim pursued.

In *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.* C (Case 106/77) [1978] E.C.R. 629, 644, para. 21, the Court of Justice held that every national court must in a case within its jurisdiction apply Community law in its entirety and protect rights which the latter confers on individuals. It is not disputed that the provisions of article 30 have direct effect. In *Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd. (No. 2)* (Case C 213/89) [1991] 1 A.C. 603, it was made D clear that national courts are expected to ensure the full effectiveness of rights claimed under Community law by granting interim relief and that prima facie it is the duty of the national court to do everything necessary to preserve the existence of rights so claimed. In the course of his opinion in that case, the Advocate General said, at p. 630, that the purpose of interim protection was

E "to achieve that fundamental objective of every legal system, the effectiveness of judicial protection. Interim protection is intended to prevent so far as possible the damage occasioned by the fact that the establishment and the existence of the right are not fully contemporaneous from prejudicing the effectiveness and the very purpose of establishing the right, which was also specifically affirmed by the Court of Justice when it linked interim protection to a F requirement that, when delivered, the judgment will be fully effective . . ."

Later, at p. 631, he referred to such protection as being

"a fundamental and indispensable instrument of any judicial system, which seeks to achieve, in the particular case and always in an effective manner, the objective of determining the existence of a G right and more generally of giving effect to the relevant legal provision, whenever the duration of the proceedings is likely to prejudice the attainment of this objective and therefore to nullify the effectiveness of the judgment."

If the councils in the present appeal do not succeed in showing the compatibility of section 47 with article 30 of the E.E.C. Treaty, the H defendants would undoubtedly suffer substantial damage. I agree that the normal means of securing that the defendants' rights are protected is by an undertaking in damages. But in the present case the councils contend that they should not be required to give such an undertaking

because they are seeking an injunction in aid of their public duty of enforcing the criminal law and their position is therefore comparable to that of the Attorney-General acting on behalf of the Crown. They further contend that the reason they are unable to offer such an undertaking in damages is that if they had to consider the financial implications of giving such an undertaking in every case, they could not justify a decision to bring proceedings of this kind under section 222 of the Local Government Act 1972. Consequently, although they could still proceed by way of prosecution under section 71 of the Shops Act 1950, the law would remain effectively unenforceable.

In *Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd. (No. 2)* (Case C 213/89) [1991] 1 A.C. 603, the applicants were seeking to restrain the Crown from enforcing a law which they claimed was in breach of obligations under articles of the E.E.C. Treaty. The House of Lords had held that it had no power to grant interim relief in such a case against the Crown, but the Court of Justice ruled that a national rule must be disregarded if its effect was to prevent the courts from giving full effect to Community law. When after the Court of Justice's ruling the House considered, under the guidelines established in *American Cyanamid Co. v. Ethicon Ltd.* [1975] A.C. 396, whether to grant interim relief in that case, Lord Goff of Chieveley set out the matters which should guide a court in exercising its discretion. His exposition was accepted by the House. He said at p. 672:

> "I turn to consider the impact upon these guidelines of the public interest, with particular reference to cases in which a public authority is seeking to enforce the law against some person, and either the authority seeks an interim injunction to restrain that person from acting contrary to the law, and that person claims that no such injunction should be granted on the ground that the relevant law is, for some reason, invalid; or that other person seeks an interim injunction to restrain the action of the authority, on the same ground. I take the first stage. This may be affected in a number of ways. For example, where the Crown is seeking to enforce the law, it may not be thought right to impose upon the Crown the usual undertaking in damages as a condition of the grant of an injunction: see *F. Hoffmann-La Roche & Co. A.G. v. Secretary of State for Trade and Industry* [1975] A.C. 295."

It is to be observed that Lord Goff of Chieveley expressed a possible reservation about imposing the usual undertaking in damages only in the case of enforcement of the law by the Crown. He continued at pp. 672–673:

> "there would be no remedy in damages available to the applicants in the present case for loss suffered by them by reason of the enforcement of the Act of 1988 against them, if the relevant part of the Act should prove to be incompatible with European law: see *Bourgoin S.A. v. Ministry of Agriculture, Fisheries and Food* [1986] Q.B. 716. Conversely, an authority acting in the public interest cannot normally be protected by a remedy in damages because it will itself have suffered none. It follows that, as a general rule, in cases of this kind

involving the public interest, the problem cannot be solved at the first stage, and it will be necessary for the court to proceed to the second stage, concerned with the balance of convenience.

"Turning then to the balance of convenience, it is necessary in cases in which a party is a public authority performing duties to the public that 'one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom these duties are owed:' see *Smith v. Inner London Education Authority* [1978] 1 All E.R. 411, 422, *per* Browne L.J., and see also *Sierbein v. Westminster City Council* (1987) 86 L.G.R. 431. Like Browne L.J., I incline to the opinion that this can be treated as one of the special factors referred to by Lord Diplock in the passage from his speech which I have quoted. In this context, particular stress should be placed upon the importance of upholding the law of the land, in the public interest, bearing in mind the need for stability in our society, and the duty placed upon certain authorities to enforce the law in the public interest. This is of itself an important factor to be weighed in the balance when assessing the balance of convenience. So if a public authority seeks to enforce what is on its face the law of the land, and the person against whom such action is taken challenges the validity of that law, matters of considerable weight have to be put into the balance to outweigh the desirability of enforcing, in the public interest, what is on its face the law, and so to justify the refusal of an interim injunction in favour of the authority, or to render it just or convenient to restrain the authority for the time being from enforcing the law."

After referring to views expressed by members of the appellate committee in the *Hoffmann-La Roche* case [1975] A.C. 295, Lord Goff of Chieveley continued [1991] 1 A.C. 603, 674:

"I myself am of the opinion that in these cases, as in others, the discretion conferred upon the court cannot be fettered by a rule; I respectfully doubt whether there is any rule that, in cases such as these, a party challenging the validity of a law must—to resist an application for an interim injunction against him, or to obtain an interim injunction restraining the enforcement of the law—show a strong prima facie case that the law is invalid. It is impossible to foresee what cases may yet come before the courts; I cannot dismiss from my mind the possibility (no doubt remote) that such a party may suffer such serious and irreparable harm in the event of the law being enforced against him that it may be just or convenient to restrain its enforcement by an interim injunction even though so heavy a burden has not been discharged by him. In the end, the matter is one for the discretion of the court, taking into account all the circumstances of the case."

It is at the second stage, of the balance of convenience, that Lord Goff states that in cases in which one party is a public authority performing duties to the public, the interests of the public in general become an important consideration. He laid particular stress on the importance of upholding the law of the land in the public interest, **110**

bearing in mind the need for stability in our society and the duty placed on certain authorities to enforce the law in the public interest. This, he said, is of itself an important factor to be weighed in the balance when assessing the balance of convenience. He added, at p. 673:

> "So if a public authority seeks to enforce what is on its face the law of the land, and the person against whom such action is taken challenges the validity of that law, matters of considerable weight have to be put into the balance to outweigh the desirability of enforcing, in the public interest, what is on its face the law, and so to justify the refusal of an interim injunction in favour of the authority . . ."

In approaching the grant of an interlocutory injunction, it seems to me that it is as an aspect of the justice of the case that the court weighs the effect which the grant or refusal of the relief will have on the parties. Where only one party may suffer damage and it could be substantial, to excuse the opposite party from the usual undertaking would place on only one party a risk of injustice which I believe a court would contemplate only in the most exceptional circumstances. In the present cases the councils did not enjoy the traditional immunity from such undertakings afforded to the Crown and, as in *Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd. (No. 2)* (Case C 213/89) [1991] 1 A.C. 603, the court was required to protect rights conferred by Community law. In considering the position under Community law, Mervyn Davies J. in the *Kirklees* case said [1990] 1 W.L.R. 1237, 1247:

> "(d) It is by no means clear to me that if the defendant were to succeed at trial it would be entitled to any damages in respect of the period pending trial in that if article 30 is held to nullify section 47 it may do so without retrospective effect as to acts done prior to the date of annulment. To my mind the defendant, if successful at trial, ought not to recover damages in respect of a period prior to the date when section 47 is declared ineffective."

In this, for the reasons stated, I believe the judge was in error. His decision was followed in the *Mendip* case. Accordingly it seems to me that in both cases the defendants have shown the judge's discretion to have been exercised wrongly. Nor do I think that the other circumstances which led the judges to exercise their discretion to grant the relief claimed in the absence of the usual undertaking in damages justified the exercise of their discretion in that way.

Accordingly I would allow the appeals.

Appeals allowed with costs.
Interlocutory injunctions discharged.
Leave to appeal refused.

Solicitors: Metcalfe Copeman & Pettefar, Peterborough; Sharpe Pritchard for Solicitor, Kirklees Metropolitan Borough Council; Hepherd Winstanley & Pugh, Southampton; Sharpe Pritchard for Solicitor, Mendip District Council.

M. I. H.

A The borough council appealed by leave dated 18 November 1991 of the House of Lords (Lord Bridge of Harwich, Lord Ackner and Lord Browne-Wilkinson).

In the House of Lords the Attorney-General applied for and was granted leave to intervene in the proceedings in order to represent and advance the interests of the Crown.

B

Stuart Isaacs Q.C., Timothy Straker and *Neil Calver* for the borough council. The key question for decision is: is a local authority on which Parliament by a public general Act has imposed a duty, or an apparent duty, to take all necessary proceedings to procure the observance of statutory provisions, obliged either under English law or Community law to give a cross-undertaking in damages in return for the grant of an C interlocutory injunction in connection therewith? The answer depends upon the correct analysis of three decisions of this House: *Stoke-on-Trent City Council v. B. & Q. (Retail) Ltd.* [1984] A.C. 754; *F. Hoffmann-La Roche & Co. A.G. v. Secretary of State for Trade and Industry* [1975] A.C. 295 and *Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd. (No. 2)* (Case C 213/89) [1991] 1 A.C. 603.

D A local authority has a two-fold duty under section 71 of the Shops Act 1950: see *Stoke-on-Trent City Council v. B. & Q. (Retail) Ltd.* [1984] A.C. 754, 768G–769A. The duty imposed by section 71, when read with section 222 of the Local Government Act 1972, is not confined to instituting criminal proceedings. The local authority having resolved that the present proceedings were necessary was under a duty to institute proceedings under section 71. The fact that section 222 is in permissive E terms does not diminish the duty under section 71.

It is no part of the court's function at the interlocutory stage to resolve difficult questions of law: see *American Cyanamid Co. v. Ethicon Ltd.* [1975] A.C. 396, 407H. In exercising its discretion the court takes the course which, in all the circumstances, appears to offer the best prospect that eventual injustice will be avoided or minimized: *Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd. (No. 2)* (Case F C 213/89) [1991] 1 A.C. 603, 659C–G, 671E–672E, 682H–683C. The grant of an interlocutory injunction is a discretionary remedy and the Court of Appeal by requiring a cross-undertaking introduced a rigidity into the law which is contrary to the approach adopted in *F. Hoffmann-La Roche & Co. A.G. v. Secretary of State for Trade and Industry* [1975] A.C. 295. If the Court of Appeal was right, it follows that section G 37 of the Supreme Court Act 1981 is invalid in part as being contrary to Community law.

The Court of Appeal held that the true ambit of the decision in the *Hoffmann-La Roche* case was confined to cases where the law enforcer was the Crown. There is no warrant for so restricting the ambit of the decision, which embraces all law enforcement actions irrespective of the identity of the law enforcer. It is artificial to isolate the Crown from H local authorities and other organs of civil government. This is particularly so given that there is a recurrent transfer of functions between central, local and statutory authorities: *D. v. National Society for the Prevention of Cruelty to Children* [1978] A.C. 171, 235G–236B. If, for present

purposes, the local authority is put in the same category as the Crown, this does not "open the flood gates." A public utility such as British Gas Plc., when it brings proceedings, is pursuing private, not public, rights. [Reference was made to *Derbyshire County Council v. Times Newspapers Ltd.* [1992] Q.B. 770, 775 et seq., Morland J.]

The reasons why no cross-undertaking in damages should be required from the borough council as a matter of policy or discretion or convenience are (i) the financial consequences to the local authority and its inhabitants of being liable on cross-undertaking; (ii) the frustration of proceedings considered by the local authority to be expedient for its inhabitants; (iii) the fact that the local authority is under a duty to take such proceedings; (iv) the need in the public interest to ensure that those who have the duty to take such proceedings should not be deterred from doing so (see *Sierbein v. Westminster City Council* (1987) 86 L.G.R. 431, 438); (v) the absence of any special reason shown by the defendants as to why justice requires that the injunction should only be granted on terms (see *Director General of Fair Trading v. Tobyward Ltd.* [1989] 1 W.L.R. 517, 524); (vi) in particular, the absence of any sufficiently firmly based challenge by the defendants to the validity of sections 47 and 59 of the Act of 1950 (see *Coventry City Council v. Woolworths Plc.* [1991] 2 C.M.L.R. 3); (vii) even if sections 47 and 59 are invalid by virtue of article 30 of the E.E.C. Treaty (Cmnd. 5179-II), that the defendants have no remedy in damages against the borough council in view of *Bourgoin S.A. v. Ministry of Agriculture, Fisheries and Food* [1986] Q.B. 716; (viii) the decision in *Stoke-on-Trent City Council v. B. & Q. Plc.* [1991] Ch. 48 and (ix) the rulings of the European Court of Justice and the opinion of the Advocate General in *Union Départementale des Syndicats C.G.T. de l'Aisne v. Sidef Conforama* (Case C 312/89), The Times, 6 March 1991 and *Criminal Proceedings v. A. Marchandise* (Case C 332/89), The Times, 6 March 1991.

As a matter of principle, the local authority as law enforcer should not be put on terms as the price of the enforcement of the law. The enforcer in a law enforcement action should not, in the absence of special circumstances, have to incur legal liability to the person alleged to be in breach of the law. The law enforcer's position is akin to that of a prosecutor in criminal proceedings: see *F. Hoffmann-La Roche & Co. A.G. v. Secretary of State for Trade and Industry* [1975] A.C. 295, 341D–E. The dividing line in criminal proceedings between malicious and negligent prosecutions has its counterpart in section 222 proceedings in the ability of the defendant to seek judicial review.

The difficulty which confronts the defendants that the presumption that an Act of Parliament is compatible with Community law unless and until declared to be incompatible must be at least as strong as the presumption that delegated legislation is valid unless and until declared invalid: see *Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd. (No. 2)* (Case C 213/89) [1991] 1 A.C. 603, 678H. This is not the same as presuming the continued existence of the domestic law irrespective of the strength of the Community law alleged: see, for example, *Polydor Ltd. v. Harlequin Record Shops Ltd.* [1980] 2 C.M.L.R. 413.

A As to whether a local authority could be required to exercise its powers under section 71 of the Act of 1950, the answer is in the affirmative: see *Reg. v. Braintree District Council, Ex parte Willingham* (1982) 81 L.G.R. 70 and *Stoke-on-Trent City Council v. B. & Q. (Retail) Ltd.* [1984] A.C. 754. The Court of Appeal failed to have proper regard to the autonomous nature of proceedings under section 222 of the Act of 1972. *Stoke-on-Trent City Council v. B. & Q. (Retail)* B *Ltd.* [1984] A.C. 754 shows that section 222 did not deprive the Attorney-General of his power to enforce obedience to public law by proceedings ex officio or by relator actions, but conferred an *additional power* on a local authority charged with the administration of an area. The Court of Appeal's approach is also inconsistent with the decision of that court in *City of London Corporation v. Bovis Construction Ltd.* C (1988) 86 L.G.R. 660, 682. If the preliminary condition of section 222 is met, the local authority stands in the same position as the Attorney-General. [Reference was made to *Coventry City Council v. Woolworths Plc.* [1991] 2 C.M.L.R. 3.]

Assuming against the borough council that the Court of Appeal was right to proceed on the footing that it could not clearly be said that the defendants had no defence under Community law, it was still wrong to D hold that Community law required the imposition of a cross-undertaking. The Court of Appeal failed to apply properly the ruling of the European Court of Justice and the subsequent decision of the House of Lords in *Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd. (No. 2)* (Case C 213/89) [1991] 1 A.C. 603. There is nothing in that case that deprives the national court of any discretion in respect of the grant of E interim relief. On remit to it the House of Lords correctly applied the decision of the European Court of Justice. That decision did not fetter the House of Lords' discretion to determine whether an appropriate case for the grant of interim relief has been made out: *Factortame (No. 2)* [1991] 1 A.C. 603, 659c.

Francovich v. Republic of Italy (Joined Cases C 6/90 and C 9/90) [1992] I.R.L.R. 84 does not detract in any way from what the European F Court of Justice stated in *Factortame (No. 2)* in relation to the grant of interim relief. *Factortame (No. 2)* did not decide that breach of article 30 of the E.E.C. Treaty must as a matter of Community law give rise to a claim for damages, and therefore there is no basis for any reference to the European Court of Justice.

As to the balance of convenience, the Court of Appeal wrongly G failed to consider whether the defendants' challenge to the validity of section 47 was "so firmly based as to justify" the exceptional course of the apparent law not being enforced: see *Factortame (No. 2)* [1991] 1 A.C. 603, 673B–674D. In the light of the developments in the law subsequent to the ruling in *Torfaen Borough Council v. B. & Q. Plc.* (Case 145/88) [1990] 2 Q.B. 19, even if the Court of Appeal gave consideration to this issue, the defendants failed to make out a challenge H to section 47 which was sufficiently firmly based to justify the exceptional course in fact taken by the Court of Appeal. The court has a discretion, which it must exercise, whether or not to exact an undertaking in damages from the borough council. In exercising that discretion, the

court must assess the strength of the challenge, at the interlocutory stage, to the domestic law and must have in mind the factors referred to in *Factortame (No. 2)* [1991] 1 A.C. 603, 672G–673A, 673B–674E. The national court is not obliged as a matter of Community law to require from the borough council an undertaking in damages. The Court of Appeal erred in law in holding that the national court was bound under Community law to require a cross-undertaking in damages and that the court has on this aspect no discretion. If this were correct, the inevitable consequence would be that section 37 of the Supreme Court Act 1981 is itself, in part, contrary to Community law.

Moreover, and independent of the approach of the House of Lords in *Factortame (No. 2)*, there is no obligation under Community law for the national court to impose the procedural condition of a cross-undertaking in damages at the interlocutory stage. It is well established that in the absence of Community rules on the subject, it is for the domestic legal system of each member state to determine the procedural conditions governing actions at law intended to ensure the protection of rights which individuals derive from the direct effect of Community law: see *Rewe-Zentralfinanz A.G. v. Landwirtschaftskammer für das Saarland* (Case 33/76) [1976] E.C.R. 1989. The only qualifications are that the procedural rules in question must not be less favourable than those applicable in purely domestic cases and must not in practice make it impossible or excessively difficult for compensation to be obtained. Neither qualification applies in the present case. [Reference was also made to *Smith v. Inner London Education Authority* [1978] 1 All E.R. 411 and *Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd.* [1990] 2 A.C. 85.]

Stephen Richards and *Nicholas Paines* for the Attorney-General. The issues that arise in relation to the requirement of a cross-undertaking in damages as a condition of the grant of an interlocutory injunction may affect the interests of the Crown both in relation to the enforcement of the Act of 1950 and in relation to law enforcement actions generally.

So far as the application of domestic law is concerned, the issues have only an indirect, though none the less important, effect on the Crown. The Crown's own position in relation to the giving of cross-undertakings in law enforcement actions brought directly by the Crown was decided in *F. Hoffmann-La Roche & Co. A.G. v. Secretary of State for Trade and Industry* [1975] A.C. 295, which held that there was no invariable rule that the Crown should not be required to give a cross-undertaking in a law enforcement action. All the circumstances of the case were to be taken into account. If the Court of Appeal were right to hold that cross-undertakings must invariably be given by local authorities, upon whom the primary responsibility for enforcement of the Act has been placed by statute, serious questions of fairness would arise if the Attorney-General sought to circumvent that ruling by seeking interlocutory injunctions in his own name without a cross-undertaking. In discharging its statutory responsibility to enforce section 47, a local authority is in a position indistinguishable from that of the Crown in law enforcement actions and should therefore be treated in the same way as the Crown as regards cross-undertakings. Accordingly Mervyn Davies J.

A was right to exercise his discretion to grant an injunction without a cross-undertaking.

The judgment below raises the further question whether a cross-undertaking is required pursuant to Community law whenever an interlocutory injunction is sought to enforce public law against a person who claims by way of defence that the law in question is incompatible with directly effective rights arising under Community law. The ruling B that, as a matter of Community law, a cross-undertaking is invariably required from a local authority in such a case has a direct effect on the interests of the Crown, for the position of the Crown would appear to be indistinguishable from that of local authorities. It follows from that ruling that the Crown must give a cross-undertaking whenever it seeks an interlocutory injunction to restrain breaches of domestic law by those C who seek to rely on a Community law defence. But that is contrary to the rationale enunciated in the *Hoffmann-La Roche* case [1975] A.C. 295 for the position under domestic law and would give exaggerated weight to the protection of what may be tenuous claims under Community law at the expense of the maintenance of the apparent law as laid down in the provision which is sought to be enforced. The decision below is wrong in law and inconsistent with the principles laid D down in *Factortame (No.2)* [1991] 1 A.C. 603, 671E–674D. Whether a cross-undertaking is appropriate, or whether it is appropriate to grant an injunction without a cross-undertaking, must depend upon an assessment of all relevant circumstances. Community law does not have the effect of depriving the courts of their discretion.

The defendants have taken the point that an injunction should not in E any event be granted since, by reason of the article 30 defence, it is not clear that their conduct was criminal. But that contention is at odds with the approach adopted by the House of Lords in *Hoffmann-La Roche* [1975] A.C. 295 and *Factortame (No. 2)* [1991] 1 A.C. 603, which show that an arguable defence of invalidity is not in itself enough.

Decisions such as *Factortame (No. 2)* show that the national court must in certain circumstances disapply national procedural rules which F restrict the effectiveness of Community law. There is nothing in the cases, however, to require the national court to adopt a different approach towards the assessment of the merits and the exercise of its discretion in relation to interim relief simply because rights are claimed under Community law rather than under domestic law.

As to whether the exaction of a cross-undertaking is required to G protect a right to damages in Community law, that law does not provide a cause of action for breach of article 30: *Bourgoin S.A. v. Ministry of Agriculture, Fisheries and Food* [1986] Q.B. 716. Moreover, *Francovich v. Republic of Italy* (Joined Cases C 6/90 and C 9/90) [1992] I.R.L.R. 84, upon which the defendants rely, is authority only for the proposition that a member state is liable in damages for failure to implement a directive in certain circumstances.

H In the circumstances, it is necessary for the House of Lords to form a provisional view (without finally deciding the Community law issue) on whether the article 30 defence is sufficiently strong to outweigh the desirability of enforcing what is on its face the law of the land. The

assessment of the strength of the article 30 defence involves the considerations (i) whether the requirement for national courts to investigate whether, as a matter of fact, the effects of the legislation exceed those intrinsic to trade rules still applies after the decisions of the full Court of Justice in the *Conforama* and *Marchandise* cases, The Times, 6 March 1991; if so, (ii) whether the defendants have a strong case for saying that section 47 produces effects exceeding those intrinsic to trade rules. This latter consideration involves considering the nature of the exercise stipulated by *Torfaen Borough Council v. B. & Q. Plc.* (Case 145/88) [1990] 2 Q.B. 19. As to (i), there is a strong case that, while falling short of being acte claire, this requirement no longer applies as a result of the *Conforama* and *Marchandise* decisions. Any other conclusion would produce consequences that the European Court of Justice cannot have intended. As to (ii), it appears to be at least implicit in the defendants' contentions that the court must carry out the so called "balancing test" in which it measures the worth of the objective pursued by section 47 against its effects upon intra-Community trade. But such an approach is contrary to the *Torfaen* case; the *Conforama* and *Marchandise* cases; *W.H. Smith Do-It-All Ltd. v. Peterborough City Council* [1991] 1 Q.B. 304 and *Stoke-on-Trent City Council v. B. & Q. Plc.* [1991] Ch. 48. The *Torfaen* judgment [1990] 2 Q.B. 19, 48, 53 makes plain that the European Court of Justice does not require or empower British courts to substitute their own evaluation of the aims pursued by section 47 for that of the legislature.

The exercise which the European Court of Justice prescribed consisted in ascertaining whether any of the effects of the legislation went beyond the achievement of the legislative aim. It follows that the burden of establishing that such is the case lies upon him who challenges the law. The enforcing authority cannot be required to demonstrate a negative proposition. This was the view of Mervyn Davies J. [1990] 1 W.L.R. 1237, 1244G–H. It also follows (and certainly in the absence of any indication that the effects of section 47 exceed those necessary to achieve its aim) that the section satisfies the test prescribed in the *Torfaen* judgment [1990] 2 Q.B. 19.

The power of evaluation of the need to prevent Sunday trading is left by Community law to the Parliament of the United Kingdom. It is for Parliament and not the courts to decide whether the evaluation implicit in the provisions of section 47 should be revised.

Andrew Collins Q.C. and *Paul Lasok* for the defendants. It is fair that a person who claims that he has a defence should be recompensed if, after the grant of an interlocutory injunction against him, the court holds at the trial of the proceedings that the claim was well-founded. The European Court of Justice has already decided that section 47 of the Act of 1950 is incompatible with Community law, subject to the doctrine of proportionality: *Torfaen Borough Council v. B. & Q. Plc.* (Case 145/88) [1990] 2 Q.B. 19.

The Shops (Sunday Trading Restriction) Act 1936 was intended to liberalise the 17th century legislation. This accounts for some of the anomalies in Schedule 5 to the Act of 1950, and shows that it is not entirely clear what public policy is in this field. This is an important

A factor in deciding whether or not a cross-undertaking in damages should be required before granting an interlocutory injunction to prohibit the right of a trader to trade on Sundays.

The Act falls to be construed by reference to its provisions alone. The only sanction imposed by the Act for breach of section 47 is criminal: section 59. The enforcement of the provisions of the Act could only be by the means provided for by the Act, namely, criminal process. B In section 71(1) of the Act the word "proceedings" must therefore be defined as, and limited to, "criminal proceedings:" cf. section 71(4). Parliament has not, as it could have (see, for example, section 58 of the Control of Pollution Act 1974), provided for other means of enforcing the Act of 1950. Thus, the duty arising under section 71(1) is limited to a duty to enforce by criminal proceedings.

C In 1950 local authorities could not have instituted or carried on any proceedings other than criminal proceedings; any civil proceedings would have had to be instituted and carried on by the Attorney-General ex relatione (or, in theory, ex officio). All that section 222 of the Local Government Act 1972 has done is to give local authorities an additional power which can be exercised by them at their discretion if the condition precedent to its exercise is satisfied. That condition is that the local D authority must "consider it expedient for the promotion or protection of the interests of the inhabitants of their area" to take any proceedings. The condition precedent is different from and inconsistent with the duty in section 71(1). Even if injunction proceedings were considered necessary to secure observance of section 47 of the Act of 1950, a local authority might properly consider that it was not expedient for the E promotion or protection of the interests of the inhabitants of its area to take them: *Stoke-on-Trent City Council v. B. & Q. (Retail) Ltd.* [1984] A.C. 754, 768D–769B.

If, however, section 71(1) is to be construed as imposing a duty to institute such proceedings, whether civil or criminal, as for the time being the local authority has power to institute, so that section 222 introduced the possibility of civil proceedings by abolishing the need to F go to the Attorney-General, this duty can only extend to the institution of such proceedings as can lawfully be instituted by a local authority. Thus, (a) the section 222 condition precedent must be satisfied, since otherwise any proceedings would be ultra vires, and (b) the circumstances must exist to justify the grant of an injunction in support of the criminal law. Community law, however, requires that the defendants be given G protection by means of a cross-undertaking as to damages.

There are four essential matters to bear in mind in relation to the grant of the interlocutory injunction. (a) The jurisdiction must be exercised with great caution: *Stoke-on-Trent City Council v. B. & Q. (Retail) Ltd.* [1984] A.C. 754. (b) There must be more than a mere infringement of the criminal law to justify an injunction. (c) The jurisdiction will be exercised only in certain well defined circumstances, H namely, (i) where there has been a deliberate flouting of the law, and it can be shown either from past behaviour that prosecutions are of no avail or it is clear on the evidence that unless restrained the defendant intends to continue to break the law, or (ii) where the conduct in

question will cause grave and irreparable damage or danger to the public: see *Attorney-General v. Chaudry* [1971] 1 W.L.R. 1614, 1624D, 1625 and *Runnymede Borough Council v. Ball* [1986] 1 W.L.R. 353, 359C, 363E, 365. (d) It must be clear that there is no defence to the criminality of the conduct. The question (see *American Cyanamid Co. v. Ethicon Ltd.* [1975] A.C. 396) is whether there is no defence on which reliance can be placed. At the interlocutory stage, the plaintiff must begin by showing that the defendant *plainly* has no defence to a criminal prosecution: see *Waverley Borough Council v. Hilden* [1988] 1 W.L.R. 246, 254E–F; *Wychavon District Council v. Midland Enterprises (Special Event) Ltd.* [1988] 1 C.M.L.R. 397, 401, 408 and *Portsmouth City Council v. Richards* (1988) 87 L.G.R. 757, 770–771.

The ambit of *F. Hoffmann-La Roche & Co. A.G. v. Secretary of State for Trade and Industry* [1975] A.C. 295 is limited to the Crown, alternatively or additionally, to a case where the only remedy available is by civil process. [Reference was also made to *Stafford Borough Council v. Elkenford Ltd.* [1977] 1 W.L.R. 324, 330.] If there is to be no cross-undertaking the effect of an interlocutory injunction will be the same as that of a final injunction. It follows that extreme caution is required in using this procedure in enforcing the criminal law, a fortiori where the criminal law is uncertain by virtue of the provisions of Community law: see *Solihull Metropolitan Borough Council v. Maxfern Ltd. (No. 2)* (1976) 75 L.G.R. 392; *Blackpool Borough Council v. W.H. Smith Do-It-All Ltd.* (unreported), 28 July 1987, Walton J.; *Torfaen Borough Council v. B. & Q. Plc.* (Case 145/88) [1990] 2 Q.B. 19, 35, 50, 51–53 and *W.H. Smith Do-It-All Ltd. v. Peterborough City Council* [1991] 1 Q.B. 304, 329, 332, 333. In view of the decision in *Torfaen* [1990] 2 Q.B. 19 there is no presumption of the validity of section 47. The all important question is: what is the ratio of the *Hoffmann-La Roche* case [1975] A.C. 295? It is narrow and ought to be applied narrowly because of the injustice that otherwise could befall a defendant: see [1975] A.C. 295, 336E. [Reference was also made to *Hammersmith London Borough Council v. Magnum Automated Forecourts Ltd.* [1978] 1 W.L.R. 50; *Rochdale Borough Council v. Anders* [1988] 3 All E.R. 490, 491; *Bourgoin S.A. v. Ministry of Agriculture, Fisheries and Food* [1986] Q.B. 716 and *Francovich v. Republic of Italy* (Joined Cases C 6/90 and C 9/90) [1992] I.R.L.R. 84.] There is no injustice to the local authority in asking for the cross-undertaking. Nor can it be said that there is an overriding public interest that the law should be enforced at the expense of creating great hardship to a defendant who in the outcome is proved to have a valid defence.

Mervyn-Davies J. [1990] 1 W.L.R. 1237, 1247E was wrong in the exercise of his discretion, in that the legal basis of his conclusion is contrary to *Amministrazione delle Finanze dello Stato v. S.p.A. San Giorgio* (Case 199/82) [1983] E.C.R. 3595 and section 2 of the European Communities Act 1972. The Court of Appeal exercised its discretion independently and unless it can be shown that the court exercised it on the wrong basis it should be upheld on classic principles. [Reference was also made to *City of London Corporation v. Bovis Construction Ltd.*, 86 L.G.R. 660; *Attorney-General v. Wright* [1988] 1 W.L.R. 164 and

Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd. [1990] 2 A.C. 85.]

Lasok, following, referred to *Firma Molkerei-Zentrale Westfalen/Lippe G.m.b.H. v. Hauptzollamt Paderborn* (Case 28/67) [1968] E.C.R. 143; *Deutsche Milchkontor G.m.b.H. v. Federal Republic of Germany* (Joined Cases 205/82 to 215/82) [1983] E.C.R. 2633 and *Amministrazione delle Finanze dello Stato v. S.p.A. San Giorgio* (Case 199/82) [1983] E.C.R. 3595.

Isaacs Q.C. replied.

Paines, in reply, referred to *G.R. Amylum N.V. v. Council and Commission of the European Communities* (Joined Cases 116/77, 124/77 and 143/77) [1978] E.C.R. 893.

Their Lordships took time for consideration.

25 June. LORD KEITH OF KINKEL. My Lords, I have read the speech to be delivered by my noble and learned friend, Lord Goff of Chieveley. I agree with it, and for the reasons he gives would allow the appeal.

LORD ACKNER. My Lords, I have had the advantage of reading the speech of my noble and learned friend, Lord Goff of Chieveley. I agree with it and for the reasons he gives I, too, would allow the appeal.

LORD GOFF OF CHIEVELEY. My Lords, this appeal is about Sunday trading. In England and Wales, Sunday trading is prohibited by section 47 of the Shops Act 1950 which provides, subject to certain specified exceptions, that "Every shop shall . . . be closed for the serving of customers on Sunday." The aim of the legislation is to ensure that, so far as possible, shopkeepers and shop assistants do not have to work on Sunday: see *Stoke-on-Trent City Council v. B. & Q. Plc.* [1991] Ch. 48, 66, *per* Hoffmann J. But the prohibition against Sunday trading has become controversial in modern times. On the one hand, the Church and other religious organisations uphold the traditional principle that Sunday should be kept as a day apart, for religious observance and for rest; they receive support from trade unions and others who fear that those who work in shops may, if Sunday trading is permitted, find themselves under pressure to work on Sunday against their will. But there are pressures the other way. Many people consider that, with only a small proportion of the population attending church on Sunday, the whole idea of a prohibition against Sunday trading is now out of date. This approach is supported for commercial reasons by large retailers, notably do-it-yourself stores, who have discovered that, if their stores are open on Sundays, not merely is this a convenience for their customers but a significant increase in their trade is generated. There can be little doubt that there are many people in this country who would welcome such a change, as is evidenced by the customers who flock to stores to shop on Sunday when they are given the opportunity to do so; but it might not be so popular with small retailers who could find it more difficult to open their shops regularly on Sundays to remain

competitive with their larger and more powerful rivals. At all events, a recent proposal by the Government to abolish the prohibition against Sunday trading failed; and in consequence section 47 of the Act of 1950 remains in force with the effect that, so far as our domestic law is concerned, the general prohibition against Sunday trading is still the law.

Even so, during the past few years we have seen some large stores opening on Sundays, in apparent defiance of the law. Prosecutions by local authorities under the Act of 1950 have little deterrent effect, because the increased sales are such that fines at the level presently authorised under the statute can be absorbed by large retailers as a relatively small increase in their costs, though the same is not true of small shops with their much lower sales. An increase in the level of fines is scheduled to come into effect in the autumn of this year; but in the meantime the temptation remains for large stores to open on Sundays. The ineffectiveness of prosecution, or the threat of prosecution, to deter large stores from Sunday opening has caused local authorities, who are charged with the enforcement of section 47, to search for a more effective remedy, and as a result they have resorted to seeking injunctions to restrain stores from infringing the section. In response, the stores appear first to have sought the protection of one of the specified exceptions to the prohibition in section 47, viz. the sale of motor accessories. The argument was that almost anything could be used in connection with cars or motoring, and so a very wide range of goods fell to be classified as motor accessories for the purposes of the section. This argument has, not surprisingly, been rejected by the courts. But now the stores have taken the more formidable step of invoking Community law. The argument is that section 47 cannot stand because it is inconsistent with article 30 of the Treaty, a provision having direct effect which prohibits between member states quantitative restrictions on imports and all measures having equivalent effect; it is said that the prohibition against Sunday trading in this country has such an effect. The argument has been considered by the European Court of Justice in *Torfaen Borough Council v. B. & Q. Plc.* (Case 145/88) [1990] 2 Q.B. 19. I shall have to consider the effect of the judgment of the court in that case, and two later cases, *Union Départmentale des Syndicats C.G.T. de l'Aisne v. Sidef Conforama* (Case C 312/89) and *Criminal Proceedings v. A. Marchandise* (Case C 332/89), The Times, 6 March 1991, at a later stage. An important issue in the case now before your Lordships' House is the impact of Community law, as interpreted in those three cases, upon our domestic law.

The present case has arisen as follows. On 14 May 1990 the appellants, the Council of the Metropolitan Borough of Kirklees ("the council"), obtained from Mervyn Davies J. an interlocutory injunction restraining the respondents, Wickes Building Supplies Ltd. ("Wickes"), until trial from using any premises in the Kirklees area as a retail do-it-yourself centre or for the purpose of any other retail trade or business on Sundays, except for the purpose of carrying out transactions excepted under the Act of 1950. On the evidence before the learned judge, it was plain that Wickes had been trading on Sundays and intended to

A continue doing so in the future unless restrained by the court; and it was common ground between the parties that Wickes' Sunday trading was in breach of section 47 unless that section had been rendered ineffective by article 30 of the Treaty. The judge, having referred to the *Torfaen* case (Case 145/88) [1990] 2 Q.B. 19, turned to the question whether it was appropriate to grant the council interlocutory relief. Applying the principles laid down by this House in *American Cyanamid Co. v.* B *Ethicon Ltd.* [1975] A.C. 396, he first asked himself whether there was a serious question to be tried; he held that there was, the question being whether or not the facts were such that section 47 was incompatible with article 30. Turning to the balance of convenience, he was in no doubt that the balance lay in favour of granting an interlocutory injunction. Finally, applying the principles established in *F. Hoffmann-La Roche &* C *Co. A.G. v. Secretary of State for Trade and Industry* [1975] A.C. 295, he held that, since the council was engaged in law enforcement duties, he had a discretion whether or not to require the council to give an undertaking in damages as a prerequisite of the grant of an interlocutory injunction, and he decided to exercise that discretion against requiring such an undertaking.

As a result of Mervyn Davies J.'s decision not to require an D undertaking in damages, many other local councils sought and obtained interlocutory injunctions on the same terms restraining Sunday trading by retail stores. By the time that the present case had reached the Court of Appeal, as many as 100 injunctions had been granted by judges of the Chancery Division, following the approach of Mervyn Davies J. By that time, too, the decision of the European Court of E Justice in the *Torfaen* case had been followed by its decisions in the *Conforama* and *Marchandise* cases; and it was the contention of the council that the approach of the court in the former case, upon which Wickes relied, had been tacitly abandoned by the court in the latter two cases. The Court of Appeal took the view that it remained unclear whether the court had so resiled. In any event, however, the Court of Appeal decided that the judge had erred in not requiring the council to F give an undertaking in damages. Dillon and Mann L.JJ. held that he had erred in English domestic law, because he had misunderstood the *Hoffmann-La Roche* case as extending to local authorities a privilege which belonged to the Crown alone; and furthermore that he had erred in Community law because, since it is the duty of the national court to ensure the legal protection which persons derive from the direct effect G of provisions of Community law, it was necessary to require an undertaking in damages to protect any current right which Wickes might have, by virtue of article 30, to open their doors for Sunday trading. Beldam L.J. considered that, since the court was required to protect rights conferred under Community law, the judge had erred in exercising his discretion not to require an undertaking. As a result, the council having declined to give an undertaking, the interlocutory injunction was H discharged; and your Lordships were informed that the interlocutory injunctions granted in about 100 other cases were likewise discharged for the same reason. It appears that no council feels able to give an undertaking in damages in cases of this kind, because of the possible

serious impact upon their limited financial resources. The result is that, for the time being, large retail stores are trading on Sundays, up and down the country, undeterred by the threat of criminal prosecution and unrestrained by an injunction. It is against the decision of the Court of Appeal, and in particular its decision on the undertaking in damages, that the council now appeals, with the leave of your Lordships' House. At the commencement of the hearing, your Lordships gave leave to the Attorney-General to intervene in the proceedings.

There can be no doubt, since the decision of this House in *Stoke-on-Trent City Council v. B. & Q. (Retail) Ltd.* [1984] A.C. 754, that a local authority has power, in appropriate circumstances, to proceed in its own name by way of injunction to restrain infringements of section 47 of the Shops Act 1950. Section 71(1) of the Act provides:

> "It shall be the duty of every local authority to enforce within their district the provisions of this Act and of the orders made under those provisions, and for that purpose to institute and carry on such proceedings in respect of contraventions of the said provisions and such orders as aforesaid as may be necessary to secure observance thereof."

At the time when the Act was passed, there was no power in a local authority to take proceedings in its own name for an injunction. However, section 222 of the Local Government Act 1972 provided:

> "(1) Where a local authority consider it expedient for the promotion or protection of the interests of the inhabitants of their area—
> (*a*) they may prosecute or defend or appear in any legal proceedings and, in the case of civil proceedings, may institute them in their own name . . ."

On the face of these two statutory provisions, it appears that proceedings in its own name by way of injunction are open to a local authority in order to secure observance of section 47 of the Shops Act. In *Stoke-on-Trent City Council v. B. & Q. (Retail) Ltd.* [1984] A.C. 754, a determined attack on the existence of this power was made by B. & Q., but was rejected by this House. On the present appeal before your Lordships it was suggested, even so, that the exercise by a local authority of the power under section 222 to institute civil proceedings in its own name was not authorised by section 71(1). The function of this argument was to suggest that, although the local authority may have had *power* to institute civil proceedings in its own name under section 222, it had no *duty* to do so under section 71(1). The basis of the argument was that since, at the date of the Shops Act 1950, the only proceedings which the local authority could then have instituted to enforce the law against Sunday trading were criminal proceedings, section 71(1) should be read as limited to such proceedings. I am unable to accept this argument. Section 71(1) is in very broad terms, and it is well capable of embracing any proceeding necessary to secure observance of the Act, including civil proceedings for an injunction which authorities are subsequently empowered to commence in their own name. Such was the conclusion of the Divisional Court in *Reg. v. Braintree District*

Council, Ex parte Willingham (1982) 81 L.G.R. 70, a case cited with approval in *Stoke-on-Trent City Council v. B. &. Q. (Retail) Ltd.* [1984] A.C. 754, 768, *per* Lord Roskill; the same view was expressed by Lord Templeman, at p. 776, in the course of a speech with which the other members of the Appellate Committee expressed their agreement. He said:

> "The right to invoke the assistance of the civil court in aid of the criminal law is a comparatively modern development. Where Parliament imposes a penalty for an offence, Parliament must consider the penalty is adequate and Parliament can increase the penalty if it proves to be inadequate. It follows that a local authority should be reluctant to seek and the court should be reluctant to grant an injunction which if disobeyed may involve the infringer in sanctions far more onerous than the penalty imposed for the offence. In *Gouriet v. Union of Post Office Workers* [1978] A.C. 435 Lord Wilberforce said at p. 481, that the right to invoke the assistance of civil courts in aid of the criminal law is 'an exceptional power confined, in practice, to cases where an offence is frequently repeated in disregard of a, usually, inadequate penalty . . . or to cases of emergency . . .' In my view there must certainly be something more than infringement before the assistance of civil proceedings can be invoked and accorded for the protection or promotion of the interests of the inhabitants of the area. In the present case the council were concerned with what appeared to be a proliferation of illegal Sunday trading. The council was by section 71 of the Shops Act 1950 charged with the statutory duty of ensuring compliance with the Act. The council received letters from traders complaining of infringements of the Sunday trading legislation by other shops and intimating that the complainants would themselves feel obliged to open on Sundays in order to preserve their trade unless the Act was generally observed. The council could not treat some traders differently from others. The council wrote to warn infringing traders some of whom ceased to trade on Sundays as a result of the warnings. In one case where an ignored warning was followed by the issue of a writ the proceedings resulted in an undertaking to desist. In these circumstances there was ample justification for the council to take the view that it was expedient in the general interests of the inhabitants to take such steps as were necessary to ensure compliance by the appellants with the laws of Sunday trading."

I have cited this passage in full, because it expresses very clearly the caution which must be exercised before the court grants an injunction to restrain an infringement of the criminal law. In *Gouriet v. Union of Post Office Workers* [1978] A.C. 435, it was stressed that the jurisdiction must be exercised with great caution. In the passage I have just quoted, Lord Templeman said that there must certainly be something more than infringement before the assistance of civil proceedings can be invoked. It is sometimes said that the offender must have been deliberately and flagrantly flouting the law. However, quite apart from the fact that such

a statement does not accommodate cases of emergency—cases where the defendant's unlawful conduct could, unless restrained, cause serious and irreparable harm before trial, as for example where the defendant threatens to cut down a tree in breach of a tree preservation order—in other cases it is usually not so much the flagrancy of the breach as the fact that the defendant intends to persist in offending unless restrained by an injunction, which justifies the invocation of that form of relief: see *City of London Corporation v. Bovis Construction Ltd.* (1988) 86 L.G.R. 660, 682, *per* Bingham L.J.

It was however submitted before your Lordships, by Mr. Collins on behalf of Wickes, that there was a further, more specific, prerequisite of the exercise of the jurisdiction to grant an injunction in such a case, viz. that the defendant must plainly have no defence to a criminal prosecution. I have no doubt that, in practice, this is usually the case. Sometimes, indeed, the injunction will be sought following a series of convictions for an offence which carries a financial penalty so small that it does not deter further infringements. In other cases, if there is any suggestion that the defendant has a defence, the point can be tested immediately by treating the hearing of the motion as the trial of the action, or by some other means (such as Order 14 proceedings) which result in a final injunction. Indeed, the authorities upon which Mr. Collins relied in support of his submission proved on examination to be cases in which the possibility of a defence had been disposed of in that way. But this is not always possible. In an emergency case, for example, the court may consider it just and convenient to impose an immediate interlocutory injunction, leaving the merits of any defence to be resolved at trial. Further, as the present case shows, the introduction of a possible Community law defence may transform the situation. This is because the raising of such a defence may involve the necessity of a reference to the European Court of Justice under article 177 of the Treaty. Such a reference can, your Lordships were told, involve a delay of as much as 18 months before an answer is received from the court, during which time there can be no final determination of the issue. It would be startling if the mere fact that the defendant invoked a Community law defence, with sufficient substance (but no more) to escape rejection under the narrowly drawn principle of acte clair, should be capable of itself of excluding this useful jurisdiction, thus providing encouragement to those seeking to profit from law-breaking activities to adopt this method of prolonging what may prove to be a source of illicit profit. However, I am unable to accept Mr. Collins's submission. I know of no authority which supports it. There are cases in which an interlocutory injunction has been granted, despite the fact that the defendant was raising a defence to the alleged crime. In *Portsmouth City Council v. Richards* (1988) 87 L.G.R. 757, the Court of Appeal upheld the grant of an interlocutory injunction restraining the operation of sex shops, despite the fact that the defendant had raised a defence under article 30 of the Treaty. In *City of London Corporation v. Bovis Construction Ltd.*, 86 L.G.R. 660, the Court of Appeal upheld the grant of an interlocutory injunction restraining a breach of the Control of Pollution Act 1974, notwithstanding an alleged defence invoked by the

A defendant which had not been disposed of. Furthermore, the submission of Mr. Collins ignores the fact that, since an injunction may be granted in an emergency to restrain an infringement of the law, for example the cutting down of a tree in breach of a tree preservation order (see, e.g., *Newport Borough Council v. Khan (Sabz Ali)* [1990] 1 W.L.R. 1185), it may well be impossible in such circumstances to resolve the issue of a possible defence on the application for an interlocutory injunction. Mr. B Collins sought to accommodate such cases by recognising them as an exception to his suggested rule. I cannot think that this is right. The power to grant injunctions, which now arises under section 37 of the Supreme Court Act 1981, is a discretionary power, which should not as a matter of principle be fettered by rules. In my opinion, the existence of an alleged defence is a matter to be taken into account in the exercise C of the court's discretion, when deciding whether it is just and convenient that interlocutory relief should be granted.

I turn next to the question of the undertaking in damages, which lies at the heart of the present appeal. The Court of Appeal required the council to give such an undertaking, as a condition of the grant of an injunction, first because, as Dillon and Mann L.JJ. held, in English law the discretion to dispense with such an undertaking in cases where an D injunction is sought to restrain an infringement of the criminal law is available only to give effect to a privilege of the Crown alone and does not extend to local authorities exercising the function of law enforcement; and second because under Community law an undertaking must be given where necessary to protect any Community law right of direct effect which might possibly be affected.

E I first consider the point under English domestic law. This depends upon a proper understanding of the decision of this House in *F. Hoffmann-La Roche & Co. A.G. v. Secretary of State for Trade and Industry* [1975] A.C. 295. The case was concerned with a claim by the Secretary of State for an injunction restraining Hoffmann-La Roche from charging prices for certain drugs in excess of those specified in an Order, approved by both Houses of Parliament, made following an F inquiry and report by the Monopolies Commission in which the Commission concluded that the prices charged by Hoffmann-La Roche were excessive. Hoffmann-La Roche claimed that the proceedings adopted by the Monopolies Commission were contrary to the rules of natural justice and that in consequence the Order was ultra vires and invalid; it brought proceedings against the Secretary of State claiming a G declaration to that effect, and indicated that in the meanwhile it would not comply with the Order. In the proceedings brought by the Secretary of State for an injunction, the question arose whether the Secretary of State should be required to give an undertaking in damages to recompense Hoffmann-La Roche in the event of the Order being held to be invalid. This House held that, in the circumstances, he was not required to do so.

H The question whether the Crown is required in law enforcement proceedings to give such an undertaking was considered in depth in that case. Previously, it had been generally accepted that the requirement of an undertaking in damages as a condition of the grant of an interlocutory

injunction did not apply in the case of the Crown. However, the origin of this rule appears to have lain in the fact that, since the Crown was not liable in damages in the ordinary way, a requirement for an undertaking in damages would be inconsistent with the Crown's immunity from liability; and it was concluded that the Crown Proceedings Act 1947 had removed the justification for the rule. It followed that the House had to consider afresh the principles upon which the court ought to exercise its discretion whether to require an undertaking in damages from the Crown. It was decided, first, that in actions brought by the Crown to enforce or protect its proprietary or contractual rights, it should be in no different position from the ordinary citizen and so should be required to give an undertaking in the usual way. But, second, it was held that different principles applied in cases where the Crown brought a law enforcement action, in which an injunction was sought to restrain a subject from breaking a law where the breach would be harmful to the public or a section of it. Lord Diplock drew a distinction between two types of proceedings. The first was a relator action in which, once the Attorney-General's consent had been obtained, the relator stood in the shoes of the plaintiff in an ordinary suit between subject and subject, and an undertaking in damages was required from the relator but not from the Attorney-General. The second was a law enforcement action brought by the Crown; he referred in particular to such an action brought under a statute which provided expressly for enforcement of a provision of the statute by civil proceedings by the Crown, which was the position in the *Hoffmann-La Roche* case [1975] A.C. 295 where the Crown was proceeding pursuant to a provision of the Monopolies and Restrictive Practices (Inquiry and Control) Act 1948. Lord Diplock explained the distinction between these two types of case in the following passage, at p. 364:

> "So even before the passing of the Crown Proceedings Act 1947 the fact that the suit was brought to enforce jus publicum was not of itself sufficient to displace the ordinary rule that a defendant was entitled to the usual undertaking in damages as a condition of the grant of any interlocutory injunction against him, though the undertaking was exacted from the relator and not from the Crown on whose behalf the Attorney-General was the nominal plaintiff in the suit. I see no reason since the passing of that Act why a rigid rule that the Crown itself should *never* be required to give the usual undertaking in damages should be retained in those law enforcement actions where the Crown now sues without a relator.
>
> "Nevertheless, the converse does not follow that in this type of action the court in granting an interim injunction ought *always* to require an undertaking as to damages from the Crown. A relator owes no duty to the public to initiate any law enforcement action. He does not usually do so unless he or a section of the public which he represents has some special interest to protect, in enforcing that particular law, that is not shared by the public at large. Even if he has no special interest—and it is not essential that he should—his action nevertheless is that of an officious, though well-meaning, bystander who is not content merely to stand by. When, however,

A a statute provides that compliance with its provisions shall be enforceable by civil proceedings by the Crown for an injunction, and particularly if this is the only method of enforcement for which it provides, the Crown does owe a duty to the public at large to initiate proceedings to secure that the law is not flouted, and not simply to leave it to the chance that some relator may be willing to incur the expense and trouble of doing so.

B "I agree therefore with all your Lordships that the practice of exacting an undertaking in damages from the Crown as a condition of the grant of an interlocutory injunction in this type of law enforcement action ought not to be applied as a matter of course, as it should be in actions between subject and subject, in relator actions, and in actions by the Crown to enforce or to protect its C proprietary or contractual rights. On the contrary, the propriety of requiring such an undertaking from the Crown should be considered in the light of the particular circumstances of the case."

It was decided that, in the circumstances of that case, the discretion should be so exercised as not to require an undertaking in damages from the Crown.

D In that case, this House was concerned only with the position of the Crown in law enforcement actions. It was not concerned with the position of local authorities which have the function of enforcing the law in their districts in the public interest. Whether the same principle should be held to apply in the case of public authorities other than the Crown charged with the enforcement of the law falls to be decided in the present case.

E The majority of the Court of Appeal concluded that the same principle should not apply in the case of such public authorities. Dillon L.J., ante, p. 245E–F concluded that the discretionary power not to require an undertaking in damages in a law enforcement action was "a privilege of the Crown alone." In reaching that conclusion, he was much influenced by the fact that, in a relator action brought to enforce F public rights or public law, it is accepted practice, where the relator is a local authority, to require an undertaking in damages from the local authority as in the case of any other relator. Mann L.J. was impressed by the same consideration. He continued, ante, pp. 249–250:

"I see no reason for such a surprising change. It was pressed upon us that local authorities were now performing law enforcement G functions of their own. As a general proposition that is unexceptionable, but it by no means follows that the Crown and a local authority should be equated in regard to the requirement of an undertaking. The decision in the *Hoffmann-La Roche* case is not about law enforcement actions in general. It is specifically about actions by the Crown under a statute providing a prescribed means of law enforcement. The decision may extend to proceedings H to enforce a public right brought by the Attorney-General ex officio, and in *Attorney-General v. Wright* [1988] 1 W.L.R. 164, 166G, Hoffmann J. held that it did. Nevertheless, in my judgment, and granted the consequence to which I have referred, there is no

reason to extend the decision in regard to the Crown to some or all actions by a local authority under section 222(1) of the Act of 1972. I say 'some or all' for there is no perceptible limitation. I express no opinion upon the case where a local or other public authority brings a civil action under a statute which prescribes that action as being the only method of enforcing a law which it is obliged to enforce. Suffice to say such a case might be closer to the reasoning of Lord Diplock in *F. Hoffmann-La Roche & Co. A.G. v. Secretary of State for Trade and Industry* [1975] A.C. 295 . . ."

I do not, however, find this reasoning persuasive. My main difficulty is that it reduces the principle enunciated by this House in the *Hoffmann-La Roche* case to the status of an arbitrary rule—what Dillon L.J. called "a privilege of the Crown." Yet I do not read the speeches in the *Hoffmann-La Roche* case as conferring a privilege on the Crown in law enforcement proceedings. On the contrary, I read them as dismantling an old Crown privilege and substituting for it a principle upon which, in certain limited circumstances, the court has a discretion whether or not to require an undertaking in damages from the Crown as law enforcer. The principle appears to be related not to the Crown as such but to the Crown when performing a particular function. It is true that, in all the speeches in that case, attention was focused upon the position of the Crown, for the obvious reason that it was the position of the Crown which was in issue in that case. But the considerations which persuaded this House to hold that there was a discretion whether or not to require an undertaking in damages from the Crown in a law enforcement action are equally applicable to cases in which some other public authority is charged with the enforcement of the law: see e.g. Lord Reid, at p. 341G, Lord Morris of Borth-y-Gest, at p. 352C, and Lord Cross of Chelsea, at p. 371B–G. In the circumstances, I find it difficult to understand why the same principle should not, in similar circumstances, apply to other public authorities when exercising the function of law enforcer in the public interest.

It is instructive to turn to the position of the local authority in the present case. Plainly, the function of law enforcement under the Shops Act 1950 is entrusted to the local authority of each district. Under section 71(1) of the Act, it is the duty of each local authority to enforce within its district the provisions of the Act and "for that purpose to institute and carry on such proceedings in respect of contraventions of the said provisions . . . as may be necessary to secure observance thereof." It is true that the section does not expressly refer to proceedings by way of injunction as such; but, as I have previously said, the breadth of the section is such as to embrace injunction proceedings, brought under the power subsequently conferred by section 222 of the Local Government Act 1972, when such proceedings are necessary. It is also true that proceedings by way of injunction are not the only form of proceedings open to a local authority under the section; but, unlike Mann L.J., I am not impressed by that fact, because, in practice, for reasons I have previously given, the circumstances in which injunction proceedings may be successfully brought by a local

A authority are such that no other proceedings will be effective to enforce the law.

In these circumstances, I for my part can see no material distinction between the council in the present case and the Crown in the *Hoffmann-La Roche* case [1975] A.C. 295. Nor do I feel compelled to depart from that conclusion by the fact that, under the present practice, a local authority which acts as a relator in a relator action is required to give an B undertaking in damages even though it is so proceeding in order to enforce the law in the public interest. I observe that, in the *Hoffmann-La Roche* case, Lord Diplock distinguished the position of a relator on the ground that he owes no duty to the public to initiate any law enforcement action. In the present case, however, the Council is indeed charged with such a duty. That does not prevent the Crown from C proceeding to enforce the law under its general powers; but it would be an extraordinary situation if a local authority, acting under a statutory duty, was required to give an undertaking in damages, whereas the Crown was not. To my mind, the position of the local authority as relator cannot be decisive of the present case. The essential question is whether the court's discretion to require an undertaking in damages in D law enforcement actions is confined to cases in which the Crown is plaintiff, or should be held to apply to other public authorities exercising the function of law enforcement in the circumstances specified in the *Hoffmann-La Roche* case. In my opinion, for the reasons I have given, it should be held so to apply.

It follows that, apart from the question of the impact of Community law, such is the discretion which the courts should have exercised in the E present case. I turn therefore to the issue of Community law. The conclusion of the majority of the Court of Appeal was that the court was bound by Community law to require an undertaking in damages from the council if an interlocutory injunction was to be granted. This conclusion was based on the premises that (1) it is the duty of the national court to ensure the legal protection which persons derive from F the direct effect of a provision of Community law; (2) article 30 was such a provision; (3) if Wickes is right that section 47 of the Act of 1950 is incompatible with article 30, it has a current right to open its stores for Sunday trading, and it is the duty of the national court to protect that right; (4) in the absence of an undertaking in damages, Wickes will have been restrained from opening on Sundays, without any right to G compensation; (5) there is no need for this purpose to assess the strength of Wickes' challenge to section 47 on the basis of article 30, it being enough that the challenge is not without foundation: see, ante, pp. 243G–244F *per* Dillon L.J., and, ante, pp. 250D–251E, *per* Mann L.J. Beldam L.J. also concluded that the court was required to protect rights conferred by Community law; and in the circumstances he concluded that the exercise of the judge's discretion against requiring an undertaking H in damages from the council could not be justified (see, ante, p. 256B–F).

It is, I consider, desirable that the present case should be set in its European context. Your Lordships were much assisted by counsel, who undertook an examination of the decision of the European Court of 130

Justice on a reference by the Cwmbran Justices (the *Torfaen* case (Case 145/88) [1990] 2 Q.B. 19) on the issue whether section 47 of the Act of 1950 is inconsistent with article 30, together with the European jurisprudence which formed the background of that decision, and the subsequent very similar (if not precisely identical) cases of *Conforama* (Case C 312/89) and *Marchandise* (Case C 332/89), The Times, 6 March 1991. The decision of the European Court of Justice in the *Torfaen* case has been the subject of exposition in two cases in this country, *W.H. Smith Do-It-All Ltd. v. Peterborough City Council* [1991] 1 Q.B. 304 and *Stoke-on-Trent City Council v. B. & Q. Plc.* [1991] Ch. 48. In both cases there are illuminating judgments on the subject, in the former by Mustill L.J. and Schiemann J., and in the latter by Hoffmann J. The *W.H. Smith* case took the form of an appeal to the Divisional Court from the Crown Court, by way of case stated, against the conviction of the two defendant stores for Sunday trading; the *Torfaen* decision was published after the hearing before the Crown Court and before the hearing before the Divisional Court and, it being plain that the Crown Court had misdirected itself on the effect of article 30, the Divisional Court quashed the convictions. The *Stoke-on-Trent* case was heard shortly after judgment was given in the *W. H. Smith* case. In that case, Hoffmann J. [1991] Ch. 48 interpreted and applied the decision of the European Court of Justice in the *Torfaen* case, and decided to grant a final injunction restraining B. & Q. from Sunday trading in breach of the Act of 1950. That decision has been regarded as definitive, by judges of first instance, as to the application of the *Torfaen* principle in this country; but of course matters have changed following the collapse of injunction proceedings by local authorities after the decision of the Court of Appeal now under consideration. The decision of Hoffmann J. in the *Stoke-on-Trent* case came before your Lordships' House on appeal under the leapfrog procedure last year. By that time, the *Torfaen* case had been followed by the *Conforama* and *Marchandise* decisions. It was the submission of the appellant, B. & Q., that your Lordships were bound to refer the matter to the European Court of Justice, whereas the respondent councils submitted that, following the *Conforama* and *Marchandise* decisions, the conclusion reached by Hoffmann J. could not possibly be disturbed so that no reference was required. This House, despite a formidable argument advanced by Mr. Isaacs for the councils, nevertheless felt compelled to make the reference for which B. & Q. contended.

For present purposes I shall consider again, as briefly as I can, the impact of the two later cases on the earlier *Torfaen* case (Case 145/88) [1990] 2 Q.B. 19. The first question posed by the Cwmbran justices in the *Torfaen* case [1990] 2 Q.B. 19, 23 took the following form:

> "(1) Where a member state prohibits retail premises from being open on Sunday for the sale of goods to customers, save in respect of certain specified items sales of which are permitted, and where the effect of the prohibition is to reduce in absolute terms the sales of goods in those premises including goods manufactured in other member states, and correspondingly to reduce the volume of imports of goods from other member states, is such a prohibition a measure

having equivalent effect to a quantitative restriction on imports within the meaning of article 30 of the Treaty?"

The court's reply [1990] 2 Q.B. 19, 53 to the question was as follows:

> "17. . . . article 30 of the Treaty must be interpreted as meaning that the prohibition which it lays down does not apply to national rules prohibiting retailers from opening their premises on Sunday where the restrictive effects on Community trade which may result therefrom do not exceed the effects intrinsic to rules of that kind."

Hoffmann J. considered that the effect of this decision was to raise an issue of proportionality which had to be determined by the national court as an issue of fact. That issue he determined in favour of the councils, and he accordingly granted the final injunction requested by them.

Before the appeal in that case came before your Lordships' House, the *Conforama* and *Marchandise* decisions were published. It is right to observe that, until the decision of Hoffmann J., the interpretation and application of the *Torfaen* case was causing great problems in numerous prosecutions for Sunday trading in magistrates' courts and Crown Courts up and down the country. Of these prosecutions, Hoffmann J. said [1991] Ch. 48, 65:

> "In many of these [prosecutions], evidence has been led on the question of proportionality. A troupe of experts has toured the country giving their views over periods of several days and as a result some courts have convicted and others have acquitted. If the question depends simply on the oral evidence led at the trial, even a decision of the House of Lords on appeal from one of these cases need not settle the matter. The prosecution will fail if the local authority's travelling expert fails to turn up, or if his evidence is different. We shall have the absurd state of affairs that the Sunday trading laws will be valid on one day and invalid on another: enforceable in Wellingborough but not in Pendle. The summary prosecution of offences under section 47 will in practice become impossible because local authorities will have excessive demands made on their resources."

Hoffmann J. took the robust course of solving this problem on the basis that all the relevant facts were properly matters of judicial notice. At all events, when the *Conforama* and *Marchandise* cases came before the European Court of Justice, Mr. Advocate General W. van Gerven (who had also been Advocate General in the *Torfaen* case) urged caution upon the European Court. Those two cases were concerned not with Sunday trading but with restrictions upon working hours on Sundays; but the Advocate General was plainly influenced by the strong similarity between those cases and the *Torfaen* case. He urged the court to accept the argument of the commission that the assessment of the need for and proportionality of specific legislation cannot be left to the national

courts. When he came to consider the classic requirements of necessity and proportionality, he had this to say, at para. 14:

> "In my view, the criterion applied by the court in the *B. & Q.* judgment, according to which an obstacle to intra-Community trade may not exceed what is necessary for the attainment of the objective pursued, reflects both aspects of the criterion of necessity: the restrictive national legislation is relevant with regard to the objective pursued, since it is necessary for the attainment of that objective and has therefore been enacted with that end in view; the legislation may not go beyond what is necessary for the attainment of that objective, which implies that a less restrictive alternative is not available. However, the criterion of proportionality is not incorporated in that, since on the basis of that criterion legislation which is necessary for the attainment of the objective in question, and therefore does not exceed what is necessary, must nevertheless be set aside by the member state. Does this mean that in the *B. & Q.* judgment the court abandoned the criterion of proportionality and thus went back on its earlier case law? I think not: in Case 145/88 the court had no need to rely on the criterion of proportionality—any more than it does in these cases—since it was immediately apparent, as it is now in these proceedings, that the obstacles created by the national legislation in question certainly were not, and are not, of such a kind as to compel the member state to dispense with a measure necessary for the attainment of a justified objective. If, on the other hand, the obstacle is of such a kind as to jeopardize the integration of the market, it may seriously be doubted whether it is still proportionate to be in itself the legitimate objective pursued by the measure. Hence I take the view that the absence of any reference to the criterion of proportionality in the *B. & Q.* judgment is not of fundamental importance and that the reason for the omission lay in the specific circumstances of the case, from which it was clear that any obstacles which might be created were not particularly serious."

In accordance with that view, the final conclusion expressed by the Advocate General was that, in the circumstances of the *Conforama* and *Marchandise* cases, it could not be concluded that the obstacles created exceeded what was necessary for the attainment of the objective pursued or that they were out of proportion thereto. He therefore expressed the opinion that the national legislation in question was compatible with article 30.

The *Conforama* and *Marchandise* cases came before the full court, whereas the *Torfaen* case had been heard by a chamber of the court. The court gave judgment to the same effect in both cases. Paragraphs 10 to 12 of the judgment in the *Conforama* case read as follows:

> "10. In the *Torfaen* judgment the court ruled, in relation to similar national legislation prohibiting the opening of retail shops on Sundays, that such a prohibition was not compatible with the principle of the free movement of goods provided for in the Treaty unless any obstacles to Community trade thereby created did not

A exceed what was necessary in order to ensure the attainment of the objective in view and unless that objective was justified with regard to Community law.

"11. That being so, it must first be stated that legislation such as the legislation at issue pursues an end which is justified with regard to Community law. The court has already held, in its judgment of 23 November 1989 in the *Torfaen* case, that national rules governing B the opening hours of retail premises reflect certain political and economic choices in so far as their purpose is to ensure that working and non-working hours are so arranged as to accord with national or regional socio-cultural characteristics, and that, in the present state of Community law, is a matter for the member states.

"12. It must further be stated that the restrictive effects on trade C which may stem from such rules do not seem disproportionate to the end pursued.

The first question posed in the *Conforama* case was whether provisions prohibiting the employment of workers on Sundays constituted a measure having an equivalent effect to quantitative restrictions within the meaning of article 30 of the Treaty. The answer of the court was that "the D prohibition contained in article 30 of the Treaty, properly construed, does not apply to national legislation prohibiting the employment of staff on Sundays."

It was on the basis of the decision in those two cases that Mr. Isaacs for the two councils in the *Stoke-on-Trent* case [1991] Ch. 48 submitted that, following those decisions, it was no longer appropriate for the national courts to investigate any issue of proportionality, and that the E *Torfaen* case (Case 145/88) [1990] 2 Q.B. 19 should no longer be understood as requiring any such investigation in the Sunday trading cases. Since the point has now been referred by your Lordships' House to the European Court of Justice in that case, I am most reluctant to become involved in any discussion upon it. It is enough for me to say that, on the basis of those two cases, the arguments of the two councils F in the *Stoke-on-Trent* case struck your Lordships as being very powerful, but not sufficiently powerful to persuade your Lordships' House that it need not refer the matter to the European Court of Justice under article 177. It follows however that, so far as is relevant for the purposes of the present appeal, I do not consider that much weight can be attached to the argument of Wickes that section 47 is inconsistent with article 30.

It is against that background that I return to the conclusion of the G majority of the Court of Appeal that the mere fact that Wickes might be able to advance such an argument founded upon article 30, which was at least not a groundless argument, compelled the Court of Appeal to require an undertaking in damages from the council. In so holding, the court relied in particular upon the decision of the European Court of Justice in *Amministrazione delle Finanze dello Stato v. Simmenthal* H *S.p.A.* (Case 106/77) [1978] E.C.R. 629, 645–646 dated 9 March 1978, in which the court ruled that:

"A national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty

to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provisions of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means."

I only pause to observe at this stage that the decision, although obviously of great importance, was not concerned with the terms upon which interim relief in the form of an interlocutory injunction should be granted.

Before your Lordships, it was submitted by Mr. Isaacs on behalf of the council that the Court of Appeal had erred in requiring the council to give an undertaking in damages. He submitted that, if a national court is considering whether to grant an interlocutory injunction in a case such as the present, where the validity of the law sought to be enforced is challenged by the defendant on the ground that it is inconsistent with Community law, the question whether the court should require an undertaking in damages from the plaintiff as a condition of the grant of an injunction is to be decided on the principles applicable to that question under the national law, being a question of procedure which, on established principles of Community law, is left to the national law. In support of this submission, he relied in particular on the approach of the European Court of Justice in *Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd. (No. 2)* (Case C 213/89) [1991] 1 A.C. 603. There the European Court, consistently with the opinion of the Advocate General (see p. 663), declined to regulate the manner in which the national court should decide whether to grant interim relief following upon the European Court's ruling on the main question concerned with the power of the national court to grant relief in the circumstances of the case. In particular, the European Court did not answer the second question posed for its consideration by this House, which was concerned with the criteria to be applied by the national court in deciding whether or not to grant interim protection of the rights claimed.

I have however come to the conclusion that this submission of Mr Isaacs is too sweeping in its effect. No doubt it is part of the function of the national court to assess the strength of the challenge to the national law in question, and to weigh both the possibility of damage in the interim to the subject if the law in question is enforced against him, and the possibility of damage to the public interest if the law is not so enforced. But the question of the terms upon which an injunction may be granted to enforce, or to restrain the enforcement of, a law which is under challenge on Community law grounds, cannot in my opinion necessarily be regarded as a matter of procedure for the national law where the imposition of the term under consideration is directed towards preserving rights which may arise under Community law. This appears from the decision of the European Court of Justice in *Zuckerfabrik Süderdithmarschen A.G. v. Hauptzollamt Itzehoe* (Joined Cases C 143/88 and C 92/89), The Times, 27 March 1991 (judgment delivered on 21 February 1991) where the court laid down conditions for the grant of

A a stay of execution of a national administrative Act based on a Community Regulation because of doubts on the part of the national court as to the validity of the Regulation (see paragraphs 22–23 of the judgment of the court).

On the other hand it was the submission of Mr. Collins for Wickes that the function of the undertaking in damages required of the council by the Court of Appeal was to protect the right of Wickes which flowed B from the direct effect of article 30, in the event of the European Court of Justice holding, on the reference to it of the *Stoke-on-Trent* case [1991] Ch. 48, that section 47 of the Shops Act 1950 was invalid because it was inconsistent with article 30. Accordingly, submitted Mr. Collins, such an undertaking was required to give immediate effect to Community law. However this submission, which was accepted by the Court of C Appeal, appears to me, with all respect, to be misconceived.

I approach the matter as follows. In *Bourgoin S.A. v. Ministry of Agriculture, Fisheries and Food* [1986] Q.B. 716, it was held by the Court of Appeal (Parker and Nourse L.JJ., Oliver L.J. dissenting) that a breach of article 30 would not of itself give rise to a claim in damages by the injured party. However, since the decision of the European Court of Justice in *Francovich v. Republic of Italy* (Joined Cases C 6/90 D and C 9/90) [1992] I.R.L.R. 84 (judgment delivered on 1 November 1991), there must now be doubt whether the *Bourgoin* case was correctly decided. It is true that the *Francovich* case was concerned with the situation where a member state fails to implement an E.E.C. Directive, the court holding that in such a case the member state is obliged to make good damage suffered by individuals as a result of its failure so to E do. But the court spoke in more general terms, as follows, at p. 88, paras. 33 to 37:

> "33. It should be stated that the full effectiveness of Community provisions would be affected and the protection of the rights they recognise undermined if individuals were not able to recover damages when their rights were infringed by a breach of Community F law attributable to a member state.
>
> "34. The possibility of obtaining damages from the state is particularly essential where, as in the present case, the full effect of Community provisions is conditional on the state taking certain action, and, in consequence, in the absence of such action being taken, individuals cannot rely on the rights accorded to them by G Community law before national courts.
>
> "35. It follows that the principle of the liability of the state for damage to individuals caused by a breach of Community law for which it is responsible is inherent in the scheme of the Treaty.
>
> "36. The obligation on member states to make good the damage is also based on article 5 of the Treaty, under which the member states are bound to take all appropriate measures, whether general H or particular, to ensure fulfilment of the obligations arising under Community law. . . .
>
> "37. It follows from the foregoing that Community law lays down a principle according to which a member state is obliged to make

good the damage to individuals caused by a breach of Community law for which it is responsible."

It is not necessary for the purposes of the present case for your Lordships' House to decide whether the *Bourgoin* case [1986] Q.B. 716 was correctly decided, and indeed no argument was addressed to your Lordships on that question. But, having regard to the passage from the judgment of the European Court in the *Francovich* case which I have just quoted, it is in my opinion right that in the present case your Lordships should proceed on the basis that if, on the reference to it in the *Stoke-on-Trent* case [1991] Ch. 48, the court should hold that section 47 of the Shops Act 1950 is invalid as being in conflict with article 30 of the Treaty, the United Kingdom may be obliged to make good damage caused to individuals by the breach of article 30 for which it is responsible.

It does not however follow that, in the present case, the council should be obliged to give an undertaking in damages as a condition of the grant of an injunction restraining Wickes from acting in breach of section 47. This is because the obligation (if any) on the United Kingdom to make good any damage suffered by Wickes will arise irrespective of any undertaking in damages given by the council. In the circumstances, such an undertaking would be superfluous. But there are two other subsidiary matters which reinforce the conclusion that the council should not be required to give such an undertaking. The first is that the effect of such an undertaking would be to impose an obligation on the council to indemnify Wickes against damage suffered by it, in the event of section 47 being held to be invalid as inconsistent with article 30, irrespective of whether in such circumstances Wickes has a right to damages—i.e., irrespective of whether the *Bourgoin* case is wrongly decided. In other words, that question is pre-empted by the requirement of such an undertaking from the council. The second is that if, following the *Francovich* case, there was held to be a right to damages in such circumstances, the effect of requiring an undertaking from the council would be to impose liability in damages on the council instead of on the United Kingdom which, as I understand the position, would properly be the party so liable. That it is the member state which is liable in such circumstances appears from the passage from the judgment in the *Francovich* case which I have quoted. This is no doubt because it is the Government which would, on the hypothesis that section 47 was invalid because inconsistent with article 30, have failed to take the necessary steps to ensure that section 47 was amended or repealed as necessary. If so, it would be wrong that the council, because it has performed its statutory duty under the national law to enforce section 47, was to find itself under a liability in damages as a result of performing that duty.

For these reasons, I am of the opinion that Wickes' argument that the council should be required to give an undertaking in damages has no justification in Community law.

It follows that the judge was right to decide the question on the ordinary principles of English law. Of course, having regard to the

A weakness of Wickes' challenge to the validity of section 47, the grant of an interlocutory injunction was fully justified on the principles stated by this House in the second *Factortame* case (Case C 213/89) [1991] 1 A.C. 603. For the reasons I have given, I am of the opinion that he was also correct to hold that it was a matter within his discretion to decide whether or not to require the local authority to give an undertaking in damages. In so deciding, he had to take into account the fact that it B was plain that Wickes would, unless restrained, continue to act in contravention of section 47 of the Shops Act 1950; and that, in practical terms, proceedings by way of injunction were the only means open to the council to perform its duty to enforce the provisions of section 47. He could also have taken into account, if he was aware of it, that the effect of requiring an undertaking in damages from the council would be C to cause the collapse of the law enforcement process in this area of law; and further that the enforcement of the law was not merely desirable as such in the public interest, but that small retailers could well suffer if large retailers such as Wickes were able to continue to trade with impunity during a significant period in contravention of what might well prove to be a perfectly valid law. On the facts of the present case the judge was, in my opinion, fully entitled to decide that, in the exercise of D his discretion, no undertaking in damages should be required of the council. I for my part can see no error in the exercise of his discretion in this respect.

It was suggested by Wickes that this was an appropriate case for a reference to the European Court of Justice on the issue raised by the decision of the Court of Appeal that Community law required an E undertaking in damages. I for my part am unable to accept this submission. In my opinion, there was no basis in Community law for that decision.

For these reasons, I would allow the appeal with costs, and restore the order of the judge.

LORD JAUNCEY OF TULLICHETTLE. My Lords, I have had the F advantage of reading the speech of my noble and learned friend, Lord Goff of Chieveley. I agree with it and for the reasons he gives I, too, would allow the appeal.

LORD LOWRY. My Lords, I have had the opportunity of reading in draft the speech of my noble and learned friend, Lord Goff of Chieveley. G I agree with it and, for the reasons given by my noble and learned friend, I, too, would allow the appeal and restore the order of Mervyn Davies J.

Appeal allowed with costs.

Solicitors: Sharpe Pritchard for Michael R.G. Vause, Huddersfield; H *Edwin Coe for Metcalfe Copeman & Pettefar, Peterborough; Treasury Solicitor.*

Neutral Citation Number: [2002] EWHC 244 Admin
IN THE HIGH COURT OF JUSTICE NO: CO/4661/2001
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2

Tuesday, 12th February 2002

B e f o r e:

LORD JUSTICE SIMON BROWN

and

MR JUSTICE SCOTT BAKER

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S

-v-

POOLE BOROUGH COUNCIL

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MR J GAU (instructed by Turners) appeared on behalf of the Claimant
MRS B BATH (instructed by Legal Services, Poole Borough Council) appeared on behalf of the Defendant

- - - - - - -
J U D G M E N T
(As Approved by the Court)
- - - - - - -

 1. LORD JUSTICE SIMON BROWN: This is an appeal by way of case stated against the order of the Bournemouth Crown Court -- Judge Beashel and two lay justices -- made on 16th March 2001, dismissing the appellant's appeal against a two-year, anti-social behaviour order (hereafter "ASBO") made against him by the district judge at the Poole Magistrates' Court on 3rd August 2000. The appellant was born on 17th July 1984 and so is now aged 17. At the time of the events in question he was aged 14 or 15.

2. ASBOs were introduced into the armoury of the law by section 1 of the Crime and Disorder Act 1998, which, so far as presently material, provides:

> "1(1) An application for an order under this section may be made by a relevant authority if it appears to the authority that the following conditions are fulfilled with respect to any person aged 10 or over, namely-
>
> "(a) that the person has acted, since the commencement date, in an anti-social manner, that is to say, in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same

household as himself; and

"(b) that such an order is necessary to protect persons in the local government area in which the harassment, alarm or distress was caused or was likely to be caused from further anti-social acts by him;

"and in this section 'relevant authority' means the council for the local government area or any chief officer of police any part of whose police area lies within the area.

"(2) A relevant authority shall not make such an application without consulting each other relevant authority.

"(3) Such an application shall be made by complaint to the magistrates' court whose commission area includes the place where it is alleged that the harassment, alarm or distress was caused or was likely to be caused.

"(4) If, on such an application, it is proved that the conditions mentioned in subsection (1) above are fulfilled, the magistrates' court may make an order under this section (an 'anti-social behaviour order') which prohibits the defendant from doing anything described in the order."

"(7) An anti-social behaviour order shall have effect for a period (not less than two years) specified in the order or until further order."

3. I need read no more.

4. The order made by the magistrate and upheld by the Crown Court was in these terms:

"It is adjudged that the Defendant acted in the following manner, which caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself:

"1. Persistent abusive and intimidating behaviour towards elderly residents at Hope Court and Stanfield Close, Poole, causing them fear and distress.

"2. Persistent unruly behaviour and damage to property leading to verbal abuse and threats of violence and intimidation of staff, pupils and visitors to Martin Kemp Welch School and Leisure Centre site.

"3. Consistent display of anti-social behaviour leading to the intimidation of staff and customers at the Dillons Store, 97 Melbury Avenue, One Stop, 184 Herbert Avenue, Poole (formerly known as Dillons) and Alldays, 36 Rossmore Road, Poole.

"And it is further adjudged that this Order is necessary to protect persons in the following Local Government area(s) of Poole from further anti-social acts by him.

"And it is ordered that the Defendant is prohibited from:-

"1. Entering on the grounds or premises of the Martin Kemp Welch School or Leisure Centre site.

"2. Loitering outside or entering premises known as:-

"(a) One Stop, formerly known as Dillons, 184 Herbert Avenue, Poole.

"(b) Alldays, 36 Rossmore Road, Poole.

> "3. Causing a nuisance or disturbance or loitering outside of:
>
> "(a) Hope Court, 198 Herbert Avenue, Poole.
>
> "(b) Stanfield Close, Poole.
>
> "4. Using threatening, intimidating or other such behaviour likely to cause alarm, distress or harassment, or inciting or encouraging others to do so within the Poole area.
>
> "5. Causing or attempting to cause vandalism or damage to property within the Poole area.
>
> "Until (... 03.08.2002 ...)"

5. It will be seen from the order that part of the appellant's misbehaviour was found to have occurred at Martin Kemp Welch School, a school from which we are told today that he had been excluded, and indeed the order as made prohibited him from entering those premises.

6. On the same date as the respondents applied for the ASBO, 21st March 2000, they also laid informations against him in respect of a number of offences under section 547(1) of the Education Act 1996. That section provides:

> "Any person who without lawful authority is present on premises to which this section applies and causes or permits nuisance or disturbance to the annoyance of persons who lawfully use those premises (whether or not any such persons are present at the time) is guilty of an offence and liable on summary conviction to a fine not exceeding level 2 on the standard scale."

7. On 15th May 2000, before therefore the ASBO was made, the appellant was convicted in the Central Dorset Youth Court on his own pleas of guilty to five such offences contrary to section 547(1), for which fines totalling £50 were imposed, payable at £5 per week for ten weeks by the appellant's father, RS, who was bound over. All five offences occurred in October 1999. The relevance of that to the present appeal will shortly appear.

8. Rather than setting out the facts found by the court in the conventional manner, the case stated instead annexes Judge Beashel's judgment, given on 16th March 2001, a judgment which was plainly extempore and covers some eight and a half pages of transcript. For present purposes, I can adequately summarise the facts found as follows. According to a large body of evidence before the Crown Court (which heard this case for two days, as had the district judge before them), the appellant was one of two main ringleaders of a group of some ten to 15 youths regularly gathering in the Poole Borough area. For a period of nearly 18 months, starting in about November 1998 and continuing up until March 2000, this appellant, his fellow ringleader and the group as a whole had repeatedly engaged in anti-social behaviour. There was a wealth of general evidence, both direct and hearsay, to that effect. The conduct in question included shouting, swearing, spitting, threats, intimidation, criminal damage, theft and general boorishness of the worst and most offensive kind. That said, the judgment condescends to a detailed account of only some six or seven specific occasions, three of them occasions which had already been the subject of section 547 proceedings. It is sufficient to give one example of a school incident and one of a non-school incident.

9. One of the school incidents occurred on 5th November 1999, this, be it noted, albeit the subject of a criminal summons, did not in the event lead to a conviction; rather, on this particular summons, the prosecution offered no evidence and it was accordingly dismissed. At the Crown Court two witnesses gave evidence as to what happened at the school on that occasion. The school's site manager described the appellant as being aggressive towards pupils, disrupting a class, spitting at pupils through the window, refusing to leave and being verbally abusive. One of the teachers takes up the story from that point and describes the appellant and another youth shouting, spitting in at the windows, throwing dirt through the windows and verbally abusing the teacher by telling him to "fuck off" and so forth, and the class being severely disrupted by

the incident.

10. By way of non-school-based activity, I will simply quote the judgment's summary of the evidence of a Mrs James, evidence which the court plainly accepted. She had formerly been supervisor at the One Stop store and described all sorts of misbehaviour:

> "She said that this group of local youths had threatened the staff, they stole, they caused damage, eggs were thrown at the shop windows, customers were spat at and had their way blocked by the youths, and the intimidation was so bad that, on some occasions, the store had to be closed. [The judgment then indicates where this witness's statement is to be found.] She told us that, having had a lot of dealings with this group and having observed them for some long time (and her statement was made exactly a year ago), she believed that there were two main ringleaders [and then she names the other one and this defendant]. She told us how she would see younger children, who had previously been well-behaved and polite, take up with these two and suddenly change in their attitude towards the staff, becoming rude and disorderly.
>
> "She told us how they would harass the staff, causing damage to the store, and on one occasion the group pulled all the shutters down on the outside of the store preventing the customers inside from leaving, threw eggs, spat at customers, blocked their way and the store had to be closed.
>
> "She described an incident on 8th March when the group, including [the other ringleader] and the defendant, were outside the store throwing plastic bins and signs at the windows, they also tried to remove a pane of glass, and their behaviour was so brazen, she said, that, no matter how many people were around, they still continued with their actions and were abusive and threatening to anyone who tried to remonstrate with them.
>
> "In cross-examination, Mrs James told us that, at first, the defendant was a perfectly nice young man and that [the other boy] was the ringleader, but gradually the defendant behaved in the way she has described. She said that, so far as 8th May was concerned, she was there that night. She said that the defendant was there and was causing a disturbance, 'although I cannot say particularly what he was doing, but in another instance I could'."

11. Having in this and other such passages thus summarised much of the direct, eye-witness evidence, the judgment continues as follows:

> "There was a great deal more evidence. The police officers had set up a team to concentrate on the problem in the locality. Inspector James gave evidence before us, and told us how, over the six months up until July [1999], two youths in particular had caused a particularly serious problem, being [the other ringleader] and this defendant. The police kept a log of all reported incidents involving the two of them, which is to be found in our bundle of documents, and we referred to a letter that was sent to the defendant's parents telling him that, if his behaviour was no better, an application would be made for an ASBO."

12. The judge then observed how it was perfectly true that there was a great deal of hearsay, if not double hearsay, involved in aspects of the evidence, but he described it as "extremely useful background" and said that the court was:

> "Concentrating on the real issues that we have found proved on the criminal standard of proof."

13. In conclusion, the judgment made plain that they were satisfied to that same standard on both limbs of section 1 of the 1998 Act and concluded:

> "We consider that the behaviour of this defendant was serious behaviour. We consider his behaviour to be appalling, and we think this Act was brought in to deal with this very sort of troublemaker. We have no hesitation in dismissing the appeal and confirming the order made by the learned district judge on 3rd August last year."

14. I can now return to the case stated, which formulates three questions for the opinion of this court as follows:

> "i. Whether it is proper for the identical facts relied on by the Respondent in a Criminal Prosecution for nuisance under the Education Act 1996 to be relied on at a later date by the Respondent in a civil hearing under the Crime and Disorder Act 1998, which hearing is intended to be an alternative procedure to any criminal prosecution?
>
> "ii. Whether as a matter of law the facts found proved by the Court could reasonably be described as Anti Social Behaviour under Section 1 of the Crime and Disorder Act 1998?
>
> "iii. Whether as a matter of the law on the facts found proved whether the Court could reasonably be satisfied that such an Order was necessary?"

15. We will now address those three questions briefly and in turn. The reference in question i to the 1998 Act being "intended to be an alternative procedure to any criminal prosecution" I understand to be a reference to two paragraphs in the Master of the Rolls' judgment in The Queen on the Application of McCann v Manchester Crown Court [2001] 4 All ER 264, the case which decided that section 1(1) proceedings for an ASBO are civil proceedings both under the domestic law and for the purposes of Article 6 of the European Convention on Human Rights. The two paragraphs in question are these, at page 271:

> "18. The Home Office has published a guidance document which, it emphasises, is non-statutory and should not be regarded as authoritative legal advice. This includes the following commentary:
>
> 'The order making process itself is a civil one akin to that for an injunction. The order is aimed at deterring anti-social behaviour and preventing escalation of the behaviour, without recourse to criminal sanctions. Breach of the order, however, is a criminal offence. The process is not suitable for private disputes between neighbours (which are usually civil matters), but is intended to deal with criminal or sub-criminal activity which, for one reason or another, cannot be proven to the criminal standard, or where criminal proceedings are not appropriate. The orders are not intended to replace existing criminal offences, for example in the Public Order Act 1986, but there may be circumstances where they provide alternative means to deal with such behaviour.'
>
> "19. It may be that Lord Woolf had this passage in mind when he spoke of an object of the legislation as being to make anti-social behaviour easier to prove. It may be that he had in mind the legislative history. No evidence has been put before us in relation to this, but it is apparent from the Act itself that its purpose is to adopt a novel method of attacking anti-social behaviour. It can properly be implied that the reason for so doing was that the existing provisions of the criminal law were not proving adequate for this purpose."

16. Basing himself on those paragraphs, I understand Mr Gau to be submitting that, because some at least of the incidents relied upon as part of the evidence in support of the ASBO had already produced convictions under the Education Act, they could not properly found part of the material supporting the making of the order. I see no warrant whatever for that submission. It seems to me perfectly proper to use the same material to found a criminal conviction and then in a civil process to support the making of an order akin to an injunction. Indeed, it would seem to

me positively eccentric to have omitted reference to part of the conduct which undoubtedly contributed to the public mischief when it came to seeking to deter it in future.

17. Question ii I can deal with yet more briefly. The answer to it is in my judgment a resounding and emphatic "yes". If the appellant's conduct, as described by the various witnesses, was not such as to cause or be likely to cause harassment, alarm or distress to others within the meaning of section 1(1)(a) of the 1998 Act, it is difficult to see what would be. The Crown Court described the appellant's conduct as "appalling". So it was. The appeal in this regard seems to me an impertinence.

18. Question iii strikes me as no less easily answered. Mr Gau suggests that the Crown Court, having found section 1(1)(a) proved, did not then go on to ask itself whether section 1(1)(b) also was proved, whether in short it was proved that an ASBO was necessary. His contention is that the Crown Court imposed the order, or rather upheld the order, by way of "punishment for historical behaviour". Mr Gau's argument in this regard I understand to be based essentially on the fact that the last incident of misbehaviour relied upon by the applicant authority occurred in March 2000, just before the application was made, and nothing had been alleged, let alone proved, against the appellant between then and 3rd August, when the district judge originally made the ASBO, let alone between then and the date of the Crown Court hearing some seven and a half months later.

19. With the best will in the world, that to my mind is a hopeless argument. It must be expected that, once an application of this sort is made, still more obviously once an ASBO has been made, its effect will be likely to deter future misconduct. That, indeed, is the justification for such orders in the first place. It would be a remarkable situation were a defendant, against whom an order has rightly been made, then able, on appeal to the Crown Court, to achieve its quashing because in the interim he has not disobeyed it; rather the very effectiveness of such an order would to my mind justify its continuance. The conduct on which the Magistrates' Court and in turn the Crown Court should concentrate on determining whether such an order is necessary is that which underlay the authority's application for the order in the first place. To my mind, indeed, it would have been surprising here had the Crown Court not been satisfied that this order was necessary and that its continuation was justified in the particular circumstances of this case.

20. It follows that I would answer all three questions in the affirmative and would unhesitatingly dismiss this appeal.

MR JUSTICE SCOTT BAKER: I agree.

LORD JUSTICE SIMON BROWN: Now, Mrs Bath, are there any consequential orders to be sought?

MRS BATH: My Lord, yes, I would ask for my costs of this appeal.

LORD JUSTICE SIMON BROWN: Any resistance to that, Mr Gau?

MR GAU: My client is a legally aided 17-year old under a representation order.

LORD JUSTICE SIMON BROWN: That makes your application somewhat difficult, does it not?

MRS BATH: My Lord, yes. I would ask for the usual order.

LORD JUSTICE SIMON BROWN: You want a football pool order, do you?

MRS BATH: My Lord, yes. He is 17. One expects that he will be 18 shortly and he will enter the working world and have some money in due course.

MR JUSTICE SCOTT BAKER: So you want an order for costs not to be enforced without further order?

MRS BATH: Please, my Lord.

LORD JUSTICE SIMON BROWN: Yes, Mr Gau. Can you resist an order in those terms?

MR GAU: No, my Lord, not with such a low reference from Mrs Bath.

LORD JUSTICE SIMON BROWN: Very good. Do you seek a legal aid taxation?

MR GAU: I do, my Lord.

LORD JUSTICE SIMON BROWN: Yes, you may have it.

Mr Gau, I do not want to be tiresome but I do, with respect, think that, before you raise such points as you sought to raise at the outset, you really ought to be very clear indeed that they are soundly based and not just pulled out of a hat without reference to the case stated, except for a very compelling reason.

MR GAU: My Lord, I agree. I apologise.

House of Lords

South Bucks District Council *v* Porter and another

Chichester District Council *v* Searle and others

Wrexham County Borough Council *v* Berry

[2003] UKHL 26

2003 April 7, 8, 9; May 22

Lord Bingham of Cornhill, Lord Steyn, Lord Clyde, Lord Hutton and Lord Scott of Foscote

Planning — Planning control — Breach — Local authority's application for injunction — Gipsies occupying mobile homes on own land in breach of planning control — Whether court obliged to consider likely effect of injunction and any penalties for infringement on gipsies' right to respect for home and family life — Whether environmental considerations outweighing gipsies' human rights — Town and Country Planning Act 1990 (c 8), s 187B (as inserted by Planning and Compensation Act 1991 (c 34), s 3) — Human Rights Act 1998 (c 42), s 6(1), Sch 1, Pt I, art 8

In three cases local planning authorities applied successfully to the court under section 187B of the Town and Country Planning Act 1990[1] for injunctive relief against the defendants, who were gipsies, to prevent them from living in mobile homes and caravans on land acquired by them for that purpose but for which planning consent had been refused. The defendants appealed on the ground that in granting the injunctions the court had failed to consider, in addition to any relevant planning considerations, the likely effect of the orders on their human rights in accordance with section 6(1) of the Human Rights Act 1998[2] and the Convention scheduled to that Act. The Court of Appeal allowed their appeals.

On appeal by the local planning authorities—

Held, dismissing the appeals, that section 187B of the 1990 Act conferred on the court an original and discretionary, not a supervisory, jurisdiction, to be exercised with due regard to the purpose for which it was conferred to restrain actual or threatened breaches of planning control; that it was inherent in the injunctive remedy that its grant depended on the court's judgment of all the circumstances of the case; that, although the court would not examine matters of planning policy and judgment which lay within the exclusive purview of the authorities responsible for administering the planning regime, the court was not obliged to grant relief because a planning authority considered it necessary or expedient to restrain a planning breach; that the court would have regard to all, including the personal, circumstances of the case, and, since section 6 of the 1998 Act required the court to act compatibly with a Convention right as so defined, and having regard to the right guaranteed in article 8, the court would only grant an injunction where it was just and proportionate to do so; and that, accordingly, the planning authorities' applications would be determined on that basis (post, paras 20, 27–31, 37–42, 49–50, 53, 55–59, 63–67, 71, 73–74, 75–77, 84–89, 92–93, 95, 98–104).

Mole Valley District Council v Smith (1992) 90 LGR 557, CA and *Hambleton District Council v Bird* [1995] 3 PLR 8, CA distinguished.

Decision of the Court of Appeal [2001] EWCA Civ 1549; [2002] 1 WLR 1359; [2002] 1 All ER 425 affirmed.

[1] Town and Country Planning Act 1990, s 187B, as inserted: see post, para 43.
[2] Human Rights Act 1998, s 6: see post, para 58. Sch 1, Pt I, art 8: see post, para 58.

The following cases are referred to in the opinions of their Lordships:

Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223; [1947] 2 All ER 680, CA

Attorney General v Bastow [1957] 1 QB 514; [1957] 2 WLR 340; [1957] 1 All ER 497

Attorney General v Chaudry [1971] 1 WLR 1614; [1971] 3 All ER 938, CA

Basildon District Council v Secretary of State for the Environment, Transport and the Regions [2001] JPL 1184

Buckley v United Kingdom (1996) 23 EHRR 101

Castanho v Brown & Root (UK) Ltd [1981] AC 557; [1980] 3 WLR 991; [1981] 1 All ER 143, HL(E)

Chapman v United Kingdom (2001) 33 EHRR 399

City of London Corpn v Bovis Construction Ltd [1992] 3 All ER 697, CA

East Barnet Urban District Council v British Transport Commission [1962] 2 QB 484; [1962] 2 WLR 134; [1961] 3 All ER 878, DC

Gouriet v Union of Post Office Workers [1978] AC 435; [1977] 3 WLR 300; [1977] 3 All ER 70, HL(E)

Guildford Borough Council v Smith [1994] JPL 734, CA

Hambleton District Council v Bird [1995] 3 PLR 8, CA

Liddell's Settlement Trusts, In re [1936] Ch 365; [1936] 1 All ER 239, CA

Manchester Corpn v Connolly [1970] Ch 420; [1970] 2 WLR 746; [1970] 1 All ER 961, CA

Mole Valley District Council v Smith (unreported) 21 June 1991, Hoffmann J; (1992) 90 LGR 557, CA

Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment [1985] AC 132; [1984] 3 WLR 32; [1984] 2 All ER 358, HL(E)

R v Basildon District Council, Ex p Clarke [1996] JPL 866

R v Lincolnshire County Council, Ex p Atkinson (1995) 8 Admin LR 529

R v Wicks [1998] AC 92; [1997] 2 WLR 876; [1997] 2 All ER 801, HL(E)

R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23; [2003] 2 AC 295; [2001] 2 WLR 1389; [2001] 2 All ER 929, HL(E)

Sheffield City Council v Smart [2002] EWCA Civ 4; [2002] LGR 467, CA

Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759; [1995] 2 All ER 636, HL(E)

Waverley Borough Council v Hilden [1988] 1 WLR 246; [1988] 1 All ER 807

Westminster City Council v Great Portland Estates plc [1985] AC 661; [1984] 3 WLR 1035; [1984] 3 All ER 744, HL(E)

The following additional cases were cited in argument:

Aylesbury Vale District Council v Miller (unreported) 30 July 1999, Burton J

Bristol City Council v Lovell [1998] 1 WLR 446; [1998] 1 All ER 775, HL(E)

Brown v Stott [2003] 1 AC 681; [2001] 2 WLR 817; [2001] 2 All ER 97, PC

Buckinghamshire County Council v North West Estates plc [2003] JPL 414

County Properties Ltd v Scottish Ministers 2000 SLT 965

Johnson (B) & Co (Builders) Ltd v Minister of Health [1947] 2 All ER 395, CA

Miles v Secretary of State for the Environment (unreported) 11 August 1999, CA; Court of Appeal (Civil Division) Transcript No 1495 of 1999, CA

R (Daly) v Secretary of State for the Home Department [2001] UKHL 26; [2001] 2 AC 532; [2001] 2 WLR 1622; [2001] 3 All ER 433, HL(E)

R (Samaroo) v Secretary of State for the Home Department [2001] EWCA Civ 1139; [2001] UKHRR 1150, CA

Runa Begum v Tower Hamlets London Borough Council (First Secretary of State intervening) [2003] UKHL 5; [2003] 2 AC 430; [2003] 2 WLR 388; [2003] 1 All ER 731, HL(E)

APPEALS from the Court of Appeal

In the first case the claimant, South Bucks District Council appealed, with leave of the House of Lords (Lord Bingham of Cornhill, Lord Hoffmann and Lord Hobhouse of Woodborough) granted on 18 March 2002, from the decision of the Court of Appeal (Simon Brown, Peter Gibson and Tuckey LJJ) dated 12 October 2001 allowing an appeal by the first defendant, Linda Porter, from the order of Burton J made on 27 January 2000 pursuant to section 187B of the Town and Country Planning Act 1990, as inserted by section 3 of the Planning and Compensation Act 1991, granting the claimant injunctive relief requiring her and the second defendant, John Porter, to cease within one year using her land at Willow Tree Farm, Swallow Street, Iver, Buckinghamshire to station caravans in breach of planning control.

In the second case the claimant, Chichester District Council, appealed, with leave of the House of Lords (Lord Bingham of Cornhill, Lord Hoffmann and Lord Hobhouse of Woodborough) granted on 18 March 2002, from the decision of the Court of Appeal (Simon Brown, Peter Gibson and Tuckey LJJ) dated 12 October 2001 allowing an appeal by the defendants, Darren Searle, Danny Keet and Kim Searle, from the order of Judge Barratt QC, sitting at Chichester County Court, made on 30 June 2000 granting the claimant an injunction under section 187B of the 1990 Act, as inserted, prohibiting the defendants, with immediate effect, from residing in mobile homes on their land to the south of Willowmead, Highleigh Road, Sidlesham, West Sussex.

In the third case the claimant, Wrexham County Borough Council, appealed, with leave of the House of Lords (Lord Bingham of Cornhill, Lord Hoffmann and Lord Hobhouse of Woodborough) granted on 18 March 2002, from the decision of the Court of Appeal (Simon Brown, Peter Gibson and Tuckey LJJ) dated 12 October 2001 allowing an appeal by the defendant, Michael Berry, from the injunctive order made by McCombe J on 12 February 2001 on the claimant's application under section 187B of the 1990 Act, as inserted, requiring the defendant to remove caravans and vehicles stationed on his land at Homestead Lane, Wrexham, in breach of planning control by 20 April 2001.

The facts are stated in the opinion of Lord Bingham of Cornhill.

Timothy Straker QC and *Ian Albutt* for the local authority in the first appeal and *Timothy Straker QC* and *Robin Green* for the local authorities in the second and third appeals. The scheme of planning control, including enforcement, imposes restrictions, in the public interest, on private rights of ownership of land. To ensure public accountability implementation and administration of the main elements of the scheme are principally entrusted to local planning authorities, which are democratically elected bodies; and their decisions are in general subject to an appeal on the merits to the Secretary of State, who is accountable to Parliament.

The local planning authorities' functions include the formulation and application of development plan policies, determination of planning applications which involves the weighing of competing interests in the overall general interest, and enforcement of planning control. These are administrative functions, wholly different from the judicial function of the court which exists, where appropriate, to support enforcement. The courts

A are not appropriate arbiters of matters of policy or expediency and the Town and Country Planning Act 1990 makes provision for only a limited review jurisdiction exercisable by the High Court over certain planning decisions, thereby ensuring respect for the rule of law without undermining the democratic principle: see *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295; B *Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment* [1985] AC 132; *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759; *B Johnson & Co (Builders) Ltd v Minister of Health* [1947] 2 All ER 395 and *County Properties Ltd v Scottish Ministers* 2000 SLT 965.

Section 187B was inserted into Part VII of the 1990 Act by the Planning and Compensation Act 1991 following the recommendations of the Report by Mr Robert Carnwath QC: "Enforcing Planning Control" (February C 1989), to supplement the armoury of enforcement procedures available to planning authorities. Guidance is given on its application in Department of the Environment, Transport and the Regions Circular 10/97, Annex 5; "Enforcing Planning Control: Good Practice Guide for Local Planning Authorities, chap 9 (Department of the Environment, Transport and the Regions, 1997); *City of London Corpn v Bovis Construction Ltd* [1992] 3 All D ER 697 and *Bristol City Council v Lovell* [1998] 1 WLR 446.

Section 187B forms part of the general scheme of enforcement and should be interpreted to give effect to the overall policy of enforcement procedures (see, by contrast *R v Wicks* [1998] AC 92) in which the local planning authority, subject to limited review by the court, is the principal agent. The terms of section 187B and its place in the scheme of planning control indicate that the role of the court is as envisaged in the Carnwath Report: it is for the E local planning authority to determine whether an injunction is appropriate, and for the court, exercising a limited review jurisdiction, to grant an injunction in terms suited to restraining the relevant breach. Accordingly only local planning authorities may apply for an injunction; members of the public, no matter how badly affected by unlawful development, have no power to do so; and before applying an authority must be satisfied that there F is an actual or apprehended breach of planning control, and that it is necessary or expedient for that breach to be restrained by an injunction. In reaching the decision to initiate proceedings the authority will inevitably have to assess, inter alia, the planning merits of the development and the interests of local inhabitants and the defendant: see *Westminster City Council v Great Portland Estates plc* [1985] AC 661 and *East Barnet Urban* G *District Council v British Transport Commission* [1962] 2 QB 484.

Section 187B did not introduce a new regime, but continued the approach previously adopted. Under predecessor legislation it was not for the court, on an authority's application for injunctive relief in support of enforcement, to review the decision to bring the proceedings: to do so was to usurp the policy decision-making functions of the Secretary of State. Similarly, on an application under section 187B it is not for the court, considering the H exercise of its discretion, to act as an appellate body in respect of a planning decision or to seek to assess for itself the benefits and disbenefits to the public. Accordingly the position prior to the implementation of the Human Rights Act 1998 was that, provided the breach of planning control was made out and the local planning authority's decision to seek an injunction

was not vitiated on *Wednesbury* grounds (see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223), an injunction should issue: see *Mole Valley District Council v Smith* (unreported) 21 June 1991; (1992) 90 LGR 557; *Hambleton District Council v Bird* [1995] 3 PLR 8; *Waverley Borough Council v Hilden* [1988] 1 WLR 246 and *Attorney General v Bastow* [1957] 1 QB 514. A local planning authority's decision to apply for an injunction may be challenged on judicial review, but more conveniently the same grounds of challenge can in most cases be raised on a section 187B application: see *R v Basildon District Council, Ex p Clarke* [1996] JPL 866.

The position after implementation of the 1998 Act has not changed the allocation of planning functions; and the obligation on the court to act compatibly with the Convention does not mean that in determining an application for a section 187B injunction the court is required to consider for itself matters of policy or expediency, or to decide where the balance lies between the interests of the defendant and the wider interests of the community: see *Chapman v United Kingdom* (2001) 33 EHRR 399; *Sheffield City Council v Smart* [2002] LGR 467; *Runa Begum v Tower Hamlets London Borough Council* [2003] 2 AC 295 and *Buckinghamshire County Council v North West Estates plc* [2003] JPL 414.

The national scheme for determining planning applications and enforcing planning control is regarded as being compatible with articles 6 and 8 of the Convention: see the *Chapman* case and *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295. Planning control decisions fall within an area in which decision-making is customarily entrusted to administrators, and are decisions appropriate for administrative determination. A limited judicial review jurisdiction is therefore permissible: see the *Runa Begum* case. It recognised that national authorities are better placed than the Strasbourg tribunals to evaluate local needs and conditions: see *Buckley v United Kingdom* (1996) 23 EHRR 101.

Although article 8(2) requires any interference with rights under article 8(1) to be proportionate it does not require the court to exercise a full merits review when, prior to implementation of the Convention, a limited supervisory jurisdiction was in place: see *R (Daly) v Secretary of State for the Home Secretary* [2001] 2 AC 532, 548, para 28.

The question what punishment should attend a breach of a court's order made pursuant to section 187B is separate from, and not determinative of, the question whether an injunction should be granted. On the application the court is asked to enforce the general law; on an application to commit the court is asked to enforce its order. Different circumstances and considerations apply at each stage; and in any event the court is not obliged to impose a penalty for breach: see *Guildford Borough Council v Smith* [1994] JPL 734.

The Court of Appeal were wrong to conclude that the court should refuse to grant an injunction unless it would be prepared to contemplate committal for breach. If that were a proper approach the court would be obliged to consider, on a section 187B application, a wide range of matters, including hardship, health and educational needs and planning history, and to weigh competing interests and to conclude whether the grant of an injunction

A would be proportionate. On that approach the court would conduct the exercise entrusted to local planning authorities. In any event injunctions are granted in the expectation that they will be obeyed: see *In re Liddell's Settlement Trust* [1936] Ch 365 and *Castanho v Brown & Root (UK) Ltd* [1981] AC 557. The court's function is to administer the law (see *Manchester Corpn v Connolly* [1970] Ch 420) and it should not decline to
B do so because of distaste for the possible consequences for the law-breaker.

The Court of Appeal should not have departed from its previous decisions and should not have held that the court had an absolute discretion under section 187B, which required it to balance for itself the various competing interests of the defendant and the community. In so holding the Court of Appeal failed to recognise the democratic principle inherent in the scheme of the 1990 Act.

C

Charles George QC and *Stephen Cottle* for the defendants in the first and third appeals. The only issue concerns the role and jurisdiction of the court on an application under section 187B(1) of the 1990 Act: whether the court is constrained from considering the consequences for a defendant of the grant of an injunction, including questions relating to hardship and to the unsuitability or unavailability of alternative premises. Whatever the
D position before implementation of the Human Rights Act 1998, the court must, after October 2000, exercise a full jurisdiction in addressing issues arising under article 8(2) of Schedule 1, Part I to the 1998 Act.

However, the judge's decision in the first appeal was reached before implementation of the 1998 Act, and in any event section 187B(2) confers a discretion on the court enabling and requiring it to take into account a wide
E range of considerations, including hardship, in determining whether to make an injunction, and if so, the terms in which it should be framed: see by contrast *Aylesbury Vale District Council v Miller* (unreported) 30 July 1999. Before the enactment of section 187B the court was able, as a matter of jurisdiction, to consider the availability of, and any shortfall in, alternative sites: see *Mole Valley District Council v Smith* 90 LGR 557, 562–563. After section 187B came into force, although the court applied a narrow
F construction to the scope of such residual discretion as it retained (see *Hambleton District Council v Bird* [1995] 3 PLR 8), it was unwilling to impose a penalty where its injunctive order was breached: see *Guildford Borough Council v Smith* [1994] JPL 734.

When Parliament enacted section 187B the sponsoring department correctly stated that it was for the local planning authority to initiate
G injunctive proceedings based on its assessment of the seriousness of the breach (actual or anticipated) and the particular personal circumstances involved, and for the courts, in their absolute discretion to consider, in the circumstances of any case, whether to make the order sought: see Guidance issued by the Department of the Environment, Circular 21/92, "Planning and Compensation Act 1991: Implementation of the Main Enforcement Provisions" annex 4 and Department of the Environment, Transport and the
H Regions: "Enforcing Planning Control: Good Practice Guide for Local Planning Authorities" (1997), para 9.9.

In exercising its powers the court is inevitably engaged in an aspect of planning control; but its jurisdiction is original, not supervisory: see *Sheffield City Council v Smart* [2002] LGR 467, 482. Although the local

planning authority must have reached a lawful decision to make an application under section 187B(1) which would be reviewable on *Wednesbury* principles (see *R v Basildon District Council, Ex p Clarke* [1996] JPL 866 and *Aylesbury Vale District Council v Miller* (unreported) 30 July 1999), any such review concerns only the position as at the date of the decision to initiate proceedings. Irrespective of whether that decision was *Wednesbury* unreasonable, the court under section 187B has to reach its own view of what is appropriate and commensurate as at the date of the hearing. In doing so the court would inevitably pay great weight to the local planning authority's assessment of the planning merits, in particular the harm caused by the actual or apprehended breach of planning control. It is no part of the court's role to question or redetermine planning policy in respect of which the local planning authority has particular expertise as well statutory obligations; but certain planning matters, notably of a factual nature, fall within a different category and should in no sense be precluded from the court's consideration. Similarly, personal circumstances and hardship should not be ignored: see *Westminster City Council v Great Portland Estates plc* [1985] AC 661 and *Basildon District Council v Secretary of State for the Environment, Transport and the Regions* [2001] JPL 1184, specifically in the context of gipsies. It would be illogical to interpret section 187B(2) so as to exclude consideration of the hardship to a defendant which the grant of an injunction might occasion, as a factor in the court's assessment as to whether it should be granted.

Local planning authorities are enjoined to adopt a humane and compassionate approach to the exercise of their powers in the case of gipsies: see Department of the Environment Circular 18/94: "Gypsy Sites Policy and Unauthorised Camping" para 9; Department of the Environment, Transport and the Regions Circular 26 July 2000, para 9; *R v Lincolnshire County Council, Ex p Atkinson* (1995) 8 Admin LR 529 and *Guildford Borough Council v Smith* [1994] JPL 734. Thus, hardship and availability of alternative, suitable accommodation ought to be considered at the injunctive stage.

The proper approach to section 187B(2), save in exceptional circumstances, is only to grant relief in cases which are regarded as being clear: where the court is satisfied, first, that the planning authority has properly reached a final conclusion that the gipsies' continuing occupation of the site could no longer be tolerated in the public interest, and secondly, that it is appropriate to enforce their removal by injunction even though that would drive the gipsies either onto the road, into homeless accommodation or, on non-compliance, into prison.

In any event, after implementation of the 1998 Act, the effect of article 8(2) has potential or actual impact in cases such as the present. It is therefore for the court reach its own decision whether the gypsies' removal from the site is proportionate to the public interest in preserving the environment: and the court must therefore decide that removal, on pain of imprisonment for disobedience to its order, is necessary for that end and that that would not impose an excessive burden on the defendant. In particular, where, as here, the defendant in each case is of good character and in poor health and, on the evidence, no suitable alternative accommodation is

A available, it is inconsistent with article 8 to treat those matters as foreclosed for the purposes of section 187B(2). The issue as to whether or not planning permission should be granted is exclusively a matter for the local planning authority. However, the making of the order sought in each of the present cases would constitute interference with the defendant's article 8 rights in a situation where there was a positive obligation, given the defendant's membership of a vulnerable minority group, to facilitate his or her way of B life: see *Chapman v United Kingdom* 33 EHRR 399, 422, 427, paras 78 and 96. The courts are obliged, so far as possible, to read section 187B(2) in a way which is compatible with Convention rights, and, as a public authority, they must not act incompatibly with such a right: see sections 3(1) and 6(1) of the 1998 Act and *R (Daly) v Secretary of State for the Home Department* [2002] 2 AC 532, 546. The court is therefore itself making a primary C decision under section 187B(2), rather than merely reviewing the local planning authority's decision under section 187B(1) to apply for injunctive relief.

The court must therefore itself investigate and decide whether the breach of article 8(1) is justified under article 8(2), and must adopt a stringent approach to an application by an organ of the state for the removal of a D person's home: see *Miles v Secretary of State for the Environment* (unreported) 11 August 1999; Court of Appeal (Civil Division) Transcript No 1495 of 1999.

In every case under article 8(2) the question arises whether the interference is in accordance with the law, pursues a legitimate aim and is necessary, and proportionate in a democratic society: see the *Chapman* case and *R (Samaroo) v Secretary of State for the Home Department* [2001] E UKHRR 1150. The court must evaluate and determine each aspect and, unless all the tests are satisfied, the interference cannot be justified under article 8(2) and cannot be appropriate under section 187B(2).

A margin of discretion will be accorded to the local planning authority. The court should recognise their expertise, local knowledge and planning background and that the procedure for initiating section 187B proceedings F are by statute entrusted to them. However, that margin of discretion is distinct from and narrower than the European Court of Human Rights' margin of appreciation: see *Brown v Stott* [2003] 1 AC 681.

Cottle following. Relief should also be refused in the third appeal on the ground that the local authority's decision to apply for injunctive relief was flawed on the facts.

G *Straker QC* replied.

The defendants in the second appeal did not appear and were not represented.

Their Lordships took time for consideration.

H 22 May. **LORD BINGHAM OF CORNHILL**

1 My Lords, on 12 October 2001, the Court of Appeal (Simon Brown, Peter Gibson and Tuckey LJJ) allowed three appeals and dismissed one: [2002] 1 WLR 1359. The dismissal of the fourth of these appeals (*Hertsmere Borough Council v Harty)* has not been challenged and that case

need not be mentioned further. The appellants before the Court of Appeal in each of the three cases now before the House were Gipsies complaining of injunctions granted against them at first instance on the application of local planning authorities under section 187B of the Town and Country Planning Act 1990. For reasons given by Simon Brown LJ in a judgment with which the other members of the court agreed (paragraphs 60, 61) the Gipsies' appeals were allowed and the cases were remitted to the respective trial courts for redetermination. By leave of the House the three local authorities now appeal to it, challenging the guidance given by the Court of Appeal on the grant of injunctions under section 187B. The correctness of that guidance is the central issue in these appeals.

2 Although the Court of Appeal described the facts of these particular cases as of secondary importance only (paragraph 5), because the issue raised is one of principle, it is none the less relevant to record the facts in brief summary and to note factual developments in the period of 18 months since the Court of Appeal gave judgment.

Mr Berry

3 Mr Berry bought land near Wrexham, within the Green Barrier, the Welsh equivalent of the Green Belt, in August 1994. The land is within the area of the Wrexham County Borough Council. His applications for planning permission to live on the land with his wife and six children were refused in October 1994, December 1995 and July 1999. He and his family were then living on a local authority site at Croesnewydd, but in September 1999 that site was closed and they were evicted. They transferred to another local authority site nearby at Ruthin Road but were subjected to violence at the hands of other residents of the site and in September 2000 moved to the land which Mr Berry owned. The local authority warned him that he had no planning permission to use the site in this way, and called on him to rectify this breach of planning control. His solicitor was instructed to say that Mr Berry would apply for planning permission. The local authority however resolved to issue an enforcement notice and seek an injunction. The application for an injunction was made on 26 October 2000. The hearing of this application was stayed to await the outcome of an application pending in the European Court of Human Rights: *Chapman v United Kingdom* (2001) 33 EHRR 399. On 12 February 2001 the application came before McCombe J, who granted an injunction requiring Mr Berry to remove himself and his caravans and vehicles from the site on or before 20 April 2001. Mr Berry's appeal against this decision was allowed by the Court of Appeal in the decision under appeal. He had by this time, following the grant of the injunction, again applied for planning permission which had again (July 2001) been refused. This refusal prompted the local authority to issue the enforcement notice authorised some ten months earlier, which it did on 31 July 2001. Mr Berry appealed both against the refusal of planning permission and against issue of the enforcement notice. On 18 June 2002 (well after the decisions of the judge and the Court of Appeal) both appeals succeeded. The local authority's challenge to those decisions was rejected by Sullivan J in the Administrative Court but awaits a further hearing by the Court of Appeal.

A **4** There was evidence before McCombe J, to which he referred in his judgment (transcript, p 10), that Mr Berry had a history of cardiac illness. He had had a severe heart attack in about 1997. He remained under the care of a consultant cardiologist. His symptoms of chest pain were largely controlled by medication, but occasional emergencies required his admission to hospital.

B **5** No site was available for occupation by Mr Berry and his family within the local authority's area, except at Ruthin Road.

Mr Searle and others

6 In May 2000 Mr Searle (whom it is unnecessary to distinguish from his co-respondents) bought land within the area of the Chichester District Council from a Mrs Collins for £14,000. She had previously applied for C planning permission for residential occupation of the land but had been refused. The land was not within a Green Belt but was in an area where development was closely controlled. Mr Searle was told by the local authority that planning permission was needed to move a mobile home on to the land, and gave more than one assurance that he would not do so, but by 12 June 2000 he had moved two such homes on to the site. He requested a D form to apply for planning permission and asked that enforcement action be deferred, but on 19 June the local authority resolved to apply for the grant of an injunction. On 22 June application was made and on 30 June an injunction was granted by Judge Barratt QC, who ordered that both mobile homes be removed forthwith. The Court of Appeal allowed Mr Searle's appeal against that order in the decision now under appeal. After that date, the local authority issued an enforcement notice and Mr Searle appealed E against the issue of that notice and also against the refusal of planning permission. It seems that an inquiry was held, the outcome of which is unknown to the House. But Mr Searle and his co-respondents have not appeared to resist the local authority's appeal to the House or uphold the decision of the Court of Appeal. This appeal therefore raises the same issue of principle as those of Mr Berry and Mrs Porter, but whatever the outcome F of the appeal there can in this case be no question of remitting the matter to the trial judge or reimposing the injunction, which is understood to have been overtaken by events.

Mrs Porter

7 Mrs Porter has lived with her partner in a caravan on a site within the G Green Belt at Iver in Buckinghamshire since 1985 when she bought the land. It is within the area of the South Bucks District Council. She has never had planning permission to live on the site, which her partner has used for breeding and dealing in horses. Applications for planning permission made by her in 1988, 1992, 1993 and 1997 were refused, and her appeals against these refusals were either withdrawn (1992, 1993) or dismissed (1998). Enforcement notices were issued in 1987 and 1993: she was fined for non- H compliance with the earlier of these notices in 1988; her appeal against the latter was dismissed in 1994. In September 2000 a further application for planning permission was refused, but she appealed and following a public inquiry in January 2002 an inspector, in February 2002, allowed her appeal and granted her planning permission limited to her personal occupation and

requiring removal of her caravan as soon as she no longer needed it. The reason given by the inspector was that

> "The status of [Mrs Porter] as a Gipsy, the lack of an alternative site for her to go to in the area and her chronic ill health constitute very special circumstances which are, in this case, sufficient to override national and statutory development GB policies."

The local authority challenged the Inspector's decision in the Administrative Court before Judge Rich QC in September 2002, but unsuccessfully. Permission was given to the local authority to appeal to the Court of Appeal against his decision, and on 19 May 2003 the appeal was allowed. Meanwhile, however, the present proceedings had been initiated. The local authority provisionally decided, subject to legal advice, to seek an injunction on 13 January 1999. Application was duly made on 1 December 1999 and on 27 January 2000 Burton J granted an injunction requiring Mrs Porter to cease to use the land for the stationing of caravans on or before 27 January 2001. It was Mrs Porter's appeal against that decision which led to the judgment now under appeal before the House. It will be noted that planning permission had not been granted to Mrs Porter when Burton J and the Court of Appeal made their respective decisions.

8 Mrs Porter was born in 1942. There was evidence before the trial judge that she suffered from chronic asthma, severe generalised osteo-arthritis and chronic urinary tract infection. Her mobility was poor as a result of her osteo-arthritis and asthma. She suffered from depression and was taking painkillers, antibiotics, antidepressants and medication for her asthma. Her general practitioner considered that eviction from the site would be detrimental to her health, which has worsened over the last few years.

9 There were three residential Gipsy sites within the local authority's area, but all of them were full and had long waiting lists; there would be a delay of up to three years before a pitch was likely to become available.

Planning control

10 Over the past 60 years there has been ever-increasing recognition of the need to control the use and development of land so as to prevent inappropriate development and protect the environment. This is, inevitably, a sensitive process, since it constrains the freedom of private owners to use their own land as they wish. But it is a very important process, since control, appropriately and firmly exercised, enures to the benefit of the whole community.

11 It is unnecessary for present purposes to do more than identify the rudiments of the current planning regime, now largely found in the Town and Country Planning Act 1990. The cornerstone of this regime, regulated by sections 55–106B in Part III of the Act, is the requirement in section 57(1) that planning permission be obtained for the carrying out of any development of land as defined in section 55. Applications are made to, and in the ordinary way determined in the first instance by, local planning authorities, which are local bodies democratically-elected and accountable. The responsibility of the local community for managing its own environment is integral to the system. But the local planning authority's

A decision is not final. An appeal against its decision lies to the Secretary of State, on the merits, which will be investigated by an expert, independent inspector empowered to hold an inquiry at which evidence may be received and competing interests heard before advice is tendered to the Secretary of State. The final decision on the merits rests with the Secretary of State, a political office-holder answerable to Parliament. The courts have no B statutory role in the granting or refusing of planning permission unless, on purely legal grounds, it is sought to challenge an order made by the local planning authority or the Secretary of State: in such event section 288 of the Act grants a right of application to the High Court. In addition, there exists the general supervisory jurisdiction of the High Court, which may in this field as in others be invoked to control decisions which are made in bad faith, or perversely, or unfairly or otherwise unlawfully. But this is not a C jurisdiction directed to the merits of the decision under review.

12 The second crucial instrument of control provided by the Act is the enforcement notice, which local planning authorities are empowered to issue by section 172 where it appears to them that there has been a breach of planning control and that it is expedient to issue a notice. Once the notice has taken effect, it amounts to a mandatory order to do what the notice D specifies as necessary to remedy the breach (section 173). Failure to comply may be penalised, on summary conviction, by a substantial fine, and on conviction on indictment by an unlimited fine (section 179(8)). Persistent non-compliance may give rise to repeated convictions (section 179(6)). The coercive effect of an enforcement notice may be reinforced by a stop notice, which the local planning authority may (save in the case of buildings used as dwelling houses) serve if they consider it expedient that any relevant activity E should cease before the expiry of the period for compliance (section 183). Failure to comply may be visited with the same penalties as on non-compliance with an enforcement notice (section 187(2)), and persistent non-compliance may give rise to repeated convictions (section 187 (1A)). Again, however, the local planning authority's decision on enforcement is not final: a right of appeal to the Secretary of State lies against an enforcement notice F (section 174). On appeal the merits of the planning situation may be fully explored and an application for planning permission may be made (section 174(2)(a)). In this instance also the control regime is entrusted to democratically-accountable bodies, the local planning authority and the Secretary of State. The role of the court is confined to determining a challenge on a point of law to a decision of the Secretary of State G (section 289), and to its ordinary supervisory jurisdiction by way of judicial review.

13 The means of enforcement available to local planning authorities under the 1990 Act and its predecessors, by way of enforcement orders, stop orders and criminal penalties, gave rise to considerable dissatisfaction. There were a number of reasons for this, among them the delay inherent in a process of application, refusal, appeal, continued user, enforcement notice, H appeal; the possibility of repeated applications, curbed but not eliminated by section 70A of the 1990 Act; and the opportunities for prevarication and obstruction which the system offered. In the case of Gipsies, the problem was compounded by features peculiar to them. Their characteristic lifestyle debarred them from access to conventional sources of housing provision.

Their attempts to obtain planning permission almost always met with failure: statistics quoted by the European Court of Human Rights in *Chapman v United Kingdom* 33 EHRR 399, 420, para 66, showed that in 1991, the most recent year for which figures were available, 90% of applications made by Gipsies had been refused whereas 80% of all applications had been granted. But for many years the capacity of sites authorised for occupation by Gipsies has fallen well short of that needed to accommodate those seeking space on which to station their caravans. Sedley J alluded to this problem in *R v Lincolnshire County Council, Ex p Atkinson* (1995) 8 Admin LR 529, 533, in a passage quoted in *Chapman* at paragraph 45:

> "It is relevant to situate this new and in some ways Draconic legislation in its context. For centuries the commons of England provided lawful stopping places for people whose way of life was or had become nomadic. Enough common land had survived the centuries of enclosure to make this way of life still sustainable, but by section 23 of the Caravan Sites and Control of Development Act 1960 local authorities were given power to close the commons to travellers. This they proceeded to do with great energy, but made no use of the concomitant power given to them by section 24 of the same Act to open caravan sites to compensate for the closure of the commons. By the Caravan Sites Act 1968, therefore, Parliament legislated to make the section 24 power a duty, resting in rural areas upon county councils rather than district councils (although the latter continued to possess the power to open sites). For the next quarter of a century there followed a history of non-compliance with the duties imposed by the Act of 1968, marked by a series of decisions of this court holding local authorities to be in breach of their statutory duty, to apparently little practical effect. The default powers vested in central government, to which the court was required to defer, were rarely if ever used."

The essential problem was succinctly stated in a housing research summary, "Local Authority Powers for Managing Unauthorised Camping" (Office of the Deputy Prime Minister, No 90, 1998, updated 4 December 2000):

> "The basic conflict underlying the 'problem' of unauthorised camping is between gipsies/travellers who want to stay in an area for a period but have nowhere they can legally camp, and the settled community who, by and large, do not want gipsies/travellers camped in their midst. The local authority is stuck between the two parties, trying to balance the conflicting needs and often satisfying no one."

14 The perceived inadequacy of local authorities' enforcement powers led them to seek injunctive relief, whether in a relator action in the name of the Attorney General (as in *Attorney General v Bastow* [1957] 1 QB 514, a case involving caravans but not Gipsies), or by invoking the general injunctive power of the court (as in *Manchester Corpn v Connolly* [1970] Ch 420), or, later, under section 222 of the Local Government Act 1972 as in *Waverley Borough Council v Hilden* [1988] 1 WLR 246 and *Mole Valley District Council v Smith* (1992) 90 LGR 557). Dissatisfaction with the efficacy of measures to enforce planning control however persisted, and in

July 1988 Mr Robert Carnwath QC was asked by the Secretary of State to examine the scope and effectiveness of existing enforcement provisions and recommend improvements.

15 In his report ("Enforcing Planning Control", February 1989), Mr Carnwath acknowledged (p 21, para 1.1) that the enforcement system had received a consistently bad press ever since the beginning of modern planning control in 1947. He recognised (p 24, para 2.8) that

> "The enforcement system therefore cannot be too rigid. There will always be difficult cases where there is a need to balance the interests of enforcement against the individual circumstances of a business or individual. The system needs to be flexible enough to accommodate such cases, while providing the teeth to secure effective action where it is justified. There will always be disagreement as to where the line is to be drawn."

Mr Carnwath considered (p 41, para 2.22) that the best approach lay in recognition of the injunction as a back-up to the normal statutory remedies, since "Use of the courts ensures that both sides are fully protected, and that the remedies can be adapted to suit the needs of the case." He favoured a formalisation and clarification, but not a significant extension, of the existing law, to give statutory recognition to this "useful weapon in the planning armoury" (p 41, para 2.23). His recommendation on this matter was expressed in these terms (pp 85–86, paras 10.1–10.3):

> "10.1 As explained above (chapter 5, section 2), injunctions have proved a useful back-up to the statutory system in difficult cases. However, there are still doubts about the circumstances in which the remedy is available. In particular, it is unclear to what extent it is available to restrain an actual or threatened breach of planning control before it has become a criminal offence (following service of an enforcement notice or stop notice).
>
> "10.2 In my view the authority should be able to apply for an injunction in respect of any breach or threatened breach of planning control, whether or not an enforcement notice or stop notice has been served. There are likely to be two sets of circumstances where it will be especially useful. First, it can provide an urgent remedy in cases where there is a serious threat to amenity, to deal with either a threatened breach (before a stop notice can be served) or an actual breach (for example, where there are problems in preparing an effective enforcement and stop notice in time). Secondly, it can provide a stronger back-up power in cases where the existing remedies have proved, or are thought likely to be, inadequate. The latter function is well recognised in existing case-law, and has a precedent, for example, in section 58(8) of the Control of Pollution Act 1974.
>
> "10.3 I think it would be a mistake to attempt to prescribe too closely the circumstances in which the remedy would be available, or the forms of order which could be granted. Experience of decisions over the last few years (see chapter 5 above) shows that the merit of the remedy is its flexibility and its ability to evolve to meet changing needs. What is required is its recognition in the Act as a normal back-up to the other remedies, and acceptance that it is for the authority to judge (subject to

the ordinary judicial review criteria of reasonableness) when its use is appropriate. The court already has a wide discretion as to the terms on which an order is to be made. In cases where an order is made in advance of an enforcement or stop notice, the terms could include an undertaking by the authority to serve such notices, so that the ordinary procedures would be available for determining the merits and protecting the recipient."

16 Legislative effect was given to Mr Carnwath's recommendation by section 187B, inserted into the 1990 Act by section 3 of the Planning and Compensation Act 1991, which became effective on 2 January 1992. The correct interpretation and application of this section lie at the heart of these appeals. It provides:

"*Injunctions restraining breaches of planning control.* (1) Where a local planning authority consider it necessary or expedient for any actual or apprehended breach of planning control to be restrained by injunction, they may apply to the court for an injunction, whether or not they have exercised or are proposing to exercise any of their other powers under this Part.

"(2) On an application under subsection (1) the court may grant such an injunction as the court thinks appropriate for the purpose of restraining the breach.

"(3) Rules of court may provide for such an injunction to be issued against a person whose identity is unknown.

"(4) In this section 'the court' means the High Court or the county court."

17 Since the enactment of the section the Department of the Environment has given guidance to local planning authorities on the exercise of enforcement powers which, although inadmissible to construe the section, throws light on what was officially understood to be its effect. Thus in circular 21/91 ("Planning and Compensation Act 1991: Implementation of the Main Enforcement Provisions", 16 December 1991) it was stated:

"7. The decision whether to grant an injunction is always solely a matter for the court, in its absolute discretion in the circumstances of any case. Nevertheless, it is unlikely that the court will grant an injunction unless all the following criteria are satisfied—(1) the LPA have taken account of what appear to be the relevant considerations in deciding that it is necessary or expedient to initiate injunctive proceedings; (2) there is clear evidence that a breach of planning, listed building, or conservation area control, or unauthorised work on a protected tree, has already occurred, or is likely to occur, on land in the LPA's area; (3) injunctive relief is a commensurate remedy in the circumstances of the particular case . . . Even when all these criteria are satisfied, the court may decide that the circumstances of the case do not, on the balance of convenience, justify granting an injunction. If an injunction is granted, the court may suspend its effect until a specified later date."

This advice was substantially repeated in circular 10/97 ("Enforcing Planning Control: Legislative Provisions and Procedural Requirements", 31 July 1997, paragraphs 5.5–5.10), with the substitution of

A "proportionate" for "commensurate" but again with reference to the "absolute" discretion of the court. In chapter 9 of Enforcing Planning Control: Good Practice Guide for Local Planning Authorities (1997), the Department of Environment, Transport and the Regions addressed the topic again:

"*The personal nature of injunctive proceedings*

B "9.9 Unlike an enforcement notice or a stop notice, a planning enforcement injunction is not primarily directed at the parcel of land on which the breach of control is taking place. Injunctive proceedings are 'personal' in the sense that the LPA seeks to obtain an order from the court to restrain a person, or a number of people, who must each be cited by name in the LPA's application, from carrying on the breach. It follows C that, in assessing what is called 'the balance of convenience' in the decision whether to grant injunctive relief on the LPA's application, the court will have to weigh the public interest (which the LPA represents) against the private interest of the person or people whom the LPA seek to restrain. This differs from, for example, the process of an enforcement appeal where the decision-maker is concerned with whether the appeal should succeed on its legal or planning merits. And, even if the court D concludes that an interlocutory injunction should be granted, its effect may be suspended for a specified period so that the defendant has time in which to make suitable alternative arrangements for whatever activity is to be restrained. The court may require the plaintiff (the LPA) and the defendant to appear in person at the end of an initial period of suspension of an injunction, so that the balance of convenience can be reassessed."

E

The Court of Appeal decision

18 In the Court of Appeal [2001] 1 WLR 1359 separate teams of counsel represented the appellant Gipsies and the respondent local authorities and the submissions made on each side were not to identical effect. Simon Brown LJ summarised the Gipsies' argument in paragraphs F 29–34 of his judgment. In broad summary the argument, in all essentials the argument repeated by Mr Charles George in the House, was to the following effect. Section 187B gives the judge a discretion, to be exercised as an original jurisdiction not a review power. Since injunctions are likely to prove the most effective way of remedying breaches of planning control, because attended by the most severe sanctions, including imprisonment, they should be granted only where plainly appropriate and where the court is G willing to contemplate the imposition of severe penalties. If the court is unwilling to commit it should be unwilling to enjoin. In cases such as *Mole Valley District Council v Smith* 90 LGR 557 and *Hambleton District Council v Bird* [1995] 3 PLR 8 the court had taken too narrow a view of its discretion. The court

"would only be prepared to grant injunctive relief in cases which the H court itself regarded as clear, cases where it was quite satisfied first that the planning authority (whether the district council or the Secretary of State/inspector on appeal) had properly reached a final conclusion that the gipsies' continuing occupation of the site could no longer be tolerated in the public interest, and secondly that it was appropriate to enforce their

removal by injunction even though, in a case where no alternative sites were available, that would drive the gipsies either onto the roads, into homelessness accommodation (see *Chapman's* case 33 EHRR 399, 416, para 54) or, on non-compliance with the injunction, into prison." (Paragraph 31.)

Whatever the position before the Human Rights Act 1998, the court must now address the issues arising under article 8(2) of the European Convention on Human Rights and reach its own decision on whether the Gipsies' removal from the site is proportionate to the public interest in preserving the environment. This did not mean that the court would pay no heed to the decisions of local planning authorities: issues as to whether or not planning permission should be granted are exclusively a matter for them, and the planning history of the site, including any recent decisions, will be highly relevant. Respect should be accorded to the decisions of a democratically accountable body. But it is still for the court to reach its own independent conclusion on the proportionality of the relief sought to the object to be attained.

19 In the Court of Appeal Mr Timothy Straker represented the three local authorities now before the House and Simon Brown LJ summarised his essential argument as being "that the judge exercising his section 187B jurisdiction is more or less bound to grant an injunction unless the local planning authority's application can be shown to be flawed on *Wednesbury* grounds" (paragraph 35). The court's function is supervisory. The power to grant an injunction should be exercised in support of planning control. The *Mole Valley* and *Hambleton* cases were rightly decided. Not until the stage of committal for breach of an injunction is the court entitled to reach an independent view on proportionality. At the injunction stage the court should consider only whether the Gipsies should leave the site, not whether they should suffer serious penalty if they fail to do so. The court's role is unaffected by the Human Rights Act 1998. Reliance was placed on the decision of the House in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295.

20 The Court of Appeal's ruling on the approach to section 187B was expressed in five paragraphs of Simon Brown LJ's judgment, which I must quote in extenso:

"*The approach to section 187B*

"38. I would unhesitatingly reject the more extreme submissions made on either side. It seems to me perfectly clear that the judge on a section 187B application is not required, nor even entitled, to reach his own independent view of the planning merits of the case. These he is required to take as decided within the planning process, the actual or anticipated breach of planning control being a given when he comes to exercise his discretion. But it seems to me no less plain that the judge should not grant injunctive relief unless he would be prepared if necessary to contemplate committing the defendant to prison for breach of the order, and that he would not be of this mind unless he had considered for himself all questions of hardship for the defendant and his family if required to move, necessarily including, therefore, the availability of suitable alternative sites. I cannot accept that the consideration of those matters

A is, as Burton J suggested was the case in the pre-1998 Act era, 'entirely foreclosed' at the injunction stage. Questions of the family's health and education will inevitably be of relevance. But so too, of course, will countervailing considerations such as the need to enforce planning control in the general interest and, importantly therefore, the planning history of the site. The degree and flagrancy of the postulated breach of
B planning control may well prove critical. If conventional enforcement measures have failed over a prolonged period of time to remedy the breach, then the court would obviously be the readier to use its own, more coercive powers. Conversely, however, the court might well be reluctant to use its powers in a case where enforcement action had never been taken. On the other hand, there might be some urgency in the situation sufficient to justify the pre-emptive avoidance of an anticipated breach of
C planning control. Considerations of health and safety might arise. Preventing a gipsy moving onto the site might, indeed, involve him in less hardship than moving him out after a long period of occupation. Previous planning decisions will always be relevant; how relevant, however, will inevitably depend on a variety of matters, including not least how recent they are, the extent to which considerations of hardship
D and availability of alternative sites were taken into account, the strength of the conclusions reached on land use and environmental issues, and whether the defendant had and properly took the opportunity to make his case for at least a temporary personal planning permission.

"39. Relevant too will be the local authority's decision under section 187B(1) to seek injunctive relief. They, after all, are the democratically elected and accountable body principally responsible for planning control
E in their area. Again, however, the relevance and weight of their decision will depend above all on the extent to which they can be shown to have had regard to all the material considerations and to have properly posed and approached the article 8(2) questions as to necessity and proportionality.

"40. Whilst it is not for the court to question the correctness of the
F existing planning status of the land, the court in deciding whether or not to grant an injunction (and, if so, whether and for how long to suspend it) is bound to come to some broad view as to the degree of environmental damage resulting from the breach and the urgency or otherwise of bringing it to an end. In this regard the court need not shut its mind to the possibility of the planning authority itself coming to reach a different
G planning judgment in the case.

"41. True it is, as Mr McCracken points out, that, once the planning decision is taken as final, the legitimate aim of preserving the environment is only achievable by removing the gipsies from site. That is not to say, however, that the achievement of that aim must always be accepted by the court to outweigh whatever countervailing rights the gipsies may have, still less that the court is bound to grant injunctive (least of all immediate
H injunctive) relief. Rather I prefer the approach suggested by the 1991 Circular: the court's discretion is absolute and injunctive relief is unlikely unless properly thought to be 'commensurate'—in today's language, proportionate. The approach in the *Hambleton* case [1995] 3 PLR 8 seems to me difficult to reconcile with that circular. However, whatever

view one takes of the correctness of the *Hambleton* approach in the period prior to the coming into force of the Human Rights Act 1998, to my mind it cannot be thought consistent with the court's duty under section 6(1) to act compatibly with convention rights. Proportionality requires not only that the injunction be appropriate and necessary for the attainment of the public interest objective sought—here the safeguarding of the environment—but also that it does not impose an excessive burden on the individual whose private interests—here the gipsy's private life and home and the retention of his ethnic identity—are at stake.

"42. I do not pretend that it will always be easy in any particular case to strike the necessary balance between these competing interests, interests of so different a character that weighing one against the other must inevitably be problematic. This, however, is the task to be undertaken by the court and, provided it is undertaken in a structured and articulated way, the appropriate conclusion should emerge."

Mole Valley District Council v Smith

21 Before considering the merits of the competing arguments and the correctness of the guidance given by the Court of Appeal, account should be taken of earlier Court of Appeal authority. *Mole Valley District Council v Smith* 90 LGR 557 was one of two appeals heard and reported together. The other was *Reigate and Banstead Borough Council v Brown*, which involved different Gipsies and a different (although neighbouring) local authority.

22 In the *Mole Valley* case the Gipsies appealed against the grant of an injunction by Hoffmann J at first instance under section 222 of the 1972 Act. The facts disclosed a history of unsuccessful enforcement by the local planning authority and non-compliance by the Gipsies over several years (pp 565–566). The principal issue before the Court of Appeal was whether the Gipsies could successfully resist eviction by the local planning authority on the ground that a different body, the county council, had fallen down on its statutory duty to provide enough pitches to accommodate the Gipsies seeking them (pp 559–560). Lord Donaldson of Lymington MR held (p 568) that they could not, a conclusion shared by Balcombe LJ (p 569) and Stuart-Smith LJ (p 570). The Master of the Rolls approved a passage in the judgment of Hoffmann J (p 567) where he had said:

"There can be no doubt that requiring [the defendants] to leave the site would cause considerable hardship. This court, however, is not entrusted with a general jurisdiction to solve social problems. The striking of a balance between the requirements of planning policy and the needs of these defendants is a matter which, in my view, has been entrusted to other authorities."

The Court of Appeal did not approach this case as one turning on hardship to the Gipsies, which was not relied on as a ground of appeal. No reference was made to age, infirmity, ill-health or the reasonable needs of children. The Court of Appeal furthermore understood that a number of additional pitches would become available in the reasonably near future (p 563), declined to shorten the period allowed by the judge for complying with the injunction (pp 568–569) and envisaged that in deciding whether to enforce

A the injunction the local planning authority would have regard to the availability of alternative authorised pitches "very shortly thereafter" (p 569).

23 In the *Reigate and Banstead* case the principal issue was the same (pp 559–560) but the evidence of unsuccessful enforcement and non-compliance was even stronger (pp 563–565). There was little prospect of B additional pitches become available in this area in the near future (p 563). In this case the Gipsies did rely on what they claimed would be exceptional hardship if interlocutory relief were granted pending trial (p 559), but no allusion was made to this ground of appeal in the judgments and no reference was made to the personal circumstances of the Gipsies. The court granted the same period of suspension (pp 568–569), and made the same observation about enforcement (p 569), envisaging, it would seem, that C these Gipsies would take advantage of the additional pitches expected to become available nearby.

24 The ratio of both decisions was that the problems confronting the Gipsies, the local planning authorities and the county council

> "are social in nature and fall to be solved in the context of town and country planning policies. These are matters ultimately for the Secretary D of State, subject only to the court's supervisory jurisdiction by means of judicial review which is not invoked in these proceedings." (P 566.)

Hambleton District Council v Bird

25 In this case [1995] 3 PLR 8, the local authority appealed against the refusal of the trial judge to grant an injunction under section 187B to restrain E the respondent Gipsies, a large family, from continuing to use land, which they owned, for the purpose of siting residential caravans. The Gipsies had used the site, in breach of planning control, for a number of years. Applications for planning permission had been refused and an enforcement notice had proved ineffective, as had prosecutions for non-compliance (pp 9–11). In declining to grant an injunction the judge had referred to the F financial burden on the local authority of housing the Gipsies, money which the judge plainly thought could be better spent (p 12), and he considered it wrong to grant an injunction, which would cause "gross disruption to no great public benefit" when the Gipsies were contemplating a further planning application which might arguably succeed (p 12).

26 Giving the leading judgment in the Court of Appeal, Pill LJ made G detailed reference to the *Mole Valley* case, and also to a decision of Scott J in *Waverley Borough Council v Hilden* [1988] 1 WLR 246, 264. He criticised the trial judge for taking it upon himself to assess the benefits and disbenefits to the public as a whole and to exercise the policy function of planning and housing authorities (p 15). He also held (p 15) that the possibility of a future grant of planning permission was not a legitimate reason for refusing an injunction to restrain a breach of the law. These errors were held to H vitiate the judge's exercise of discretion, and exercising a fresh discretion Pill LJ thought it clear that an injunction should be granted, a conclusion with which Sir Ralph Gibson (p 16) and Balcombe LJ (p 18) agreed. In the course of his judgment Pill LJ made no reference to hardship. He accepted that at the date of trial no alternative site was available (p 12), although

Sir Ralph Gibson thought it clear that such a site would before long become available, and he discounted the Gipsies' objections to it (p 17).

Section 187B

27 The jurisdiction of the court under section 187B is an original, not a supervisory, jurisdiction. The supervisory jurisdiction of the court is invoked when a party asks it to review an exercise of public power. A local planning authority seeking an injunction to restrain an actual or apprehended breach of planning control does nothing of the kind. Like other applicants for injunctive relief it asks the court to exercise its power to grant such relief. It is of course open to the defendant, in resisting the grant of an injunction, to seek to impugn the local authority's decision to apply for an injunction on any of the conventional grounds which may be relied on to found an application for judicial review. As Carnwath J observed in *R v Basildon District Council, Ex p Clarke* [1996] JPL 866, 869:

> "If something had gone seriously wrong with the procedure, whether in the initiation of the injunction proceedings or in any other way, it was difficult to see why the county court judge could not properly take it into account in the exercise of his discretion to grant or refuse the injunction."

But a defendant seeking to resist the grant of an injunction is not restricted to reliance on grounds which would found an application for judicial review.

28 The court's power to grant an injunction under section 187B is a discretionary power. The permissive "may" in subsection (2) applies not only to the terms of any injunction the court may grant but also to the decision whether it should grant any injunction. It is indeed inherent in the concept of an injunction in English law that it is a remedy that the court may but need not grant, depending on its judgment of all the circumstances. Underpinning the court's jurisdiction to grant an injunction is section 37(1) of the Supreme Court Act 1981, conferring power to do so "in all cases in which it appears to the court to be just and convenient to do so". Thus the court is not obliged to grant an injunction because a local authority considers it necessary or expedient for any actual or apprehended breach of planning control to be restrained by injunction and so makes application to the court. No assistance is gained from *R v Wicks* [1998] AC 92, relied on by the local authorities, where it was held to be too late to challenge an enforcement notice in criminal proceedings, a situation quite unlike the present.

29 The court's discretion to grant or withhold relief is not however unfettered (and by quoting the word "absolute" from the 1991 Circular in paragraph 41 of his judgment Simon Brown LJ cannot have intended to suggest that it was). The discretion of the court under section 187B, like every other judicial discretion, must be exercised judicially. That means, in this context, that the power must be exercised with due regard to the purpose for which the power was conferred: to restrain actual and threatened breaches of planning control. The power exists above all to permit abuses to be curbed and urgent solutions provided where these are called for. Since the facts of different cases are infinitely various, no single test can be prescribed to distinguish cases in which the court's discretion should be exercised in favour of granting an injunction from those in which

A it should not. Where it appears that a breach or apprehended breach will continue or occur unless and until effectively restrained by the law and that nothing short of an injunction will provide effective restraint (*City of London Corpn v Bovis Construction Ltd* [1992] 3 All ER 697, 714), that will point strongly towards the grant of an injunction. So will a history of unsuccessful enforcement and persistent non-compliance, as will evidence
B that the defendant has played the system by wilfully exploiting every opportunity for prevarication and delay, although section 187B(1) makes plain that a local planning authority, in applying for an injunction, need not have exercised nor propose to exercise any of its other enforcement powers under Part VII of the Act. In cases such as these the task of the court may be relatively straightforward. But in all cases the court must decide whether in all the circumstances it is just to grant the relief sought against the particular
C defendant.

30 As shown above the 1990 Act, like its predecessors, allocates the control of development of land to democratically-accountable bodies, local planning authorities and the Secretary of State. Issues of planning policy and judgment are within their exclusive purview. As Lord Scarman pointed out in *Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment*
D [1985] AC 132, 141, "Parliament has provided a comprehensive code of planning control." In *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, paras 48, 60, 75, 129, 132, 139–140, 159 the limited role of the court in the planning field is made very clear. An application by a local planning authority under section 187B is not an invitation to the court to exercise functions allocated elsewhere. Thus it could never be appropriate for the court to hold that
E planning permission should not have been refused or that an appeal against an enforcement notice should have succeeded or (as in *Hambleton* [1995] 3 PLR 8) that a local authority should have had different spending priorities. But the court is not precluded from entertaining issues not related to planning policy or judgment, such as the visibility of a development from a given position or the width of a road. Nor need the court refuse to consider
F (pace *Hambleton*) the possibility that a pending or prospective application for planning permission may succeed, since there may be material to suggest that a party previously unsuccessful may yet succeed, as the cases of Mr Berry and Mrs Porter show. But all will depend on the particular facts, and the court must always, of course, act on evidence.

31 In *Westminster City Council v Great Portland Estates plc* [1985] AC 661, 670 Lord Scarman drew attention to the relevance to planning
G decisions, on occasion, of personal considerations:

> "Personal circumstances of an occupier, personal hardship, the difficulties of businesses which are of value to the character of a community are not to be ignored in the administration of planning control. It would be inhuman pedantry to exclude from the control of our environment the human factor. The human factor is always present, of
H course, indirectly as the background to the consideration of the character of land use. It can, however, and sometimes should, be given direct effect as an exceptional or special circumstance. But such circumstances, when they arise, fall to be considered not as a general rule but as exceptions to a general rule to be met in special cases. If a planning authority is to give

effect to them, a specific case has to be made and the planning authority must give reasons for accepting it. It follows that, though the existence of such cases may be mentioned in a plan, this will only be necessary where it is prudent to emphasise that, notwithstanding the general policy, exceptions cannot be wholly excluded from consideration in the administration of planning control."

Ouseley J made the same point more recently in *Basildon District Council v Secretary of State for the Environment, Transport and the Regions* [2001] JPL 1184, an appeal under section 288 of the 1990 Act, when he said in paragraph 33 of his judgment:

"From that analysis I conclude, first, that quite apart from any considerations of common humanity, the needs of these particular gipsy families were a material consideration because they had a need for this development in this location. Those personal circumstances entitled the Secretary of State to have regard to them as relevant to the decision he had to make in the public interest about the use of the land for the stationing of residential caravans. Their particular need for stability in the interest of the education of the younger children can also reasonably be seen as an aspect of the wider land use interest in the provision of gipsy sites, which interest includes the need for stable educational opportunities. There is also a public interest in the planning system providing stable educational opportunities for gipsy families, including these gipsy families."

Thus the Secretary of State was entitled to have regard to the personal circumstances of the Gipsies, as he did in the cases of Mr Berry and Mrs Porter. When application is made to the court under section 187B, the evidence will usually make clear whether, and to what extent, the local planning authority has taken account of the personal circumstances of the defendant and any hardship an injunction may cause. If it appears that these aspects have been neglected and on examination they weigh against the grant of relief, the court will be readier to refuse it. If it appears that the local planning authority has fully considered them and none the less resolved that it is necessary or expedient to seek relief, this will ordinarily weigh heavily in favour of granting relief, since the court must accord respect to the balance which the local planning authority has struck between public and private interests. It is, however, ultimately for the court to decide whether the remedy sought is just and proportionate in all the circumstances, and there is force in the observation attributed to Václav Havel, no doubt informed by the dire experience of central Europe: "The Gipsies are a litmus test not of democracy but of civil society" (quoted by McCracken and Jones, counsel for *Hertsmere* in the fourth appeal, "Article 8 ECHR, Gipsies, and Some Remaining Problems after *South Buckinghamshire*" [2003] JPL 382, 396, fn 99).

32 When granting an injunction the court does not contemplate that it will be disobeyed: *In re Liddell's Settlement Trusts* [1936] Ch 365, 373–374; *Castanho v Brown & Root (UK) Ltd* [1981] AC 557, 574. Apprehension that a party may disobey an order should not deter the court from making an order otherwise appropriate: there is not one law for the law-abiding and another for the lawless and truculent. When making an order, the court should ordinarily be willing to enforce it if necessary. The rule of law is not

well served if orders are made and disobeyed with impunity. These propositions however rest on the assumption that the order made by the court is just in all the circumstances and one with which the defendant can and reasonably ought to comply, an assumption which ordinarily applies both when the order is made and when the time for enforcement arises. Since a severe financial penalty may be imposed for failure to comply with an enforcement notice, the main additional sanction provided by the grant of an injunction is that of imprisonment. The court should ordinarily be slow to make an order which it would not at that time be willing, if need be, to enforce by imprisonment. But imprisonment in this context is intended not to punish but to induce compliance, reinforcing the requirement that the order be one with which the defendant can and reasonably ought to comply. The court ought not to face the dilemma addressed by Staughton LJ in *Guildford Borough Council v Smith* [1994] JPL 734, 739.

33 There is no reason to doubt that the *Mole Valley, Reigate and Banstead* 90 LGR 557 and *Hambleton* [1995] 3 PLR 8 cases were rightly decided on their facts, but they should now be read subject to this opinion.

Article 8 of the European Convention on Human Rights

34 If section 187B is interpreted and applied in accordance with the principles adumbrated in the foregoing paragraphs, it is very questionable whether article 8 of the European Convention has any bearing on the court's approach to an application under the section. But since the European Court of Human Rights has given judgment in two cases involving Gipsies in the United Kingdom, brief reference should be made to those cases. In both it was effectively common ground that enforcement action by the local planning authority to secure the removal of the Gipsy from a site involved an interference by a public authority with the Gipsy's right to respect for her home, that such interference was in accordance with the law and that the measures pursued aims entitled to recognition under the Convention as legitimate. The issue was whether measures were "necessary in a democratic society" or, differently expressed, whether the means employed to pursue those legitimate aims were proportionate.

35 In *Buckley v United Kingdom* (1996) 23 EHRR 101, 120, paras 84–86, the Commission concluded by a narrow majority that the measures were excessive and disproportionate. Even allowing for the margin of appreciation enjoyed by the national authorities, the Commission found that the interests of the applicant outweighed the general interest. The Court, also by a majority, took the opposite view: it concluded (p 132, para 84) that the responsible planning authorities had arrived at their decision after weighing in the balance the various competing interests at issue; that it was not for the Court to sit in appeal on the merits of that decision; that the reasons relied on by the planning authorities were relevant and sufficient; and that the means employed to achieve the legitimate aims pursued could not be regarded as disproportionate.

36 A majority of the Court again rejected the complaint of the applicant in *Chapman v United Kingdom* 33 EHRR 399. The report of this case contains a helpful and detailed summary of the factual background and also makes reference to the Framework Convention for the Protection of National Minorities, which the United Kingdom ratified and which came

into force in May 1998. In this case the Commission found, by a majority, that there had been no violation of Mrs Chapman's rights under article 8 (p 420, para 69), and a majority of the Court agreed (p 431, para 115). The Court recognised (p 421, para 73) that Mrs Chapman's occupation of her caravan was an integral part of her ethnic identity as a Gipsy but acknowledged (pp 425–426, para 92) that as a supranational court it was ill-equipped to assess matters within the proper purview of national authorities and did not accept (p 426, para 94) that a consensus had emerged on the practical steps necessary to give effect to the Framework Convention. It envisaged (p 426, para 95) that problems might arise under article 14 if Gipsies were treated differently from non-Gipsies. In rejecting Mrs Chapman's complaint the Court (p 430, para 113) was not persuaded that there were no alternatives available to her other than remaining in occupation of land without planning permission in a Green Belt area and held that

> "The humanitarian considerations which might have supported another outcome at national level cannot be used as the basis of a finding by the Court which would be tantamount to exempting the applicant from the implementation of the national planning laws and obliging governments to ensure that every gypsy family has available for its use accommodation appropriate to its needs. Furthermore, the effect of these decisions cannot on the facts of this case be regarded as disproportionate to the legitimate aim being pursued." (P 431, para 115.)

37 These cases make plain that decisions properly and fairly made by national authorities must command respect. They also make plain that any interference with a person's right to respect for her home, even if in accordance with national law and directed to a legitimate aim, must be proportionate. As a public authority, the English court is prohibited by section 6(1) and (3)(a) of the Human Rights Act 1998 from acting incompatibly with any Convention right as defined in the Act, including article 8. It follows, in my opinion, that when asked to grant injunctive relief under section 187B the court must consider whether, on the facts of the case, such relief is proportionate in the Convention sense, and grant relief only if it judges it to be so. Although domestic law is expressed in terms of justice and convenience rather than proportionality, this is in all essentials the task which the court is in any event required by domestic law to carry out. I should add that while nothing in the Court of Appeal judgment in *Sheffield City Council v Smart* [2002] LGR 467 is, as I read it, inconsistent with what is said above, I should be wary of concluding that any action by a public authority seeking possession of residential property occupied by a defendant engages the operation of article 8.

Conclusion

38 The guidance given by the Court of Appeal in the judgment of Simon Brown LJ quoted in paragraph 20 above was in my opinion judicious and accurate in all essential respects and I would endorse it.

39 In the *Berry* case the Court of Appeal concluded (paragraph 49) that the trial judge had erred in regarding the *Chapman* case as effectively determinative of the application before him. I find no fault with that

A conclusion. I would accordingly dismiss this appeal with costs, and affirm the Court of Appeal's order that the matter be remitted to the Queen's Bench Division for the underlying application for an injunction to be determined.

40 In the *Searle* case I would again dismiss the appeal, but with no order for costs and no order for remission. The Court of Appeal was entitled to
B conclude (paragraph 44) that the trial judge had taken too restricted a view of the discretion which he was called upon to exercise.

41 In the *Porter* case I would dismiss the appeal and make the same orders as in the *Berry* case. The judge was wrong to regard all questions of hardship as "entirely foreclosed" by the *Mole Valley* 90 LGR 557 and *Hambleton* [1995] 3 PLR 8 decisions, as the Court of Appeal rightly held (paragraph 43).

C **42** I have had the advantage of reading in draft the opinions of my noble and learned friends with which I agree.

LORD STEYN

43 My Lords, the question is how section 187B of the Town and Country Planning Act 1990 (as inserted in the 1990 Act by the Planning and
D Compensation Act 1991) should be interpreted. Section 187B reads as follows:

> "(1) Where a local planning authority consider it necessary or expedient for any actual or apprehended breach of planning control to be restrained by injunction, they may apply to the court for an injunction, whether or not they have exercised or are proposing to exercise any of
E their other powers under this Part.
>
> "(2) On an application under subsection (1) the court may grant such an injunction as the court thinks appropriate for the purpose of restraining the breach.
>
> "(3) Rules of court may provide for such an injunction to be issued against a person whose identity is unknown.
>
> "(4) In this section 'the court' means the High Court or the county
F court."

The Civil Procedure Rules 1998 make the provision contemplated by subsection (3): RSC Ord 110, r 1; CCR Ord 49, r 7.

44 The question of interpretation before the Court of Appeal was whether (as three local planning authorities contended) it is beyond the
G power of the court under section 187B(2) to take into account in the exercise of its discretion the hardship likely to be caused by an injunction to vacate land in the case of a defendant who was in ill health and had nowhere else to go. Counsel for the local authorities acknowledged that in accordance with the law as stated in *Westminster City Council v Great Portland Estates plc* [1985] AC 661 such matters are relevant to the decisions of local authorities and the Secretary of State. Overruling first instance decisions the Court of
H Appeal held that such matters may also be relevant to the exercise of the discretion of the court under section 187B and it remitted the decisions for rehearing at first instance: *South Buckinghamshire District Council v Porter* [2002] 1 WLR 1359. The local authorities now challenge the decision of the Court of Appeal.

45 The setting of section 187B is as follows. By the 1980s it had become a notorious fact that determined individuals and enterprises could, by playing the system with the aid of lawyers, frustrate the implementation of valid planning decisions for many years. It was not only old people in caravans which caused the problem. More frequently flagrant and persistent breaches were perpetrated by entrepreneurs for commercial profit. It is true that the 1990 Act provides for a system of enforcement notices which if ignored may lead to a prosecution: section 171A. The 1990 Act also contains provisions for the service of stop notices: section 183(1). These powers were supported by the power of the Attorney General on relation of a local authority to claim an injunction restraining a breach of planning law: *Attorney General v Bastow* [1957] 1 QB 514. This power was supplemented by section 222 of the Local Government Act 1972 as amended. Section 222(1) provides:

> "Where a local authority consider it expedient for the promotion or protection of the interests of the inhabitants of their area—(a) they may prosecute or defend or appear in any legal proceedings and, in the case of civil proceedings, may institute them in their own name, and (b) they may, in their own name, make representations in the interests of the inhabitants at any public inquiry held by or on behalf of any minister or public body under any enactment."

There was nevertheless a strong perception that the planning system was systematically abused and that it required more effective enforcement.

46 This led to the Report by Robert Carnwath QC, entitled "Enforcing Planning Control", which was published in February 1989. Paragraph 10.3 of the Report described the supplemental function of injunctions:

> "I think it would be a mistake to attempt to prescribe too closely the circumstances in which the remedy would be available, or the forms of order which could be granted. Experience of decisions over the last few years . . . shows that the merit of the remedy is its flexibility and its ability to evolve to meet changing needs. What is required is its recognition in the Act as a normal back-up to the other remedies, and acceptance that *it is for the authority to judge (subject to the ordinary judicial review criteria of reasonableness) when its use is appropriate*. The court already has a wide discretion as to the terms on which an order is to be made. In cases where an order is made in advance of an enforcement or stop notice, the terms could include an undertaking by the authority to serve such notices, so that the ordinary procedures would be available for determining the merits and protecting the recipient." (Emphasis added.)

Mr Carnwath's recommendation was:

> "Recommendation (11) I recommend that there be an express power for authorities exercising planning functions to apply to the High Court or county court for an injunction to restrain any threatened or actual breach of planning control (whether or not an enforcement or stop notice has been served), where they consider it necessary or expedient in order to prevent serious damage to amenity or otherwise to supplement the powers available under the Act."

A It will be noted that the language of section 187B follows the wording of recommendation 11 to a substantial extent.

47 Counsel for the local authorities fastened on to the italicised words in paragraph 10.3 to argue that it is the exclusive task of democratically elected planning authorities to weigh issues of personal hardship against the public interest in enforcing planning law. Taken in isolation there may be some logical force in this argument. The main emphasis of the Carnwath Report was on the public interest in enforcing planning. But Mr Carnwath did not ignore considerations of personal hardship. In para 2.8, at p 24, he said:

> "The enforcement system . . . cannot be too rigid. There will always be difficult cases where there is a need to balance the interests of enforcement against the individual circumstances of a business or individual. The system needs to be flexible enough to accommodate such cases, while providing the teeth to secure effective action where it is justified. There will always be disagreement as to where the line is to be drawn."

In para 2.22, at p 41, he observed that "use of the courts ensures that both sides are fully protected". In para 4.2, at p 58, he emphasised the value of "a flexible system of interim remedies—based on the balance of convenience". The support for the position of the local authorities in the Carnwath Report is therefore fragile.

48 Next counsel for the local authorities relied on dicta in the House of Lords, in diverse contexts, which emphasise that, subject to judicial review, the planning system is essentially one administered by democratically elected authorities: *Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment* [1985] AC 132; *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759; *R v Wicks* [1998] AC 92; *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and Regions* [2003] 2 AC 295. These dicta do not directly or by useful analogy throw any light on the amplitude of the court's jurisdiction to grant an injunction operating in personam requiring a defendant to vacate land.

49 Counsel for the local authorities put forward a related point based on the structure of the 1990 Act. He submitted in his printed case, and in oral argument, that it is for the local planning authority to determine whether an injunction is appropriate, and for the court, exercising a limited review jurisdiction, to grant an injunction in terms suited to restricting the relevant breach. I would reject this argument. It depends on interpolating words into the language of section 187B(2) which are ill suited to the context. Under section 187B(2) the court is not exercising a review jurisdiction: the coercive power conferred by statute is an original jurisdiction. Moreover, the remedy is an equitable one, which prima facie carries with it the notion of a broad discretion.

50 The starting point must be the language of section 187B read in the context of its purpose viz in the words of the Carnwath Report that "use of the courts ensures that both sides are fully protected" (para 2.22, at p 41). The argument of the local authorities that consideration of questions of hardship by them means that this aspect may not be considered by the court under section 187B sits uneasily with the breadth of the statutory language.

The critical provision is subsection (2) which provides that the court *may* grant such an injunction *as the court thinks appropriate* for the purpose of restraining the breach. "May" does not mean "shall". The notion of "appropriate" relief necessarily involves an exercise of judgment weighing the factors for and against the grant of an injunction. There is not a hint of the restriction of the court's ordinary powers to consider logically relevant countervailing considerations at the stage of the grant of an injunction.

51 The local authority is empowered to apply for an injunction under section 187B(1) whenever it considers it "necessary or expedient" to do so. I would not accept a tentative suggestion in argument that "or" in this phrase could be read as "and". In my view the local authority may apply for an injunction if it considers it "expedient", that is convenient, to do so. It is not in doubt that the local authority may take into consideration questions of hardship. But the independent criterion of expediency suggests that the intent was that the local authority is entitled to take the view that notwithstanding marked personal hardship "we will put the matter before the court for it to decide on all countervailing issues". The *Encyclopaedia of Planning Law and Practice* rightly points out that section 187B(1) is only "a deliberately loose entry barrier and is not the criterion upon which the court is required to act": Volume 2, P187B.09.

52 Procedural considerations pull in the same direction. There may be a delay between the decision of the local authority and the hearing of application for an injunction by the court. During this period the personal circumstances of a defendant may change adversely, e g the individual may suffer a stroke or a heart attack. On the interpretation of the local authorities the solution is the contrived one that the matter should be adjourned for the local authority to reconsider the decision already taken. If the Court of Appeal's decision is correct, the solution is simple and straightforward: the court will consider the case in the round as it is presented to it on the day of the hearing.

53 There is an even more important factor to be taken into account. The terms of an injunction must be strictly observed. The potential penalties upon a breach of an injunction are considerable. The local authorities argue that, while personal hardship may not be taken into account by the court considering the grant of an injunction, the court will be able to do so in considering what penalties to impose in committal proceedings. The concession is, of course, inevitable. But it results in the situation that, even in a case where the judge would not contemplate sending a defendant to prison for a breach, he must nevertheless impose an injunction carrying that threat. Such an approach does not advance the rule of law. It tends to bring the law into disrepute. In the Court of Appeal Simon Brown LJ found the right balance. He observed, at p 1377, para 38:

> "It seems to me perfectly clear that the judge on a section 187B application is not required, nor even entitled, to reach his own independent view of the planning merits of the case. These he is required to take as decided within the planning process, the actual or anticipated breach of planning control being given when he comes to exercise his discretion. But it seems to me no less plain that the judge should not grant injunctive relief unless he would be prepared if necessary to contemplate committing the defendant to prison for breach of the order, and that he

A would not be of this mind unless he had considered for himself all questions of hardship for the defendant and his family if required to move, necessarily including, therefore, the availability of suitable alternative sites. I cannot accept that the consideration of those matters is, as Burton J suggested [in *South Buckinghamshire District Council v Porter*] was the case in the pre-1998 Act era, 'entirely foreclosed' at the B injunction stage. Questions of the family's health and education will inevitably be of relevance. But so too, of course, will countervailing considerations such as the need to enforce planning control in the general interest and, importantly therefore, the planning history of the site. The degree and flagrancy of the postulated breach of planning control may well prove critical."

C I would endorse this approach. In short the granting of an injunction under section 187B is an equitable remedy and the court has a wide discretion.

54 A series of Circulars issued by the Department of Environment, and its successor the Department of the Environment, Transport and the Regions, have since 1991 emphasised the width of the power of the court and that injunctive relief must be a commensurate remedy in the particular case: Circular No 21/91 dated 16 December 1991, para 7; Circular No 18/94 D dated 23 November 1994; Circular No 10/97, dated 31 July 1997, para 5.10; DETR guidance dated 26 July 2000, para 9. Section 187B came into force on 2 January 1992: SI 1991/2905. But it received the Royal Assent on 25 July 1991. These circulars are not relevant to the construction of section 187B: they were not part of the contemporary materials available to Parliament when the legislation was passed. On the other hand, they may E arguably have some value as persuasive evidence of the workability of the interpretation preferred by the Court of Appeal. It is unnecessary, however, to rely on these materials in the present case.

55 That leaves two Court of Appeal decisions which undoubtedly assist the argument of the local authorities. The first is *Mole Valley District Council v Smith* 90 LGR 557. The defendants, who were Gipsies, had persistently flouted planning laws in respect of caravan sites. They relied on F the fact that the city council was in undoubted breach of its statutory duty to Gipsies by failing to provide sufficient sites for them. Lord Donaldson of Lymington MR relied on a dictum of Hoffmann J at first instance which was to the following effect, at p 567:

> "There can be no doubt that requiring [the defendants] to leave the site would cause considerable hardship. This court, however, is not entrusted G with a general jurisdiction to solve social problems. The striking of a balance between the requirements of planning policy and the needs of these defendants is a matter which, in my view, has been entrusted to other authorities."

With the agreement of the other members of the court the Master of the Rolls dismissed the appeal against the grant of an injunction.

H **56** The second decision is *Hambleton District Council v Bird* [1995] 3 PLR 8. Despite persistent breaches of the planning laws the judge had refused to grant an injunction requiring the defendants to vacate certain land. The Court of Appeal held that the judge had misdirected himself by taking into consideration the merits of the planning decision and whether a

further application for planning permission might be successful; and he wrongly considered the availability of alternative accommodation for the respondents, the evidence that the official site was unsuitable, and the hardship to the respondents: see p 17D. There are passages in the judgments which suggest that under section 187B hardship is legally *irrelevant* to the exercise of the court's discretion.

57 These decisions predate the coming into operation of the Human Rights Act 1998. But even under domestic law the dicta were in my view too austere in so far as they appeared to suggest that even great hardship was irrelevant. A civil society requires a fairer and more balanced approach. There was insufficient allowance for the equitable nature of the remedy and the width of the discretion. On this ground alone these decisions of the Court of Appeal should no longer to be treated as controlling.

58 In any event, the new landscape of the Human Rights Act 1998 requires a different perspective. Article 8 of the European Convention on Human Rights contains a fundamental right. It reads:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> "2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, 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."

It is unlawful for the court to act in a way which is incompatible with a Convention right: section 6(1). Even if it had previously been possible to ignore great or marked hardship in the exercise of discretion under section 187B—a hypothesis which I do not accept—such an approach is no longer possible. Sometimes, perhaps more often than not, the interference with a Convention right may be justified on public interest grounds. But effective protection of a Convention right requires the court to approach the matter in a structured fashion in accordance with the principle of proportionality. What in the context of the present case is required was explained by Simon Brown LJ in terms on which I cannot improve. He said, at p 1378:

> "Proportionality requires not only that the injunction be appropriate and necessary for the attainment of the public interest objective sought—here the safeguarding of the environment—but also that it does not impose an excessive burden on the individual whose private interests—here the gipsy's private life and home and the retention of his ethnic identity—are at stake."

Plainly, the protection of the relevant Convention right would not be effectively protected by leaving it to local authorities acting under section 187B(1) to consider matters of hardship under article 8. It follows that, whatever their earlier status, the reasoning in the *Mole* and *Hambleton* decisions are no longer authoritative or helpful.

59 For the reasons given by my noble and learned friend, Lord Bingham of Cornhill, as well as the reasons I have given, I would make the orders proposed by Lord Bingham.

A **LORD CLYDE**

60 My Lords, these three appeals concern the enforcement of planning control against gypsies who were occupying lands in the areas of the respective local authorities without planning permission to do so. The respondents in one of the appeals, that of *Chichester District Council v Searle* did not present argument at the hearing because they have sold the B lands in question and left them. In each of the two remaining cases planning permissions have been given at least to secure the occupation by the respective respondents but these are currently under appeal. The issue before this House relates to the granting of injunctions against the respective respondents under section 187B of the Town and Country Planning Act 1990.

61 Section 187B provides:

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> "(1) Where a local planning authority consider it necessary or expedient for any actual or apprehended breach of planning control to be restrained by injunction, they may apply to the court for an injunction, whether or not they have exercised or are proposing to exercise any of their other powers under this Part.
>
> D "(2) On an application under subsection (1) the court may grant such an injunction as the court thinks appropriate for the purpose of restraining the breach."

62 It is undisputed that under subsection (2) the court has a discretion. What is in dispute is the extent of that discretion, in particular with regard to the possible effects of an injunction on the defendants by way of hardship. E The appellants contend that the role of the court is essentially a supervisory one. On their approach, if the local authority have considered the question of the possible hardship to the defendants, and all other relevant factors, the court may not explore such matters but must accept the conclusion reached by the authority. The respondents argue that the particular point of dispute in the present cases is whether the court may consider the consequences of F the injunction for the defendants in deciding whether or not to grant it. They contend that at the very least the court may properly have regard to the possible hardship for the defendants. The issue thus raises questions about the precise scope of the discretion given to the court by section 187B(2).

63 It may be noted at the outset that the section is talking about an injunction. This is not a new remedy created by Parliament but a familiar G and long-established form of remedy in English law. What the section did was to give an express statutory power for local planning authorities to apply to the court for that remedy and a discretion in the court to grant it. The power was given expressly to local planning authorities, so that this remedy may not be sought under the statute by anyone else. Parliament imposed an express precondition for the application upon the authority, namely that it must consider it necessary or expedient for an actual or H apprehended breach of planning control to be restrained by injunction. That initial step of consideration is one which they must have taken before they can make the application and it serves as an initial restraint on the power to make the application under the Act. It does not seem to me to bear upon the problem of the scope of the court's discretion. I note in passing that we are

not required in the present case to explore the application of the possibly overlapping tests of "necessary or expedient". A

64 Subsection (1) may be seen as widening the availability of the power to apply in providing that the application may be made whether or not the authority have exercised or are proposing to exercise any of the other powers in Part VII of the Act. That includes in particular the power to issue a planning contravention notice under section 171C, an enforcement notice under section 172, a breach of condition notice under section 187A, and a stop notice under section 183. But that does not mean that the court may not take account of the facts regarding any other remedy which the authority have pursued or the fact that they have not pursued any other remedy. In my view the provisions in subsection (1) all relate to the power in the authority to make the application. They do not cast any direct light on the question of the scope of the discretion given to the court in subsection (2) in the granting or withholding of the remedy. The authority have to decide in accordance with the statute to make the application for an injunction but it is for the court to decide whether or not to grant it and the decision to make the application cannot determine that question. B C

65 Since the remedy which the court was expressly permitted to grant under subsection (2) was a familiar remedy under English law it might be expected that in dealing with an application for such a remedy the court would adopt the same approach and apply the same tests as it has always done in relation to injunctions. The jurisdiction expressly conferred upon the court by subsection (2) is plainly an original jurisdiction. It is not presented as a means of appeal or of review of the decision to enforce planning control or of the decision to apply for an injunction. On the face of it there seems no reason why the court should not take into account what effect an injunction might have on the personal circumstances of the defendant. D E

66 Counsel for the appellants laid stress on the final phrase of section 187B(2) "for the purpose of restraining the breach". As a matter of the construction of the subsection this phrase does not seem to me to circumscribe the power of the court so as to make the whole choice of action dependant upon the consideration of whether or not an injunction would serve the purpose of restraining the breach. If that was the intention of the final phrase then it would be hard to imagine any case in which an injunction would not be granted. In every case an injunction operates to restrain the breach. But the court is not compelled to grant an injunction. The subsection only empowers that to be done. I cannot read into the phrase any limitation upon the matters to which the court may have regard in exercising its discretion nor can I find there an indication that the court's role is intended to be a supervisory one. The importance of the phrase to my mind is in directing the court to the purposes which any injunction must be designed to achieve. The injunction which is permitted by the subsection is "such" injunction as will serve the stated purposes. The phrase indicates the kind of injunction, the terms of the order, if any, which may be granted. It does not resolve the question how far the court's discretion may go. F G H

67 The principal theme in the appellants' argument as it seemed to me was the concern that the court should not trespass into areas with which it has no concern. I certainly accept that it is for the planning authorities and

A not for the courts to see to the preparation and administration of plans and policies for the use of land. What uses should or should not be allowed of lands within the area of the authority, what developments should or should not be permitted to take place upon such lands, are questions for the planning authorities and not for courts of law to resolve. The expression "planning matters" may be too uncertain a use of language in this context. I also find the expression "planning code" which was sometimes used in the B argument lacking in precision. The expression "planning merits" seems to me to be more exact, but I would prefer to identify the forbidden ground as comprising matters of "planning judgment".

68 The factors which require to be considered in the making of a planning judgment are potentially many and varied. They include matters relating to the economic and social needs of the locality, the interests of the C public and of the individual members of it who live there, the preservation of the environment and the protection of amenity. Lord Hoffmann observed in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 780H: "If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State." The D courts may consider the legality of a planning judgment but not the merits of the planning decision. In *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295 this distinction was recognised and held to be consistent with article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. If the courts were to embark upon a reassessment of matters of planning judgment they would, to use the language of Lord Hoffmann in *R v* E *Wicks* [1998] AC 92, 120F be subverting the whole scheme of the Act.

69 Planning authorities will in particular require to consider the human factor. In *Westminster City Council v Great Portland Estates plc* [1985] AC 661, 670 Lord Scarman observed: "Personal circumstances of an occupier, personal hardship, the difficulties of businesses which are of value to the character of a community are not to be ignored in the administration F of planning control." Certainly in the enforcement of planning control these personal and human factors must be taken into account. They will also play a part in the earlier stages of the drawing up of plans and policies as well, of course, in the decisions in individual cases whether or not some particular permission should or should not be granted.

70 But the enforcement of the planning decisions which have been G reached by planning authorities does not in my view strictly involve the exercise of a planning judgment. The statutory provisions relating to enforcement are set out in a distinct part of the Town and Country Planning Act 1990, Part VII. They are in a broad sense "planning matters". Indeed the initiative to enforce planning control under these provisions lies with the authority. In deciding whether to take action in the event of a breach of planning control the authority will require to weigh a variety of factors H which go beyond the considerations of the planning judgment in the light of which the plans were made and permissions granted or refused. The factors will now include the seriousness of the breach and its effect in the particular case. The authority will also require to consider which of the various methods of enforcement provided by the statute they should adopt.

Enforcement notices and stop notices are courses which the authority may take at their own hand. So also is the breach of condition notice introduced by section 187A. But the injunction provided for by section 187B requires the intervention of the court. Parliament has expressly given the power to grant this particular form of remedy to the court. The authority must decide that the course is "necessary or expedient", but it is for the court, not for them, to issue the order.

71 In exercising its power the court must not re-assess matters which are the subject of a planning judgment. But that does not mean that the factors which have been considered by the authority in making their planning judgment may not be properly taken into account by the court in deciding whether or not to grant this particular remedy. In looking at the factors which weighed with the authority the court is not embarking upon a reassessment of what was decided as matter of planning judgment but entering upon the different exercise of deciding whether the circumstances are such as to warrant the granting of the particular remedy of an injunction.

72 It is said that if the court was enabled to take into account matters which have been considered by the planning authority in deciding whether a particular development was acceptable in planning terms and the court refused an injunction it would in effect be granting a temporary planning permission for the development. But the analogy is not exact. The authority might be able to take fresh steps for enforcement on a more secure basis than that on which they had attempted to do so before. They could also seek enforcement if any change of circumstances occurred. So the defendant does not truly enjoy any protective permission. The temporary relief which he may enjoy is no different from the relief which he would achieve through a successful challenge by judicial review and the propriety of the court granting review of an invalid decision by the local authority should not be open to criticism on the ground that the court is granting some kind of temporary permission to the person who applied for review.

73 Accordingly in my view section 187B(2) allows and has always allowed the court in the exercise of its discretion in granting an injunction to weigh up the public interest in securing the enforcement of planning policy and planning decisions against the private interests of the individuals who are allegedly in breach of planning control. In particular I would hold that it is open to the court to consider questions of hardship, particularly as regards health, arising out of the effect on such individuals of a grant of an injunction. In that regard I do not consider the observations contrary to that view in *Mole Valley District Council v Smith* 90 LGR 557 and more particularly in *Hambleton District Council v Bird* [1995] 3 PLR 8 to be sound.

74 Those two cases were decided before the Human Rights Act 1998 came into effect. The requirement imposed by section 6(1) of that Act on a court to whom an application for an injunction is made under section 187B of the 1990 Act now makes it a matter of statutory necessity for the court in any case where article 8 of the Convention applies to see whether the test of proportionality is satisfied before an injunction is granted. Counsel for the appellants sought assistance from the decision of the Court of Appeal in *Sheffield City Council v Smart* [2002] LGR 467. But that case was dealing

A with non-secure tenancies under section 193 of the Housing Act 1996 and it may be noted by way of distinction that Laws LJ said, at p 482, para 31:

> "In my judgment it is important to notice that the regimes of secure tenancies and of planning control (engaged in the gipsy cases), require the court to adjudicate upon the specific merits or otherwise of coercive action in the individual case . . ."

B Counsel also argued that the court did not require itself to apply a test of proportionality where the regime was already compliant with the Convention. But while the scheme of the planning legislation may comply with the Convention the application of particular provisions of it in particular circumstances gives rise to distinct and separate questions which are not solved merely by reference to the general regime.

C 75 So far as the particular cases before us are concerned I gratefully adopt the account of the facts which has been set out in the speech of my noble and learned friend, Lord Bingham of Cornhill. In that regard I would point out that the circumstances of the two cases where the respondents have contested the appeal before us are quite special. In each case the respondent owns the land in question and while the two pieces of land lie respectively in an area of green belt or green barrier it is not suggested that there is any D urgent environmental problem. In each case there are problems of health and lack of alternative accommodation made more problematic as the respondents are Gipsies where considerations of humanity may be particularly acute owing to their particular traditions and lifestyle. That their cases are far from hopeless on the merits is reflected in the fact that they have each been granted a planning permission, although since the hearing E before us I understand that an appeal by the local authority in Mrs Porter's case has been upheld. These considerations give a particular force to the proposition that an injunction may be an inappropriate remedy. But that these particular cases have that force should not be understood as diminishing in any way the value of the means of enforcement of planning control provided by section 187B. One reason for its introduction was to F reduce the risk of the system for the enforcement of planning control being abused. It remains a potent weapon for that purpose and no doubt in other cases its use to support and back up the other methods of control will be found to be appropriate.

76 However in the present case I consider that the Court of Appeal proceeded upon the correct approach and I agree with the decision which they reached. I agree in particular with their criticism of the decision in the G case of Berry whose facts in my view can be distinguished from those in *Chapman v United Kingdom* 33 EHRR 399. I would accordingly dismiss the three appeals which are before us.

LORD HUTTON

77 My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends, Lord Bingham of Cornhill and Lord Steyn, H and I am in full agreement with the reasons which they give for dismissing these appeals. I will only add a few observations of my own relating to the issue of personal hardship.

78 The appeals are concerned with the problem which arises when the enforcement of planning control would result in considerable personal

hardship to the occupier of the site against whom the enforcement is to take place. The present cases are examples of the difficulties which arise when it is desirable on planning grounds relating to the amenity of the area to stop the use of land as a site for a caravan or mobile home, but when an injunction under section 187B of the Town and Country Planning Act 1990 ordering the cessation of such use would cause severe hardship to the person who lives in the caravan or mobile home because of his or her age or ill health.

79 Section 187B of the Town and County Planning Act 1990 provides:

> "(1) Where a local planning authority consider it necessary or expedient for any actual or apprehended breach of planning control to be restrained by injunction, they may apply to the court for an injunction, whether or not they have exercised or are proposing to exercise any of their other powers under this Part.
>
> "(2) On an application under subsection (1) the court may grant such an injunction as the court thinks appropriate for the purpose of restraining the breach."

80 In his judgment in the Court of Appeal (with which Peter Gibson and Tuckey LJJ agreed) [2002] 1 WLR 1359, 1363F Simon Brown LJ stated that the central issue for determination on the appeals was the extent to which the court itself on a section 187B application should exercise an independent judgment in deciding whether or not to grant an injunction. After a careful consideration of the authorities Simon Brown LJ stated his opinion as to the approach which a court should take on an application for an injunction under section 187B in cases such as the present ones, at pp 1377–1378, paras 38–42 of his judgment which have been set out in full in the speech of Lord Bingham.

81 Mr Straker, for the appellants, submitted that the Court of Appeal erred in departing from the approach taken by that court in earlier decisions that it is not for a court to weigh competing interests in planning matters. Parliament had entrusted to local planning authorities, which are democratically elected bodies, the task of weighing such interests and the decisions of those authorities are subject to an appeal on the merits to the Secretary of State who is answerable to Parliament. Therefore it is not the concern of a court to carry out that function and to decide where the balance lies between the interests of the defendant occupier and the wider community. If, on an application under section 187B, a local planning authority proves a breach of planning control, an injunction should be granted unless it can be shown that its decision to enforce planning control is invalid on *Wednesbury* grounds (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223). The purpose of the court is to assist in the enforcement of planning control, not to make planning decisions itself.

82 Mr Straker cited a number of decisions in support of this submission: *Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment* [1985] AC 132; *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759; *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295. The statement which most strongly supports the appellants' argument is the

A observation of Lord Hoffmann in the *Tesco Stores* case [1995] 1 WLR 759, 780:

> "The fact that the law regards something as a material consideration therefore involves no view about the part, if any, which it should play in the decision-making process. This distinction between whether something is a material consideration and the weight which it should be
B given is only one aspect of a fundamental principle of British planning law, namely that the courts are concerned only with the legality of the decision-making process and not with the merits of the decision. If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State."

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83 However the issue which lies at the heart of this case is what in *Westminster City Council v Great Portland Estates plc* [1985] AC 661 Lord Scarman termed "the human factor". The cases on which Mr Straker relied related to matters of planning policy and the planning merits of particular cases and were not concerned with cases where the question of human hardship arose. On this issue the speech of Lord Scarman (with which the
D other members of the House concurred) provides clear guidance. In the *Great Portland Estates* case a question arose as to whether in formulating a plan for the development of the use of land under the Town and Country Planning Act 1971 a city council should have regard to the interests of individual occupiers of premises. In his speech Lord Scarman considered the extent to which the human factor can be taken into account in planning
E decisions. At p 669H he cited the observation of Lord Parker CJ in *East Barnet Urban District Council v British Transport Commission* [1962] 2 QB 484, 491 that "what is really to be considered is the character of the use of the land, not the particular purpose of a particular occupier". At p 670D he said that "a planning purpose is one which relates to the character of the use of land" and he stated, at p 670:

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> "However, like all generalisations Lord Parker CJ's statement has its own limitations. Personal circumstances of an occupier, personal hardship, the difficulties of businesses which are of value to the character of a community are not to be ignored in the administration of planning control. It would be inhuman pedantry to exclude from the control of our environment the human factor. The human factor is always present, of
G course, indirectly as the background to the consideration of the character of land use. It can, however, and sometimes should, be given direct effect as an exceptional or special circumstance. But such circumstances, when they arise, fall to be considered not as a general rule but as exceptions to a general rule to be met in special cases."

84 In his judgment [2002] 1 WLR 1359, 1377, para 38 Simon Brown LJ
H drew a distinction between the planning merits of a case on the one hand and the hardship which would be suffered by a defendant and his family on the other. He held that it was not for the judge to decide purely planning matters—this was a matter for the local planning authority, but that it was right for the judge to take into account the human factor, stating, at p 1377:

"It seems to me perfectly clear that the judge on a section 187B application is not required, nor even entitled, to reach his own independent view of the planning merits of the case. These he is required to take as decided within the planning process, the actual or anticipated breach of planning control being a given when he comes to exercise his discretion. But it seems to me no less plain that the judge should not grant injunctive relief unless he would be prepared if necessary to contemplate committing the defendant to prison for breach of the order, and that he would not be of this mind unless he had considered for himself all questions of hardship for the defendant and his family if required to move, necessarily including, therefore, the availability of suitable alternative sites."

85 As Lord Scarman recognised in his speech in *Great Portland Estates* [1985] AC 661 that the human factor is sometimes a distinct and additional factor to be viewed separately from ordinary planning considerations and that on occasions it should be given direct effect as an exceptional or special circumstance, I think that Simon Brown LJ was right to make the distinction he did between purely planning considerations and the human factor, and that he was also right to hold that the human factor should be taken into account in deciding whether planning control should be enforced by the granting of an injunction.

86 I do not accept Mr Straker's submission that it is not appropriate for a court to take into account and weigh against purely planning considerations the hardship which the defendant would suffer if he or she were forced to move from the site. It is clear that section 187B gives the court an original jurisdiction which it is to exercise as it thinks right. Subsection (2) states that the court "may" grant such an injunction as the court "thinks appropriate" for the purpose of restraining the breach. Therefore it is not for the court to act merely as a rubber stamp to endorse the decision of the local planning authority to stop the user by the particular defendant in breach of planning control. Moreover the court is as well placed as the local planning authority to decide whether the considerations relating to the human factor outweigh purely planning considerations; the weight to be attached to the personal circumstances of a defendant in deciding whether a coercive order should be made against him is a task which is constantly performed by the courts.

87 Article 8 of the European Convention on Human Rights provides:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

"2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, 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."

In *Buckley v United Kingdom* 23 EHRR 101 the European Court of Human Rights held that the fact that a gipsy was living in a caravan on a site in breach of planning control did not disentitle her from claiming that the caravan was her "home" within the meaning of article 8. Simon Brown LJ

held, at p 1378, para 41 of his judgment that under section 6(1) of the Human Rights Act 1998 a court hearing an application for an injunction under section 187B must act in a way which is compatible with the right given by article 8. In my opinion he was right to do so because section 187B requires the court to decide on the facts of the individual case whether it is appropriate to grant an injunction which, in cases such as these, will require the defendant to leave his or her home.

88 Simon Brown LJ [2002] 1 WLR 1359, 1377–1378, paras 38 to 42 of his judgment gave what, in my respectful opinion, is clear and helpful guidance as to the factors which a court hearing a section 187B application should take into account, which included the following. He stated, at p 1377:

> "Questions of the family's health and education will inevitably be of relevance. But so too, of course, will countervailing considerations such as the need to enforce planning control in the general interest and, importantly therefore, the planning history of the site. The degree and flagrancy of the postulated breach of planning control may well prove critical. If conventional enforcement measures have failed over a prolonged period of time to remedy the breach, then the court would obviously be the readier to use its own, more coercive powers."

And, at p 1377:

> "Relevant too will be the local authority's decision under section 187B(1) to seek injunctive relief. They, after all, are the democratically elected and accountable body principally responsible for planning control in their area. Again, however, the relevance and weight of their decision will depend above all on the extent to which they can be shown to have had regard to all the material considerations and to have properly posed and approached the article 8(2) questions as to necessity and proportionality."

In *Chapman v United Kingdom* 33 EHRR 399 the European Court of Human Rights stated, at p 428:

> "102. Where a dwelling has been established without the planning permission which is needed under the national law, there is a conflict of interest between the right of the individual under article 8 of the Convention to respect for his or her home and the right of others in the community to environmental protection. When considering whether a requirement that the individual leave his or her home is proportionate to the legitimate aim pursued, it is highly relevant whether or not the home was established unlawfully. If the home was lawfully established, this factor would self-evidently be something which would weigh against the legitimacy of requiring the individual to move. Conversely, if the establishment of a home in a particular place was unlawful, the position of the individual objecting to an order to move is less strong. The Court will be slow to grant protection to those who, in conscious defiance of the prohibitions of the law, establish a home on an environmentally protected site. For the Court to do otherwise would be to encourage illegal action to the detriment of the protection of the environmental rights of other people in the community.

"103. A further relevant consideration, to be taken into account in the first place by the national authorities, is that if no alternative accommodation is available, the interference is more serious than where such accommodation is available. The more suitable the alternative accommodation is, the less serious is the interference constituted by moving the applicant from his or her existing accommodation.

"104. The evaluation of the suitability of alternative accommodation will involve a consideration of, on the one hand, the particular needs of the person concerned—his or her family requirements and financial resources—and, on the other hand, the rights of the local community to environmental protection. This is a task in respect of which it is appropriate to give a wide margin of appreciation to national authorities, who are evidently better placed to make the requisite assessment."

89 I consider that the factors stated by Simon Brown LJ properly reflect the considerations which in *Chapman* the European Court stated should be taken into account and that a court which follows the guidance given by him will be acting compatibly with article 8.

90 Whilst I do not express a concluded opinion on the point which was not the subject of detailed argument before the House, I see no reason to doubt the view expressed by Laws LJ in *Sheffield City Council v Smart* [2002] LGR 467, 486D that there are some statutory regimes under which the balance of interests arising under article 8(2) has in all its essentials been struck by the legislature and under which a court, before ordering a defendant to give up possession of accommodation where he has been living, is not obliged to adjudicate upon the specific merits of coercive action in an individual case.

91 Mr George, for the respondents, submitted that Simon Brown LJ had gone too far in stating that the judge on a section 187B application was not entitled to reach his own independent view on the planning merits of the case. He advanced the submission that, whilst it would be right for the judge to accord great deference to the decision of the local planning authority on matters of planning policy such as whether an area of land should be kept as an open space or should be used for the building of houses, the judge was not bound by its decision on every aspect of planning control. Thus, for example, if the local planning authority decided to enforce the removal of some unsightly structure because it spoilt the view of a number of houses, it would be open for the judge to differ from that decision if it were proved that no house had a view of the structure.

92 In stating that the judge should not come to a decision on the planning merit of the case I think that Simon Brown LJ was intending to give effect to the principle stated by Lord Hoffmann in *Tesco Stores*, at p 780G, and was not considering the unusual type of case suggested by Mr George. In my opinion the judge is not precluded from deciding some factual issue, such as that instanced by counsel. But I think that such cases would be rare and I consider that a judge should be alert to ensure that he does not embark on the determination of an issue which would, in reality, involve him in the assessment of planning considerations which lie within the ambit of the functions of the local planning authority.

A **93** Accordingly for the reasons which I have given, and also for the reasons given by Lord Bingham and Lord Steyn, I would dismiss these appeals.

LORD SCOTT OF FOSCOTE

94 My Lords, the issue of importance raised by these three appeals relates to the function of the court and the criteria the court should apply
B when dealing with an application by a local planning authority, made under section 187B of the Town and County Planning Act 1990, for an injunction to restrain a breach of planning control. I have had the advantage of reading in advance the opinions of my noble and learned friends Lord Bingham of Cornhill, Lord Steyn, Lord Clyde and Lord Hutton and need not repeat what they have said about the facts of the three cases and about the background to
C and the reasons for the enactment of section 187B.

95 I respectfully agree that the jurisdiction exercised by the court on an application under section 187B is an original, as opposed to a supervisory, jurisdiction. The section did not, however, confer a new jurisdiction. It had been settled law for many years that the court had jurisdiction to grant a civil law remedy by way of injunction in order to enforce the public law, except in cases where statute had expressly or by necessary implication removed the
D jurisdiction. In *Attorney General v Chaudry* [1971] 1 WLR 1614, 1624 Lord Denning MR said:

> "Whenever Parliament has enacted a law and given a particular remedy for the breach of it, such remedy being in an inferior court, nevertheless the High Court always has reserve power to enforce the law so enacted by way of an injunction or declaration or other suitable
E remedy. The High Court has jurisdiction to ensure obedience to the law whenever it is just and convenient so to do."

96 The principle was confirmed by this House in *Gouriet v Union of Post Office Workers* [1978] AC 435 but their Lordships emphasised that the jurisdiction was one "of great delicacy and . . . to be used with caution" (Lord Wilberforce, at p 481).

F **97** Absent some special statutory authorisation, an application for an injunction to enforce the public law has to be brought by the Attorney General. In *Attorney General v Bastow* [1957] 1 QB 514, 519 Devlin J described the Attorney General as "the only authority who has a right to bring a civil suit upon the infringement of public rights". This principle, too, was confirmed by the House in the *Gouriet* case. However, section 222 of
G the Local Government Act 1972 empowered local authorities to institute civil actions in their own name where they considered it "expedient for the promotion or protection of the interests of the inhabitants of their area . . ." Post 1972, therefore, an application by a local planning authority for an injunction to enforce the planning law could be made in an action brought by the local authority in its own name. Previously the action had to be a relator action brought in the name and with the consent of the Attorney
H General. But the nature of the application for an injunction was not changed by the advent of locus standi for the local authority to sue in its own name. Nor were the criteria to be applied by the court in deciding whether or not to grant the injunction altered. The criteria remained those expressed in section 37 of the Supreme Court Act 1981 (and its predecessor, section 45 of

the Judicature Act 1925), which empowered the High Court to grant an injunction: "in all cases in which it appears to the court to be just and convenient to do so." A

98 Section 187B, providing specifically in relation to planning controls an authority to bring proceedings that previously had been provided generally by section 222 of the Local Government Act 1972, authorised a local planning authority to apply for an injunction in support of planning law where the local planning authority "consider it necessary or expedient for any actual or apprehended breach of planning control to be restrained by injunction" (subsection (1)). The criteria of "necessary or expedient" relate to the decision of the local authority to apply for the injunction. They take the place of criteria set out in section 222 of the 1972 Act. They are not criteria which apply to the court's decision whether or not to grant the injunction. Section 187B(2) says that on an application under subsection (1) the court "may grant such an injunction as the court thinks appropriate for the purpose of restraining the breach". This language does not, in my opinion, add to or subtract from the criteria expressed in section 37 of the Supreme Court Act 1981. The grant of the injunction must be "just and convenient". If the grant of the injunction cannot satisfy this test it can hardly be thought "appropriate" to grant it. B C D

99 The criteria that govern the grant by the court of the injunction make clear, in my opinion, that the court must take into account all or any circumstances of the case that bear upon the question whether the grant would be "just and convenient". Of particular importance, of course, will be whether or not the local planning authority can establish not only that there is a current or apprehended breach of planning control but also that the ordinary statutory means of enforcement are not likely to be effective in preventing the breach or bringing it to an end. In a case in which the statutory procedure of enforcement notice, prosecution for non-compliance and exercise by the authority of such statutory self-help remedies as are available had not been tried and where there was no sufficient reason to assume that, if tried, they would not succeed in dealing with the breach, the local planning authority would be unlikely to succeed in persuading the court that the grant of an injunction would be just and convenient. E F

100 In deciding whether or not to grant an injunction under section 187B the court does not turn itself into a tribunal to review the merits of the planning decisions that the authority, or the Secretary of State, has taken. The purpose of the injunction would be to restrain the alleged breach of planning controls and the court could not in my opinion properly refuse an injunction simply on the ground that it disagreed with the planning decisions that had been taken. If the court thought that there was a real prospect that an appeal against an enforcement notice or a fresh application by the defendant for the requisite planning permission might succeed, the court could adjourn the injunction application until the planning situation had become clarified. But where the planning situation is clear and apparently final the court would, in my opinion, have no alternative but to consider the injunction application without regard to the merits of the planning decisions. G H

101 It does not, however, follow that once the planning situation is clear and apparently final it is not open to the court to take into account the

personal circumstances of the defendant and the hardship that may be caused if the planning controls are enforced by an injunction. Planning controls are imposed as a matter of public law. The local planning authority in seeking to enforce those controls is not enforcing any private rights of its own. If a local authority mortgagee is seeking an order for possession against the mortgagor, or a local authority landlord is seeking an order for possession against a tenant, or a local authority landowner is seeking an order to remove squatters or to restrain trespass, the local authority is seeking an order to enforce its private property rights. It is as well entitled to do so as is a private mortgagee, landlord or landowner. The function of the court in civil litigation of that character is, in my opinion, to give effect to the private rights that the local authority claimant is seeking to enforce. But an application for an injunction under section 187B, or any other application for an injunction in aid of the public law is different. As Lord Wilberforce said in the *Gouriet* case, the jurisdiction to grant such injunctions is one of great delicacy and to be used with caution.

102 I respectfully agree with the criticism expressed by my noble and learned friend, Lord Steyn, of the two Court of Appeal authorities particularly relied on by the appellant planning authorities (see paragraphs 55 to 57 of his opinion). The hardship likely to be caused to a defendant by the grant of an injunction to enforce the public law will always, in my opinion, be relevant to the court's decision whether or not to grant the injunction. In many, perhaps most, cases the hardship prayed in aid by the defendant will be of insufficient weight to counter balance a continued and persistent disobedience to the law. There is a strong general public interest that planning controls should be observed and, if not observed, enforced. But each case must depend upon its own circumstances.

103 The manner in which the Court of Appeal approached the issue, as evidenced by paragraphs 38 to 42 of the judgment of Simon Brown LJ, cited by my noble and learned friend, Lord Bingham of Cornhill, was, in my respectful opinion, correct.

104 For these reasons, as well as those to be found in the opinions of my noble and learned friends with all of which I am in agreement, I too would dismiss these appeals and make the orders proposed by Lord Bingham.

Appeals dismissed with costs.
Cases in first and third appeals remitted.

Solicitors: Sharpe Pritchard; Community Law Partnership, Birmingham.

DECP

Supreme Court

Financial Services Authority *v* Sinaloa Gold plc and others (Barclays Bank plc intervening)

[2013] UKSC 11

2012 Dec 12, 13;
2013 Feb 27

Lord Neuberger of Abbotsbury PSC, Baroness Hale of Richmond, Lord Mance, Lord Clarke of Stone-cum-Ebony, Lord Sumption JJSC

Injunction — Interlocutory — Undertaking as to damages — Financial Services Authority alleging defendants operating share scam and obtaining interlocutory freezing injunction against them — Order including standard cross-undertaking to pay third parties' costs and losses — Authority subsequently seeking to exclude losses from undertaking — Whether court to exercise discretion to require authority exercising law enforcement role to give undertaking to third parties

The Financial Services Authority alleged that the defendants were involved in a fraudulent share scheme and obtained a freezing injunction against them. The injunction contained the standard cross-undertaking as to damages to any third party affected by the freezing order. On its application to continue the injunction the authority sought a variation of the order so that it only undertook to pay the reasonable costs, and not any other losses, incurred by third parties in complying with the order. The defendants' bank, which had been served with the order, intervened to oppose the variation. The judge accepted the bank's contentions and continued the freezing order with the undertaking in favour of third parties as originally framed. The Court of Appeal removed the undertaking.

On the bank's appeal—

Held, dismissing the appeal, that there was a general distinction between private litigation and public law enforcement action; that, in private litigation, a claimant acted in its own interests and had a choice whether to commit its assets and energies to doing so and if it sought interim relief which might, if unjustified, cause loss or expense to the defendant, it was usually fair to require the claimant to be ready to accept responsibility for that loss or expense; that different considerations arose where a public authority was seeking to enforce the law in the interests of the public generally, often in pursuance of a public duty to do so, and enjoyed only the resources which had been assigned to it for its functions; that it remained the case that English law did not confer a general remedy for loss suffered by administrative law action; that the fact that an injunction might later be discharged did not signify that there had been any breach of duty on the public authority's part in originally seeking it; that there was no significant distinction between the protection of a defendant and a third party, as in either case what was covered by the cross-undertaking was loss caused by the grant of an injunction where the person incurring the loss was essentially innocent; that, accordingly, there was no general rule that an authority like the Financial Services Authority acting pursuant to a public duty should be required to give such an undertaking, whether at the without notice or the on notice stage of proceedings, unless circumstances appeared which justified a different position; and that, in the present case, there were no particular circumstances which did justify such a change of position (post, paras 1, 30, 31, 33–34, 36–37, 41, 43, 45).

F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry [1975] AC 295, HL(E) applied.

Decision of the Court of Appeal [2011] EWCA Civ 1158; [2012] Bus LR 753 affirmed.

A The following cases are referred to in the judgment of Lord Mance JSC:

Attorney General v Wright [1988] 1 WLR 164; [1987] 3 All ER 579
Cheltenham & Gloucester Building Society (formerly Portsmouth Building Society) v Ricketts [1993] 1 WLR 1545; [1993] 4 All ER 276, CA
Clipper Maritime Co Ltd of Monrovia v Mineralimportexport [1981] 1 WLR 1262; [1981] 3 All ER 664; [1981] 2 Lloyd's Rep 458
B *Customs and Excise Comrs v Anchor Foods Ltd* [1999] 1 WLR 1139; [1999] 3 All ER 268
Customs and Excise Comrs v Barclays Bank plc [2006] UKHL 28; [2007] 1 AC 181; [2006] 3 WLR 1; [2006] 4 All ER 256; [2006] 2 All ER (Comm) 831; [2006] 2 Lloyd's Rep 327, HL(E)
Director General of Fair Trading v Tobyward Ltd [1989] 1 WLR 517; [1989] 2 All ER 266
Dormer v Newcastle-upon-Tyne Corpn [1940] 2 KB 204; [1940] 2 All ER 521, CA
C *Galaxia Maritime SA v Mineralimportexport* [1982] 1 WLR 539; [1981] 1 All ER 796; [1982] 1 Lloyd's Rep 351, CA
Gorringe v Calderdale Metropolitan Borough Council [2004] UKHL 15; [2004] 1 WLR 1057; [2004] 2 All ER 326, HL(E)
Hammersmith and City Railway Co v Brand (1869) LR 4 HL 171, HL(E)
Highfield Commodities Ltd, In re [1985] 1 WLR 149; [1984] 3 All ER 884
Hoffmann-La Roche (F) & Co AG v Secretary of State for Trade and Industry [1975]
D AC 295; [1974] 3 WLR 104; [1974] 2 All ER 1128, HL(E)
Jain v Trent Strategic Health Authority [2009] UKHL 4; [2009] AC 853; [2009] 2 WLR 248; [2009] PTSR 382; [2009] 1 All ER 957, HL(E)
Kirklees Metropolitan Borough Council v Wickes Building Supplies Ltd [1993] AC 227; [1992] 3 WLR 170; [1992] 3 All ER 717, HL(E)
Miller Brewing Co v Mersey Docks and Harbour Co [2003] EWHC 1606 (Ch); [2004] FSR 81
E *Rahman (Prince Abdul) bin Turki al Sudairy v Abu-Taha* [1980] 1 WLR 1268; [1980] 3 All ER 409; [1980] 2 Lloyd's Rep 565, CA
Searose Ltd v Seatrain UK Ltd [1981] 1 WLR 894; [1981] 1 All ER 806; [1981] 1 Lloyd's Rep 556
Securities and Investments Board v Lloyd-Wright [1993] 4 All ER 210
Tucker v New Brunswick Trading Co of London (1890) 44 Ch D 249, CA
United States Securities and Exchange Commission v Manterfield [2009] EWCA Civ
F 27; [2010] 1 WLR 172; [2009] Bus LR 1593; [2009] 2 All ER 1009; [2009] 2 All ER (Comm) 941; [2009] 1 Lloyd's Rep 399, CA

The following additional cases were cited in argument:

Banco Nacional de Comercio Exterior SNC v Empresa de Telecomunicaciones de Cuba SA [2007] EWCA Civ 662; [2008] 1 WLR 1936; [2008] Bus LR 1265; [2007] 2 All ER (Comm) 1093; [2007] 2 Lloyd's Rep 484, CA
G *Gulf Insurance Ltd v Central Bank of Trinidad and Tobago* [2005] UKPC 10, PC
R v Secretary of State for Transport, Ex p Factortame Ltd (No 2) (Case C-213/89) [1991] 1 AC 603; [1990] 3 WLR 818; [1991] 1 All ER 70; [1991] 1 Lloyd's Rep 10, ECJ and HL(E)
Z Ltd v A-Z and AA-LL [1982] QB 558; [1982] 2 WLR 288; [1982] 1 All ER 556; [1982] 1 Lloyd's Rep 240, CA

H **APPEAL** from the Court of Appeal

On 17 December 2010 the claimant, the Financial Services Authority, obtained a without notice freezing injunction against the defendants, Sinaloa Gold plc, the person or persons trading as PH Capital Invest, and Glen Lawrence Hoover. That injunction, both as originally granted by Kevin Prosser QC, sitting as a deputy judge of the Chancery Division, and as

continued by David Richards J on 31 December 2010, contained the standard cross-undertaking as to damages to any third party affected by it. On the claimant subsequently applying for a variation of the order to exclude the undertaking to compensate any third party for its losses, Barclays Bank plc, which had been served with the injunction, intervened in the proceedings. By a judgment dated 25 January 2011 Judge Hodge QC [2011] EWHC 144 (Ch) continued the injunction but refused the claimant's application to vary the cross-undertaking. The Court of Appeal (Mummery, Patten LJJ and Hedley J) [2011] EWCA Civ 1158; [2012] Bus LR 753 allowed the Financial Services Authority's appeal on 18 October 2011 and removed the undertaking to compensate third parties.

With permission of the Supreme Court (Lord Walker of Gestingthorpe, Lord Kerr of Tonaghmore and Lord Wilson JJSC) given on 6 February 2012 Barclays Bank plc appealed. The issue in the appeal was agreed to be whether or not the Financial Services Authority, when acting in its capacity as a regulator, should generally be required, as a condition of obtaining a freezing injunction against a respondent, to give the court a cross-undertaking in damages in favour of third parties affected by the injunction.

The facts are stated in the judgment of Lord Mance JSC.

Richard Handyside QC and *Tamara Oppenheimer* (instructed by *Litigation and Special Investigations, Retail and Business Banking, Barclays Bank plc*) for Barclays Bank plc.

In proceedings between private litigants, the courts generally require the applicant, as a condition of obtaining the order, to provide cross-undertakings in damages to the respondent and also to third parties who may be affected by the order. The effect of the applicant giving a cross-undertaking is to confer power upon the court, where otherwise none would exist, to order the applicant to compensate a third party for losses suffered as a result of the freezing injunction. Such an order to pay compensation will only be made where the court later decides that the injunction has caused the third party loss for which the third party ought to be compensated. The Court of Appeal decided that the Financial Services Authority ("FSA") should not generally be required, when seeking freezing injunctions in the performance of its statutory functions, to give a cross-undertaking in damages in favour of third parties. The consequence of the Court of Appeal's decision is that where the FSA obtains a freezing injunction affecting an innocent third party, the court will have no jurisdiction to order the FSA to compensate the third party for any loss suffered by it as a result of the order. That decision is wrong in principle. It is unjust for a court to make an order that may cause loss to an innocent third party who is not represented before it on terms that effectively preclude the third party, irrespective of the circumstances, from obtaining an order for compensation against the person who obtained the injunction. Accordingly, the FSA should generally be required, as a condition of obtaining a freezing order, to give a cross-undertaking in damages to third parties affected by the order. That is a modest proposition. To require the FSA to give a cross-undertaking in damages to a third party will not predetermine any liability of the FSA to the third party. In order for the FSA to be liable to pay money under the cross-undertaking, the court must first decide to enforce the undertaking. The third party must then prove causation and loss. The principles of remoteness of damage will also apply, and the third party will be obliged to take reasonable

A steps to mitigate or avoid his loss. The provision of a cross-undertaking therefore simply puts in place a mechanism whereby the court may order the FSA to compensate a third party where the court concludes that justice requires that compensation be paid: see *Cheltenham & Gloucester Building Society (formerly Portsmouth Building Society) v Ricketts* [1993] 1 WLR 1545. Once that point, which does not feature in the analysis of the Court of Appeal below, is understood, it becomes self-evident that a cross-undertaking B should be required save in exceptional circumstances. A very strong and cogent countervailing policy consideration would be needed in order to dispense with the third party cross-undertaking. No such consideration was identified by the Court of Appeal below, and none exists in this case.

The practice of requiring an applicant for an interlocutory injunction to give a cross-undertaking in damages in favour of a defendant originated in the C 19th century. With the advent of the *Mareva* jurisdiction, the aim of which was to prevent dissipation of a defendant's assets rather than to restrain arguable breaches by the defendant of a claimant's right, the courts' focus was turned, additionally, to the potential costs and losses of innocent third parties caught up in the dispute: see *Prince Abdul Rahman bin turki al Sudairy v Abu-Taha* [1980] 1 WLR 1268 and *Searose Ltd v Seatrain UK Ltd* [1981] 1 WLR D 894. Initially, the protection was limited to paying the expenses of third parties notified of the injunction, but within a year there was authority that claimants should undertake to pay losses suffered by third parties as a result of the injunction: see *Clipper Maritime Co Ltd of Monrovia v Mineralimportexport* [1981] 1 WLR 1262. In subsequent cases, it was made clear that the protection afforded to third parties should also extend to any liability incurred by the third party: see *Z Ltd v A-Z and AA-LL* [1982] QB E 558. Thus the protection has been extended not only to those third parties served with the order, but to any third parties who may be affected by the order: see *Banco Nacional de Comercio Exterior SNC v Empresa de Telecommunicaciones de Cuba SA* [2008] 1 WLR 1936. In summary, it is now firmly established in the authorities that an applicant for a freezing injunction will generally be required to give a cross-undertaking in damages to protect third parties against any expense, loss or liability caused by the order, and that F it is only in exceptional cases that that requirement will be dispensed with.

The FSA relies upon another line of authorities as establishing that the general practice of the court is not to require a cross-undertaking in favour of a defendant from a public authority when it seeks an injunction as part of its law enforcement functions: see *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295; *In re Highfield* G *Commodities Ltd* [1985] 1 WLR 149; *Attorney General v Wright* [1988] 1 WLR 164; *Kirklees Metropolitan Borough Council v Wickes Building Supplies Ltd* [1993] AC 227; *Securities and Investments Board v Lloyd-Wright* [1993] 4 All ER 210 and *Customs and Excise Comrs v Anchor Foods Ltd* [1999] 1 WLR 1139. That line of authorities does not establish any such general practice of dispensing with cross-undertakings in favour of H defendants, and if (contrary to that submission) there is any such general practice, it does not extend and should not be extended to cross-undertakings in favour of third parties. It would be wrong in principle to apply to third parties any practice which may have evolved to dispense with cross-undertakings in favour of respondents. The position of a third party is self-evidently different to that of a respondent. Where an interim freezing

injunction is granted against a respondent there must, by definition, be evidence before the court, sufficient to establish a good arguable case, to justify the making of that order. The third party, in contrast, is not the subject of the claim, and will typically be an innocent bystander who has inadvertently become caught up in a dispute between other parties. It should also be noted that the decision in *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 has been the subject of academic criticism: see Zuckerman "Dispensation with undertaking in damages—An elementary injustice" [1993] CJQ 268, 274; Zuckerman "The Undertaking in Damages—Substantive and Procedural Dimensions" [1994] CLJ 546. The Court of Appeal's decision not to require the FSA to provide a cross-undertaking to third parties was significantly influenced by the existence of the FSA's statutory immunity at paragraph 19(1) of Schedule 1 to the Financial Services and Markets Act 2000. There is no inconsistency between, on the one hand, the limited immunity conferred upon the FSA by the Act, and on the other hand, requiring the FSA to give a cross-undertaking in damages to third parties as the price of obtaining a freezing order: see *Customs and Excise Comrs v Barclays Bank plc* [2007] 1 AC 181 and *Gulf Insurance Ltd v Central Bank of Trinidad and Tobago* [2005] UKPC 10. The FSA cannot be compelled to give a cross-undertaking against its will. If it is unwilling to give a cross-undertaking, the likely consequence will be that the injunction will not be granted. If the FSA has a significant concern that it might be ordered to compensate third parties for its actions, that provides a compelling reason why the FSA should be required to provide an undertaking, rather than a reason why it should not.

Nicholas Vineall QC, James Purchas and *Adam Temple* (instructed by *Enforcement and Financial Crime Division, Financial Services Authority*) for the Financial Services Authority ("FSA").

Whether or not to require an applicant for an injunction to give a cross-undertaking in damages to third parties is always ultimately a matter of discretion. For a private claimant asserting private law rights the court will, save in exceptional cases, require a cross-undertaking in damages in favour of (a) the enjoined defendant/s and (b) third parties. By contrast, if the applicant for such an injunction is the Crown or a public body exercising statutory duties for the public good different considerations arise. Unless special factors arise, the court should usually dispense with the requirement of a cross-undertaking in damages in favour of enjoined defendants and likewise dispense with the requirement of a cross-undertaking in damages in favour of third parties.

There are three main reasons why no cross-undertaking in damages should be required from the FSA: the first two reasons extend to all public body regulators, the third applies only to public bodies which (like the FSA) enjoy a statutory immunity from damages claim. The three reasons are: (1) The rationale for dispensing with the requirement of a cross-undertaking as between public bodies and enjoined defendants applies equally as between public bodies and third parties. The rationale for the general dispensation for public bodies (i e that they do not have to give a cross-undertaking in favour of defendants) is grounded in the role and function the public body is performing rather than the fact that there is a prima facie case against the enjoined defendant. The same rationale applies vis-à-vis a cross-undertaking in favour of third parties. Barclays say that the fact that a third party will

A generally be entirely "innocent" means that third parties should have the benefit of the cross-undertaking even though an enjoined defendant does not. That overlooks the fact that the main purpose of a cross-undertaking in favour of the defendants is to protect the defendant if he turns out to be wholly innocent. (2) There are strong policy grounds not to require a cross-undertaking in damages to third parties, because to do so would expose the public body regulator to the risk of unquantifiable liabilities to an uncertain B class of persons, that will inevitably tend to inhibit the public body from seeking injunctive relief, and that is contrary to the public interest. When private litigants decide whether to seek an injunction they are balancing a prospective monetary liability under their cross-undertakings against a correlative prospective advantage to themselves (usually a monetary advantage) if they succeed in the action and enforce their claim. Public bodies C enforcing the law are in a different position, for there is no monetary advantage to them if the action succeeds. (3) The FSA has a statutory immunity from damages claims. Although an eventual liability imposed under a cross-undertaking in damages is not, in the strictest sense, a liability in damages, it would be inconsistent with the existence of the statutory immunity to require a cross-undertaking in damages. Further, requiring the FSA to give a cross-undertaking in damages in favour of third party banks D would also be inconsistent with the position where an asset requirement is imposed by the FSA in support of action taken against a regulated entity.

It is important to consider what the present state of the law is, so that Barclays's suggested new practice can be compared with it. Under the law as its stands the FSA should not in general be required to give a blanket cross-undertaking to defendants or third parties at the without notice stage. But if E an enjoined defendant, or an affected third party, believes there are grounds on which the FSA should, unusually, be required to give a cross-undertaking as a condition of the injunction continuing, it can make such an application on the return date, or at any other time. On any such application: (1) The defendant or third party will be able to explain to the court what it is about the circumstances that is said to justify departure from the normal position. (2) The nature of the apprehended loss or damage can be identified. (3) Some F estimate can be made by the FSA of the risk of it materialising, and of the quantum of loss or damage if it does materialise. (4) The court can be addressed, in the light of the facts, as to whether a departure from the normal position is justified. (5) The court can consider whether it is minded to require a cross-undertaking, and if so on what terms. It might for instance be limited in amount, or in time. It might be subject to conditions, for instance G that the third party notify the FSA if and when losses begin to be incurred, or are first apprehended, or reach a certain level. (6) When the court has decided whether and in what terms it will require an undertaking as the price of continuing the injunction, the FSA can decide, on an informed basis, whether it is prepared to give that undertaking or whether it prefers to give up the injunction. Barclays's suggestion, by contrast, is that a blanket undertaking to third parties should be given as a matter of course in all cases at the ex parte H stage. The problems with Barclays's suggested practice are as follows: (1) It creates uncertainty. The regulator will be perpetually looking over its shoulder. Barclays's suggestion does nothing to address the vice that FSA action will be inhibited, in borderline cases, by uncertainty as to its potential liabilities. (2) It creates a markedly greater risk of exposing the FSA to

liabilities it (properly) does not want to incur than might arise on the FSA's alternative model. On the Barclays approach there is no incentive for, nor requirement on, a third party promptly to identify to the FSA the losses which it seeks to recover under the cross-undertaking, with the result that the FSA is disabled from considering on an informed basis whether paying the "price" would be justified. (3) It is likely to raise expectations in third parties only for them to be disappointed, specially if the FSA is right and its immunity means that it is most unlikely that the court will ultimately exercise its discretion to require the FSA to pay third party (or defendant) losses. At any rate it creates uncertainty for third parties. (4) It will lead to satellite litigation.

In *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 the House of Lords considered what the position of Crown departments ought to be, given that the Crown's general immunity had been abolished. It held that in a Crown action brought to enforce or protect its proprietary or contractual rights an undertaking would normally be required, just as it would of any ordinary litigant. But the majority held that such an undertaking should not be required as a matter of course in a "law enforcement" action, albeit there was still a discretion to require such an undertaking. There is disagreement between Barclays and the FSA as to exactly what the *Hoffmann-La Roche* case decided. It is correct to say that the majority of the House decided that in cases where the injunction was sought in order to enforce the law it would be for the defendant to show some good or special reason why a cross-undertaking should be required. See also *In re Highfield Commodities Ltd* [1985] 1 WLR 149; *United States Securities and Exchange Commission v Manterfield* [2010] 1 WLR 172; *Customs and Excise Comrs v Anchor Foods Ltd* [1999] 1 WLR 1139; *Miller Brewing Co v Mersey Docks and Harbour Co* [2004] FSR 81 and *R v Secretary of State for Transport, Ex p Factortame Ltd (No 2)* (Case C-213/89) [1991] 1 AC 603.

Handyside QC in reply.

F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry [1975] AC 295 did not decide that there is a general principle in favour of dispensing with cross-undertakings when an injunction was sought by a law enforcement agency. It decided that the issue should be determined on a case by case basis. That decision is not challenged. It turns on its own facts and concerns defendants. It is, however, questioned whether the case would be decided in the same way today given the effect of article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The court took time for consideration.

27 February 2013. **LORD MANCE JSC** (with whom **LORD NEUBERGER OF ABBOTSBURY PSC, BARONESS HALE OF RICHMOND, LORD CLARKE OF STONE-CUM-EBONY** and **LORD SUMPTION JJSC** agreed) handed down the following judgment.

Introduction

1 The issue on this appeal is whether and if so in what circumstances the Financial Services Authority ("FSA") should, as a condition of obtaining a freezing injunction under section 380(3) of the Financial Services and Markets Act 2000 and/or section 37(1) of the Senior Courts Act 1981, be

A required to give to the court a cross-undertaking in damages in favour of third parties affected by the injunction. The answer I would give is that there is no general rule that an authority like the FSA acting pursuant to a public duty should be required to give such an undertaking, and that there are no particular circumstances why it should be required to do so in the present case.

B **2** The issue has been argued as a matter of principle between the FSA and Barclays Bank plc ("Barclays"), a potentially affected third party. However, a brief statement of the background is appropriate.

3 On 20 December 2010 proceedings were commenced by the FSA against three defendants (Sinaloa Gold plc, a person or persons trading as PH Capital Invest and a Mr Glen Lawrence Hoover) on the basis that (a) Sinaloa was promoting the sales of shares without being authorised to do C so and without an approved prospectus, contrary to sections 21 and 85 of the 2000 Act, (b) PH Capital Invest and Mr Hoover were knowingly engaged in this activity, and (c) PH Capital Invest was as an unauthorised person carrying on regulated activities in breach of section 19 of the 2000 Act in various other respects.

4 Sinaloa Gold plc had six bank accounts at Barclays, in respect of all of which Mr Hoover was the sole authorised signatory.

D **5** Before issuing these proceedings, the FSA had on 17 December 2010 obtained without notice an injunction freezing the defendants' assets under sections 380(3) of the 2000 Act and/or 37(1) of the 1981 Act. Barclays were notified of the order on 20 December 2010, and the injunction was continued by David Richards J at a hearing on notice on 31 December 2010.

6 As originally issued, Schedule B to the injunction, headed E "Undertakings given to the court by the applicant", read:

> "(1) The applicant does not offer a cross-undertaking in damages . . ."
>
> "(4) The applicant will pay the reasonable costs of anyone other than the respondents which have been incurred as a result of this order including the costs of finding out whether that person holds any of the respondent's assets *and if the court later finds that this order has caused* F *such person loss, and decides that such person should be compensated for that loss, the applicant will comply with any order the court may make*." (Emphasis added.)

By the time the injunction was continued, the possible inconsistency between paragraphs (1) and (4) was observed, and the FSA was required to agree to add at the end of paragraph (1) the phrase "save to the extent provided in G paragraph (4) below", without prejudice to its right to apply to vary paragraph (4).

7 On 12 January 2011 the FSA applied to have the words which I have italicised in paragraph (4) removed. Barclays intervened to oppose the application, which was refused by Judge Hodge QC on 25 January 2011 [2011] EWHC 144 (Ch). On 18 October 2011, the Court of Appeal reversed his decision and ordered a cross-undertaking in the terms of H paragraph (4) without the italicised words [2012] Bus LR 753. The effect was to preserve the undertaking in respect of costs incurred by third parties (which the FSA did not dispute), but to eliminate any requirement that the FSA give an undertaking in respect of losses incurred by third parties. Barclays now appeals by permission of this court.

The FSA and the 2000 Act

8 The FSA is governed by the 2000 Act. Schedule 1 to the 2000 Act makes provision about its status, including an exemption from liability in damages: para 12 below. The FSA was given general functions which in discharging it must, so far as is reasonably possible, act in a way which is compatible with defined regulatory objectives and which it considers most appropriate for the purpose of meeting those objectives: section 2(1) and (4) of the 2000 Act. Its general functions include making rules, preparing and issuing codes, giving general guidance and determining general policy and principles by reference to which to perform particular functions. The regulatory objectives include maintaining market confidence in the UK financial system (section 3), protecting and enhancing the stability of the UK financial system (section 3A, as inserted by section 1(3) of the Financial Services Act 2010), securing the appropriate degree of protection for consumers (section 5) and reducing the extent to which it is possible for a business carried on by a regulated person or in contravention of the general prohibition to be used for a purpose connected with financial crime: section 6.

9 Section 19 in Part II of the 2000 Act prohibits any person from carrying on, or purporting to carry on, a regulated activity in the UK unless authorised (under sections 40 to 43 in Part IV) or exempt. This is the "general prohibition", for contravention of which penalties are set by section 23. Section 21 contains specific restrictions on financial promotion, including communicating an invitation or inducement to engage in investment activity in the course of business, with penalties for contravention being set by section 25. Section 85 prohibits dealing in transferable securities without an approved prospectus.

10 Section 380(3) provides that, if, on the application of the FSA or the Secretary of State, the court is satisfied that any person may have contravened, or been knowingly concerned in the contravention of, a relevant requirement "it may make an order restraining . . . him from disposing of, or otherwise dealing with, any assets of his which it is satisfied he is reasonably likely to dispose of or otherwise deal with". A relevant requirement includes "a requirement which is imposed by or under this Act" (section 380(6)(a)) and so includes the requirement under section 19 to be authorised or exempt before carrying on a regulated activity.

11 Under Part IV of the 2000 Act, permission may be given subject to such requirements as the FSA thinks appropriate (section 43), which may include an "assets requirement" prohibiting the disposal of, or other dealing with, any of the permitted person's ("A's") assets or their transfer to a trustee approved by the FSA: section 48(3). Under section 45(4), the FSA may on its own initiative vary a previously included Part IV permission to include an assets requirement. Under section 48(4)(5), if the FSA imposes an assets requirement and gives notice to any institution with which a person ("A") keeps an account, the notice has the effect that (a) the institution does not act in breach of any contract with A in refusing any instruction from A in the reasonably held belief that complying would be incompatible with the requirement and (b) if the institution complies with the instruction, it is liable to pay to the FSA an amount equal to that transferred from or paid out of A's account. In relation to authorised persons, the FSA thus enjoys a right

A to impose a freezing order without going to court and without any occasion arising on which a cross-undertaking could be required of it.

12 The FSA also enjoys an exemption from liability in damages, set out in paragraph 19 of Schedule 1 to the 2000 Act:

> "(1) Neither the authority nor any person who is, or is acting as, a member, officer or member of staff of the authority is to be liable in
B damages for anything done or omitted in the discharge, or purported discharge, of the authority's functions.
>
> "(2) Neither the investigator appointed under paragraph 7 nor a person appointed to conduct an investigation on his behalf under paragraph 8(8) is to be liable in damages for anything done or omitted in the discharge, or purported discharge, of his functions in relation to the investigation of a complaint.
C
> "(3) Neither sub-paragraph (1) nor sub-paragraph (2) applies— (a) if the act or omission is shown to have been in bad faith; or (b) so as to prevent an award of damages made in respect of an act or omission on the ground that the act or omission was unlawful as a result of section 6(1) of the Human Rights Act 1998."

13 Paragraph 19(1) of Schedule 1 would protect the FSA, if it was, for
D example, the subject of a claim by A on whom it had imposed an assets requirement under section 45(4), by an institution to which it had notified the imposition of such a requirement under section 48(4) and (5) or by any other third person. Paragraphs 7 and 8 of Schedule 1 require the FSA to establish a scheme for the independent investigation of complaints against it (other than complaints more appropriately dealt with in another way, e g by
E referral to the Upper Tribunal under the appeals procedure contained in Part IX of the 2000 Act or by the institution of other legal proceedings), and the issue and, where appropriate, publication of reports on such complaints.

The present issue

14 The issue now before the Supreme Court raises for consideration:
F (a) whether and how far the position of the FSA, seeking an interim injunction pursuant to its public law function and duty, is to be equated with that of a person seeking such an injunction in pursuance of private interests; (b) whether and how far the position regarding the giving of any cross-undertaking differs according to whether it is to protect a defendant or a third party; and (c) whether there is any coherent distinction between cross-undertakings in respect of third party losses and costs.

G **15** Taking the first point, I propose to start with the requirements which apply when a claimant is pursuing private interests. Since the first half of the 19th century such claimants have when seeking an interim injunction been required to give the "usual undertaking". That means an

> "undertaking to abide by any order this court may make as to damages in case the court shall hereafter be of opinion that the defendants . . . shall
H have sustained any by reason of this order which the [claimant] ought to pay": see e g *Tucker v New Brunswick Trading Co of London* (1890) 44 Ch D 249, 251.

The practice regarding defendants is reflected in paragraph 5.1(1) of Practice Direction 25A supplementing CPR Pt 25, requiring, unless the court orders

otherwise, an undertaking "to pay any damages which the respondent sustains which the court considers the applicant should pay". But modern practice, reflected in paragraph 5.1A of the practice direction, also provides that, when the court orders an injunction

> "it should consider whether to require an undertaking by the applicant to pay any damages sustained by a person other than the respondent, including another party to the proceedings or any other person who may suffer loss as a consequence of the order."

16 Asset freezing (formerly *Mareva*) injunctions were developed by the courts in the late 1970s and 1980s. Because of their particular, potentially stringent effects, they are separately regulated in the rules. Paragraph 6.1 of Practice Direction 25A annexes a sample wording which may be modified in any particular case. In addition to an undertaking in the usual form in favour of the defendant, it includes an undertaking in favour of third persons in identical form to paragraph (4) of that originally required in this case (para 6 above).

17 The history of the undertaking in favour of third persons can be traced back to a statement by Lord Denning MR in *Prince Abdul Rahman Bin Turki Al Sudairy v Abu-Taha* [1980] 1 WLR 1268, 1273 and to decisions by Robert Goff J in *Searose Ltd v Seatrain UK Ltd* [1981] 1 WLR 894 and *Clipper Maritime Co Ltd of Monrovia v Mineralimportexport* [1981] 1 WLR 1262. In the *Searose* case [1981] 1 WLR 894, Robert Goff J, building on Lord Denning MR's statement, held that, where a bank had to incur costs in identifying whether a bank account existed within the terms of a *Mareva* injunction, it should be entitled to an undertaking to cover its reasonable costs, before it incurred them. In the *Clipper Maritime* case [1981] 1 WLR 1262 the freezing injunction obtained by the claimants covered cargo or bunkers belonging to the defendants Mineralimportexport on board a vessel which was on time charter to Mineralimportexport and which was in the port of Barry. Its effect might have been to inhibit the port authority in its use of the port and to cause it loss of income. An undertaking was required to cover any actual income lost to the port authority. In the later case of *Galaxia Maritime SA v Mineralimportexport* [1982] 1 WLR 539, the defendants were again Mineralimportexport and a freezing injunction was initially granted to prevent them from removing from the jurisdiction (just before Christmas) a cargo on a third party's vessel which was only on voyage charter to Mineralimportexport. The Court of Appeal categorically refused to continue the interim injunction on any terms, since it could effectively block the third party's vessel indefinitely.

18 Under the standard forms of injunction currently in use for both ordinary interim injunctions and freezing injunctions, the enforcement of the undertaking is expressed to be in the court's discretion. There is little authority in this area. Neill LJ undertook a useful review of the general principles in *Cheltenham and Gloucester Building Society (formerly Portsmouth Building Society) v Ricketts* [1993] 1 WLR 1545, 1551–1552. The position regarding undertakings in favour of defendants has been more recently reviewed in *Commercial Injunctions*, by Steven Gee QC, 5th ed (2004 and First Supplement), paras 11.017–11.032, while the authorities on undertakings in favour of third parties are covered in paras 11.008–11.012. An inquiry into damages will ordinarily be ordered where a freezing

injunction is shown to have been wrongly granted, even though the claimant was not at fault: para 11.023. But, depending on the circumstances, it may be appropriate for the court to await the final outcome of the trial before deciding whether to enforce: see the *Cheltenham and Gloucester* case, p 1552B. However, Professor Adrian Zuckerman has pointed out ("The Undertaking in Damages—Substantive and Procedural Dimensions" [1994] CLJ 546, 562) that it does not follow from a defendant's success on liability that he did not in fact remove (or seek to remove) assets from the reach of the claimant, justifying an interim freezing order. The court retains a discretion not to enforce the undertaking if the defendant's conduct makes it inequitable to enforce: *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295, 361E, per Lord Diplock. It seems likely that compensation is assessed on a similar basis to that upon which damages are awarded for breach of contract: the *Cheltenham and Gloucester* case [1993] 1 WLR 1545, 1552C–D, per Neill LJ.

19 The position regarding third persons is necessarily different in certain respects. The purpose of the cross-undertaking is to protect them—so long at least as they are "innocent" third persons not implicated in the alleged wrongdoing or conduct justifying the freezing order—whether or not the freezing order was justified as against the defendant. That purpose goes back to the orders first made in the *Searose* [1981] 1 WLR 894 and *Clipper Maritime* [1981] 1 WLR 1262 cases.

20 I turn to the position of an authority acting in pursuit of public functions. The leading authority is the *Hoffmann-La Roche* case [1975] AC 295. Following a report by the Monopolies Commission the Department of Trade and Industry made an order under the relevant monopolies legislation: the Regulation of Prices (Tranquillising Drugs) (No 3) Order 1973 (SI 1973/1093), setting maximum prices for certain drugs. Hoffmann-La Roche issued proceedings claiming that the Monopolies Commission report had been unfair and contrary to natural justice and was invalid, and that the Regulations based upon it were likewise ultra vires and invalid. The Department issued proceedings, and sought an injunction to restrain Hoffmann-La Roche from charging prices in excess of the Order prices under a provision in the primary legislation (section 11 of the Monopolies and Restrictive Practices (Inquiry and Control) Act 1948) which provided that "compliance with any such order shall be enforceable by civil proceedings by the Crown for an injunction or for any other appropriate relief".

21 The issue argued was whether the Department should be required to give a cross-undertaking in damages in order to obtain the order. The House recognised the general rule requiring a cross-undertaking as a condition of the grant of an interim injunction in ordinary litigation: see e g per Lord Reid [1975] AC 295, 341B. It recognised that, since the Crown Proceedings Act 1947, there was no continuing justification for the former blanket practice whereby the Crown was not required to give any such undertaking in any circumstances (even in cases where it was asserting proprietary or contractual rights which a private person could have and enforce): per Lord Reid at p 341C and Lord Diplock at p 362B–H. But it considered, by a majority, that the Crown remains in a position different from that of any private individual when it brings what Lord Diplock described as a "law enforcement action": p 363B.

22 The majority did not express itself with one voice regarding the implications of this distinction. Lord Reid thought "special circumstances" or "special reason" to be required before the Crown should have to expose itself by cross-undertaking: p 341E, G. Lord Cross of Chelsea however accepted that it might be fair to require that the Crown give a cross-undertaking where the defendant's defence was that what he is doing or proposing to do was not prohibited by the order in question, but that, where as here the defence was that what was "on the face of it the law of the land" was not in fact the law, "exceptional circumstances" would be required before the court "should countenance the possibility" that the Crown might be deterred from applying for an interim injunction by the need to give a cross-undertaking: p 371. Lord Morris of Borth-y-Gest also focused on the apparent unlawfulness of the sales in excess of the order prices which Hoffmann-La Roche was threatening. Lord Diplock saw no reason, since the Crown Proceedings Act, for "a rigid rule that the Crown itself should *never* be required to give the usual undertaking in damages" in a law enforcement action, but equally no basis for the converse proposition that "the court . . . ought *always* to require an undertaking". This was because, at p 364:

> "When . . . a statute provides that compliance with its provisions shall be enforceable by civil proceedings by the Crown for an injunction, and particularly if this is the only method of enforcement for which it provides, the Crown does owe a duty to the public at large to initiate proceedings to secure that the law is not flouted . . ."

Lord Diplock continued, at p 364:

> "I agree therefore with all your Lordships that the practice of exacting an undertaking in damages from the Crown as a condition of the grant of an interlocutory injunction in this type of law enforcement action ought not to be applied as a matter of course, as it should be in actions between subject and subject, in relator actions, and in actions by the Crown to enforce or to protect its proprietary or contractual rights. On the contrary, the propriety of requiring such an undertaking from the Crown should be considered in the light of the particular circumstances of the case."

23 In concluding that no cross-undertaking should be required, Lord Diplock repeated that the Crown was seeking to enforce the law by the only means available under the governing statute, and he, like Lord Morris and Lord Cross, stressed that Hoffmann-La Roche was threatening to breach an apparently valid order approved by each House of Parliament: pp 364–365. On this basis, he also said, at p 367:

> "So in this type of law enforcement action if the only defence is an attack on the validity of the statutory instrument sought to be enforced the ordinary position of the parties as respects the grant of interim injunctions is reversed. The duty of the Crown to see that the law declared by the statutory instrument is obeyed is not suspended by the commencement of proceedings in which the validity of the instrument is challenged. Prima facie the Crown is entitled as of right to an interim injunction to enforce obedience to it. To displace this right or to fetter it by the imposition of conditions it is for the defendant to show a strong prima facie case that the statutory instrument is ultra vires."

24 However, he went on, at p 367:

> "Even where a strong prima facie case of invalidity has been shown upon the application for an interim injunction it may still be inappropriate for the court to impose as a condition of the grant of the injunction a requirement that the Crown should enter into the usual undertaking as to damages. For if the undertaking falls to be implemented, the cost of implementing it will be met from public funds raised by taxation and the interests of members of the public who are not parties to the action may be affected by it."

25 Lord Wilberforce, dissenting in the *Hoffmann-La Roche* case, was unenthusiastic about English law's "unwillingness to accept that a subject should be indemnified for loss sustained by invalid administrative action" (p 359B), but rested his dissent ultimately on the fact that, without a cross-undertaking, the Crown in the *Hoffmann-La Roche* case would be put in a position where, if it ultimately lost the action, the injunction would have enabled it (through the National Health Service) to profit during the period while the injunction precluded Hoffmann-La Roche from selling to the National Health Service at market rather than order prices.

26 *Kirklees Metropolitan Borough Council v Wickes Building Supplies Ltd* [1993] AC 227 was another case concerned with a claim to enforce apparently valid legislation, this time by a local authority and relating to Sunday trading. Lord Goff of Chieveley, at p 274, read the speeches in the *Hoffmann-La Roche* case

> "as dismantling an old Crown privilege and substituting for it a principle upon which, in certain limited circumstances, the court has a discretion whether or not to require an undertaking in damages from the Crown as law enforcer".

In extending the principle to all public authorities, he said, at p 274:

> "The principle appears to be related not to the Crown as such but to the Crown when performing a particular function . . . the considerations which persuaded this House to hold that there was a discretion whether or not to require an undertaking in damages from the Crown in a law enforcement action are equally applicable to cases in which some other public authority is charged with the enforcement of the law: see e g Lord Reid, at p 341G, Lord Morris of Borth-y-Gest, at p 352C, and Lord Cross of Chelsea, at p 371B–G."

27 In *In re Highfield Commodities Ltd* [1985] 1 WLR 149 Sir Robert Megarry V-C interpreted the *Hoffmann-La Roche* case [1975] AC 295 as deciding that no cross-undertaking should be required of the Crown unless the defendant showed special circumstances justifying the requirement. In *Attorney General v Wright* [1988] 1 WLR 164 Hoffmann J regarded as undeniable (even if, to some eyes, not "particularly attractive") the "potency" of the principle "that Crown officials should not be inhibited from performing their duty to take action to enforce the law by the fear that public funds may be exposed to claims for compensation by people who have thereby caused [sic] loss": p 166C–D. On the facts, however, he required an undertaking to be given by the receiver of, and to be met out of the funds of, the charity for whose benefit the Attorney General was suing to recover property. Although

the Attorney General was not suing to protect any proprietary or contractual right of the Crown, he was suing in the proprietary interests of the charity, which could be expected to give an undertaking. In *Director General of Fair Trading v Tobyward Ltd* [1989] 1 WLR 517, Hoffmann J said that, whatever one might say about the policy, it is well established that "the usual practice is that no cross undertaking is required" when the Crown is seeking an interim injunction to enforce the law: p 524E–H. In *Securities and Investments Board v Lloyd-Wright* [1993] 4 All ER 210, Morritt J addressed the issues on the basis of defence counsel's concession that "it would not be appropriate that there should be a cross-undertaking of damages" in a law enforcement action (p 213H–J), and in *Customs and Excise Comrs v Anchor Foods Ltd* [1999] 1 WLR 1139, 1152C–D, Neuberger J said that "it would ordinarily not be right to require a cross-undertaking in damages from Customs", but ordered one because of the "unusual facts of this case", in which Customs was, to protect its right to VAT, seeking to halt a sale of business at an independent valuation to a new company. Finally, the Court of Appeal in *United States Securities and Exchange Commission v Manterfield* [2010] 1 WLR 172 applied the line of authority including the *Kirklees* case [1993] AC 227, *In re Highfield Commodities Ltd* [1985] 1 WLR 149 and the *Lloyd-Wright* case [1993] 4 All ER 210 when endorsing the exercise of the judge's discretion to dispense with the giving of a cross-undertaking by the United States Securities and Exchange Commission. The commission was seeking a freezing order in aid of Massachusetts proceedings brought in the interest of investors generally to recover assets obtained by Manterfield in the course of a fraudulent investment scheme involving the sale of "limited partnership interests" in an unregistered fund.

28 Presenting the present appeal for Barclays, Mr Richard Handyside did not mount a direct attack on the *Hoffmann-La Roche* case [1975] AC 295 itself. Rather he submitted that it was distinguishable because it concerned enforcement of an apparently valid executive order in relation to which the only defence was that the order was invalid, and that the later authorities referred to in the preceding paragraph had read it too broadly. Mr Handyside did however also refer to Professor Zuckerman's article, which was avowedly critical of the decision in the *Hoffmann-La Roche* case. Professor Zuckerman's reasons included Lord Wilberforce's, and he also argued that a cross-undertaking can encourage greater care before interfering with a citizen's liberty. He questioned the weight placed in the *Hoffmann-La Roche* case on the presumption of validity of the relevant law. Mr Handyside submits that the same criticism applies, a fortiori, to the weight placed by Hoffmann J on the apparent strength of the complaint of misleading advertising on which the injunction was based in the *Tobyward* case [1989] 1 WLR 517.

29 There is considerable general force in this particular criticism of the *Hoffmann-La Roche* case [1975] AC 29. The purpose of a cross-undertaking in favour of a defendant is to cover the possibility of loss in the event that the grant of an injunction proves to have been inappropriate. To refuse to require a cross-undertaking because it appears, however strongly, unlikely ever to be capable of being invoked misses the point. The remoteness of the possibility of loss might indeed be thought to be a reason why the public authority would be unlikely to be inhibited from seeking injunctive relief by fear that public funds may be exposed to claims for compensation. I note that, although Lord Diplock attached some significance to the strength of the

Crown's case in the *Hoffmann-La Roche* case, he did not confine his comments on the difference between private litigation and law enforcement action to cases where the Crown's case was founded on apparently well-founded legislation; on the contrary: see para 24 above.

30 In any event, however, this particular criticism does not impinge on the general distinction drawn in the *Hoffmann-La Roche* case and subsequent cases between private litigation and public law enforcement action. In private litigation, a claimant acts in its own interests and has a choice whether to commit its assets and energies to doing so. If it seeks interim relief which may, if unjustified, cause loss or expense to the defendant, it is usually fair to require the claimant to be ready to accept responsibility for the loss or expense. Particularly in the commercial context in which freezing orders commonly originate, a claimant should be prepared to back its own interests with its own assets against the event that it obtains unjustifiably an injunction which harms another's interests.

31 Different considerations arise in relation to law enforcement action, where a public authority is seeking to enforce the law in the interests of the public generally, often in pursuance of a public duty to do so, and enjoys only the resources which have been assigned to it for its functions. Other than in cases of misfeasance in public office, which require malice, and cases of breach of the Convention rights within section 6(1) of the Human Rights Act 1998, it remains the case that English law does not confer a general remedy for loss suffered by administrative law action. That is so, even though it involves breach of a public law duty. In the present context, the fact that an injunction is discharged, or that the court concludes after hearing extended argument that it ought not in the first place to have been granted, by no means signifies that there was any breach of duty on the public authority's part in seeking it.

32 As I have said, Mr Handyside does not take issue with this general distinction, and the appeal has been argued accordingly. Mr Handyside does, however, take issue with the way in which the *Hoffmann-La Roche* case [1975] AC 295 has been interpreted as indicating that public authority claims to interim injunctions should be approached. The *Hoffmann-La Roche* case has been understood at first instance as involving a usual or normal rule that a cross-undertaking will not be required from the Crown. Mr Handyside submits that this understanding goes further than justified. In the *Hoffmann-La Roche* case, only Lord Reid spoke of a general rule according to which special circumstances or reason must exist before a cross-undertaking should be required from the Crown. Lord Morris was silent. But Lord Diplock said that the practice of exacting an undertaking "ought not to be applied as a matter of course" and should, "on the contrary . . . be considered in the light of the particular circumstances of the case": p 364. This was a more neutral formulation, but still indicates a need to identify particular circumstances before a cross-undertaking is required. Lord Morris and Lord Cross focused on the particular circumstance that the only defence involved a challenge to the validity of an apparently valid order. However, I do not regard that as a satisfactory demarcation of any distinction between public and private claims: para 29 above.

33 For reasons indicated in para 31 above, there is in my view a more general distinction between public and private claims. Ultimately, there is a choice. Either the risk that public authorities might be deterred or burdened

in the pursuit of claims in the public interest is accepted as a material consideration, or authorities acting in the public interest must be expected generally to back their legal actions with the public funds with which they are entrusted to undertake their functions. That latter approach could not be adopted without departing from the *Hoffmann-La Roche* case, and the *Hoffmann-La Roche* case draws a distinction between public and private claims which depends upon accepting the former approach. The *Hoffmann-La Roche* case stands at least for the proposition that public authority claims brought in the public interest require separate consideration. Consistently with the speeches of Lord Reid and Lord Diplock (and probably also of Lord Cross), it indicates that no cross-undertaking should be exacted as a matter of course, or without considering what is fair in the particular circumstances of the particular case. A starting point along these lines does not appear to me to differ significantly from the practice subsequently adopted at first instance: see para 27 above. I accept its general appropriateness.

34 Mr Handyside further submitted that, in whatever sense the *Hoffmann-La Roche* case is understood, it concerned only the protection of defendants. The present appeal concerns the protection of third persons, who, unless the contrary is shown, are to be taken as having no involvement in the breach of the law alleged against the defendants. The present appeal certainly proceeds on the basis that Barclays had no such involvement. However, the distinction which Mr Handyside suggests does not in my opinion hold good. Speaking generally, a cross-undertaking in relation to a defendant protects against the event that no injunction should have been granted, either when it was granted or in the light of the defendants' ultimate success at trial. While it is possible to conceive of a case in which an injunction was wrongly granted on the material then available, but the defendant is at trial found to have breached the law, it is unlikely that the cross-undertaking would then be enforced. A cross-undertaking in relation to third persons protects against the event that an innocent third person, without involvement in whatever breach of the law is alleged against the defendant, suffers loss or expense through the grant of the injunction, whether this should or should not have occurred. In either case, therefore, it is loss caused by the grant of an injunction in circumstances where the person incurring the loss is essentially innocent that is covered by the cross-undertaking.

35 Finally, Mr Handyside submits that no sensible distinction can exist between a cross-undertaking in respect of costs, which the FSA has accepted that Barclays should receive (paras 6 and 7 above), and the cross-undertaking in damages, which is at issue on this appeal. The FSA has, he submits, in effect, undermined its own case by conceding the former. This is not convincing. First, the appeal raises an issue of general principle, which cannot be resolved by a concession in a particular case. Second, there is to my mind a pragmatic basis for a distinction between specific costs and general loss. The rationale of the *Hoffmann-La Roche* case, that public authorities should be able to enforce the law without being inhibited by the fear of cross-claims and of exposing financially the resources allocated by the state for their functions, apply with particular force to any open-ended cross-undertaking in respect of third party loss. It does not apply in the same way to a cross-undertaking in respect of third party expense. Even in a private law context, this distinction may sometimes be relevant to bear in mind. So Neuberger J thought in *Miller Brewing Co v Mersey Docks &*

Harbour Co [2004] FSR 81, paras 44–45 (paragraphs not touched by criticism levelled at the actual decision in Mr Gee's work on *Commercial Injunctions*, para 11.015, into which it is unnecessary to go).

The present case

36 The present case resembles the *Hoffmann-La Roche* [1975] AC 295, *Kirklees* [1993] AC 227, *Tobyward* [1989] 1 WLR 517 and *Lloyd-Wright* [1993] 4 All ER 210 cases. It is a case of a public authority seeking to enforce the law by the only means available under the governing statute. The FSA was acting under its express power to seek injunctive relief conferred by section 380(3). It was acting in fulfilment of its public duties in sections 3 to 6 of the 2000 Act to protect the interests of the UK's financial system, to protect consumers and to reduce the extent to which it was possible for a business being carried on in contravention of the general prohibition being used for a purpose connected with financial crime. I therefore approach this appeal on the basis that there is no general rule that the FSA should be required to give a cross-undertaking, in respect of loss suffered either by the defendants or by third parties. It is necessary to consider the circumstances to determine whether a cross-undertaking should be required in this particular case.

37 The circumstances include some further background considerations. First, there is no general duty in English public law to indemnify those affected by action undertaken under legislative authority. Innocent third parties may be affected in situations ranging from the Victorian example of trains run on an authorised railway line (*Hammersmith and City Railway Co v Brand* (1869) LR 4 HL 171) to the erection of a barrier on a pavement (*Dormer v Newcastle-upon-Tyne Corpn* [1940] 2 KB 204) to police closure of a street following an incident. Secondly, if one focuses attention on acts for which fault might be alleged to attach to the FSA, the FSA will be liable in the unlikely event of a misfeasance in public office or in the event that its conduct amounts to a breach of the Human Rights Act Convention rights. But there is no basis in the 2000 Act for treating the FSA as having a wider statutory or common law responsibility even to innocent third parties. Thus, thirdly, if the FSA were to fail to take appropriate steps to shut down unlawfully conducted activity, innocent third persons might suffer loss, but they could have no claim against the FSA. Fourthly, even in a case of positive action taken by the FSA affecting innocent third persons, the general protective duties and objectives of the 2000 Act could not involve under the 2000 Act or at common law any assumption of responsibility towards or any liability for breach of a duty of care enforceable at the instance of third persons: see eg *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057, *Jain v Trent Strategic Health Authority* [2009] AC 853 and *Customs and Excise Comrs v Barclays Bank plc* [2007] 1 AC 181. Paragraph 19 of Schedule 1 to the 2000 Act in any event provides expressly that they do not.

38 The present appeal concerns the fourth situation, in that the FSA was taking positive action to shut down what it alleged to be unlawful activity. An interim injunction obtained in such a situation may cause innocent third persons loss. They clearly could not complain about loss arising from an unlawful scheme being closed down. But, if the scheme proved after all to be lawful, they might be seen to have sustained loss which they should not in a perfect world have suffered. However, the FSA has powers under Part IV of

the 2000 Act allowing it without any application to the court to freeze the assets of an authorised person, in a way which could equally cause loss to innocent third persons. If the exercise of a Part IV freezing power should subsequently transpire to have been inappropriate, no basis exists upon which such third persons could claim to be indemnified in respect of such loss. Indeed paragraph 19 of Schedule 1 to the 2000 Act would again clearly exclude the FSA from any risk of liability: see para 12 above. There would be an apparent imbalance, if the FSA were required to accept potential liability under a cross-undertaking when it addresses the activities of unauthorised persons and has therefore to seek the court's endorsement of its stance in order for a freezing order to issue.

39 The respondent sought also to gain assistance from paragraph 19 of Schedule 1 to the 2000 Act. A cross-undertaking is colloquially described as being "in damages", and liability under it is measured on ordinary damages principles. But it is clear that it does not involve a liability for damages in a conventional legal sense. The cross-undertaking is to the court. Liability under it, when the court in its discretion determines that the cross-undertaking should be enforced, is in a sum assessed by the court, albeit using similar principles to those by which it measures damages. Accordingly, it is common ground that paragraph 19 cannot directly apply to prevent the FSA from being required to give, or from enforcement of, a cross-undertaking. On the other hand, as the court was told without contradiction, the enactment of paragraph 19 was not based and did not follow upon any consideration of the possibility that the FSA might be required to give a cross-undertaking before being granted an injunction under section 380(3). That possibility was, so far as appears, not in the legislator's mind, one way or the other.

40 In the *Lloyd-Wright* case [1993] 4 All ER 210 (para 27 above), Morritt J considered in a context paralleling the present a predecessor to paragraph 19 which existed in the form of section 187(3) of the Financial Services Act 1986. He rejected a submission of the Securities and Investment Board that this prevented the court from requiring a cross-undertaking. But he went on, at p 214:

> "Rather, it seems to me to be a clear pointer in the exercise of the discretion, which the court undoubtedly has, to indicate that no such cross-undertaking should be required where the designated agency is, in fact, seeking to discharge functions exercisable pursuant to a delegation under the 1986 Act. It seems to me that that is a matter which, in the exercise of my discretion, I should take into account in concluding that no cross-undertaking should be required."

It is unnecessary on this appeal to express any view on the correctness of treating paragraph 19 as a clear pointer in a context where that paragraph cannot ex hypothesi apply.

41 In the light of the factors identified in paras 36–38, there is on any view no reason to move away from the starting position, which is that the FSA should not have to give any cross-undertaking in order to obtain an injunction under section 380(3). Judge Hodge QC [2011] EWHC 144 (Ch) at [66] considered that such a cross-undertaking in favour of innocent third parties should be required "as a matter of course", from the moment when any freezing order was first granted on an ex parte basis. The Court of Appeal was

A in my view right to disagree and substituted for the undertaking as originally given an undertaking in the limited form (i e excluding the italicised words) indicated in paras 6 and 7 above. I would therefore dismiss this appeal.

Further observations

42 A further word is appropriate regarding the positions at the initial
B stage, where injunctive relief is sought on an ex parte (or "without notice") basis, and at the later stage, when the matter comes before the court on notice to both parties as well perhaps as to third persons, such as Barclays. Normally, there would only be a very short period before an on notice hearing could occur, and normally one would expect any third person affected by an injunction to become aware of this risk, even if not given formal notice of the injunction by the FSA. Loss could in theory be sustained
C by either a defendant or a third person in that short period. But any cross-undertaking required as a condition of the grant of interim injunctive relief on a without notice basis would have to be in general and unqualified terms, and therefore be of the kind which could cause most concern to a regulator worried about risk and resource implications.

43 The present appeal concerns the position of the FSA at the without notice and on notice stages. The starting position at each stage should in my
D view be that no cross-undertaking should be required unless circumstances appear which justify a different position. Any inhibition on the part of a public authority about giving an undertaking is likely to be greater, rather than less, at a without notice stage. To require a blanket undertaking in favour of third parties at that stage would provide no incentive to third parties to come forward and identify any real concerns that they might have.
E The better approach is in my view to regard the starting position, that no cross-undertaking should be required, as being as applicable at the without notice stage as it is at the on notice stage. A defendant or a third party who is or fears being adversely affected by an injunction obtained under section 380(3) can and should be expected to come forward, to explain the loss feared and to apply for any continuation of the injunction to be made conditional on such cross-undertaking, if any, as the court may conclude
F should in all fairness be required to meet this situation.

44 Finally, whenever the court is considering whether to order an interim injunction without any cross-undertaking, it should bear in mind that this will mean that the defendant or an innocent third party may as a result suffer loss which will be uncompensated, even though the injunction later proves to have been unjustified. This consideration was rightly
G identified by Neuberger J in the *Miller Brewing* case [2004] FSR 81, para 40.

Conclusion

45 For the reasons given in paras 1–41, I would dismiss this appeal.

Appeal dismissed.

H Ms B L Scully, Barrister

Chancery Division

Vastint Leeds BV *v* Persons unknown

[2018] EWHC 2456 (Ch)

2018 July 20; Sept 24 Marcus Smith J

Injunction — Trespass — Quia timet — Proper approach to exercise of court's discretion

The claimant had the immediate right of possession of an industrial site which was in the process of being developed. Despite taking a number of measures to secure the site, the claimant apprehended a threat of trespass from entry involving caravans by travellers seeking to occupy the site, from persons organising and participating in raves, and persons seeking to use the site for fly-tipping. It was contended that the acts of trespass envisaged posed a safety risk to the trespassers themselves, the claimant's contractors and staff, and could result in the claimant incurring considerable expense, which in practice would be irrecoverable. The claimant sought a quia timet injunction against persons unknown restraining them from entering the site.

On the claim—

Held, that a quia timet injunction would be granted in respect of threatened incursions by persons seeking to establish a more than temporary or more than purely transient occupation of the site, and persons organising, involved in, or participating in raves (post, paras 39).

Statement of the established law relating to the granting of final quia timet relief (post, para 31).

CLAIM

By an application notice dated 27 April 2018, the claimant, Vastint Leeds BV, sought an interim injunction against persons unknown enjoining them, without the consent of the claimant, from entering or remaining on the site, the former Tetley Brewery site, Leeds. By a claim form dated 30 April 2018 and amended by the order of Marcus Smith J on 4 July 2018, the claimant sought a final injunction in similar terms. The interim injunction was granted on 4 May 2018 by Hildyard J and ran until 4 July 2018. On 4 July 2018 the order was continued by Marcus Smith J until 31 July 2018.

The facts are stated in the judgment, post, paras 1–5, 8–18.

Brie Stevens-Hoare QC (instructed by *Fieldfisher llp*) for the claimant.

The court took time for consideration.

24 September 2018. **MARCUS SMITH J** handed down the following judgment.

A. Introduction

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

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

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

4 The interim injunction ran until 4 July 2018, which date was expressed to be the "return date" for the interim injunction. However, Hildyard J's order made clear that the return date was to be treated as the trial of the action, without pleadings or disclosure: see para 5.

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

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

7 Before considering the rules regarding the grant of final quia timet relief and the rules regarding the joinder as defendants of "persons unknown", it is necessary briefly to describe the facts as presented in the evidence before me.[1]

B. The facts

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

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

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

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

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

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

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

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

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

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

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

(1) Despite Vastint taking a number of measures to ensure the physical integrity of the Site, the threat of trespass remains. That threat is said to emanate from three, specific, sources: (a) Entry involving caravans, by travellers, seeking to establish a more than temporary, or more than purely transient, occupation of the Site. (b) Entry of persons organising, involved in, or participating in, raves. (c) Entry of persons seeking to use the Site for fly-tipping.

(2) The evidence regarding the level of the threat from these sources becomes more exiguous as the three sources, described in the preceding sub-paragraph, are individually considered: (a) There is evidence of actual past entry onto the Estate and/or the Site involving caravans. I do not consider that it is especially profitable to differentiate between trespass involving the Estate and trespass involving the Site. One (the Site) is a subset of the other (the Estate), and in my judgment, trespass onto the Estate albeit not involving the Site is good evidence of a risk of this sort of trespass to the Site. (b) There is no evidence of actual past entry onto the Estate or the Site for the purpose of raves. Vastint's concern regarding this particular threat is informed by what has occurred at the East London site of its sister company, combined with the existence of premises on the Site (the Asda land) which are attractive to those organising raves. (c) There is limited evidence of actual past entry onto *other* Vastint group properties for the purposes of fly-tipping, and there are cases involving the property of third parties, including third party developers.

(3) In terms of the risks that exist in the case of trespass, these are twofold: (a) First, there are risks to the health and safety of those trespassing (to whom Vastint owes a limited duty of care) as well as risks to the health and safety of those having to deal with such trespass (which persons will include employees and contractors engaged by Vastint, to whom a rather more extensive duty of care will be owed). Obviously, were injury or worse to be sustained by a person, that is only compensable in damages in the most rudimentary way. It is clearly better that the trespass —and the consequent risk to health and safety—not occur. (b) Secondly, Vastint may well, in the case of trespass, incur significant costs in dealing with such trespass which (albeit theoretically recoverable from the trespasser) are likely to prove in practice irrecoverable.

(4) In terms of the benefits that an injunction enjoining persons (or a class of person) from entering the Site would confer, these are threefold: (a) First, it was stressed to me that the effect of a court order, enjoining entry, was (in Vastint's experience) a material one; and that this effect was over-and-above the deterrence provided by Vastint's other measures to maintain the integrity of the Site. In short, an injunction, if granted, would have a real effect in preserving the Site from trespass. (b) Secondly, Vastint considered that an injunction would not only affect the conduct of potential trespassers, but also would underline the seriousness of the position to the police, who might be more responsive in the case of any trespass in breach of a court order. (c) Thirdly, given that the order sought by Vastint will be buttressed by a penal notice, Vastint would have easier recourse to the court's contempt jurisdiction. (I say easier because, although both Hildyard J and I ordered service of the interlocutory injunctions in this case by additional means (see para 3 above), personal service was *not* dispensed with. Accordingly, unless personal service *is* dispensed with, it would be necessary for an order to be personally served on a party in breach, and for the order to continue to be breached, before committal proceedings could be contemplated.)

C. Proceedings and orders against persons unknown

19 It was established in *Bloomsbury Publishing Group plc v News Group Newspapers Ltd* [2003] EWHC 1205 (Ch); [2003] 1 WLR 1633 that following the introduction of the CPR, there was no requirement that a defendant must be named in proceedings against him/her/it, but merely a direction that the defendant should be named (if possible).

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

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

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

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

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

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

(1) In *Bloomsbury* itself, the Vice-Chancellor stated, at para 21 as follows:[2]

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

(2) *South Cambridgeshire District Council v Gammell* [2005] EWCA Civ 1429; [2006] 1 WLR 658, the Court of Appeal considered the effect of an injunction granted pursuant to section 187B of the Town and Country Planning Act 1990, which provided for the making of injunctions against persons unknown. The Court of Appeal concluded, at para 32 that a person became a party to proceedings by the very act of infringing the order: "In each of these appeals the appellant became a party to the proceedings when she did an act which brought her within the definition of defendant in the particular case."

(3) In *Ineos Upstream Ltd v Persons Unknown* [2017] EWHC 2945 (Ch) at [119], Morgan J expressed a degree of concern about orders having this effect, but concluded, at para 121 that (particularly in light of the *South Cambridgeshire* decision) this procedure was now open to claimants in cases outside section 187B of the Town and Country Planning Act 1990.

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

24 However, aside from the fact that the making of such orders is now settled practice, *provided* the order is clearly enough drawn (a point I revert to below), it actually works extremely well within the framework of the CPR. Until an act infringing the order is committed, *no-one* is party to the proceedings. It is the act of infringing the order that makes the infringer a party. It follows that—as a non-party—any person affected by the order (provided he or she has not breached it) may apply to set the order aside pursuant to CPR r 40.9. CPR r 40.9 provides: "A person who is not a party but who is directly affected by a judgment or order may apply to have the judgment or order set aside or varied." Thus, were a person to become aware of such an order, and consider the order improperly made, that person (if "directly affected" by the order) could apply to set it aside without more. It is simply that such a person would have to do so *before* infringing the order, whilst still a non-party. It is entirely right that even court orders wrongly made should be obeyed until set aside or varied, and CPR r 40.9 does no more than emphasise the importance of such an approach.[3]

25 In terms of how such an order might be framed, the Vice-Chancellor gave the following guidance in *Hampshire Waste Services Ltd v Intending Trespassers Upon Chineham Incinerator Site* [2003] EWHC 1738 (Ch); [2004] Env LR 9:

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

(2) Secondly, that it is undesirable to use a description such as "intending to trespass", because that depends on the subjective intention of the individual which is not necessarily known to the outside world, and in particular the claimant, and is susceptible of change.[4]

D. Quia timet injunctions

26 *Gee, Commercial Injunctions*, 6th ed (2016), para 2-035 describes a quia timet injunction in the following terms: "A quia timet (since he fears) injunction is an injunction granted where no actionable wrong has been committed, to prevent the occurrence of an actionable wrong, or to prevent repetition of an actionable wrong": see also *Proctor v Bayley* (1889) 42 Ch D 390, 398.

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

28 *Hooper v Rogers* [1975] Ch 43; [1974] 3 WLR 329 was a case where the Court of Appeal was considering the circumstances in which a *mandatory*[5] final quia timet injunction was being sought. Russell LJ, with whom Stamp and Scarman LJJ agreed, articulated the circumstances in which such an injunction would be granted, at p 50:

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

29 *Gee, Commercial Injunctions*, 6th ed (2016), para 2-035 similarly, suggests that the circumstances in which a quia timet injunction will be granted are relatively flexible:

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

30 However, in *Islington London Borough Council v Elliott* [2012] EWCA Civ 56; [2012] 7 EG 90, Patten LJ, with whom Longmore and Rafferty LJJ agreed, formulated an altogether more stringent test, at paras 29–31:

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

"30. A much-quoted formulation of this principle is set out in the judgment of Pearson J in *Fletcher v Bealey* (1884) 28 Ch D 688 at 698 where he first quotes from Mellish LJ in *Salvin v North Brancepeth Coal Company* (1874) LR 9 Ch App 705 and then adds his own comments that: 'it is not correct to say, as a strict proposition of law, that, if the plaintiff has not sustained, or cannot prove that he has sustained, substantial damage, this court will give no relief; because, of course, if it could be proved that the plaintiff was certainly about to sustain very substantial damage by what the defendant was doing, and there was no doubt about it, this court would at once stop the defendant, and would not wait until the substantial damage had been sustained. But in nuisance of this particular kind, it is known by experience that unless substantial damage has actually been sustained, it is impossible to be certain that substantial damage ever will be sustained, and, therefore, with reference to this particular description of nuisance, it becomes practically correct to lay down the principle, that, unless substantial damage is proved to have been sustained, this court will not interfere. I do not think, therefore, that I shall be very far wrong if I lay it down that there are at least two necessary ingredients for a quia timet action. There must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended damage will, if it comes, be very substantial. I should almost say it must be proved that it will be irreparable, because, if the danger is not proved to be so imminent that no one can doubt that, if the remedy is delayed, the damage will be suffered, I think it must be shewn that, if the damage does occur at any time, it will come in such a way and under such circumstances that it will be impossible for the plaintiff to protect himself against it if relief is denied to him in a quia timet action.'

"31. More recently in *Lloyd v Symonds* [1998] EWCA Civ 511 (a case involving nuisance caused by noise) Chadwick LJ said: 'On the basis of the judge's finding that the previous nuisance had ceased at the end of May 1996 the injunction which he granted on 7 January 1997 was quia timet. It was an injunction granted, not to restrain anything that the defendants were doing (then or at the commencement of the proceedings on 20 June 1996), but to restrain something which (as the plaintiff alleged) they were threatening or intending to do. Such an injunction should not, ordinarily, be granted unless the plaintiff can show a strong probability that, unless restrained, the defendant

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

31 From this, I derive the following propositions:

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

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

(3) When considering whether to grant a quia timet injunction, the court follows a two-stage test: (a) First, is there a strong probability that, unless restrained by injunction, the defendant will act in breach of the claimant's rights? (b) Secondly, if the defendant did an act in contravention of the claimant's rights, would the harm resulting be so grave and irreparable that, notwithstanding the grant of an immediate interlocutory injunction (at the time of *actual* infringement of the claimant's rights) to restrain further occurrence of the acts complained of, a remedy of damages would be inadequate?

(4) There will be multiple factors relevant to an assessment of each of these two stages, and there is some overlap between what is material to each. Beginning with the first stage—the strong possibility that there will be an infringement of the claimant's rights—and without seeking to be comprehensive, the following factors are relevant: (a) If the anticipated infringement of the claimant's rights is entirely anticipatory—as here—it will be relevant to ask what other steps the claimant might take to ensure that the infringement does not occur. Here, for example, Vastint has taken considerable steps to prevent trespass; and yet, still, the threat exists. (b) The attitude of the defendant or anticipated defendant in the case of an anticipated infringement is significant. As *Spry, Equitable Remedies*, 9th ed (2013) notes at p 393: "One of the most important indications of the defendant's intentions is ordinarily found in his own statements and actions". (c) Of course, where acts that may lead to an infringement have *already* been committed, it may be that the defendant's intentions are less significant than the natural and probable consequences of his or her act. (d) The time-frame between the application for relief and the threatened infringement may be relevant. The courts often use the language of imminence, meaning that the remedy sought must not be premature. (*Hooper v Rogers* [1975] Ch 43, 50)

(5) Turning to the second stage, it is necessary to ask the counterfactual question: assuming no quia timet injunction, but an infringement of the claimant's rights, how effective will a

more-or-less immediate interim injunction plus damages in due course be as a remedy for that infringement? Essentially, the question is how easily the harm of the infringement can be undone by an ex post rather than an ex ante intervention, but the following other factors are material: (a) The gravity of the anticipated harm. It seems to me that if some of the consequences of an infringement are potentially very serious and incapable of ex post remedy, albeit only one of many types of harm capable of occurring, the seriousness of these irremediable harms is a factor that must be borne in mind. (b) The distinction between mandatory and prohibitory injunctions.

E. Disposition

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

32 Applying the two-stage test as I have described it, Vastint labours under the considerable disadvantage that it cannot, with any specificity at all, identify the persons likely to trespass on its property. Of course, I accept entirely that this court has jurisdiction to permit proceedings and make orders, even final orders, against "persons unknown", who are only defined by reference to their future acts: see paras 21–24 above. But, I must recognise, as a strong indicator against the granting of an injunction, that Vastint lacks altogether any evidence regarding the attitude of the anticipated defendants.

33 On the other hand, Vastint has taken careful and responsible steps to secure the Site and to prevent trespass on it. Despite these measures, as I have described (see para 18(2) above), there has been actual past entry onto the Estate and/or the Site involving caravans. A future incursion by caravans may very well occur; it is impossible to say when. I consider that, as regards this threatened infringement of Vastint's rights, that the first stage of the test has been made out, and that there is a strong probability that, unless restrained by injunction, there will be a future infringement of Vastint's rights by way of trespass.

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

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

(2) Gravity of resulting harm

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

37 Additionally, there are the significant costs that Vastint would incur in the case of removing trespassers from the Site. Although I accept that, in theory, such costs are compensable in damages, this court should look to the reality of the situation, and recognise that such costs—in theory recoverable from the trespassers—are unlikely ever to be recovered.[6]

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

(3) The appropriate order in this case

39 For the reasons I have given, it is appropriate to grant a quia timet injunction in respect of threatened incursions by: (1) Persons seeking to establish a more than temporary or more than purely transient occupation of the Site. (2) Persons organising, involved in, or participating in raves.

40 Vastint contended for an order in the following terms: "Those defendants who are not already in occupation of [the Site][7] must not enter or remain on Site without the written consent of [Vastint] …" The duration of the order is time limited to the period in which the perimeter surrounding the Site is in place.

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

(1) As I pointed out in argument, as framed, this order would involve police officers and other public authorities entering the property in the lawful execution of their duties being in

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

(2) Clearly, the Site is being developed. That will involve large numbers of persons *legitimately* working on the Site. I anticipate that the identity of the persons so involved will fluctuate over time, with existing members of this group leaving it, and new members joining it. As the order is drafted, each such person will require Vastint's written consent to be on the Site in order to avoid their being in breach of the order. I have not been addressed on the workability of this. Suffice it to say that I have considerable concerns, and I do not consider that the order, as drafted, meets the criteria framed by the Vice-Chancellor and set out in para 22(1) above.

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

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

(1) First, it was suggested that the order as drafted followed the suggested form of words of the Vice-Chancellor in *Hampshire Waste Services Ltd v Intending Trespassers Upon Chineham Incinerator Site* [2003] EWHC 1738 (Ch); [2004] Env LR 9. That is not, in fact, the case. The wording suggested by the Vice-Chancellor at para 10 was as follows:

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

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

(2) Secondly, it was suggested that it might not be possible to define, with sufficient clarity, the "persons unknown" to whom the order was directed and/or that such narrow drafting would give rise to argument about whether a given person had or had not infringed the order. There are two answers to this point: (a) First, as a matter of principle, it seems to me that unless the ambit of the order can clearly be drawn, so that it is clear, it ought not to be granted. I do not consider, in this case, that an appropriate order cannot be drafted. (b) Secondly, for the reason given in para 41 above, the draft order as framed by Vastint is itself unsatisfactorily clear, because I am satisfied that Vastint has given insufficient consideration as to how written consent to be present on the Site will be given to the large and fluctuating workforce that will be properly present on the Site.

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

(4) Final matters

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

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

of potential defendants should constitute the *only* form of service, and that personal service be dispensed with.

Notes

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

2. Affirmed in *Cameron v Hussain* [2017] EWCA Civ 366 at [50], [53] and [54].

3. It may be that a person infringing the order—and so a party—could apply under CPR r 39.3 to have the order set aside. That, as it seems to me, involves something of a strained reading of CPR r 39.3, since at the time the order was made, such a person would not have been a party.

4. As regards the second point, it is worth noting that there have been later cases where subjective states of mind have been used in the order. Morgan J referred to this in *Ineos* at para 122. See, for example, *Sheffield City Council v Fairhall* [2018] EWHC 1793 (QB).

5. In this case, Vastint does not seek a mandatory but a prohibitive injunction.

6. See *Hampshire Waste Services Ltd v Intending Trespassers Upon Chineham Incinerator Site* [2003] EWHC 1738 (Ch), where such irrecoverable costs (as well as safety risks) were taken into account).

7. It is unclear to me what the purpose of the words "who are not already in occupation of the Site" is.

Order accordingly.

SARAH PARKER, Barrister

Neutral Citation Number: [2019] EWHC 1619 (QB)

Case No: F90BM116

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/06/2019

Before :

MR JUSTICE WARBY

- -

Between :

Birmingham City Council	**Claimant**
- and -	
(1) Mr Shakeel Afsar	
(2) Ms Rosina Afsar	
(3) Mr Amir Ahmed	
(4) Persons Unknown	**Defendants**

- -
- -

Jonathan Manning (instructed by **Birmingham City Council**) for the **Claimant**
John Randall QC and James Dixon (instructed by **Safaaz Solicitors**) for the **First to Third Defendants**

Hearing date: 10 June 2019

- -

Approved Judgment

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

.....

MR JUSTICE WARBY:

1. On Monday 17 June 2019, I handed down my reserved judgment giving reasons for the decisions announced at the hearing on 10 June 2019: [2019] EWHC 1560 (QB). Draft orders have since been drawn up, and largely agreed, leaving only one matter for decision: whether the claimant Council should be required to give undertakings in damages. This is an issue that was raised by me. By agreement, I have resolved that issue on the basis of written submissions, for which I thank Counsel.

2. My conclusion is that, in the particular circumstances of this case, the Council should provide undertakings in the usual form: to comply with any order the Court may make if the Court later finds that the injunctions I have granted have caused loss to any defendant or third party for which that defendant or third party should be compensated. The Council has made clear that if this was my conclusion the undertakings would be forthcoming, so I accept them.

3. The relevant principles appear to be these:

    (1) The long-standing norm in civil litigation is to require the applicant for an injunction to provide these undertakings; the rules now provide that this should be done "unless the Court orders otherwise": see PD 25A para 5.1(1). The onus is therefore on an applicant which wishes to be exempted from this requirement to show why that should be done. The presumption in favour of such undertakings is reflected in the Model Order.

    (2) There is no such presumption when it comes to third parties. When they are concerned, the Court must consider whether to require an undertaking to compensate them: PD25A para 5.3. But the norm, in litigation affecting Article 10 rights, is to require such an undertaking: see, again, the Model Order.

    (3) The old rule that the Crown should never be required to give such an undertaking is a thing of the past. Such an undertaking *may* be required of central or local government bodies, or other public bodies. But this should not be done as a matter of course. This is nowadays a matter of discretion; the propriety of requiring such an undertaking should be considered in the light of the particular circumstances of the case, and what the Court considers fair in those circumstances. See *Hoffman-La-Roche v Secretary of State for Trade and Industry* [1975] AC 295, 364 (Lord Diplock); *Kirklees MBC v Wickes Building Supplies Ltd* [1993] AC 227, 274 (Lord Goff of Chieveley); *Financial Services Authority v Sinaloa Gold Plc* [2013] UKSC 11 [33] (Lord Neuberger).

    (4) A factor of general importance that needs to be borne in mind, when exercising the discretion, is the fact that in general – with few exceptions – English law does not confer a remedy for loss caused by administrative law action: *FSA v Sinaloa* [31]. The exceptions identified by the Supreme Court were misfeasance in public office and cases of breach of the Convention rights, within s 6(1) of the HRA.

(5) Other relevant considerations identified in the cases cited above include whether the authority is acting pursuant to a statutory duty in seeking relief; the fact that the authority is only accorded limited resources to fulfil its functions; whether some other person or body would be able to, and would, act if the authority did not; and the undesirability of dissuading or deterring a public authority from acting in the public interest.

4. Another factor which seems to me to be relevant is the nature of the undertaking itself. Two features may be important. First, it is for the respondent to show that loss has been suffered, and that this has resulted from the grant of the injunction. Secondly, the Court retains the power, and duty, to decide whether, in all the circumstances, the respondent should be compensated for that loss. This must of course be done in a principled way. But by the same token, it must mean that in reaching a decision the Court should take into account the general rule against awarding compensation for loss caused by administrative action undertaken on behalf of the public, and in the name of the public interest.

5. Here, I take account of the following: (1) The Council has a duty to protect public rights to use the highway, but that is not at the centre of its claim. The provisions that are principally relied on (s 222 of the Local Government Act and, in particular, the 2014 Act) are permissive. (2) The main target of the action is anti-social behaviour in the form of speech. The nature of the behaviour is harassment, causing alarm or distress, to individuals. The action is not being taken on behalf of the public at large but rather a section, or some sections, of the public. The main beneficiaries are teachers, other staff, and pupils at the school. (3) The individuals concerned could, in principle, bring their own private law actions to prevent harassment, if it attained the level of criminal behaviour required by the Protection from Harassment Act 1997. If they did so, they would undoubtedly be required to give undertakings as to damages. (4) There is nothing wrong with the Council pursuing this action in their stead, but there is no particular magic in the fact that a public authority is taking on that burden. It seems to me to be reasonable to provide the respondent/defendants with a corresponding level of protection. (5) The fact that the action is brought by a public authority, and (by concession) interferes with the Convention rights of the respondent/defendants is a factor in favour of exercising my discretion to require the undertakings. Breaches of the Convention by public authorities can sound in damages, where that is necessary. This is one of the recognised exceptions to the general rule. The provision of an undertaking sets up a relatively simple mechanism for the resolution of any such claim. Finally, (6) there is little prospect that the provision of these undertakings will in practice impose a great burden on the Council. It is improbable that the injunctions will cause any material loss; the damage which could realistically be suffered is injury to rights and freedoms. Those are not to be treated lightly, but the scale of any compensation required, even if unlawful conduct were established, would probably be relatively modest. Again, the provision of undertakings is a proportionate means of dealing with the assessment of any such compensation.

6. It will be noted by the defendants that I have not accepted their submission that the Council is "acting in its own interest" in this matter. That seems an artificial way to describe the nature of the claim. Nor have I accepted the defendants' submission that factors in favour of requiring undertakings include what they call the "vindictive conduct of the School", and the (alleged) fact that the School undertook no

consultation as regards the delivery of the teaching which is the subject of the protest. I could not make factual findings about those matters at this stage, nor do I see clearly their legal relevance, or a route by which they would feed into the exercise of my discretion if I upheld what the defendants allege.

A Court of Appeal

Bromley London Borough Council *v* Persons Unknown (London Gipsies and Travellers and others intervening)

B [2020] EWCA Civ 12

2019 Dec 3;
2020 Jan 21

Ryder, Coulson, Haddon-Cave LJJ

Injunction — Trespass — Quia timet — Local authority seeking quia timet injunction against gipsy and traveller community to prevent anticipated unlawful trespass C *— Interim injunction granted but final injunction refused as disproportionate — Proper approach to quia timet injunction sought against persons unknown — Whether terms of injunction proportionate — Whether local authority complying with public sector equality duty — Whether equality impact assessment required — Guidance on seeking injunctions against gipsy and traveller community — Equality Act 2010 (c 15), s 149*

D The claimant local authority sought and was granted a without notice interim injunction against persons unknown on a quia timet basis prohibiting the unauthorised occupation and/or the deposition of waste on land owned or managed by the local authority. The injunction prohibited anyone from setting up an encampment on the land, entering and/or occupying the land for residential purposes, bringing onto the land any caravans or mobile homes, bringing vehicles onto the land for the purpose of disposal of waste or materials, and depositing E waste or fly-tipping on the land. Although the stated target of the injunction was "persons unknown", it was common ground that the injunction was aimed at the gipsy and traveller community. The second and fourth interveners were other local authorities in the Greater London and South East area which had obtained similar injunctions following uncontested hearings. At the final hearing the judge found that all the necessary ingredients for a quia timet injunction against persons unknown F had been established and proceeded to consider whether it was proportionate, in all the circumstances, to grant the injunction. The judge considered the wide extent of the relief sought and its geographical compass, the fact that the injunction was not aimed specifically at prohibiting anti-social or criminal behaviour but simply entry and occupation, the lack of availability of alternative sites, the cumulative effect of injunctions granted elsewhere, various specific failures on the part of the local authority in respect of its duties under the Convention for the Protection of Human G Rights and Fundamental Freedoms, and particularly its public sector equality duty under section 149 of the Equality Act 2010[1], the unduly long five-year period for which the proposed injunction would be in force, and the unsatisfactory treatment of the issue of permitted development rights. In relation to the public sector equality duty, the judge found not only that the local authority had undertaken no equality impact assessment but that there had been no engagement at all with gipsy and traveller families. She therefore concluded that it was not proportionate to grant H the final injunction sought in respect of entry and encampments, but that it was proportionate to grant an injunction prohibiting fly-tipping and the disposal of waste. The local authority appealed on the grounds, inter alia, that the judge had erred in (i) finding that the order sought was disproportionate, (ii) setting too high a threshold for

[1] Equality Act 2010, s 149: see post, paras 50, 51.

the harm caused by the threat of trespass and (iii) concluding that the local authority had failed to discharge its public sector equality duty.

On the claim—

Held, (1) that the requirements necessary for the grant of a quia timet injunction against persons unknown were that (i) there had to be a sufficiently real and imminent risk of a tort being committed to justify quia timet relief, (ii) it was impossible to name the persons who were likely to commit the tort unless restrained, (iii) it was possible to give effective notice of the injunction and for the method of such notice to be set out in the order, (iv) the terms of the injunction had to correspond to the threatened tort and not to be so wide that they prohibited lawful conduct, (v) the terms of the injunction had to be sufficiently clear and precise as to enable persons potentially affected to know what they could not do and (vi) the injunction should have clear geographical and temporal limits; that as a matter of procedural fairness a court should always be cautious when considering granting injunctions against persons unknown, particularly on a final basis, in circumstances where they were not there to put their side of the case; that the nature and extent of the likely harm which the claimant had to show in order to obtain the injunction was that of irreparable harm; and that the judge had applied the correct test in finding in favour of the local authority that the test for a quia timet injunction against persons unknown had been made out (post, paras 29–30, 34, 35, 60, 95, 110, 111).

Ineos Upstream Ltd v Persons Unknown (Friends of the Earth intervening) [2019] 4 WLR 100, CA applied.

(2) Dismissing the appeal, that the judge had been right to be concerned about the width of the injunction being sought and to regard that as a highly relevant factor in the proportionality exercise; that the absence of any substantial evidence of past criminality was a factor relevant, although not determinative, to the proportionality exercise which the judge had been entitled to take into account; that the absence of any transit or other alternative sites was a very important factor militating against the imposition of a borough-wide injunction; that the criticism that the judge had failed to consider whether the absence of suitable alternative sites should have led to a lesser order was unfair and unrealistic; that the cumulative effect of other injunctions was a material consideration and the weight to be afforded to it a matter for the judge, there being no suggestion that she had given it undue weight or significance; that, while it had been repeatedly accepted that the public sector equality duty imposed on public authorities by section 149 of the Equality Act 2010 did not require an equality impact assessment, the reality was that undertaking such an assessment would be a factor in a case of the present sort pointing towards a proportionate approach on the part of a local authority; that it was the substance of the assessment undertaken which mattered, not its formal existence; that the judge had therefore been entitled to find that the local authority had failed to comply with its public sector equality duty having regard to the absence of an equality impact assessment and the fact that there had been no proper engagement with the gipsy and traveller community; that the duration of the injunction sought was a relevant factor and the judge had been entitled to conclude that a five-year term was much too long; and that, the judge having considered all relevant factors and disregarded irrelevant matters when undertaking her proportionality exercise, and having reached a conclusion which she had been entitled to reach, there was no basis for the Court of Appeal to interfere with her conclusions (post, paras 52, 65, 67, 73–74, 79, 81, 86, 88–89, 97, 105, 110, 111).

Dictum of Aikens LJ in *R (Brown) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening)* [2009] PTSR 1506, para 92, DC applied.

Per curiam. It is potentially fatal to any application for a local authority to seek a combination of a borough-wide injunction and a duration of a period as long as five years (post, paras 105–106, 110, 111).

Guidance to local authorities considering seeking a quia timet injunction against persons unknown where the proposed injunction is directed towards the gipsy and traveller community (post, paras 104–109, 110, 111).

Decision of Leigh-Ann Mulcahy QC sitting as a deputy judge of the Queen's Bench Division [2019] EWHC 1675 (QB) affirmed.

The following cases are referred to in the judgment of Coulson LJ:

AEI Rediffusion Music Ltd v Phonographic Performance Ltd [1999] 1 WLR 1507; [1999] 2 All ER 299, CA

Attorney General v Newspaper Publishing plc [1988] Ch 333; [1987] 3 WLR 942; [1987] 3 All ER 276, CA

Buckland v United Kingdom CE:ECHR:2012:0918JUD004006008; 56 EHRR 16

Chapman v United Kingdom CE:ECHR:2001:0118JUD002723895; 33 EHRR 18

Connors v United Kingdom CE:ECHR:2004:0527JUD006674601; 40 EHRR 9

Elliott v Islington London Borough Council [2012] EWCA Civ 56; [2012] 7 EG 90 (CS), CA

Fletcher v Bealey (1885) 28 ChD 688

G v G (Minors: Custody Appeal) [1985] 1 WLR 647; [1985] 2 All ER 225, HL(E)

Harlow District Council v McGinley [2017] EWHC 1851 (QB)

Harlow District Council v Stokes [2015] EWHC 953 (QB)

Havering London Borough Council v Stokes [2019] EWHC 3006 (QB)

Ineos Upstream Ltd v Persons Unknown (Friends of the Earth intervening) [2019] EWCA Civ 515; [2019] 4 WLR 100; [2019] 4 All ER 699, CA

Jacobson v Frachon (1927) 138 LT 386

Kingston upon Thames London Borough Council v Persons Unknown [2019] EWHC 1903 (QB)

Lloyd v Symonds [1998] EHLR Dig 278, CA

R (Brown) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening) [2008] EWHC 3158 (Admin); [2009] PTSR 1506, DC

R (Bulger) v Secretary of State for the Home Department [2001] EWHC Admin 119; [2001] 3 All ER 449, DC

R (Moore) v Secretary of State for Communities and Local Government (Equality and Human Rights Commission intervening) [2015] EWHC 44 (Admin); [2015] PTSR D14

Secretary of State for the Environment, Food and Rural Affairs v Meier [2009] UKSC 11; [2010] PTSR 321; [2009] 1 WLR 2780; [2010] 1 All ER 855, SC(E)

South Bucks District Council v Porter [2003] UKHL 26; [2003] 2 AC 558; [2003] 2 WLR 1547; [2003] 3 All ER 1; [2003] LGR 449, HL(E)

Sutton London Borough Council v Persons Unknown (unreported) 7 November 2018, Warby J

Tendring District Council v Persons Unknown [2016] EWHC 2050 (QB)

Vastint Leeds BV v Persons Unknown [2018] EWHC 2456 (Ch); [2019] 4 WLR 2

Waltham Forest London Borough Council v Persons Unknown [2018] EWHC 2400 (QB)

Winterstein v France CE:ECHR:2013:1017JUD002701307

Wolverhampton City Council v Persons Unknown [2018] EWHC 3777 (QB)

Yordanova and Toshev v Bulgaria CE:ECHR:2012:1002JUD000512605

Zoumbas v Secretary of State for the Home Department [2013] UKSC 74; [2013] 1 WLR 3690; [2014] 1 All ER 638, SC(Sc)

The following additional cases were cited in argument or referred to in the skeleton arguments:

Ansco Arena Ltd v Law [2019] EWHC 835 (QB)
B (A Child) (Care Proceedings: Threshold Criteria), In re [2013] UKSC 33; [2013] 1 WLR 1911; [2013] 3 All ER 929; [2013] 2 FLR 1075, SC(E)
Birmingham City Council v Shafi [2008] EWCA Civ 1186; [2009] PTSR 503; [2009] 1 WLR 1961; [2009] 3 All ER 127; [2009] LGR 367, CA
Bloomsbury Publishing Group plc v News Group Newspapers Ltd [2003] EWHC 1205 (Ch); [2003] 1 WLR 1633; [2003] 3 All ER 736
Buckley v United Kingdom CE:ECHR:1996:0925JUD002034892; 23 EHRR 101
Chief Constable of Leicestershire v M [1989] 1 WLR 20; [1988] 3 All ER 1015
Cross v British Airways plc [2006] EWCA Civ 549; [2006] ICR 1239, CA
Gouriet v Union of Post Office Workers [1978] AC 435; [1977] 3 WLR 300; [1977] 3 All ER 70, HL(E)
Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator Site [2003] EWHC 1738 (Ch); [2004] Env LR 9
Hertsmere Borough Council v Persons Unknown [2019] EWHC 3230 (QB)
Ladd v Marshall [1954] 1 WLR 1489; [1954] 3 All ER 745, CA
Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment [1985] AC 132; [1984] 3 WLR 32; [1984] 2 All ER 358; 82 LGR 488, HL(E)
Plymouth (Earl of) v Rees [2019] EWHC 1008 (Ch); [2019] 4 WLR 74
Runnymede Borough Council v Ball [1986] 1 WLR 353; [1986] 1 All ER 629; 84 LGR 481, CA
Secretary of State for the Home Department v AP [2010] UKSC 24; [2011] 2 AC 1; [2010] 3 WLR 51; [2010] 4 All ER 245, SC(E)
Secretary of State for the Environment, Food and Rural Affairs v Drury [2004] EWCA Civ 200; [2004] 1 WLR 1906; [2004] 2 All ER 1056, CA
ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4; [2011] 2 AC 166; [2011] 2 WLR 148; [2011] 2 All ER 783, SC(E)

APPEAL from Leigh-Ann Mulcahy QC sitting as a judge of the Queen's Bench Division

By a CPR Pt 8 claim form issued on 15 August 2018 the claimant local planning authority, Bromley London Borough Council, sought an interim injunction against persons unknown prohibiting unauthorised occupation and/or deposition of waste on land owned or managed by the local authority. An interim injunction was granted by Goose J on a without notice basis on the same day. On 26 November 2018 Nicol J gave permission to the London Gipsies and Travellers ("the first intervener") to intervene, and continued the interim injunction until further order. At a hearing on 15 May 2019 the local authority sought a final injunction in the following terms, amended on 16 May 2019: that until 4pm on 15 May 2022 the defendant, as persons unknown, occupying land and/or depositing waste were forbidden from: (1) setting up any encampment on the land in question without the grant of planning permission and the written permission of the local authority, (2) entering or occupying the land in question for residential purposes (temporary or otherwise) including caravans, mobile homes, vehicles and residential paraphernalia without the grant of planning permission and the written permission of the local authority, (3) bringing onto the land in question any caravans/mobile homes other than driving through the London Borough of Bromley or in compliance with the parking orders regulating use of the car parks/highways and with express permission from the owners of the land, (4) bringing onto the land in question any vehicle for the purposes

A of the disposal of waste and materials or fly-tipping other than when driving through the London Borough of Bromley or in compliance with the parking orders regulating use of the car parks/highways and with express permission from the owners of the land, and (5) depositing waste or fly-tipping on the land in question without the written consent of the local authority. On 17 May 2019 Leigh-Ann Mulcahy QC sitting as a judge of the Queen's Bench Division [2019] EWHC 1675 (QB) refused to order paras (1)–(3) but granted an injunction in terms of paras (4) and (5) but with additional words in para (5) so as to read "depositing substantial amounts of waste or fly-tipping on the land identified without the written consent of the local authority".

By an appellant's notice filed on 6 June 2019 and pursuant to permission granted by the judge the local authority appealed on the grounds that the C judge had erred: (1) in finding that the order sought was disproportionate, (2) in setting too high a threshold for the harm caused by the threat of trespass, (3) in her approach to the cumulative effect of injunctions granted elsewhere, (4) in concluding that the local authority had failed to discharge its public sector equality duty, and (5) in ruling that the issue of permitted development rights had not been satisfactorily addressed.

D Also intervening in the appeal were: Merton London Borough Council, Sutton London Borough Council and Kingston upon Thames Royal London Borough Council (together "the second interveners"), Liberty ("the third intervener"), Harlow District Council, Barking and Dagenham London Borough Council, Redbridge London Borough Council and Thurrock Council (together "the fourth interveners").

The facts are stated in the judgment of Coulson LJ, post, paras 1–14.

E

Richard Kimblin QC and *Jack Smyth* (instructed by *Solicitor, Bromley London Borough Council, Bromley*) for the local planning authority.

Mark Willers QC and *Tessa Buchanan* (both acting pro bono) (instructed by *The Community Law Partnership Ltd, Birmingham*) for the first intervener.

F *Steven Woolf* (instructed by *South London Legal Partnership*) for the second interveners.

Jude Bunting (instructed by *Head of Legal Department, Liberty*) for the third intervener by written submissions only.

Caroline Bolton for the fourth interveners by written submissions only.

No defendants appeared or were represented.

G The court took time for consideration.

21 January 2020. The following judgments were handed down.

COULSON LJ

H *1. Introduction*

1 This is an appeal against the refusal by the High Court to grant what the judge called "a de facto borough-wide prohibition of encampment and upon entry/occupation … in relation to all accessible public spaces in Bromley except cemeteries and highways". Although the stated target of

the injunction was "persons unknown", it was common ground that the injunction was aimed squarely at the gipsy and traveller community. The points arising from the appeal itself are of relatively narrow compass, but all parties were anxious that, in the light of the recent spate of similar cases, this court should provide some guidance as to how local authorities might address this issue in future.

2 Numerous similar injunctions have been granted by the High Court in recent years and months. We refer to a number of those judgments below. One common feature of those cases was that the gipsy and traveller community was not represented before the court at either the interim or final hearing. Although that did not stop the judges concerned looking very carefully at the orders which they were being asked to make, I do not doubt that, in an adversarial system, there can be no substitute for reasoned submissions from those against whom an injunction is directed.

3 This, therefore, was the first case involving an injunction in which the gipsy and traveller community were represented before the High Court. As a result of their success in discharging the interim injunction, it is also the first such case to be argued out at appellate level. I would wish to express my thanks to all counsel, but in particular to Mr Mark Willers QC and Ms Tessa Buchanan (and their solicitors, Community Law Partnership), who have acted substantially pro bono throughout and have put the points on behalf of the first intervener and the gipsy and traveller community with clarity and concision.

2. The factual background

4 Romany gipsies have been in Britain since at least the 16th century, and Irish travellers since at least the 19th century. They are a particularly vulnerable minority. They constitute separate ethnic groups protected as minorities under the Equality Act 2010 (see *R (Moore) v Secretary of State for Communities and Local Government (Equality and Human Rights Commission intervening)* [2015] EWHC 44 (Admin); [2015] PTSR D14), and are noted as experiencing some of the worst outcomes of any minority across a broad range of social indicators (see, for example, Department for Communities and Local Government, *Progress report by the ministerial working group on tackling inequalities experienced by Gypsies and Travellers* (2012) and Equality and Human Rights Commission, *England's most disadvantaged groups: Gypsies, Travellers and Roma* (2016)).

5 A nomadic lifestyle is an integral part of gipsy and traveller tradition and culture. While the majority of gipsies and travellers now reside in conventional housing, a significant number (perhaps around 25%, according to the 2011 United Kingdom census) live in caravans in accordance with their traditional way of life. The centrality of the nomadic lifestyle to the gipsy and traveller identity has been recognised by the European Court of Human Rights. In *Chapman v United Kingdom* (2001) 33 EHRR 18, the court held at para 73:

> "The court considers that the applicant's occupation of her caravan is an integral part of her ethnic identity as a gipsy, reflecting the long tradition of that minority of following a travelling lifestyle. This is the case even though, under the pressure of development and diverse policies

A or from their own volition, many gipsies no longer live a wholly nomadic existence and increasingly settle for long periods in one place in order to facilitate, for example, the education of their children. Measures which affect the applicant's stationing of her caravans therefore have a wider impact on the right to respect for home. They also affect her ability to maintain her identity as a gipsy and to lead her private and family life in accordance with that tradition."

B

6 In the UK, there is a long-standing and serious shortage of sites for gipsies and travellers. A briefing by the Race Equality Foundation found that gipsies and travellers were 7·5 times more likely than white British households to suffer from housing deprivation (Race Equality Foundation, *Ethnic Disadvantage in the Housing Market: Evidence from the 2011 census*, C April 2015). The lack of suitable and secure accommodation includes not just permanent sites but also transit sites. This lack of housing inevitably forces many gipsies and travellers onto unauthorised encampments.

7 The evidence is that gipsies and travellers had a particular association with the appellant, whose own accommodation assessment of November 2016 ("the Accommodation Assessment") said at para 1.3 that gipsies and D travellers had been stopping in Bromley for many years. Traditionally they had done so:

> "whilst working in and travelling through the borough. Historically, gipsies moved between farms in Bromley and Kent picking fruit and vegetables in the summer, hops and potatoes in early autumn. [However] as traditional forms of work diminished, travelling patterns changed E both nationally and locally. More recently Irish travellers have also visited the borough."

8 The evidence was that Bromley had also had a history of unauthorised encampments, albeit in relatively small numbers. In 2016 there were 11 such unauthorised encampments; in 2017 there were 12; and in 2018, prior to F the application for an interim injunction in the middle of August 2018, there were again 12. The average length of stay was between five days and two weeks.

9 There are no transit sites to cater for this need, whether in Bromley or anywhere else in Greater London. The court was told that the closest transit site is in South Mimms in Hertfordshire. As to permanent pitches in G Bromley, in 2016 there was a shortage of between 10 to 14 pitches with a recognised need for a further six by 2021. Despite all that, Ms Slater, the appellant's acting planning policy manager, has previously suggested that there was insufficient need for a transit site in Bromley.

10 In the South East, the recent spate of wide-ranging injunctions has been aimed at the gipsy and traveller community. This process began in 2015 with *Harlow District Council v Stokes* [2015] EWHC 953 (QB). The prohibition H on encampments in that borough, and the subsequent perception that the injunction had been effective, led to a large number of similar injunctions in 2017–2019. Most of these injunctions, such as the injunction granted in the recent case of *Kingston upon Thames London Borough Council v Persons Unknown* [2019] EWHC 1903 (QB), as well as the interim injunction granted in this case, did not identify any named defendants. The second and

fourth interveners in this case all obtained similar injunctions following what were uncontested hearings. A

11 It appears that, in total, there are now 38 of these injunctions in place nationwide. It would be unrealistic to think that their widespread use has not led to something of a feeding frenzy in this contentious area of local authority responsibility. First, these injunctions have had the effect of forcing the gipsy and traveller community out of those boroughs which have obtained injunctions, thereby imposing a greater strain on the resources of those boroughs or councils which have not yet applied for such an order. Secondly, they have created an understandable concern amongst those local authorities who have not yet obtained such injunctions to seek them forthwith. B

12 The appellant sought and was granted an interim injunction on a without notice basis on 15 August 2018. It covered 171 sites in Bromley: 139 parks, recreation grounds or open spaces, and 32 public car parks. The 171 sites amounted to all the public spaces in the borough: they excluded only highways and cemeteries, and that seemed to be because there had not been a particular problem with incursions on those sites in the past. C

13 The basis for the application has never been entirely clear. When it came before Ms Leigh-Ann Mulcahy QC, sitting as a deputy judge of the High Court ("the judge"), she commented at paras 23–24 of her judgment, that, although the appellant had said in its evidence that there had been a "sharp increase" in incursions in 2018, that was not in fact the case. The number of incursions had not increased prior to the application for an injunction, a point borne out by the fact that Ms Slater stated publicly (albeit in a slightly different context) that Bromley "did not suffer particularly from gipsy and traveller incursions". At best it appears that, prior to the original application in August 2018, there had been an increase in the frequency with which the incursions occurred (again, see para 24 of the judgment). D E

14 The hearing for the final injunction took place on 17 May 2019. As I have said, it was the first time that the gipsy and traveller community had been represented at a hearing, through the offices of the first intervener. Having considered the various arguments, the judge refused to grant the final injunction sought in respect of entry and encampments. She did grant a wide injunction in relation to fly-tipping and waste. F

3. The judgment

15 At the start of her careful ex tempore judgment, at [2019] EWHC 1675 (QB), the judge addressed the effect of other boroughs in London and the South East obtaining such injunctions (para 6); the fact that there were 34 injunctions nationwide (para 9); and the cumulative effect of such injunctions (paras 11–12). At paras 13–15 the judge dealt with the first intervener's argument that the granting of widespread injunctions was in danger of supplanting the existing statutory scheme, parts of which she set out. It does not appear that she reached any conclusions on that specific aspect of the case. G

16 It is clear that the judge was concerned about the width of the injunction being sought and the conduct at which it was aimed. This is apparent from paras 16–17 as follows: H

> "16. It is important to recognise that the injunction that is being sought, and the injunctions that have been sought and granted in other

A cases, are not limited to preventing fly-tipping, and no one, including the intervener, is suggesting that this kind of behaviour should not be prevented by legal means if necessary. The injunctions are not specifically addressed to antisocial behaviour or criminal acts. They are focused on prohibiting (with, of course, the penal sanction of potential committal to prison if breached) anyone from setting up an encampment without permission of the local authority and the landowner and
B entering and/or occupying land for residential purposes, and bringing onto the land any caravans or mobile homes and bringing vehicles onto the land in question for the purpose of disposal of waste or materials.

"17. Mr Smyth accepted during the course of argument that the order that he was seeking amounted, on at least a de facto basis, to a borough-wide exclusion save that gipsies and travellers could still go onto private
C land, cemeteries and highways which were not subject to the order. There is clearly a potential issue when one takes the cumulative effect of all the injunctions granted and potentially to be granted in future into account, as to whether gipsies and travellers will be prevented from exercising what is recognised in both UK equalities law and human rights law to be their right to pursue their traditional nomadic lifestyle. I am told that three quarters of the 30,000 or so gipsies or travellers in
D London are in permanent accommodation, and on the evidence there is some provision in that regard in Bromley, albeit with a shortfall based on need, but one quarter of that number are nomadic and travel rather than remaining in one place. Whilst there is no general entitlement to encamp or reside on public or recreational spaces and it is a matter for the planning system to ensure suitable provision is made for gipsies and
E travellers, I am told that there are no authorised transit sites available for nomadic gipsies and travellers anywhere in London, including Bromley, which then raises the question of where they are to go."

17 At paras 18 and 19 the judge addressed a separate argument about whether the Town and Country Planning (General Permitted Development)
F (England) Order 2015 (SI 2015/596) ("GPDO") permitted the limited occupation of land by caravans in certain circumstances, because the first intervener was arguing that such permitted development could not amount to a breach of planning control. As the judge noted, the appellant's answer was to say that this issue did not affect the proposed injunction in relation to three quarters of the sites, because those were owned outright by Bromley
G (and therefore covered by the separate claim in trespass). At the hearing there had been a debate about whether the appellant would be content with an injunction which carved out any permitted development rights. The judge recorded that, through counsel, the appellant had made plain that the proposal would constitute a "second rate" injunction, "and not something that the local authority would wish to have".

18 At para 20, the judge identified three issues which, she said, had
H not been the subject of appellate review. Those were: (i) the cumulative effect of the injunctions granted elsewhere; (ii) the interrelationship between judicially created relief in the form of injunctions and the statutory scheme of enforcement laid down by Parliament; and (iii) the impact of permitted development rights on the proper scope of any injunction. However, having identified those three points, the judge then went on to say at para 21 that it

was her role as a first instance judge to apply existing law to the claim and to the evidence. She then set out the detailed factual background to the claim at paras 22–31.

19 Having completed her review of the facts, the judge noted that the legal basis of the claim to an injunction in respect of the 171 sites was a claim for (anticipated) trespass, in relation to approximately three quarters of them (being the sites that Bromley owned). She identified some of the relevant authorities at paras 33–38. She dealt with the particular requirements of an application for an injunction against persons unknown at paras 39–42. She addressed the issue of permitted development rights which related both to the sites owned by the local authority and the approximately one quarter of the sites which were not. She then referred at paras 46–47 to the appellant's public sector equality duty ("PSED") and article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention").

20 When turning to apply the relevant principles to the facts, the judge began at para 48 with a consideration of the requirements of a quia timet injunction against persons unknown. She concluded that it was impossible in this case to name the persons who were likely to commit the conduct which it was sought to restrain. Similarly, at para 49 the judge was satisfied that it was possible to give effective notice of the injunction to those affected by it. Finally, on this aspect of the application, the judge concluded at para 51 that there was "a strong probability" that, unless restrained by an injunction, the defendants would act in breach of the appellant's rights.

21 As to the likelihood and degree of potential harm required for a quia timet injunction, the judge's conclusions were as follows:

> "54. The key question is the second part of the test which has been expressed slightly differently in different cases. In *Vastint Leeds BV v Persons Unknown* [2019] 4 WLR 2 it was expressed as follows: 'Secondly, if the defendant did an act in contravention of the claimant's rights, would the harm resulting be so grave and irreparable that, notwithstanding the grant of an immediate interlocutory injunction (at the time of actual infringement of the claimant's rights) to restrain further occurrence of the acts complained of, a remedy of damages would be inadequate?'
>
> "55. There was some disagreement between counsel as to whether irreparable harm was actually required as a matter of law by the authorities. Clearly, substantial harm has been caused which is sufficient, in my view, to amount to grave harm to local residents as a result of their inability to access and use public and recreational areas they are entitled to access and use news and the environmental impact in the respects I have already outlined, together with the clean-up costs which are borne by the Bromley taxpayer.
>
> "56. It is a more difficult question whether the harm can be said to be 'irreparable', if that is a requirement, since the damage, for example, to points of entry and so on can be repaired, albeit at a cost in terms of time and money. It could be said that the damage to community relations and the distress to residents is irreparable."

Accordingly, the judge found that all the necessary ingredients for a quia timet injunction against persons unknown were in place, and that what

A remained was the discretionary exercise of weighing up whether or not it was proportionate to grant such an injunction in all the circumstances of the case.

22 The judge dealt with proportionality from paras 57–72. Her conclusion was that it was not proportionate to grant the injunction sought. During the course of his submissions on behalf of the appellant, Mr Richard Kimblin QC identified seven factors from these paragraphs which he said comprised the critical elements of the judge's assessment of proportionality, B and which he went on to criticise in various ways. I use those seven factors to address the bulk of the appeal in section 6 of this judgment.

23 The seven factors were:

(a) The wide extent of the relief sought and its geographical compass, amounting to "a de facto borough-wide prohibition of encampment and upon entry/occupation for residential purposes … in relation to all accessible C public spaces in Bromley except cemeteries and highways": para 59.

(b) The fact that the injunction was not aimed specifically at prohibiting anti-social or criminal behaviour, but just entry and occupation: para 60.

(c) The lack of availability of alternative sites. As to this important factor, the judge said, at paras 61–62:

> D "61. However, one factor that is clearly relevant to my consideration, as was made clear in *South Bucks District Council v Porter* [2002] 1 WLR 1359 by Simon Brown LJ, is the availability of suitable alternative sites. I note this was an important factor that influenced the decision of Jefford J in the *Wolverhampton City Council v Persons Unknown* [2018] EWHC 3777 (QB) case when granting an injunction similar to the one sought here. At para 10 she makes clear that she E was concerned but was reassured that the result of the injunction would not be a borough-wide prohibition on traveller sites in Wolverhampton because there were other sites that could be occupied, not all sites were subject to the injunction, and the local authority had taken steps to consider and was seeking to put in place the provision of a transit site. She granted the injunction for a period of three years but with an annual review at which the council would be required to provide evidence of F the steps it had actually taken to provide the said transit site.
>
> "62. That is not the case here. Here there is no transit site and there is no proposal for a transit site. Further, it would seem that Bromley is not supporting the provision of a transit site in Bromley, at least based on Ms Slater's evidence at the examination in public."

G (d) The cumulative effect of other injunctions. The judge said, at para 63:

> "Mr Smyth's answer to this was that the gipsy and traveller community can occupy private land or they can go elsewhere outside the borough. I do not regard transferring the undoubted problems the local authority has experienced to private landowners, who would themselves be entitled to seek possession orders evicting such occupants H from their land, as a solution. The 'going elsewhere' option (which is apparently what has happened following the grant of an interim injunction) transfers the difficulties to another borough, who will then in turn invoke and seek to rely on the grant of the previous injunction to seek theirs on a 'me too' approach. The problem, as I indicated before, is now the cumulative effect of all these injunctions which are

> reaching significant numbers and continue to be applied for by new local authorities as the problem gets transferred into their area, which means there is now more force in the argument that this is a relevant factor to be considered in deciding whether to grant the relief sought."

(e) Various specific failures on the part of the appellant, as the judge found, in respect of its duties under the Convention and in particular, its PSED. The judge found that, in contrast to the approach taken by other boroughs in other cases, there was no evidence that any proper equality impact assessment ("EIA") had been carried out "whether in form or indeed in substance": para 65. She found in the same paragraph that there had been no engagement with gipsy and traveller families. She also found that it was not clear how any infringements of the injunction would be dealt with in future and that, from the one recent incident (at Leaves Green, first referred to at para 27), it did not appear that any welfare assessments had been carried out: para 67. This led to her conclusion on this topic in the following terms, at para 68:

> "In my view, the decision to apply for an injunction was not made having had regard to all the material considerations and did not properly pose and approach the article 8.2 questions as to necessity and proportionality or indeed the need to have regard to the best interests of children (and there are clearly children who are going to be affected by the policy that is being adopted)."

(f) The length of time—five years—for which the proposed injunction would be in force. The judge found that this was "an unduly wide and disproportionate temporal limit": para 69.

(g) The issue of permitted development rights had not been satisfactorily addressed by the appellant. The judge reiterated at para 70 the fact that the appellant had told her that it did not want an injunction which excluded lawfully exercised permitted development rights.

24 For these reasons, therefore, the judge concluded that, on a consideration of the proportionality test, the appellant had not satisfied her that it was proportionate to grant an injunction in the terms sought.

4. The grounds of appeal

25 It was perhaps inevitable that the judge herself gave permission to appeal, given what she had said in the judgment about the various elements of these injunction cases which had never been considered at appellate level. The judge gave permission on two bases:

> "1. Although the proposed appeal against the refusal to grant an injunction prohibiting persons unknown from unauthorised occupation of public land is an appeal against the exercise of a discretion and an assessment of proportionality, in circumstances where (a) it appears that injunctions that are wider even than in this case have previously been granted in a number of cases without being held to be disproportionate, and (b) there is room for legitimate differences of view as to how local authorities should strike the necessary 'fair balance' between the article 8 Convention rights of gipsies and travellers on the one hand and the rights of the residents who have been adversely affected by the existence of

unauthorised encampments on the other, the appeal has a real prospect of success pursuant to CPR r 52.6(1)(a).

"2. There is in any event a compelling reason for an appeal to be heard pursuant to CPR r 52.6(1)(b). Some 34 injunctions to date have been granted by the courts to local authorities in similar terms (all apparently undefended). This is the first case which has had the benefit of a formal intervention, evidence and argument by leading and junior counsel on behalf of the gipsy and traveller community. The cumulative effect of such injunctions now merits consideration in circumstances where it is common ground that their grant has the effect of displacing the difficulties into the area of a nearby local authority which then applies for a similar injunction relying on those difficulties and the previous grant of such relief. Further, injunctive relief, if it continues to be sought and granted as it has been to date, would appear to carry a risk of supplanting the existing statutory scheme for the removal of gipsies and travellers supported by government guidance. In addition, the injunctions which have previously been granted pursuant to section 187B of the Town and Country Planning Act 1990 arguably proscribe the lawful exercise of permitted development rights. All these matters appear to me to merit appellate consideration."

26 There is some tension between the judge's reasons for granting permission to appeal and the subsequent grounds of appeal prepared by the appellant. This sets out five grounds. (a) Ground 1: The judge erred in finding that the order sought was disproportionate. (b) Ground 2: The judge erred in setting too high a threshold for the harm caused by the threat of trespass. (c) Ground 3: The judge erred in approach to the cumulative effect issue. (d) Ground 4: The judge was wrong to conclude that the appellant had failed to discharge its PSED. (e) Ground 5: The judge erred in ruling that the issue of "permitted development" rights had not been satisfactorily addressed. On one view, only grounds 1 and 3 were covered by the judge's grant of permission. In addition, under ground 1, the written grounds of appeal only identified two ways in which it was said that the judge erred in finding that the order sought was disproportionate, whilst Mr Kimblin's skeleton argument, and his oral submissions, asserted numerous other ways in which it was said that the judge failed to carry out the proportionality test correctly.

27 However, despite these potential difficulties, at the hearing of this appeal all parties were able to focus on the handful of relatively short issues between them. Moreover, Mr Kimblin did not at any time underestimate the burden which any appellant has to discharge when seeking to challenge the exercise of discretion by a judge at first instance.

5. The relevant law

5.1 General

28 I set out below what I consider to be the relevant law. This is perhaps more important in underpinning the guidance which this court has been asked to provide (section 7 below) than for the disposal of the appeal itself. I do this under four broad headings: (i) quia timet injunctions against persons unknown; (ii) quia timet injunctions to prevent trespass; (iii) article 8 and the gipsy and traveller community; and (iv) the relevant statutory and other guidance relating to the gipsy and traveller community.

5.2 Quia timet injunctions against persons unknown

29 The law in relation to injunctions against persons unknown has been recently considered by this court in *Ineos Upstream Ltd v Persons Unknown (Friends of the Earth intervening)* [2019] 4 WLR 100. That was a case involving protesters concerned about the fracking process. Having said at para 32 that it was not easy to formulate the broad principles on which an injunction against unknown persons can properly be granted, Longmore LJ "tentatively" framed the requirements at para 34 in the following way:

> "(1) there must be a sufficiently real and imminent risk of a tort being committed to justify quia timet relief; (2) it is impossible to name the persons who are likely to commit the tort unless restrained; (3) it is possible to give effective notice of the injunction and for the method of such notice to be set out in the order; (4) the terms of the injunction must correspond to the threatened tort and not be so wide that they prohibit lawful conduct; (5) the terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do; and (6) the injunction should have clear geographical and temporal limits."

30 Those requirements comprise an elegant synthesis of a number of earlier statements of principle, which makes it now unnecessary to refer to other authorities. I respectfully endorse them.

31 It is, however, appropriate to add something about procedural fairness, because that has arisen starkly in this and the other cases involving the gipsy and traveller community.

32 Article 6 of the Convention provides: "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

33 This is reflective of a principle of English law that civil litigation is adversarial: "English civil courts act in personam. They adjudicate disputes between the parties to an action and make orders against those parties only." (*Attorney General v Newspaper Publishing plc* [1988] Ch 333, 369C, per Sir John Donaldson MR.) This allows disputes to be decided fairly: a defendant is served with a claim, obtains disclosure of the evidence against them, and can substantially present their case before the court (*Jacobson v Frachon* (1927) 138 LT 386, 393, per Atkins LJ). This allows arguments to be fully tested.

34 The principle that the court should hear both sides of the argument is therefore an elementary rule of procedural fairness. This has the consequence that a court should always be cautious when considering granting injunctions against persons unknown, particularly on a final basis, in circumstances where they are not there to put their side of the case.

35 The other area of potential debate which did not arise in *Ineos* concerns the nature and extent of the likely harm which the claimant must show in order to obtain the injunction. In my view, the approach which the judge in the present case adopted, that what was required was "irreparable harm", was in accordance with authority: (a) In *Fletcher v Bealey* (1885) 28 Ch D 688, 698 Pearson J said that "it must be proved that it [the

apprehended damage] will be irreparable". (b) In *Lloyd v Symonds* [1998] EHLR Dig 278, Chadwick LJ stated:

> "Such an injunction should not, ordinarily, be granted unless the plaintiff can show a strong probability that, unless restrained, the defendant will do something which will cause the plaintiff irreparable harm—that is to say, harm which, if it occurs, cannot be reversed or restrained by an immediate interlocutory injunction and cannot be adequately compensated by an award for damages."

(c) In *Elliott v Islington London Borough Council* [2012] 7 EG 90 (CS), Patten LJ agreed with and approved both *Fletcher v Bealey* and *Lloyd v Symonds*. (d) Finally, as already noted, in *Vastint Leeds BV v Persons Unknown* [2019] 4 WLR 2, (a case about illegal raves) Marcus Smith J said at para 31(3) that the relevant question was "would the harm resulting be so grave and irreparable that, notwithstanding the grant of an immediate injunction … to restrain further occurrence of the acts complained of, a remedy of damages would be inadequate?"

5.3 Quia timet injunctions to prevent likely trespass

36 *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2010] PTSR 321 was concerned with travellers who set up camp on woodland owned by the Forestry Commission and who, on the evidence, if moved on from that camp, would move to another part of the same woodland. The Supreme Court upheld the Court of Appeal's decision to grant an injunction (against some named defendants and some persons unknown) restraining them from entering any other part of the woodland (including those parts which had never been the subject of an encampment). Baroness Hale of Richmond JSC said, at paras 38–40:

> "38. The main objection to extending the order to land some distance away from the parcel which has actually been intruded upon is one of natural justice. Before any coercive order is made, the person against whom it is made must have an opportunity of contesting it, unless there is an emergency. In the case of named defendants, such as the appellants here, this need not be an obstacle. They have the opportunity of coming to court to contest the order both in principle and in scope. The difficulty lies with 'persons unknown'. They are brought into the action by the process of serving notice not on individuals but on the land. If it were to be possible to enforce the physical removal of 'persons unknown' from land on which they had not yet trespassed when the order was made, notice would also have to be given on that land too. That might be thought an evolution too far. Whatever else a possession order may be or have been, it has always been a remedy for a present wrongful interference with the right to occupy. There is an intrusion and the person intruded upon has the right to throw the intruder out.
>
> "39. Thus, while I would translate the modern remedy into modern terms designed to match the remedy to the rights protected, and would certainly not put too much weight on the word 'recover', I would hesitate to apply it to quite separate land which has not yet been intruded upon. The more natural remedy would be an injunction against

that intrusion, and I would not be unduly hesitant in granting that. We should assume that people will obey the law, and in particular the targeted orders of the court, rather than that they will not. We should not be too ready to speculate about the enforcement measures which might or might not be appropriate if it is broken. But the main purpose of an injunction would be to support a very speedy possession order, with severely abridged time limits, if it is broken.

"40. However, I would not see these procedural obstacles as necessarily precluding the 'incremental development' which was sanctioned in [*Secretary of State for the Environment, Food and Rural Affairs v Drury* [2004] 1 WLR 1906]. Provided that an order can be specifically tailored against known individuals who have already intruded upon the claimant's land, are threatening to do so again, and have been given a proper opportunity to contest the order, I see no reason in principle why it should not be so developed. It would be helpful if the Rules provided for it, so that the procedures could be properly thought through and the forms of order properly tailored to the facts of the case. The main problem at the moment is the 'scatter-gun' form of the usual order (though it is not one prescribed by the Rules)."

37 In the same case, Lord Neuberger of Abbotsbury MR said, at para 58:

"Particularly with the advent of the Civil Procedure Rules, it is clear that judges should strive to ensure that court procedures are efficacious, and that, where there is a threatened or actual wrong, there should be an effective remedy to prevent it or to remedy it. Further, as Lady Hale points out, so long as landowners are entitled to evict trespassers physically, judges should ensure that the more attractive and civilised option of court proceedings is as quick and efficacious as legally possible. Accordingly, the Court of Appeal was plainly right to seek to identify an effective remedy for the problem faced by the Commission as a result of unauthorised encampments, namely that, when a possession order is made in respect of one wood, the travellers simply move on to another wood, requiring the Commission to incur the cost, effort and delay of bringing a series or potentially endless series of possession proceedings against the same people."

38 We were referred to eight cases in which wide injunctions were obtained against the gipsy and traveller community. They were, in chronological order: *Harlow District Council v Stokes* [2015] EWHC 953 (QB); *Tendring District Council v Persons Unknown* [2016] EWHC 2050 (QB); *Harlow District Council v McGinley* [2017] EWHC 1851 (QB); *Wolverhampton City Council v Persons Unknown* [2018] EWHC 3777 (QB); *Waltham Forest London Borough Council v Persons Unknown* [2018] EWHC 2400 (QB); *Sutton London Borough Council v Persons Unknown* (unreported) 7 November 2018, Warby J; *Kingston upon Thames London Borough Council v Persons Unknown* [2019] EWHC 1903; and *Havering London Borough Council v Stokes* [2019] EWHC 3006 (QB). As I have said, the one common denominator in relation to all of these decisions is that, although it was the target of all the injunctions sought, the gipsy and traveller community was not legally represented.

39 It is unnecessary to go through each of these cases in any detail. It is however instructive to note the following:

(a) In *Harlow v Stokes* [2015] EWHC 953 P atterson J described the scale of the problem (109 encampments) at paras 3 and 4. She identified that there would be ten new sites for gipsies and travellers in the borough by 2018 at paras 4 and 8. She noted the liaison meetings with the gipsy and traveller community at para 6. She also identified the graphic evidence of criminality and the risks posed to public health and safety (para 10) and the fact that assessments had been offered and not taken up (para 12). It was therefore a case where the proportionality assessment clearly favoured the granting of the interim injunction.

(b) In the *Wolverhampton* case [2018] EWHC 3777, paras 10–11, Jefford J was troubled about the width of the injunction sought and, in particular, whether there were other council-owned sites that could still be occupied. She was also concerned about the need for a transit site. Positive evidence on both these points had a major impact on her decision:

> "10. It is, nonetheless, necessary for me to consider whether it is just and proportionate to grant such an injunction. One matter that needs to be addressed is whether there are lesser alternatives to such an injunction. I am satisfied that, in terms of the efficacy of preventing unauthorised encampments, there is no adequate alternative remedy. There have been plenty of instances in which the council has tried to make it more difficult to access a site. Indeed, businesses have done the same. But measures taken to prevent access have simply been torn down, gates climbed over and ignored. Actions for possession take time and also eat up further council resources. My concern, however, has been, as I said at the outset of this application, that even bearing all that in mind, there is a potential risk in this injunction that it would have the draconian impact of leaving travellers with nowhere to go within the city council of Wolverhampton's area of control. That is one of the reasons why the identification of the relevant sites is material. It appeared to me that it might be the case that the 60 sites that have been identified were the only sites that might be available to travellers within the relevant area and that, if that were the case, the net result of the injunction which was sought would be a borough-wide prohibition on travellers' sites in Wolverhampton. I have been told today, and I accept, that that is not the case and that the 60 sites identified are those that are the most vulnerable, that other sites could still be occupied, and indeed that, since this application was made, one such site not covered by the scope of the injunction sought has been the subject of an unauthorised encampment. That is a relevant consideration.
>
> "11. The second matter, however, is this. The council recognises, very fairly and properly, that there is a balancing act to be carried out between the protection of sites from unauthorised encampments and the provision of facilities for those who choose to adopt, as it was put, a nomadic lifestyle. The council has therefore taken steps set out in the evidence before me to consider the provision of a transit site. In the absence of that transit site, all that is available to travellers within this area are the sites that would be unaffected by this proposed injunction. Efforts have been made to identify such a transit site, and a shortlist of

> three has been drawn up. I was told today that matters are progressing well in that respect. The preferred site is the fishing pool site, which is a privately owned site, and negotiations are taking place with the owner with a view to renting that site to the claimant so that it can be established as an appropriate transit site."

(c) In *Harlow v McGinley* [2017] EWHC 1851 Jay J expressly noted that the cumulative effect of other injunctions was a relevant factor to be taken into account in any proportionality exercise. In that case, the injunction was justified in part because of the extent and nature of the criminality identified by the judge at paras 17–18.

(d) Although the *Tendring* case [2016] EWHC 2050 was very specific because it related to a particular event (namely the Clacton Air Show), Knowles J refused the injunction, partly because of the lack of alternative sites. Presciently, he observed at para 46 that the council's methodology "could lead to injunctions of ever-increasing compass year by year". The *Waltham Forest* case was largely concerned with fly-tipping (in respect of which the judge granted an injunction in the present case). I note too that, in *Waltham Forest* [2018] EWHC 2400, the injunction was for three years, not the five years sought in the present case.

(e) Fly-tipping was also the principal concern in the *Sutton* case 7 November 2018: see paras 18, 19, 36 and 38 of the judgment of Warby J. The judge went on to note that the granting of this sort of injunction could be unjustified and disproportionate, but he concluded that, on the facts of that particular case, it was not. Amongst the factors that led him to that conclusion were the careful making of assessments on the part of the local authority (paras 40–44). In particular, there was evidence of a policy of "negotiated stopping" which demonstrated both a degree of flexibility and a willingness to engage which, on the judge's findings in the present case, was absent here.

(f) I also note that, in the *Sutton* case, an EIA had been carried out. Although a perusal of that document demonstrated that it was a rather one-sided exercise, I think that Mr Willers was right to say that it at least showed that the second intervener was aware of its PSED. Again, the judge in the present case reached a contrary view on the different evidence before her.

5.3 Article 8 and the gipsy and traveller community

40 The starting point is *South Bucks District Council v Porter* [2003] 2 AC 558. That was a case in which injunctions granted against the gipsy and traveller community to enforce planning requirements were refused by the Court of Appeal and House of Lords on the basis that it was inherent in the injunctive remedy that its grant depended on the court's judgment of all the circumstances of the case. Two aspects of the judgment of Lord Bingham of Cornhill should be set out: the first concerned with the history (which demonstrates that, 15 years on, very little has changed) and the second concerned with principle.

41 As to history, Lord Bingham said, at para 13:

> "13. The means of enforcement available to local planning authorities under the 1990 Act and its predecessors, by way of enforcement orders, stop orders and criminal penalties, gave rise to

considerable dissatisfaction. There were a number of reasons for this, among them the delay inherent in a process of application, refusal, appeal, continued user, enforcement notice, appeal; the possibility of repeated applications, curbed but not eliminated by section 70A of the 1990 Act; and the opportunities for prevarication and obstruction which the system offered. In the case of Gipsies, the problem was compounded by features peculiar to them. Their characteristic lifestyle debarred them from access to conventional sources of housing provision.

"Their attempts to obtain planning permission almost always met with failure: statistics quoted by the European Court of Human Rights in *Chapman v United Kingdom* (2001) 33 EHRR 399, 420, para 66, showed that in 1991, the most recent year for which figures were available, 90% of applications made by Gipsies had been refused whereas 80% of all applications had been granted. But for many years the capacity of sites authorised for occupation by Gipsies has fallen well short of that needed to accommodate those seeking space on which to station their caravans. Sedley J alluded to this problem in *R v Lincolnshire County Council, Ex p Atkinson* (1995) 8 Admin LR 529, 533, in a passage quoted in *Chapman* at para 45: 'It is relevant to situate this new and in some ways Draconic legislation in its context. For centuries the commons of England provided lawful stopping places for people whose way of life was or had become nomadic. Enough common land had survived the centuries of enclosure to make this way of life still sustainable, but by section 23 of the Caravan Sites and Control of Development Act 1960 local authorities were given power to close the commons to travellers. This they proceeded to do with great energy, but made no use of the concomitant power given to them by section 24 of the same Act to open caravan sites to compensate for the closure of the commons. By the Caravan Sites Act 1968, therefore, Parliament legislated to make the section 24 power a duty, resting in rural areas upon county councils rather than district councils (although the latter continued to possess the power to open sites). For the next quarter of a century there followed a history of non-compliance with the duties imposed by the Act of 1968, marked by a series of decisions of this court holding local authorities to be in breach of their statutory duty, to apparently little practical effect. The default powers vested in central government, to which the court was required to defer, were rarely if ever used.'"

The essential problem was succinctly stated in a housing research summary, "Local Authority Powers for Managing Unauthorised Camping" (Office of the Deputy Prime Minister, No 90, 1998, updated 4 December 2000):

> "The basic conflict underlying the 'problem' of unauthorised camping is between gipsies/travellers who want to stay in an area for a period but have nowhere they can legally camp, and the settled community who, by and large, do not want gipsies/travellers camped in their midst. The local authority is stuck between the two parties, trying to balance the conflicting needs and often satisfying no one."

42 As to principle, Lord Bingham said at para 18 that it was "for the court to reach its own independent conclusion on the proportionality of the

relief sought to the object to be attained". He had regard to a number of European decisions at paras 34–36 and concluded at para 37:

> "It follows, in my opinion, that when asked to grant injunctive relief under section 187B [of the Town and Country Planning Act 1990] the court must consider whether, on the facts of the case, such relief is proportionate in the Convention sense, and grant relief only if it judges it to be so. Although domestic law is expressed in terms of justice and convenience rather than proportionality, this is in all essentials the task which the court is any event required by domestic law to carry out."

43 As to matters of detail, at para 38 Lord Bingham endorsed the practical guidance given by the Court of Appeal in that case, which he had set out at para 20. This included the following passage ([2002] 1 WLR 1359, para 38) in the judgment of Simon Brown LJ (as he then was):

> "I would unhesitatingly reject the more extreme submissions made on either side. It seems to me perfectly clear that the judge on a section 187B application is not required, nor even entitled, to reach his own independent view of the planning merits of the case. These he is required to take as decided within the planning process, the actual or anticipated breach of planning control being a given when he comes to exercise his discretion. But it seems to me no less plain that the judge should not grant injunctive relief unless he would be prepared if necessary to contemplate committing the defendant to prison for breach of the order, and that he would not be of this mind unless he had considered for himself all questions of hardship for the defendant and his family if required to move, necessarily including, therefore, the availability of suitable alternative sites. I cannot accept that the consideration of those matters is, as Burton J suggested was the case in the pre-1998 Act era, 'entirely foreclosed' at the injunction stage. Questions of the family's health and education will inevitably be of relevance. But so too, of course, will countervailing considerations such as the need to enforce planning control in the general interest and, importantly therefore, the planning history of the site. The degree and flagrancy of the postulated breach of planning control may well prove critical. If conventional enforcement measures have failed over a prolonged period of time to remedy the breach, then the court would obviously be the readier to use its own, more coercive powers. Conversely, however, the court might well be reluctant to use its powers in a case where enforcement action had never been taken. On the other hand, there might be some urgency in the situation sufficient to justify the pre-emptive avoidance of an anticipated breach of planning control. Considerations of health and safety might arise. Preventing a gipsy moving onto the site might, indeed, involve him in less hardship than moving him out after a long period of occupation. Previous planning decisions will always be relevant; how relevant, however, will inevitably depend on a variety of matters, including not least how recent they are, the extent to which considerations of hardship and availability of alternative sites were taken into account, the strength of the conclusions reached on land use and environmental issues, and whether the defendant had and properly

A took the opportunity to make his case for at least a temporary personal planning permission."

44 In *Chapman v United Kingdom* 33 EHRR 18 (referred to by Lord Bingham at para 38 of his judgment), the European Court of Human Rights ("ECtHR") made a series of important observations: (a) The occupation
B of a caravan by a member of the gipsy and traveller community was an "integral part of her ethnic identity" and her removal from the site interfered with her article 8 rights not only because it interfered with her home, but also because it affected her ability to maintain her identity as a gipsy (para 73). (b) There was an emerging international consensus amongst Council of Europe states recognising the special needs of minority communities and an obligation to protect their security, identity, and lifestyle (para 93).
C (c) Members of the gipsy and traveller community were in a vulnerable position as a minority, with the result that "special consideration should be given to their needs and their different lifestyle"; to that extent there was a positive obligation on states to facilitate the gipsy way of life (para 96). (d) The fact that a home had been established unlawfully was highly relevant (para 102). (e) If no alternative accommodation is available, the interference
D was more serious than where such accommodation is available (para 103). (f) Individuals affected by an enforcement notice ought to have a full and fair opportunity to put any relevant material before the decision-maker before enforcement action was taken (para 106).

45 In *Connors v United Kingdom* (2004) 40 EHRR 9 the ECtHR again emphasised the vulnerable position of gipsies and travellers as a minority, reiterating that "some special consideration should be given to their needs
E and their different lifestyle" to the extent that there is a positive obligation on the state to "facilitate the gipsy way of life": para 84. The court distilled three further principles of importance: (a) Given that the applicant was rendered homeless by the decision under challenge, "particularly weighty reasons of public interest" were required by way of justification (para 86). (b) The mere fact that anti-social behaviour occurred on local authority gipsy and
F traveller sites could not, in itself, justify a summary power of eviction (para 89). (c) Judicial review was not a satisfactory safeguard as it did not establish the facts (para 92) and because there was no means of testing the individual proportionality of the decision to evict (para 95).

46 In *Yordanova and Toshev v Bulgaria* CE:ECHR:2012:1002JUD000512605 the ECtHR noted a series of
G resolutions in the Council of Europe which called upon member states to exercise restraint when carrying out eviction measures that impacted upon the gipsy and traveller community. The court considered that such measures should include consultation with the community or individual concerned, reasonable notice, provision of information, and a guarantee of alternative housing measures (paras 76–79). In its judgment, the court reiterated and expanded upon the principles developed in the case law:
H (a) Although it was legitimate for the authorities to seek to regain possession of land from persons who did not have a right to occupy it (para 111), orders should not be enforced without regard to the consequences upon the gipsy and traveller residents or without the securing of alternative shelter for the community (para 126). (b) The authorities should consider approaches specifically tailored to the needs of the gipsy and traveller community (para

128) and should consider gipsy and traveller groups as part of "an outcast community and of the socially disadvantaged groups", who "may need assistance in order to be able effectively to enjoy the same rights as the majority population" (para 129). (c) The underprivileged status of the community "must be a weighty factor in considering approaches to dealing with their unlawful settlement and, if their removal is necessary, in deciding on its timing, modalities, and, if possible, arrangements for alternative shelter" (para 133).

47 In *Buckland v United Kingdom* (2012) 56 EHRR 16 the court built upon the principle set out at para 95 of *Connors* 40 EHRR 189, namely that the absence of any measure enabling a member of the gipsy and traveller community to challenge the proportionality of a possession order was a violation of article 8. At para 65 the court held that:

> "As the court has previously emphasised, the loss of one's home is the most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in light of the relevant principles under article 8 of the Convention, notwithstanding that, under domestic law, his right to occupation has come to an end."

48 Finally, in *Winterstein v France* CE:ECHR:2013:1017JUD002701307, a decision also dating from 2013, the ECtHR again emphasised that occupation of a caravan was an integral part of the identity of the gipsy and traveller community so that measures affecting the stationing of caravans affected their ability to maintain their identity. The margin of appreciation left to local authorities was narrower where the right at stake was crucial to the individual's enjoyment of their article 8 rights.

5.4 Relevant statutes and other guidance

5.4.1 Statutes

49 Romany gipsies and Irish travellers are separate ethnic minorities protected by the Equality Act 2010. Pursuant to section 29(6) of the 2010 Act: "[a] person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation." This includes indirect discrimination, which is when a practice, criterion or procedure puts or would put the protected group at a particular disadvantage when compared with people who do not share the protected characteristic. Indirect discrimination by a public authority is capable of justification.

50 The 2010 Act imposes upon public authorities a public sector equality duty at section 149. This duty requires a public authority, in the exercise of its functions, to have *due regard* to the need to: (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act; (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

51 By section 149(3), having due regard to the need to advance equality of opportunity between persons who share a relevant characteristic and

A those who do not share it involves, in particular, the need to: (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic; (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it; (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is B disproportionately low.

52 Whilst it has been repeatedly accepted that the PSED does not require an EIA, the reality is that undertaking an EIA will be a factor in a case of this sort that points towards a proportionate approach on the part of a local authority. It is the substance of the EIA undertaken that matters, not its formal existence (*R (Brown) v Secretary of State for Work and Pensions* C *(Equality and Human Rights Commission intervening)* [2009] PTSR 1506, para 93). An EIA undertaken prior to the seeking of injunctive relief will be evidence of good practice. Further, the carrying out of a welfare assessment on unauthorised campers to identify any welfare issues that need to be addressed, prior to the taking of any enforcement action against them, is good practice.

D **53** As to statutory enforcement powers, the court was taken to sections 61 and 62A of the Criminal Justice and Public Order Act 1994 ("the CJPOA"), which gives the police powers to direct trespassers to leave land if (in the words of section 61) they consider that they "are present there with the common purpose of residing there for any period". The same power is given to the relevant local authority pursuant to section 77 of the CJPOA, although this is limited to "unauthorised campers".

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5.4.2 Guidance

54 The issue of unauthorised encampments is the subject of voluminous guidance. Department for the Environment Circular 18/94 *Gypsy Sites Policy and Unauthorised Camping* (November 1994) states that "it is a matter for local discretion whether it is appropriate to evict an unauthorised F gipsy encampment" (para 6); where there are no authorised sites but an unauthorised encampment is not causing a level of nuisance which cannot be effectively controlled, the authorities should consider providing basic services (para 6); that local authorities should try and identify possible emergency stopping places as close as possible to the transit routes used by gipsies where gipsy families would be allowed to camp for short periods (para 7); that, where gipsies are unlawfully camped, it is for the local authority to take G any necessary steps to ensure that the encampment "does not constitute a hazard to public health" (para 8); and that "local authorities should not use their powers to evict gipsies needlessly … local [authorities] should use their powers in a humane and compassionate way" (para 9).

55 In the Home Office *Guide to Effective Use of Enforcement Powers (Part 1; Unauthorised Encampments)*, published in February 2006, it was H emphasised at paras 9 and 77 that local authorities had an obligation to carry out welfare assessments on unauthorised campers to identify any welfare issue that needed to be addressed before taking enforcement action against them. In addition, para 83, entitled "Avoiding unnecessary enforcement action", requires landowners to consider "whether enforcement is absolutely necessary" and identifies alternatives to eviction action.

56 And in May 2006, in a document entitled *Guidance on Managing Unauthorised Camping*, the Department for Communities and Local Government provided 66 pages of guidance to local authorities as to how they should best manage unauthorised camping. Chapter 5, entitled "Making Decisions on Unauthorised Encampments", stresses the importance of striking a balance between "the needs of all parties".

5.4.3 UNCRC

57 Article 3.1 of the United Nations Convention on the Rights of the Child ("UNCRC") (1989) (Cm 1976) states: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

58 As the Supreme Court explained in *Zoumbas v Secretary of State for the Home Department* [2013] 1 WLR 3690, para 10, the best interests of a child are an integral part of the proportionality assessment under article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

6. Analysis of the appeal

6.1 Proportionality generally

59 I turn now to an analysis of the appeal. I undertake that task principally by reference to ground 1 of the appeal, and the seven aspects of the judge's proportionality exercise identified by Mr Kimblin (and set out at para 23 above). As will be seen, this analysis also sweeps up all but one of the other grounds of appeal. However, before embarking on that exercise, two preliminary points need to be made.

60 First, as I have said, the judge found in favour of the appellant that the test for a quia timet injunction against persons unknown had been made out. In other words, she found that the six requirements noted in *Ineos* [2019] 4 WLR 100 had been satisfied and that there was a strong probability of irreparable harm[12]. Accordingly, it seems to me to be unnecessary to trawl over those points again, since they do not affect the outcome of this appeal.

61 Secondly, since the appeal turns on the judge's approach to proportionality, it is necessary to record the high hurdle which must be overcome in order to set aside the exercise of a judge's discretion when undertaking a proportionality analysis. The constraints inherent in such an exercise are apparent from:

(a) *G v G (Minors: Custody Appeal)* [1985] 1 WLR 647, where Lord Fraser of Tullybelton said, at p 652D–E:

> "the appellate court should only interfere when they consider that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible."

[2] **Reporter's note*. The superior figures in the text refer to the notes at the end of the judgment of Coulson LJ on pp 1075–1076.

A (b) In *AEI Rediffusion Music Ltd v Phonographic Performance Ltd* [1999] 1 WLR 1507 Lord Woolf MR confirmed at p 1523:

> "Before the court can interfere it must be shown that the judge has either erred in principle in his approach, or has left out of account, or taken into account, some feature that he should, or should not, have considered, or that his decision is wholly wrong because the court is
B forced to the conclusion that he has not balanced the various factors fairly in the scale".

(c) In *R (Bulger) v Secretary of State for the Home Department* [2001] 3 All ER 449 the judge said, at para 50: "A submission that undue or insufficient weight has been given to a relevant factor does not raise any arguable error of law."

C

6.2 Factor 1: The extent of the injunction

62 As I have said, the judge described the relief sought and its geographical compass as being "very broad" amounting to "a de facto borough-wide prohibition of encampment and upon entry/occupation for residential purposes" (para 59). Mr Kimblin submitted that this was an inaccurate
D description of what was being sought. He relied on two things: the fact that the proposed injunction excluded cemeteries and highways, and the fact that there was a good deal of green space in the southern part of the borough which, being privately owned, was not the subject of the proposed injunction at all.

63 In my view, these are not proper criticisms of the judge's finding. Her
E description of the injunction as a borough-wide prohibition was expressly accepted by the appellant's junior counsel at the hearing.

64 As to the two specific points raised, the evidence is that gipsies and travellers do not camp in cemeteries and no one could regard highways as being an appropriate place for any sort of encampment. This is borne out by the fact that there had been no recorded encampments in cemeteries or
F highways in Bromley in any event. In addition, I reject the submission that, because the proposed injunction did not cover private land, its width was overstated. The judge expressly dealt with that at para 63. She said that she did not regard transferring the undoubted problems that the appellant had experienced to private landowners, who would themselves be entitled to seek possession orders evicting the occupants from their land, as a solution. I respectfully agree.

G **65** Accordingly, the judge's description of the width of the injunction, accepted as it was at the hearing, was an accurate description of what was being sought. The judge was quite right to be concerned about its width, and to regard that as a highly relevant factor in the proportionality exercise.

6.3 Factor 2: Entry/Occupation

H **66** Mr Kimblin suggested that the judge had been wrong to be concerned by the fact that the injunction went only to entry/occupation and was unconnected to anti-social or criminal behaviour. This was a point that she first raised at para 16 of her judgment and was referred to again at para 60. He suggested that the fact that there was no specific evidence of such conduct in the past could not be a relevant factor.

67 In my view, although it could not be said to be determinative, the absence of any substantial evidence of past criminality (leaving aside fly-tipping) was a factor that was relevant to the proportionality exercise. The fact that the sort of criminal and quasi-criminal conduct which was the basis of the injunctions in the *Harlow* cases was absent here was not unimportant, because it meant that the mischief at which the injunction was aimed was simply entry and occupation. Beyond that, the weight to be given to this factor was entirely a matter for the judge. She was entitled to take it into account when considering proportionality.

6.4 Factor 3: Alternative sites

68 Here the principal criticism of the judge is that, because she was concerned that there were no suitable alternative sites, she failed to consider whether this should have led to an injunction in different terms, or what Mr Kimblin called "a lesser outcome". He said that it was incumbent upon the judge to consider lesser alternatives as part of the proportionality exercise.

69 This needs to be unpicked a little. It appears to be inherent in that criticism that the appellant accepted that the absence of any alternative sites was a relevant factor in the proportionality exercise. For the avoidance of doubt, I consider that it was plainly relevant. There was an irreconcilable conflict between, on the one hand, Ms Slater's statement that Bromley did not need a transit site because it did not suffer particularly from incursions, and Bromley's claim for a borough-wide injunction preventing *any* entry or encampment.

70 I note that the fact that the injunction only related to some but not all sites, coupled with the proposal of a transit site, were important factors for Jefford J in the *Wolverhampton* case [2018] EWHC 3777 (see para 39(b) above). That approach is in accordance with the ECtHR authorities set out at paras 44–48 above. These important safety valves were not in play here, because of the width of the injunction which the appellant was seeking and the absence of any proposal for a transit site (despite the clear need).

71 The main difficulty for the appellant in relation to its suggestion that the judge did not consider a lesser order is that at no time did it itself put forward any alternative or lesser order. As we have seen in relation to the permitted development point, when a lesser alternative was expressly mooted, the appellant made plain that it was not interested in any "second rate" solution. So whilst I accept that, in appropriate circumstances, a judge should consider whether the problem can be dealt with in a less draconian way, there must always be realistic limits to that exercise. A proportionality analysis requires a judge primarily to consider whether what is being proposed is proportionate in all the circumstances. The fixed point therefore is that which is actually sought, not that which might have been sought in other circumstances.

72 In cases such as this, what is being sought is a matter for the local authority. It is a matter for the authority carefully to consider the temporal and geographical range of the order sought, and the steps that could be taken to explore alternative sites and other solutions. That is particularly important when it is seeking an injunction against persons unknown, when it knows that the defendants will almost certainly not be represented at either the interim or final hearings. Of course the judge will want to scrutinise carefully

A what is being sought (and the cases referred to in paras 38 and 39 above make plain just how scrupulously the first instance judges have undertaken that exercise in these cases) but, ultimately, the burden remains on the local authority.

73 What is more, that makes practical sense. Only the appellant would know which of the 171 sites might be regarded as a priority, and which of them might be considered as suitable for exclusion from the terms of any B proposed injunction. Only the appellant would know what its proposals were in respect of transit sites (and if there were no such proposals, how that could be squared with the alleged need for the borough-wide injunction). It was not explained how the judge could have satisfactorily undertaken such tasks. In my view, therefore, this criticism of the judge was unfair and unrealistic.

74 Accordingly, it seems to me that, not only is there nothing in this third C criticism of the judge's proportionality exercise, but the absence of any transit or other alternative sites was a very important factor militating against the imposition of the borough-wide injunction.

6.5 Factor 4: Cumulative effect

75 Although the judge dealt with the cumulative effect in her D proportionality exercise quite shortly (the second part of para 63), she had referred to the effect of other injunctions granted in favour of other local authorities on a number of occasions in the earlier parts of her judgment.

76 The appellant's criticism of the judge is that, in essence, she should not have placed any weight on the cumulative effect of other injunctions. This is also reflected in the separate ground 3 of the appeal. Mr Kimblin said that *Meier* [2010] PTSR 321 was a strong indication that the use of a quia timet E injunction to deal with an anticipated problem like this was an appropriate course. He said that it then became a matter for each local planning authority independently (although he did not go as far as to say that the cumulative effect was not a material consideration at all). Mr Kimblin also said that, if the cumulative effect was overstated, it might mean that the competing needs of different local authorities would be ignored.

F **77** There are a number of points to be made about those submissions. First, I do not consider that *Meier* is authority for the wide proposition advanced by Mr Kimblin. On the contrary, I note that Baroness Hale JSC expressly said, at para 39, that she was hesitant about granting an injunction in respect of "quite separate land which has not yet been intruded upon". That is this case.

G **78** Secondly, although I accept that each case has to be looked at on its own merits (that is the whole force of the House of Lords' decision in *South Bucks* [2003] 2 AC 558) and that the situation in respect of each local authority will be different, it would be wrong to ignore the plain fact that a neighbouring authority's successful injunction potentially narrows the options for everyone else, including other local authorities and the gipsy and traveller community itself. If every local authority obtains an injunction, the H community has literally nowhere to go. So, as the judge acknowledged, it would be unrealistic to say that the cumulative effect of all the injunctions which have been granted so far was anything other than a relevant factor when carrying out the proportionality exercise.

79 Thirdly, Jay J said in *Harlow District Council v McGinley* [2017] EWHC 1851 that the cumulative effect of other injunctions was a material

consideration, but that the weight to be afforded to it was a matter for the judge. I agree with that approach[2]. Here, the judge clearly had the cumulative effect in mind, but she does not say anything which suggests that she gave it undue weight or significance. It was simply a factor that she took into account in her assessment of proportionality. Since Mr Kimblin rightly accepted that he could not say that the cumulative effect of other injunctions was something to which the judge should have paid no attention at all, the difference between the judge's approach and Mr Kimblin's ultimate position was nugatory. I therefore reject this fourth criticism of the judge's proportionality exercise.

6.6 Factor 5: Article 8 and the EIA

80 The judge found a number of specific failures on the part of the appellant, including a failure to comply with its PSED and its failure to carry out an EIA. These failures distinguish the appellant's position from at least the majority of the second and fourth interveners. The scope for any challenge to these findings was inevitably limited. For the reasons noted at paras 49–52 above, this is an extremely important element of the case.

81 The narrow point taken on appeal by the appellant, which is also reflected in the separate ground 4 of the appeal, is that there was no statutory duty or requirement to carry out an EIA. I have dealt with that at para 52 above. Regardless of whether the failure to undertake an EIA was a specific breach of duty on the part of the appellant, this was a case where the judge found that, not only was there no EIA in fact, but there had been no proper engagement with the gipsy and traveller community at all. There was therefore a failure by the appellant to comply with its PSED.

82 Both the Equality Act duties at paras 49–52 above, and the lengthy existing guidance to which I have referred at paras 54–56 above, mean that assessments of various kinds are required in many circumstances when dealing with gipsy and traveller encampments. There is evidence that, for example, some of the second interveners considered these obligations and undertook full assessments before seeking the injunction. As the judge below noted, in the *Sutton* case 7 November 2018, there was detailed evidence about the second interveners' engagement with the gipsy and traveller community and the proposed completion of various welfare and equality assessments. The judge found that this simply had not happened in the present case and, with one exception, there was no substantive answer to that criticism at the appeal hearing.

83 The exception which Mr Kimblin relied on in this connection was the accommodation assessment of 2016, referred to in para 7 above. He said that this showed the appellant had given careful consideration to the needs of this particular group and that it was wrong and unfair for the judge to make the criticisms that she did at paras 64–68 of her judgment.

84 In my view there are a number of answers to that submission. First, it was common ground that the judge was shown the accommodation assessment, and there is nothing to say that she did not have regard to it. Secondly, since the accommodation assessment itself expressly referred at para 2.31 to the outstanding demand for additional sites in the borough, which demand had not been acted upon by the appellant in the time since the accommodation assessment was completed, it does not seem to me that it demonstrated any particular engagement with this issue by the appellant. Thirdly, and most important of all, the accommodation assessment was

A prepared before the appellant had even thought about, let alone obtained, the wide interim injunction in this case. It was therefore already out of date by the time of the hearing before the judge and of little relevance to the issues before the court.

85 Take an example: the judge had to address how infringements of the injunction might be dealt with in the future and did so at para 67, noting that no proper welfare assessment was carried out in relation to the one incident B that had been addressed in the evidence. That was a serious matter and directly referred to an event close in time to the hearing before the judge. The accommodation assessment of 2016, on the other hand, could not contain any answer to that question.

86 Accordingly, I consider that the particular factual criticisms that the judge made of the appellant in this case were plainly open to her on the C evidence. As I have noted, these criticisms (and in particular the various failings under the Equality Act 2010) go a long way towards distinguishing the appellant's case from those of the majority of the second and fourth interveners. I note that Mr Woolf, who made short oral submissions on behalf of the second interveners, was anxious to emphasise those differences, and in particular the failings of the appellant in relation to its PSED and its D general dealings with the gipsy and traveller community.

87 For all these reasons, I consider that there is nothing in the fifth criticism of the judge's proportionality exercise and ground 4 of the appeal.

6.7 Factor 6: Duration

88 The judge concluded that the five-year term sought was unduly E long and therefore disproportionate. The criticism is that she should have considered whether a lesser period was appropriate. Again, therefore, it appears to be accepted that the issue of duration was a relevant factor (as it was said to be by Longmore LJ in *Ineos* [2019] 4 WLR 100). In my view it was plainly a relevant factor.

89 As to the argument that the judge should have explored the possibility of a shorter timescale, my view is similar to that noted in paras 69–71 above. F The appellant never suggested a shorter period. Whilst that would have been something which the judge could have considered, she was primarily obliged to test the proportionality of the injunction in the terms sought by the appellant. She was certainly entitled to conclude that the five-year term was, for a variety of reasons, much too long. I therefore reject this criticism of the judge.

G

6.8 Factor 7: Permitted development

90 By reference back to Schedule 1 to the Caravan Sites and Control of Development Act 1960, the GPDO grants deemed planning permission for the stationing of a single caravan on land for not more than two nights, or not more than three caravans on a larger site, or use of land as a caravan H site for a travelling showman. The argument before the judge was that this injunction would potentially cut across those permitted development rights. She concluded that the appellant had not dealt with this in a satisfactory way and that that was a seventh and final factor in the proportionality exercise.

91 The appellant took three points on appeal. First, it said that the permitted development rights were irrelevant because the injunction was

aimed at larger encampments. Secondly, it submitted that the judge could have drafted the injunction so as to expressly preserve any permitted development rights. Thirdly, it argued (for the first time) that permitted development rights could not change the use of land for which permission had not already been granted and/or that such rights cannot be exercised without the consent of the landowner. The "permitted development rights" issue is also reflected in ground 5 of the grounds of appeal.

92 In my view, it is unnecessary and possibly unwise to decide this third (and highly technical) point for the purposes of this appeal. I am aware that planning law in respect of caravans and camping has been described as "particularly complex"[3] and the issue about permitted development rights was never a significant part of the argument before the judge (which probably explains why it was dealt with last). But I consider that the judge was plainly entitled to conclude that the matter had not been dealt with satisfactorily by the appellant. This was in part because, on the arguments before her, it was said that this point only related to a quarter of the sites, but those sites could not be identified (see para 70). Furthermore, on the face of it, the existence of such permitted development rights would seem to require the appellant, as part of its application, at least to explain how or why they had been exhausted or did not apply. Finally, the criticism that the judge should have expressly preserved any permitted development rights in the injunction is most unfair, given that she expressly raised it and the offer was declined by the appellant's junior counsel.

93 The permitted development rights were, in my view, a factor which was relevant to proportionality. The travelling showman exception in the GPDO is perhaps a good example of this. The judge needed to be satisfied that the proposed injunction would not cut across that permitted development right, because the accommodation assessment showed that there were large numbers of travelling showmen in Bromley. The appellant did not demonstrate that to her (or my) satisfaction. This may be something which, in another case, could be resolved, either by way of the wording of the injunction, or by the designation of particular sites for this permitted development. But the judge was entitled to reach the view that she did on this issue, based on the evidence before her. There is therefore nothing in this last criticism of the judge's proportionality exercise.

6.9 Irreparable harm

94 As noted at para 21 above, the judge concluded that the required threshold of harm had been made out by the appellant. It is therefore curious that ground 2 of the appeal (the only ground not yet covered) sought to challenge the judge's conclusion that the necessary threshold was one of "irreparable harm". Even if, as the appellant maintains, that was too high a threshold, the judge found that the appellant had satisfied the test in this case, so the point simply does not arise on appeal.

95 However, as noted in paras 35 and 60 above, I consider that the test of "irreparable harm" is the right one, supported as it is by a number of authorities. Contrary to Mr Kimblin's submissions, that conclusion is not contrary to *Meier* [2010] PTSR 321, because that was not a case in which the test for a quia timet injunction was in issue: all that mattered in that case was whether or not such an injunction was at least potentially available to the claimant.

96 For those reasons, therefore, the judge was right to apply the test of irreparable harm as a matter of law.

6.10 Summary

97 For the reasons set out above, I would dismiss this appeal. The judge considered all of the relevant factors when undertaking her proportionality exercise. She did not have regard to anything irrelevant. She came to a conclusion which she was entitled to reach. Whilst I would not accept Mr Willers's description of the appellant's arguments as "just a list of grouches", I agree with his summary submission that the appellant has struggled and failed to find any error of principle in the judge's reasoning. There is therefore no basis for this court to interfere with her conclusions.

98 I would not wish to move on to the wider guidance sought in this case without expressing my admiration for the judge's impressive ex tempore judgment. Not only did she have a good deal to consider, and not only was she able to marshal all of that material into a cogent judgment, but she took a clear-eyed view of the underlying problems and was not unduly swayed by the number of other cases in which wide injunctions had been granted in ostensibly similar circumstances.

7. Wider guidance

99 As noted at the outset of this judgment, the parties were anxious for this court to provide some wider guidance as to how local authorities should deal with this plainly pressing issue. I am wary of offering too prescriptive a set of suggestions, particularly in circumstances where the appeal itself raised a number of fact-specific matters and has been refused. However, in deference to the parties' requests, I will endeavour to set out in brief terms what I consider to be the overall position.

100 I consider that there is an inescapable tension between the article 8 rights of the gipsy and traveller community (as stated in such clear terms by the European case law summarised at paras 44–48 above), and the common law of trespass. The obvious solution is the provision of more designated transit sites for the gipsy and traveller community. It is a striking feature of many of the documents that the court was shown that the absence of sufficient transit sites has repeatedly stymied any coherent attempt to deal with this issue. The reality is that, without such sites, unauthorised encampments will continue and attempts to prevent them may very well put the local authorities concerned in breach of the Convention.

101 This tension also manifests itself in much of the guidance documentation to which I have referred at paras 54–56 above. That guidance presupposes that there will be unlawful encampments, and does not suggest, save as a last resort, that such encampments should be closed down, unless there are specific reasons for so doing. There is no hint in the guidance that it is or could be a satisfactory solution to seek a wide injunction of the sort in issue in this case: indeed, on one view, much of that guidance would be irrelevant if the answer was a borough-wide prohibition on entry or encampment.

102 It therefore follows that local authorities must regularly engage with the gipsy and traveller community (and/or, in the Greater London area, the first intervener). Through a process of dialogue and communication, and following the copious guidance set out above, it should be possible for

the need for this kind of injunction to be avoided altogether. "Negotiated stopping" is just one of many ways referred to in the English case law in which this might be achieved.

103 If a local authority considers that a quia timet injunction may be the only way forward, then it will still be of the utmost importance to seek to engage with the gipsy and traveller community before seeking any such order if time and circumstances permit. Welfare assessments should be carried out, particularly in relation to children. An up-to-date EIA will always be important because the impact on the gipsy and traveller community will vary from borough to borough and area to area. In my view, if the appropriate communications, and assessments (like the EIA) are not properly demonstrated, then the local authority may expect to find its application refused.

104 Three particular considerations should be at the forefront of a local authority's mind when considering whether a quia timet injunction should be sought against persons unknown, and where the proposed injunction is directed towards the gipsy and traveller community:

(a) Injunctions against persons unknown are exceptional measures because they tend to avoid the protections of adversarial litigation and article 6 of the Convention.

(b) In order for proportionality (or an equilibrium) to be met in these cases, it is important that local authorities understand and respect the gipsy and traveller community's culture, traditions and practices, in so far as those factors are capable of being realised in accordance with the rule of law. That will normally require some positive action on the part of the authority to consider the circumstances in which the article 8 rights of the members of those communities are "lived rights" i e are capable of being realised.

(c) The vulnerability and protected status of the gipsy and traveller community, as well as the integral role that the nomadic lifestyle plays as part of their ethnic identities, will be given weight in any assessment as to the proportionality of an injunction or eviction measure.

(d) The equitable doctrine of "clean hands" may require local authorities to demonstrate that they have complied with their general obligations to provide sufficient accommodation and transit sites for the gipsy and traveller community.

(e) Common sense requires the court, when carrying out the proportionality exercise, to have careful regard to the cumulative effect of other injunctions granted against the gipsy and traveller community.

105 In my view, borough-wide injunctions are inherently problematic. They give the gipsy and traveller community no room for manoeuvre. They are much more likely to be refused by the court as a result (as happened here). The solution in *Wolverhampton* [2018] EWHC 3777, which identified particularly vulnerable sites but did not include all the sites owned by the council, seems to me to be a much more proportionate answer. I do not accept that this automatically means that the remaining sites will be the subject of unauthorised encampment, as Mr Kimblin suggested, but even if that happens, it is likely to be a better solution than a potentially discriminatory blanket ban.

106 The same is true of the duration of the injunction. Again, in the *Wolverhampton* case, the injunction was limited to a period of one year after which there was a review. That again seems to me to be sensible. I consider

A that it is—without more—potentially fatal to any application for a local authority to seek a combination of a borough-wide injunction and a duration of a period as long as five years.

107 Credible evidence of criminal conduct in the past, and/or of likely risks to health and safety, are important if a local authority wishes to obtain a wide injunction. In my view, the injunctions in the *Harlow* cases were explicable on the grounds of criminality and the grave risks to health and B safety. Injunctions which are designed to prevent entry and encampment only, and without evidence of such matters, should be correspondingly more difficult to obtain.

108 Whilst I do not accept the written submissions produced on behalf of the third intervener, to the general effect that this kind of injunction should never be granted, the following summary of the points noted above may be C a useful guide:

(a) When injunction orders are sought against the gipsy and traveller community, the evidence should include what other suitable and secure alternative housing or transit sites are reasonably available. This is necessary if the nomadic lifestyle of the gipsy and traveller community is to have effective protection under article 8 and the Equality Act 2010.

D (b) If there is no alternative or transit site, no proposal for such a site, and no support for the provision of such a site, then that may weigh significantly against the proportionality of any injunction order.

(c) The submission that the gipsy and traveller community can "go elsewhere" or occupy private land is not a sufficient response, particularly when an injunction is imposed in circumstances where multiple nearby authorities are taking similar action.

E (d) There should be a proper engagement with the gipsy and traveller community and an assessment of the impact of an injunction might have, taking into account their specific needs, vulnerabilities and different lifestyle. To this end, the carrying out of a substantive EIA, so far as the needs of the affected community can be identified, should be considered good practice, as is the carrying out of welfare assessments of individual members of the F community (especially children) prior to the initiation of any enforcement action.

(e) Special consideration is to be given to the timing and manner of approaches to dealing with any unlawful settlement and as regards the arrangements for alternative pitches or housing.

109 Finally, it must be recognised that the cases referred to above make plain that the gipsy and traveller community have an enshrined freedom not G to stay in one place but to move from one place to another. An injunction which prevents them from stopping at all in a defined part of the UK comprises a potential breach of both the Convention and the Equality Act 2010, and in future should only be sought when, having taken all the steps noted above, a local authority reaches the considered view that there is no other solution to the particular problems that have arisen or are H imminently likely to arise.

Notes

1. Because the appellant has raised a separate issue about harm, set out in ground 2 of the appeal, I deal with it shortly at section 6.9 (paras 94–96 below).

2. There were also shades of the same approach in *Tendring* [2016] EWHC 2050: see para 39(d) above.

3. See para 3B-1144.2 of vol 6 of the Encyclopaedia of Planning Law and Practice.

HADDON-CAVE LJ

110 I agree.

RYDER LJ

111 I also agree.

Appeal dismissed.

FRASER PEH, Barrister

Neutral Citation Number: [2022] EWHC 1703 (Pat)

Case No: HP-2022-000010

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD)
PATENTS COURT

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Friday, 1st July 2022

Before:

MR. JUSTICE MEADE

- -

Between:

KONINKLIJKE PHILIPS N.V. **(a company incorporated in the Netherlands)**	**Claimant/ Applicant**
- and -	
(1) GUANGDONG OPPO MOBILE TELECOMMUNICATIONS CORP, LTD **(a company incorporated under the laws of the People's Republic of China)** **(2) OPPO MOBILE UK LTD** **(3) ONEPLUS TECHNOLOGY (SHENZHEN) CO., LTD** **(a company incorporated under the laws of the People's Republic of China)** **(4) UNUMPLUS LIMITED (t/a OnePlus)** **(5) OPLUS MOBILETECH UK LIMITED** **(6) REFLECTION INVESTMENT B.V.** **(a company incorporated under the laws of the Netherlands)** **(7) REALME MOBILE TELECOMMUNICATIONS (SHENZHEN) CO., LTD** **(a company incorporated under the laws of the People's Republic of China)** **(8) REALME CHONGQING MOBILE TELECOMMUNICATIONS CORP LTD** **(a company incorporated under the laws of the People's Republic of China)** **(9) ASCENSION INTERNATIONAL TRADING CO., LIMITED (t/a realme)** **(a company incorporated under the laws of the Hong Kong Special Administrative Region of the People's Republic of China)**	**Defendants/ Respondents**

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- -

MR. ALAN MACLEAN QC (instructed by **Bristows LLP**) for the **Claimant/Applicant**

MR. LAWRENCE AKKA QC and MS JOSEPHINE DAVIES (instructed by **Hogan Lovells International LLP**) for the **Defendants/Respondents**

- -

Approved Judgment

Transcript of the Stenograph Notes of Marten Walsh Cherer Ltd.,
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MR. JUSTICE MEADE:

1. On 4th May 2022, Mellor J granted an *ex parte* and without notice anti-suit injunction in these proceedings, and he made an order for service out. In substance, the injunctive order he made was what is sometimes referred to as an "anti-anti-suit injunction", but I am just going to refer to "anti-suit" injunction generally in this judgment. The order made by Mellor J was continued until the determination of the application that I am hearing by the order of Falk J of 17th May 2022. On 28th June, this week, I heard argument about continuation of the anti-suit injunction and this is my judgment in respect of that.

2. The basic background is set out in paragraphs 1-4 of the judgment of Mellor J as follows:

> "1. There are two applications before the Court by Philips, as claimant and patentee, in this action against three sets of defendants: The Oppo defendants (which are defendants 1 and 2), the OnePlus defendants (defendants 3-6), and the RealMe defendants (defendants 7-9).
>
> 2. The action is in familiar form, in the sense that Philips asserts three patents (EP(UK) 1,623,511; 1,999,874 and 3,020,043) which are said to be, and have been declared, essential to one or more of the 3G or 4G standards and therefore infringed by various mobile devices conforming to those standards sold by or at the behest of each set of defendants in the UK, as detailed in the Particulars of Infringement.
>
> 3. The relief which Philips seeks is fairly standard for this type of SEP FRAND action. It is to be expected that the defences to these claims for infringement of the patents will involve claims that one or more of the patents is invalid, and obviously counterclaims for invalidity have to be heard by this court.
>
> 4. It is now conventional in this type of SEP FRAND case for the Court to manage the action into one or more technical trials, followed by a FRAND trial to determine the terms on which the patentee's SEP portfolio should be licensed."

3. At the hearing before me this week, Mr. Maclean QC appeared for Philips, and Mr. Akka QC and Ms Davies appeared for the defendants. I am grateful to all Counsel for their helpful and concise submissions.

4. In terms of evidence, I considered the first witness statement of Mr. Boon, of Bristows (Philips' solicitors), which was the primary evidence before Mellor J. A second witness statement of Mr. Boon that was before Mellor J was also referred to before me; it was primarily concerned with the service out application and, as it transpired, was not very important to the arguments before me. I considered a short third witness statement by Mr. Boon concerning some points raised by Hogan Lovells, the defendants' solicitors, in correspondence. The main evidence for the defendants in opposition to the continuation of the order was the first witness statement of Mr. Brown, of

Hogan Lovells. Finally, there was a witness statement, his first and only one so far, from Mr. Pinckney of Bristows, responding to certain points made by Mr. Brown.

5. I note that the defendants have said that they intend to challenge jurisdiction in these proceedings. They oppose continuation of the anti-suit injunction on grounds that I will come to, but they have offered a contractual undertaking in correspondence, by letter of 30th May 2022, from Hogan Lovells, which is in the following terms:

> "Until the end of the Action HP-2022-000010 (including any appeals) the Respondents undertake to give the Applicant 7 days' notice before they, whether by their directors, officers, partners, employees or agents, or in any other way, seek any relief from the PRC" -- that is People's Republic of China -- "courts that would restrain, prevent, require the withdrawal of, or seek to penalise the Applicant for pursuing the Action in the UK. For the avoidance of doubt, this undertaking does not extend to requiring the Respondents to notify the Applicant in advance of initiating a rate-setting action in the PRC Courts to determine the FRAND rates of a licence between them."

6. The precise form of the order made by Mellor J is of particular significance to the argument I heard, and paragraph 5 of his order was as follows:

> "Until after the return date or further order of the Court, the Respondent, whether by its directors, officers, partners, employees or agents, or in any other way, must not seek any relief from a foreign court or tribunal that would interfere with, restrain, prevent, require the withdrawal of, or seek to penalise the Applicant for pursuing the Claim herein, or taking any step in relation to the Claim, including, without limitation, pursuing the Applications or any application to be made at the return date."

7. Also of significance is the SEP FRAND landscape internationally, which was described as follows, in paragraphs 3 and 4 of the defendants' skeleton:

> "3. Since ***Unwired Planet*** [2020] UKSC 37 it has been clear that the English court is prepared to set FRAND terms for a global SEP portfolio, not just for a SEP holder's UK portfolio. The English court is not the only jurisdiction which will do this. The courts of the People's Republic of China ('**PRC**') will also set global terms (see ***Sharp v OPPO***). There is a potential for inconsistent determinations therefore and questions as to the correct approach to managing such potential parallel litigation are before the Court of Appeal this week (***Nokia v OPPO*** on appeal from [2021] EWHC 2952 (Pat) with the Judge's permission).
>
> 4. Actual or potential concurrent proceedings on the same or similar subject matter in England and abroad may be undesirable

> from a costs perspective but are not of themselves regarded as an attack on the English court and the overseas proceedings may not be restrained by injunction. In the present context in particular, the risk of there being conflicting judgments from different courts is acknowledged to be an unfortunate consequence of the industry's decision to establish international standard setting organisations such as ETSI (***Unwired Planet*** (above) [90]; ***Nokia v OPPO*** (above) [116])."

8. I should note that footnote 1 to those paragraphs says: "It is understood that (at least) the courts of the Netherlands, France and USA will do so as well." "Do so" refers to global rate-setting. I should make it clear that there is quite a lot of complexity and nuance to the position in those courts and I, by taking in those paragraphs, do not purport to endorse footnote 1. But the general description of the position following *Unwired Planet* and the position in the PRC is important and, in my view, correctly set out in those paragraphs

9. The *Sharp v OPPO* litigation referred to there also included, as well as rate-setting, an anti-suit injunction obtained by OPPO in the PRC. That is described in paragraph 11 of the judgment of Mellor J.

10. In other somewhat similar disputes, however, OPPO has not sought antisuit relief in China, and I will come to that in more detail in this judgment.

11. The defendants oppose the continuation of the relief granted by Mellor J on a number of grounds, which are set out in paragraph 15 of their skeleton for this hearing as follows:

> "As a result of Philip's current position, the outline of OPPO's opposition to the Injunction is as follows:
>
> (1) The Injunction should be set aside *ab initio* because of material lack of full and frank disclosure at the without notice hearing.
>
> (a) The Injunction was sought *quia timet* but Mellor J was not referred to the relevant legal threshold requirements.
>
> (b) Mellor J was not referred to significant material demonstrating that OPPO had no intention to apply for anti-suit relief in PRC or elsewhere.
>
> (c) The fact that the Injunction was intended to apply worldwide was not drawn to Mellor J's attention. There was neither evidence nor submission on the point.
>
> (d) The meaning of the words "interfere with" (which Philips now asserts preclude the enforcement in PRC of a PRC judgment (or even, e.g., a French judgment in France)), was not addressed in evidence or submissions. Indeed it was not even put before

> the Court until Philips' Reply evidence for the current application.
>
> (e) Further, there was no basis for an order of this sort (i.e. to bar enforcement of a judgment in proceedings which had not even been begun to have been sought) on an urgent, without notice, basis. But neither point was addressed.
>
> (2) The Injunction, having been set aside *ab initio*, should not be re-granted.
>
> (3) The Injunction should not be continued because now that OPPO have had the opportunity to file their own evidence it is beyond doubt that they have no intention of applying for anti-suit relief. Further, OPPO have offered an unequivocal undertaking not to do so without notice (which Philips has refused to accept).
>
> (4) Alternatively, the Injunction sought should not be continued in the terms sought.
>
> (a) The words 'interfere with' should be removed because: (i) they would (on Philips' case) impose an illegitimate restraint on legitimate parallel proceedings; (ii) there is no evidence that OPPO would (or could at any proximate date) seek to enforce a hypothetical future PRC judgment PRC proceedings have not even been started; and (iii) if they are not the restraint for which Philips contends they are confusing surplusage.
>
> (b) There was and is no basis for the Injunction to apply worldwide."

12. I will, first of all, identify the legal principles applicable to my determination, in relation to which there was in fact relatively little disagreement. Mellor J set out the basic position at paragraph 9 of his judgment, by reference to *Glencore v Metro Trading International Inc (No 3)* [2002] 2 All ER (Comm) 1, per Rix LJ, at paragraph 42. Mr. Akka, for the defendants, did not submit that that was wrong.

13. In paragraph 18 of the defendants' skeleton, emphasis was placed on the decision of the House of Lords in *Airbus v Patel* [1999] 1 AC 119, where Lord Goff elaborated on what "vexatious" or "oppressive" meant. I accept that principle. In paragraph 19 of their skeleton, the defendants emphasised that “parallel proceedings are not objectionable *per se*" by reference to the case of *OT Africa v Magic Sportswear* [2005] EWCA Civ 719 at paragraph 31, where Longmore LJ said:

> "... the mere fact that the English court refused a stay of English proceedings on the ground of forum non conveniens did not itself justify the grant of an injunction to restrain foreign proceedings. The doctrine of comity requires restraint since (a) another jurisdiction may take the view that the courts of that jurisdiction are an equally (or even more) appropriate forum than the English

> court and (b) any anti-suit injunction can be perceived as an, at least indirect, interference with such foreign court."

14. Then, in paragraph 20 of their skeleton, the defendants drew attention to what Lord Brandon said in *South Carolina v Assurantie NV* [1986] 1 AC 26 25 at 41D:

> "It is difficult, and would probably be unwise, to seek to define the expression 'unconscionable conduct' in anything like an exhaustive manner. In my opinion, however, it includes, at any rate, conduct which is oppressive or vexatious or which interferes with the due process of the court."

15. It is primarily in this sense (interference with the due process of the court), as I understand it, that the claimant argues that an anti-suit injunction in China would be unconscionable.

16. It is not in dispute between the parties that parallel proceedings can and do sometimes happen and that while this gives rise to the risk of inconsistent decisions, that is also something which can and does happen. It bears emphasis that an anti-suit injunction to restrain *enforcement* of a foreign decision in the context I have just identified of the possibility of parallel proceedings is something that the English court will be very slow to do and be very cautious about. The defendants identified that principle in their skeleton at paragraphs 23-24, by reference primarily to *ED & F Man v Haryanto (No. 2)* [1991] 1 Lloyd's Rep. 161. As I understand it, Mr. Maclean accepted this principle.

17. Anti-suit injunctions in relation to SEP FRAND cases, in the form of anti-anti-suit injunctions, have been granted in previous cases by the English courts. Mr. Maclean, in his skeleton, identified certain specific instances at paragraphs 45-47, in particular litigation in *IPCom v Lenovo* and a decision of Mann J in *Philips v Xiaomi*. The fact that those orders have been made in the past should not be thought to make anti-suit injunctions the default or the rule. Quite clearly, they have to be justified on the facts of every individual case.

18. I move on to the principles applicable to *quia timet* relief, which is quite plainly the form of relief sought by the claimant on this application. Again, there is very little dispute about the principles. For present purposes, I think I can take them from the decision of Marcus Smith J in *Vastint v. Persons Unknown* [2018] EWHC 2456 (Ch). I refer, in particular, to paragraphs 29-31 as follows:

> "29. *Gee, Commercial Injunctions*, 6th ed (2016), para 2-035 similarly, suggests that the circumstances in which a quia timet injunction will be granted are relatively flexible:
>
> 'There is no fixed or "absolute" standard for measuring the degree of apprehension of a wrong which must be shown in order to justify quia timet relief. The graver the likely consequences, the more the court will be reluctant to consider the application as "premature". But there must be at least some real risk of an actionable wrong.'

30. However, in *Islington London Borough Council v Elliott* [2012] EWCA Civ 56; [2012] 7 EG 90, Patten LJ, with whom Longmore and Rafferty LJJ agreed, formulated an altogether more stringent test, at paras 29–31:

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

'30. A much-quoted formulation of this principle is set out in the judgment of Pearson J in *Fletcher v Bealey* (1884) 28 Ch D 688 at 698 where he first quotes from Mellish LJ in *Salvin v North Brancepeth Coal Company* (1874) LR 9 Ch App 705 and then adds his own comments that: "It is not correct to say, as a strict proposition of law, that, if the plaintiff has not sustained, or cannot prove that he has sustained, substantial damage, this court will give no relief; because, of course, if it could be proved that the plaintiff was certainly about to sustain very substantial damage by what the defendant was doing, and there was no doubt about it, this court would at once stop the defendant, and would not wait until the substantial damage had been sustained. But in nuisance of this particular kind, it is known by experience that unless substantial damage has actually been sustained, it is impossible to be certain that substantial damage ever will be sustained, and, therefore, with reference to this particular description of nuisance, it becomes practically correct to lay down the principle, that, unless substantial damage is proved to have been sustained, this court will not interfere. I do not think, therefore, that I shall be very far wrong if I lay it down that there are at least two necessary ingredients for a quia timet action. There must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended damage will, if it comes, be very substantial. I should almost say it must be proved that it will be irreparable, because, if the danger is not proved to be so imminent that no one can doubt that, if the remedy is delayed, the damage will be suffered, I think it must be shewn that, if the damage does occur at any time, it will come

in such a way and under such circumstances that it will be impossible for the plaintiff to protect himself against it if relief is denied to him in a quia timet action.'

31. More recently in *Lloyd v Symonds* [1998] EWCA Civ 511 (a case involving nuisance caused by noise) Chadwick LJ said: "On the basis of the judge's finding that the previous nuisance had ceased at the end of May 1996 the injunction which he granted on 7 January 1997 was quia timet. It was an injunction granted, not to restrain anything that the defendants were doing (then or at the commencement of the proceedings on 20 June 1996), but to restrain something which (as the plaintiff alleged) they were threatening or intending to do. Such an injunction should not, ordinarily, be granted unless the plaintiff can show a strong probability that, unless restrained, the defendant will do something which will cause the plaintiff irreparable harm — that is to say, harm which, if it occurs, cannot be reversed or restrained by an immediate interlocutory injunction and cannot be adequately compensated by an award for damages. There will be cases in which the court can be satisfied that, if the defendant does what he is threatening to do, there is so strong a probability of an actionable nuisance that it is proper to restrain the act in advance rather than leave the plaintiff to seek an immediate injunction once the nuisance has commenced. 'Preventing justice excelleth punishing justice' — see *Graigola Merthyr Co Ltd v Swansea Corpn* [1928] Ch 235, 242. But, short of that, the court ought not to interfere to restrain a threatened action in circumstances in which it is satisfied that it can do complete justice by appropriate orders made if and when the threat of nuisance materialises into actual nuisance (see *Attorney-General v Nottingham Corpn* [1904] 1 Ch 673, 677). ... In the present case, therefore, I am persuaded that the judge approached the question whether or not to grant a permanent injunction on the wrong basis. He should have asked himself whether there was a strong probability that, unless restrained by injunction, the defendants would act in breach of the Abatement Notice served on 22 April 1996. That notice itself prohibited the causing of a nuisance. Further he should have asked himself whether, if the defendants did act in contravention of that notice, the damage suffered by the plaintiff would be so grave and irreparable that, notwithstanding the grant of an immediate interlocutory injunction (at that stage) to restrain further occurrence of the acts complained of, a remedy in damages would be inadequate. Had the judge approached the question on that basis, I am satisfied that he could not have reached the conclusion that the grant of a permanent injunction quia timet was appropriate in the circumstances of this case."

31. From this, I derive the following propositions:

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

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

(3) When considering whether to grant a quia timet injunction, the court follows a two-stage test: (a) First, is there a strong probability that, unless restrained by injunction, the defendant will act in breach of the claimant's rights? (b) Secondly, if the defendant did an act in contravention of the claimant's rights, would the harm resulting be so grave and irreparable that, notwithstanding the grant of an immediate interlocutory injunction (at the time of *actual* infringement of the claimant's rights) to restrain further occurrence of the acts complained of, a remedy of damages would be inadequate?

(4) There will be multiple factors relevant to an assessment of each of these two stages, and there is some overlap between what is material to each. Beginning with the first stage – the strong possibility that there will be an infringement of the claimant's rights – and without seeking to be comprehensive, the following factors are relevant: (a) If the anticipated infringement of the claimant's rights is entirely anticipatory — as here — it will be relevant to ask what other steps the claimant might take to ensure that the infringement does not occur. Here, for example, Vastint has taken considerable steps to prevent trespass; and yet, still, the threat exists. (b) The attitude of the defendant or anticipated defendant in the case of an anticipated infringement is significant. As *Spry, Equitable Remedies*, 9th ed (2013) notes at p 393: 'One of the most important indications of the defendant's intentions is ordinarily found in his own statements and actions'. (c) Of course, where acts that may lead to an infringement have *already* been committed, it may be that the defendant's intentions are less significant than the natural and probable consequences of his or her act. (d) The time-frame between the application for relief and the threatened infringement may be

> relevant. The courts often use the language of imminence, meaning that the remedy sought must not be premature. (*Hooper v Rogers* [1975] Ch 43, 50).
>
> (5) Turning to the second stage, it is necessary to ask the counterfactual question: assuming no quia timet injunction, but an infringement of the claimant's rights, how effective will a more-or-less immediate interim injunction plus damages in due course be as a remedy for that infringement? Essentially, the question is how easily the harm of the infringement can be undone by an ex post rather than an ex ante intervention, but the following other factors are material: (a) The gravity of the anticipated harm. It seems to me that if some of the consequences of an infringement are potentially very serious and incapable of ex post remedy, albeit only one of many types of harm capable of occurring, the seriousness of these irremediable harms is a factor that must be borne in mind. (b) The distinction between mandatory and prohibitory injunctions."

Those paragraphs begin with a citation from Mr. Gee's book on commercial injunctions. There has been a further edition since, but that does not affect the position, which suggests that the circumstances in which a *quia timet* injunction will be granted are flexible.

19. I agree with this. It is clear from the decision of Marcus Smith J and the earlier cases that he cites, including *Islington Council v Elliot* and *Lloyd v Symonds* that assessment of the appropriateness of *quia timet* relief is a multifactorial test. The court is not just to assess as a percentage the likelihood of the defendant doing the act which is sought to be restrained, but must have regard to the other matters identified in those paragraphs.

20. That is of relevance here, because Philips relies on the facts, as it asserts them to be, that if the defendants had obtained an anti-suit injunction in China that would have been irreversible and terminal for these proceedings. I accept those submissions. None the less, whilst the likelihood of the defendant doing that which is sought to be restrained is not the only factor, it is clearly always going to be a very significant one and perhaps the most significant one in many cases. A central argument by the defendants on this application is that there is no likelihood of anti-suit relief being sought in the PRC.

21. Next, it is said by the defendants that when the court decides whether or not to grant anti-suit relief, it is not proceeding on the basis of *American Cyanamid*, because the decision it makes is a permanent one, or at least a final one. I accept that and I did not understand Mr. Maclean to dispute it, but an important nuance is that Mr. Maclean submits that what Mellor J was doing when he granted the *ex parte* order was dictated, or at least guided by *American Cyanamid*, because the decision that he was making was how to hold the ring until an *inter partes* return date, i.e. this hearing. I accept that submission on behalf of the claimant.

22. The last aspect of the legal principles that I have to consider is the obligation of full and frank disclosure on an *ex parte* application. There was no real dispute about this either. I consider that I can adequately get the applicable principles from the decision in *CEF*

Holdings v Mundey [2012] EWHC 1524 at paragraphs 34 to 35 summarising many other well-known decisions.

23. On the basis of those principles, I would say that a material breach of the obligation of full and frank disclosure usually leads to discharging a without notice order. The jurisdiction is a penal one, as Mr. Maclean accepted in the course of argument when I put it to him.

24. Mr. Maclean's skeleton contained the argument that the obligation is one of disclosure and not of full argument. If that had been meant to convey that there was no duty on an applicant to identify arguments that the respondent might make in due course, I would have rejected the submission on the basis of *Memory Corporation v Sudhu (No.2)* [2000] 1 WLR 1443 at 1454-5 in the judgment of Robert Walker LJ (as he then was), citing *Tate Access v Boswell* [1991] Ch. 512, but I do not think that was the real gist of Mr. Maclean's submissions in any event. What he was really saying was that there is an emphasis on the need to identify the crucial points and not every point.

25. Having identified the principles, I turn to consider the circumstances of the present case, and central to the arguments, and because of that centrality, the first point that I will consider, is whether there was and is a real threat by the defendants to seek anti-suit relief in the Chinese courts. A central part of the picture, quite plainly, in my view, is the *Sharp v Oppo* litigation, where in a similar situation to the present, as I have mentioned already, Oppo sought and obtained an anti-suit injunction in the PRC which completely ended German infringement proceedings as a result, to put it in a nutshell, of Sharp giving in under the pressure exerted by the Chinese order.

26. Following the end of that litigation, Oppo made some public statements about it. I heard very detailed arguments about what Oppo said. These turned on the translation of a press release, on some words not appearing in the original version of the press release and so on. I do not think I need to go into those arguments in the greatest detail. It is fair to say that there is some ambiguity, but my clear impression and my finding is that by what it said, Oppo was claiming a major litigation win based, in large measure, on the availability of global rate-setting in the People's Republic of China, but also, to a significant extent, on the obtaining of anti-suit relief. Certainly, there was nothing, in my view, adequate to restrict its statements to its having obtained the ability to have global rate-setting done in China.

27. Taken in isolation, the *Sharp v Oppo* history would, in my view, found a good inference that Oppo would be willing to do the same again if it was strategically advantageous to it in litigation and it might very well be strategically advantageous to it in the present case. Coupled with the irreversibility and the seriousness of obtaining anti-suit relief in China, that would found an adequate, imminent threat.

28. However, matters do not end there and *Sharp v Oppo* cannot be seen in isolation, in my view. There are two major other matters which have to be considered and which the defendants relied on heavily. The first was the existence of proceedings where Oppo did not seek anti-suit injunctive relief in China and, secondly, statements that have been made in evidence for the purposes of this application.

29. I first of all consider other proceedings where Oppo, and/or other of the defendants, it does not matter precisely, were involved. Situations prior to the decision in *Sharp v*

Oppo that the PRC courts could undertake global rate-setting are, in my view, of much less relevance, because it was evidently less likely that anti-suit relief would be sought or obtained to allow the PRC courts to go ahead with global rate-setting. This is not an entirely clear picture, because in fact anti-suit relief was granted in some proceedings concerning Huawei in August 2020, but none the less, I think proceedings prior to the decision in *Sharp v Oppo* are of extremely limited relevance.

30. However, there are two other bits of Oppo litigation since, which are potentially more important, one involving Nokia, which started, as I understand it, in July 2021, and litigation involving InterDigital started in December 2021.

31. In Nokia, on the evidence before me, the German court did grant an anti-anti-suit injunction, but I do not have any great detail about it. In the UK proceedings, there was a full jurisdiction hearing and there was no indication in the course of that of any likelihood of an anti-suit injunction being sought by Oppo. I note, in passing, that the decision of His Honour Judge Hacon, who sat as a High Court judge in that hearing, is before the Court of Appeal this week.

32. I know, also, rather little about the InterDigital proceedings. I will need to refer further to this in relation to the arguments on full and frank disclosure, because the defendants say that Mellor J should have been told more than he was.

33. That is the situation with other litigation and I turn to the evidence of the defendants to which I have referred and the key evidence is paragraphs 15 and 16 of the witness statement of Mr. Brown, of Hogan Lovells who stated as follows:

> "15. I am informed by Jack Peng, that, although the First Respondent did seek an anti-suit injunction against Sharp, it has not sought anti-suit relief in any court since and neither it nor any associated company has any intention to do so again; i.e. they have no intention to apply to the courts for anti-suit style relief so as to preclude parallel patent infringement lawsuits linked to FRAND of the sort being pursued by Philips in this case (or, indeed, other claimants such as Nokia and InterDigital in England - see further below). My firm drew this lack of intention to the attention of Philips in a letter of 30 May 2022 (pages 1-2 of E**x**hibit PJB-1).
>
> 16. Again, Mr Peng informs me that since the Sharp case if the First Respondent (or associated companies) considers that the more appropriate forum to hear proceedings initially commenced in another jurisdiction is the PRC courts (where its business is predominantly based), its practice is to approach that issue by challenging the jurisdiction of any non-PRC court using the processes and procedures of that non-PRC court. This is evident from the Mitsubishi, Nokia and InterDigital claims which have been issued against some of the Respondents in this jurisdiction more recently (on 23 April 2019, 1 July 2021 and 20 December 2021 respectively)."

34. My assessment of this evidence is that it is very carefully worded and somewhat conclusory. It leaves room for the defendants to change their mind and to seek anti-suit relief, especially if its favoured approach, as described in paragraph 16, of challenging jurisdiction in these courts, is unsuccessful. It does not say that the defendants have concluded that the type of relief sought in *Sharp v Oppo* is inappropriate or that it never ought to be sought and it could be simply that that sort of relief was thought by the defendants to be less appropriate in the particular circumstances of the previous litigation to which I have referred, but might, in due course, be regarded by the defendants as a useful thing to do in this litigation.

35. A more minor part of the picture is that the undertaking offered allows the defendants to act on seven days' notice. Apart from the fact that that is obviously a period that is impractically short, it leaves the question: why is that reservation made? What is it that the defendants are reserving the right to do specifically? In the course of correspondence, which has been, I have to say, a little bit testy on both sides, the defendants have not clarified this.

36. Overall, I consider that despite the submissions of the defendants, there is a sufficiently imminent – and I use the word "imminent" in the sense of the authorities to which I have already referred – risk that the defendants would seek anti-suit relief in the courts of the People's Republic of China.

37. The second extremely significant aspect of the argument before me has related to the use of the word "interfere" in Mellor J's order. The defendants object to it on the basis that it is generally unclear, would or might hinder the commencement or prosecution of a parallel rate-setting case in the courts of the PRC and would or might hinder enforcement of a judgment from those courts, in due course, resulting from such a parallel action.

38. The last of these, in my view, is the most serious, by which I mean hindering enforcement of a Chinese final judgment setting a rate. Until the hearing before me, Philips was maintaining that the injunctive relief sought should restrict the defendants' ability to enforce a final Chinese judgment, even in China, and that appears from Bristows' letter of 8th June 2022. This is no longer maintained. At the hearing before me, Mr. Maclean accepted, as I understood it, that enforcement of a Chinese judgment ought not to be restrained by any order I make. I have already referred to the principles applicable above in relation to anti-enforcement injunctions, which I think really made the concession made by the claimant at the hearing before me inevitable.

39. Furthermore, I accept Mr. Akka's submission on behalf of the defendants that enforcement of a final Chinese judgment setting a rate is in no sense imminent. It is far off in the future. By "imminent" there, I mean close in time.

40. The procedural impact of Chinese parallel proceedings also has to be considered. It is possible that case management decisions quite properly made by the Chinese court could have a negative knock-on effect on proceedings here, not on the ability of the High Court to proceed at all, but just at a practical level. That can be case-managed by the courts here, if it occurs, but I think there is a risk that the word "interfere" would or could penalise the defendants taking procedural arguments in China and for that reason, too, the word "interfere" is not an appropriate one to include in any order that I make.

41. These are specific contextual reasons why "interfere" is not appropriate to include in any order I make, but apart from these context-specific points, I would not have concluded that "interfere" was inherently ambiguous to an extent which made it inappropriate to include in the injunction. I rather suspect that it is used in injunctions in other fields of the law and it is certainly used to characterise wrongful conduct, as in the context, perhaps, of interfering with the quiet enjoyment of property. To that extent I would agree with the observation of Falk J in argument when the injunction granted by Mellor J was continued.

42. I note, for completeness, that "interfere" was also included in an anti-suit injunction granted by Mann J in *Philips v Xiaomi*, but as I understand it, he was not considering the arguments that I have been, so although his decision perhaps stands for the proposition or at least supports it, there is nothing wrong with the verb in general, in the present context, because of the two points that I have mentioned, "interfere" ought not to be included in any order that I make.

43. I next consider the undertakings offered by the defendants. These are contractual undertakings, as I have mentioned above, and the reason given in correspondence for giving contractual undertakings as opposed to undertakings to the court was a concern on the part of the defendants, which they have been scrupulous in stressing on many occasions, that they do not wish to risk submitting to the court's jurisdiction or to prejudice their application to set aside service out.

44. I do not accept that is an adequate reason for limiting undertakings offered to the contractual form and, in my view, if they were otherwise appropriate, I could direct or decide that the offering of undertakings to the court would not prejudice the defendants' position on jurisdiction.

45. The contractual undertakings offered would also have the problem that if there was a need to enforce them, the claimant would have to bring proceedings in contract with the procedural friction and potentially delay that that would involve. I am not of the view that the offering of contractual undertakings is appropriate.

46. There is a presentational reason, which I acknowledge, for preferring undertakings to an injunction, since no commercial organisation likes it to be said that it has been injuncted. Since the defendants have engaged, albeit in my view imperfectly, with the situation that has arisen by offering undertakings, I would, in principle, if I decided to make an order or grant relief, to accept undertakings to the court from the defendants instead of an injunction. On that point specifically, as I understood it, Mr. Maclean did not really disagree. His concern was much more that any undertaking given should not be merely a contractual one.

47. I acknowledge that sometimes the court does accept contractual undertakings and, in Mr. Akka's skeleton at footnote 13, reference was made to the case of *Caterpillar* as follows:

> "A contractual undertaking was considered to be satisfactory in ***Caterpillar Logistics Services (UK) Ltd v de Crean*** [2012] EWCA Civ 156, [2012] 3 All ER 129 (Stanley Burnton LJ), [67]."

I appreciate that is sometimes done, but that was a very different situation and it is by no means a general rule

48. The next substantive aspect of the argument before me concerns the fact that the relief granted by Mellor J on the claimant's application was worldwide. It is said by the defendants that nowhere else but the courts of the PRC makes available both global rate-setting and anti-suit injunctions of the kind made in *Sharp v Oppo* to restrain infringement proceedings in other jurisdictions.

49. I am not sure that is absolutely true, since my understanding is that the courts of the United States have done both, where the parties agreed to global rate-setting, but that is not this case and the general proposition put forward by the defendants, in my view, is correct and that would lead me to conclude that there is no threat sufficient to found *quia timet* relief in relation to anywhere other than the PRC.

50. I turn, against that background, to consider full and frank disclosure. I have done it in this order because it seemed to me that the central arguments were those I have touched on already and they give me a context to explain the full and frank disclosure arguments, but I also appreciate that in a logical sense, one might well put full and frank disclosure first, since if the applicant had been in breach of that obligation, there is a leaning by the court to set the order aside altogether and not renew it. My reasons for dealing with it last are simply that doing so allows me to provide the factual context, rather than because I think it is unimportant. On the contrary, it is very important, as the authorities that I have cited explain.

51. I have already said that the aspects where it said that full and frank disclosure was not made were identified in paragraph 15 of Mr. Akka's skeleton. The first is that the injunction was sought *quia timet*, but that Mellor J was not referred to the relevant legal threshold requirements. In my view, there is nothing to this point. What was being sought before Mellor J was an order to hold the ring until the return date and the judge was clearly aware of this and it is spelled out in paragraphs 23 and 41 of the skeleton that Mr. Maclean put in for the purpose of the application to Mellor J.

52. Second, it is said that there was a lack of full and frank disclosure in relation to what is said by the defendants to be significant material demonstrating that Oppo had no intention to apply for anti-suit relief in the PRC or elsewhere. Obviously, the statements in Mr. Brown's evidence were not before the judge. What was before him was details of the previous cases to which I have referred.

53. I ought to mention, at this stage, that the claimant's evidence before Mellor J referred to situations where companies other than defendants had obtained anti-suit injunctions in the PRC. The defendants submit that that is irrelevant. I do not agree and I think it is of some relevance. A relatively common remedy might more readily be sought than a truly rare one, but I do agree with the defendants that it is not central to what was up for consideration before Mellor J. On the other hand, nor was it presented as such.

54. The real gist of the complaint is that there was limited, and the defendants say inadequate, reference in the evidence before Mellor J and in the argument to the cases where the defendants had not sought anti-suit relief in China.

55. Mr. Boon's first witness statement covered litigation involving, as the counterparties to the defendants, Mitsubishi, Philips in India and the Nokia UK proceedings, and made the point about circumstances changing when the courts of the PRC became willing and able to do global rate-setting.

56. Mr. Boon's evidence did not, however, mention the proceedings involving InterDigital. The defendants focus on this, among other things, and on the fact that there was no explicit reference in Mr. Boon's first witness statement to the November 2021 hearing before His Honour Judge Hacon in the Nokia proceedings, which I have already mentioned.

57. Dealing with the second point first, I do not see why Mr. Boon needed to deal with all the stages in *Nokia v Oppo*. There was a perfectly adequate basis for Mellor J to appreciate that they were typical set FRAND proceedings and that there had been no application for an anti-suit injunction in China. Mr. Boon recognised, but did not overplay, in my view, the German anti-suit injunction in *Nokia v Oppo*.

58. In relation to the InterDigital proceedings, Mr. Boon does not, in his third witness statement, say that he was not aware of it. I am satisfied that he probably could have found out the proceedings existed, if he did not already know, but the question then arises: What is the importance of that? All he would have said was that there was a lack of detail available to him.

59. In my view, the "crucial" point, to use the word from the authorities that I referred to earlier on, was that while Oppo had sought anti-suit injunctive relief on one occasion, a very important one in a parallel situation, it had not done so on a variety of other occasions. Mr. Boon, in my view, made this more than adequately clear, and the criticisms made, if I accepted them, would, I think, impose a standard of perfection on a party in the claimant's position which is beyond what the law requires on the authorities I have touched on.

60. Relatedly, it is said that Mr. Boon overstated Oppo's press release at the end of the Sharp litigation. I do not think he did. I have dealt with this earlier and I have concluded that Oppo's position was that it had obtained a strategic litigation triumph, including, in part, the anti-suit relief.

61. Next, it is said that it was not drawn to Mellor J's attention that the injunction was intended to apply worldwide. I find (and accept) the defendants' submission that this was not drawn to Mellor J's attention explicitly. That much is obvious. I have to say that I think it was a little bit sloppy of Philips to seek worldwide relief without explicitly seeking to support it. However, the complaint and that point makes the whole issue sound a lot more important than it practically is. The whole issue is (and was before Mellor J) about China, and Mellor J was aware of that. I do not think he was remotely misled that there might be some other territory that might realistically grant an anti-suit injunction. Although it would clearly have been better if this point had been addressed, I do not think it is consequential in any way and, to be fair, Mr. Akka did not press this point very hard at all

62. The next issue is the meaning of the word "interfere". I have already rejected the inclusion of any such language in any order I was to make, but that does not mean that there was a lack of full and frank disclosure. The defendants argue that Philips has

either (1) sought, since Mellor J's order to expand the relief sought, to make it anti-enforcement relief as well as anti-suit relief, or (2) failed to make full and frank disclosure because they did not tell Mellor J he was granting anti-enforcement relief. In other words, the allegation of lack of full and frank disclosure is a contingent one. I have held that former is the case and, therefore, the full and frank disclosure point does not arise in this respect.

63. For completeness, I should say that I was referred to the evidence of a Ms. Liao of the defendants' Chinese lawyers, which was put in before His Honour Judge Hacon in the Nokia litigation. Her evidence described the sanctions the Chinese court can impose on a party which disobeys one of its orders. In my view it is clear that Ms. Liao was speaking in the context of a final rate-setting order and not an anti-suit order directed at the initiation of foreign proceedings. However, the sanctions she described are general and could be applied in the latter context as well.

64. His Honour Judge Hacon considered the evidence in the Nokia case in his judgment and concluded that such sanctions were theoretically available, but that that did not mean that they would, in practice, be used or were likely to be used. I do not think I need to revisit that. All I draw from Ms. Liao's evidence is that a Chinese court has powers to compel obedience to its orders, as does this court, and I think that although I have covered it because the parties argued it, the evidence of Ms. Liao is neither here nor there on the issues for me.

65. My conclusion is that there was no material lack of full and frank disclosure.

66. I conclude, for reasons that I have given already, that there is a sufficient and sufficiently imminent threat for the grant of *quia timet* relief. The seeking of an anti-suit injunction in China would, in my view, be vexatious and oppressive and unconscionable in the sense identified above, given that it would prevent a UK court from determining infringement of a UK patent, i.e. for essentially the same reasons as Mellor J gave.

67. I record that I do not think, in truth, the defendants contended that that was not so. Their central point, which I have dealt with and rejected on the facts, was that there was absolutely no threat of doing it. In principle, and subject to the limitations that I have indicated, I am willing to grant relief.

68. I should say that I have also considered and reflected on the requirements of comity. The relief I propose to grant does not restrict, even indirectly via the defendants, the courts of the PRC from conducting global rate-setting if the defendants initiate proceedings and if the courts of the PRC consider it appropriate. The relief I have granted simply defends the English court's proceedings in relation to infringement of a national patent, as was explained in the *Unwired Planet* decision of the Supreme Court to be the nature of these SEP/FRAND cases.

69. It is out of a deference to the requirements of comity, in part, that I have restricted the relief sought to avoid the limitation on any Chinese rate-setting proceedings that do take place by removing the word "interfere" and also to make clear that enforcement of a Chinese judgment rate-setting, if one eventually emerges, is not affected.

70. I will therefore grant relief as sought, but with the removal of the word "interfere" and with an appropriate change to delete "foreign" and insert "in the People's Republic of China". I repeat what I have already said, that although that is the scope of relief that I think is appropriate, in the circumstances of the case, I am willing to accept undertakings to the court from the defendants instead of granting an injunction, making clear that this does not prejudice their position on jurisdiction, if the defendants still prefer that course.

71. I will say that I do not consider that it is necessary to include in any relief a specific express permission for a rate-setting claim in the People's Republic of China, if the defendants bring one. I think attempting to word the carve-out would only cause confusion. For reasons I have explained, it is my view that the words used, once "interfere" is deleted, do not prevent or restrict the bringing of such an action and my judgment spells this out as well.

72. Those are my conclusions.

(For continuation of proceedings: please see separate transcript)

73. I have to deal with two consequential matters. The first is permission to appeal. Mr. Akka seeks permission to appeal on the basis of the sufficient/imminent threat issue. I refuse permission to appeal because I accepted that the applicable legal principles were the very ones argued for by Mr. Akka and my assessment of how to apply those principles on the facts of this case is a multi-factorial one and/or within my discretion and not appropriate for the consideration of the Court of Appeal. I refuse permission to appeal and the defendants will need to ask the Court of Appeal for that, if they consider it appropriate.

74. The second issue is costs. I remind myself, first of all, that the overriding point under CPR part 44 is that costs should follow the event. Mr. Akka submits that it is central to my decision that I have rejected the "interfere" wording. It is quite difficult, in the circumstances of this case, to characterise whether that was the event or not or merely a sub-issue and Mr. Maclean, for the claimant, argues that the event was really the granting or withholding of relief at all.

75. Further complicating the analysis is the fact that, of course, the original application was *ex parte* and without notice, for reasons which I think it follows from my judgment were appropriate, but that did mean that the defendants did not have the opportunity to engage and try to negotiate suitable undertakings until later on, which they did in correspondence, in circumstances identified in my main judgment.

76. There were deficiencies in the undertakings offered, as explained in my judgment, and it is fair to say that the defendants did not remedy those, for example, by offering an undertaking to the court instead. It is also fair to say that the nature of the correspondence which I have characterised in my judgment as being a little bit testy on both sides, did not really facilitate the parties in getting to a final agreement.

77. I would say that I think if it had not been for the fact that this had been an *ex parte* application, albeit for reasons that were appropriate, and this had come before the court *inter partes* on the first occasion, it is quite likely that with some knocking together of heads, the result that I have reached would have resulted by agreement, but that did not

happen and I have to try to reach a fair result on costs in the messy situation which I have described.

78. Doing the best I can, I think I ought to characterise what has happened as a result of my judgment as two events. One important event is that I have granted relief in the form either of an injunction or an undertaking to the court, which was resisted right until the end by the defendants, on the basis of sticking to their contractual undertakings and on the basis of arguing the full and frank disclosure issues.

79. On the other hand, the point about "interfere" became extremely important. It was very fully flagged-up by the defendants in correspondence. As identified in my main judgment, Bristows stuck to the line that the relief sought should interfere with the initiation and/or enforcement of Chinese rate-setting and I have concluded that that was not defensible on the authorities.

80. It may be slightly unorthodox to regard there as having been two events, but I think that reflects the true reality. A great deal of effort, clearly, on the defendants' side, went into the "interfere" point, and I think their concern was legitimate and substantive.

81. I am unable to attribute, numerically, costs to these two events. I suspect that the defendants have spent much more on "interfere" than the claimant has, and I suspect that the claimant has spent much more on the question of whether there should be relief at all than the defendants. I do not have any costs budgets to guide me on this, let alone costs budgets breaking things down by issue.

82. In this unusual situation, I reach the conclusion that the two events that I have identified broadly set each other off and I am not going to make any order as to costs as a result. I am satisfied that I am doing justice to the "costs follow the event" principle, because there are two events, and my concluding that they net off against each other is somewhat rough justice in the absence of figures, but standing back I am satisfied that it is entirely just in overall terms.

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A Court of Appeal

Barking and Dagenham London Borough Council and others *v* Persons Unknown and others

[2022] EWCA Civ 13

B 2021 Nov 30; Dec 1, 2;
2022 Jan 13

Sir Geoffrey Vos MR, Lewison, Elisabeth Laing LJJ

Injunction — Final — Persons unknown — Local authorities obtaining final injunctions against persons unknown to restrain unauthorised encampments on land — Judge calling in injunctions for reconsideration in light of subsequent C *legal developments — Whether court having power to grant final injunctions against persons unknown — Whether procedure adopted by judge appropriate — Whether limits on court's power to grant injunctions against world — Senior Courts Act 1981 (c 54), s 37[1] — Town and Country Planning Act 1990 (c 8), s 187B[2]*

In claims brought under CPR Pt 8, a number of local authorities obtained a series D of injunctions which were aimed at the gypsy and traveller community and targeted unauthorised encampment on land. All of the injunctions were against "persons unknown" although most also included varying numbers of named defendants. In some cases only interim injunctions were granted and in others final injunctions were also made. A judge took the view that a series of subsequent decisions of the Supreme Court and Court of Appeal had changed the law relating to injunctions against persons unknown, with the consequence that many of the injunctions might need to E be discharged. Accordingly, with the concurrence of the President of the Queen's Bench Division and the judge in charge of the Queen's Bench Civil List, he made an order effectively calling in the final injunctions for reconsideration. Following a hearing the judge discharged some of the injunctions, holding that the court could not grant final injunctions that prevented persons who were unknown and unidentified at the date of the order from occupying and trespassing on local authority land, because final injunctions could only be made against parties who had been identified and had F had an opportunity to contest the final injunction sought.

On appeal by some of the local authorities—

Held, allowing the appeals, that section 37 of the Senior Courts Act 1981, which was a broad provision, gave the court power to grant a final injunction that bound individuals who were not parties to the proceedings at the date when the injunction was granted; that, in particular, there was no difference in jurisdictional terms between an interim and a final injunction, particularly in the context of those granted G against persons unknown; that, rather, where an injunction was granted, whether on an interim or a final basis, the court retained the right to supervise and enforce that injunction, including bringing before the court parties violating the injunction who thereby made themselves parties to the proceedings, which were not at an end until the injunction had been discharged; that, therefore, the court had power under section 37 of the 1981 Act to grant a final injunction that prevented persons who were unknown and unidentified at the date of the injunction from occupying and trespassing on local H authority land; that it followed that the judge had been wrong to hold that the court could not grant a local authority's application for a final injunction against unauthorised encampment that prevented newcomers from occupying and trespassing

[1] Senior Courts Act 1981, s 37: see post, para 72.
[2] Town and Country Planning Act 1990, s 187B: see post, para 114.

on the land; and that, accordingly, the judge's orders discharging the final injunctions obtained by the local authorities would be set aside (post, paras 7, 71–77, 81–82, 86, 89, 91–93, 98–99, 101, 125, 126).

Young v Bristol Aeroplane Co Ltd [1944] KB 718, CA, *South Cambridgeshire District Council v Gammell* [2006] 1 WLR 658, CA and *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100, CA applied.

Canada Goose UK Retail Ltd v Persons Unknown [2020] 1 WLR 2802, CA not applied.

Cameron v Hussain [2019] 1 WLR 1471, SC(E) and *Venables v News Group Newspapers Ltd* [2001] Fam 430 considered.

Per curiam. (i) The procedure adopted by the judge was unorthodox and highly unusual in so far as it sought to call in final orders of the court for revision in the light of subsequent legal developments. The circumstances which will justify varying or revoking a final order under CPR r 3.1(7) will be very rare given the importance of finality. However no harm has been done in that the parties did not object to the judge's procedure at the time and it has enabled a comprehensive review of the law applicable in an important field. In any event, most of the orders provided for review or gave permission to apply (post, paras 7, 110–112, 125, 126).

Terry v BCS Corporate Acceptances Ltd [2018] EWCA Civ 2422, CA applied.

(ii) Section 37 of the 1981 Act and section 187B of the Town and Country Planning Act 1990 impose the same procedural limitations on applications for injunctions against persons unknown. In either case, the applicant must describe any persons unknown in the claim form by reference to photographs, things belonging to them or any other evidence, and that description must be sufficiently clear to enable persons unknown to be served with the proceedings, whilst acknowledging that the court retains the power in appropriate cases to dispense with service or to permit service by an alternative method or at an alternative place. CPR PD 8A, para 20 seems to have been drafted with the objective of providing, so far as possible, procedural coherence and consistency rather than separate procedures for different kinds of cases (post, paras 7, 117, 125, 126).

(iii) The court cannot and should not limit in advance the types of injunction that might in future cases be held appropriate to be made against the world under section 37 of the 1981 Act. It is extremely undesirable for the court to lay down limitations on the scope of as broad and important a statutory provision as section 37, which might tie the hands of a future court in types of case that cannot now be predicted. Injunctions against the world have been granted to restrain the publication of information which would put a person at risk of serious injury or death, to prevent unauthorised encampment and to prohibit the tortious actions of protesters. No further limitations are appropriate since although such cases are exceptional, other categories may in future be shown to be proportionate and justified (post, paras 7, 72, 119–121, 125, 126).

(iv) Each member of the gypsy and traveller community has a right under article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms to pursue a traditional nomadic lifestyle. Accordingly, when a member of that community makes themselves party to an unauthorised encampment injunction they have the opportunity to apply to the court to set aside the injunction praying in aid that right. Then the court can test whether the injunction interferes with that person's article 8 rights, the extent of that interference and whether the injunction is proportionate, balancing their article 8 rights against the public interest. It is incorrect to say that the gypsy and traveller community has article 8 rights, since Convention rights are individual. Nonetheless, local authorities should engage in a process of dialogue and communication with travelling communities and should respect their culture, traditions and practices. Persons unknown injunctions against unauthorised encampments should be limited in time, perhaps to one year at a time before a review (post, paras 105–107, 125, 126).

(v) This area of law and practice has been bedevilled by the use of Latin tags. That usage is particularly inappropriate in an area where it is important that members of the public can understand the courts' decisions. Plain language should be used in place of Latin (post, paras 8, 125, 126).

Decision of Nicklin J [2021] EWHC 1201 (QB) reversed.

The following cases are referred to in the judgment of Sir Geoffrey Vos MR:

Attorney General v Newspaper Publishing plc [1988] Ch 333; [1987] 3 WLR 942; [1987] 3 All ER 276, CA

Attorney General v Times Newspapers Ltd [1992] 1 AC 191; [1991] 2 WLR 994; [1991] 2 All ER 398, HL(E)

Barton v Wright Hassall LLP [2018] UKSC 12; [2018] 1 WLR 1119; [2018] 3 All ER 487, SC(E)

Birmingham City Council v Afsar [2019] EWHC 3217 (QB); [2020] 4 WLR 168; [2020] 3 All ER 756

Bloomsbury Publishing Group Ltd v News Group Newspapers Ltd [2003] EWHC 1205 (Ch); [2003] 1 WLR 1633; [2003] 3 All ER 736

Bromley London Borough Council v Persons Unknown [2020] EWCA Civ 12; [2020] PTSR 1043; [2020] 4 All ER 114, CA

Burris v Azadani [1995] 1 WLR 1372; [1995] 4 All ER 802, CA

Cameron v Hussain [2019] UKSC 6; [2019] 1 WLR 1471; [2019] 3 All ER 1, SC(E)

Canada Goose UK Retail Ltd v Persons Unknown [2019] EWHC 2459 (QB); [2020] 1 WLR 417; [2020] EWCA Civ 303; [2020] 1 WLR 2802; [2020] 4 All ER 575, CA

Canary Wharf Investments Ltd v Brewer [2018] EWHC 1760 (QB)

Chapman v United Kingdom (Application No 27238/95) (2001) 33 EHRR 18, ECtHR (GC)

Chelsea FC plc v Brewer [2018] EWHC 1424 (Ch)

Cuadrilla Bowland Ltd v Persons Unknown [2020] EWCA Civ 9; [2020] 4 WLR 29, CA

Davis v Tonbridge and Malling Borough Council [2004] EWCA Civ 194; The Times, 5 March 2004, CA

Dresser UK Ltd v Falcongate Freight Management Ltd (The Duke of Yare) [1992] QB 502; [1992] 2 WLR 319; [1992] 2 All ER 450, CA

Enfield London Borough Council v Persons Unknown [2020] EWHC 2717 (QB)

Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator Site [2003] EWHC 1738 (Ch); [2004] Env LR 9

Hubbard v Pitt [1976] QB 142; [1975] 3 WLR 201; [1975] ICR 308; [1975] 3 All ER 1, CA

Ineos Upstream Ltd v Persons Unknown [2017] EWHC 2945 (Ch); [2019] EWCA Civ 515; [2019] 4 WLR 100; [2019] 4 All ER 699, CA

Jacobson v Frachon (1927) 138 LT 386, CA

Manchester City Council v Pinnock [2010] UKSC 45; [2011] 2 AC 104; [2010] 3 WLR 1441; [2011] PTSR 61; [2011] 1 All ER 285, SC(E)

Mid-Bedfordshire District Council v Brown [2004] EWCA Civ 1709; [2005] 1 WLR 1460, CA

Secretary of State for the Environment, Food and Rural Affairs v Meier [2009] UKSC 11; [2009] 1 WLR 2780; [2010] PTSR 321; [2010] 1 All ER 855, SC(E)

South Bucks District Council v Porter [2003] UKHL 26; [2003] 2 AC 558; [2003] 2 WLR 1547; [2003] 3 All ER 1, HL(E)

South Cambridgeshire District Council v Gammell [2005] EWCA Civ 1429; [2006] 1 WLR 658, CA

South Cambridgeshire District Council v Persons Unknown [2004] EWCA Civ 1280; [2004] 4 PLR 88, CA

Speedier Logistics Co Ltd v Aardvark Digital Ltd [2012] EWHC 2776 (Comm)

Starmark Enterprises Ltd v CPL Distribution Ltd [2001] EWCA Civ 1252; [2002] Ch 306; [2002] 2 WLR 1009; [2002] 4 All ER 264, CA

Terry v BCS Corporate Acceptances Ltd [2018] EWCA Civ 2422, CA
Vastint Leeds BV v Persons Unknown [2018] EWHC 2456 (Ch); [2019] 4 WLR 2
Venables v News Group Newspapers Ltd [2001] Fam 430; [2001] 2 WLR 1038; [2001] 1 All ER 908
Young v Bristol Aeroplane Co Ltd [1944] KB 718; [1944] 2 All ER 293, CA

The following additional cases were cited in argument:

Attorney General v Harris [1961] 1 QB 74; [1960] 3 WLR 532; [1960] 3 All ER 207, CA
Bank of Scotland plc (formerly Governor and Company of the Bank of Scotland) v Pereira (Practice Note) [2011] EWCA Civ 241; [2011] 1 WLR 2391; [2011] 3 All ER 392, CA
Birmingham City Council v Sharif [2020] EWCA Civ 1488; [2021] 1 WLR 685; [2021] 3 All ER 176, CA
Bromsgrove District Council v Carthy (1975) 30 P & CR 34, DC
Cartier International AG v British Sky Broadcasting Ltd [2016] EWCA Civ 658; [2017] Bus LR 1; [2017] 1 All ER 700, CA
Claimants in the Royal Mail Group Litigation v Royal Mail Group Ltd [2021] EWCA Civ 1173, CA
Crédit Agricole Corporate and Investment Bank v Persons Having Interest in Goods Held by the Claimant [2021] EWHC 1679 (Ch); [2021] 1 WLR 3834; [2022] 1 All ER 83
Fourie v Le Roux [2007] UKHL 1; [2007] 1 WLR 320; [2007] Bus LR 925; [2007] 1 All ER 1087, HL(E)
Iveson v Harris (1802) 7 Ves 251
Marengo v Daily Sketch and Sunday Graphic Ltd [1948] 1 All ER 406
Newbury District Council v Secretary of State for the Environment [1978] 1 WLR 1241; [1979] 1 All ER 243, CA
OPQ v BJM [2011] EWHC 1059 (QB); [2011] EMLR 23
Persons formerly known as Winch, In re [2021] EWHC 1328 (QB); [2021] EMLR 20, DC
Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment [1985] AC 132; [1984] 3 WLR 32; [1984] 2 All ER 358, HL(E)
R (Youngsam) v Parole Board [2019] EWCA Civ 229; [2020] QB 387; [2019] 3 WLR 33; [2019] 3 All ER 954, CA
Rickards v Rickards [1990] Fam 194; [1989] 3 WLR 748; [1989] 3 All ER 193, CA
Roult v North West Strategic Health Authority [2009] EWCA Civ 444; [2010] 1 WLR 487, CA
Serious Organised Crime Agency v O'Docherty [2013] EWCA Civ 518; [2013] CP Rep 35, CA
Test Valley Investments Ltd v Tanner (1963) 15 P & CR 279, DC
University of Essex v Djemal [1980] 1 WLR 1301; [1980] 2 All ER 742, CA
Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd) [2013] UKSC 46; [2014] AC 160; [2013] 3 WLR 299; [2013] 4 All ER 715, SC(E)
X (formerly Bell) v O'Brien [2003] EWHC 1101 (QB); [2003] EMLR 37

The following additional cases, although not cited, were referred to in the skeleton arguments:

Akerman v Richmond upon Thames London Borough Council [2017] EWHC 84 (Admin); [2017] PTSR 351, DC
Ashford Borough Council v Cork [2021] EWHC 476 (QB)
Attorney General v Premier Line Ltd [1932] 1 Ch 303
Attorney General v Punch Ltd [2002] UKHL 50; [2003] 1 AC 1046; [2003] 2 WLR 49; [2003] 1 All ER 289, HL(E)

Basingstoke and Deane Borough Council v Eastwood [2018] EWHC 179 (QB)
Basingstoke and Deane Borough Council v Thompson [2018] EWHC 11 (QB)
Bensaid v United Kingdom (Application No 44599/98) (2001) 33 EHRR 10, ECtHR
Birmingham City Council v Shafi [2008] EWCA Civ 1186; [2009] 1 WLR 1961; [2009] PTSR 503; [2009] 3 All ER 127, CA
British Broadcasting Corpn, In re [2009] UKHL 34; [2010] 1 AC 145; [2009] 3 WLR 142; [2010] 1 All ER 235, HL(E)
Broadmoor Special Hospital Authority v Robinson [2000] QB 775; [2000] 1 WLR 1590; [2000] 2 All ER 727, CA
Cadder v HM Advocate [2010] UKSC 43; [2010] 1 WLR 2601, SC(Sc)
Carr v News Group Newspapers Ltd [2005] EWHC 971 (QB)
Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334; [1993] 2 WLR 262; [1993] 1 All ER 664, HL(E)
City of London Corpn v Bovis Construction Ltd [1992] 3 All ER 697, CA
City of London Corpn v Persons Unknown [2021] EWHC 1378 (QB)
City of London Corpn v Samede [2012] EWCA Civ 160; [2012] PTSR 1624; [2012] 2 All ER 1039, CA
D v Persons Unknown [2021] EWHC 157 (QB)
Guardian News and Media Ltd, In re [2010] UKSC 1; [2010] 2 AC 697; [2010] 2 WLR 325; [2010] 2 All ER 799, SC(E)
Hall v Beckenham Corpn [1949] 1 KB 716; [1949] 1 All ER 423
Hatton v United Kingdom (Application No 36022/97) (2003) 37 EHRR 28, ECtHR (GC)
Independent Publishing Co Ltd v Attorney General of Trinidad and Tobago [2004] UKPC 26; [2005] 1 AC 190; [2004] 3 WLR 611; [2005] 1 All ER 499, PC
Lambeth Overseers v London County Council [1897] AC 625, HL(E)
Local Authority, A v W [2005] EWHC 1564 (Fam); [2006] 1 FLR 1
López Ostra v Spain (Application No 16798/90) (1994) 20 EHRR 277, ECtHR
Masri v Consolidated Contractors International (UK) Ltd (No 2) [2008] EWCA Civ 303; [2009] QB 450; [2009] 2 WLR 621; [2009] Bus LR 168; [2008] 2 All ER (Comm) 1099, CA
Mayor of London (on behalf of the Greater London Authority) v Hall [2010] EWCA Civ 817; [2011] 1 WLR 504, CA
Mileva v Bulgaria (Application Nos 43449/02 and 21475/04) (2010) 61 EHRR 41, ECtHR
Moreno Gómez v Spain (Application No 4143/02) (2004) 41 EHRR 40, ECtHR
R v Hatton [2005] EWCA Crim 2951; [2006] 1 Cr App R 16, CA
RXG v Ministry of Justice [2019] EWHC 2026 (QB); [2020] QB 703; [2020] 2 WLR 635, DC
S (A Child) (Identification: Restrictions on Publication), In re [2004] UKHL 47; [2005] 1 AC 593; [2004] 3 WLR 1129; [2004] 4 All ER 683, HL(E)
Scott v Scott [1913] AC 417, HL(E)
Siskina (Owners of cargo lately laden on board) v Distos Cia Naviera SA (The Siskina) [1979] AC 210; [1977] 3 WLR 818; [1977] 3 All ER 803, HL(E)
Stoke-on-Trent City Council v B & Q (Retail) Ltd [1984] Ch 1; [1983] 3 WLR 78; [1983] 2 All ER 787, CA
Tewkesbury Borough Council v Smith [2016] EWHC 1883 (QB)
UK Oil and Gas Investments plc v Persons Unknown [2018] EWHC 2252 (Ch); [2019] JPL 161
Von Hannover v Germany (Application No 59320/00) (2004) 40 EHRR 1, ECtHR
Wellesley v Duke of Beaufort (1827) 2 Russ 1
Wokingham Borough Council v Scott [2017] EWHC 294 (QB)
X (A Minor) (Wardship: Injunction), In re [1984] 1 WLR 1422; [1985] 1 All ER 53
X and Y v The Netherlands (Application No 8978/80) (1985) 8 EHRR 235, ECtHR

APPEALS from Nicklin J

Using the modified CPR Pt 8 procedure provided by CPR r 65.43 Walsall Metropolitan Borough Council applied for a traveller injunction against Brenda Bridges and 17 other named defendants and persons unknown. An interim injunction without notice was granted on 23 September 2016. A final injunction was granted on 21 October 2016 until further order of the court.

By a claim form issued on 10 March 2017 Barking and Dagenham London Borough Council applied for a borough-wide injunction against Tommy Stokes and 63 other named defendants and persons unknown, being members of the traveller community who had unlawfully encamped within the borough of Barking and Dagenham. On 29 March 2017 an interim injunction was granted prohibiting trespass on land by named defendants and persons unknown ("a traveller injunction"). On 30 October 2017 a final injunction was granted until further order against 23 named defendants and persons unknown, containing permission to apply to the defendants or "anyone notified of this order" to vary or discharge the order on 72 hours' written notice.

By a claim form issued on 21 December 2017 Rochdale Metropolitan Borough Council applied for a traveller injunction against Shane Heron and 88 other named defendants and persons unknown, being members of the travelling community who had unlawfully encamped within the borough of Rochdale. An interim injunction was granted on 9 February 2018 with a power of arrest.

By a claim form issued on 26 April 2018 Redbridge London Borough Council applied for an injunction against Martin Stokes and 99 other named defendants and persons unknown forming or intending to form unauthorised encampments in the London Borough of Redbridge. On 4 June 2018 an interim injunction was granted against 70 named defendants and persons unknown with a power of arrest. A final injunction was granted on 12 November 2018 until 21 November 2021 against 69 named defendants and persons unknown. The final injunction contained a permission to apply to the defendants "and anyone notified of this order" to vary or discharge on 72 hours' written notice.

By a claim form issued on 28 June 2018 Wolverhampton City Council applied for a traveller injunction against persons unknown. An injunction contra mundum with a power of arrest was granted on 2 October 2018. The order provided for a review hearing to take place on the first available date after 1 October 2019. A further injunction order was granted on 5 December 2019, contra mundum and with a power of arrest. The order provided for a further review hearing to take place on 20 July 2020, following which an order was made dated 29 July 2020 continuing the injunction.

By a claim form issued on 2 July 2018 Basingstoke and Deane Borough Council and Hampshire County Council applied for a traveller injunction against Henry Loveridge and 114 other named defendants and persons unknown, the owner and/or occupiers of land at various addresses set out in a schedule attached to the claim form. On 30 July 2018 an interim injunction was granted with a power of arrest. A final injunction was granted on 26 April 2019 until 3 April 2024 or further order against 115 named defendants and persons unknown with a power of arrest. The final

injunction contained a permission to apply to the defendants or "anyone notified of this order" to vary or discharge on 72 hours' written notice.

By a claim form issued on 22 February 2019 Nuneaton and Bedworth Borough Council and Warwickshire County Council applied for a traveller injunction against Thomas Corcoran and 52 other named defendants and persons unknown forming unauthorised encampments within the borough of Nuneaton and Bedworth. On 19 March 2019 an interim injunction was granted with a power of arrest.

By a claim form issued on 6 March 2019 Richmond upon Thames London Borough Council applied for a traveller injunction against persons unknown possessing or occupying land and persons unknown depositing waste or flytipping on land. By an order of 10 May 2019 the final hearing of the claim was adjourned until the decision of the Court of Appeal in *Bromley London Borough Council v Persons Unknown* [2020] PTSR 1043. An interim injunction without notice was granted on 14 August 2018 and continued on 24 August 2018. Both contained powers of arrest.

By a claim form issued on 29 March 2019 Hillingdon London Borough Council applied for an injunction against persons unknown occupying land and persons unknown depositing waste or flytipping on land. On 12 June 2019 an interim traveller injunction without notice was granted with a power of arrest. By an order of 17 June 2019 the final hearing of the claim was adjourned until the decision of the Court of Appeal in the case of *Bromley London Borough Council v Persons Unknown* [2020] PTSR 1043.

By a claim form issued on 31 July 2019 Havering London Borough Council applied for a traveller injunction against William Stokes and 104 other named defendants and persons unknown. On 11 September 2019 an interim traveller injunction was granted pending the final injunction hearing with a power of arrest.

By a claim form issued on 31 July 2019 Thurrock Council applied for a traveller injunction against Martin Stokes and 106 other named defendants and persons unknown. An interim injunction was granted on 3 September 2019 with a power of arrest.

By a claim form issued on 18 June 2020 Test Valley Borough Council applied for a traveller injunction against Albert Bowers and 88 other named defendants and persons unknown forming unauthorised encampments within the borough of Test Valley. An interim injunction was granted on 28 July 2020 with a power of arrest.

On 16 October 2020 Nicklin J made an order of his own motion, but with the concurrence of Dame Victoria Sharp P and Stewart J (the judge in charge of the Queen's Bench Civil List), ordering each claimant in 38 sets of proceedings, including those detailed above, to complete a questionnaire in the form set out in a schedule to the order with a view to identifying those local authorities with existing "traveller injunctions" who wished to maintain such injunctions (possibly with modification), and those who wished to discontinue their claims and/or discharge the current traveller injunction granted in their favour. On 27 and 28 January 2021, as a consequence of local authorities having completed the questionnaire, Nicklin J conducted a hearing in which he considered the injunctions granted in those proceedings. By a judgment handed down on 12 May 2021 Nicklin J [2021] EWHC 1201 (QB) held that the court could not grant final injunctions which prevented

persons who were unknown and unidentified at the date of the order from occupying and trespassing on local authority land. By an order dated 24 May 2021 Nicklin J discharged certain of the injunctions that the local authorities had obtained.

By appellants' notices filed on or about 7 June 2021 and with permission of the judge the local authorities detailed above appealed on the following grounds. (1) The judge had erred in law in finding that the court had jurisdiction to vary and/or discharge final injunction orders where no application had been made by a person affected by those final orders to vary or discharge them. (2) The judge had been wrong to hold that the injunction order bound only the parties to the proceedings at the date of the order and did not bind "newcomers" where the injunction was granted pursuant to section 187B of the Town and Country Planning Act 1990, which provided a statutory power to grant an injunction against persons unknown at the interim and final stages. The judge had failed to take into account the court's entitlement to grant an injunction that bound newcomers pursuant to section 222 of the Local Government Act 1972, in particular where the local authorities' enforcement powers pursuant to sections 77 and 78 of the Criminal Justice and Public Order Act 1994 had proved to be ineffective. (3) The judge had been wrong to hold that final injunction orders sought and obtained pursuant to section 222 of the 1972 Act could not, in principle, bind newcomers who were not party to the litigation. Such injunctions could be granted on a contra mundum basis where there was evidence of widespread impact on the article 8 rights of the inhabitants of the local authority area. One of the claimants in the court below, Basildon Borough Council, did not appeal but was given permission to intervene by written submissions only. The following bodies were granted permission to intervene: London Gypsies and Travellers; Friends, Families and Travellers; Derbyshire Gypsy Liaison Group; High Speed Two (HS2) Ltd; and Basildon Borough Council.

The facts are stated in the judgment of Sir Geoffrey Vos MR, post, paras 9–17.

Nigel Giffin QC and *Simon Birks* (instructed by *Walsall Metropolitan Borough Council Legal Services*) for Walsall.

There are no unavoidable conceptual objections to the grant of final injunctions against newcomers, that is, persons who have not been identified as defendants prior to the date on which the final order is made, whether identification is by name or by some sufficient other description. The key principle is procedural fairness. If ways can be found of granting a final injunction while complying with procedural fairness there is no principled objection to doing so. The final injunction must provide a means by which a newcomer may ask the court to vary or discharge the injunction to comply with procedural fairness. In the present case Nicklin J accepted that interim injunctions can be granted against persons unknown, including newcomers who become parties after the order has been made by doing an act which breaches the injunction and by being served with the injunction or by a form of alternative service. If a person can become a party to the proceedings after the order has been made at the interim stage, that should apply equally

A at the final stage. A final injunction is final only in the sense that it is not a staging post on the way to a later trial. It is *not* final in the sense of being set in stone. A person who breaches the injunction and as a consequence becomes a party to it is entitled to apply for the injunction to be varied or discharged.

A rigid distinction between interim and final injunctions would be
B false and lead to undesirable consequences: see the flytipping case of *Enfield London Borough Council v Persons Unknown* [2020] EWHC 2717 (QB) at [41]–[44], per Nicklin J. In the case of a rolling occupation, where one group of persons move on to land for a time and are immediately replaced by another group, which makes it difficult to identify those involved, a rigid approach to identifying defendants does not address the practical problems faced by local authorities. Nicklin J's approach is unworkable
C and impractical with wide ramifications. That approach has considerably truncated the use of interim as well as final injunctions, which is inconsistent with authority: cf *Bromley London Borough Council v Persons Unknown* [2020] PTSR 1043, *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100 and *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] 1 WLR 2780. It is consistent with interim injunction cases
D where by the time of the application for a final injunction the defendants have all been identified (see *South Cambridgeshire District Council v Gammell* [2006] 1 WLR 658), but in the case of the present injunctions it is not possible to identify all the defendants. Similar problems can arise in different areas of the law including protest cases, copyright infringement and nuisance, for example, car cruising and illegal raves. Section 37 of the Senior Courts Act 1981, which confers jurisdiction to grant a final injunction
E binding non-parties, is flexible and adapts to new circumstances: see *Cartier International AG v British Sky Broadcasting Ltd* [2017] Bus LR 1 and *Fourie v Le Roux* [2007] 1 WLR 320. Apart from exceptional cases against the world, the use of section 37 should not be excluded on an a priori basis and regardless of the particular facts unless a reason of principle compels such a conclusion.

F What is important is not the difference between interim and final injunctions but between injunctions and other remedies such as damages. The latter are backward-looking, compensating for past wrongs, and are by their nature once and for all and binary. It inevitably follows that the person sought to be held liable must already be a party at the time of trial. Any opportunity to be heard must be extended to that party by trial at the latest:
G see *Cameron v Hussain* [2019] 1 WLR 1471. *Cameron* is distinguishable from the present cases on the basis that it concerned the remedy of damages, not an injunction. The fundamental principle that a person could not be made subject to the jurisdiction of the court without having such notice of the proceedings as would enable him to be heard was applicable to the issues considered in that case, but the issues arising in the present cases, including rolling occupation and newcomers, were not before the Supreme Court in
H *Cameron*. It follows that it was not part of the ratio of *Cameron* that a final injunction could not be granted against persons unknown.

Where a form of relief by its nature operates only for the future, there is no reason of principle why it should not operate against newcomers who come to the proceedings in the future. By contrast with monetary remedies,

injunctions are forward-looking, and even if final rather than interim they can be varied for the future. It is not the case that proof of historic wrongdoing by person A is intrinsically incapable of justifying a quia timet (precautionary) injunction against person B. The material upon which the court is invited to act when granting an injunction will necessarily relate to what has been said and done in the past. But inferences can be drawn from such material about what is likely to happen in the future in the absence of an injunction. That is the whole basis of precautionary claims, although naturally a court will be cautious in drawing such inferences and the relief to be granted on the basis of them: see *Ineos* [2019] 4 WLR 100 and *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29. The fact that evidence relates to the past behaviour of A does not mean that it is incapable of founding an inference about the likely future behaviour of B, but rather goes to the weight to be placed on the evidence in that respect. The past conduct of a substantial number of persons, significant numbers of whom it has not been possible to identify, is in appropriate circumstances capable of founding inferences as to the likely future behaviour of persons who have not yet been identified.

A final injunction should be formulated so as to catch only behaviour which is unlawful and ought to be restrained. There are obvious problems, other than on a purely temporary basis, when seeking to control an activity not intrinsically unlawful, such as protest on the public highway, the lawfulness of which will depend critically on what a given protester actually does, and which very directly engages rights under the Convention for the Protection of Human Rights and Fundamental Freedoms, particularly articles 10 and 11: see *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802. Those problems are compounded, and probably insuperable, if the injunction is directed to an unlimited class of potential future newcomers. That is one reason why the attempt to obtain a final injunction in *Canada Goose* failed. The ratio in *Canada Goose* does not lay down a universal principle of general application but applies only to protester injunctions: see para 89. If that were not the case, *Ineos* and *Canada Goose*, both Court of Appeal decisions, would be inconsistent. Any apparently broader statements made by the Court of Appeal in *Canada Goose* cannot be considered to be part of the binding ratio: see *R (Youngsam) v Parole Board* [2020] QB 387, para 48, per Leggatt LJ. [Reference was made to *Bank of Scotland plc (formerly Governor and Company of the Bank of Scotland) v Pereira (Practice Note)* [2011] 1 WLR 2391.]

In considering whether to grant an injunction against the unauthorised occupation and use of land, Convention rights are relevant, but the starting point has to be whether the activity being restrained would have an impact upon the Convention rights of the persons living or working in the relevant part of the claimant local authority's area, particularly article 8 rights. Whether the unauthorised occupation and use of land would in fact violate Convention rights, and whether a contra mundum (against the world) injunction would represent a proportionate means of protecting those rights, would of course depend entirely upon the particular facts. But that possibility cannot be ruled out as a matter of principle.

A *Mark Anderson QC* and *Michelle Caney* (instructed by *Wolverhampton City Council Legal Services* for Wolverhampton.

The injunction granted to the local authority in this case is a precautionary injunction against persons unknown in order to prevent future encampments following frequent disruptive incursions on local authority land. There being no named defendants, the injunction defines defendants as persons who, in the future, would set up encampments. Defendants would come into being only if and when they committed the prohibited acts. It is therefore a precautionary injunction and provisional because it will only take effect against an individual who acts inconsistently with it, is identified and brought before the court. There being no return date or expression that it will only last until trial, it is not interim but neither is it a final order which can only be challenged on appeal. Since it is not a final order in the usual sense, it is not inconsistent with the fundamental principle 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: see *Cameron v Hussain* [2019] 1 WLR 1471, para 17, *Iveson v Harris* (1802) 7 Ves 251, 256–257, *Marengo v Daily Sketch and Sunday Graphic Ltd* [1948] 1 All ER 406 and *Attorney General v Times Newspapers Ltd* ("*Spycatcher*") [1992] 1 AC 191, 224A–B per Lord Oliver of Aylmerton. The injunction includes provision for an application to discharge the order. That is consistent with a proportionate approach permitting a person who becomes a defendant by breaching the injunction of which he or she has knowledge to apply for the injunction to be varied or discharged: see *South Cambridgeshire District Council v Gammell* [2006] 1 WLR 658. A full assessment of all the circumstances, as in *South Bucks District Council v Porter* [2003] 2 AC 558, is not required: see *Gammell*, para 27. None of the courts in *Iveson*, *Marengo* or *Spycatcher* defined the circumstances in which a court can grant a precautionary injunction or explored the limits of such orders.

There is no fundamental distinction between interim and final injunctions. An injunction is always against the world to the extent that it binds newcomers as defined in *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802, para 82(1). Thus, the distinction between "persons unknown" and "against the world" injunctions, when analysing their effectiveness against newcomers, is conceptually unimportant. A problem arises if it is possible to obtain injunctive relief against the whole world provided the claimant can name one defendant, but not possible to obtain any relief at all if there is no named defendant to a claim. That is close to the distinction which can lead to the anomalous position identified in *Bloomsbury Publishing Group plc v News Group Newspapers Ltd* [2003] 1 WLR 1633, para 11, per Sir Andrew Morritt V-C, and approved in *Cameron v Hussain* [2019] 1 WLR 1471, para 10. An injunction will not be granted against a defendant who cannot be served unless an alternative method of service is available. An alternative method is provided in the injunction granted to the local authority in the present case. All the injunctions in this appeal should have been reviewed by the court which granted them in accordance with the guidance in the test case of *Bromley London Borough Council v Persons Unknown* [2020] PTSR 1043, para 106.

The injunction considered by the Court of Appeal in *Canada Goose* [2020] 1 WLR 2802 (a protester case) was a very different type of injunction in very

different circumstances from those of the present case, where there is a binary distinction between whether individuals are trespassing on land and whether they are not. Trespass is always unlawful. *Canada Goose* is distinguishable from the present circumstances. The injunction sought in *Canada Goose* was not precautionary. It was not intended to preserve the status quo, but to put a final end to an existing activity. It was an application for summary judgment, so had nothing provisional about it. The claimant was a private entity seeking to use remedies in private litigation to prevent what it perceived as public disorder to protect its own commercial interests. The Court of Appeal found that in a protester case the fundamental principle necessitates that a final injunction must only prohibit a person from activity in which that person has already participated. The circumstances are very different in the case of unauthorised encampments on local authority land. The guidance in *Bromley* [2020] PTSR 1043 should stand and be applied. There was no need for Nicklin J to revisit it in these cases.

Ranjit Bhose QC and *Steven Woolf* (instructed by *South London Legal Partnership*) for Hillingdon and Richmond upon Thames.

The difficulty of obtaining an injunction against traveller encampments with a floating population of travellers has long been recognised: see *Test Valley Investments Ltd v Tanner* (1963) 15 P & CR 279, 280, per Lord Parker CJ and *Bromsgrove District Council v Carthy* (1975) 30 P & CR 34, per Lord Widgery CJ. Some local authorities have had a long-standing problem with deliberate breaches of planning law. There has long been a strong perception that the planning system is being systematically abused and needed strengthening: see *South Bucks District Council v Porter* [2003] 2 AC 558, para 45, per Lord Steyn. This is the context in which section 187B of the Town and Country Planning Act 1990 was enacted and the mischief at which it was directed.

Section 187B of the 1990 Act envisages that a final injunction may be granted against newcomers. Being expressed in wide terms, section 187B confers locus on a local planning authority to apply to the court for injunctive relief (including quia timet relief) where it is "necessary or expedient" within subsection (1), but it also confers power on the court itself to grant such relief by subsection (2). It differs, in this respect, from cases in which an authority brings proceedings under section 222 of the Local Government Act 1972, where the court's power to grant injunctive relief comes from section 37 of the Senior Courts Act 1981. This does not, however, warrant a different approach by the courts. The language of section 187B does not differ from the criteria in section 37 of the 1981 Act. The grant of the injunction must be just and convenient. If this test is not satisfied it is not appropriate to grant an injunction: see *South Bucks District Council*, para 98, per Lord Scott of Foscote. The focus of planning and planning control is what is done to the land. By whom it is done is secondary.

Section 187B enables the local authority to apply to the court for an injunction to prohibit an express breach or to prevent an apprehended breach. Alone in this area of law section 187B is prospective. It can be invoked as a stand alone provision where a breach is threatened, whether or not the local authority is proposing to exercise other powers. Section 187B itself confers power on the court to grant relief against a person whose identity is unknown, this being implicit in the terms of subsection (3), which

A contemplate that rules of court may make provision for an injunction to be issued against such a person. The power to grant relief comes from subsection (2) and this power cannot be widened or narrowed by rules of court that happen to be made (or not made) or the terms of those rules: see *Cameron v Hussain* [2019] 1 WLR 1471, para 12, per Lord Sumption, who stated that Practice Directions are no more than guidance on matters of
B practice, they have no statutory force and they cannot alter the general law. Section 187B is broad and open-textured. It contains nothing to exclude final relief against newcomers. [Reference was made to *In re Persons formerly known as Winch* [2021] EMLR 20.]

The dispute in these cases is not between individuals but between the public and a small part of the public not complying with the law. The law
C should protect the public. To counter this contemporary problem an injunction is only effective if it can be enforced against newcomers. *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 did not establish a principle of universal application to civil litigation that a final injunction against "persons unknown" binds only those who are parties to the proceedings at the date the final order is granted. It is distinguishable on a number of bases. First, it was a protest case and applies to applications for
D injunctive relief in protester cases: see paras 11, 82, 89, and 93. Second, like *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100 and *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29, a private entity was seeking to protect its commercial interests against interference with its private law rights. The claimants, by contrast, are public authorities: their claims do not concern interference with their private law rights (save in
E relation to trespass), but with their public law rights. Third, nothing in *Canada Goose* calls into question or qualifies the Court of Appeal's judgment handed down the previous month in *Bromley London Borough Council v Persons Unknown* [2020] PTSR 1043, which was an appeal by a local authority against a refusal to grant final injunctions relating to residential encampment. In *Bromley* the only judgment was given by
F Coulson LJ, who was then part of the constitution which delivered the judgment of the court in *Canada Goose*. Fourth, para 44 of *Birmingham City Council v Sharif* [2021] 1 WLR 685 suggests that the Court of Appeal does not regard *Canada Goose* as necessarily applying to injunctions under section 222 of the Local Government Act 1972, since there the court referred to the possibility of further consideration in any future case about injunctions to restrain anti-social behaviour by persons unknown.

G The claimant local authorities are seeking to enforce public rights for the benefit of the public in their areas. Three public wrongs are of particular concern: (i) breaches of planning law; (ii) public nuisance, for example, fly-tipping; and (iii) trespass. Local authorities as owners of land for public use such as parks and the green belt, can enforce planning law in the public interest. Where local authorities are seeking to enforce public rights on
H behalf of all members of the public, as in the case of the Attorney General, the court should seek to assist them: see *Attorney General v Harris* [1961] 1 QB 74 and paras 42 and 44 of *Sharif*, a case of street cruising in the local authority's area which the Court of Appeal concluded could only effectively be restrained by an injunction. The prospect of obtaining effective relief in

the instant cases is vanishingly small if no final injunction can be granted against persons unknown.

Caroline Bolton and *Natalie Pratt* (instructed by *Sharpe Pritchard LLP* and *Legal Services, Barking and Dagenham London Borough Council*) for Barking and Dagenham, Havering, Redbridge, Basingstoke and Deane, Hampshire, Nuneaton and Bedworth, Warwickshire, Rochdale, Test Valley and Thurrock.

The general principle that applies to final orders is that once judgment has been given on a claim, the cause of action is extinguished and the sole right is on the judgment: see *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd)* [2014] AC 160, para 17, per Lord Sumption JSC. Nicklin J in the present case wrongly found that the court could disturb the final orders granted to the local authorities of its own initiative and/or pursuant to CPR r 3.1(7) and was wrong to find that, where a final order binds persons unknown (as these final orders do), a change in the law could justify the disturbing of an order where no application has been made by a non-party to vary or discharge the order. There having been, in the cases of these local authorities, no application by a non-party to vary or set aside the final orders, nor any application under the liberty to apply provisions, the court was wrong to re-open, case manage and ultimately discharge the final orders in so far as they relate to persons unknown.

In *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 the court held that final injunctions bind only parties to the proceedings. But that case is distinguishable because it concerned private law rights and common law causes of action in nuisance and trespass, whereas the present cases concern public law rights and statutory rights, including section 187B of the Town and Country Planning Act 1990 and section 222 of the Local Government Act 1972. Nicklin J was wrong to say that *Canada Goose* was of universal application. *Canada Goose* concerned a claim against protesters, where no statutory power had been provided to grant an injunction against persons unknown, by contrast with the present cases in which section 187B of the 1990 Act provides a statutory power to grant an injunction against persons unknown at the interim and final stages. The 1990 Act, like its predecessors, provides that matters of planning control and judgment are exclusively for local planning authorities and the Secretary of State: see *South Bucks District Council v Porter* [2003] 2 AC 558, para 30, per Lord Bingham of Cornhill and *Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment* [1985] AC 132, 141, per Lord Scarman. Private law is not to be applied to planning law unless it is necessary for interpretation: see *Newbury District Council v Secretary of State for the Environment* [1978] 1 WLR 1241, 1248–1249. The court has power under section 187B to grant a final injunction against persons unknown: see *South Cambridgeshire District Council v Persons Unknown* [2004] 4 PLR 88, para 8 and *South Cambridgeshire District Council v Gammell* [2006] 1 WLR 658, para 2. A final order is binding on persons unknown who were not defendants at the time the order was made but became defendants when they knowingly acted in breach of it: see *Mid-Bedfordshire District Council v Brown* [2005] 1 WLR 1460, paras 23–28.

Canada Goose applied *Cameron v Hussain* [2019] 1 WLR 1471, para 9, in which the Supreme Court confirmed the general rule that proceedings may

not be commenced against unnamed parties but referred to statutory exceptions to the principle, in particular, the specific power in section 187B of the 1990 Act to restrain actual or apprehended breaches of planning control, with the provision of rules of court for injunctions against persons unknown pursuant to section 187B(3). Thus, the principle in *Canada Goose* is subject to statutory exceptions, in particular section 187B of the 1990 Act.

Bromley London Borough Council v Persons Unknown [2020] PTSR 1043 concerned a final injunction to restrain unauthorised occupation of land owned or managed by the local authority and/or the disposal of waste or fly-tipping on the land, which was refused by the judge on proportionality grounds. Whereas *Bromley* was a case on public law rights, it is distinguishable from *Canada Goose* which was concerned with private law rights. There is no suggestion in the text of section 187B, or CPR PD 8A, paras 20.1–20.10, that orders against persons unknown are intended to be limited to the interim injunction stage in proceedings. The appropriate approach is to ask whether a case is sufficiently serious to justify granting a final injunction. Service on persons unknown under this type of order is alternative service: see *South Cambridgeshire District Council v Gammell* [2006] 1 WLR 658. It is important for orders made against persons unknown to include a liberty to apply clause, so that when a person becomes a defendant by knowingly breaching the injunction, that defendant can apply to vary or discharge the order. A non-party who is affected by an order may also apply to set it aside under CPR r 40.9.

A court has no power to case manage a final injunction without a specific provision for review in the liberty to apply clause. Nicklin J had no power in the present case to call in final orders, review them and discharge them. He was wrong to take the view that *Bromley* and *Canada Goose* obliged him to call in the final orders that he did: see *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] AC 160. That approach offends against the principle of finality and runs contrary to the case law on final orders. [Reference was made to *Crédit Agricole Corporate and Investment Bank v Persons Having Interest in Goods Held by the Claimant* [2021] 1 WLR 3834.]

Although CPR r 3.1(7) provides a wide power for a court making an order to vary or revoke the order, there are limitations on that power. First, rule 3.1(7) cannot constitute a power in a judge to hear an appeal from himself in respect of a final order. Second, whilst the powers at rule 3.1(7) may be invoked in respect of procedural or interlocutory orders where either (i) the order was made on the basis of erroneous information or (ii) a subsequent event destroys the basis on which the order was made, it does not follow that where either (i) or (ii) are established a party may return to a trial judge and ask him to re-open a final order disposing of the case, whether in whole or in part. Third, to extend the power at rule 3.1(7) would undermine the principle of finality: see *Roult v North West Strategic Health Authority* [2010] 1 WLR 487. This limitation on the power at rule 3.1(7) is well established, and recognised in subsequent Court of Appeal authority: see *Terry v BCS Corporate Acceptances Ltd* [2018] EWCA Civ 2422 at [75]. Neither of the first two limitations are present in the cases before the court. The retrospective effect of a judicial decision is excluded from cases already finally determined: see *Serious Organised Crime Agency v O'Docherty* [2013] CP Rep 35, para 20.

Richard Kimblin QC (instructed by *Eversheds Sutherland (International) LLP*) for High Speed Two (HS2) Ltd, intervening. A

The approach of Nicklin J in the present case has produced an unworkable outcome which makes it impossible to obtain relief other than on a short-term basis on an interim application, and after trial relief is available only against named defendants which is of no use against a fluctuating body of unknown persons. HS2 has experienced significant B disruption from protesters against the national high-speed rail link it is building, and has obtained interim injunctions against persons unknown at three different places. Each injunction is temporally and geographically limited. Following the judgment below the protection they give is short-lived and after trial, non-existent against persons unknown.

HS2 has two central concerns: (i) whether the temporal limits on interim injunctions are short (see *Canada Goose UK Retail Ltd v Persons Unknown* C [2020] 1 WLR 2802, paras 92–93); and (ii) whether a newcomer, that is, a person who was not a party to the litigation at the date on which the final order was granted, is bound by it. On *Canada Goose* the submissions of Mr Giffin and Mr Anderson are adopted.

First, assessing a claim for relief against persons unknown is a highly fact-specific exercise. Second, classification of injunctions by reference to D the type of claimant or defendant is unhelpful because the range of rights to be balanced is not consistent from case to case. Third, it is properly open to a court to grant interim relief which will last for a long time. Fourth, an injunction against persons unknown, made by final order, may bind newcomers if one or more representative persons have been served with the claim form or the order is plainly contra mundum. Such an order is E appropriate where the extent of its effects are necessarily limited and do not, in reality, affect everybody. *Canada Goose* was not intended to have the wide and restrictive effect which Nicklin J understood it to have; alternatively, paras 89–90 of *Canada Goose* should not be followed in that limited respect.

There is a wide range of factual circumstances in which claimants seek relief by injunction or order for possession: cf *Canada Goose*, *Bloomsbury* F *Publishing Group plc v News Group Newspapers Ltd* [2003] 1 WLR 1633, *Attorney General v Times Newspapers Ltd* ("*Spycatcher*") [1992] 1 AC 191, *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] 1 WLR 2780 and *Bromley London Borough Council v Persons Unknown* [2020] PTSR 1043. In all of these cases, the following differ greatly: (i) the number of people who might reasonably be thought to be G affected; (ii) the type and gravity of the anticipated harm; (iii) the length of time during which there was an issue to be addressed; (iv) the legal right to be protected, or the illegality to be prevented; and (v) the legal rights of potential defendants. HS2's circumstances illustrate why the fact-specific nature of the jurisdiction is so central to the legal issues which have to be solved in any particular case. HS2 seeks to keep possession of its land in H much the same way as local authorities do in respect of, for example, their amenity land. But the defendants would say that they are protesters, not trespassers, so the set of legal issues is quite different to those arising from local authority concerns which are prompted by traveller incursions. For that reason, it may be unhelpful to classify cases.

A The first and obvious solution to the problem of providing relief where the case calls for it but the defendants fluctuate, is to leave it to the judgment of the first instance judge to decide what interim relief is appropriate. As the circumstances and legal issues are so very variable, an overburden of principles and classifications is a hindrance to finding a just solution in a particular case. No claim should be allowed to go to sleep. Active B case management assists all parties and the court. But what constitutes appropriate case management will be highly variable and not susceptible to prescriptive guidance in cases which are looking to future events. Nicklin J overstated both the restriction on contra mundum orders and the effect of *Canada Goose* [2020] 1 WLR 2802, which is inconsistent with *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100. *Ineos* is to be preferred. In that case it was held that there is no conceptual or legal C prohibition on suing persons unknown who are not currently in existence but will come into existence when they commit the prohibited tort. It is accepted that any prohibitory order in respect of specified land should be conditional, which is the case in each of the three injunctions made in HS2's favour. The appropriate conditions will relate to the circumstances of the case and not to generalised prescription. What constitutes a just order is fact D specific. It is an assessment which is closely allied to any necessary consideration of proportionality, in that the court will take a view about the extent of land to be affected which will in turn affect who, in reality, is likely to be subject to the terms of the order. The quality of service is important. It is perfectly possible to effect alternative service which provides a fair opportunity to challenge an application for an order against persons unknown. In the light of *Burris v Azadani* [1995] 1 WLR 1372, 1380 the E Court of Appeal in *Canada Goose* held that the court may prohibit lawful conduct where there is no other proportionate means of protecting the claimant's rights. The court was adjusting its approach by reference to the outcome which it needed to achieve, that is, protecting rights. That position was anticipated in *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] 1 WLR 2780, paras 39–40, and is appropriate.

F *Tristan Jones* (instructed by *Attorney General*) as advocate to the court.

These appeals concern the conflict between, on the one hand, the desirability of the court aiding the prevention of persistent and harmful wrongdoing, and on the other hand, the principled and practical limits to the court's ability to criminalise conduct ex ante and ex parte. Those important issues have already been the subject of very extensive judicial consideration, G including by the Court of Appeal on several occasions over recent years. Once the authorities are properly understood and the rules of precedent properly applied, the answers to most of the claimants' arguments are clear.

There are two issues on the appeal. Issue 1, on which Barking and Dagenham and others in the same group seek permission to appeal, is whether the court has power, either generally under CPR r 3.1(7) or specifically on the terms of the order below, to case manage the proceedings H and/or to vary or discharge injunctions that have previously been granted by final order. Issue 2, on which all the claimants appeal, is whether the court has jurisdiction, and/or whether it is correct in principle, generally or in any relevant category of claim, to grant a claimant local authority final injunctive relief either against "persons unknown" who are not, by the

date of the hearing of the application for a final injunction, parties to the proceedings, and/or on a contra mundum basis. A

In relation to the procedural limb of the claimants' argument on issue 1, the court's power to vary or revoke final orders is recognised in several CPR provisions, including the general provision in CPR r 3.1(7), and the liberty to apply provisions in the injunctions themselves. The answer to the claimants' procedural point is CPR r 3.3(1), which provides that, except where a rule or some other enactment provides otherwise, the court may exercise its powers on an application or of its own initiative. The substantive question concerns the circumstances in which the court's power is properly to be exercised. The claimants rely on *Roult v North West Strategic Health Authority* [2010] 1 WLR 487, but that was inter partes litigation of limited interest in the present appeals. The better analogy would be with cases where a party failed to attend the final hearing and then applied to set aside judgment under CPR r 39.3(3), in which case the judgment may be set aside provided the requirements of rule 39.3(5) are met. A further analogy is with cases where a non-party makes an application under rule 40.9, on which the authorities establish that the court will take a flexible approach but in an appropriate case will reconsider the issues on the merits. The underlying principle is natural justice. How that applies to a particular case will depend on the circumstances. In general, a newcomer or prospective newcomer should be able to challenge an injunction on any grounds, including on the merits, without bringing the case within a category ordinarily applicable on the application of a party present at the original hearing. If the court makes an order ex parte with lasting effects against newcomers, then it has necessarily taken on a role with wider public consequences than ordinarily arise in private litigation. If the jurisdiction is exercised then it is right that the court should retain a flexible power to oversee and review its orders on an ongoing basis. There is, accordingly, no need to bring this case within one of the categories of cases recognised to apply in inter partes litigation: see *Roult*. In the present case Nicklin J found that the court had jurisdiction because the terms of the final injunctions expressly provided for the court's continuing jurisdiction, and in any event applied to newcomers who were not parties to the relevant proceedings when the order was granted. He was essentially right for the reasons he gave. B C D E F

The question of res judicata, raised by Wolverhampton, has some relevance to both issues 1 and 2. The claimant argues that an injunction against newcomers is necessarily an injunction contra mundum; that it follows that in such a case there is no res judicata; and that that is why such injunctions can be re-opened. Nicklin J adopted that argument at para 141 of his judgment in relation to issue 1, but the argument is wrong. The claimant is right to argue that an injunction against newcomers would in effect be (and could in principle only be) an injunction contra mundum. Essentially such an injunction would be in rem. But the claimant is wrong to suggest that orders in rem do not create a res judicata. Further, the claimant is wrong to assume that final decisions creating a res judicata cannot be set aside. The reason the court can set aside the injunctions in this case is not because they are a special kind of final relief which creates no res judicata, it is instead the result of the application of the normal procedural and substantive rules, namely CPR rr 39.3 (an application by a party), 40.9 (an application by a non-party) or 3.3(1) (the court's power to make an order of its own initiative). G H

A The parties agree that issue 2 contains two separate issues: (i) how Nicklin J understood the issue; and (ii) how he addressed it. That is the correct approach because there is a clear difference between making an unknown person a party to an injunction on a "persons unknown" basis, and, by contrast, obtaining an injunction against the entire world under the exceptional contra mundum jurisdiction. Nicklin J was right on the persons unknown issue in holding that
B the court could not grant final injunctions that prevented persons who were unknown and unidentified at the date of the order from occupying and trespassing on local authority land, for the reasons he gave. As regards the contra mundum injunctions issue, Nicklin J's conclusion will be correct in the very large majority of cases but it is possible that there could in future be a case in which the court might be compelled to grant a contra mundum injunction to safeguard local residents' article 8 rights.

C The difference between a persons unknown injunction and a contra mundum injunction starts from the principle that an injunction normally only operates in personam, which is to say in relation to persons over whom the court has jurisdiction because they have properly been made parties to the claim: see *Iveson v Harris* (1802) 7 Ves 251. Exceptions have been recognised where an injunction may operate contra mundum and bind
D non-parties, but only in exceptional and tightly defined circumstances, which may include (of particular significance) final injunctions where required by the Human Rights Act 1998. A separate question arises as to the circumstances in which a person whose identity is not known can be made a party to a claim. The answer, in broad terms, is that an unknown person can be made a party to a claim if they can be suitably described and given adequate notice to enable them to participate fairly in the action: see
E *Cameron v Hussain* [2019] 1 WLR 1471. It is helpful to distinguish between three categories of unknown persons: (a) existing identifiable unknown persons can be made parties to the claim and may thus be the subject of an injunction on normal principles; (b) existing unidentifiable unknown persons can be made subject to an interim injunction, the breach of which would make them an identifiable party to the claim within (a) above, but otherwise
F cannot be made a party to the claim; and (c) newcomers are subject to the same principles as existing unidentifiable unknown persons. In practical terms the claim form will list, as parties, "persons unknown", and a suitable description will need to be given for them to be adequately identified. In contrast, in a claim contra mundum it has been suggested that as there are no parties the claim form should simply leave the "defendant" box blank: see
G Nicklin J in *Persons formerly known as Winch* [2021] EMLR 20, para 31. One potential source of confusion is that the expression "persons unknown" is somewhat ambiguous: it is sometimes used to refer compendiously to persons unknown injunctions and contra mundum injunctions. The drafting of an injunction may also be unclear: it might be expressed as being against "persons unknown" even though it is in reality contra mundum.

H The four main categories of the claimants' argument with the answers to them are in summary as follows. (1) Some claimants argue that the persons unknown case law permits the making of final injunctions against newcomers. That is contrary to authority. A final persons unknown injunction cannot be made against newcomers. A court could only make a final injunction against newcomers if permitted under the contra mundum

jurisdiction, but that would be subject to the limits of that case law: see *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802, paras 89, 91 and 92. What is not permissible is to bypass that case law by relying on a new form of "final persons unknown injunction against newcomers" jurisdiction. (2) Some claimants argue that final injunctions against newcomers are specifically permitted under section 187B of the Town and Country Planning Act 1990. If that were possible at all, it would require there to be relevant rules of court, which there are not. (3) Some claimants base arguments on section 222 of the Local Government Act 1972, which gives the claimants standing to seek certain kinds of injunction but does not create any new kind of injunction. (4) Some claimants argue that a contra mundum injunction may be made to protect the article 8 rights of local residents. Nicklin J rejected that argument, holding that such an injunction could never be justified. This question requires a cautious approach. Nicklin J identified a range of compelling factors which tend to show that such injunctions would always be highly problematic, but those factors do not arise in the case law regarding confidentiality injunctions which is the foundation of the claimants' human rights arguments. Contrary to what the claimants say, one cannot simply transpose the approach adopted in the confidentiality context to this context. On the other hand, the Strasbourg authorities do establish that, as in the confidentiality context, there could in principle be a positive duty on a court to take action within its jurisdiction to protect a local resident's article 8 rights against unlawful action by third parties. Therefore the possibility that a contra mundum injunction might be required in a particular case cannot be ruled out if there were an exceptional and compelling need to prevent a significant interference with the article 8 rights of local residents.

The principal authorities on contra mundum injunctions are distilled with an overview of all the authorities in a High Court case, *OPQ v BJM* [2011] EMLR 23. The so-called *Spycatcher* principle provides that anyone who reveals confidential information the subject of an interim injunction to restrain publication by the defendants, with knowledge of that injunction, is liable for criminal contempt of court: see *Attorney General v Newspaper Publishing plc* [1988] Ch 333 and *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191. Once a permanent injunction has been obtained the *Spycatcher* doctrine no longer applies because the court's purpose, in holding the ring until trial, has been overtaken by events. That remains the position. *Spycatcher* also recognised limited exceptions such as the wardship jurisdiction, which have been expanded in the new era of the Human Rights Act 1998: see *Venables v News Group Newspapers Ltd* [2001] Fam 430, para 100, per Dame Elizabeth Butler-Sloss P. The Convention for the Protection of Human Rights and Fundamental Freedoms places a duty on the court to protect individuals from the criminal acts of others where exceptionally it is necessary and proportionate to protect them by granting an injunction against the world. That jurisdiction having been established, a court could expand it where it was necessary and proportionate on the facts to do so, on grounds not limited to human rights. In the cases before the court no injunctions were sought on human rights grounds.

The case law on persons unknown was reviewed in *Bloomsbury Publishing Group plc v News Group Newspapers Ltd* [2003] 1 WLR 1633

A by Sir Andrew Morritt V-C, who concluded at paras 20–22 that, under the CPR provisions, an unknown person may be a party provided that the description used was sufficiently certain to identify "both those who are included and those who are not", a test which was satisfied in that case. It should be noted that the interim injunctions in the *Bloomsbury* case were against existing persons unknown, not newcomers. In *South Cambridgeshire*
B *District Council v Gammell* [2006] 1 WLR 658 interim injunctions were granted restraining the stationing of caravans on identified land. The appellants were newcomers who became defendants when they stationed their caravans on the land: see para 32 per Sir Anthony Clarke MR.

Later authorities have explained that the ratio in *Gammell* is confined to interim injunctions and therefore does not establish a novel principle. In
C *Cameron v Hussain* [2019] 1 WLR 1471 the Supreme Court considered the basis and extent of the persons unknown jurisdiction in a damages case. The question was widely framed by Lord Sumption and considered two classes of persons unknown: those who could be identified but not named, such as squatters identifiable by their location, and those who could not be named or identified, for example, hit and run drivers. The first category, which included people who can be given notice of the proceedings because they become
D identifiable if and when they commit conduct in breach of an interim order, can be parties to proceedings. The second category of anonymous defendant, who is not identifiable and cannot be served, cannot be a party, subject to any statutory provision to the contrary: see para 21. The ratio of *Cameron* was not confined to actions for damages because of the broad question posed, but extends to injunctions and other forms of relief. Although *Cameron* does not
E expressly consider newcomers, they are a fortiori in the second category of unidentifiable defendants. Any person affected by an order can apply under the CPR to become a party and participate in the final trial because they have been identified. That is consistent with *Cameron*.

The issues raised have been considered since *Cameron* in several recent Court of Appeal authorities. *Ineos Upstream Ltd v Persons Unknown*
F [2019] 4 WLR 100, an interim injunction case, held that newcomers can be sued as persons unknown, and parts of the judgment can be read (wrongly) as extending that proposition to final injunctions: see para 34. In *Bromley London Borough Council v Persons Unknown* [2020] PTSR 1043, as it was not in issue that the court could make an order against persons unknown in a final injunction case, the court's consideration of that issue was obiter. The
G correct position is that such final injunctions cannot be made save for potentially under an exceptional contra mundum jurisdiction. That issue was not considered in *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29.

In *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802, paras 57, 65–72 the discussion of *Ineos* is confined to interim injunctions only. Final injunctions against newcomers are only permitted if
H they can be brought within established exceptions for against the world injunctions: see paras 89, 91, 92. That is a principle of general application, derived from *Cameron* [2019] 1 WLR 1471. Both *Cameron* and *Canada Goose* apply to the present cases. The claimants' submissions that *Canada Goose* is per incuriam are not correct. However, setting out different

scenarios, the first being if *Cameron* does not apply to injunction cases, if the court concludes that either *Gammell* [2006] 1 WLR 658 or *Ineos* decide as part of their binding reasoning that it is permissible generally to grant a final injunction against newcomers, then *Canada Goose* would be inconsistent with that principle. The court would not be bound by *Canada Goose* if its ratio only applies to protesters. If *Canada Goose* cannot be distinguished and its ratio includes the reasoning that no final injunction can be made against newcomers there would be a conflict of authority. The answer may be to apply the principle that, where the ratio of an earlier decision of the Court of Appeal is directly applicable to the circumstances of a case before the Court of Appeal but that decision has been wrongly distinguished in a later Court of Appeal decision, it is open to the Court of Appeal to apply the ratio of the earlier decision and to decline to follow the later decision: see *Starmark Enterprises Ltd v CPL Distribution Ltd* [2002] Ch 306, paras 65, 67, 97, and cf *Claimants in the Royal Mail Group Litigation v Royal Mail Group Ltd* [2021] EWCA Civ 1173.

A second scenario is if the principle that no final injunction can be made against newcomers is not part of the binding reasoning in *Gammell* or *Ineos*, and *Canada Goose* is distinguishable, then there is no binding authority either way. If it is not possible to distinguish *Canada Goose*, but the court considers that it is based on a misunderstanding of *Cameron*, the court can apply the principle in *Rickards v Rickards* [1990] Fam 194, 204, 206, 210. Where the Court of Appeal is satisfied that an earlier Court of Appeal decision was erroneous, there is no likelihood of the matter being reviewed by the Supreme Court and the issue concerns the jurisdiction of the Court of Appeal, the court is justified in treating the earlier decision as within an exceptional category of case in which it is entitled to regard the decision as given per incuriam and to decline to follow it. Even if the court were to follow *Canada Goose* and uphold the judgment as a general proposition, the court could still find that Nicklin J below went too far in ruling out ever obtaining an injunction against persons unknown in cases of trespass on and occupation of local authority land. Such an injunction could be granted to protect the article 8 rights of local residents. Although none of the claimants have put forward arguments on article 8 grounds, it should be put before the court. If such an injunction were considered by the court, there would then be a balancing exercise between the article 8 rights of the travellers and those of the local residents.

HS2's core argument is that each case raises its own range of issues and that the court should not be overburdened with principles and classifications, such as contra mundum, persons unknown, and interim as against final injunctions. That is a recipe for uncertainty, and in any event that approach is not open to this court on the authorities. The court should instead be flexible to give effective remedies in meritorious cases. The submissions of the advocate to the court are consistent with those on behalf of the London Gypsies and Travellers. The one point of difference is that those interveners do not contemplate the possibility of making a contra mundum order in certain exceptional cases raising local residents' article 8 issues. However, they may have focused somewhat more on the lack of evidence for creating such an exceptional jurisdiction in these particular

A cases, as opposed to the wider question of principle of whether it could ever be appropriate. If the court agrees with the interveners regarding the evidence in these cases then the appropriate result may be to dismiss the appeals even if the court agrees that it is possible that, in another case, a contra mundum injunction might be necessary.

On the question of the procedure adopted by Nicklin J in bringing these
B cases before the court for review, in consultation with the President of the Queen's Bench Division, that course was taken because of a change in the law and widespread problems which had arisen. Fairness requires a review of cases against newcomers. Some injunctions contain ongoing review provisions but others do not. Nicklin J exercised a power the court had to review these cases though there does not appear to be any previous example of such a course having been adopted.

C

Marc Willers QC, Tessa Buchanan and *Owen Greenhall* (instructed by *Community Law Partnership, Birmingham*) for London Gypsies and Travellers; Friends, Families and Travellers; and Derbyshire Gypsy Liaison Group, intervening.

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
D proceedings as will enable him to be heard: see *Cameron v Hussain* [2019] 1 WLR 1471, para 17, per Lord Sumption. Two categories of unknown defendant were identified by Lord Sumption: anonymous defendants who are identifiable but whose names are unknown and anonymous defendants who cannot be identified. An interim injunction may be made whereby a person only becomes party to proceedings when they commit the act
E prohibited under the order: see *South Cambridgeshire District Council v Gammell* [2006] 1 WLR 658, para 32. Applying the principles in *Cameron*, the Court of Appeal has ruled that a final injunction cannot be granted in a protester case against persons unknown who are not parties at the date of the final order, that is newcomers who have not by that time committed the prohibited acts and so do not fall within the description of the persons unknown and who have not been served with the claim form: see *Canada*
F *Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802, para 89. The progenitor of that jurisdiction is a possession case brought by a university against students occupying parts of the university and threatening to move on to other parts, in which a wide injunction was granted extending to the whole of the university premises against named defendants "or any person who might be in adverse possession": see *University of Essex v*
G *Djemal* [1980] 1 WLR 1301, 1305. The principle in that case is where there is a right, there should be a remedy to fit the right (see *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] 1 WLR 2780, para 25); but an order must be made against known individuals who have already intruded upon the claimant's land, are threatening to do so again, and have been given a proper opportunity to contest the order (see *Meier* at
H para 40). *Canada Goose* is the key case. In the orders before the court a number of individuals have been named and efforts have been made to identify others so the final injunctions granted will not offend against the principle in *Canada Goose*.

The increasing popularity of wide injunctions granted to local authorities against persons unknown prohibiting unauthorised occupation or use of

land is identified in *Bromley London Borough Council v Persons Unknown* [2020] PTSR 1043, para 10. There is a shortage of sites available for travellers, which means that those travelling for an economic purpose such as seeking work will be caught by borough-wide injunctions since there has been no improvement in the availability of sites in recent years. Given that there may well be nowhere to park a caravan when travellers are moving for work, it is right to restrict the width of the ambit of injunctions granted. The centrality of the nomadic lifestyle to the gypsy and traveller identity has been recognised by the European Court of Human Rights: see *Chapman v United Kingdom* (2001) 33 EHRR 18, para 73. [Reference was made to a government policy document, *Planning Policy for Traveller Sites*, updated 31 August 2015.]

In para 124 of his judgment in the present case Nicklin J found that the traveller injunctions granted to the claimant local authorities were subject to the principle that a final injunction operated only between the parties to the proceedings and did not fall into the exceptional category of civil injunction that could be granted contra mundum. On this issue the grounds of appeal fall into three broad categories: (i) traveller injunctions do or should fall into the exceptional category of contra mundum cases; (ii) the court has the power to grant a final injunction against newcomers under the *Gammell* principle and there is no principled reason why it should not be exercised in traveller injunction cases; and/or (iii) there are specific statutory powers to grant final injunctions against newcomers in traveller injunction cases.

In general, first, injunctions against persons unknown can still be made in respect of a defendant who is identifiable but whose name is unknown. There is an obvious tension between the argument frequently advanced by the local authorities that, on the one hand, a wide injunction is needed because otherwise the occupants of one encampment will simply move onto the next site, and, on the other hand, the claimed inability to identity any defendants. If a local authority knows that there is a "rolling cast" moving from site to site, then it must know enough to identify at least some of the alleged wrongdoers. A local authority therefore could obtain an injunction against named defendants (for example there were 105 named defendants in Havering's case), and limit the application to those individuals. Second, it is not Nicklin J's judgment which is radical, but the cases advanced by the local authorities. It is not radical to say that a claimant cannot sue a defendant who does not exist. What would be truly radical would be to hold that the court has the power, absent the exceptional category of contra mundum cases, to grant wide-ranging relief against persons who have never been before the court or had notice of the claim. Third, one-sided justice results if a claimant is allowed to bring proceedings in an adversarial system without having to name, and therefore give notice to, any defendant.

On the contra mundum issue, Nicklin J correctly excluded borough-wide injunctions from traveller injunctions. The court's power to grant an injunction under section 37 of the Senior Courts Act 1981 "in all cases in which it appears to the court to be just and convenient to do so" is subject to the fundamental principle that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard: see *Iveson v Harris* (1802) 7 Ves 251, 256–257 and *Cameron v Hussain* [2019] 1 WLR 1471, para 17. The only exception

A to the principle that the court cannot grant an injunction which binds a non-party is where it is necessary for the court to grant a contra mundum injunction in order to avoid a breach of section 6 of the Human Rights Act 1998. The local authorities cannot bring themselves within the existing exception.

The truly exceptional nature of the circumstances warranting such
B injunctions can be seen from an examination of the facts of those cases: see *Venables v News Group Newspapers Ltd* [2001] Fam 430, *X (formerly Bell) v O'Brien* [2003] EMLR 37 and *OPQ v BJM* [2011] EMLR 23. There are no cases cited by the local authorities where a contra mundum final order has been granted which has not concerned exceptional circumstances including a risk to life (*Venables*), a risk to physical health (*X v O'Brien*) or
C serious risk to mental health (*X v O'Brien* and *OPQ v BJM*). Two principles can be derived from those authorities. First, a contra mundum injunction can only be made to prevent a breach of an individual's human rights. That is fundamentally inconsistent with an application made at a general, or borough-wide, level, such as those made by the local authorities. Second, a contra mundum injunction can only be granted where to do otherwise would defeat the purpose of the injunction, such as in publicity cases like
D *Venables*. The same cannot be said to apply to the case of unauthorised encampments, which will vary immeasurably in terms of their size, nature, and effect.

The court cannot create another exception to the principle that a final injunction binds only the parties to a claim. The importance of the fundamental principle identified by Lord Sumption is such that any other
E exception must be created by legislation. In any event, it would be wrong in principle to create another exception. The flexibility of section 37 of the 1981 Act is not without limit and the case law continually refers to the need for a party to be before the court as a restriction on the grant of injunctive relief. Where an extension of an existing jurisdiction is sought, the onus is on those who seek to increase jurisdiction to justify the extension. There are
F further specific reasons for concern in relation to borough-wide traveller injunctions identified by Nicklin J at para 234 on the basis that it is impossible to carry out the required parallel analysis of, and intense focus upon, the engaged rights. Further, in *Bromley London Borough Council v Persons Unknown* [2020] PTSR 1043, para 101 the Court of Appeal expressed concern that closing down unlawful encampments on land and moving on
G gypsies and travellers must be regarded as a last resort. Prospectively making a contra mundum injunction prohibiting all encampments is arguably worse. Nicklin J was therefore correct to refuse to extend contra mundum cases to traveller injunctions.

Contrary to the submissions for the local authorities, *Canada Goose* [2020] 1 WLR 417, para 89 precludes all final injunctions against newcomers. Lord Sumption referred in *Cameron v Hussain* [2019] 1 WLR
H 1471, para 15 to the cases of *Bloomsbury Publishing Group plc v News Group Newspapers Ltd* [2003] 1 WLR 1633 and *Gammell* [2006] 1 WLR 658 as examples of interim injunctions concerning anonymous but identifiable defendants. There is scope for making persons unknown subject to a final injunction provided the persons unknown are confined to those

anonymous defendants who are identifiable as having committed the relevant unlawful acts prior to the date of the final order and have been served (probably pursuant to an order for alternative service) prior to the date: see *Canada Goose*, para 91. It is wrong to differentiate between the injunction against protesters in *Canada Goose* and those injunctions against travellers granted to local authorities in these cases. The causes of action, for example, in nuisance and trespass, are similar. All that is required for an injunction against persons unknown is their identification.

It is wrong to seek to extend the *Gammell* principle to final injunctions on the basis that relief is sought on a quia timet or precautionary basis. The limitations on suing persons unknown are not based on whether the harm sought to be prevented has occurred or not, they are based on the need properly to identify defendants even where they cannot be named. The procedural protections in a final order proposed by the local authorities do not overcome the jurisdictional issues that arise in cases where unidentifiable defendants are subject to final orders. The purpose of the *Gammell* principle is to enable a claimant to identify defendants and bring them before the court so that the claim may be determined.

The adequacy of procedural protection cannot, and should not, be assessed in a vacuum. A realistic assessment of the position of those affected by the order must be made, and the resources available to gypsies and travellers and their pattern of life are relevant factors for the court to consider: see *Bromley London Borough Council v Persons Unknown* [2020] PTSR 1043, paras 104–105. These injunctions are aimed at temporary encampments formed by nomadic people, many of whom will be of limited means with poor literacy. The injunction will inevitably do what it was designed to do: it will have a chilling effect and scare away those likely to be affected by it without enabling them to have a reasonable opportunity to challenge the order. There is no inconsistency between *Canada Goose* [2020] 1 WLR 417 and earlier Court of Appeal decisions in *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100 and *Gammell*. *Canada Goose*, in which the court concluded that in protester cases there is no justification for injunctions against the world, is binding on the present court. The court in *Canada Goose* did not misunderstand the fundamental principle in *Cameron* that persons unknown should be identified to enable them to participate in proceedings for a final injunction on the basis of fairness.

Section 187B of the Town and Country Planning Act 1990, one of the specific exceptions to the general rule that proceedings may not be brought against unnamed persons, does not, in and of itself, allow for injunctions to be made against persons unknown, but allows for rules of court to be made to that effect. The scope of the jurisdiction is in CPR PD 8A, paras 20.1–20.10, from which it is apparent that there must still be an identifiable (if anonymous) defendant to whom the normal rules requiring service still apply. Since neither section 222 of the Local Government Act 1972 nor sections 77 to 79 of the Criminal Justice and Public Order Act 1994 provide any power on which to grant injunctive relief, their combination cannot achieve a different result. There are no other statutory powers which provide a basis for the local authorities to obtain the injunctive relief sought.

A Permission to appeal on the first proposed ground of appeal should be refused on the grounds set out by Nicklin J: see paras 146–147.

Giffin QC replied.

Anderson QC replied.

Bhose QC replied.

B *Bolton* replied.

Wayne Beglan (instructed by *Basildon Borough Council Legal Services*) for Basildon Borough Council, intervening by written submissions only.

The court took time for consideration.

C 13 January 2022. The following judgments were handed down.

SIR GEOFFREY VOS MR

Introduction

1 This case arises in the context of a number of cases in which local D authorities have sought interim and sometimes then final injunctions against unidentified and unknown persons who may in the future set up unauthorised encampments on local authority land. These persons have been collectively described in submissions as "newcomers". Mr Marc Willers QC, leading counsel for the first three interveners, explained that the persons concerned fall mainly into three categories, who would describe themselves as Romani Gypsies, Irish Travellers and New Travellers.

E **2** The central question in this appeal is whether the judge was right to hold that the court cannot grant final injunctions that prevent persons, who are unknown and unidentified at the date of the order (i e newcomers), from occupying and trespassing on local authority land. The judge, Nicklin J, held that this was the effect of a series of decisions, particularly this court's decision in *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 F ("*Canada Goose*") and the Supreme Court's decision in *Cameron v Hussain* [2019] 1 WLR 1471 ("*Cameron*"). The judge said that, whilst interim injunctions could be made against persons unknown, final injunctions could only be made against parties who had been identified and had had an opportunity to contest the final order sought.

3 The 15 local authorities that are parties to the appeals before the court contend that the judge was wrong[1*], and that, even if that is what the Court G of Appeal said in *Canada Goose*, its decision on that point was not part of its essential reasoning, distinguishable on the basis that it applied only to so-called protester injunctions, and, in any event, should not be followed because (a) it was based on a misunderstanding of the essential decision in *Cameron*, and (b) was decided without proper regard to three earlier Court of Appeal decisions in *South Cambridgeshire District Council v Gammell* H [2006] 1 WLR 658 ("*Gammell*"), *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100 ("*Ineos*"), and *Bromley London Borough Council v Persons Unknown* [2020] PTSR 1043 ("*Bromley*").

* *Reporter's note*. The superior figures in the text refer to notes which can be found at the end of the judgment of Sir Geoffrey Vos MR, on p 350.

4 The case also raises a secondary question as to the propriety of the procedure adopted by the judge to bring the proceedings in their current form before the court. In effect, the judge made a series of orders of the court's own motion requiring the parties to these proceedings to make submissions aimed at allowing the court to reach a decision as to whether the interim and final orders that had been granted in these cases could or should stand. Counsel for one group of local authorities, Ms Caroline Bolton, submitted that it was not open to the court to call in final orders made in the past for reconsideration in the way that the judge did.

5 In addition, there are subsidiary questions as to whether (a) the statutory jurisdiction to make orders against persons unknown under section 187B of the Town and Country Planning Act 1990 ("section 187B") to restrain an actual or apprehended breach of planning control validates the orders made, and (b) the court may in any circumstances like those in the present case make final orders against all the world.

6 I shall first set out the essential factual and procedural background to these claims, then summarise the main authorities that preceded the judge's decision, before identifying the judge's main reasoning, and finally dealing with the issues I have identified.

7 I have concluded that: (i) the judge was wrong to hold that the court cannot grant final injunctions that prevent persons, who are unknown and unidentified at the date of the order, from occupying and trespassing on land, and (ii) the procedure adopted by the judge was unorthodox. It was unusual insofar as it sought to call in final orders of the court for revision in the light of subsequent legal developments, but has nonetheless enabled a comprehensive review of the law applicable in an important field. Since most of the orders provided for review and nobody objected to the process at the time, there is now no need for further action. (iii) Section 37 of the Senior Courts Act 1981 ("section 37") and section 187B impose the same procedural limitations on applications for injunctions of this kind. (iv) Whilst it is the court's proper function to give procedural guidelines, the court cannot and should not limit in advance the types of injunction that may in future cases be held appropriate to make under section 37 against the world.

8 This area of law and practice has been bedevilled by the use of Latin tags. That usage is particularly inappropriate in an area where it is important that members of the public can understand the courts' decisions. I have tried to exclude Latin from this judgment, and would urge other courts to use plain language in its place.

The essential factual and procedural background

9 There were five groups of local authorities before the court, although the details are not material. The first group was led by Walsall Metropolitan Borough Council ("Walsall"), represented by Mr Nigel Giffin QC. The second group was led by Wolverhampton City Council ("Wolverhampton"), represented by Mr Mark Anderson QC. The third group was led by Hillingdon London Borough Council ("Hillingdon"), represented by Mr Ranjit Bhose QC. The fourth and fifth groups were led respectively by Barking and Dagenham London Borough Council ("Barking") and Havering London Borough Council ("Havering"), represented by Ms Caroline Bolton.

A The cases in the groups led by Walsall, Wolverhampton, and Barking related to final injunctions, and those led by Hillingdon and Havering related to interim injunctions.

10 The injunctions granted in each of the cases were in various forms broadly described in the detailed Appendix 1 to the judge's judgment. Some of the final injunctions provided for review of the orders to be made by the
B court either annually or at other stages. Most, if not all, of the injunctions allowed permission for anyone affected by the order, including persons unknown, to apply to vary or discharge them.

11 It is important to note at the outset that these claims were all started under the procedure laid down by CPR Pt 8, which is appropriate where the claimant seeks the court's decision on a question which is unlikely to involve a substantial dispute of fact (CPR r 8.1(2)(a)). Whilst CPR r 8.2A(1)
C contemplates a practice direction setting out circumstances in which a claim form may be issued under Part 8 without naming a defendant, no such practice direction has been made (see *Cameron* at para 9). Moreover, CPR r 8.9 makes clear that, where the Part 8 procedure is followed, the defendant is not required to file a defence, so that several other familiar provisions of the CPR do not apply and any time limit preventing parties taking a step
D before defence also does not apply. A default judgment cannot be obtained in Part 8 cases (CPR r 8.1(5)). Nonetheless, CPR r 70.4 provides that a judgment or order against "a person who is not a party to proceedings" may be enforced "against that person by the same methods as if he were a party".

12 These proceedings seem to have their origins from 2 October 2020 when Nicklin J dealt with an application in the case of *Enfield London Borough Council v Persons Unknown* [2020] EWHC 2717 (QB) ("*Enfield*"),
E and raised with counsel the issues created by *Canada Goose*. Nicklin J told the parties that he had spoken to the President of the Queen's Bench Division (the "PQBD") about there being a "group of local authorities who already have these injunctions and who, therefore, may following the decision today, be intending or considering whether they ought to restore the injunctions in their cases to the court for reconsideration". He reported that the PQBD's
F current view was that she would direct that those claims be brought together to be managed centrally. In his judgment in *Enfield*, Nicklin J said that "the legal landscape that [governed] proceedings and injunctions against persons unknown [had] transformed since the interim and final orders were granted in this case", referring to *Cameron*, *Ineos*, *Bromley*, *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29 ("*Cuadrilla*"), and *Canada Goose*.

G **13** Nicklin J concluded at para 32 in *Enfield* that, in the light of the decision in *Speedier Logistics Co Ltd v Aardvark Digital Ltd* [2012] EWHC 2776 (Comm) ("*Speedier*"), there was "a duty on a party, such as the claimant in this case who (i) has obtained an injunction against persons unknown without notice, and (ii) is aware of a material change of circumstances, including for these purposes a change in the law, which gives rise to a real
H prospect that the court would amend or discharge the injunction, to restore the case within a reasonable period to the court for reconsideration". He said that duty was not limited to public authorities.

14 At paras 42–44, Nicklin J said that *Canada Goose* established that final injunctions against persons unknown did not bind newcomers, so that any "interim injunction the court granted would be more effective and more

extensive in its terms than any final order the court could grant". That raised the question of whether the court ought to grant any interim relief at all. The only way that Enfield could achieve what it sought was "to have a rolling programme of applications for interim orders", resulting in "litigation without end".

15 On 16 October 2020, Nicklin J made an order expressed to be with the concurrence of the PQBD and the judge in charge of the Queen's Bench Division Civil List. That order ("the 16 October order") recited the orders that had been made in *Enfield,* and that it appeared that injunctions in similar terms might have been made in 37 scheduled sets of proceedings, and that similar issues might arise. Accordingly, Nicklin J ordered without a hearing and of the court's own motion, that, by 13 November 2020, each claimant in the scheduled actions must file a completed and signed questionnaire in the form set out in schedule 2 to the order. The 16 October order also made provision for those claimants who might want, having considered *Bromley* and *Canada Goose*, to discontinue or apply to vary or discharge the orders they had obtained in their cases. The 16 October order stated that the court's first objective was to "identify those local authorities with existing traveller injunctions who [wished] to maintain such injunctions (possibly with modification), and those who [wished] to discontinue their claims and/or discharge the current traveller injunction granted in their favour".

16 Mr Giffin and Mr Anderson emphasised to us that they had not objected to the order the court had made. The 16 October order does, nonetheless, seem to me to be unusual in that it purports to call in actions in which final orders have been made suggesting, at least, that those final orders might need to be discharged in the light of a change in the law since the cases in question concluded. Moreover, Mr Anderson expressed his client's reservations about one judge expressing "deep concern" over the order that had been made in favour of Wolverhampton by three other judges. By way of example, Jefford J had said in her judgment on 2 October 2018 that she was satisfied, following the principles in *Bloomsbury Publishing Group Ltd v News Group Newspapers Ltd* [2003] 1 WLR 1633 ("*Bloomsbury*") and *South Cambridgeshire District Council v Persons Unknown* [2004] 4 PLR 88 ("*South Cambridgeshire*"), that it was appropriate for the application to be made against persons unknown.

17 The 16 October order and the completion of questionnaires by numerous local authorities resulted in the rolled-up hearing before Nicklin J on 27 and 28 January 2021, in respect of which he delivered judgment on 12 May 2021. As a result, the judge made a number of orders discharging the injunctions that the local authorities had obtained and giving consequential directions.

18 Nicklin J concluded his judgment by explaining the consequences of what he had decided, in summary, as follows:

(i) Claims against persons unknown should be subject to stated safeguards.

(ii) Precautionary interim injunctions would only be granted if the applicant demonstrated, by evidence, that there was a sufficiently real and imminent risk of a tort being committed by the respondents.

A (iii) If an interim injunction were granted, the court in its order should fix a date for a further hearing suggested to be not more than one month from the interim order.

(iv) The claimant at the further hearing should provide evidence of the efforts made to identify the persons unknown and make any application to amend the claim form to add named defendants.

B (v) The court should give directions requiring the claimant, within a defined period: (a) if the persons unknown have not been identified sufficiently that they fall within category 1 persons unknown[2], to apply to discharge the interim injunction against persons unknown and discontinue the claim under CPR r 38.2(2)(a), (b) otherwise, as against the category 1 persons unknown defendants, to apply for (i) default judgment[3]; or C (ii) summary judgment; or (iii) a date to be fixed for the final hearing of the claim, and, in default of compliance, that the claim be struck out and the interim injunction against persons unknown discharged.

(vi) Final orders must not be drafted in terms that would capture newcomers.

19 I will return to the issues raised by the procedure the judge adopted when I deal with the second issue before this court raised by Ms Bolton. D

The main authorities preceding the judge's decision

20 It is useful to consider these authorities in chronological order, since, as the judge rightly said in *Enfield*, the legal landscape in proceedings against persons unknown seems to have transformed since the injunction was granted in that case in mid-2017, only $4\frac{1}{2}$ years ago. E

Bloomsbury: judgment 23 May 2003

21 The persons unknown in *Bloomsbury* [2003] 1 WLR 1633 had possession of and had made offers to sell unauthorised copies of an unpublished Harry Potter book. Sir Andrew Morritt V-C continued orders F against the named parties for the limited period until the book would be published, and considered the law concerning making orders against unidentified persons. He concluded that an unknown person could be sued, provided that the description used was sufficiently certain to identify those who were included and those who were not. The description in that case (para 4) described the defendants' conduct and was held to be sufficient to identify them (paras 16–21). Sir Andrew was assisted by an advocate to the G court. He said that the cases decided under the Rules of the Supreme Court did not apply under the Civil Procedure Rules: "The overriding objective and the obligations cast on the court are inconsistent with an undue reliance on form over substance": para 19. Whilst the persons unknown against whom the injunction was granted were in existence at the date of the order and not newcomers in the strict sense, this does not seem to me to be a distinction of H any importance. The order he made was also not, in form, a final order made at a hearing attended by the unknown persons or after they had been served, but that too, as it seems to me, is not a distinction of any importance, since the injunction granted was final and binding on those unidentified persons for the relevant period leading up to publication of the book.

Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator Site [2004] Env LR 9 ("Hampshire Waste"): judgment 8 July 2003

22 *Hampshire Waste* was a protester case, in which Sir Andrew Morritt V-C granted a without notice injunction against unidentified "Persons entering or remaining without the consent of the claimants, or any of them, on any of the incinerator sites . . . in connection with the 'Global Day of Action Against Incinerators' ". Sir Andrew accepted at paras 6–10 that, subject to two points on the way the unknown persons were described, the position was in essence the same as in *Bloomsbury*. The unknown persons had not been served and there was no argument about whether the order bound newcomers as well as those already threatening to protest.

South Cambridgeshire: judgment 17 September 2004

23 In *South Cambridgeshire* [2004] 4 PLR 88 the Court of Appeal (Brooke and Clarke LJJ) granted a without notice interim injunction against persons unknown causing or permitting hardcore to be deposited, or caravans being stationed, on certain land, under section 187B.

24 At paras 8–11, Brooke LJ said that he was satisfied that section 187B gave the court the power to "make an order of the type sought by the claimants". He explained that the "difficulty in times gone by against obtaining relief against persons unknown" had been remedied either by statute or by rule, citing recent examples of the power to grant such relief in different contexts in *Bloomsbury* and *Hampshire Waste*.

Gammell: judgment 31 October 2005

25 In *Gammell* [2006] 1 WLR 658, two injunctions had been granted against persons unknown under section 187B. The first (in *South Cambridgeshire District Council v Gammell*) was an interim order granted by the Court of Appeal restraining the occupation of vacant plots of land. The second (in *Bromley London Borough Council v Maughan*) ("*Maughan*") was an order made until further order restraining the stationing of caravans. In both cases, newcomers who violated the injunctions were committed for contempt, and the appeals were dismissed.

26 Sir Anthony Clarke MR (with whom Rix and Moore-Bick LJJ agreed) said that the issue was whether and in what circumstances the approach of the House of Lords in *South Bucks District Council v Porter* [2003] 2 AC 558 ("*Porter*") applied to cases where injunctions were granted against newcomers (para 6). He explained that, in *Porter*, section 187B injunctions had been granted against unauthorised development of land owned by named defendants, and the House was considering whether there had been a failure to consider the likely effect of the orders on the defendants' Convention rights in accordance with section 6(1) of the Human Rights Act 1998 ("the 1998 Act") and the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention").

27 Sir Anthony noted at para 10 that in *Porter*, the defendants were in occupation of caravans in breach of planning law when the injunctions were granted. The House had (Lord Bingham of Cornhill at para 20) approved paras 38–42 of Simon Brown LJ's judgment, which suggested that injunctive

A relief was always discretionary and ought to be proportionate. That meant that it needed to be: "appropriate and necessary for the attainment of the public interest objective sought—here the safeguarding of the environment—but also that it does not impose an excessive burden on the individual whose private interests—here the gypsy's private life and home and the retention of his ethnic identity—are at stake." He cited what
B Auld LJ (with whom Arden and Jacob LJJ had agreed) had said in *Davis v Tonbridge and Malling Borough Council* [2004] EWCA Civ 194 ("*Davis*") at para 34 to the additional effect that it was "questionable whether article 8 adds anything to the existing equitable duty of a court in the exercise of its discretion under section 187B", and that the jurisdiction was to be exercised with due regard to the purpose for which it was conferred, namely to restrain breaches of planning control. Auld LJ at para 37 in *Davis* had explained
C that *Porter* recognised two stages: first, to look at the planning merits of the matter, according respect to the authority's conclusions, and secondly to consider for itself, in the light of the planning merits and any other circumstances, in particular those of the defendant, whether to grant injunctive relief. The question, as Sir Anthony saw it in *Gammell* [2006] 1 WLR 658 at para 12, was whether those principles applied to the cases in
D question.

28 At paras 28–29, Sir Anthony held, as a matter of essential decision, that the balancing exercise required in *Porter* did not apply, either directly or by analogy, to cases where the defendant was a newcomer. In such cases, Sir Anthony held at paras 30–31 that the court would have regard to statements in *Mid-Bedfordshire District Council v Brown* [2005] 1 WLR 1460
E ("*Brown*") (Lord Phillips of Worth Matravers MR, Mummery and Jonathan Parker LJJ) as to cases in which defendants occupy or continue to occupy land without planning permission and in disobedience of orders of the court. The principles in *Porter* did not apply to an application to add newcomers (such as the defendants in *Gammell* and *Maughan*) as defendants to the action. It was, in that specific context, that Sir Anthony said what is so often cited at para 32 in *Gammell*, namely:

F

> "In each of these appeals the appellant became a party to the proceedings when she did an act which brought her within the definition of defendant in the particular case. Thus in the case of [Ms Maughan] she became a person to whom the injunction was addressed and a defendant when she caused her three caravans to be stationed on the land on 20 September 2004. In the case of [Ms Gammell] she became both a
G person to whom the injunction was addressed and the defendant when she caused or permitted her caravans to occupy the site. In neither case was it necessary to make her a defendant to the proceedings later."

29 In dismissing the appeals against the findings of contempt, Sir Anthony summarised the position at para 33 including the following: (i) *Porter* applied when the court was considering granting an injunction
H against named defendants. (ii) *Porter* did not apply in full when a court was considering an injunction against persons unknown because the relevant personal information was, ex hypothesi, unavailable. That fact made it "important for courts only to grant such injunctions in cases where it is not possible for the applicant to identify the persons concerned or likely to be

concerned". (iii) In deciding a newcomer's application to vary or discharge an injunction against persons unknown, the court will take account of all the circumstances of the case, including the reasons for the injunction, the reasons for the breach and the applicant's personal circumstances, applying the *Porter* and *Brown* principles.

30 These holdings were, in my judgment, essential to the decision in *Gammell*. It was submitted that the local authority had to apply to join the newcomers as defendants, and that when the court considered whether to do so, the court had to undertake the *Porter* balancing exercise. The Court of Appeal decided that there was no need to join newcomers to an action in which injunctions against persons unknown had been granted and knowingly violated by those newcomers. In such cases, the newcomers automatically became parties by their violation, and the *Porter* exercise was irrelevant. As a result, it was irrelevant also to the question of whether the newcomers were in contempt.

31 There is nothing in *Gammell* to suggest that any part of its reasoning depended on whether the injunctions had been granted on an interim or final basis. Indeed, it was essential to the reasoning that such injunctions, whether interim or final, applied in their full force to newcomers with knowledge of them. It may also be noted that there was nothing in the decision to suggest that it applied only to injunctions granted specifically under section 187B, as opposed to cases where the claim was brought to restrain the commission of a tort.

Secretary of State for the Environment, Food and Rural Affairs v Meier [2009] 1 WLR 2780 ("Meier"): judgment 1 December 2009

32 In *Meier*, the Forestry Commission sought an injunction against travellers who had set up an unauthorised encampment. The injunction was granted by the Court of Appeal against "those people trespassing on, living on, or occupying the land known as Hethfelton Wood". The case did not, therefore, concern newcomers. Nonetheless, Lord Rodger of Earlsferry JSC made some general comments at paras 1–2 which are of some relevance to this case. He referred to the situation where the identities of trespassers were not known, and approved the way in which Sir Andrew Morritt V-C had overcome the procedural problems in *Bloomsbury* [2003] 1 WLR 1633 and *Hampshire Waste* [2004] Env LR 9. Referring to *South Cambridgeshire* [2004] 4 PLR 88, he cited with approval Brooke LJ's statement that "There was some difficulty in times gone by against obtaining relief against persons unknown, but over the years that problem has been remedied either by statute or by rule"[4].

Cameron: Judgment 20 February 2019

33 In *Cameron* [2019] 1 WLR 1471, an injured motorist applied to amend her claim to join "The person unknown driving [the other vehicle] who collided with [the claimant's vehicle] on [the date of the collision]". The Court of Appeal granted the application, but the Supreme Court unanimously allowed the appeal.

34 Lord Sumption said at para 1 that the question in the case was in what circumstances it was permissible to sue an unnamed defendant. Lord Sumption said at para 11 that, since *Bloomsbury*, the jurisdiction had been

A regularly invoked in relation to abuse of the internet, trespasses and other torts committed by protesters, demonstrators and paparazzi. He said that in some of the cases, proceedings against persons unknown were allowed in support of an application for precautionary injunctions, where the defendants could only be identified as those persons who might in future commit the relevant acts. It was that body of case law that the majority of
B the Court of Appeal (Gloster and Lloyd-Jones LJJ) had followed in deciding that an action was permissible against the unknown driver who injured Ms Cameron. He said that it was "the first occasion on which the basis and extent of the jurisdiction [had] been considered by the Supreme Court or the House of Lords".

35 After commenting at para 12 that the CPR neither expressly authorised nor expressly prohibited exceptions to the general rule that
C actions against unnamed parties were permissible only against trespassers (see CPR r 55.3(4), which in fact only refers to possession claims against trespassers), Lord Sumption distinguished at para 13 between two kinds of case in which the defendant cannot be named: (i) anonymous defendants who are identifiable but whose names are unknown (e g squatters), and (ii) defendants, such as most hit and run drivers, who are not only
D anonymous but cannot even be identified. The distinction was that those in the first category were described in a way that made it possible in principle to locate or communicate with them, whereas in the second category it was not. It is to be noted that Lord Sumption did not mention a third category of newcomers.

36 At para 14, Lord Sumption said that the legitimacy of issuing or amending a claim form so as to sue an unnamed defendant could properly be
E tested by asking whether it was conceptually possible to serve it: the general rule was that service of originating process was the act by which the defendant was subjected to the court's jurisdiction: *Barton v Wright Hassall LLP* [2018] 1 WLR 1119 at para 8. The court was seised of an action for the purposes of the Brussels Convention when the proceedings were served (as much under the CPR as the preceding Rules of the Supreme
F Court): *Dresser UK Ltd v Falcongate Freight Management Ltd (The Duke of Yare)* [1992] QB 502, 523 per Bingham LJ. An identifiable but anonymous defendant could be served with the claim form, if necessary, by alternative service under CPR r 6.15, which was why proceedings against anonymous trespassers under CPR r 55.3(4) had to be effected in accordance with CPR r 55.6 by placing them in a prominent place on the land. In *Bloomsbury*
G [2003] 1 WLR 1633, for example, the unnamed defendants would have had to identify themselves as the persons in physical possession of copies of the book if they had sought to do the prohibited act, namely disclose it to people (such as newspapers) who had been notified of the injunction. Lord Sumption then referred to *Gammell* [2006] 1 WLR 658 as being a case where the Court of Appeal had held that, when proceedings were brought against unnamed persons and interim relief was granted to restrain specified
H acts, a person became both a defendant and a person to whom the injunction was addressed by doing one of those acts. It does not seem that he disapproved of that decision, since he followed up by saying that "in the case of anonymous but identifiable defendants, these procedures for service are now well established, and there is no reason to doubt their juridical basis".

37 Accordingly, pausing there, Lord Sumption seems to have accepted that, where an action was brought against unknown trespassers, newcomers could, as Sir Anthony Clarke MR had said in *Gammell*, make themselves parties to the action by (knowingly) doing one of the prohibited acts. This makes perfect sense, of course, because Lord Sumption's thesis was that, for proceedings to be competent, they had to be served. Once Ms Gammell knowingly breached the injunction, she was both aware of the proceedings and made herself a party. Although Lord Sumption mentioned that the *Gammell* injunction was "interim", nothing he said places any importance on that fact, since his concern was service, rather than the interim or final nature of the order that the court was considering.

38 Lord Sumption proceeded to explain at para 16 that one did not identify unknown persons by referring to something they had done in the past, because it did not enable anyone to know whether any particular persons were the ones referred to. Moreover, service on a person so identified was impossible. It was not enough that the wrongdoers themselves knew who they were. It was that specific problem that Lord Sumption said at para 17 was more serious than the recent decisions of the courts had recognised. It was a fundamental principle of justice that a person could not be made subject to the jurisdiction of the court without having such notice of the proceedings as would enable him to be heard[5].

39 Pausing once again, one can see that, assuming these statements were part of the essential decision in *Cameron*, they do not affect the validity of the orders against newcomers made in *Gammell* (whether interim or final) because before any steps could be taken against such newcomers, they would, by definition, have become aware of the proceedings and of the orders made, and made themselves parties to the proceedings by violating those orders (see para 32 in *Gammell*).

40 At para 19, Lord Sumption explained why the treatment of the principle that a person could not be made subject to the jurisdiction of the court without having notice of the proceedings had been "neither consistent nor satisfactory". He referred to a series of cases about road accidents, before remarking that CPR rr 6.3 and 6.15 considerably broadened the permissible modes of service, but that the object of all the permitted modes of service was to enable the court to be satisfied that the method used either had put the recipient in a position to ascertain its contents or was reasonably likely to enable him to do so. He commented that the Court of Appeal in *Cameron* appeared to "have had no regard to these principles in ordering alternative service of the insurer". On that basis, Lord Sumption decided at para 21 that, subject to any statutory provision to the contrary, it was an essential requirement for any form of alternative service that the mode of service should be such as could reasonably be expected to bring the proceedings to the attention of the defendant. The Court of Appeal had been wrong to say that service need not be such as to bring the proceedings to the defendant's attention. At para 25, Lord Sumption commented that the power in CPR r 6.16 to dispense with service of a claim form in exceptional circumstances had, in general, been used to escape the consequences of a procedural mishap. He found it hard to envisage circumstances in which it would be right to dispense with service in circumstances where there was no reason to believe that the defendant was aware that proceedings had been or

were likely to be brought. He concluded at para 26 that the anonymous unidentified driver in *Cameron* could not be sued under a pseudonym or description, unless the circumstances were such that the service of the claim form could be effected or properly dispensed with.

Ineos: judgment 3 April 2019

41 *Ineos* [2019] 4 WLR 100 was argued just two weeks after the Supreme Court's decision in *Cameron*. The claimant companies undertook fracking, and obtained interim injunctions restraining unlawful protesting activities such as trespass and nuisance against persons unknown including those entering or remaining without consent on the claimants' land. One of the grounds of appeal raised the issue of whether the judge had been right to grant the injunctions against persons unknown (including, of course, newcomers).

42 Longmore LJ (with whom both David Richards and Leggatt LJJ agreed) first noted that *Bloomsbury* and *Hampshire Waste* had been referred to without disapproval in *Meier*. Having cited *Gammell* in detail, Longmore LJ recorded that Ms Stephanie Harrison QC, counsel for one of the unknown persons (who had been identified for the purposes of the appeal), had submitted that the enforcement against persons unknown was unacceptable because they "had no opportunity, before the injunction was granted, to submit that no order should be made" on the basis of their Convention rights. Longmore LJ then explained *Cameron*, upon which Ms Harrison had relied, before recording that she had submitted that Lord Sumption's two categories of unnamed or unknown defendants at para 13 in *Cameron* were exclusive and that the defendants in *Ineos* did not fall within them.

43 Longmore LJ rejected that argument on the basis that it was "too absolutist to say that a claimant can never sue persons unknown unless they are identifiable at the time the claim form is issued". Nobody had suggested that *Bloomsbury* and *Hampshire Waste* were wrongly decided. Instead, she submitted that there was a distinction between injunctions against persons who existed but could not be identified and injunctions against persons who did not exist and would only come into existence when they breached the injunction. Longmore LJ rejected that submission too at paras 29–30, holding that Lord Sumption's two categories were not considering persons who did not exist at all and would only come into existence in the future (referring to para 11 in *Cameron*). Lord Sumption had, according to Longmore LJ, not intended to say anything adverse about suing such persons. Lord Sumption's two categories did not include newcomers, but "he appeared rather to approve them [suing newcomers] provided that proper notice of the court order can be given and that the fundamental principle of justice on which he relied for the purpose of negating the ability to sue a 'hit and run' driver" was not infringed (see my analysis above). Lord Sumption's para 15 in *Cameron* amounted "at least to an express approval of *Bloomsbury* and no express disapproval of *Hampshire Waste*". Longmore LJ, therefore, held in *Ineos* that there was no conceptual or legal prohibition on suing persons unknown who were not currently in existence but would come into existence when they committed the prohibited tort.

44 Once again, there is nothing in this reasoning that justifies a distinction between interim and final injunctions. The basis for the decision was that *Bloomsbury* and *Hampshire Waste* were good law, and that in *Gammell* the defendant became a party to the proceedings when she knew of the injunction and violated it. *Cameron* was about the necessity for parties to know of the proceedings, which the persons unknown in *Ineos* did.

Bromley: judgment 21 January 2020

45 In *Bromley* [2020] PTSR 1043, there was an interim injunction preventing unauthorised encampment and fly tipping. At the return date, the judge refused the injunction preventing unauthorised encampment on the grounds of proportionality, but granted a final injunction against fly tipping including by newcomers. The appeal was dismissed. *Cameron* was not cited to the Court of Appeal, and *Bloomsbury* and *Hampshire Waste* were cited, but not referred to in the judgments. At para 29, however, Coulson LJ (with whom Ryder and Haddon-Cave LJJ agreed), endorsed the elegant synthesis of the principles applicable to the grant of precautionary injunctions against persons unknown set out by Longmore LJ at para 34 in *Ineos*. Those principles concerned the court's practice rather than the appropriateness of granting such injunctions at all. Indeed, the whole focus of the judgment of Coulson LJ and the guidance he gave was on the proportionality of granting borough-wide injunctions in the light of the Convention rights of the travelling communities.

46 At paras 31–34, Coulson LJ considered procedural fairness "because that has arisen starkly in this and the other cases involving the gypsy and traveller community". Relying on article 6 of the Convention, *Attorney General v Newspaper Publishing plc* [1988] Ch 333 and *Jacobson v Frachon* (1927) 138 LT 386, Coulson LJ said that "The principle that the court should hear both sides of the argument [was] therefore an elementary rule of procedural fairness".

47 Coulson LJ summarised many of the cases that are now before this court and dealt also with the law reflected in *Porter* [2003] 2 AC 558, before referring at para 44 to *Chapman v United Kingdom* (2001) 33 EHRR 18 ("*Chapman*") at para 73, where the European Court of Human Rights ("ECtHR") had said that the occupation of a caravan by a member of the gypsy and traveller community was an integral part of her ethnic identity and her removal from the site interfered with her article 8 rights not only because it interfered with her home, but also because it affected her ability to maintain her identity as a gypsy. Other cases decided by the ECtHR were also mentioned.

48 After rejecting the proportionality appeal, Coulson LJ gave wider guidance starting at para 100 by saying that he thought there was an inescapable tension between the "article 8 rights of the gypsy and traveller community" and the common law of trespass. The obvious solution was the provision of more designated transit sites.

49 At paras 102–108, Coulson LJ said that local authorities must regularly engage with the travelling communities, and recommended a process of dialogue and communication. If a precautionary injunction were thought to be the only way forward, then engagement was still of the utmost importance: "Welfare assessments should be carried out, particularly in

relation to children". Particular considerations included that: (a) injunctions against persons unknown were exceptional measures because they tended to avoid the protections of adversarial litigation and article 6 of the Convention, (b) there should be respect for the travelling communities' culture, traditions and practices, in so far as those factors were capable of being realised in accordance with the rule of law, and (c) the clean hands doctrine might require local authorities to demonstrate that they had complied with their general obligations to provide sufficient accommodation and transit sites, (d) borough-wide injunctions were inherently problematic, (e) it was sensible to limit the injunction to one year with subsequent review, as had been done in the *Wolverhampton* case (now before this court), and (f) credible evidence of criminal conduct or risks to health and safety were important to obtain a wide injunction. Coulson LJ concluded with a summary after saying that he did not accept the submission that this kind of injunction should never be granted, and that the cases made plain that "the gypsy and traveller community have an enshrined freedom not to stay in one place but to move from one place to another": "An injunction which prevents them from stopping at all in a defined part of the UK comprises a potential breach of both the Convention and the Equality Act 2010, and in future should only be sought when, having taken all the steps noted above, a local authority reaches the considered view that there is no other solution to the particular problems that have arisen or are imminently likely to arise."

50 It may be commented at once that nothing in *Bromley* suggests that final injunctions against unidentified newcomers can never be granted.

Cuadrilla: judgment 23 January 2020

51 In *Cuadrilla* [2020] 4 WLR 29 the Court of Appeal considered committals for breach of a final injunction preventing persons unknown, including newcomers, from trespassing on land in connection with fracking. The issues are mostly not relevant to this case, save that Leggatt LJ (with whom Underhill and David Richards LJJ substantively agreed) summarised the effect of *Ineos* (in which Leggatt LJ had, of course, been a member of the court) as being that there was no conceptual or legal prohibition on (a) suing persons unknown who were not currently in existence but would come into existence if and when they committed a threatened tort, or (b) granting precautionary injunctions to restrain such persons from committing a tort which has not yet been committed (para 48). After further citation of authority, the Court of Appeal departed from one aspect of the guidance given in *Ineos*, but not one that is relevant to this case. Leggatt LJ noted at para 50 that the appeal in *Canada Goose* was shortly to consider injunctions against persons unknown.

Canada Goose: judgment 5 March 2020

52 The first paragraph of the judgment of the court in *Canada Goose* [2020] 1 WLR 2802 (Sir Terence Etherton MR, David Richards and Coulson LJJ) recorded that the appeal concerned the way in which, and the extent to which, civil proceedings for injunctive relief against persons unknown could be used to restrict public protests. On the claimants' application for summary judgment, Nicklin J had refused to grant a final injunction, discharged the interim injunction, and held that the claim form

had not been validly served on any defendant in the proceedings and that it was not appropriate to make an order dispensing with service under CPR r 6.16(1). The first defendants were named as persons unknown who were protesters against the manufacture and sale at the first claimant's store of clothing made of or containing animal products. An interim injunction had been granted until further order in respect of various tortious activities including assault, trespass and nuisances, with a further hearing also ordered.

53 The grounds of appeal were based on Nicklin J's findings on alternative service and dispensing with service, the description of the persons unknown, and the judge's approach to the evidence and to summary judgment. The appeal on the service issues was dismissed at paras 37–55. The Court of Appeal started its treatment of the grounds of appeal relating to description and summary judgment by saying that it was established that proceedings might be commenced, and an interim injunction granted, against persons unknown in certain circumstances, as had been expressly acknowledged in *Cameron* and put into effect in *Ineos* and *Cuadrilla*.

54 The court in *Canada Goose* set out at para 60 Lord Sumption's two categories from para 13 of *Cameron*, before saying at para 61 that that distinction was critical to the possibility of service: "Lord Sumption acknowledged that the court may grant interim relief before the proceedings have been served or even issued but he described that as an emergency jurisdiction which is both provisional and strictly conditional": para 14. This citation may have sown the seeds of what was said at paras 89–92, to which I will come in a moment.

55 At paras 62–88 in *Canada Goose*, the court discussed in entirely orthodox terms the decisions in *Cameron*, *Gammell*, *Ineos*, and *Cuadrilla*, in which Leggatt LJ had referred to *Hubbard v Pitt* [1976] QB 142 and *Burris v Azadani* [1995] 1 WLR 1372. At para 82, the court built on the *Cameron* and *Ineos* requirements to set out refined procedural guidelines applicable to proceedings for interim relief against persons unknown in protester cases like the one before that court. The court at paras 83–88 applied those guidelines to the appeal to conclude that the judge had been right to dismiss the claim for summary judgment and to discharge the interim injunction.

56 It is worth recording the guidelines for the grant of interim relief laid down in *Canada Goose* at para 82 as follows:

> "(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'.

A "(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 [precautionary] relief.

"(4) As in the case of the originating process itself, the defendants
B 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.

C "(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
D 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
E 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."

57 The claim form was held to be defective in *Canada Goose* under those guidelines and the injunctions were impermissible. The description of
F the persons unknown was also impermissibly wide, because it was capable of applying to persons who had never been at the store and had no intention of ever going there. It would have included a "peaceful protester in Penzance". Moreover, the specified prohibited acts were not confined to unlawful acts, and the original interim order was not time limited. Nicklin J had been bound to dismiss the application for summary judgment and to discharge the interim injunction: "both because of non-service of the
G proceedings and for the further reasons . . . set out below".

58 It is the further reasons "set out below" at paras 89–92 that were relied upon by Nicklin J in this case that have been the subject of the most detailed consideration in argument before us. They were as follows:

"89. A final injunction cannot be granted in a protester case against 'persons unknown' who are not parties at the date of the final order, that
H is to say newcomers who have not by that time committed the prohibited acts and so do not fall within the description of the 'persons unknown' and who have not been served with the claim form. There are some very limited circumstances, such as in *Venables v News Group Newspapers Ltd* [2001] Fam 430, in which a final injunction may be granted against

the whole world. Protester actions, like the present proceedings, do not fall within that exceptional category. The usual principle, which applies in the present case, is that a final injunction operates only between the parties to the proceedings: *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191, 224. That is consistent with the fundamental principle in *Cameron* (at para 17) 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."

"91. That does not mean to say that there is no scope for making 'persons unknown' subject to a final injunction. That is perfectly legitimate provided the persons unknown are confined to those within Lord Sumption's category 1 in *Cameron*, namely those anonymous defendants who are identifiable (for example, from CCTV or body cameras or otherwise) as having committed the relevant unlawful acts prior to the date of the final order and have been served (probably pursuant to an order for alternative service) prior to the date. The proposed final injunction which Canada Goose sought by way of summary judgment was not so limited. Nicklin J was correct (at para 159) to dismiss the summary judgment on that further ground (in addition to non-service of the proceedings). Similarly, Warby J was correct to take the same line in *Birmingham City Council v Afsar* [2019] EWHC 3217 (QB) at [132].

"92. In written submissions following the conclusion of the oral hearing of the appeal Mr Bhose submitted that, if there is no power to make a final order against 'persons unknown', it must follow that, contrary to *Ineos*, there is no power to make an interim order either. We do not agree. An interim injunction is temporary relief intended to hold the position until trial. In a case like the present, the time between the interim relief and trial will enable the claimant to identify wrongdoers, either by name or as anonymous persons within Lord Sumption's category 1. Subject to any appeal, the trial determines the outcome of the litigation between the parties. Those parties include not only persons who have been joined as named parties but also 'persons unknown' who have breached the interim injunction and are identifiable albeit anonymous. The trial is between the parties to the proceedings. Once the trial has taken place and the rights of the parties have been determined, the litigation is at an end. There is nothing anomalous about that."

The reasons given by the judge

59 The judge began his judgment at paras 2–5 by setting out the background to unauthorised encampment injunctions derived mainly from Coulson LJ's judgment in *Bromley* [2020] PTSR 1043. At para 6, the judge said that the central issue to be determined was whether a final injunction granted against persons unknown was subject to the principle that final injunctions bind only the parties to the proceedings. He said that *Canada Goose* [2020] 1 WLR 2802 held that it was, but the local authorities contended that it should not be. It may be noted at once that this is a one-sided view of the question that assumes the answer. The question was not whether an assumed general principle derived from *Attorney General v Times Newspapers Ltd* ("*Spycatcher*") [1992] 1 AC 191 or *Cameron* [2019] 1 WLR 1471 applied to final injunctions against persons unknown (which if

A it were a general principle, it obviously would), but rather what were the general principles to be derived from *Spycatcher*, *Cameron* and *Canada Goose*.

60 At paras 10–25, the judge dealt with three of the main cases: *Cameron*, *Bromley* and *Canada Goose*, as part of what he described as the "changing legal landscape".

B **61** At paras 26–113, the judge dealt in detail with what he called the cohort claims under 9 headings: assembling the cohort claims and their features, service of the claim form on persons unknown, description of persons unknown in the claim form and in CPR r 8.2A, the (mainly statutory) basis of the civil claims against persons unknown, powers of arrest attached to injunction orders, use of the interim applications court of the Queen's Bench Division (court 37), failure to progress claims after the C grant of an interim injunction, particular cohort claims, and the case management hearing on 17 December 2020: identification of the issues of principle to be determined.

62 On the first issue before him (what I have described at para 4 above as the secondary question before us), the judge stated his conclusion at para 120 to the effect that the court retained jurisdiction to consider the terms of the D final injunctions. At para 136, he said that it was legally unsound to impose concepts of finality against newcomers, who only later discovered that they fell within the definition of persons unknown in a final judgment. The permission to apply provisions in several injunctions recognised that it would be fundamentally unjust not to afford such newcomers the opportunity to ask the court to reconsider the order. A newcomer could apply under CPR r 40.9, which provided that "A person who is not a party but who is directly affected E by a judgment or order may apply to have the judgment or order set aside or varied".

63 On the second and main issue (the primary issue before us), the judge stated his conclusion at para 124 that the injunctions granted in the cohort claims were subject to the *Spycatcher* principle (derived from p 224 of the speech of Lord Oliver of Aylmerton) and applied in *Canada Goose* that a F final injunction operated only between the parties to the proceedings, and did not fall into the exceptional category of civil injunction that could be granted against the world. His conclusion is explained at paras 161–189.

64 On the third issue before him (but part of the main issue before us), the judge concluded at para 125 that if the relevant local authority cannot identify anyone in the category of persons unknown at the time the final G order was granted, then that order bound nobody.

65 The judge stated first, in answer to his second issue, that the court undoubtedly had the power to grant an injunction that bound non-parties to proceedings under section 37. That power extended, exceptionally, to making injunction orders against the world (see *Venables v News Group Newspapers Ltd* [2001] Fam 430 ("*Venables*")). The correct starting point was to recognise the fundamental difference between interim and final H injunctions. It was well established that the court could grant an interim injunction against persons unknown which would bind all those falling within the description employed, even if they only became such persons as a result of doing some act after the grant of the interim injunction. He said that the key decision underpinning that principle was *Gammell* [2006]

1 WLR 658, which had decided that a newcomer became a party to the underlying proceedings when they did an act which brought them within the definition of the defendants to the claim. The judge thought that there was no conceptual difficulty about that at the interim stage, and that *Gammell* was a case of a breach of an interim injunction. At para 173, the judge stated that *Gammell* was not authority for the proposition that persons could become defendants to proceedings, after a final injunction was granted, by doing acts which brought them within the definition of persons unknown. He did not say why not. But the point is, at least, not free from doubt, bearing in mind that it is not clear whether Ms Maughan's case, decided at the same time as *Gammell*, concerned an interim or final order.

66 At para 174, the judge suggested that a claim form had to be served for the court to have jurisdiction over defendants at a trial. Relief could only be granted against identified persons unknown at trial: "It is fundamental to our process of civil litigation that the court cannot grant a final order against someone who is not party to the claim." Pausing there, it may be noted that, even on the judge's own analysis, that is not the case, since he acknowledged that injunctions were validly granted against the world in cases like *Venables*. He relied on para 92 in *Canada Goose* as deciding that a person who, at the date of grant of the final order, is not already party to a claim, cannot subsequently become one. In my judgment, as appears hereafter, that statement was at odds with the decision in *Gammell*.

67 At paras 175–176, the judge rejected the submission that traveller injunctions were "not subject to these fundamental rules of civil litigation or that the principle from *Canada Goose* is limited only to 'protester' cases, or cases involving private litigation". He said that the principles enunciated in *Canada Goose*, drawn from *Cameron*, were "of universal application to civil litigation in this jurisdiction". Nothing in section 187B suggested that Parliament had granted local authorities the ability to obtain final injunctions against unknown newcomers. The procedural rules in CPR PD 20.4 positively ruled out commencing proceedings against persons unknown who could not be identified. At para 180 the judge said that, insofar as any support could be found in *Bromley* for a final injunction binding newcomers, *Bromley* was not considering the point for decision before Nicklin J.

68 The judge then rejected at para 186 the idea that he had mentioned in *Enfield* that application of the *Canada Goose* principles would lead to a rolling programme of interim injunctions: (i) On the basis of *Ineos* and *Canada Goose*, the court would not grant interim injunctions against persons unknown unless satisfied that there were people capable of being identified and served. (ii) There would be no civil claim in which to grant an injunction, if the claim cannot be served in such a way as can reasonably be expected to bring the proceedings to an identified person's attention. (iii) An interim injunction would only be granted against persons unknown if there were a sufficiently real and imminent risk of a tort being committed to justify precautionary relief; thereafter, a claimant will have the period up to the final hearing to identify the persons unknown.

69 The judge said that a final injunction should be seen as a remedy flowing from the final determination of rights between the claimant and the defendants at trial. That made it important to identify those defendants

A before that trial. The legitimate role for interim injunctions against persons unknown was conditional and to protect the existing state of affairs pending determination of the parties' rights at a trial. A final judgment could not be granted consistently with *Cameron* against category 2 defendants: i e those who were anonymous and could not be identified.

70 Between paras 190–241, Nicklin J considered whether final
B injunctions could ever be granted against the world in these types of case. He decided they could not, and discharged those that had been granted against persons unknown. At paras 244–246, the judge explained the consequential orders he would make, before giving the safeguards that he would provide for future cases (see para 17 above).

The main issue: Was the judge right to hold that the court cannot grant final
C *injunctions that prevent persons, who are unknown and unidentified at the date of the order (i e newcomers), from occupying and trespassing on local authority land?*

Introduction to the main issue

71 The judge was correct to state as the foundation of his considerations that the court undoubtedly had the power under section 37 to
D grant an injunction that bound non-parties to proceedings. He referred to *Venables* [2001] Fam 430 as an example of an injunction against the world, and there is a succession of cases to similar effect. It is true that they all say, in the context of injuncting the world from revealing the identity of a criminal granted anonymity to allow him to rehabilitate, that such a remedy is exceptional. I entirely agree. I do not, however, agree that the courts
E should seek to close the categories of case in which a final injunction against all the world might be shown to be appropriate. The facts of the cases now before the court bear no relation to the facts in *Venables* and related cases, and a detailed consideration of those cases is, therefore, ultimately of limited value.

72 Section 37 is a broad provision providing expressly that "the High Court may by order (whether interlocutory or final) grant an injunction . . .
F in all cases in which it appears to the court to be just and convenient to do so". The courts should not cut down the breadth of that provision by imposing limitations which may tie a future court's hands in types of case that cannot now be predicted.

73 The judge in this case seems to me to have built upon paras 89–92 of *Canada Goose* to elevate some of what was said into general principles that
G go beyond what it was necessary to decide either in *Canada Goose* or this case.

74 First, the judge said that it was the "correct starting point" to recognise the fundamental difference between interim and final injunctions. In fact, none of the cases that he relied upon decided that. As I have already pointed out, none of *Gammell*, *Cameron* or *Ineos* drew such a distinction.

75 Secondly, the judge said at para 174 that it was "fundamental to our
H process of civil litigation that the court cannot grant a final order against someone who is not party to the claim". Again, as I have already pointed out, no such fundamental principle is stated in any of the cases, and such a principle would be inconsistent with many authorities (not least, *Venables*, *Gammell* and *Ineos*). The highest that *Canada Goose* put the point was to

refer to the "usual principle" derived from *Spycatcher* to the effect that a final injunction operated only between the parties to the proceedings. The principle was said to be applicable in *Canada Goose*. Admittedly, *Canada Goose* also described that principle as consistent with the fundamental principle in *Cameron* (at para 17) 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, but that was said without disapproving the mechanism explained by Sir Anthony Clarke MR in *Gammell* by which a newcomer might become a party to proceedings by knowingly breaching a persons unknown injunction.

76 Thirdly, the judge suggested that the principles enunciated in *Canada Goose*, drawn from *Cameron*, were "of universal application to civil litigation in this jurisdiction". This was, on any analysis, going too far as I shall seek to show in the succeeding paragraphs.

77 Fourthly, the judge said that it was important to identify all defendants before trial, because a final injunction should be seen as a remedy flowing from the final determination of rights between identified parties. This ignores the Part 8 procedure adopted in unauthorised encampment cases, which rarely, if ever, results in a trial. Interim injunctions in other fields often do protect the position pending a trial, but in these kinds of case, as I say, trials are infrequent. Moreover, there is no meaningful distinction between an interim and final injunction, since, as the facts of these cases show and *Bromley* explains, the court needs to keep persons unknown injunctions under review even if they are final in character.

78 With that introduction, I turn to consider whether the statements made in paras 89–92 of *Canada Goose* properly reflect the law. I should say, at once, that those paragraphs were not actually necessary to the decision in *Canada Goose*, even if the court referred to them at para 88 as being further reasons for it.

Para 89 of Canada Goose

79 The first sentence of para 89 said that "A final injunction cannot be granted in a protester case against 'persons unknown' who are not parties at the date of the final order, that is to say newcomers who have not by that time committed the prohibited acts and so do not fall within the description of the 'persons unknown' and who have not been served with the claim form". That sentence does not on its face apply to cases such as the present, where the defendants were not protesters but those setting up unauthorised encampments. It is nonetheless very hard to see why the reasoning does not apply to unauthorised encampment cases, at least insofar as they are based on the torts of trespass and nuisance. I would be unwilling to accede to the local authorities' submission that *Canada Goose* can be distinguished as applying only to protester cases.

80 *Canada Goose* then referred at para 89 to "some very limited circumstances" in which a final injunction could be granted against the whole world, giving *Venables* as an example. It said that protester actions did not fall within that exceptional category. That is true, but does not explain why a final injunction against persons unknown might not be appropriate in such cases.

A 81 *Canada Goose* then said at para 89, as I have already mentioned, that the usual principle, which applied in that case, was that a final injunction operated only between the parties to the proceedings, citing *Spycatcher* as being consistent with *Cameron* at para 17. That passage was, in my judgment, a misunderstanding of para 17 of *Cameron*. As explained above, para 17 of *Cameron* did not affect the validity of the orders against newcomers made in
B *Gammell* (whether interim or final) because before any steps could be taken against such newcomers, they would, by definition, have become aware of the proceedings and of the orders made, and made themselves parties to the proceedings by violating them (see para 32 in *Gammell*). Moreover at para 63 in *Canada Goose*, the court had already acknowledged that (i) Lord Sumption had not addressed a third category of anonymous defendants, namely people who will or are highly likely in the future to commit an unlawful civil wrong
C (i e newcomers), and (ii) Lord Sumption had referred at para 15 with approval to *Gammell* where it was held that "persons who entered onto land and occupied it in breach of, and subsequent to the grant of, an interim injunction became persons to whom the injunction was addressed and defendants to the proceedings". There was no valid distinction between such an order made as a final order and one made on an interim basis.

D 82 There was no reason for the Court of Appeal in *Canada Goose* to rely on the usual principle derived from *Spycatcher* that a final injunction operates only between the parties to the proceedings. In *Gammell* and *Ineos* (cases binding on the Court of Appeal) it was held that a person violating a "persons unknown" injunction became a party to the proceedings. *Cameron* referred to that approach without disapproval. There is and was no reason why the court cannot devise procedures, when making longer
E term persons unknown injunctions, to deal with the situation in which persons violate the injunction and make themselves new parties, and then apply to set aside the injunction originally violated, as happened in *Gammell* itself. Lord Sumption in *Cameron* was making the point that parties must always have the opportunity to contest orders against them. But the persons unknown in *Gammell* had just such an opportunity, even though they were
F held to be in contempt. *Spycatcher* was a very different case, and only described the principle as the usual one, not a universal one. Moreover, it is a principle that sits uneasily with parts of the CPR, as I shall shortly explain.

Para 90 of Canada Goose

83 In my judgment both the judge at para 90 and the Court of Appeal in
G *Canada Goose* at para 90 were wrong to suggest that Marcus Smith J's decision in *Vastint Leeds BV v Persons Unknown* [2019] 4 WLR 2 ("*Vastint*") was wrong. There, a final injunction was granted against persons unknown enjoining them from entering or remaining at the site of the former Tetley Brewery (for the purpose of organising or attending illegal raves). At paras 19–25, Marcus Smith J explained his reasoning relying on *Bloomsbury*, *Hampshire Waste*, *Gammell* and *Ineos* (at first instance: [2017] EWHC 2945
H (Ch)). At para 24, he said that the making of orders against persons unknown was settled practice provided the order was clearly enough drawn, and that it worked well within the framework of the CPR: "Until an act infringing the order is committed, no one is party to the proceedings. It is the act of infringing the order that makes the infringer a party." Any person affected by

the order could apply to set it aside under CPR r 40.9. None of *Cameron*, *Ineos*, or *Spycatcher* showed *Vastint* to be wrong as the court suggested.

Para 91 of Canada Goose

84 In the first two sentences of para 91, *Canada Goose* seeks to limit persons unknown subject to final injunctions to those "within Lord Sumption's category 1 in *Cameron*, namely those anonymous defendants who are identifiable (for example, from CCTV or body cameras or otherwise) as having committed the relevant unlawful acts prior to the date of the final order and have been served (probably pursuant to an order for alternative service) prior to [that] date". This holding ignores the fact that *Canada Goose* had already held that Lord Sumption's categories did not deal with newcomers, which were, of course, not relevant to the facts in *Cameron*.

85 The point in *Cameron* was that the proceedings had to be served so that, before enforcement, the defendant had knowledge of the order and could contest it. As already explained, *Gammell* held that persons unknown were served and made parties by violating an order of which they had knowledge. Accordingly, the first two sentences of para 91 are wrong and inconsistent both with the court's own reasoning in *Canada Goose* and with a proper understanding of *Gammell*, *Ineos* and *Cameron*.

86 In the third sentence of para 91, the court in *Canada Goose* said that the proposed final injunction which Canada Goose sought by way of summary judgment was objectionable as not being limited to Lord Sumption's category 1 defendants, who had already been served and identified. As I have said, that ignores the fact that the court had already said that Lord Sumption excluded newcomers and the *Gammell* situation.

87 The court in *Canada Goose* then approved Nicklin J at para 159 in his judgment in *Canada Goose*, where he said this:

> "158. Rather optimistically, Mr Buckpitt suggested that all these concerns could be adequately addressed by the inclusion of a provision in the 'final order' permitting any newcomers to apply to vary or discharge the 'final order'.
>
> "159. Put bluntly, this is just absurd. It turns civil litigation on its head and bypasses almost all of the fundamental principles of civil litigation: see paras 55–60 above. Unknown individuals, without notice of the proceedings, would have judgment and a 'final injunction' granted against them. If subsequently, they stepped forward to object to this state of affairs, I assume Mr Buckpitt envisages that it is only at this point that the question would be addressed whether they had actually done (or threatened to do) anything that would justify an order being made against them. Resolution of any factual dispute taking place, one assumes, at a trial, if necessary. Given the width of the class of protestor, and the anticipated rolling programme of serving the 'final order' at future protests, the court could be faced with an unknown number of applications by individuals seeking to 'vary' this 'final order' and possible multiple trials. This is the antithesis of finality to litigation."

88 This passage too ignores the essential decision in *Gammell*.

89 As I have already said, there is no real distinction between interim and final injunctions, particularly in the context of those granted against persons

A unknown. Of course, subject to what I say below, the guidelines in *Canada Goose* need to be adhered to. Orders need to be kept under review. For as long as the court is concerned with the enforcement of an order, the action is not at end. A person who is not a party but who is directly affected by an order may apply under CPR r 40.9. In addition, in the case of a third party costs order, CPR r 46.2 requires the non-party to be made party to the B proceedings, even though the dispute between the litigants themselves is at an end. In this case, as in *Canada Goose*, the court was effectively concerned with the enforcement of an order, because the problems in *Canada Goose* all arose because of the supposed impossibility of enforcing an order against a non-party. Since the order can be enforced as decided authoritatively in *Gammell*, there is no procedural objection to its being made. The CPR contain many ways of enforcing an order. CPR r 70.4 says that an order C made against a non-party may be enforced by the same methods as if he were a party. In the case of a possession order against squatters, the enforcement officer will enforce against anyone on the property whether or not a newcomer. Notice must be given to all persons against whom the possession order was made and "any other occupiers": CPR r 83.8A. Where a judgment is to be enforced by charging order CPR r 73.10 allows "any person" to object D and allows the court to decide any issue between any of the parties and any person who objects to the charging order. None of these rules was considered in *Canada Goose*. In addition, in the case of an injunction (unlike the claim for damages in *Cameron*), there is no possibility of a default judgment, and the grant of the injunction will always be in the discretion of the court.

90 The decision of Warby J in *Birmingham City Council v Afsar* [2020] 4 WLR 168 at para 132 provides no further substantive reasoning beyond E para 159 of Nicklin J.

Para 92 of Canada Goose

91 The reasoning in para 92 is all based upon the supposed objection (raised in written submissions following the conclusion of the oral hearing of the appeal) to making a final order against persons unknown, because F interim relief is temporary and intended to "enable the claimant to identify wrongdoers, either by name or as anonymous persons within Lord Sumption's category 1". Again, this reasoning ignores the holding in *Gammell*, *Ineos* and *Canada Goose* itself that an unknown and unidentified person knowingly violating an injunction makes themselves parties to the action. Where an injunction is granted, whether on an interim or a final G basis for a fixed period, the court retains the right to supervise and enforce it, including bringing before it parties violating it and thereby making themselves parties to the action. That is envisaged specifically by point 7 of the guidelines in *Canada Goose*, which said expressly that a persons unknown injunction should have "clear geographical and temporal limits". It was suggested that it must be time limited because it was an interim and not a final injunction, but in fact all persons unknown injunctions ought H normally to have a fixed end point for review as the injunctions granted to these local authorities actually had in some cases.

92 It was illogical for the court at para 92 in *Canada Goose* to suggest, in the face of *Gammell*, that the parties to the action could only include persons unknown "who have breached the interim injunction and are

identifiable albeit anonymous". There is, as I have said, almost never a trial in a persons unknown case, whether one involving protesters or unauthorised encampments. It was wrong to suggest in this context that "Once the trial has taken place and the rights of the parties have been determined, the litigation is at an end". In these cases, the case is not at end until the injunction has been discharged.

The judge's reasoning in this case

93 In my judgment, the judge was wrong to suggest that the correct starting point was the "fundamental difference between interim and final injunctions". There is no difference in jurisdictional terms between the grant of an interim and a final injunction. *Gammell* had not, as the judge thought, drawn any such distinction, and nor had *Ineos* as I have explained at paras 31 and 44 above. It would have been wrong to do so.

94 The judge, as it seems to me, went too far when he said at para 174 that relief could only be granted against identified persons unknown at trial. He relied on *Canada Goose* at para 92 as deciding that a person who, at the date of grant of the final order, is not already party to a claim, cannot subsequently become one. But, as I have said, that misunderstands both *Gammell* and *Ineos*. *Ineos* itself made clear that Lord Sumption's two categories of defendant in *Cameron* did not consider persons who did not exist at all and would only come into existence in the future. *Ineos* held that there was no conceptual or legal prohibition on suing persons unknown who were not currently in existence but would come into existence when they committed the prohibited tort.

95 I agree with the judge that there is no material distinction between an injunction against protesters and one against unauthorised encampment, certainly insofar as they both involve the grant of injunctions against persons unknown in relation to torts of trespass or nuisance. Nor is there any material distinction between those cases and the cases of urban exploring where judges have granted injunctions restraining persons unknown from trespassing on tall buildings (for example, the Shard) by climbing their exteriors (e g *Canary Wharf Investments Ltd v Brewer* [2018] EWHC 1760 (QB) and *Chelsea FC plc v Brewer* [2018] EWHC 1424 (Ch)). One of those cases was an interim and one a final injunction, but no distinction was made by either judge.

96 As I have explained, in my judgment, the judge ought not to have applied paras 89–92 of *Canada Goose*. Instead, he ought to have applied *Gammell* and *Ineos*. *Bromley* too had correctly envisaged the possibility of final injunctions against newcomers. The judge misunderstood the Supreme Court's decision in *Cameron*.

The doctrine of precedent

97 We received helpful submissions during the hearing as to the propriety of our reaching the conclusions already stated. In particular, we were concerned that *Cameron* had been misunderstood in the ways I have now explained in detail. The question, however, was, even if *Cameron* did not mandate the conclusions reached by the judge and paras 89–92 of *Canada Goose*, whether this court would be justified in refusing to follow those paragraphs. That question turns on precisely what *Gammell*, *Ineos* and *Canada Goose* decided.

A 98 In *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 ("*Young*"), three exceptions to the rule that the Court of Appeal is bound by its previous decisions were recognised. First, the Court of Appeal can decide which of two conflicting decisions of its own it will follow. Secondly, the Court of Appeal is bound to refuse to follow a decision of its own which cannot stand with a subsequent decision of the Supreme Court, and thirdly, the Court of
B Appeal is not bound to follow a decision of its own if given without proper regard to previous binding authority.

99 In my judgment, it is clear that *Gammell* [2006] 1 WLR 658 decided, and *Ineos* [2019] 4 WLR 100 accepted, that injunctions, whether interim or final, could validly be granted against newcomers. Newcomers were not any part of the decision in *Cameron* [2019] 1 WLR 1471, and there is and was no basis to suggest that the mechanism in *Gammell* was not applicable to make
C an unknown person a party to an action, whether it occurred following an interim or a final injunction. Accordingly, a premise of *Gammell* was that injunctions generally could be validly granted against newcomers in unauthorised encampment cases. *Ineos* held that the same approach applied in protester cases. Accordingly, paras 89–92 of *Canada Goose* [2020] 1 WLR 2802 were inconsistent with *Ineos* and *Gammell*. Moreover, those
D paragraphs seem to have overlooked the provisions of the CPR that I have mentioned at para 89 above. For those reasons, it is open to this court to apply the first and third exceptions in *Young*. It can decide which of *Gammell* and *Canada Goose* it should follow, and it is not bound to follow the reasons given at paras 89–92 of *Canada Goose*, which even if part of the court's essential reasoning, were given without proper regard to *Gammell*, which was binding on the Court of Appeal in *Canada Goose*.

E 100 This analysis is applicable even if paras 89–92 of *Canada Goose* are taken as explaining *Gammell* and *Ineos* as being confined to interim injunctions. The Court of Appeal can, in that situation, refuse to follow its second decision if it takes the view, as I do, that paras 89–92 of *Canada Goose* wrongly distinguished *Gammell* and *Ineos* (see *Starmark Enterprises Ltd v CPL Distribution Ltd* [2002] Ch 306 at paras 65–67 and 97).

F *Conclusion on the main issue*

101 For the reasons I have given, I would decide that the judge was wrong to hold that the court cannot grant final injunctions that prevent persons, who are unknown and unidentified at the date of the order (newcomers), from occupying and trespassing on local authority land.

G *The guidance given in Bromley and Canada Goose and in this case by Nicklin J*

102 We did not hear detailed argument either about the guidance given in relation to interim injunctions against persons unknown at para 82 of *Canada Goose* (see para 56 above), or in relation to how local authorities should approach persons unknown injunctions in unauthorised encampment
H cases at paras 99–109 in *Bromley* [2020] PTSR 1043 (see para 49 above). It would, therefore, be inappropriate for me to revisit in detail what was said there. I would, however, make the following comments.

103 First, the court's approach to the grant of an interim injunction would obviously be different if it were sought in a case in which a final

injunction could not, either as a matter of law or settled practice, be granted. In those circumstances, these passages must, in view of our decision in this case, be viewed with that qualification in mind.

104 Secondly, I doubt whether Coulson LJ was right to comment that: (i) there was an inescapable tension between the article 8 rights of the gypsy and traveller community and the common law of trespass, and (ii) the cases made plain that the gypsy and traveller community have an enshrined freedom not to stay in one place but to move from one place to another.

105 On the first point, it is not right to say that either "the gypsy and traveller community" or any other community has article 8 rights. Article 8 provides that "everyone has the right to respect for his private and family life, his home and his correspondence". In unauthorised encampment cases, unlike in *Porter* [2003] 2 AC 558 (and unlike in *Manchester City Council v Pinnock* [2011] 2 AC 104), newcomers cannot rely on an article 8 right to respect for their home, because they have no home on land they do not own. They can rely on a private and family life claim to pursue a nomadic lifestyle, because *Chapman* 33 EHRR 18 decided that the pursuit of a traditional nomadic lifestyle is an aspect of a person's private and family life. But the scheme of the Human Rights Act 1998 is individualised. It is unlawful under section 6 for a public authority to act incompatibly with a Convention right, which refers to the Convention right of a particular person. The mechanism for enforcing a Convention right is specified in section 7 as being legal proceedings by a person who is or would be a victim of any act made unlawful by section 6. That means, in this context, that it is when individual newcomers make themselves parties to an unauthorised encampment injunction, they have the opportunity to apply to the court to set aside the injunction praying in aid their private and family life right to pursue a nomadic lifestyle. Of course, the court must consider that putative right when it considers granting either an interim or a final injunction against persons unknown, but it is not the only consideration. Moreover, it can only be considered, at that stage, in an abstract way, without the factual context of a particular person's article 8 rights. The landowner, by contrast, has specific Convention rights under article 1 to the First Protocol to the peaceful enjoyment of particular possessions. The only point at which a court can test whether an order interferes with a particular person's private and family life, the extent of that interference, and whether the order is proportionate, is when that person comes to court to resist the making of an order or to challenge the validity of an order that has already been made.

106 Secondly, it is not, I think, quite clear what Coulson LJ meant by saying that the gypsy and traveller community had an enshrined freedom to move from one place to another. Each member of those communities, and each member of any community, has such a freedom in our democratic society, but the communities themselves do not have Convention rights as I have explained. Individuals' qualified Convention rights must be respected, but the right to that respect will be balanced, in short, against the public interest, when the court considers their challenge to the validity of an unauthorised encampment injunction binding on persons unknown. The court will also take into account any other relevant legal considerations, such as the duties imposed by the Equality Act 2010.

A 107 Nothing I have said should, however, be regarded as throwing doubt upon Coulson LJ's suggestions that local authorities should engage in a process of dialogue and communication with travelling communities, undertake, where appropriate, welfare and equality impact assessments, and should respect their culture, traditions and practices. I would also want to associate myself with Coulson LJ's suggestion that persons unknown
B injunctions against unauthorised encampments should be limited in time, perhaps to one year at a time before a review.

108 It will already be clear that the guidance given by the judge in this case at para 248 (see para 18 above) requires reconsideration. There are indeed safeguards that apply to injunctions sought against persons unknown in unauthorised encampment cases. Those safeguards are not, however, based on the artificial distinction that the judge drew between interim and
C final orders. The normal rules are applicable, as are the safeguards mentioned in *Bromley* (subject to the limitations already mentioned at paras 104–106 above), and those mentioned below at para 117. There is no rule that an interim injunction can only be granted for any particular period of time. It is good practice to provide for a periodic review, even when a final order is made. The two categories of persons unknown referred to by Lord Sumption
D at para 13 in *Cameron* have no relevance to cases of this kind. He was not considering the position of newcomers. The judge was wrong to suggest that directions should be given for the claimant to apply for a default judgment. Such judgments cannot be obtained in Part 8 cases. A normal procedural approach should apply to the progress of the Part 8 claims, bearing in mind the importance of serving the proceedings on those affected and giving notice of them, so far as possible, to newcomers.
E

The secondary question as to the propriety of the procedure adopted by the judge to bring the proceedings in their current form before the court

109 In effect, the judge made a series of orders of the court's own motion requiring the parties to these proceedings to make submissions aimed at allowing the court to reach a decision as to whether the interim and
F final orders that had been granted in these cases could or should stand. Counsel for one group of local authorities, Ms Caroline Bolton, submitted that it was not open to the court to call in final orders made in the past for reconsideration in the way that the judge did.

110 In my judgment, the procedure adopted was highly unusual, because it was, in effect, calling in cases that had been finally decided on the
G basis that the law had changed. We heard considerable argument based on the court's power under CPR r 3.1(7), which gives the court a power "to vary or revoke [an] order". This court has recently said that the circumstances which would justify varying or revoking a final order would be very rare given the importance of finality (see *Terry v BCS Corporate Acceptances Ltd* [2018] EWCA Civ 2422 at [75]).

H 111 As it seems to me, however, we do not need to spend much time on the process which was adopted. First, the local authorities concerned did not object at the time to the court calling in their cases. Secondly, the majority of the injunctions either included provision for review at a specified future time or express or implied permission to apply. Thirdly, even without such provisions, the orders in question would, as I have already explained,

be reviewable at the instance of newcomers, who had made themselves parties to the claims by knowingly breaching the injunctions against unauthorised encampment.

112 In these circumstances, the process that was adopted has ultimately had a beneficial outcome. It has resulted in greater clarity as to the applicable law and practice.

The statutory jurisdiction to make orders against person unknown under section 187B to restrain an actual or apprehended breach of planning control validates the orders made

113 The injunctions in these cases were mostly granted either on the basis of section 187B or on the basis of apprehended trespass and nuisance, or both.

114 Section 187B provides that:

"(1) Where a local planning authority consider it necessary or expedient for any actual or apprehended breach of planning control to be restrained by injunction, they may apply to the court for an injunction, whether or not they have exercised or are proposing to exercise any of their other powers under this Part.

"(2) On an application under subsection (1) the court may grant such an injunction as the court thinks appropriate for the purpose of restraining the breach.

"(3) Rules of court may provide for such an injunction to be issued against a person whose identity is unknown.

"(4) In this section 'the court' means the High Court or the county court."

115 CPR PD 8A provides at paras 20.1–20.6 in part as follows:

"20.1 This paragraph relates to applications under— (1) [section 187B]; . . .

"20.2 An injunction may be granted under those sections against a person whose identity is unknown to the applicant . . .

"20.4 In the claim form, the applicant must describe the defendant by reference to— (1) a photograph; (2) a thing belonging to or in the possession of the defendant; or (3) any other evidence.

"20.5 The description of the defendant under paragraph 20.4 must be sufficiently clear to enable the defendant to be served with the proceedings. (The court has power under Part 6 to dispense with service or make an order permitting service by an alternative method or at an alternative place.)

"20.6 The application must be accompanied by a witness statement. The witness statement must state— (1) that the applicant was unable to ascertain the defendant's identity within the time reasonably available to him; (2) the steps taken by him to ascertain the defendant's identity; (3) the means by which the defendant has been described in the claim form; and (4) that the description is the best the applicant is able to provide."

116 In the light of what I have decided as to the approach to be followed in relation to injunctions sought under section 37 against persons unknown in relation to unauthorised encampment, the distinctions that the parties

A sought to draw between section 37 and section 187B applications are of far less significance to this case.

117 In my judgment, sections 37 and 187B impose the same procedural limitations on applications for injunctions of this kind. In either case, the applicant must describe any persons unknown in the claim form by reference to photographs, things belonging to them or any other evidence, and that
B description must be sufficiently clear to enable persons unknown to be served with the proceedings, whilst acknowledging that the court retains the power in appropriate cases to dispense with service or to permit service by an alternative method or at an alternative place. These safeguards and those referred to with approval earlier in this judgment are as much applicable to an injunction sought in an unauthorised encampment case under section 187B as they are to one sought in such a case to restrain apprehended trespass or
C nuisance. Indeed, CPR PD 8A, para 20 seems to me to have been drafted with the objective of providing, so far as possible, procedural coherence and consistency rather than separate procedures for different kinds of cases.

118 There is, therefore, no need for me to say any more about section 187B.

D *Can the court in any circumstances like those in the present case make final orders against all the world?*

119 As I have said, Nicklin J decided at paras 190–241 that final injunctions against persons unknown, being a species of injunction against all the world, could never be granted in unauthorised encampment cases. For the reasons I have given, I take the view that he was wrong.

E **120** I have already explained the circumstances in which such injunctions can be granted at paras 102–108. Beyond what I have said, however, I take the view that it is extremely undesirable for the court to lay down limitations on the scope of as broad and important a statutory provision as section 37. Injunctions against the world have been granted in the type of case epitomised by *Venables*. Persons unknown injunctions have been granted in cases of unauthorised encampment and may be appropriate
F in some protester cases as is demonstrated by the authorities I have already referred to. I would not want to lay down any further limitations. Such cases are certainly exceptional, but that does not mean that other categories will not in future be shown to be proportionate and justified. The urban exploring injunctions I have mentioned are an example of a novel situation in which such relief was shown to be required.

G **121** I conclude that the court cannot and should not limit in advance the types of injunction that may in future cases be held appropriate to make under section 37 against the world.

Conclusions

122 The parties agreed four issues for determination in terms that
H I have not directly addressed in this judgment. They did, however, raise substantively the four issues I have dealt with.

123 I have concluded, as I indicated at para 7 above, that the judge was wrong to hold that the court cannot grant final injunctions against unauthorised encampment that prevent newcomers from occupying and trespassing on land. Whilst the procedure adopted by the judge was

unorthodox and unusual in that he called in final orders for revision, no harm has been done in that the parties did not object at the time and it has been possible to undertake a comprehensive review of the law applicable in an important field. Most of the orders anyway provided for review or gave permission to apply. The procedural limitations applicable to injunctions against person unknown are as much applicable under section 37 as they are to those made under section 187B. The court cannot and should not limit in advance the types of injunction that may in future cases be held appropriate to make under section 37 against the world.

124 I would allow the appeal. I am grateful to all counsel, but particularly to Mr Tristan Jones, whose submissions as advocate to the court have been invaluable. Counsel will no doubt want to make further submissions as to the consequences of this judgment. Without pre-judging what they may say, it may be more appropriate for such matters to be dealt with in the High Court.

Notes

1. There were 38 local authorities before the judge.

2. This was a reference to the two categories set out by Lord Sumption at para 13 in *Cameron*, as to which see para 35.

3. As I have noted above, default judgment is not available in Part 8 cases.

4. Lord Rodger noted also the discussion of such injunctions in Jillaine Seymour, "Injunctions Enjoining Non-Parties: Distinction without Difference" (2007) 66 CLJ 605.

5. See *Jacobson v Frachon* (1927) 138 LT 386, 392 per Atkin LJ.

LEWISON LJ

125 I agree.

ELISABETH LAING LJ

126 I also agree.

Appeals allowed.
Judge's order set aside.
Injunctions obtained by Havering, Nuneaton and Bedworth, Rochdale, Test Valley and Wolverhampton restored subject to review hearing.
Interim injunctions obtained by Hillingdon and Richmond upon Thames restored subject to applications for review on terms.
Permission to appeal refused.

25 October 2022. The Supreme Court (Lord Hodge DPSC, Lord Hamblen and Lord Stephens JJSC)) allowed an application by London Gypsies and Travellers for permission to appeal.

SUSAN DENNY, Barrister

A

Supreme Court

Wolverhampton City Council and others *v* London Gypsies and Travellers and others

[On appeal from *Barking and Dagenham London Borough Council v Persons Unknown*]

B

[2023] UKSC 47

2023 Feb 8, 9; Nov 29

Lord Reed PSC, Lord Hodge DPSC, Lord Lloyd-Jones, Lord Briggs JJSC, Lord Kitchin

C

Injunction — Trespass — Persons unknown — Local authorities obtaining injunctions against persons unknown to restrain unauthorised encampments on land — Whether court having power to grant final injunctions against persons unknown — Whether limits on court's power to grant injunctions against world — Senior Courts Act 1981 (c 54), s 37

With the intent of preventing unauthorised encampments by Gypsies or Travellers within their administrative areas, a number of local authorities issued D proceedings under CPR Pt 8 seeking injunctions under section 37 of the Senior Courts Act 1981[1] prohibiting "persons unknown" from setting up such camps in the future. Injunctions of varying length were granted to some 38 local authorities, or groups of local authorities, on varying terms by way of both interim and permanent injunctions. After the hearing of an application to extend one of the injunctions which was coming to an end, a judge ordered a review of all such injunctions as remained in force and which the local authority in question wished to maintain. The E judge discharged the injunctions which were final and directed at unknown persons, holding that final injunctions could only be made against parties who had been identified and had had an opportunity to contest the order sought. The Court of Appeal allowed appeals by some of the local authorities and restored those final injunctions which were the subject of appeal, holding that final injunctions against persons unknown were valid since any person who breached one would as a consequence become a party to it and so be entitled to contest it.

F On appeal by three intervener groups representing the interests of Gypsies and Travellers—

Held, dismissing the appeal, (1) that although now enshrined in statute, the court's power to grant an injunction was, and continued to be, a type of equitable remedy; that although the power was, subject to any relevant statutory restrictions, unlimited, the principles and practice which the court had developed governing the proper exercise of that power did not allow judges to grant or withhold injunctions purely on their own subjective perception of the justice and convenience of doing so G in a particular case but required the power to be exercised in accordance with those equitable principles from which injunctions were derived; that, in particular, equity (i) sought to provide an effective remedy where other remedies available under the law were inadequate to protect or enforce the rights in issue, (ii) looked to the substance rather than to the form, (iii) took an essentially flexible approach to the formulation of a remedy and (iv) was not constrained by any limiting rule or principle, other than justice and convenience, when fashioning a remedy to suit new H circumstances; and that the application of those principles had not only allowed the general limits or conditions within which injunctions were granted to be adjusted over time as circumstances changed, but had allowed new kinds of injunction to be formulated in response to the emergence of particular problems, including

[1] Senior Courts Act 1981, s 37: see post, para 145.

prohibitions directed at the world at large which operated as an exception to the normal rule that only parties to an action were bound by an injunction (post, paras 16–17, 19, 22, 42, 57, 147–148, 150–153, 238).

Venables v News Group Newspapers Ltd [2001] Fam 430 applied.

Dicta of Lord Mustill in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, 360–361, HL(E) and of Lord Jauncey of Tullichettle in *Fourie v Le Roux* [2007] 1 WLR 320, para 25, HL(E) applied.

Secretary of State for the Environment, Food and Rural Affairs v Meier [2009] 1 WLR 2780, SC(E), *Cameron v Hussain* [2019] 1 WLR 1471, SC(E) and *Bromley London Borough Council v Persons Unknown* [2020] PTSR 1043, CA considered.

South Cambridgeshire District Council v Gammell [2006] 1 WLR 658, CA and *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802, CA not applied.

(2) That in principle it was such a legitimate extension of the court's practice for it to allow both interim and final injunctions against "newcomers", i e persons who at the time of the grant of the injunction were neither defendants nor identifiable and were described in the injunction only as "persons unknown"; that an injunction against a newcomer, which was necessarily granted on a without notice application, would be effective to bind anyone who had notice of it while it remained in force, even though that person had no intention and had made no threat to do the act prohibited at the time when the injunction was granted and was therefore someone against whom, at that time, the applicant had no cause of action; that, therefore, there was no immoveable obstacle of jurisdiction or principle in the way of granting injunctions prohibiting unauthorised encampments by Gypsies or Travellers who were "newcomers" on an essentially without notice basis, regardless of whether in form interim or final; that, however, such an injunction was only likely to be justified as a novel exercise of the court's equitable discretionary power if the applicant (i) demonstrated a compelling need for the protection of civil rights or the enforcement of public law not adequately met by any other available remedies (including statutory remedies), (ii) built into the application and the injunction sought, procedural protection for the rights (including Convention rights) of those persons unknown who might be affected by it, (iii) complied in full with the disclosure duty which attached to the making of a without notice application and (iv) showed that, on the particular facts, it was just and convenient in all the circumstances that the injunction sought should be made; that, if so justified, any injunction made by the court had to (i) spell out clearly and in everyday terms the full extent of the acts it was prohibiting, corresponding as closely as possible to the actual or threatened unlawful conduct, (ii) extend no further than the minimum necessary to achieve the purpose for which it was granted, (iii) be subject to strict temporal and territorial limits, (iv) be actively publicised by the applicant so as to draw it to the attention of all actual and potential respondents and (v) include generous liberty to any person affected by its terms to apply to vary or discharge the whole or any part of the injunction; and that, accordingly, it followed that the challenge to the court's power to grant the impugned injunctions at all failed (post, paras 142–146, 150, 167, 170, 186, 188, 222, 225, 230, 232, 238).

Per curiam. (i) The theoretical availability of byelaws or other measures or powers available to local authorities as a potential alternative remedy is no reason why newcomer injunctions should never be granted. The question whether byelaws or other such measures or powers represent a workable alternative is one which should be addressed on a case by case basis (post, paras 172, 216).

(i) To the extent that a particular person who became the subject of a newcomer injunction wishes to raise particular circumstances applicable to them and relevant to a balancing of their article 8 Convention rights against the claim for an injunction, this can be done under the liberty to apply (post, para 183).

(iii) The emphasis in this appeal has been on newcomer injunctions in Gypsy and Traveller cases and nothing said should be taken as prescriptive in relation to newcomer injunctions in other cases, such as those directed at protesters who engage

in direct action. Such activity may, depending on all the circumstances, justify the grant of an injunction against persons unknown, including newcomers (post, para 235).

Decision of the Court of Appeal sub nom *Barking and Dagenham London Borough Council v Persons Unknown* [2022] EWCA Civ 13; [2023] QB 295; [2022] 2 WLR 946; [2022] 4 All ER 51 affirmed on different grounds.

The following cases are referred to in the judgment of Lord Reed PSC, Lord Briggs JSC and Lord Kitchin:

A (A Protected Party) v Persons Unknown [2016] EWHC 3295 (Ch); [2017] EMLR 11

Abela v Baadarani [2013] UKSC 44; [2013] 1 WLR 2043; [2013] 4 All ER 119, SC(E)

Adair v New River Co (1805) 11 Ves 429

Anton Piller KG v Manufacturing Processes Ltd [1975] EWCA Civ 12; [1976] Ch 55; [1976] 2 WLR 162; [1976] 1 All ER 779, CA

Ashworth Hospital Authority v MGN Ltd [2002] UKHL 29; [2002] 1 WLR 2033; [2002] 4 All ER 193, HL(E)

Attorney General v Chaudry [1971] 1 WLR 1614; [1971] 3 All ER 938, CA

Attorney General v Crosland [2021] UKSC 15; [2021] 4 WLR 103; [2021] UKSC 58; [2022] 1 WLR 367; [2022] 2 All ER 401, SC(E)

Attorney General v Harris [1961] 1 QB 74; [1960] 3 WLR 532; [1960] 3 All ER 207, CA

Attorney General v Leveller Magazine Ltd [1979] AC 440; [1979] 2 WLR 247; [1979] 1 All ER 745; 68 Cr App R 342, HL(E)

Attorney General v Newspaper Publishing plc [1988] Ch 333; [1987] 3 WLR 942; [1987] 3 All ER 276, CA

Attorney General v Punch Ltd [2002] UKHL 50; [2003] 1 AC 1046; [2003] 2 WLR 49; [2003] 1 All ER 289, HL(E)

Attorney General v Times Newspapers Ltd [1992] 1 AC 191; [1991] 2 WLR 994; [1991] 2 All ER 398, HL(E)

Baden's Deed Trusts, In re [1971] AC 424; [1970] 2 WLR 1110; [1970] 2 All ER 228, HL(E)

Bankers Trust Co v Shapira [1980] 1 WLR 1274; [1980] 3 All ER 353, CA

Barton v Wright Hassall LLP [2018] UKSC 12; [2018] 1 WLR 1119; [2018] 3 All ER 487, SC(E)

Birmingham City Council v Afsar [2019] EWHC 1619 (QB)

Blain (Tony) Pty Ltd v Splain [1993] 3 NZLR 185

Bloomsbury Publishing Group plc v News Group Newspapers Ltd [2003] EWHC 1205 (Ch); [2003] 1 WLR 1633; [2003] 3 All ER 736

Brett Wilson LLP v Persons Unknown [2015] EWHC 2628 (QB); [2016] 4 WLR 69; [2016] 1 All ER 1006

British Airways Board v Laker Airways Ltd [1985] AC 58; [1984] 3 WLR 413; [1984] 3 All ER 39, HL(E)

Broadmoor Special Hospital Authority v Robinson [2000] QB 775; [2000] 1 WLR 1590; [2000] 2 All ER 727, CA

Bromley London Borough Council v Persons Unknown [2020] EWCA Civ 12; [2020] PTSR 1043; [2020] 4 All ER 114, CA

Burris v Azadani [1995] 1 WLR 1372; [1995] 4 All ER 802, CA

CMOC Sales and Marketing Ltd v Person Unknown [2018] EWHC 2230 (Comm); [2019] Lloyd's Rep FC 62

Cameron v Hussain [2019] UKSC 6; [2019] 1 WLR 1471; [2019] 3 All ER 1, SC(E)

Canada Goose UK Retail Ltd v Persons Unknown [2019] EWHC 2459 (QB); [2020] 1 WLR 417; [2020] EWCA Civ 303; [2020] 1 WLR 2802; [2020] 4 All ER 575, CA

Cardile v LED Builders Pty Ltd [1999] HCA 18; 198 CLR 380

Carr v News Group Newspapers Ltd [2005] EWHC 971 (QB)
Cartier International AG v British Sky Broadcasting Ltd [2014] EWHC 3354 (Ch); [2015] Bus LR 298; [2015] 1 All ER 949; [2016] EWCA Civ 658; [2017] Bus LR 1; [2017] 1 All ER 700, CA; [2018] UKSC 28; [2018] 1 WLR 3259; [2018] Bus LR 1417; [2018] 4 All ER 373, SC(E)
Castanho v Brown & Root (UK) Ltd [1981] AC 557; [1980] 3 WLR 991; [1981] 1 All ER 143; [1981] 1 Lloyd's Rep 113, HL(E)
Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334; [1993] 2 WLR 262; [1993] 1 All ER 664; [1993] 1 Lloyd's Rep 291, HL(E)
Chapman v United Kingdom (Application No 27238/95) (2001) 33 EHRR 18, ECtHR (GC)
Commerce Commission v Unknown Defendants [2019] NZHC 2609
Convoy Collateral Ltd v Broad Idea International Ltd [2021] UKPC 24; [2023] AC 389; [2022] 2 WLR 703; [2022] 1 All ER 289; [2022] 1 All ER (Comm) 633, PC
Cuadrilla Bowland Ltd v Persons Unknown [2020] EWCA Civ 9; [2020] 4 WLR 29, CA
D v Persons Unknown [2021] EWHC 157 (QB)
Dresser UK Ltd v Falcongate Freight Management Ltd [1992] QB 502; [1992] 2 WLR 319; [1992] 2 All ER 450, CA
EMI Records Ltd v Kudhail [1985] FSR 36, CA
ESPN Software India Private Ltd v Tudu Enterprise (unreported) 18 February 2011, High Ct of Delhi
Earthquake Commission v Unknown Defendants [2013] NZHC 708
Ernst & Young Ltd v Department of Immigration 2015 (1) CILR 151
F (orse A) (A Minor) (Publication of Information), In re [1977] Fam 58; [1976] 3 WLR 813; [1977] 1 All ER 114, CA
Financial Services Authority v Sinaloa Gold plc [2013] UKSC 11; [2013] 2 AC 28; [2013] 2 WLR 678; [2013] Bus LR 302; [2013] 2 All ER 339, SC(E)
Fourie v Le Roux [2007] UKHL 1; [2007] 1 WLR 320; [2007] Bus LR 925; [2007] 1 All ER 1087, HL(E)
Friern Barnet Urban District Council v Adams [1927] 2 Ch 25, CA
Guaranty Trust Co of New York v Hannay & Co [1915] 2 KB 536, CA
Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator Site [2003] EWHC 1738 (Ch); [2004] Env LR 9
Harlow District Council v Stokes [2015] EWHC 953 (QB)
Heathrow Airport Ltd v Garman [2007] EWHC 1957 (QB)
Hubbard v Pitt [1976] QB 142; [1975] 3 WLR 201; [1975] ICR 308; [1975] 3 All ER 1, CA
Ineos Upstream Ltd v Persons Unknown [2019] EWCA Civ 515; [2019] 4 WLR 100; [2019] 4 All ER 699, CA
Iveson v Harris (1802) 7 Ves 251
Joel v Various John Does (1980) 499 F Supp 791
Kingston upon Thames Royal London Borough Council v Persons Unknown [2019] EWHC 1903 (QB)
M and N (Minors) (Wardship: Publication of Information), In re [1990] Fam 211; [1989] 3 WLR 1136; [1990] 1 All ER 205, CA
MacMillan Bloedel Ltd v Simpson [1996] 2 SCR 1048
McPhail v Persons, Names Unknown [1973] Ch 447; [1973] 3 WLR 71; [1973] 3 All ER 393, CA
Manchester Corpn v Connolly [1970] Ch 420; [1970] 2 WLR 746; [1970] 1 All ER 961, CA
Marengo v Daily Sketch and Sunday Graphic Ltd [1948] 1 All ER 406, HL(E)
Mareva Cia Naviera SA v International Bulkcarriers SA [1975] 2 Lloyd's Rep 509, CA
Maritime Union of Australia v Patrick Stevedores Operations Pty Ltd [1998] 4 VR 143

Mercedes Benz AG v Leiduck [1996] AC 284; [1995] 3 WLR 718; [1995] 3 All ER 929; [1995] 2 Lloyd's Rep 417, PC
Meux v Maltby (1818) 2 Swans 277
Michaels (M) (Furriers) Ltd v Askew (1983) 127 SJ 597, CA
Murphy v Murphy [1999] 1 WLR 282; [1998] 3 All ER 1
News Group Newspapers Ltd v Society of Graphical and Allied Trades '82 (No 2) [1987] ICR 181
North London Railway Co v Great Northern Railway Co (1883) 11 QBD 30, CA
Norwich Pharmacal Co v Customs and Excise Comrs [1974] AC 133; [1973] 3 WLR 164; [1973] 2 All ER 943, HL(E)
OPQ v BJM [2011] EWHC 1059 (QB); [2011] EMLR 23
Parkin v Thorold (1852) 16 Beav 59
Persons formerly known as Winch, In re [2021] EWHC 1328 (QB); [2021] EMLR 20, DC; [2021] EWHC 3284 (QB); [2022] ACD 22, DC
R v Lincolnshire County Council, Ex p Atkinson (1995) 8 Admin LR 529, DC
R (Wardship: Restrictions on Publication), In re [1994] Fam 254; [1994] 3 WLR 36; [1994] 3 All ER 658, CA
RWE Npower plc v Carrol [2007] EWHC 947 (QB)
RXG v Ministry of Justice [2019] EWHC 2026 (QB); [2020] QB 703; [2020] 2 WLR 635, DC
Revenue and Customs Comrs v Egleton [2006] EWHC 2313 (Ch); [2007] Bus LR 44; [2007] 1 All ER 606
Secretary of State for the Environment, Food and Rural Affairs v Meier [2009] UKSC 11; [2009] 1 WLR 2780; [2010] PTSR 321; [2010] 1 All ER 855, SC(E)
Siskina (Owners of cargo lately laden on board) v Distos Cia Naviera SA [1979] AC 210; [1977] 3 WLR 818; [1977] 3 All ER 803; [1978] 1 Lloyd's Rep 1, HL(E)
Smith v Secretary of State for Housing, Communities and Local Government [2022] EWCA Civ 1391; [2023] PTSR 312, CA
South Bucks District Council v Porter [2003] UKHL 26; [2003] 2 AC 558; [2003] 2 WLR 1547; [2003] 3 All ER 1, HL(E)
South Cambridgeshire District Council v Gammell [2005] EWCA Civ 1429; [2006] 1 WLR 658, CA
South Cambridgeshire District Council v Persons Unknown [2004] EWCA Civ 1280; [2004] 4 PLR 88, CA
South Carolina Insurance Co v Assurantie Maatschappij "De Zeven Provincien" NV [1987] AC 24; [1986] 3 WLR 398; [1986] 3 All ER 487; [1986] 2 Lloyd's Rep 317, HL(E)
Stoke-on-Trent City Council v B & Q (Retail) Ltd [1984] AC 754; [1984] 2 WLR 929; [1984] 2 All ER 332, HL(E)
TSB Private Bank International SA v Chabra [1992] 1 WLR 231; [1992] 2 All ER 245
UK Oil and Gas Investments plc v Persons Unknown [2018] EWHC 2252 (Ch); [2019] JPL 161
United Kingdom Nirex Ltd v Barton The Times, 14 October 1986
Venables v News Group Newspapers Ltd [2001] Fam 430; [2001] 2 WLR 1038; [2001] 1 All ER 908
Wykeham Terrace, Brighton, Sussex, In re, Ex p Territorial Auxiliary and Volunteer Reserve Association for the South East [1971] Ch 204; [1970] 3 WLR 649
X (A Minor) (Wardship: Injunction), In re [1984] 1 WLR 1422; [1985] 1 All ER 53
X (formerly Bell) v O'Brien [2003] EWHC 1101 (QB); [2003] EMLR 37
Z Ltd v A-Z and AA-LL [1982] QB 558; [1982] 2 WLR 288; [1982] 1 All ER 556; [1982] 1 Lloyd's Rep 240, CA

The following additional cases were cited in argument:

A v British Broadcasting Corpn [2014] UKSC 25; [2015] AC 588; [2014] 2 WLR 1243; [2014] 2 All ER 1037, SC(Sc)

Abortion Services (Safe Access Zones) (Northern Ireland) Bill, In re [2022] UKSC 32; [2023] AC 505; [2023] 2 WLR 33; [2023] 2 All ER 209, SC(NI)
Astellas Pharma Ltd v Stop Huntingdon Animal Cruelty [2011] EWCA Civ 752, CA
Birmingham City Council v Nagmadin [2023] EWHC 56 (KB)
Birmingham City Council v Sharif [2020] EWCA Civ 1488; [2021] 1 WLR 685; [2021] 3 All ER 176; [2021] RTR 15, CA
Cambridge City Council v Traditional Cambridge Tours Ltd [2018] EWHC 1304 (QB); [2018] LLR 458
Crédit Agricole Corporate and Investment Bank v Persons Having Interest in Goods Held by the Claimant [2021] EWHC 1679 (Ch); [2021] 1 WLR 3834; [2022] 1 All ER 83; [2022] 1 All ER (Comm) 239
High Speed Two (HS2) Ltd v Persons Unknown [2022] EWHC 2360 (KB)
Hillingdon London Borough Council v Persons Unknown [2020] EWHC 2153 (QB); [2020] PTSR 2179
Kudrevičius v Lithuania (Application No 37553/05) (2015) 62 EHRR 34, ECtHR (GC)
MBR Acres Ltd v McGivern [2022] EWHC 2072 (QB)
Mid-Bedfordshire District Council v Brown [2004] EWCA Civ 1709; [2005] 1 WLR 1460, CA
Porter v Freudenberg [1915] 1 KB 857, CA
Redbridge London Borough Council v Stokes [2018] EWHC 4076 (QB)
Secretary of State for Transport v Cuciurean [2021] EWCA Civ 357, CA
Winterstein v France (Application No 27013/07) (unreported) 17 October 2013, ECtHR

APPEAL from the Court of Appeal

On 16 October 2020 Nicklin J, with the concurrence of Dame Victoria Sharp P and Stewart J (Judge in Charge of the Queen's Bench Civil List), ordered a number of local authorities which had been involved in 38 sets of proceedings each obtaining injunctions prohibiting "persons unknown" from making unauthorised encampments within their administrative areas, or on specified areas of land within those areas, to complete a questionnaire with a view to identifying those local authorities who wished to maintain such injunctions and those who wished to discontinue them. On 12 May 2021, after receipt of the questionnaires and a subsequent hearing to review the injunctions, Nicklin J [2021] EWHC 1201 (QB); [2022] JPL 43 held that the court could not grant final injunctions which prevented persons who were unknown and unidentified at the date of the order from occupying and trespassing on local authority land and, by further order dated 24 May 2021, discharged a number of the injunctions on that ground.

By appellant's notices filed on or about 7 June 2021 and with permission of the judge, the following local authorities appealed: Barking and Dagenham London Borough Council; Havering London Borough Council; Redbridge London Borough Council; Basingstoke and Deane Borough Council and Hampshire County Council; Nuneaton and Bedworth Borough Council and Warwickshire County Council; Rochdale Metropolitan Borough Council; Test Valley Borough Council; Thurrock Council; Hillingdon London Borough Council; Richmond upon Thames London Borough Council; Walsall Metropolitan Borough Council and Wolverhampton City Council. The following bodies were granted permission to intervene in the appeal: London Gypsies and Travellers; Friends, Families and Travellers; Derbyshire Gypsy Liaison Group; High Speed Two (HS2) Ltd and Basildon Borough Council. On 13 January 2022 the Court of Appeal (Sir Geoffrey Vos MR,

A Lewison and Elisabeth Laing LJJ) [2022] EWCA Civ 13; [2023] QB 295 allowed the appeals.

With permission granted by the Supreme Court on 25 October 2022 (Lord Hodge DPSC, Lord Hamblen and Lord Stephens JJSC) London Gypsies and Travellers, Friends, Families and Travellers and Derbyshire Gypsy Liaison Group appealed against the Court of Appeal's orders. The
B following local authorities participated in the appeal as respondents: (i) Wolverhampton City Council; (ii) Walsall Metropolitan Borough Council; (iii) Barking and Dagenham London Borough Council; (iv) Basingstoke and Deane Borough Council and Hampshire County Council; (v) Redbridge London Borough Council; (vi) Havering London Borough Council; (vii) Nuneaton and Bedworth Borough Council and Warwickshire County Council; (viii) Rochdale Metropolitan Borough
C Council; (ix) Test Valley Borough Council and Hampshire County Council and (x) Thurrock Council. The following bodies were granted permission to intervene in the appeal: Friends of the Earth; Liberty, High Speed Two (HS2) Ltd and the Secretary of State for Transport.

The facts and the agreed issues for the court are stated in the judgment of Lord Reed PSC, Lord Briggs JSC and Lord Kitchin, post, paras 6–13.

D *Richard Drabble KC*, *Marc Willers KC*, *Tessa Buchanan* and *Owen Greenhall* (instructed by *Community Law Partnership, Birmingham*) for the appellants.

Mark Anderson KC and *Michelle Caney* (instructed by *Wolverhampton City Council Legal Services*) for the first respondent.

Nigel Giffin KC and *Simon Birks* (instructed by *Walsall Metropolitan*
E *Borough Council Legal Services*) for the second respondent.

Caroline Bolton and *Natalie Pratt* (instructed by *Sharpe Pritchard LLP* and *Legal Services, Barking and Dagenham London Borough Council*) for the third to tenth respondents.

Stephanie Harrison KC, *Stephen Clark* and *Fatima Jichi* (instructed by *Hodge Jones and Allen*) for Friends of the Earth, intervening.

Jude Bunting KC and *Marlena Valles* (instructed by *Liberty*) for Liberty,
F intervening.

Richard Kimblin KC and *Michael Fry* (instructed by *Treasury Solicitor*) for High Speed Two (HS2) Ltd and the Secretary of State for Transport, intervening.

The court took time for consideration.

G 29 November 2023. **LORD REED PSC, LORD BRIGGS JSC** and **LORD KITCHIN** (with whom **LORD HODGE DPSC** and **LORD LLOYD-JONES JSC** agreed) handed down the following judgment.

1. Introduction

(1) The problem

H **1** This appeal concerns a number of conjoined cases in which injunctions were sought by local authorities to prevent unauthorised encampments by Gypsies and Travellers. Since the members of a group of Gypsies or Travellers who might in future camp in a particular place cannot generally be identified in advance, few if any of the defendants to the proceedings were

identifiable at the time when the injunctions were sought and granted. Instead, the defendants were described in the claim forms as "persons unknown", and the injunctions similarly enjoined "persons unknown". In some cases, there was no further description of the defendants in the claim form, and the court's order contained no further information about the persons enjoined. In other cases, the defendants were described in the claim form by reference to the conduct which the claimants sought to have prohibited, and the injunctions were addressed to persons who behaved in the manner from which they were ordered to refrain.

2 In these circumstances, the appeal raises the question whether (and if so, on what basis, and subject to what safeguards) the court has the power to grant an injunction which binds persons who are not identifiable at the time when the order is granted, and who have not at that time infringed or threatened to infringe any right or duty which the claimant seeks to enforce, but may do so at a later date: "newcomers", as they have been described in these proceedings.

3 Although the appeal arises in the context of unlawful encampments by Gypsies and Travellers, the issues raised have a wider significance. The availability of injunctions against newcomers has become an increasingly important issue in many contexts, including industrial picketing, environmental and other protests, breaches of confidence, breaches of intellectual property rights, and a wide variety of unlawful activities related to social media. The issue is liable to arise whenever there is a potential conflict between the maintenance of private or public rights and the future behaviour of individuals who cannot be identified in advance. Recent years have seen a marked increase in the incidence of applications for injunctions of this kind. The advent of the internet, enabling wrongdoers to violate private or public rights behind a veil of anonymity, has also made the availability of injunctions against unidentified persons an increasingly significant question. If injunctions are available only against identifiable individuals, then the anonymity of wrongdoers operating online risks conferring upon them an immunity from the operation of the law.

4 Reflecting the wide significance of the issues in the appeal, the court has heard submissions not only from the appellants, who are bodies representing the interests of Gypsies and Travellers, and the respondents, who are local authorities, but also from interveners with a particular interest in the law relating to protests: Friends of the Earth, Liberty, and (acting jointly) the Secretary of State for Transport and High Speed Two (HS2) Ltd.

5 The appeal arises from judgments given by Nicklin J and the Court of Appeal on what were in substance preliminary issues of law. The appeal is accordingly concerned with matters of legal principle, rather than with whether it was or was not appropriate for injunctions to be granted in particular circumstances. It is, however, necessary to give a brief account of the factual and procedural background.

(2) The factual and procedural background

6 Between 2015 and 2020, 38 different local authorities or groups of local authorities sought injunctions against unidentified and unknown persons, which in broad terms prohibited unauthorised encampments within their administrative areas or on specified areas of land within those areas. The claims were brought under the procedure laid down in Part 8 of the Civil

Procedure Rules 1998 ("CPR"), which is appropriate where the claimant seeks the court's decision on a question which is unlikely to involve a substantial dispute of fact: CPR r 8.1(2). The claimants relied upon a number of statutory provisions, including section 187B of the Town and Country Planning Act 1990, under which the court can grant an injunction to restrain an actual or apprehended breach of planning control, and in some cases also upon common law causes of action, including trespass to land.

7 The claim forms fell into two broad categories. First, there were claims directed against defendants described simply as "persons unknown", either alone or together with named defendants. Secondly, there were claims against unnamed defendants who were described, in almost all cases, by reference to the future activities which the claimant sought to prevent, either alone or together with named defendants. Examples included "persons unknown forming unauthorised encampments within the Borough of Nuneaton and Bedworth", "persons unknown entering or remaining without planning consent on those parcels of land coloured in Schedule 2 of the draft order", and "persons unknown who enter and/or occupy any of the locations listed in this order for residential purposes (whether temporary or otherwise) including siting caravans, mobile homes, associated vehicles and domestic paraphernalia".

8 In most cases, the local authorities obtained an order for service of the claim forms by alternative means under CPR r 6.15, usually by fixing copies in a prominent location at each site, or by fixing there a copy of the injunction with a notice that the claim form could be obtained from the claimant's offices. Injunctions were obtained, invariably on without notice applications where the defendants were unnamed, and were similarly displayed. They contained a variety of provisions concerning review or liberty to apply. Some injunctions were of fixed duration. Others had no specified end date. Some were expressed to be interim injunctions. Others were agreed or held by Nicklin J to be final injunctions. Some had a power of arrest attached, meaning that any person who acted contrary to the injunction was liable to immediate arrest.

9 As we have explained, the injunctions were addressed in some cases simply to "persons unknown", and in other cases to persons described by reference to the activities from which they were required to refrain: for example, "persons unknown occupying the sites listed in this order". The respondents were among the local authorities who obtained such injunctions.

10 From around mid-2020, applications were made in some of the claims to extend or vary injunctions of fixed duration which were nearing their end. After a hearing in one such case, Nicklin J decided, with the concurrence of the President of the Queen's Bench Division and the Judge in Charge of the Queen's Bench Civil List, that there was a need for review of all such injunctions. After case management, in the course of which many of the claims were discontinued, there remained 16 local authorities (or groups of local authorities) actively pursuing claims. The appellants were given permission to intervene. A hearing was then fixed at which four issues of principle were to be determined. Following the hearing, Nicklin J determined those issues: *Barking and Dagenham London Borough Council v Persons Unknown* [2022] JPL 43.

11 Putting the matter broadly at this stage, Nicklin J concluded, in the light particularly of the decision of the Court of Appeal in *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 ("*Canada Goose*"), that interim injunctions could be granted against persons unknown, but that final injunctions could be granted only against parties who had been identified and had had an opportunity to contest the final order sought. If the relevant local authority could identify anyone in the category of "persons unknown" at the time the final order was granted, then the final injunction bound each person who could be identified. If not, then the final injunction granted against "persons unknown" bound no-one. In the light of that conclusion, Nicklin J discharged the final injunctions either in full or in so far as they were addressed to any person falling within the definition of "persons unknown" who was not a party to the proceedings at the date when the final order was granted.

12 Twelve of the claimants appealed to the Court of Appeal. In its decision, set out in a judgment given by Sir Geoffrey Vos MR with which Lewison and Elisabeth Laing LJJ agreed, the court held that "the judge was wrong to hold that the court cannot grant final injunctions that prevent persons, who are unknown and unidentified at the date of the order, from occupying and trespassing on land": *Barking and Dagenham London Borough Council v Persons Unknown* [2023] QB 295, para 7. The appellants appeal to this court against that decision.

13 The issues in the appeal have been summarised by the parties as follows:

(1) Is it wrong in principle and/or not open to a court for it to exercise its statutory power under section 37 of the Senior Courts Act 1981 ("the 1981 Act") so as to grant an injunction which will bind "newcomers", that is to say, persons who were not parties to the claim when the injunction was granted, other than (i) on an interim basis or (ii) for the protection of Convention rights (i e rights which are protected under the Human Rights Act 1998)?

(2) If it is wrong in principle and/or not open to a court to grant such an injunction, then—

(i) Does it follow that (other than for the protection of Convention rights) such an injunction may likewise not properly be granted on an interim basis, except where that is required for the purpose of restraining wrongful actions by persons who are identifiable (even if not yet identified) and who have already committed or threatened to commit a relevant wrongful act?

(ii) Was Nicklin J right to hold that the protection of Convention rights could never justify the grant of a Traveller injunction, defined as an injunction prohibiting the unauthorised occupation or use of land?

2. *The legal background*

14 Before considering the development of "newcomer" injunctions—that is to say, injunctions designed to bind persons who are not identifiable as parties to the proceedings at the time when the injunction is granted—it may be helpful to identify some of the issues of principle which are raised by such injunctions. They can be summarised as follows:

(1) Are newcomers parties to the proceedings at the time when the injunction is granted? If not, is it possible to obtain an injunction against a

A non-party? If they are not parties at that point, when (if ever) and how do they become parties?

(2) Does the claimant have a cause of action against newcomers at the time when the injunction is granted? If not, is it possible to obtain an injunction without having an existing cause of action against the person enjoined?

B (3) Can a claim form properly describe the defendants as persons unknown, with or without a description referring to the conduct sought to be enjoined? Can an injunction properly be addressed to persons so described? If the description refers to the conduct which is prohibited, can the defendants properly be described, and can an injunction properly be issued, in terms which mean that persons do not become bound by the injunction until they infringe it?

C (4) How, if at all, can such a claim form be served?

15 This is not the stage at which to consider these questions, but it may be helpful to explain the legal context in which they arise, before turning to the authorities through which the law relating to newcomer injunctions has developed in recent times. We will explain at this stage the legal background, prior to the recent authorities, in relation to (1) the jurisdiction to grant injunctions, (2) injunctions against non-parties, (3) injunctions in D the absence of a cause of action, (4) the commencement of proceedings against unidentified defendants, and (5) the service of proceedings on unidentified defendants.

(1) The jurisdiction to grant injunctions

16 As Lord Scott of Foscote commented in *Fourie v Le Roux* [2007] E 1 WLR 320, para 25, in a speech with which the other Law Lords agreed, jurisdiction is a word of some ambiguity. Lord Scott cited with approval Pickford LJ's remark in *Guaranty Trust Co of New York v Hannay & Co* [1915] 2 KB 536, 563 that "the only really correct sense of the expression that the court has no jurisdiction is that it has no power to deal with and decide the dispute as to the subject matter before it, no matter in what form F or by whom it is raised". However, as Pickford LJ went on to observe, the word is often used in another sense: "that although the court has power to decide the question it will not according to its settled practice do so except in a certain way and under certain circumstances". In order to avoid confusion, it is necessary to distinguish between these two senses of the word: between the power to decide—in this context, the power to grant an injunction—and the principles and practice governing the exercise of that G power.

17 The injunction is equitable in origin, and remains so despite its statutory confirmation. The power of courts with equitable jurisdiction to grant injunctions is, subject to any relevant statutory restrictions, unlimited: Spry, *Equitable Remedies*, 9th ed (2014) ("*Spry*"), p 333, cited with approval in, among other authorities, *Broadmoor Special Hospital* H *Authority v Robinson* [2000] QB 775, paras 20–21 and *Cartier International AG v British Sky Broadcasting Ltd* [2017] Bus LR 1, para 47 (both citing the equivalent passage in the 5th ed (1997)), and *Convoy Collateral Ltd v Broad Idea International Ltd* [2023] AC 389 ("*Broad Idea*"), para 57. The breadth of the court's power is reflected in the terms of section 37(1) of the 1981 Act, which states that: "The High Court may by

order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so." As Lord Scott explained in *Fourie v Le Roux* (ibid), that provision, like its statutory predecessors, merely confirms and restates the power of the courts to grant injunctions which existed before the Supreme Court of Judicature Act 1873 (36 & 37 Vict c 66) ("the 1873 Act") and still exists. That power was transferred to the High Court by section 16 of the 1873 Act and has been preserved by section 18(2) of the Supreme Court of Judicature (Consolidation) Act 1925 and section 19(2)(b) of the 1981 Act.

18 It is also relevant in the context of this appeal to note that, as a court of inherent jurisdiction, the High Court possesses the power, and bears the responsibility, to act so as to maintain the rule of law.

19 Like any judicial power, the power to grant an injunction must be exercised in accordance with principle and any restrictions established by judicial precedent and rules of court. Accordingly, as Lord Mustill observed in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, 360–361:

> "Although the words of section 37(1) [of the 1981 Act] and its forebears are very wide it is firmly established by a long history of judicial self-denial that they are not to be taken at their face value and that their application is subject to severe constraints."

Nevertheless, the principles and practice governing the exercise of the power to grant injunctions need to and do evolve over time as circumstances change. As Lord Scott observed in *Fourie v Le Roux* at para 30, practice has not stood still and is unrecognisable from the practice which existed before the 1873 Act.

20 The point is illustrated by the development in recent times of several new kinds of injunction in response to the emergence of particular problems: for example, the *Mareva* or freezing injunction, named after one of the early cases in which such an order was made (*Mareva Cia Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509); the search order or *Anton Piller* order, again named after one of the early cases in which such an order was made (*Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55); the *Norwich Pharmacal* order, also known as the third party disclosure order, which takes its name from the case in which the basis for such an order was authoritatively established (*Norwich Pharmacal Co v Customs and Excise Comrs* [1974] AC 133); the *Bankers Trust* order, which is an injunction of the kind granted in *Bankers Trust Co v Shapira* [1980] 1 WLR 1274; the internet blocking order, upheld in *Cartier International AG v British Sky Broadcasting Ltd* [2017] Bus LR 1 (para 17 above), and approved by this court in the same case, on an appeal on the question of costs: *Cartier International AG v British Telecommunications plc* [2018] 1 WLR 3259, para 15; the anti-suit injunction (and its offspring, the anti-anti-suit injunction), which has become an important remedy as globalisation has resulted in parties seeking tactical advantages in different jurisdictions; and the related injunction to restrain the presentation or advertisement of a winding-up petition.

21 It has often been recognised that the width and flexibility of the equitable jurisdiction to issue injunctions are not to be cut down by categorisations based on previous practice. In *Castanho v Brown & Root*

(UK) Ltd [1981] AC 557, for example, Lord Scarman stated at p 573, in a speech with which the other Law Lords agreed, that "the width and flexibility of equity are not to be undermined by categorisation". To similar effect, in *South Carolina Insurance Co v Assurantie Maatschappij "De Zeven Provincien" NV* [1987] AC 24, Lord Goff of Chieveley, with whom Lord Mackay of Clashfern agreed, stated at p 44:

> "I am reluctant to accept the proposition that the power of the court to grant injunctions is restricted to certain exclusive categories. That power is unfettered by statute; and it is impossible for us now to foresee every circumstance in which it may be thought right to make the remedy available."

In *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 (para 19 above), Lord Browne-Wilkinson, with whose speech Lord Keith of Kinkel and Lord Goff agreed, expressed his agreement at p 343 with Lord Goff's observations in the *South Carolina* case. In *Mercedes Benz AG v Leiduck* [1996] AC 284, 308, Lord Nicholls of Birkenhead referred to these dicta in the course of his illuminating albeit dissenting judgment, and stated:

> "As circumstances in the world change, so must the situations in which the courts may properly exercise their jurisdiction to grant injunctions. The exercise of the jurisdiction must be principled, but the criterion is injustice. Injustice is to be viewed and decided in the light of today's conditions and standards, not those of yester-year."

22 These dicta are borne out by the recent developments in the law of injunctions which we have briefly described. They illustrate the continuing ability of equity to innovate both in respect of orders designed to protect and enhance the administration of justice, such as freezing injunctions, *Anton Piller* orders, *Norwich Pharmacal* orders and *Bankers Trust* orders, and also, more significantly for present purposes, in respect of orders designed to protect substantive rights, such as internet blocking orders. That is not to undermine the importance of precedent, or to suggest that established categories of injunction are unimportant. But the developments which have taken place over the past half-century demonstrate the continuing flexibility of equitable powers, and are a reminder that injunctions may be issued in new circumstances when the principles underlying the existing law so require.

(2) Injunctions against non-parties

23 It is common ground in this appeal that newcomers are not parties to the proceedings at the time when the injunctions are granted, and the judgments below proceeded on that basis. However, it is worth taking a moment to consider the question.

24 Where the defendants are described in a claim form, or an injunction describes the persons enjoined, simply as persons unknown, the entire world falls within the description. But the entire human race cannot be regarded as being parties to the proceedings: they are not before the court, so that they are subject to its powers. It is only when individuals are served with the claim form that they ordinarily become parties in that sense, although is also possible for persons to apply to become parties in the absence of service. As

will appear, service can be problematical where the identities of the intended defendants are unknown. Furthermore, as a general rule, for any injunction to be enforceable, the persons whom it enjoins, if unnamed, must be described with sufficient clarity to identify those included and those excluded.

25 Where, as in most newcomer injunctions, the persons enjoined are described by reference to the conduct prohibited, particular individuals do not fall within that description until they behave in that way. The result is that the injunction is in substance addressed to the entire world, since anyone in the world may potentially fall within the description of the persons enjoined. But persons may be affected by the injunction in ways which potentially have different legal consequences. For example, an injunction designed to deter Travellers from camping at a particular location may be addressed to persons unknown camping there (notwithstanding that no-one is currently doing so) and may restrain them from camping there. If Travellers elsewhere learn about the injunction, they may consequently decide not to go to the site. Other Travellers, unaware of the injunction, may arrive at the site, and then become aware of the claim form and the injunction by virtue of their being displayed in a prominent position. Some of them may then proceed to camp on the site in breach of the injunction. Others may obey the injunction and go elsewhere. At what point, if any, do Travellers in each of these categories become parties to the proceedings? At what point, if any, are they enjoined? At what point, if any, are they served (if the displaying of the documents is authorised as alternative service)? It will be necessary to return to these questions. However these questions are answered, although each of these groups of Travellers is affected by the injunction, none of them can be regarded as being party to the proceedings at the time when the injunction is granted, as they do not then answer to the description of the persons enjoined and nothing has happened to bring them within the jurisdiction of the court.

26 If, then, newcomers are not parties to the proceedings at the time when the injunctions are granted, it follows that newcomer injunctions depart from the court's usual practice. The ordinary rule is that "you cannot have an injunction except against a party to the suit": *Iveson v Harris* (1802) 7 Ves 251, 257. That is not, however, an absolute rule: Lord Eldon LC was speaking at a time when the scope of injunctions was more closely circumscribed than it is today. In addition to the undoubted jurisdiction to grant interim injunctions prior to the service (or even the issue) of proceedings, a number of other exceptions have been created in response to the requirements of justice. Each of these should be briefly described, as it will be necessary at a later point to consider whether newcomer injunctions fall into any of these established categories, or display analogous features.

(i) Representative proceedings

27 The general rule of practice in England and Wales used to be that the defendants to proceedings must be named, and that even a description of them would not suffice: *Friern Barnet Urban District Council v Adams* [1927] 2 Ch 25; *In re Wykeham Terrace, Brighton, Sussex, Ex p Territorial Auxiliary and Volunteer Reserve Association for the South East* [1971] Ch 204. The only exception in the Rules of the Supreme Court ("RSC") concerned summary proceedings for the possession of land: RSC Ord 113.

A **28** However, it has long been established that in appropriate circumstances relief can be sought against representative defendants, with other unnamed persons being described in the order in general terms. Although formerly recognised by RSC Ord 15, r 12, and currently the subject of rule 19.8 of the CPR, this form of procedure has existed for several centuries and was developed by the Court of Chancery. Its rationale was explained by Sir Thomas Plumer MR in *Meux v Maltby* (1818) 2 Swans 277,
B 281–282:

> "The general rule, which requires the plaintiff to bring before the court all the parties interested in the subject in question, admits of exceptions. The liberality of this court has long held, that there is of necessity an exception to the general rule, when a failure of justice would ensue from its enforcement."

C Those who are represented need not be individually named or identified. Nor need they be served. They are not parties to the proceedings: CPR r 19.8(4)(b). Nevertheless, an injunction can be granted against the whole class of defendants, named and unnamed, and the unnamed defendants are bound in equity by any order made: *Adair v New River Co* (1805) 11 Ves 429, 445; CPR r 19.8(4)(a).

D **29** A representative action may in some circumstances be a suitable means of restraining wrongdoing by individuals who cannot be identified. It can therefore, in such circumstances, provide an alternative remedy to an injunction against "persons unknown": see, for example, *M Michaels (Furriers) Ltd v Askew* (1983) 127 SJ 597, concerned with picketing; *EMI Records Ltd v Kudhail* [1985] FSR 36, concerned with copyright
E infringement; and *Heathrow Airport Ltd v Garman* [2007] EWHC 1957 (QB), concerned with environmental protesters.

30 However, there are a number of principles which restrict the circumstances in which relief can be obtained by means of a representative action. In the first place, the claimant has to be able to identify at least one individual against whom a claim can be brought as a representative of all others likely to interfere with his or her rights. Secondly, the named defendant
F and those represented must have the same interest. In practice, compliance with that requirement has proved to be difficult where those sought to be represented are not a homogeneous group: see, for example, *News Group Newspapers Ltd v Society of Graphical and Allied Trades '82 (No 2)* [1987] ICR 181, concerned with industrial action, and *United Kingdom Nirex Ltd v Barton* The Times, 14 October 1986, concerned with protests. In addition,
G since those represented are not party to the proceedings, an injunction cannot be enforced against them without the permission of the court (CPR r 19.8(4)(b)): something which, it has been held, cannot be granted before the individuals in question have been identified and have had an opportunity to make representations: see, for example, *RWE Npower plc v Carrol* [2007] EWHC 947 (QB).

H (ii) Wardship proceedings

31 Another situation where orders have been made against non-parties is where the court has been exercising its wardship jurisdiction. In *In re X (A Minor) (Wardship: Injunction)* [1984] 1 WLR 1422 the court protected the welfare of a ward of court (the daughter of an individual who had been

convicted of manslaughter as a child) by making an order prohibiting any publication of the present identity of the ward or her parents. The order bound everyone, whether a party to the proceedings or not: in other words, it was an order contra mundum. Similar orders have been made in subsequent cases: see, for example, *In re M and N (Minors) (Wardship: Publication of Information)* [1990] Fam 211 and *In re R (Wardship: Restrictions on Publication)* [1994] Fam 254.

(iii) Injunctions to protect human rights

32 It has been clear since the case of *Venables v News Group Newspapers Ltd* [2001] Fam 430 ("*Venables*") that the court can grant an injunction contra mundum in order to enforce rights protected by the Human Rights Act 1998. The case concerned the protection of the new identities of individuals who had committed notorious crimes as children, and whose safety would be jeopardised if their new identities became publicly known. An injunction preventing the publication of information about the claimants had been granted at the time of their trial, when they remained children. The matter returned to the court after they attained the age of majority and applied for the ban on publication to be continued, on the basis that the information in question was confidential. The injunction was granted against named newspaper publishers and, expressly, against all the world. It was therefore an injunction granted, as against all potential targets other than the named newspaper publishers, on a without notice application.

33 Dame Elizabeth Butler-Sloss P held that the jurisdiction to grant an injunction in the circumstances of the case lay in equity, in order to restrain a breach of confidence. She recognised that by granting an injunction against all the world she would be departing from the general principle, referred to at para 26 above, that "you cannot have an injunction except against a party to the suit" (para 98). But she relied (at para 29) upon the passage in *Spry* (in an earlier edition) which we cited at para 17 above as the source of the necessary equitable jurisdiction, and she felt compelled to make the order against all the world because of the extreme danger that disclosure of confidential information would risk infringing the human rights of the claimants, particularly the right to life, which the court as a public authority was duty-bound to protect from the criminal acts of others: see paras 98–100. Furthermore, an order against only a few named newspaper publishers which left the rest of the media free to report the prohibited information would be positively unfair to them, having regard to their own Convention rights to freedom of speech.

(iv) Reporting restrictions

34 Reporting restrictions are prohibitions on the publication of information about court proceedings, directed at the world at large. They are not injunctions in the same sense as the orders which are our primary concern, but they are relevant as further examples of orders granted by courts restraining conduct by the world at large. Such orders may be made under common law powers or may have a statutory basis. They generally prohibit the publication of information about the proceedings in which they are made (e g as to the identity of a witness). A person will commit a contempt of court if, knowing of the order, he frustrates its purpose by

publishing the information in question: see, for example, *In re F (orse A) (A Minor) (Publication of Information)* [1977] Fam 58 and *Attorney General v Leveller Magazine Ltd* [1979] AC 440.

(v) Embargoes on draft judgments

35 It is the practice of some courts to circulate copies of their draft judgments to the parties' legal representatives, subject to a prohibition on further, unauthorised, disclosure. The order therefore applies directly to non-parties to the proceedings: see, for example, *Attorney General v Crosland* [2021] 4 WLR 103 and [2022] 1 WLR 367. Like reporting restrictions, such orders are not equitable injunctions, but they are relevant as further examples of orders directed against non-parties.

(vi) The effect of injunctions on non-parties

36 We have focused thus far on the question whether an injunction can be granted against a non-party. As we shall explain, it is also relevant to consider the effect which injunctions against parties can have upon non-parties.

37 If non-parties are not enjoined by the order, it follows that they are not bound to obey it. They can nevertheless be held in contempt of court if they knowingly act in the manner prohibited by the injunction, even if they have not aided or abetted any breach by the defendant. As it was put by Lord Oliver of Aylmerton in *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191, 223, there is contempt where a non-party "frustrates, thwarts, or *subverts the purpose* of the court's order and thereby interferes with the due administration of justice in the particular action" (emphasis in original).

38 One of the arguments advanced before the House of Lords in *Attorney General v Times Newspapers Ltd* was that to invoke the jurisdiction in contempt against a person who was neither a party nor an aider or abettor of a breach of the order by the defendant, but who had done what the defendant in the action was forbidden by the order to do was, in effect, to make the order operate in rem or contra mundum. That, it was argued, was a purpose which the court could not legitimately achieve, since its orders were only properly made inter partes.

39 The argument was rejected. Lord Oliver acknowledged at p 224 that "Equity, in general, acts in personam and there are respectable authorities for the proposition that injunctions, whether mandatory or prohibitory, operate inter partes and should be so expressed (see *Iveson v Harris*; *Marengo v Daily Sketch and Sunday Graphic Ltd* [1948] 1 All ER 406)". Nevertheless, the appellants' argument confused two different things: the scope of an order inter partes, and the proper administration of justice (pp 224–225):

> "Once it is accepted, as it seems to me the authorities compel, that contempt (to use Lord Russell of Killowen's words [in *Attorney General v Leveller Magazine Ltd* at p 468]) 'need not involve disobedience to an order binding upon the alleged contemnor' the potential effect of the order contra mundum is an inevitable consequence."

40 In answer to the objection that the non-party who learns of the order has not been heard by the court and has therefore not had the opportunity to

put forward any arguments which he may have, Lord Oliver responded at p 224 that he was at liberty to apply to the court:

> " 'The Sunday Times' in the instant case was perfectly at liberty, before publishing, either to inform the respondent and so give him the opportunity to object or to approach the court and to argue that it should be free to publish where the defendants were not, just as a person affected by notice of, for example, a *Mareva* injunction is able to, and frequently does, apply to the court for directions as to the disposition of assets in his hands which may or may not be subject to the terms of the order."

The non-party's right to apply to the court is now reflected in CPR r 40.9, which provides: "A person who is not a party but who is directly affected by a judgment or order may apply to have the judgment or order set aside or varied." A non-party can also apply to become a defendant in accordance with CPR r 19.4.

41 There is accordingly a distinction in legal principle between being bound by an injunction as a party to the action and therefore being in contempt of court for disobeying it and being in contempt of court as a non-party who, by knowingly acting contrary to the order, subverts the court's purpose and thereby interferes with the administration of justice. Nevertheless, cases such as *Attorney General v Times Newspapers Ltd* and *Attorney General v Punch Ltd* [2003] 1 AC 1046, and the daily impact of freezing injunctions on non-party financial institutions (following *Z Ltd v A-Z and AA-LL* [1982] QB 558), indicate that the differences in the legal analysis can be of limited practical significance. Indeed, since non-parties can be found in contempt of court for acting contrary to an injunction, it has been recognised that it can be appropriate to refer to non-parties in an injunction in order to indicate the breadth of its binding effect: see, for example, *Marengo v Daily Sketch and Sunday Graphic Ltd* [1948] 1 All ER 406, 407; *Attorney General v Newspaper Publishing plc* [1988] Ch 333, 387–388.

42 Prior to the developments discussed below, it can therefore be seen that while the courts had generally affirmed the position that only parties to an action were bound by an injunction, a number of exceptions to that principle had been recognised. Some of the examples given also demonstrate that the court can, in appropriate circumstances, make orders which prohibit the world at large from behaving in a specified manner. It is also relevant in the present context to bear in mind that even where an injunction enjoins a named individual, the public at large are bound not knowingly to subvert it.

(3) Injunctions in the absence of a cause of action

43 An injunction against newcomers purports to restrain the conduct of persons against whom there is no existing cause of action at the time when the order is granted: it is addressed to persons who may not at that time have formed any intention to act in the manner prohibited, let alone threatened to take or taken any steps towards doing so. That might be thought to conflict with the principle that an injunction must be founded on an existing cause of action against the person enjoined, as stated, for example, by Lord Diplock in *Siskina (Owners of cargo lately laden on board) v Distos Cia Naviera SA* [1979] AC 210 ("*The Siskina*"), at p 256. There has been a gradual but

A growing reaction against that reasoning (which Lord Diplock himself recognised was too narrowly stated: *British Airways Board v Laker Airways Ltd* [1985] AC 58, 81) over the past 40 years, culminating in the recent decision in *Broad Idea* [2023] AC 389, cited in para 17 above, where the Judicial Committee of the Privy Council rejected such a rigid doctrine and asserted the court's governance of its own practice. It is now well established that the grant of injunctive relief is not always conditional on the existence of a cause of action. Again, it is relevant to consider some established categories of injunction against "no cause of action defendants" (as they are sometimes described) in order to see whether newcomer injunctions fall into an existing legitimate class, or, if not, whether they display analogous features.

44 One long-established exception is an injunction granted on the application of the Attorney General, acting either ex officio or through another person known as a relator, so as to ensure that the defendant obeys the law (*Attorney General v Harris* [1961] 1 QB 74; *Attorney General v Chaudry* [1971] 1 WLR 1614).

45 The statutory provisions relied on by the local authorities in the present case similarly enable them to seek injunctions in the public interest. All the respondent local authorities rely on section 222 of the Local Government Act 1972, which confers on local authorities the power to bring proceedings to enforce obedience to public law, without the involvement of the Attorney General: *Stoke-on-Trent City Council v B & Q (Retail) Ltd* [1984] AC 754. Where an injunction is granted in proceedings under section 222, a power of arrest may be attached under section 27 of the Police and Justice Act 2006, provided certain conditions are met. Most of the respondents also rely on section 187B of the Town and Country Planning Act 1990, which enables a local authority to apply for an injunction to restrain any actual or apprehended breach of planning control. Some of the respondents have also relied on section 1 of the Anti-social Behaviour, Crime and Policing Act 2014, which enables the court to grant an injunction (on the application of, inter alia, a local authority: see section 2) for the purpose of preventing the respondent from engaging in anti-social behaviour. Again, a power of arrest can be attached: see section 4. One of the respondents also relies on section 130 of the Highways Act 1980, which enables a local authority to institute legal proceedings for the purpose of protecting the rights of the public to the use and enjoyment of highways.

46 Another exception, of great importance in modern commercial practice, is the *Mareva* or freezing injunction. In its basic form, this type of order restrains the defendant from disposing of his assets. However, since assets are commonly held by banks and other financial institutions, the principal effect of the injunction in practice is generally to bind non-parties, as explained earlier. The order is ordinarily made on a without notice application. It differs from a traditional interim injunction: its purpose is not to prevent the commission of a wrong which is the subject of a cause of action, but to facilitate the enforcement of an actual or prospective judgment or other order. Since it can also be issued to assist the enforcement of a decree arbitral, or the judgment of a foreign court, or an order for costs, it need not be ancillary to a cause of action in relation to which the court making the order has jurisdiction to grant substantive relief, or indeed ancillary to a cause of action at all (as where it is granted in support of an

order for costs). Even where the claimant has a cause of action against one defendant, a freezing injunction can in certain limited circumstances be granted against another defendant, such as a bank, against which the claimant does not assert a cause of action (*TSB Private Bank International SA v Chabra* [1992] 1 WLR 231; *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 and *Revenue and Customs Comrs v Egleton* [2007] Bus LR 44).

47 Another exception is the *Norwich Pharmacal* order, which is available where a third party gets mixed up in the wrongful acts of others, even innocently, and may be ordered to provide relevant information in its possession which the applicant needs in order to seek redress. The order is not based on the existence of any substantive cause of action against the defendant. Indeed, it is not a precondition of the exercise of the jurisdiction that the applicant should have brought, or be intending to bring, legal proceedings against the alleged wrongdoer. It is sufficient that the applicant intends to seek some form of lawful redress for which the information is needed: see *Ashworth Hospital Authority v MGN Ltd* [2002] 1 WLR 2033.

48 Another type of injunction which can be issued against a defendant in the absence of a cause of action is a *Bankers Trust* order. In the case from which the order derives its name, *Bankers Trust Co v Shapira* [1980] 1 WLR 1274 (para 20 above), an order was granted requiring an innocent third party to disclose documents and information which might assist the claimant in locating assets to which the claimant had a proprietary claim. The claimant asserted no cause of action against the defendant. Later cases have emphasised the width and flexibility of the equitable jurisdiction to make such orders: see, for example, *Murphy v Murphy* [1999] 1 WLR 282, 292.

49 Another example of an injunction granted in the absence of a cause of action against the defendant is the internet blocking order. This is a new type of injunction developed to address the problems arising from the infringement of intellectual property rights via the internet. In the leading case of *Cartier International AG v British Sky Broadcasting Ltd* [2017] Bus LR 1 and [2018] 1 WLR 3259, cited at paras 17 and 20 above, the Court of Appeal upheld the grant of injunctions ordering internet service providers ("ISPs") to block websites selling counterfeit goods. The ISPs had not invaded, or threatened to invade, any independently identifiable legal or equitable right of the claimants. Nor had the claimants brought or indicated any intention to bring proceedings against any of the infringers. It was nevertheless held that there was power to grant the injunctions, and a principled basis for doing so, in order to compel the ISPs to prevent their facilities from being used to commit or facilitate a wrong. On an appeal to this court on the question of costs, Lord Sumption JSC (with whom the other Justices agreed) analysed the nature and basis of the orders made and concluded that they were justified on ordinary principles of equity. That was so although the claimants had no cause of action against the respondent ISPs, who were themselves innocent of any wrongdoing.

(4) The commencement and service of proceedings against unidentified defendants

50 Bringing proceedings against persons who cannot be identified raises issues relating to the commencement and service of proceedings. It is necessary at this stage to explain the general background.

A **51** The commencement of proceedings is an essentially formal step, normally involving the issue of a claim form in an appropriate court. The forms prescribed in the CPR include a space in which to designate the claimant and the defendant. As was observed in *Cameron v Hussain* [2019] 1 WLR 1471 ("*Cameron*"), para 12, that is a format equally consistent with their being designated by name or by description. As was explained earlier, the claims in the present case were brought under Part 8 of the CPR. CPR B r 8.2A(1) provides that a practice direction "may set out circumstances in which a claim form may be issued under this Part without naming a defendant". A number of practice directions set out such circumstances, including Practice Direction 49E, paras 21.1–21.10 of which concern applications under certain statutory provisions. They include section 187B of the Town and Country Planning Act 1990, which concerns proceedings C for an injunction to restrain "any actual or apprehended breach of planning control". As explained in para 45 above, section 187B was relied on in most of the present cases. CPR r 55.3(4) also permits a claim for possession of property to be brought against "persons unknown" where the names of the trespassers are unknown.

52 The only requirement for a name is contained in paragraph 4.1 of D Practice Direction 7A, which states that a claim form should state the full name of each party. In *Bloomsbury Publishing Group plc v News Group Newspapers Ltd* [2003] 1 WLR 1633 ("*Bloomsbury*"), it was said that the words "should state" in paragraph 4.1 were not mandatory but imported a discretion to depart from the practice in appropriate cases. However, the point is not of critical importance. As was stated in *Cameron,* para 12, a practice direction is no more than guidance on matters of practice issued E under the authority of the heads of division. It has no statutory force and cannot alter the general law.

53 As we have explained at paras 27–33 above, there are undoubtedly circumstances in which proceedings may be validly commenced although the defendant is not named in the claim form, in addition to those mentioned in the rules and practice directions mentioned above. All of those examples—representative defendants, the wardship jurisdiction, and the F principle established in the *Venables* case [2001] Fam 430—might however be said to be special in some way, and to depend on a principle which is not of broader application.

54 A wider scope for proceedings against unnamed defendants emerged in *Bloomsbury*, where it was held that there is no requirement that the defendant must be named. The overriding objective of the CPR is to enable G the court to deal with cases justly and at proportionate cost. Since this objective is inconsistent with an undue reliance on form over substance, the joinder of a defendant by description was held to be permissible, provided that the description was "sufficiently certain as to identify both those who are included and those who are not" (para 21). It will be necessary to return to that case, and also to consider more recent decisions concerned with proceedings brought against unnamed persons. H

55 Service of the claim form is a matter of greater significance. Although the court may exceptionally dispense with service, as explained below, and may if necessary grant interlocutory relief, such as interim injunctions, before service, as a general rule service of originating process is the act by which the defendant is subjected to the court's jurisdiction, in the

sense of its power to make orders against him or her (*Dresser UK Ltd v Falcongate Freight Management Ltd* [1992] QB 502, 523; *Barton v Wright Hassall LLP* [2018] 1 WLR 1119). Service is significant for many reasons. One of the most important is that it is a general requirement of justice that proceedings should be brought to the notice of parties whose interests are affected before any order is made against them (other than in an emergency), so that they have an opportunity to be heard. Service of the claim form on the defendant is the means by which such notice is normally given. It is also normally by means of service of the order that an injunction is brought to the notice of the defendant, so that he or she is bound to comply with it. But it is generally sufficient that the defendant is aware of the injunction at the time of the alleged breach of it.

56 Conventional methods of service may be impractical where defendants cannot be identified. However, alternative methods of service can be permitted under CPR r 6.15. In exceptional circumstances (for example, where the defendant has deliberately avoided identification and substituted service is impractical), the court has the power to dispense with service, under CPR r 6.16.

3. The development of newcomer injunctions to restrain unauthorised occupation and use of land—the impact of Cameron and Canada Goose

57 The years from 2003 saw a rapid development of the practice of granting injunctions purporting to prohibit persons, described as persons unknown, who were not parties to the proceedings when the order was made, from engaging in specified activities including, of most direct relevance to this appeal, occupying and using land without the appropriate consent. This is just one of the areas in which the court has demonstrated a preparedness to grant an injunction, subject to appropriate safeguards, against persons who could not be identified, had not been served and were not party to the proceedings at the date of the order.

(1) Bloomsbury

58 One of the earliest injunctions of this kind was granted in the context of the protection of intellectual property rights in connection with the forthcoming publication of a novel. The *Bloomsbury* case [2003] 1 WLR 1633, cited at para 52 above, is one of two decisions of Sir Andrew Morritt V-C in 2003 which bear on this appeal. There had been a theft of several pre-publication copies of a new Harry Potter novel, some of which had been offered to national newspapers ahead of the launch date. By the time of the hearing of a much adjourned interim application most but not all of the thieves had been arrested, but the claimant publisher wished to have continued injunctions, until the date a month later when the book was due to be published, against unnamed further persons, described as the person or persons who had offered a copy of the book to the three named newspapers and the person or persons in physical possession of the book without the consent of the claimants.

59 The Vice-Chancellor acknowledged that it would under the old RSC and relevant authority in relation to them have been improper to seek to identify intended defendants in that way (see para 27 above). He noted (para 11) the anomalous consequence:

A "A claimant could obtain an injunction against all infringers by description so long as he could identify one of them by name [as a representative defendant: see paras 27–30 above], but, by contrast, if he could not name one of them then he could not get an injunction against any of them."

He regarded the problem as essentially procedural, and as having been cured B by the introduction of the CPR. He concluded, at para 21:

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

(2) Hampshire Waste Services

60 Later that same year, Sir Andrew Morritt V-C made another order against persons unknown, this time in a protester case, *Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator Site* [2004] D Env LR 9 ("*Hampshire Waste Services*"). The claimants, operators of a number of waste incinerator sites which fed power to the national grid, sought an injunction to restrain protesters from entering any of various named sites in connection with a "Global Day of Action against Incinerators" some six days later. Previous actions of this kind presented a danger to the protesters and to others and had resulted in the plants having to be shut down. The police were, it seemed, largely powerless to prevent E these threatened activities. The Vice-Chancellor, having referred to *Bloomsbury*, had no doubt the order was justified save for one important matter: the claimants were unable to identify any of the protesters to whom the order would be directed or upon whom proceedings could be served. Nevertheless, the Vice-Chancellor was satisfied that, in circumstances such as these, joinder by description was permissible, that the intended F defendants should be described as "persons entering or remaining without the consent of the claimants, or any of them, on any of the incinerator sites at [specified addresses] in connection with the 'Global Day of Action Against Incinerators' (or similarly described event) on or around 14 July 2003", and that posting notices around the sites would amount to effective substituted service. The court should not refuse an application simply because difficulties in enforcement were envisaged. It was, however, necessary that G any person who wished to do so should be able promptly to apply for the order to be discharged, and that was allowed for. That being so, there was no need for a formal return date.

61 Whereas in *Bloomsbury* the injunction was directed against a small number of individuals who were at least theoretically capable of being identified, the injunction granted in *Hampshire Waste Services* was effectively made against the world: anyone might potentially have entered or H remained on any of the sites in question on or around the specified date. This is a common if not invariable feature of newcomer injunctions. Although the number of persons likely to engage in the prohibited conduct will plainly depend on the circumstances, and will usually be relatively small, such orders bear upon, and enjoin, anyone in the world who does so.

(3) Gammell

62 The *Bloomsbury* decision has been seen as opening up a wide jurisdiction. Indeed, Lord Sumption observed in *Cameron*, para 11, that it had regularly been invoked in the years which followed in a variety of different contexts, mainly concerning the abuse of the internet, and trespasses and other torts committed by protesters, demonstrators and paparazzi. Cases in the former context concerned defamation, theft of information by hacking, blackmail and theft of funds. But it is upon cases and newcomer injunctions in the second context that we must now focus, for they include cases involving protesters, such as *Hampshire Waste Services*, and also those involving Gypsies and Travellers, and therefore have a particular bearing on these appeals and the issues to which they give rise.

63 Some of these issues were considered by the Court of Appeal only a short time later in two appeals concerning Gypsy caravans brought onto land at a time when planning permission had not been granted for that use: *South Cambridgeshire District Council v Gammell*; *Bromley London Borough Council v Maughan* [2006] 1 WLR 658 ("*Gammell*").

64 The material aspects of the two cases are substantially similar, and it will suffice for present purposes to focus on the *South Cambridgeshire* case. The Court of Appeal (Brooke and Clarke LJJ) had earlier granted an injunction under section 187B of the Town and Country Planning Act 1990 against persons described as "persons unknown . . . causing or permitting hardcore to be deposited . . . caravans, mobile homes or other forms of residential accommodation to be stationed . . . or existing caravans, mobile homes or other forms of residential accommodation . . . to be occupied" on land adjacent to a Gypsy encampment in rural Cambridgeshire: *South Cambridgeshire District Council v Persons Unknown* [2004] 4 PLR 88 ("*South Cambs*"). The order restrained the persons so described from behaving in the manner set out in that description. Service of the claim form and the injunction was effected by placing them in clear plastic envelopes in a prominent position on the relevant land.

65 Several months later, Ms Gammell, without securing or applying for the necessary planning permission or making an application to set the injunction aside or vary its terms, proceeded to station her caravans on the land. She was therefore a newcomer within the meaning of that word as used in this appeal, since she was neither a defendant nor on notice of the application for the injunction nor on the site when the injunction was granted. She was served with the injunction and its effect was explained to her, but she continued to station the caravans on the land. On an application for committal by the local authority she was found at first instance to have been in contempt. Sentencing was adjourned to enable her to appeal against the judge's refusal to permit her to be added as a defendant to the proceedings, for the purpose of enabling her to argue that the injunction should not have the effect of placing her in contempt until a proportionality exercise had been undertaken to balance her particular human rights against the grant of an injunction against her, in accordance with *South Bucks District Council v Porter* [2003] 2 AC 558.

66 The Court of Appeal dismissed her appeal. In his judgment, Sir Anthony Clarke MR, with whom Rix and Moore-Bick LJJ agreed, stated that each of the appellants became a party to the proceedings when she did an act which brought her within the definition of defendant in the particular case.

Ms Gammell had therefore already become a defendant when she stationed her caravan on the site. Her proper course (and that of any newcomer in the same situation) was to make a prompt application to vary or discharge the injunction as against her (which she had not done) and, in the meantime, to comply with the injunction. The individualised proportionality exercise could then be carried out with regard to her particular circumstances on the hearing of the application to vary or discharge, and might in any event be relevant to sanction. This reasoning, and in particular the notion that a newcomer becomes a defendant by committing a breach of the injunction, has been subject to detailed and sustained criticism by the appellants in the course of this appeal, and this is a matter to which we will return.

(4) Meier

67 We should also mention a decision of this court from about the same time concerning Travellers who had set up an unauthorised encampment in wooded areas managed by the Forestry Commission and owned by the Secretary of State for the Environment, Food and Rural Affairs: *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] 1 WLR 2780 ("*Meier*"). This was in one sense a conventional case: the Secretary of State issued proceedings alleging trespass by the occupying Travellers and sought an order for possession of the occupied sites. More unusual (and ultimately unsuccessful) was the application for an order for possession against the Travellers in respect of other land which was wholly detached from the land they were occupying. This was wrong in principle for it was simply not possible (even on a precautionary basis) to make an order requiring persons to give immediate possession of woodland of which they were *not* in occupation, and which was wholly detached from the woodland of which they *were* in occupation (as Lord Neuberger of Abbotsbury MR explained at para 75). But that did not mean the courts were powerless to frame a remedy. The court upheld an injunction granted by the Court of Appeal against the defendants, including "persons names unknown", restraining them from entering the woodland which they had not yet occupied. Since it was not argued that the injunction was defective, we do not attach great significance to Lord Neuberger MR's conclusion at para 84 that it had not been established that there was an error of principle which led to its grant. Nevertheless, it is notable that Lord Rodger of Earlsferry JSC expressed the view that the injunction had been rightly granted, and cited the decisions of Sir Andrew Morritt V-C in *Bloomsbury* and *Hampshire Waste Services*, and the grant of the injunction in the *South Cambs* case, without disapproval (at paras 2–3).

(5) Later cases concerning Traveller injunctions

68 Injunctions in the Traveller and Gypsy context were targeted first at actual trespass on land. Typically, the local authorities would name as actual or intended defendants the particular individuals they had been able to identify, and then would seek additional relief against "persons unknown", these being persons who were alleged to be unlawfully occupying the land but who could not at that stage be identified by name, although often they could be identified by some form of description. But before long, many local authorities began to take a bolder line and claims were brought simply against "persons unknown".

69 A further important development was the grant of Traveller injunctions, not just against those who were in unauthorised occupation of the land, whether they could be identified or not, but against persons on the basis only of their potential rather than actual occupation. Typically, these injunctions were granted for three years, sometimes more. In this way Traveller injunctions were transformed from injunctions against wrongdoers and those who at the date of the injunction were threatening to commit a wrong, to injunctions primarily or at least significantly directed against newcomers, that is to say persons who were not parties to the claim when the injunction was granted, who were not at that time doing anything unlawful in relation to the land of that authority, or even intending or overtly threatening to do so, but who might in the future form that intention.

70 One of the first of these injunctions was granted by Patterson J in *Harlow District Council v Stokes* [2015] EWHC 953 (QB). The claimants sought and were granted an interim injunction under section 222 of the Local Government Act 1972 and section 187B of the Town and Country Planning Act 1990 in existing proceedings against over thirty known defendants and, importantly, other "persons unknown" in respect of encampments on a mix of public and private land. The pattern had been for these persons to establish themselves in one encampment, for the local authority and the police to take action against them and move them on, and for the encampment then to disperse but later reappear in another part of the district, and so the process would start all over again, just as Lord Rodger JSC had anticipated in *Meier*. Over the months preceding the application numerous attempts had been made using other powers (such as the Criminal Justice and Public Order Act 1994 ("CJPOA")) to move the families on, but all attempts had failed. None of the encampments had planning permission and none had been the subject of any application for planning permission.

71 It is to be noted, however, that appropriate steps had been taken to draw the proceedings to the attention of all those in occupation (see para 15). None had attended court. Further, the relevant authorities and councils accepted that they were required to make provision for Gypsy and Traveller accommodation and gave evidence of how they were working to provide additional and appropriate sites for the Gypsy and Traveller communities. They also gave evidence of the extensive damage and pollution caused by the unlawful encampments, and the local tensions they generated, and the judge summarised the effects of this in graphic detail (at paras 10 and 11).

72 Following the decision in *Harlow District Council v Stokes* and an assessment of the efficacy of the orders made, a large number of other local authorities applied for and were granted similar injunctions over the period from 2017–2019, with the result that by 2020 there were in excess of 35 such injunctions in existence. By way of example, in *Kingston upon Thames Royal London Borough Council v Persons Unknown* [2019] EWHC 1903 (QB), the injunction did not identify any named defendants.

73 All of these injunctions had features of relevance to the issues raised by this appeal. Sometimes the order identified the persons to whom it was directed by reference to a particular activity, such as "persons unknown occupying land" or "persons unknown depositing waste". In many of the cases, injunctions were granted against persons identified only as those who

might in future commit the acts which the injunction prohibited (e g *UK Oil and Gas Investments plc v Persons Unknown* [2019] JPL 161). In other cases, the defendants were referred to only as "persons unknown". The injunctions remained in place for a considerable period of time and, on occasion, for years. Further, the geographical reach of the injunctions was extensive, indeed often borough-wide. They were usually granted without the court hearing any adversarial argument, and without provision for an early return date.

74 It is important also to have in mind that these injunctions undoubtedly had a significant impact on the communities of Travellers and Gypsies to whom they were directed, for they had the effect of forcing many members of these communities out of the boroughs which had obtained and enforced them. They also imposed a greater strain on the resources of the boroughs and councils which had not yet obtained an order. This combination of features highlighted another important consideration, and it was one of which the judges faced with these applications have been acutely conscious: a nomadic lifestyle has for very many years been a part of the tradition and culture of many Traveller and Gypsy communities, and the importance of this lifestyle to the Gypsy and Traveller identity has been recognised by the European Court of Human Rights in a series of decisions including *Chapman v United Kingdom* (2001) 33 EHRR 18.

75 As the Master of the Rolls explained in the present case, at paras 105 and 106, any individual Traveller who is affected by a newcomer injunction can rely on a private and family life claim to pursue a nomadic lifestyle. This right must be respected, but the right to that respect must be balanced against the public interest. The court will also take into account any other relevant legal considerations such as the duties imposed by the Equality Act 2010.

76 These considerations are all the more significant given what from these relatively early days was acknowledged by many to be a central and recurring set of problems in these cases (and it is one to which we must return in considering appropriate guidelines in cases of this kind): the Gypsies and Travellers to whom they were primarily directed had a lifestyle which made it difficult for them to access conventional sources of housing provision; their attempts to obtain planning permission almost always met with failure; and at least historically, the capacity of sites authorised for their occupation had fallen well short of that needed to accommodate those seeking space on which to station their caravans. The sobering statistics were referred to by Lord Bingham of Cornhill in *South Bucks District Council v Porter* [2003] 2 AC 558 (para 65 above), para 13.

77 The conflict to which these issues gave rise was recognised at the highest level as early as 2000 and emphasised in a housing research summary, *Local Authority Powers for Managing Unauthorised Camping* (Office of the Deputy Prime Minister, No 90, 1998, updated 4 December 2000):

> "The basic conflict underlying the 'problem' of unauthorised camping is between [Gypsies]/Travellers who want to stay in an area for a period but have nowhere they can legally camp, and the settled community who, by and large, do not want [Gypsies]/Travellers camped in their midst. The local authority is stuck between the two parties, trying to balance the conflicting needs and often satisfying no one."

78 For many years there has also been a good deal of publicly available guidance on the issue of unauthorised encampments, much of which embodies obvious good sense and has been considered by the judges dealing with these applications. So, for example, materials considered in the authorities to which we will come have included a Department for the Environment Circular 18/94, *Gypsy Sites Policy and Unauthorised Camping* (November 1994), which stated that "it is a matter for local discretion whether it is appropriate to evict an unauthorised [Gypsy] encampment". Matters to be taken into account were said to include whether there were authorised sites; and, if not, whether the unauthorised encampment was causing a nuisance and whether services could be provided to it. Authorities were also urged to try to identify possible emergency stopping places as close as possible to the transit routes so that Travellers could rest there for short periods; and were advised that where Gypsies were unlawfully encamped, it was for the local authority to take necessary steps to ensure that any such encampment did not constitute a threat to public health. Local authorities were also urged not to use their powers to evict Gypsies needlessly, and to use those powers in a humane and compassionate way. In 2004 the Office of the Deputy Prime Minister issued *Guidance on Managing Unauthorised Camping*, which recommended that local authorities and other public bodies distinguish between unauthorised encampment locations which were unacceptable, for instance because they involved traffic hazards or public health risks, and those which were acceptable, and stated that each encampment location must be considered on its merits. It also indicated that specified welfare inquiries should be undertaken in relation to the Travellers and their families before any decision was made as to whether to bring proceedings to evict them. Similar guidance was to be found in the Home Office *Guide to Effective Use of Enforcement Powers* (*Part 1; Unauthorised Encampments*), published in February 2006, in which it was emphasised that local authorities have an obligation to carry out welfare assessments on unauthorised campers to identify any issue that needs to be addressed before enforcement action is taken against them. It also urged authorities to consider whether enforcement was absolutely necessary.

79 The fact that Travellers and Gypsies have almost invariably chosen not to appear in these proceedings (and have not been represented) has left judges with the challenging task of carrying out a proportionality assessment which has inevitably involved weighing all of these considerations, including the relevance of the breadth of the injunctions sought and the fact that the injunctions were directed against "persons unknown", in deciding whether they should be granted and, if so, for how long; and whether they should be made subject to particular conditions and safeguards and, if so, what those conditions and safeguards should be.

(6) Cameron

80 The decision of the Supreme Court in *Cameron* [2019] 1 WLR 1471 (para 51 above) highlighted further and more fundamental considerations for this developing jurisprudence, and it is a decision to which we must return for it forms an important element of the case developed before us on behalf of the appellants. At this stage it is sufficient to explain that the claimant suffered personal injuries and damage to her car in a collision with another vehicle. The driver of that vehicle failed to stop and fled the scene.

A The claimant then brought an action for damages against the registered keeper, but it transpired that that person had not been driving the vehicle at the time of the accident. In addition, although there was an insurance policy in force in respect of the vehicle, the insured person was fictitious. The claimant could not sue the insurers, as the relevant legislation required that the driver was a person insured under the policy. The claimant could have sought compensation from the Motor Insurers' Bureau, which compensates B the victims of uninsured motorists, but for reasons which were unclear she applied instead to amend her claim to substitute for the registered keeper the person unknown who was driving the car at the time of the collision, so as to obtain a judgment on which the insurer would be liable under section 151 of the Road Traffic Act 1988 ("the 1988 Act"). The judge refused the application.

C **81** The Court of Appeal allowed the claimant's appeal. In the Court of Appeal's view, it would be consistent with the CPR and the policy of the 1988 Act for proceedings to be brought and pursued against the unnamed driver, suitably identified by an appropriate description, in order that the insurer could be made liable under section 151 of the 1988 Act for any judgment obtained against that driver.

D **82** A further appeal by the insurer to the Supreme Court was allowed unanimously. Lord Sumption considered in some detail the extent of any right in English law to sue unnamed persons. He referred to the decision in *Bloomsbury* and the cases which followed, many of which we have already mentioned. Then, at para 13, he distinguished between two kinds of case in which the defendant could not be named, and to which different considerations applied. The first comprised anonymous defendants who E were identifiable but whose names were unknown. Squatters occupying a property were, for example, identifiable by their location though they could not be named. The second comprised defendants, such as most hit and run drivers, who were not only anonymous but could not be identified.

83 Lord Sumption proceeded to explain that permissible modes of service had been broadened considerably over time but that the object of all of these modes of service was the same, namely to enable the court to be F satisfied that one or other of the methods used had either put the defendant in a position to ascertain the contents of the claim or was reasonably likely to enable him to do so within an appropriate period of time. The purpose of service (and substituted service) was to inform the defendant of the contents of the claim and the nature of the claimant's case against him; to give him notice that the court, being a court of competent jurisdiction, would in due G course proceed to decide the merits of that claim; and to give him an opportunity to be heard and to present his case before the court. It followed that it was not possible to issue or amend a claim form so as to sue an unnamed defendant if it was conceptually impossible to bring the claim to his attention.

84 In the *Cameron* case there was no basis for inferring that the offending driver was aware of the proceedings. Service on the insurer did H not and would not without more constitute service on that offending driver (nor was the insurer directly liable); alternative service on the insurer could not be expected to reach the driver; and it could not be said that the driver was trying to evade service for it had not been shown that he even knew that proceedings had been or were likely to be brought against him. Further, it

had not been established that this was an appropriate case in which to dispense with service altogether for any other reason. It followed that the driver could not be sued under the description relied upon by the claimant.

85 This important decision was followed in a relatively short space of time by a series of five appeals to and decisions of the Court of Appeal concerning the way in which and the extent to which proceedings for injunctive relief against persons unknown, including newcomers, could be used to restrict trespass by constantly changing communities of Travellers, Gypsies and protesters. It is convenient to deal with them in broadly chronological order.

(7) Ineos

86 In *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100, the claimants, a group of companies and individuals connected with the business of shale and gas exploration by fracking, sought interim injunctions to restrain what they contended were threatened and potentially unlawful acts of protest, including trespass, nuisance and harassment, before they occurred. The judge was satisfied on the evidence that there was a real and imminent threat of unlawful activity if he did not make an order pending trial and it was likely that a similar order would be made at trial. He therefore made the orders sought by the claimants, save in relation to harassment.

87 On appeal to the Court of Appeal it was argued, among other things, that the judge was wrong to grant injunctions against persons unknown and that he had failed properly to consider whether the claimants were likely to obtain the relief they sought at trial and whether it was appropriate to grant an injunction against persons unknown, including newcomers, before they had had an opportunity to be heard.

88 These arguments were addressed head-on by Longmore LJ, with whom the other members of the court agreed. He rejected the submission that a claimant could never sue persons unknown unless they were identifiable at the time the claim form was issued. He also rejected, as too absolutist, the submission that an injunction could not be granted to restrain newcomers from engaging in the offending activity, that is to say persons who might only form the intention to engage in the activity at some later date. Lord Sumption's categorisation of persons who might properly be sued was not intended to exclude newcomers. To the contrary, Longmore LJ continued, Lord Sumption appeared rather to approve the decision in *Bloomsbury* and he had expressed no disapproval of the decision in *Hampshire Waste Services*.

89 Longmore LJ went on tentatively to frame the requirements of an injunction against unknown persons, including newcomers, in a characteristically helpful and practical way. He did so in these terms (at para 34): (1) there must be a sufficiently real and imminent risk of a tort being committed to justify quia timet relief; (2) it is impossible to name the persons who are likely to commit the tort unless restrained; (3) it is possible to give effective notice of the injunction and for the method of such notice to be set out in the order; (4) the terms of the injunction must correspond to the threatened tort and not be so wide that they prohibit lawful conduct; (5) the terms of the injunction must be sufficiently clear and precise as to enable

A persons potentially affected to know what they must not do; and (6) the injunction should have clear geographical and temporal limits.

(8) Bromley

90 The issue of unauthorised encampments by Gypsies and Travellers was considered by the Court of Appeal a short time later in *Bromley London* B *Borough Council v Persons Unknown* [2020] PTSR 1043. This was an appeal against the refusal by the High Court to grant a five-year de facto borough-wide prohibition of encampment and entry or occupation of accessible public spaces in Bromley except cemeteries and highways. The final injunction sought was directed at "persons unknown" but it was common ground that it was aimed squarely at the Gypsy and Traveller communities.

C **91** Important aspects of the background were that some Gypsy and Traveller communities had a particular association with Bromley; the borough had a history of unauthorised encampments; there were no or no sufficient transit sites to cater for the needs of these communities; the grant of these injunctions in ever increasing numbers had the effect of forcing Gypsies and Travellers out of the boroughs which had obtained them, D thereby imposing a greater strain on the resources of those which had not yet applied for such orders; there was a strong possibility that unless restrained by the injunction those targeted by these proceedings would act in breach of the rights of the relevant local authority; and although aspects of the resulting damage could be repaired, there would nevertheless be significant irreparable damage too. The judge was satisfied that all the necessary ingredients for a quia timet injunction were in place and so it was necessary E to carry out an assessment of whether it was proportionate to grant the injunction sought in all the circumstances of the case. She concluded that it was not proportionate to grant the injunction to restrain entry and encampments but that it was proportionate to grant an injunction against fly-tipping and the disposal of waste.

92 The particular questions giving rise to the appeal were relatively F narrow (namely whether the judge had fallen into error in finding the order sought was disproportionate, in setting too high a threshold for assessment of the harm caused by trespass and in concluding that the local authority had failed to discharge its public sector equality duty); but the Court of Appeal was also invited and proceeded to give guidance on the broader question of how local authorities ought properly to address the issues raised by applications for such injunctions in the future. The decision is also G important because it was the first case involving an injunction in which the Gypsy and Traveller communities were represented before the High Court, and as a result of their success in securing the discharge of the injunction, it was the first case of this kind properly to be argued out at appellate level on the issues of procedural fairness and proportionality. It must also be borne in mind that the decision of the Supreme Court in *Cameron* was not cited H to the Court of Appeal; nor did the Court of Appeal consider the appropriateness as a matter of principle of granting such injunctions. Conversely, there is nothing in *Bromley* to suggest that final injunctions against unidentified newcomers cannot or should never be granted.

93 As it was, the Court of Appeal dismissed the appeal. Coulson LJ, with whom Ryder and Haddon-Cave LJJ agreed, endorsed what he described as

the elegant synthesis by Longmore LJ in *Ineos* (at para 34) of certain essential requirements for the grant of an injunction against persons unknown in a protester case (paras 29–30). He considered it appropriate to add in the present context (that of Travellers and Gypsies), first, that procedural fairness required that a court should be cautious when considering whether to grant an injunction against persons unknown, including Gypsies and Travellers, particularly on a final basis, in circumstances where they were not there to put their side of the case (paras 31–34); and secondly, that the judge had adopted the correct approach in requiring the claimant to show that there was a strong probability of irreparable harm (para 35).

94 The Court of Appeal was also satisfied that in assessing proportionality the judge had properly taken into account seven factors: (a) the wide extent of the relief sought; (b) the fact that the injunction was not aimed specifically at prohibiting anti-social or criminal behaviour, but just entry and occupation; (c) the lack of availability of alternative sites; (d) the cumulative effect of other injunctions; (e) various specific failures on the part of the authority in respect of its duties under the Human Rights Act and the public sector equality duty; (f) the length of time, that is to say five years, the proposed injunction would be in force; and (g) whether the order sought took proper account of permitted development rights arising by operation of the Town and Country Planning (General Permitted Development) (England) Order 2015 (SI 2015/596), that is to say the grant of "deemed planning permission" for, by way of example, the stationing of a single caravan on land for not more than two nights, which had not been addressed in a satisfactory way. Overall, the authority had failed to satisfy the judge that it was appropriate to grant the injunction sought, and the Court of Appeal decided there was no basis for interfering with the conclusion to which she had come.

95 Coulson LJ went on (at paras 99–109) to give the wider guidance to which we have referred, and this is a matter to which we will return a little later in this judgment for it has a particular relevance to the principles to which newcomer injunctions in Gypsy and Traveller cases should be subject. Aspects of that guidance are controversial; but other aspects about which there can be no real dispute are that local authorities should engage in a process of dialogue and communication with travelling communities; should undertake, where appropriate, welfare and impact assessments; and should respect, appropriately, the culture, traditions and practices of the communities. Similarly, injunctions against unauthorised encampments should be limited in time, perhaps to a year, before review.

(9) Cuadrilla

96 The third of these appeals, *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29, concerned an injunction to restrain four named persons and "persons unknown" from trespassing on the claimants' land, unlawfully interfering with their rights of passage to and from that land, and unlawfully interfering with the supply chain of the first claimant, which was involved, like *Ineos*, in the business of shale and gas exploration by fracking. The Court of Appeal was specifically concerned here with a challenge to an order for the committal of a number of persons for breach of this injunction, but, at para 48 and subject to two points, summarised the effect of *Ineos* as being that there was no conceptual or legal prohibition

against suing persons unknown who were not currently in existence but would come into existence if and when they committed a threatened tort. Nonetheless, it continued, a court should be inherently cautious about granting such an injunction against unknown persons since the reach of such an injunction was necessarily difficult to assess in advance.

(10) Canada Goose

97 Only a few months later, in *Canada Goose* [2020] 1 WLR 2802 (para 11 above), the Court of Appeal was called upon to consider once again the way in which, and the extent to which, civil proceedings for injunctive relief against persons unknown could be used to restrict public protests. The first claimant, Canada Goose, was the UK trading arm of an international retailing business selling clothing containing animal fur and down. It opened a store in London but was faced with what it considered to be a campaign of harassment, nuisance and trespass by protesters against the manufacture and sale of such clothing. Accordingly, with the manager of the store, it issued proceedings and decided to seek an injunction against the protesters.

98 Specifically, the claimants sought and obtained a without notice interim injunction against "persons unknown" who were described as "persons unknown who are protestors against the manufacture and sale of clothing made of or containing animal products and against the sale of such clothing at [the claimants' store]". The injunction restrained them from, among other things, assaulting or threatening staff and customers, entering or damaging the store and engaging in particular acts of demonstration within particular zones in the vicinity of the store. The terms of the order did not require the claimants to serve the claim form on any "persons unknown" but permitted service of the interim injunction by handing or attempting to hand it to any person demonstrating at or in the vicinity of the store or by email to either of two stated email addresses, that of an activist group and that of People for the Ethical Treatment of Animals (PETA) Foundation ("PETA"), a charitable company dedicated to the protection of the rights of animals. PETA was subsequently added to the proceedings as second defendant at its own request.

99 The claimants served many copies of the interim injunction on persons in the vicinity of the store, including over 100 identifiable individuals, but did not attempt to join any of them as parties to the claim. As for the claim form, this was sent by email to the two addresses specified for service of the interim injunction, and to one other individual who had requested a copy.

100 In these circumstances, an application by the claimants for summary judgment and a final injunction was unsuccessful. The judge held that the claim form had not been served on any defendant to the proceedings; that it was not appropriate to permit service by alternative means (under CPR r 6.15) or to dispense with service (under CPR r 6.16); and that the interim injunction would be discharged. He also considered that the description of the persons unknown was too broad, as it was capable of including protesters who might never intend to visit the store, and that the injunction was capable of affecting persons who did not carry out any activities which were otherwise unlawful. In addition, he considered that the proposed final injunction was defective in that it would capture

future protesters who were not parties to the proceedings at the time when the injunction was granted. He refused to grant a final injunction.

101 The Court of Appeal dismissed the claimants' appeal. It held, first, that service of proceedings is important in the delivery of justice. The general rule is that service of the originating process is the act by which the defendant is subjected to the court's jurisdiction—and that a person cannot be made subject to the jurisdiction without having such notice of the proceedings as will enable him to be heard. Here there was no satisfactory evidence that the steps taken by the claimants were such as could reasonably be expected to have drawn the proceedings to the attention of the respondent unknown persons; the claimants had never sought an order for alternative service under CPR r 6.15 and there was never any proper basis for an order under CPR r 6.16 dispensing with service.

102 Secondly, the Court of Appeal held that the court may grant an interim injunction before proceedings have been served (or even issued) against persons who wish to join an ongoing protest, and that it is also, in principle, open to the court in appropriate circumstances to limit even lawful activity where there is no other proportionate means of protecting the claimants' rights, as for example in *Hubbard v Pitt* [1976] QB 142 (protesting outside an estate agency), and *Burris v Azadani* [1995] 1 WLR 1372 (entering a modest exclusion zone around the claimant's home), and to this extent the requirements for a newcomer injunction explained in *Ineos* required qualification. But in this case, the description of the "persons unknown" was impermissibly wide; the prohibited acts were not confined to unlawful acts; and the interim injunction failed to provide for a method of alternative service which was likely to bring the order to the attention of the persons unknown. The court was therefore justified in discharging the interim injunction.

103 Thirdly, the Court of Appeal held (para 89) that a final injunction could not be granted in a protester case against persons unknown who were not parties at the date of the final order, since a final injunction operated only between the parties to the proceedings. As authority for that proposition, the court cited *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191 per Lord Oliver at p 224 (quoted at para 39 above). That, the court said, was consistent with the fundamental principle in *Cameron* [2019] 1 WLR 1471 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. It followed, in the court's view, that a final injunction could not be granted against newcomers who had not by that time committed the prohibited acts, since they did not fall within the description of "persons unknown" and had not been served with the claim form. This was not one of the very limited cases, such as *Venables* [2001] Fam 430, in which a final injunction could be granted against the whole world. Nor was it a case where there was scope for making persons unknown subject to a final order. That was only possible (and perfectly legitimate) provided the persons unknown were confined to those in the first category of unknown persons in *Cameron*—that is to say anonymous defendants who were nonetheless identifiable in some other way (para 91). In the Court of Appeal's view, the claimants' problem was that they were seeking to invoke the civil

jurisdiction of the courts as a means of permanently controlling ongoing public demonstrations by a continually fluctuating body of protesters (para 93).

104 This reasoning reveals the marked difference in approach and outcome from that of the Court of Appeal in the proceedings now before this court and highlights the importance of the issues to which it gives rise and to which we referred at the outset. Indeed, the correctness and potential breadth of the reasoning of the Court of Appeal in *Canada Goose*, and how that reasoning differs from the approach taken by the Court of Appeal in these proceedings, lie at the heart of these appeals.

(11) The present case

105 The circumstances of the present appeals were summarised at paras 6–12 above. In the light of the foregoing discussion, it will be apparent that, in holding that interim injunctions could be granted against persons unknown, but that final injunctions could be granted only against parties who had been identified and had had an opportunity to contest the final order sought, Nicklin J applied the reasoning of the Court of Appeal in *Canada Goose* [2020] 1 WLR 2802. The Court of Appeal, however, departed from that reasoning, on the basis that it had failed to have proper regard to *Gammell* [2006] 1 WLR 658, which was binding on it.

106 The Court of Appeal's approach in the present case, as set out in the judgment of Sir Geoffrey Vos MR, with which the other members of the court agreed, was based primarily on the decision in *Gammell*. It proceeded, therefore, on the basis that the persons to whom an injunction is addressed can be described by reference to the behaviour prohibited by the injunction, and that those persons will then become parties to the action in the event that they breach the injunction. As we will explain, we do not regard that as a satisfactory approach, essentially because it is based on the premise that the injunction will be breached and leaves out of account the persons affected by the injunction who decide to obey it. It also involves the logical paradox that a person becomes bound by an injunction only as a result of infringing it. However, even leaving *Gammell* to one side, the Court of Appeal subjected the reasoning in *Canada Goose* to cogent criticism.

107 Among the points made by the Master of the Rolls, the following should be highlighted. No meaningful distinction could be drawn between interim and final injunctions in this context (para 77). No such distinction had been drawn in the earlier case law concerned with newcomer injunctions. It was unrealistic at least in the context of cases concerned with protesters or Travellers, since such cases rarely if ever resulted in trials. In addition, in the case of an injunction (unlike a damages action such as *Cameron*) there was no possibility of a default judgment: the grant of an injunction was always in the discretion of the court. Nor was a default judgment available under Part 8 procedure. Furthermore, as the facts of the earlier cases demonstrated and *Bromley* [2020] PTSR 1043 explained, the court needed to keep injunctions against persons unknown under review even if they were final in character. In that regard, the Master of the Rolls made the point that, for as long as the court is concerned with the enforcement of an order, the action is not at an end.

4. A new type of injunction?

108 It is convenient to begin the analysis by considering certain strands in the arguments which have been put forward in support of the grant of newcomer injunctions, initially outside the context of proceedings against Travellers. They may each be labelled with the names of the leading cases from which the arguments have been derived, and we will address them broadly chronologically.

109 The earliest in time is *Venables* [2001 Fam 430 discussed at paras 32–33 above. The case is important as possibly the first contra mundum equitable injunction granted in recent times, and in our view correctly explains why the objections to the grant of newcomer injunctions against Travellers go to matters of established principle rather than jurisdiction in the strict sense: i e not to the power of the court, as was later confirmed by Lord Scott of Foscote in *Fourie v Le Roux* [2007] 1 WLR 320 at para 25 (cited at para 16 above). In that respect the *Venables* injunction went even further than the typical Traveller injunction, where the newcomers are at least confined to a class of those who might wish to camp on the relevant prohibited sites. Nevertheless, for the reasons we explained at paras 25 and 61 above, and which we develop further at paras 155–159 below, newcomer injunctions can be regarded as being analogous to other injunctions or orders which have a binding effect upon the public at large. Like wardship orders contra mundum (para 31 above), *Venables*-type injunctions (paras 32–33 above), reporting restrictions (para 34 above), and embargoes on the publication of draft judgments (para 35 above), they are not limited in their effects to particular individuals, but can potentially affect anyone in the world.

110 *Venables* has been followed in a number of later cases at first instance, where there was convincing evidence that an injunction contra mundum was necessary to protect a person from serious injury or death: see *X (formerly Bell) v O'Brien* [2003] EMLR 37; *Carr v News Group Newspapers Ltd* [2005] EWHC 971 (QB); *A (A Protected Party) v Persons Unknown* [2017] EMLR 11; *RXG v Ministry of Justice* [2020] QB 703; *In re Persons formerly known as Winch* [2021] EMLR 20 and [2022] ACD 22); and *D v Persons Unknown* [2021] EWHC 157 (QB). An injunction contra mundum has also been granted where there was a danger of a serious violation of another Convention right, the right to respect for private life: see *OPQ v BJM* [2011] EMLR 23. The approach adopted in these cases has generally been based on the Human Rights Act rather than on principles of wider application. They take the issue raised in the present case little further on the question of principle. The facts of the cases were extreme in imposing real compulsion on the court to do something effective. Above all, the court was driven in each case to make the order by a perception that the risk to the claimants' Convention rights placed it under a positive duty to act. There is no real parallel between the facts in those cases and the facts of a typical Traveller case. The local authority has no Convention rights to protect, and such Convention rights of the public in its locality as a newcomer injunction might protect are of an altogether lower order.

111 The next in time is the *Bloomsbury* case [2003] 1 WLR 1633, the facts and reasoning in which were summarised in paras 58–59 above. The case was analysed by Lord Sumption in *Cameron* [2019] 1 WLR 1471 by reference to the distinction which he drew at para 13, as explained earlier,

between cases concerned with anonymous defendants who were identifiable but whose names were unknown, such as squatters occupying a property, and cases concerned with defendants, such as most hit and run drivers, who were not only anonymous but could not be identified. The distinction was of critical importance, in Lord Sumption's view, because a defendant in the first category of case could be served with the claim form or other originating process, whereas a defendant in the second category could not, and consequently could not be given such notice of the proceedings as would enable him to be heard, as justice required.

112 Lord Sumption added at para 15 that where an interim injunction was granted and could be specifically enforced against some property or by notice to third parties who would necessarily be involved in any contempt, the process of enforcing it would sometimes be enough to bring the proceedings to the defendant's attention. He cited *Bloomsbury* as an example, stating:

> "the unnamed defendants would have had to identify themselves as the persons in physical possession of copies of the book if they had sought to do the prohibited act, namely disclose it to people (such as newspapers) who had been notified of the injunction."

113 Lord Sumption categorised *Cameron* itself as a case in the second category, stating at para 16:

> One does not, however, identify an unknown person simply by referring to something that he has done in the past. 'The person unknown driving vehicle registration number Y598 SPS who collided with vehicle registration number KG03 ZJZ on 26 May 2013', does not identify anyone. It does not enable one to know whether any particular person is the one referred to."

"Nor was there any specific interim relief, such as an injunction, which could be enforced in a way that would bring the proceedings to the unknown person's attention. The impossibility of service in such a case was, Lord Sumption said, "due not just to the fact that the defendant cannot be found but to the fact that it is not known who the defendant is" (ibid). The alternative service approved by the Court of Appeal—service on the insurer—could not be expected to reach the driver, and would be tantamount to no service at all. Addressing what, if the case had proceeded differently, might have been the heart of the matter, Lord Sumption added that although it might be appropriate to dispense with service if the defendant had concealed his identity in order to evade service, no submission had been made that the court should treat the case as one of evasion of service, and there were no findings which would enable it to do so.

114 We do not question the decision in *Cameron*. Nor do we question its essential reasoning: that proceedings should be brought to the notice of a person against whom damages are sought (unless, exceptionally, service can be dispensed with), so that he or she has an opportunity to be heard; that service is the means by which that is effected; and that, in circumstances in which service of the amended claim on the substituted defendant would be impossible (even alternative service being tantamount to no service at all), the judge had accordingly been right to refuse permission to amend.

A 115 That said, with the benefit of the further scrutiny that the point has received on this appeal, we have, with respect, some difficulties with other aspects of Lord Sumption's analysis. In the first place, we agree that it is generally necessary that a defendant should have such notice of the proceedings as will enable him to be heard before any final relief is ordered. However, there are exceptions to that general rule, as in the case of injunctions granted contra mundum, where there is in reality no defendant in the sense which Lord Sumption had in mind. It is also necessary to bear in mind that it is possible for a person affected by an injunction to be heard after a final order has been made, as was explained at para 40 above. Furthermore, notification, by means of service, and the consequent ability to be heard, is an essentially practical matter. As this court explained in *Abela v Baadarani* [2013] 1 WLR 2043, para 37, service has a number of purposes, but the most important is to ensure that the contents of the document served come to the attention of the defendant. Whether they have done so is a question of fact. If the focus is on whether service can in practice be effected, as we think it should be, then it is unnecessary to carry out the preliminary exercise of classifying cases as falling into either the first or the second of Lord Sumption's categories.

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D 116 We also have reservations about the theory that it is necessary, in order for service to be effective, that the defendant should be identifiable. For example, Lord Sumption cited with approval the case of *Brett Wilson LLP v Persons Unknown* [2016] 4 WLR 69, as illustrating circumstances in which alternative service was legitimate because "it is possible to locate or communicate with the defendant and to identify him as the person described in the claim form" (para 15). That was a case concerned with online defamation. The defendants were described as persons unknown, responsible for the operation of the website on which the defamatory statements were published. Alternative service was effected by sending the claim form to email addresses used by the website owners, who were providers of a proxy registration service (i e they were registered as the owners of the domain name and licensed its operation by third parties, so that those third parties could not be identified from the publicly accessible database of domain owners). Yet the identities of the defendants were just as unknown as that of the driver in *Cameron,* and remained so after service had been effected: it remained impossible to identify any individuals as the persons described in the claim form. The alternative service was acceptable not because the defendants could be identified, but because, as the judge stated (para 16), it was reasonable to infer that emails sent to the addresses in question had come to their attention.

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117 We also have difficulty in fitting the unnamed defendants in *Bloomsbury* within Lord Sumption's class of identifiable persons who in due course could be served. It is true that they would have had to identify themselves as the persons referred to if they had sought to do the prohibited act. But if they learned of the injunction and decided to obey it, they would be no more likely to be identified for service than the hit and run driver in *Cameron*. The *Bloomsbury* case also illustrates the somewhat unstable nature of Lord Sumption's distinction between anonymous and unidentifiable defendants. Since the unnamed defendants in *Bloomsbury* were unidentifiable at the time when the claim was commenced and the injunction was granted, one would have thought that the case fell into Lord

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A Sumption's second category. But the fact that the unnamed defendants would have had to identify themselves as the persons in possession of the book if (but only if) they disobeyed the injunction seems to have moved the case into the first category. This implies that it is too absolutist to say that a claimant can never sue persons unknown unless they are identifiable at the time the claim form is issued. For these reasons also, it seems to us that the B classification of cases as falling into one or other of Lord Sumption's categories (or into a third category, as suggested by the Court of Appeal in *Canada Goose,* para 63, and in the present case, para 35) may be a distraction from the fundamental question of whether service on the defendant can in practice be effected so as to bring the proceedings to his or her notice.

118 We also note that Lord Sumption's description of *Bloomsbury* and C *Gammell* as cases concerned with interim injunctions was influential in the later case of *Canada Goose*. It is true that the order made in *Bloomsbury* was not, in form, a final order, but it was in substance equivalent to a final order: it bound those unknown persons for the entirety of the only relevant period, which was the period leading up to the publication of the book. As for *Gammell,* the reasoning did not depend on whether the injunctions were interim or final in nature. The order in Ms Gammell's case was interim D ("until trial or further order"), but the point is less clear in relation to the order made in the accompanying case of Ms Maughan, which stated that "this order shall remain in force until further order".

119 More importantly, we are not comfortable with an analysis of *Bloomsbury* which treats its legitimacy as depending upon its being categorised as falling within a class of case where unnamed defendants may E be assumed to become identifiable, and therefore capable of being served in due course, as we shall explain in more detail in relation to the supposed *Gammell* solution, notably included by Lord Sumption in the same class alongside *Bloomsbury*, at para 15 in *Cameron*.

120 We also observe that *Cameron* was not concerned with equitable remedies or equitable principles. Nor was it concerned with newcomers. Understandably, given that the case was an action for damages, Lord F Sumption's focus was particularly on the practice of the common law courts and on cases concerned with common law remedies (e g at paras 8 and 18–19). Proceedings in which injunctive relief is sought raise different considerations, partly because an injunction has to be brought to the notice of the defendant before it can be enforced against him or her. In some cases, furthermore, the real target of the injunctive relief is not the unidentified G defendant, but the "no cause of action defendants" against whom freezing injunctions, *Norwich Pharmacal* orders, *Bankers Trust* orders and internet blocking orders may be obtained. The result of the orders made against those defendants may be to enable the unnamed defendant then to be identified and served, and effective relief obtained: see, for example, *CMOC Sales and Marketing Ltd v Person Unknown* [2019] Lloyd's Rep FC 62. In H other words, the identification of the unknown defendant can depend upon the availability of injunctions which are granted at a stage when that defendant remains unidentifiable. Furthermore, injunctions and other orders which operate contra mundum, to which (as we have already observed) newcomer injunctions can be regarded as analogous, raise issues lying beyond the scope of Lord Sumption's judgment in *Cameron.*

121 It also needs to be borne in mind that the unnamed defendants in *Bloomsbury* formed a tiny class of thieves who might be supposed to be likely to reveal their identity to a media outlet during the very short period when their stolen copy of the book was an item of special value. The main purpose of seeking to continue the injunction against them was not to act as a deterrent to the thieves or even to enable them to be apprehended or committed for contempt, but rather to discourage any media publisher from dealing with them and thereby incurring liability for contempt as an aider and abetter: see *Cameron*, para 10; *Bloomsbury*, para 20. As we have explained (paras 41 and 46 above), it is not unusual in modern practice for an injunction issued against defendants, including persons unknown, to be designed primarily to affect the conduct of non-parties.

122 In that regard, it is to be noted that Lord Sumption's reason for regarding the injunction in *Bloomsbury* as legitimate was not the reason given by the Vice-Chancellor. His justification lay not in the ability to serve persons who identified themselves by breach, but in the absence of any injustice in framing an injunction against a class of unnamed persons provided that the class was sufficiently precisely defined that it could be said of any particular person whether they fell inside or outside the class of persons restrained. That justification may be said to have substantial equitable foundations. It is the same test which defines the validity of a class of discretionary beneficiaries under a trust: see *In re Baden's Deed Trusts* [1971] AC 424, 456. The trust in favour of the class is valid if it can be said of any given postulant whether they are or are not a member of the class.

123 That justification addresses what the Vice-Chancellor may have perceived to be one of the main objections to the joinder of (or the grant of injunctions against) unnamed persons, namely that it is too vague a way of doing so: see para 7. But it does not seek directly to address the potential for injustice in restraining persons who are not just unnamed, but genuine newcomers: e g in the present context persons who have not at the time when the injunction was granted formed any desire or intention to camp at the prohibited site. The facts of the *Bloomsbury* case make that unsurprising. The unnamed defendants had already stolen copies of the book at the time when the injunction was granted, and it was a fair assumption at the time of the hearing before the Vice-Chancellor that they had formed the intention to make an illicit profit from its disclosure to the media before the launch date. Three had already tried to do so, been identified and arrested. The further injunction was just to catch the one or two (if any) who remained in the shadows and to prevent any publication facilitated by them in the meantime.

124 There is therefore a broad contextual difference between the injunction granted in *Bloomsbury* and the typical newcomer injunction against Travellers. The former was directed against a small group of existing criminals, who could not sensibly be classed as newcomers other than in a purely technical sense, where the risk of loss to the claimants lay within a tight timeframe before the launch date. The typical newcomer injunction against Travellers, on the other hand, is intended to restrain Travellers generally, for as long a period as the court can be persuaded to grant an injunction, and regardless of whether particular Travellers have yet become aware of the prohibited site as a potential camp site. The Vice-Chancellor's analysis does not seek to render joinder as a defendant unnecessary, whereas (as will be explained) the newcomer injunction does. But the case certainly

A does stand as a precedent for the grant of relief otherwise than on an emergency basis against defendants who, although joined, have yet to be served.

125 We turn next to the supposed *Gammell* [2006] 1 WLR 658 solution, and its apparent approval in *Cameron* as a juridically sound means of joining unnamed defendants by their self-identification in the course of
B disobeying the relevant injunction. It has the merit of being specifically addressed to newcomer injunctions in the context of Travellers, but in our view it is really no solution at all.

126 The circumstances and reasoning in *Gammell* were explained in paras 63–66 above. For present purposes it is the court's reasons for concluding that Ms Gammell became a defendant when she stationed her caravans on the site which matter. At para 32 Sir Anthony Clarke MR said
C this:

> "In each of these appeals the appellant became a party to the proceedings when she did an act which brought her within the definition of defendant in the particular case . . . In the case of KG she became both a person to whom the injunction was addressed and the defendant when she caused or permitted her caravans to occupy the site. In neither case
D was it necessary to make her a defendant to the proceedings later."

The Master of the Rolls' analysis was not directed to a submission that injunctions could not or should not be granted at all against newcomers, as is now advanced on this appeal. No such submission was made. Furthermore, he was concerned only with the circumstances of a person who had both been served with and (by oral explanation) notified of the terms of the
E injunction and who had then continued to disobey it. He was not concerned with the position of a newcomer, wishing to camp on a prohibited site who, after learning of the injunction, simply decided to obey it and move on to another site. Such a person would not, on his analysis, become a defendant at all, even though constrained by the injunction as to their conduct. Service of the proceedings (as opposed to the injunction) was not raised as an issue
F in that case as the necessary basis for in personam jurisdiction, other than merely for holding the ring. Neither *Cameron* nor *Fourie v Le Roux* had been decided. The real point, unsuccessfully argued, was that the injunction should not have the effect against any particular newcomer of placing them in contempt until a personalised proportionality exercise had been undertaken. The need for a personalised proportionality exercise is also
G pursued on this appeal as a reason why newcomer injunctions should never be granted against Travellers, and we address it later in this judgment.

127 The concept of a newcomer automatically becoming (or self-identifying as) a defendant by disobeying the injunction might therefore be described, in 2005, as a solution looking for a problem. But it became a supposed solution to the problem addressed in this appeal when prayed in aid, first briefly and perhaps tentatively by Lord Sumption in *Cameron* at
H para 15 and secondly by Sir Geoffrey Vos MR in great detail in the present case, at paras 28, 30–31, 37, 39, 82, 85, 91–92, 94 and 96 and concluding at 99 of the judgment. It may fairly be described as lying at the heart of his reasoning for allowing the appeals, and departing from the reasoning of the Court of Appeal in *Canada Goose*.

128 This court is not of course bound to consider the matter, as was the Master of the Rolls, as a question of potentially binding precedent. We have the refreshing liberty of being able to look at the question anew, albeit constrained (although not bound) by the ratio of relevant earlier decisions of this court and of its predecessor. We conduct that analysis in the following paragraphs. While we have no reason to doubt the efficacy of the concept of self-identification as a defendant as a means of dealing with disobedience by a newcomer with an injunction, the propriety of which is not itself under challenge (as it was not in *Gammell*), we are not persuaded that self-identification as a defendant solves the basic problems inherent in granting injunctions against newcomers in the first place.

129 The *Gammell* solution, as we have called it, suffers from a number of problems. The most fundamental is that the effect of an injunction against newcomers should be addressed by reference to the paradigm example of the newcomer who can be expected to obey it rather than to act in disobedience to it. As Lord Bingham observed in *South Bucks District Council v Porter* [2003] 2 AC 558 (cited at para 65 above) at para 32, in connection with a possible injunction against Gypsies living in caravans in breach of planning controls, "When granting an injunction the court does not contemplate that it will be disobeyed". Lord Rodger JSC cited this with approval (at para 17) in the *Meier* case [2009] 1 WLR 2780 (para 67 above). Similarly, Baroness Hale of Richmond JSC stated in the same case at para 39, in relation to an injunction against trespass by persons unknown, "We should assume that people will obey the law, and in particular the targeted orders of the court, rather than that they will not."

130 A further problem with the *Gammell* solution is that where the defendants are defined by reference to the future act of infringement, a person who breaches the order will, by that very act, become bound by it. The Court of Appeal of Victoria remarked, in relation to similar reasoning in the New Zealand case of *Tony Blain Pty Ltd v Splain* [1993] 3 NZLR 185, that an order of that kind "had the novel feature—which would have appealed to Lewis Carroll—that it became binding upon a person only because that person was already in breach of it": *Maritime Union of Australia v Patrick Stevedores Operations Pty Ltd* [1998] 4 VR 143, 161.

131 Nevertheless, a satisfactory solution, which respects the procedural rights of all those whose behaviour is constrained by newcomer injunctions, including those who obey them, should if possible be found. The practical need for such injunctions has been demonstrated both in this jurisdiction and elsewhere: see, for example, the Canadian case of *MacMillan Bloedel Ltd v Simpson* [1996] 2 SCR 1048 (where reliance was placed at para 26 on *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191 as establishing the contra mundum effect even of injunctions inter partes), American cases such as *Joel v Various John Does* (1980) 499 F Supp 791, New Zealand cases such as *Tony Blain Pty Ltd v Splain* (para 130 above), *Earthquake Commission v Unknown Defendants* [2013] NZHC 708 and *Commerce Commission v Unknown Defendants* [2019] NZHC 2609, the Cayman Islands case of *Ernst & Young Ltd v Department of Immigration* 2015 (1) CILR 151, and Indian cases such as *ESPN Software India Private Ltd v Tudu Enterprise* (unreported) 18 February 2011.

132 As it seems to us, the difficulty which has been experienced in the English cases, and to which *Gammell* has hitherto been regarded as providing

A a solution, arises from treating newcomer injunctions as a particular type of conventional injunction inter partes, subject to the usual requirements as to service. The logic of that approach has led to the conclusion that persons affected by the injunction only become parties, and are only enjoined, in the event that they breach the injunction. An alternative approach would begin by accepting that newcomer injunctions are analogous to injunctions and other orders which operate contra mundum, as noted in para 109 above and B explained further at paras 155–159 below. Although the persons enjoined by a newcomer injunction should be described as precisely as may be possible in the circumstances, they potentially embrace the whole of humanity. Viewed in that way, if newcomer injunctions operate in the same way as the orders and injunctions to which they are analogous, then anyone who knowingly breaches the injunction is liable to be held in contempt, whether or not they C have been served with the proceedings. Anyone affected by the injunction can apply to have it varied or discharged, and can apply to be made a defendant, whether they have obeyed it or disobeyed it, as explained in para 40 above. Although not strictly necessary, those safeguards might also be reflected in provisions of the order: for example, in relation to liberty to apply. We shall return below to the question whether this alternative approach is permissible as a matter of legal principle. D

133 As we have explained, the *Gammell* solution was adopted by the Court of Appeal in the present case as a means of overcoming the difficulties arising in relation to final injunctions against newcomers which had been identified in *Canada Goose* [2020] 1 WLR 2802. Where, then, does our rejection of the *Gammell* solution leave the reasoning in *Canada Goose*?

134 Although we do not doubt the correctness of the decision in E *Canada Goose*, we are not persuaded by the reasoning at paras 89–93, which we summarised at para 103 above. In addition to the criticisms made by the Court of Appeal which we have summarised at para 107 above, and with which we respectfully agree, we would make the following points.

135 First, the court's starting point in *Canada Goose* was that there were "some very limited circumstances", such as in *Venables*, in which a final injunction could be granted contra mundum, but that protester actions F did not fall within "that exceptional category". Accordingly, "The usual principle, which applies in the present case, is that a final injunction operates only between the parties to the proceedings: *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191, 224" (para 89). The problem with that approach is that it assumes that the availability of a final injunction against newcomers depends on fitting such injunctions within an existing exclusive G category. Such an approach is mistaken in principle, as explained in para 21 above.

136 The court buttressed its adoption of the "usual principle" with the observation that it was "consistent with the fundamental principle in *Cameron* . . . 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 H heard" (ibid). As we have explained, however, there are means of enabling a person who is affected by a final injunction to be heard after the order has been made, as was discussed in *Bromley* and recognised by the Master of the Rolls in the present case.

137 The court also observed at para 92 that "An interim injunction is temporary relief intended to hold the position until trial", and that "Once

the trial has taken place and the rights of the parties have been determined, the litigation is at an end". That is an unrealistic view of proceedings of the kind in which newcomer injunctions are generally sought, and an unduly narrow view of the scope of interlocutory injunctions in the modern law, as explained at paras 43–49 above. As we have explained (e g at paras 60 and 73 above), there is scarcely ever a trial in proceedings of the present kind, or even adversarial argument; injunctions, even if expressed as being interim or until further order, remain in place for considerable periods of time, sometimes for years; and the proceedings are not at an end until the injunction is discharged.

138 We are also unpersuaded by the court's observation that private law remedies are unsuitable "as a means of permanently controlling ongoing public demonstrations by a continually fluctuating body of protesters" (para 93). If that were so, where claimants face the prospect of continuing unlawful disruption of their activities by groups of individuals whose composition changes from time to time, then it seems that the only practical means of obtaining the relief required to vindicate their legal rights would be for them to adopt a rolling programme of applications for interim orders, resulting in litigation without end. That would prioritise formalism over substance, contrary to a basic principle of equity (para 151 below). As we shall explain, there is no overriding reason why the courts cannot devise procedures which enable injunctions to be granted which prohibit unidentified persons from behaving unlawfully, and which enable such persons subsequently to become parties to the proceedings and to seek to have the injunctions varied or discharged.

139 The developing arguments about the propriety of granting injunctions against newcomers, set against the established principles re-emphasised in *Fourie v Le Roux* and *Cameron*, and then applied in *Canada Goose*, have displayed a tendency to place such injunctions in one or other of two silos: interim and final. This has followed through into the framing of the issues for determination in this appeal and has, perhaps in consequence, permeated the parties' submissions. Thus, it is said by the appellants that the long-established principle that an injunction should be confined to defendants served with the proceedings applies only to final injunctions, which should not therefore be granted against newcomers. Then it is said that since an interim injunction is designed only to hold the ring, pending trial between the parties who have by then been served with the proceedings, its use against newcomers for any other purpose would fall outside the principles which regulate the grant of interim injunctions. Then the respondents (like the Court of Appeal) rely upon the *Gammell* solution (that a newcomer becomes a defendant by acting in breach of the interim injunction) as solving both problems, because it makes them parties to the proceedings leading to the final injunction (even if they then take no part in them) and justifies the interim injunction against newcomers as a way of smoking them out before trial. In sympathy with the Court of Appeal on this point we consider that this constant focus upon the duality of interim and final injunctions is ultimately unhelpful as an analytical tool for solving the problem of injunctions against newcomers. In our view the injunction, in its operation upon newcomers, is typically neither interim nor final, at least in substance. Rather it is, against newcomers, what is now called a without notice (i e in the old jargon ex parte) injunction, that is an injunction which,

A at the time when it is ordered, operates against a person who has not been served in due time with the application so as to be able to oppose it, who may have had no notice (even informal) of the intended application to court for the grant of it, and who may not at that stage even be a defendant served with the proceedings in which the injunction is sought. This is so regardless of whether the injunction is in form interim or final.

B **140** More to the point, the injunction typically operates against a particular newcomer before (if ever) the newcomer becomes a party to the proceedings, as we have explained at paras 129–132 above. An ordinarily law-abiding newcomer, once notified of the existence of the injunction (e g by seeing a copy of the order at the relevant site or by reading it on the internet), may be expected to comply with the injunction rather than act in breach of it. At the point of compliance that person will not be a defendant, C if the defendants are defined as persons who behave in the manner restrained. Unless they apply to do so they will never become a defendant. If the person is a Traveller, they will simply pass by the prohibited site rather than camp there. They will not identify themselves to the claimant or to the court by any conspicuous breach, nor trigger the *Gammell* process by which, under the current orthodoxy, they are deemed then to become a defendant D by self-identification. Even if the order was granted at a formally interim stage, the compliant Traveller will not ever become a party to the proceedings. They will probably never become aware of any later order in final form, unless by pure coincidence they pass by the same site again looking for somewhere to camp. Even if they do, and are again dissuaded, this time by the final injunction, they will not have been a party to the E proceedings when the final order was made, unless they breached it at the interim stage.

141 In considering whether injunctions of this type comply with the standards of procedural and substantive fairness and justice by which the courts direct themselves, it is the compliant (law-abiding) newcomer, not the contemptuous breaker of the injunction, who ought to be regarded as the paradigm in any process of evaluation. Courts grant injunctions on the F assumption that they will generally be obeyed, not as stage one in a process intended to lead to committal for contempt: see para 129 above, and the cases there cited, with which we agree. Furthermore the evaluation of potential injustice inherent in the process of granting injunctions against newcomers is more likely to be reliable if there is no assumption that the newcomer affected by the injunction is a person so regardless of the law that G they will commit a breach of it, even if the grant necessarily assumes a real risk that they (or a significant number of them) would, but for the injunction, invade the claimant's rights, or the rights (including the planning regime) of those for whose protection the claimant local authority seeks the injunction. That is the essence of the justification for such an injunction.

142 Recognition that injunctions against newcomers are in substance always a type of without notice injunction, whether in form interim or final, H is in our view the starting point in a reliable assessment of the question whether they should be made at all and, if so, by reference to what principles and subject to what safeguards. Viewed in that way they then need to be set against the established categories of injunction to see whether they fall into an existing legitimate class, or, if not, whether they display features by

reference to which they may be regarded as a legitimate extension of the court's practice.

143 The distinguishing features of an injunction against newcomers are in our view as follows:

(i) They are made against persons who are truly unknowable at the time of the grant, rather than (like Lord Sumption's class 1 in *Cameron*) identifiable persons whose names are not known. They therefore apply potentially to anyone in the world.

(ii) They are always made, as against newcomers, on a without notice basis (see para 139 above). However, as we explain below, informal notice of the application for such an injunction may nevertheless be given by advertisement.

(iii) In the context of Travellers and Gypsies they are made in cases where the persons restrained are unlikely to have any right or liberty to do that which is prohibited by the order, save perhaps Convention rights to be weighed in a proportionality balance. The conduct restrained is typically either a plain trespass or a plain breach of planning control, or both.

(iv) Accordingly, although there are exceptions, these injunctions are generally made in proceedings where there is unlikely to be a real dispute to be resolved, or triable issue of fact or law about the claimant's entitlement, even though the injunction sought is of course always discretionary. They and the proceedings in which they are made are generally more a form of enforcement of undisputed rights than a form of dispute resolution.

(v) Even in cases where there might in theory be such a dispute, or a real prospect that article 8 rights might prevail, the newcomers would in practice be unlikely to engage with the proceedings as active defendants, even if joined. This is not merely or even mainly because they are newcomers who may by complying with the injunction remain unidentified. Even if identified and joined as defendants, experience has shown that they generally decline to take any active part in the proceedings, whether because of lack of means, lack of pro bono representation, lack of a wish to undertake costs risk, lack of a perceived defence or simply because their wish to camp on any particular site is so short term that it makes more sense to move on than to go to court about continued camping at any particular site or locality.

(vi) By the same token the mischief against which the injunction is aimed, although cumulatively a serious threatened invasion of the claimant's rights (or the rights of the neighbouring public which the local authorities seek to protect), is usually short term and liable, if terminated, just to be repeated on a nearby site, or by different Travellers on the same site, so that the usual processes of eviction, or even injunction against named parties, are an inadequate means of protection.

(vii) For all those reasons the injunction (even when interim in form) is sought for its medium to long term effect even if time-limited, rather than as a means of holding the ring in an emergency, ahead of some later trial process, or even a renewed interim application on notice (and following service) in which any defendant is expected to be identified, let alone turn up and contest.

(viii) Nor is the injunction designed (like a freezing injunction, search order, *Norwich Pharmacal* or *Bankers Trust* order or even an anti-suit injunction) to protect from interference or abuse, or to enhance, some

related process of the court. Its purpose, and no doubt the reason for its recent popularity, is simply to provide a more effective, possibly the only effective, means of vindication or protection of relevant rights than any other sanction currently available to the claimant local authorities.

144 Cumulatively those distinguishing features leave us in no doubt that the injunction against newcomers is a wholly new type of injunction with no very closely related ancestor from which it might be described as evolutionary offspring, although analogies can be drawn, as will appear, with some established forms of order. It is in some respects just as novel as were the new types of injunction listed in para 143(viii) above, and it does not even share their family likeness of being developed to protect the integrity and effectiveness of some related process of the courts. As Mr Drabble KC for the appellants tellingly submitted, it is not even that closely related to the established quia timet injunction, which depends upon proof that a named defendant has threatened to invade the claimant's rights. Why, he asked, should it be assumed that, just because one group of Travellers have misbehaved on the subject site while camping there temporarily, the next group to camp there will be other than model campers?

145 Faced with the development by the lower courts of what really is in substance a new type of injunction, and with disagreement among them about whether there is any jurisdiction or principled basis for granting it, it behoves this court to go back to first principles about the means by which the court navigates such uncharted water. Much emphasis was placed in this context upon the wide generality of the words of section 37 of the 1981 Act. This was cited in para 17 above, but it is convenient to recall its terms:

> "(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.
>
> "(2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just."

This or a very similar formulation has provided the statutory basis for the grant of injunctions since 1873. But in our view a submission that section 37 tells you all you need to know proves both too much and too little. Too much because, as we have already observed, it is certainly not the case that judges can grant or withhold injunctions purely on their own subjective perception of the justice and convenience of doing so in a particular case. Too little because the statutory formula tells you nothing about the principles which the courts have developed over many years, even centuries, to inform the judge and the parties as to what is likely to be just or convenient.

146 Prior to 1873 both the jurisdiction to grant injunctions and the principles regulating their grant lay in the common law, and specifically in that part of it called equity. It was an equitable remedy. From 1873 onwards the jurisdiction to grant injunctions has been confirmed and restated by statute, but the principles upon which they are granted (or withheld) have remained equitable: see *Fourie v Le Roux* [2007] 1 WLR 320 (paras 16 and 17 above) per Lord Scott of Foscote at para 25. Those principles continue to tell the judge what is just and convenient in any particular case. Furthermore, equitable principles generally provide the answer to the question whether settled principles or practice about the

general limits or conditions within which injunctions are granted may properly be adjusted over time. The equitable origin of these principles is beyond doubt, and their continuing vitality as an analytical tool may be seen at work from time to time when changes or developments in the scope of injunctive relief are reviewed: see e g *Castanho v Brown & Root (UK) Ltd* [1981] AC 557 (para 21 above).

147 The expression of the readiness of equity to change and adapt its principles for the grant of equitable relief which has best stood the test of time lies in the following well-known passage from *Spry* (para 17 above) at p 333:

> "The powers of courts with equitable jurisdiction to grant injunctions are, subject to any relevant statutory restrictions, unlimited. Injunctions are granted only when to do so accords with equitable principles, but this restriction involves, not a defect of powers, but an adoption of doctrines and practices that change in their application from time to time. Unfortunately there have sometimes been made observations by judges that tend to confuse questions of jurisdiction or of powers with questions of discretions or of practice. The preferable analysis involves a recognition of the great width of equitable powers, an historical appraisal of the categories of injunctions that have been established and an acceptance that pursuant to general equitable principles injunctions may issue in new categories when this course appears appropriate."

148 In *Broad Idea* [2023] AC 389 (para 17 above) at paras 57–58 Lord Leggatt JSC (giving the opinion of the majority of the Board) explained how, via *Broadmoor Special Health Authority v Robinson* [2000] QB 775 and *Cartier International AG v British Sky Broadcasting Ltd* [2017] Bus LR 1 and [2018] 1 WLR 3259, that summary in *Spry* has come to be embedded in English law. The majority opinion in *Broad Idea* also explains why what some considered to be the apparent assumption in *North London Railway Co v Great Northern Railway Co* (1883) 11 QBD 30, 39–40 that the relevant equitable principles became set in stone in 1873 was, and has over time been conclusively proved to be, wrong.

149 The basic general principle by reference to which equity provides a discretionary remedy is that it intervenes to put right defects or inadequacies in the common law. That is frequently because equity perceives that the strict pursuit of a common law right would be contrary to conscience. That underlies, for example, rectification, undue influence and equitable estoppel. But that conscience-based aspect of the principle has no persuasive application in the present context.

150 Of greater relevance is the deep-rooted trigger for the intervention of equity, where it perceives that available common law remedies are inadequate to protect or enforce the claimant's rights. The equitable remedy of specific performance of a contractual obligation is in substance a form of injunction, and its availability critically depends upon damages being an inadequate remedy for the breach. Closer to home, the inadequacy of the common law remedy of a possession order against squatters under CPR Pt 55 as a remedy for trespass by a fluctuating body of frequently unidentifiable Travellers on different parts of the claimant's land was treated in *Meier* [2009] 1 WLR 2780 (para 67 above) as a good reason for the grant of an injunction in relation to nearby land which, because it was not yet in

A the occupation of the defendant Travellers, could not be made the subject of an order for possession. Although the case was not about injunctions against newcomers, and although she was thinking primarily of the better tailoring of the common law remedy, the following observation of Baroness Hale JSC at para 25 is resonant:

> "The underlying principle is ubi ius, ibi remedium: where there is a
B right, there should be a remedy to fit the right. The fact that 'this has never been done before' is no deterrent to the principled development of the remedy to fit the right, provided that there is proper procedural protection for those against whom the remedy may be granted."

To the same effect is the dictum of Anderson J (in New Zealand) in *Tony Blain Pty Ltd v Splain* [1993] 3 NZLR 185 (para 130 above) at pp 499–500,
C cited by Sir Andrew Morritt V-C in *Bloomsbury* [2003] 1 WLR 1633 at para 14.

151 The second relevant general equitable principle is that equity looks to the substance rather than the form. As Lord Romilly MR stated in *Parkin v Thorold* (1852) 16 Beav 59, 66–67:

> "Courts of Equity make a distinction in all cases between that which is
D matter of substance and that which is matter of form; and if it find that by insisting on the form, the substance will be defeated, it holds it to be inequitable to allow a person to insist on such form, and thereby defeat the substance."

That principle assists in the present context for two reasons. The first (discussed above) is that it illuminates the debate about the type of
E injunction with which the court is concerned, here enabling an escape from the twin silos of final and interim and recognising that injunctions against newcomers are all in substance without notice injunctions. The second is that it enables the court to assess the most suitable means of ensuring that a newcomer has a proper opportunity to be heard without being shackled to any particular procedural means of doing so, such as service of the
F proceedings.

152 The third general equitable principle is equity's essential flexibility, as explained at paras 19–22 above. Not only is an injunction always discretionary, but its precise form, and the terms and conditions which may be attached to an injunction (recognised by section 37(2) of the 1981 Act), are highly flexible. This may be illustrated by the lengthy and painstaking
G development of the search order, from its original form in *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55 to the much more sophisticated current form annexed to Practice Direction 25A supplementing CPR Pt 25 and which may be modified as necessary. To a lesser extent a similar process of careful, incremental design accompanied the development of the freezing injunction. The standard form now sanctioned by the CPR is a much more sophisticated version than the original used in *Mareva Cia Naviera SA v*
H *International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509. Of course, this flexibility enables not merely incremental development of a new type of injunction over time in the light of experience, but also the detailed moulding of any standard form to suit the justice and convenience of any particular case.

153 Fourthly, there is no supposed limiting rule or principle apart from justice and convenience which equity has regarded as sacrosanct over time. This is best illustrated by the history of the supposed limiting principle (or even jurisdictional constraint) affecting all injunctions apparently laid down by Lord Diplock in *The Siskina* [1979] AC 210 (para 43 above) that an injunction could only be granted in, or as ancillary to, proceedings for substantive relief in respect of a cause of action in the same jurisdiction. The lengthy process whereby that supposed fundamental principle has been broken down over time until its recent express rejection is described in detail in the *Broad Idea* case [2023] AC 389 and needs no repetition. But it is to be noted the number of types of injunctive or quasi-injunctive relief which quietly by-passed this supposed condition, as explained at paras 44–49 above, including *Norwich Pharmacal* and *Bankers Trust* orders and culminating in internet blocking orders, in none of which was it asserted that the respondent had invaded, or even threatened to invade, some legal right of the applicant.

154 It should not be supposed that all relevant general equitable principles favour the granting of injunctions against newcomers. Of those that might not, much the most important is the well-known principle that equity acts in personam rather than either in rem or (which may be much the same thing in substance) contra mundum. A main plank in the appellants' submissions is that injunctions against newcomers are by their nature a form of prohibition aimed, potentially at least, at anyone tempted to trespass or camp (depending upon the drafting of the order) on the relevant land, so that they operate as a form of local law regulating how that land may be used by anyone other than its owner. Furthermore, such an injunction is said in substance to criminalise conduct by anyone in relation to that land which would otherwise only attract civil remedies, because of the essentially penal nature of the sanctions for contempt of court. Not only is it submitted that this offends against the in personam principle, but it also amounts in substance to the imposition of a regime which ought to be the preserve of legislation or at least of byelaws.

155 It will be necessary to take careful account of this objection at various stages of the analysis which follows. At this stage it is necessary to note the following. First, equity has not been blind, or reluctant, to recognise that its injunctions may in substance have a coercive effect which, however labelled, extends well beyond the persons named as defendants (or named as subject to the injunction) in the relevant order. Very occasionally, orders have already been made in something approaching a contra mundum form, as in the *Venables* case already mentioned. More frequently the court has expressly recognised, after full argument, that an injunction against named persons may involve third parties in contempt for conduct in breach of it, where for example that conduct amounts to a contemptuous abuse of the court's process or frustrates the outcome which the court is seeking to achieve: see the *Bloomsbury* case [2003] 1 WLR 1633 and *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191, discussed at paras 37–41, 61–62 and 121–124 above. In all those examples the court was seeking to preserve confidentiality in, or the intellectual property rights in relation to, specified information, and framed its injunction in a way which would bind anyone into whose hands that information subsequently came.

A **156** A more widespread example is the way in which a *Mareva* injunction is relied upon by claimants as giving protection against asset dissipation by the defendant. This is not merely (or even mainly) because of its likely effect upon the conduct of the defendant, who may well be a rogue with no scruples about disobeying court orders, but rather its binding effect (once notified to them) upon the defendant's bankers and other reputable custodians of his assets: see *Z Ltd v A-Z and AA-LL* [1982] QB 558 (para 41 above).

B **157** Courts quietly make orders affecting third parties almost daily, in the form of the embargo upon publication or other disclosure of draft judgments, pending hand-down in public: see para 35 above. It cannot we hope be doubted that if a draft judgment with an embargo in this form came into the hands of someone (such as a journalist) other than the parties or their legal advisors it would be a contempt for that person to publish or disclose it further. Such persons would plainly be newcomers, in the sense in which that term is here being used.

C **158** It may be said, correctly, that orders of this kind are usually made so as to protect the integrity of the court's process from abuse. Nonetheless they have the effect of attaching to a species of intangible property a legal regime giving rise to a liability, if infringed, which sounds in contempt, regardless of the identity of the infringer. In conceptual terms, and shorn of the purpose of preventing abuse, they work in rem or contra mundum in much the same way as an anti-trespass injunction directed at newcomers pinned to a post on the relevant land. The only difference is that the property protected by the former is intangible, whereas in the latter it is land. In relation to any such newcomer (such as the journalist) the embargo is made without notice.

D

E **159** It is fair comment that a major difference between those types of order and the anti-trespass order is that the latter is expressly made against newcomers as "persons unknown" whereas the former (apart from the exceptional *Venables* type) are not. But if the consequences of breach are the same, and equity looks to the substance rather than to the form, that distinction may be of limited weight.

F **160** Protection of the court's process from abuse, or preservation of the utility of its future orders, may fairly be said to be the bedrock of many of equity's forays into new forms of injunction. Thus freezing injunctions are designed to make more effective the enforcement of any ultimate money judgment: see *Broad Idea* [2023] AC 389 at paras 11–21. This is what Lord Leggatt JSC there called the enforcement principle. Search orders are designed to prevent dishonest defendants from destroying relevant documents in advance of the formal process of disclosure. *Norwich Pharmacal* orders are a form of advance third party disclosure designed to enable a claimant to identify and then sue the wrongdoer. Anti-suit injunctions preserve the integrity of the appropriate forum from forum shopping by parties preferring without justification to litigate elsewhere.

G

H **161** But internet blocking orders (para 49 above) stand in a different category. The applicant intellectual property owner does not seek assistance from internet service providers ("ISPs") to enable it to identify and then sue the wrongdoers. It seeks an injunction against the ISP because it is a much more efficient way of protecting its intellectual property rights than suing the numerous wrongdoers, even though it is no part of its case against the ISP

that it is, or has even threatened to be, itself a wrongdoer. The injunction is based upon the application of "ordinary principles of equity": see *Cartier* [2018] 1 WLR 3259 (para 20 above) per Lord Sumption JSC at para 15. Specifically, the principle is that, once notified of the selling of infringing goods through its network, the ISP comes under a duty, but only if so requested by the court, to prevent the use of its facilities to facilitate a wrong by the sellers. The proceedings against the ISP may be the only proceedings which the intellectual property owner intends to take. Proceedings directly against the wrongdoers are usually impracticable, because of difficulty in identifying the operators of the infringing websites, their number and their location, typically in places outside the jurisdiction of the court: see per Arnold J at first instance in *Cartier* [2015] Bus LR 298, para 198.

162 The effect of an internet blocking order, or the cumulative effect of such orders against ISPs which share most of the relevant market, is therefore to hinder the wrongdoers from pursuing their infringing sales on the internet, without them ever being named or joined as defendants in the proceedings or otherwise given a procedural opportunity to advance any defence, other than by way of liberty to apply to vary or discharge the order: see again per Arnold J at para 262.

163 Although therefore internet blocking orders are not in form injunctions against persons unknown, they do in substance share many of the supposedly objectionable features of newcomer injunctions, if viewed from the perspective of those (the infringers) whose wrongdoings are in substance sought to be restrained. They are, quoad the wrongdoers, made without notice. They are not granted to hold the ring pending joinder of the wrongdoers and a subsequent interim hearing on notice, still less a trial. The proceedings in which they are made are, albeit in a sense indirectly, a form of enforcement of rights which are not seriously in dispute, rather than a means of dispute resolution. They have the effect, when made against the ISPs who control almost the whole market, of preventing the infringers carrying on their business from any location in the world on the primary digital platform through which they seek to market their infringing goods. The infringers whose activities are impeded by the injunctions are usually beyond the territorial jurisdiction of the English court. Indeed that is a principal justification for the grant of an injunction against the ISPs.

164 Viewed in that way, internet blocking orders are in substance more of a precedent or jumping-off point for the development of newcomer injunctions than might at first sight appear. They demonstrate the imaginative way in which equity has provided an effective remedy for the protection and enforcement of civil rights, where conventional means of proceeding against the wrongdoers are impracticable or ineffective, where the objective of protecting the integrity or effectiveness of related court process is absent, and where the risk of injustice of a without notice order as against alleged wrongdoers is regarded as sufficiently met by the preservation of liberty to them to apply to have the order discharged.

165 We have considered but rejected summary possession orders against squatters as an informative precedent. This summary procedure (avoiding any interim order followed by final order after trial) was originally provided for by RSC Ord 113, and is now to be found in CPR Pt 55. It is commonly obtained against persons unknown, and has effect against newcomers in the sense that in executing the order the bailiff will remove not

merely squatters present when the order was made, but also squatters who arrived on the relevant land thereafter, unless they apply to be joined as defendants to assert a right of their own to remain.

166 Tempting though the superficial similarities may be as between possession orders against squatters and injunctions against newcomers, they afford no relevant precedent for the following reasons. First, they are the creature of the common law rather than equity, being a modern form of the old action in ejectment which is at its heart an action in rem rather than in personam: see *Manchester Corpn v Connolly* [1970] Ch 420, 428–9 per Lord Diplock, *McPhail v Persons, Names Unknown* [1973] Ch 447, 457 per Lord Denning MR and more recently *Meier* [2009] 1 WLR 2780, paras 33–36 per Baroness Hale JSC. Secondly, possession orders of this kind are not truly injunctions. They authorise a court official to remove persons from land, but disobedience to the bailiff does not sound in contempt. Thirdly, the possession order works once and for all by a form of execution which puts the owner of the land back in possession, but it has no ongoing effect in prohibiting entry by newcomers wishing to camp upon it after the order has been executed. Its shortcomings in the Traveller context are one of the reasons prayed in aid by local authorities seeking injunctions against newcomers as the only practicable solution to their difficulties.

167 These considerations lead us to the conclusion that, although the attempts thus far to justify them are in many respects unsatisfactory, there is no immoveable obstacle in the way of granting injunctions against newcomer Travellers, on an essentially without notice basis, regardless of whether in form interim or final, either in terms of jurisdiction or principle. But this by no means leads straight to the conclusion that they ought to be granted, either generally or on the facts of any particular case. They are only likely to be justified as a novel exercise of an equitable discretionary power if:

(i) There is a compelling need, sufficiently demonstrated by the evidence, for the protection of civil rights (or, as the case may be, the enforcement of planning control, the prevention of anti-social behaviour, or such other statutory objective as may be relied upon) in the locality which is not adequately met by any other measures available to the applicant local authorities (including the making of byelaws). This is a condition which would need to be met on the particular facts about unlawful Traveller activity within the applicant local authority's boundaries.

(ii) There is procedural protection for the rights (including Convention rights) of the affected newcomers, sufficient to overcome the strong prima facie objection of subjecting them to a without notice injunction otherwise than as an emergency measure to hold the ring. This will need to include an obligation to take all reasonable steps to draw the application and any order made to the attention of all those likely to be affected by it (see paras 226–231 below); and the most generous provision for liberty (i e permission) to apply to have the injunction varied or set aside, and on terms that the grant of the injunction in the meantime does not foreclose any objection of law, practice, justice or convenience which the newcomer so applying might wish to raise.

(iii) Applicant local authorities can be seen and trusted to comply with the most stringent form of disclosure duty on making an application, so as both

to research for and then present to the court everything that might have been said by the targeted newcomers against the grant of injunctive relief.

(iv) The injunctions are constrained by both territorial and temporal limitations so as to ensure, as far as practicable, that they neither outflank nor outlast the compelling circumstances relied upon.

(v) It is, on the particular facts, just and convenient that such an injunction be granted. It might well not for example be just to grant an injunction restraining Travellers from using some sites as short-term transit camps if the applicant local authority has failed to exercise its power or, as the case may be, discharge its duty to provide authorised sites for that purpose within its boundaries.

168 The issues in this appeal have been formulated in such a way that the appellants have the burden of showing that the balancing exercise involved in weighing those competing considerations can never come down in favour of granting such an injunction. We have not been persuaded that this is so. We will address the main objections canvassed by the appellants and, in the next section of this judgment, set out in a little more detail how we conceive that the necessary protection for newcomers' rights should generally be built into the process for the application for, grant and subsequent monitoring of this type of injunction.

169 We have already mentioned the objection that an injunction of this type looks more like a species of local law than an in personam remedy between civil litigants. It is said that the courts have neither the skills, the capacity for consultation nor the democratic credentials for making what is in substance legislation binding everyone. In other words, the courts are acting outside their proper constitutional role and are making what are, in effect, local laws. The more appropriate response, it is argued, is for local authorities to use their powers to make byelaws or to exercise their other statutory powers to intervene.

170 We do not accept that the granting of injunctions of this kind is constitutionally improper. In so far as the local authorities are seeking to prevent the commission of civil wrongs such as trespass, they are entitled to apply to the civil courts for any relief allowed by law. In particular, they are entitled to invoke the equitable jurisdiction of the court so as to obtain an injunction against potential trespassers. For the reasons we have explained, courts have jurisdiction to make such orders against persons who are not parties to the action, i e newcomers. In so far as the local authorities are seeking to prevent breaches of public law, including planning law and the law relating to highways, they are empowered to seek injunctions by statutory provisions such as those mentioned in para 45 above. They can accordingly invoke the equitable jurisdiction of the court, which extends, as we have explained, to the granting of newcomer injunctions. The possibility of an alternative non-judicial remedy does not deprive the courts of jurisdiction.

171 Although we reject the constitutional objection, we accept that the availability of non-judicial remedies, such as the making of byelaws and the exercise of other statutory powers, may bear on questions (i) and (v) in para 167 above: that is to say, whether there is a compelling need for an injunction, and whether it is, on the facts, just and convenient to grant one. This was a matter which received only cursory examination during the hearing of this appeal. Mr Anderson KC for Wolverhampton submitted (on

A instructions quickly taken by telephone during the short adjournment) that, in summary, byelaws took too long to obtain (requiring two stages of negotiation with central government), would need to be separately made in relation to each site, would be too inflexible to address changes in the use of the relevant sites (particularly if subject to development) and would unduly criminalise the process of enforcing civil rights. The appellants did not B engage with the detail of any of these points, their objection being more a matter of principle.

172 We have not been able to reach any conclusions about the issue of practicality, either generally or on the particular facts about the cases before the court. In our view the theoretical availability of byelaws or other measures or powers available to local authorities as a potential alternative remedy is not shown to be a reason why newcomer injunctions should never C be granted against Travellers. Rather, the question whether byelaws or other such measures or powers represent a workable alternative is one which should be addressed on a case by case basis. We say more about that in the next section of this judgment.

173 A second main objection in principle was lack of procedural fairness, for which Lord Sumption's observations in *Cameron* were prayed in aid. It may be said that recognition that injunctions against newcomers D are in substance without notice injunctions makes this objection all the more stark, because the newcomer does not even know that an injunction is being sought against them when the order is made, so that their inability to attend to oppose is hard-wired into the process regardless of the particular facts.

174 This is an objection which applies to all forms of without notice injunction, and explains why they are generally only granted when there is E truly no alternative means of achieving the relevant objective, and only for a short time, pending an early return day at which the merits can be argued out between the parties. The usual reason is extreme urgency, but even then it is customary to give informal notice of the hearing of the application to the persons against whom the relief is sought. Such an application used then to be called "ex parte on notice", a partly Latin phrase which captured the F point that an application which had not been formally served on persons joined as defendants so as to enable them to attend and oppose it did not in an appropriate case mean that it had to be heard in their absence, or while they were ignorant that it was being made. In the modern world of the CPR, where "ex parte" has been replaced with "without notice", the phrase "ex parte on notice" admits no translation short of a simple oxymoron. But it demonstrates that giving informal notice of a without notice application is a G well-recognised way of minimising the potential for procedural unfairness inherent in such applications. But sometimes even the most informal notice is self-defeating, as in the case of a freezing injunction, where notice may provoke the respondent into doing exactly that which the injunction is designed to prohibit, and a search order, where notice of any kind is feared to be likely to trigger the bonfire of documents (or disposal of laptops) the H prevention of which is the very reason for the application.

175 In the present context notice of the application would not risk defeating its purpose, and there would usually be no such urgency as would justify applying without notice. The absence of notice is simply inherent in an application for this type of injunction because, quoad newcomers, the applicant has no idea who they might turn out to be. A practice requirement

to advertise the intended application, by notices on the relevant sites or on suitable websites, might bring notice of the application to intended newcomers before it came to be made, but this would be largely a matter of happenstance. It would for example not necessarily come to the attention of a Traveller who had been camping a hundred miles away and who alighted for the first time on the prohibited site some time after the application had been granted.

176 But advertisement in advance might well alert bodies with a mission to protect Travellers' interests, such as the appellants, and enable them to intervene to address the court on the local authority's application with focused submissions as to why no injunction should be granted in the particular case. There is an (imperfect) analogy here with representative proceedings (paras 27–30 above). There may also be a useful analogy with the long-settled rule in insolvency proceedings which requires that a creditors' winding up petition be advertised before it is heard, in order to give advance notice to stakeholders in the company (such as other creditors) and the opportunity to oppose the petition, without needing to be joined as defendants. We say more about this and how advance notice of an application for a newcomer injunction might be given to newcomers and persons and bodies representing their interests in the next section of this judgment.

177 It might be thought that the obvious antidote to the procedural unfairness of a without notice injunction would be the inclusion of a liberal right of anyone affected to apply to vary or discharge the injunction, either in its entirety or as against them, with express provision that the applicant need show no change of circumstances, and is free to advance any reason why the injunction should either never have been granted or, as the case may be, should be discharged or varied. Such a right is generally included in orders made on without notice applications, but Mr Drabble KC submitted that it was unsatisfactory for a number of reasons.

178 The first was that, if the injunction was final rather than interim, it would be decisive of the legal merits, and be incapable of being challenged thereafter by raising a defence. We regard this submission as one of the unfortunate consequences of the splitting of the debate into interim and final injunctions. We consider it plain that a without notice injunction against newcomers would not have that effect, regardless of whether it was in interim or final form. An applicant to vary or discharge would be at liberty to advance any reasons which could have been advanced in opposition to the grant of the injunction when it was first made. If that were not implicit in the reservation of liberty to apply (which we think it is), it could easily be made explicit as a matter of practice.

179 Mr Drabble KC's next objection to the utility of liberty to apply was more practical. Many or most Travellers, he said, would be seeking to fulfil their cultural practice of leading a peripatetic life, camping at any particular site for too short a period to make it worth going to court to contest an injunction affecting that site. Furthermore, unless they first camped on the prohibited site there would be no point in applying, but if they did camp there it would place them in breach of the injunction while applying to vary it. If they camped elsewhere so as to comply with the injunction, their rights (if any) would have been interfered with, in circumstances where there would be no point in having an expensive and

A risky legal argument about whether they should have been allowed to camp there in the first place.

180 There is some force in this point, but we are not persuaded that the general disinclination of Travellers to apply to court really flows from the newcomer injunctions having been granted on a without notice application. If for example a local authority waited for a group of Travellers to camp unlawfully before serving them with an application for an injunction, the Travellers might move to another site rather than raise a defence to the prevention of continued camping on the original site. By the time the application came to be heard, the identified group would have moved on, leaving the local authority to clear up, and might well have been replaced by another group, equally unidentifiable in advance of their arrival.

181 There are of course exceptions to this pattern of temporary camping as trespassers, as when Travellers buy a site for camping on, and are then proceeded against for breach of planning control rather than for trespass: see eg the *Gammell* case and the appeal in *Bromley London Borough Council v Maughan* heard at the same time. In such a case the potential procedural injustice of a without notice injunction might well be sufficient to require the local authority to proceed against the owners of the site on notice, in the usual way, not least because there would be known targets capable of being served with the proceedings, and any interim application made on notice. But the issue on this appeal is not whether newcomer injunctions against Travellers are always justified, but rather whether the objections are such that they never are.

182 The next logical objection (although little was made of it on this appeal) is that an injunction of this type made on the application of a local authority doing its duty in the public interest is not generally accompanied by a cross-undertaking in damages. There is of course a principled reason why public bodies doing their public duty are relieved of this burden (see *Financial Services Authority v Sinaloa Gold plc* [2013] 2 AC 28), and that reasoning has generally been applied in newcomer injunction cases against Travellers where the applicant is a local authority. We address this issue further in the next section of this judgment (at para 234) and it would be wrong for us to express more definite views on it, in the absence of any submissions about it. In any event, if this were otherwise a decisive reason why an injunction of this type should never be granted, it may be assumed that local authorities, or some of them, would prefer to offer a cross undertaking rather than be deprived of the injunction.

183 The appellants' final main point was that it would always be impossible when considering the grant of an injunction against newcomers to conduct an individualised proportionality analysis, because each potential target Traveller would have their own particular circumstances relevant to a balancing of their article 8 rights against the applicant's claim for an injunction. If no injunction could ever be granted in the absence of an individualised proportionality analysis of the circumstances of every potential target, then it may well be that no newcomer injunction could ever be granted against Travellers. But we reject that premise. To the extent that a particular Traveller who became the subject of a newcomer injunction wished to raise particular circumstances applicable to them and relevant to the proportionality analysis, this would better be done under the liberty to

apply if, contrary to the general disinclination or inability of Travellers to go to court, they had the determination to do so.

184 We have already briefly mentioned Mr Drabble KC's point about the inappropriateness of an injunction against one group of Travellers based only upon the disorderly conduct of an earlier group. This is in our view just an evidential point. A local authority that sought a borough-wide injunction based solely upon evidence of disorderly conduct by a single group of campers at a single site would probably fail the test in any event. It will no doubt be necessary to adduce evidence which justifies a real fear of widespread repetition. Beyond that, the point goes nowhere towards constituting a reason why such injunctions should never be granted.

185 The point was made by Stephanie Harrison KC for Friends of the Earth (intervening because of the implications of this appeal for protesters) that the potential for a newcomer injunction to cause procedural injustice was not regulated by any procedure rules or practice statements under the CPR. Save in relation to certain statutory applications referred to in para 51 above this is true at present, but it is not a good reason to inhibit equity's development of a new type of injunction. A review of the emergence of freezing injunctions and search orders shows how the necessary procedural checks and balances were first worked out over a period of development by judges in particular cases, then addressed by text-book writers and academics and then, at a late stage in the developmental process, reduced to rules and practice directions. This is as it should be. Rules and practice statements are appropriate once experience has taught judges and practitioners what are the risks of injustice that need to be taken care of by standard procedures, but their reduction to settled (and often hard to amend) standard form too early in the process of what is in essence judge-made law would be likely to inhibit rather than promote sound development. In the meantime, the courts have been actively reviewing what these procedural protections should be, as for example in the *Ineos* and *Bromley* cases (paras 86–95 above). We elaborate important aspects of the appropriate protections in the next section of this judgment.

186 Drawing all these threads together, we are satisfied that there is jurisdiction (in the sense of power) in the court to grant newcomer injunctions against Travellers, and that there are principled reasons why the exercise of that power may be an appropriate exercise of the court's equitable discretion, where the general conditions set out in para 167 above are satisfied. While some of the objections relied upon by the appellants may amount to good reasons why an injunction should not be granted in particular cases, those objections do not, separately or in the aggregate, amount to good reason why such an injunction should never be granted. That is the question raised by this appeal.

5. The process of application for, grant and monitoring of newcomer injunctions and protection for newcomers' rights

187 We turn now to consider the practical application of the principles affecting an application for a newcomer injunction against Gypsies and Travellers, and the safeguards that should accompany the making of such an order. As we have mentioned, these are matters to which judges hearing such applications have given a good deal of attention, as has the Court of Appeal in considering appeals against the orders they have made. Further,

A the relevant principles and safeguards will inevitably evolve in these and other cases in the light of experience. Nevertheless, they do have a bearing on the issues of principle we have to decide, in that we must be satisfied that the points raised by the appellants do not, individually or collectively, preclude the grant of what are in some ways final (but regularly reviewable) injunctions that prevent persons who are unknown and unidentifiable at the date of the order from trespassing on and occupying local authority land.
B We have also been invited to give guidance on these matters so far as we feel able to do so having regard to our conclusions as to the nature of newcomer injunctions and the principles applicable to their grant.

(1) Compelling justification for the remedy

188 Any applicant for the grant of an injunction against newcomers in a
C Gypsy and Traveller case must satisfy the court by detailed evidence that there is a compelling justification for the order sought. This is an overarching principle that must guide the court at all stages of its consideration (see para 167(i)).

189 This gives rise to three preliminary questions. The first is whether the local authority has complied with its obligations (such as they are)
D properly to consider and provide lawful stopping places for Gypsies and Travellers within the geographical areas for which it is responsible. The second is whether the authority has exhausted all reasonable alternatives to the grant of an injunction, including whether it has engaged in a dialogue with the Gypsy and Traveller communities to try to find a way to accommodate their nomadic way of life by giving them time and assistance to find alternative or transit sites, or more permanent accommodation. The
E third is whether the authority has taken appropriate steps to control or even prohibit unauthorised encampments and related activities by using the other measures and powers at its disposal. To some extent the issues raised by these questions will overlap. Nevertheless, their importance is such that they merit a degree of separate consideration, at least at this stage. A failure by the local authority in one or more of these respects may make it more difficult to satisfy a court that the relief it seeks is just and convenient.
F

(i) An obligation or duty to provide sites for Gypsies and Travellers

190 The extent of any obligation on local authorities in England to provide sufficient sites for Gypsies and Travellers in the areas for which they are responsible has changed over time.

191 The starting point is section 23 of the Caravan Sites and Control of
G Development Act 1960 ("CSCDA 1960") which gave local authorities the power to close common land to Gypsies and Travellers. As Sedley J observed in *R v Lincolnshire County Council, Ex p Atkinson* (1996) 8 Admin LR 529, local authorities used this power with great energy. But they made little or no corresponding use of the related powers conferred on them by section 24 of the CSCDA 1960 to provide sites where caravans
H might be brought, whether for temporary purposes or for use as permanent residences, and in that way compensate for the closure of the commons. As a result, it became increasingly difficult for Travellers and Gypsies to pursue their nomadic way of life.

192 In the light of the problems caused by the CSCDA 1960, section 6 of the Caravan Sites Act 1968 ("CSA 1968") imposed on local authorities a

duty to exercise their powers under section 24 of the CSCDA 1960 to provide adequate accommodation for Gypsies and Travellers residing in or resorting to their areas. The appellants accept that in the years that followed many sites for Gypsies and Travellers were established, but they contend with some justification that these sites were not and have never been enough to meet all the needs of these communities.

193 Some 25 years later, the CJPOA repealed section 6 of the CSA 1968. But the *power* to provide sites for Travellers and Gypsies remained. This is important for it provides a way to give effect to the assessment by local authorities of the needs of these communities, and these are matters we address below.

194 The position in Wales is rather different. Any local authority applying for a newcomer injunction affecting Wales must consider the impact of any legislation specifically affecting that jurisdiction including the Housing (Wales) Act 2014 ("H(W)A 2014"). Section 101(1) of the H(W)A 2014 imposes on the authority a duty to "carry out an assessment of the accommodation needs of Gypsies and Travellers residing in or resorting to its area". If the assessment identifies that the provision of sites is inadequate to meet the accommodation needs of Gypsies and Travellers in its area and the assessment is approved by the Welsh Ministers, the authority has a *duty* to exercise its powers to meet those needs under section 103 of the H(W)A 2014.

(ii) General "needs" assessments

195 For many years there has been an obligation on local authorities to carry out an assessment of the accommodation needs of Gypsies and Travellers when carrying out their periodic review of housing needs under section 8 of the Housing Act 1985.

196 This obligation was first imposed by section 225 of the Housing Act 2004. This measure was repealed by section 124 of the Housing and Planning Act 2016. Instead, the duty of local housing authorities in England to carry out a periodic review of housing needs under section 8 of the Housing Act 1985 has since 2016 included (at section 8(3)) a duty to consider the needs of people residing in or resorting to their district with respect to the provision of sites on which caravans can be stationed.

(iii) Planning policy

197 Since about 1994, and with the repeal of the statutory duty to provide sites, the general issue of Traveller site provision has come increasingly within the scope of planning policy, just as the government anticipated.

198 Indeed, in 1994, the government published planning advice on the provision of sites for Gypsies and Travellers in the form of Department of the Environment Circular 1/94 entitled *Gypsy Sites and Planning*. This explained that the repeal of the statutory duty to provide sites was expected to lead to more applications for planning permission for sites. Local planning authorities ("LPAs") were advised to assess the needs of Gypsies and Travellers within their areas and to produce a plan which identified suitable *locations* for sites (location-based policies) and if this could not be done, to explain the *criteria* for the selection of appropriate locations (criteria-based policies). Unfortunately, despite this advice, most attempts

A to secure permission for Gypsy and Traveller sites were refused and so the capacity of the relatively few sites authorised for occupation by these nomadic communities continued to fall well short of that needed, as Lord Bingham explained in *South Bucks District Council v Porter* [2003] 2 AC 558, at para 13.

199 The system for local development planning in England is now established by the Planning and Compulsory Purchase Act 2004 ("PCPA B 2004") and the regulations made under it. Part 2 of the PCPA 2004 deals with local development and stipulates that the LPA is to prepare a development scheme and plan; that this must set out the authority's policies; that in preparing the local development plan, the authority must have regard to national policy; that each plan must be sent to the Secretary of State for independent examination and that the purpose of this examination is, C among other things, to assess its soundness and that will itself involve an assessment whether it is consistent with national policy.

200 Meantime, the advice in Circular 1/94 having failed to achieve its purpose, the government has from time to time issued new planning advice on the provision of sites for Gypsies and Travellers in England, and that advice may be taken to reflect national policy.

201 More specifically, in 2006 advice was issued in the form of the D Office of the Deputy Prime Minister Circular 1/06 *Planning for Gypsy and Traveller Caravan Sites*. The 2006 guidance was replaced in March 2012 by *Planning Policy for Traveller Sites* ("PPTS 2012"). In August 2015, a revised version of PPTS 2012 was issued ("PPTS 2015") and this is to be read with the National Planning Policy Framework. There has recently been a challenge to a decision refusing planning permission on the basis that one E aspect of PPTS 2015 amounts to indirect discrimination and has no proper justification: *Smith v Secretary of State for Housing, Communities and Local Government* [2023] PTSR 312. But for present purposes it is sufficient to say (and it remains the case) that there is in these policy documents clear advice that LPAs should, when producing their local plans, identify and update annually a supply of specific deliverable sites sufficient to provide five years' worth of sites against their locally set targets to address the needs of F Gypsies and Travellers for permanent and transit sites. They should also identify a supply of specific, developable sites or broad locations for growth for years 6–10 and even, where possible, years 11–15. The advice is extensive and includes matters to which LPAs must have regard including, among other things, the presumption in favour of sustainable development; the possibility of cross-authority co-operation; the surrounding population's G size and density; the protection of local amenities and the environment; the need for appropriate land supply allocations and to respect the interests of the settled communities; the need to ensure that Traveller sites are sustainable and promote peaceful and integrated co-existence with the local communities; and the need to promote access to appropriate health services and schools. The LPAs are also advised to consider the need to avoid placing undue pressure on local infrastructure and services, and to provide a settled H base that reduces the need for long distance travelling and possible environmental damage caused by unauthorised encampments.

202 The availability of transit sites (and information as to where they may be found) is also important in providing short-term or temporary accommodation for Gypsies and Travellers moving through a local

authority area, and an absence of sufficient transit sites in an area (or information as to where available sites may be found) may itself be a sufficient reason for refusing a newcomer injunction.

(iv) Consultation and co-operation

203 This is another matter of considerable importance, and it is one with which all local authorities should willingly engage. We have no doubt that local authorities, other responsible bodies and representatives of the Gypsy and Traveller communities would benefit from a dialogue and co-operation to understand their respective needs; the concerns of the local authorities, local charities, business and community groups and members of the public; and the resources available to the local authorities for deployment to meet the needs of these nomadic communities having regard to the wider obligations which the authorities must also discharge. In this way a deeper level of trust may be established and so facilitate and encourage a constructive approach to the implementation of proportionate solutions to the problems the nomadic communities continue to present, without immediate and expensive recourse to applications for injunctive relief or enforcement action.

(v) Public spaces protection orders

204 The Anti-social Behaviour, Crime and Policing Act 2014 confers on local authorities the power to make public spaces protection orders ("PSPOs") to prohibit encampments on specific land. PSPOs are in some respects similar to byelaws and are directed at behaviour and activities carried on in a public place which, for example, have a detrimental effect on the quality of life of those in the area, are or are likely to be persistent or continuing, and are or are likely to be such as to make the activities unreasonable. Further, PSPOs are in general easier to make than byelaws because they do not require the involvement of central government or extensive consultation. Breach of a PSPO without reasonable excuse is a criminal offence and can be enforced by a fixed penalty notice or prosecution with a maximum fine of level three on the standard scale. But any PSPO must be reasonable and necessary to prevent the conduct and detrimental effects at which it is targeted. A PSPO takes precedence over any byelaw in so far as there is any overlap.

(vi) Criminal Justice and Public Order Act 1994

205 The CJPOA empowers local authorities to deal with unauthorised encampments that are causing damage or disruption or involve vehicles, and it creates a series of related offences. It is not necessary to set out full details of all of them. The following summary gives an idea of their range and scope.

206 Section 61 of the CJPOA confers powers on the police to deal with two or more persons who they reasonably believe are trespassing on land with the purpose of residing there. The police can direct these trespassers to leave (and to remove any vehicles) if the occupier has taken reasonable steps to ask them to leave and they have caused damage, disruption or distress as those concepts are elucidated in section 61(10). Failure to leave within a

A reasonable time or, if they do leave, a return within three months is an offence punishable by imprisonment or a fine. A defence of reasonable excuse may be available in particular cases.

207 Following amendment in 2003, section 62A of the CJPOA confers on the police a power to direct trespassers with vehicles to leave land at the occupier's request, and that is so even if the trespassers have not caused damage or used threatening behaviour. Where trespassers have at least one B vehicle between them and are there with the common purpose of residing there, the police, (if so requested by the occupier) have the power to direct a trespasser to leave and to remove any vehicle or property, subject to this proviso: if they have caravans that (after consultation with the relevant local authorities) there is a suitable pitch available on a site managed by the authority or social housing provider in that area.

C **208** Focusing more directly on local authorities, section 77 of the CJPOA confers on the local authority a power to direct campers to leave open-air land where it appears to the authority that they are residing in a vehicle within its area, whether on a highway, on unoccupied land or on occupied land without the consent of the occupier. There is no need to establish that these activities have caused damage or disruption. The D direction must be served on each person to whom it applies, and that may be achieved by directing it to all occupants of vehicles on the land; and failing other effective service, it may be affixed to the vehicles in a prominent place. Relevant documents should also be displayed on the land in question. It is an offence for persons who know that such an order has been made against them to fail to comply with it.

E (vii) Byelaws

209 There is a measure of agreement by all parties before us that the power to make and enforce byelaws may also have a bearing on the issues before us in this appeal. Byelaws are a form of delegated legislation made by local authorities under an enabling power. They commonly require something to be done or refrained from in a particular area or location. F Once implemented, byelaws have the force of law within the areas to which they apply.

210 There is a wide range of powers to make byelaws. By way of example, a general power to make byelaws for good rule and government and for the prevention and suppression of nuisances in their areas is conferred on district councils in England and London borough councils by G section 235(1) of the Local Government Act 1972 ("the LGA 1972"). The general confirming authority in relation to byelaws made under this section is the Secretary of State.

211 We would also draw attention to section 15 of the Open Spaces Act 1906 which empowers local authorities in England to make byelaws for the regulation of open spaces, for the imposition of a penalty for breach and for the removal of a person infringing the byelaw by an officer of the local H authority or a police constable. Notable too is section 164 of the Public Health Act 1875 (38 & 39 Vict c 55) which confers a power on the local authority to make byelaws for the regulation of public walks and pleasure grounds and for the removal of any person infringing any such byelaw, and under section 183, to impose penalties for breach.

212 Other powers to make byelaws and to impose penalties for breach are conferred on authorities in relation to commons by, for example, the Commons Act 1899 (62 & 63 Vict c 30).

213 Appropriate authorities are also given powers to make byelaws in relation to nature reserves by the National Parks and Access to the Countryside Act 1949 (as amended by the Natural Environment and Rural Communities Act 2006); in relation to National Parks and areas of outstanding natural beauty under sections 90 and 91 of the 1949 Act (as amended); concerning the protection of country parks under section 41 of the Countryside Act 1968; and for the protection and preservation of other open country under section 17 of the Countryside and Rights of Way Act 2000.

214 We recognise that byelaws are sometimes subjected to detailed and appropriate scrutiny by the courts in assessing whether they are reasonable, certain in their terms and consistent with the general law, and whether the local authority had the power to make them. It is an aspect of the third of these four elements that generally byelaws may only be made if provision for the same purpose is not made under any other enactment. Similarly, a byelaw may be invalidated if repugnant to some basic principle of the common law. Further, as we have seen, the usual method of enforcement of byelaws is a fine although powers to seize and retain property may also be included (see, for example, section 237ZA of the LGA 1972), as may powers to direct removal.

215 The opportunity to make and enforce appropriate elements of this battery of potential byelaws, depending on the nature of the land in issue and the form of the intrusion, may seem at first sight to provide an important and focused way of dealing with unauthorised encampments, and it is a rather striking feature of these proceedings that byelaws have received very little attention from local authorities. Indeed, Wolverhampton City Council has accepted, through counsel, that byelaws were not considered as a means of addressing unauthorised encampments in the areas for which it is responsible. It maintains they are unlikely to be sufficient and effective in the light of (a) the existence of legislation which may render the byelaws inappropriate; (b) the potential effect of criminalising behaviour; (c) the issue of identification of newcomers; and (d) the modest size of any penalty for breach which is unlikely to be an effective deterrent.

216 We readily appreciate that the nature of travelling communities and the respondents to newcomer injunctions may not lend themselves to control by or yield readily to enforcement of these various powers and measures, including byelaws, alone, but we are not persuaded that the use of byelaws or other enforcement action of the kinds we have described can be summarily dismissed. Plainly, we cannot decide in this appeal whether the reaction of Wolverhampton City Council to the use of all of these powers and measures including byelaws is sound or not. We have no doubt, however, that this is a matter that ought to be the subject of careful consideration on the next review of the injunctions in these cases or on the next application for an injunction against persons unknown, including newcomers.

(viii) A need for review

217 Various aspects of this discussion merit emphasis at this stage. Local authorities have a range of measures and powers available to them to

deal with unlawful encampments. Some but not all involve the enactment and enforcement of byelaws. Many of the offences are punishable with fixed or limited penalties, and some are the subject of specified defences. It may be said that these form part of a comprehensive suite of measures and powers and associated penalties and safeguards which the legislature has considered appropriate to deal with the threat of unauthorised encampments by Gypsies and Travellers. We rather doubt that is so, particularly when dealing with communities of unidentified trespassers including newcomers. But these are undoubtedly matters that must be explored upon the review of these orders.

(2) Evidence of threat of abusive trespass or planning breach

218 We now turn to more general matters and safeguards. As we have foreshadowed, any local authority applying for an injunction against persons unknown, including newcomers, in Gypsy and Traveller cases must satisfy the court by full and detailed evidence that there is a compelling justification for the order sought (see para 167(i) above). There must be a strong probability that a tort or breach of planning control or other aspect of public law is to be committed and that this will cause real harm. Further, the threat must be real and imminent. We have no doubt that local authorities are well equipped to prepare this evidence, supported by copies of all relevant documents, just as they have shown themselves to be in making applications for injunctions in this area for very many years.

219 The full disclosure duty is of the greatest importance (see para 167(iii)). We consider that the relevant authority must make full disclosure to the court not just of all the facts and matters upon which it relies but also and importantly, full disclosure of all facts, matters and arguments of which, after reasonable research, it is aware or could with reasonable diligence ascertain and which might affect the decision of the court whether to grant, maintain or discharge the order in issue, or the terms of the order it is prepared to make or maintain. This is a continuing obligation on any local authority seeking or securing such an order, and it is one it must fulfil having regard to the one-sided nature of the application and the substance of the relief sought. Where relevant information is discovered after the making of the order the local authority may have to put the matter back before the court on a further application.

220 The evidence in support of the application must therefore err on the side of caution; and the court, not the local authority, should be the judge of relevance.

(3) Identification or other definition of the intended respondents to the application

221 The actual or intended respondents to the application must be defined as precisely as possible. In so far as it is possible actually to identify persons to whom the order is directed (and who will be enjoined by its terms) by name or in some other way, as Lord Sumption explained in *Cameron* [2019] 1 WLR 1471, the local authority ought to do so. The fact that a precautionary injunction is also sought against newcomers or other persons unknown is not of itself a justification for failing properly to identify these persons when it is possible to do so, and serving them with the proceedings and order, if necessary, by seeking an order for substituted service. It is only

permissible to seek or maintain an order directed to newcomers or other persons unknown where it is impossible to name or identify them in some other and more precise way. Even where the persons sought to be subjected to the injunction are newcomers, the possibility of identifying them as a class by reference to conduct prior to what would be a breach (and, if necessary, by reference to intention) should be explored and adopted if possible.

(4) The prohibited acts

222 It is always important that an injunction spells out clearly and in everyday terms the full extent of the acts it prohibits, and this is particularly so where it is sought against persons unknown, including newcomers. The terms of the injunction—and therefore the prohibited acts—must correspond as closely as possible to the actual or threatened unlawful conduct. Further, the order should extend no further than the minimum necessary to achieve the purpose for which it was granted; and the terms of the order must be sufficiently clear and precise to enable persons affected by it to know what they must not do.

223 Further, if and in so far as the authority seeks to enjoin any conduct which is lawful viewed on its own, this must also be made absolutely clear, and the authority must be prepared to satisfy the court that there is no other more proportionate way of protecting its rights or those of others.

224 It follows but we would nevertheless emphasise that the prohibited acts should not be described in terms of a legal cause of action, such as trespass or nuisance, unless this is unavoidable. They should be defined, so far as possible, in non-technical and readily comprehensible language which a person served with or given notice of the order is capable of understanding without recourse to professional legal advisers.

(5) Geographical and temporal limits

225 The need for strict temporal and territorial limits is another important consideration (see para 167(iv)). One of the more controversial aspects of many of the injunctions granted hitherto has been their duration and geographical scope. These have been subjected to serious criticism, at least some of which we consider to be justified. We have considerable doubt as to whether it could ever be justifiable to grant a Gypsy or Traveller injunction which is directed to persons unknown, including newcomers, and extends over the whole of a borough or for significantly more than a year. It is to be remembered that this is an exceptional remedy, and it must be a proportionate response to the unlawful activity to which it is directed. Further, we consider that an injunction which extends borough-wide is likely to leave the Gypsy and Traveller communities with little or no room for manoeuvre, just as Coulson LJ warned might well be the case (see generally, *Bromley* [2020] PTSR 1043, paras 99–109. Similarly, injunctions of this kind must be reviewed periodically (as Sir Geoffrey Vos MR explained in these appeals at paras 89 and 108) and in our view ought to come to an end (subject to any order of the judge), by effluxion of time in all cases after no more than a year unless an application is made for their renewal. This will give all parties an opportunity to make full and complete disclosure to the court, supported by appropriate evidence, as to how effective the order has been; whether any reasons or grounds for its discharge have emerged;

whether there is any proper justification for its continuance; and whether and on what basis a further order ought to be made.

(6) Advertising the application in advance

226 We recognise that it would be impossible for a local authority to give effective notice to all newcomers of its intention to make an application for an injunction to prevent unauthorised encampments on its land. That is the basis on which we have proceeded. On the other hand, in the interests of procedural fairness, we consider that any local authority intending to make an application of this kind must take reasonable steps to draw the application to the attention of persons likely to be affected by the injunction sought or with some other genuine and proper interest in the application (see para 167(ii) above). This should be done in sufficient time before the application is heard to allow those persons (or those representing them or their interests) to make focused submissions as to whether it is appropriate for an injunction to be granted and, if it is, as to the terms and conditions of any such relief.

227 Here the following further points may also be relevant. First, local authorities have now developed ways to give effective notice of the grant of such injunctions to those likely to be affected by them, and they do so by the use of notices attached to the land and in other ways as we describe in the next section of this judgment. These same methods, appropriately modified, could be used to give notice of the application itself. As we have also mentioned, local authorities have been urged for some time to establish lines of communication with Traveller and Gypsy communities and those representing them, and all these lines of communication, whether using email, social media, advertisements or some other form, could be used by authorities to give notice to these communities and other interested persons and bodies of any applications they are proposing to make.

228 Secondly, we see merit in requiring any local authority making an application of this kind to explain to the court what steps it has taken to give notice of the application to persons likely to be affected by it or to have a proper interest in it, and of all responses it has received.

229 These are all matters for the judges hearing these applications to consider in light of the particular circumstances of the cases before them, and in this way to allow an appropriate practice to develop.

(7) Effective notice of the order

230 We are not concerned in this part of our judgment with whether respondents become party to the proceedings on service of the order upon them, but rather with the obligation on the local authority to take steps actively to draw the order to the attention of all actual and potential respondents; to give any person potentially affected by it full information as to its terms and scope, and the consequences of failing to comply with it; and how any person affected by its terms may make an application for its variation or discharge (again, see para 167(ii) above).

231 Any applicant for such an order must in our view make full and complete disclosure of all the steps it proposes to take (i) to notify all persons likely to be affected by its terms; and (ii) to ascertain the names and addresses of all such persons who are known only by way of description. This will no doubt include placing notices in and around the relevant sites where this

is practicable; placing notices on appropriate websites and in relevant publications; and giving notice to relevant community and charitable and other representative groups.

(8) Liberty to apply to discharge or vary

232 As we have mentioned, we consider that an order of this kind ought always to include generous liberty to any person affected by its terms to apply to vary or discharge the whole or any part of the order (again, see para 167(ii) above). This is so whether the order is interim or final in form, so that a respondent can challenge the grant of the injunction on any grounds which might have been available at the time of its grant.

(9) Costs protection

233 This is a difficult subject, and it is one on which we have received little assistance. We have considerable concern that costs of litigation of this kind are way beyond the means of most if not all Gypsies and Travellers and many interveners, as counsel for the first interveners, Friends of the Earth, submitted. This raises the question whether the court has jurisdiction to make a protective or costs capping order. This is a matter to be considered on another day by the judge making or continuing the order. We can see the benefit of such an order in an appropriate case to ensure that all relevant arguments are properly ventilated, and the court is equipped to give general guidance on the difficult issues to which it may give rise.

(10) Cross-undertaking

234 This is another important issue for another day. But a few general points may be made at this stage. It is true that this new form of injunction is not an interim order, and it is not in any sense holding the ring until the final determination of the merits of the claim at trial. Further, so far as the applicant is a public body acting in pursuance of its public duty, a cross undertaking may not in any event be appropriate. Nevertheless, there may be occasions where a cross undertaking is considered appropriate, for reasons such as those given by Warby J in *Birmingham City Council v Afsar* [2019] EWHC 1619 (QB), a protest case. These are matters to be considered on a case-by-case basis, and the applicant must equip the court asked to make or continue the order with the most up-to-date guidance and assistance.

(11) Protest cases

235 The emphasis in this discussion has been on newcomer injunctions in Gypsy and Traveller cases and nothing we have said should be taken as prescriptive in relation to newcomer injunctions in other cases, such as those directed at protesters who engage in direct action by, for example, blocking motorways, occupying motorway gantries or occupying HS2's land with the intention of disrupting construction. Each of these activities may, depending on all the circumstances, justify the grant of an injunction against persons unknown, including newcomers. Any of these persons who have notice of the order will be bound by it, just as effectively as the injunction in the proceedings the subject of this appeal has bound newcomer Gypsies and Travellers.

236 Counsel for the Secretary of State for Transport has submitted and we accept that each of these cases has called for a full and careful assessment of the justification for the order sought, the rights which are or may be interfered with by the grant of the order, and the proportionality of that interference. Again, in so far as the applicant seeks an injunction against newcomers, the judge must be satisfied there is a compelling need for the order. Often the circumstances of these cases vary significantly one from another in terms of the range and number of people who may be affected by the making or refusal of the injunction sought; the legal right to be protected; the illegality to be prevented; and the rights of the respondents to the application. The duration and geographical scope of the injunction necessary to protect the applicant's rights in any particular case are ultimately matters for the judge having regard to the general principles we have explained.

(12) Conclusion

237 There is nothing in this consideration which calls into question the development of newcomer injunctions as a matter of principle, and we are satisfied they have been and remain a valuable and proportionate remedy in appropriate cases. But we also have no doubt that the various matters to which we have referred must be given full consideration in the particular proceedings the subject of these appeals, if necessary at an appropriate and early review.

6. Outcome

238 For the reasons given above we would dismiss this appeal. Those reasons differ significantly from those given by the Court of Appeal, but we consider that the orders which they made were correct. There follows a short summary of our conclusions:

(i) The court has jurisdiction (in the sense of power) to grant an injunction against "newcomers", that is, persons who at the time of the grant of the injunction are neither defendants nor identifiable, and who are described in the order only as persons unknown. The injunction may be granted on an interim or final basis, necessarily on an application without notice.

(ii) Such an injunction (a "newcomer injunction") will be effective to bind anyone who has notice of it while it remains in force, even though that person had no intention and had made no threat to do the act prohibited at the time when the injunction was granted and was therefore someone against whom, at that time, the applicant had no cause of action. It is inherently an order with effect contra mundum, and is not to be justified on the basis that those who disobey it automatically become defendants.

(iii) In deciding whether to grant a newcomer injunction and, if so, upon what terms, the court will be guided by principles of justice and equity and, in particular:

(a) That equity provides a remedy where the others available under the law are inadequate to vindicate or protect the rights in issue.

(b) That equity looks to the substance rather than to the form.

(c) That equity takes an essentially flexible approach to the formulation of a remedy.

(d) That equity has not been constrained by hard rules or procedure in fashioning a remedy to suit new circumstances.

These principles may be discerned in action in the remarkable development of the injunction as a remedy during the last 50 years.

(iv) In deciding whether to grant a newcomer injunction, the application of those principles in the context of trespass and breach of planning control by Travellers will be likely to require an applicant:

(a) to demonstrate a compelling need for the protection of civil rights or the enforcement of public law not adequately met by any other remedies (including statutory remedies) available to the applicant.

(b) to build into the application and into the order sought procedural protection for the rights (including Convention rights) of the newcomers affected by the order, sufficient to overcome the potential for injustice arising from the fact that, as against newcomers, the application will necessarily be made without notice to them. Those protections are likely to include advertisement of an intended application so as to alert potentially affected Travellers and bodies which may be able to represent their interests at the hearing of the application, full provision for liberty to persons affected to apply to vary or discharge the order without having to show a change of circumstances, together with temporal and geographical limits on the scope of the order so as to ensure that it is proportional to the rights and interests sought to be protected.

(c) to comply in full with the disclosure duty which attaches to the making of a without notice application, including bringing to the attention of the court any matter which (after due research) the applicant considers that a newcomer might wish to raise by way of opposition to the making of the order.

(d) to show that it is just and convenient in all the circumstances that the order sought should be made.

(v) If those considerations are adhered to, there is no reason in principle why newcomer injunctions should not be granted.

Appeal dismissed.

Colin Beresford, Barrister

Neutral Citation Number: [2024] EWHC 1653 (KB)

Case No: QB-2017-005202

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 7 June 2024

BEFORE:

MR JUSTICE BUTCHER

BETWEEN:

ROCHDALE METROPOLITAN BOROUGH COUNCIL

Claimant

- and -

SHANE HERON
& ORS

Defendants

CAROLINE BOLTON and **NATALIE PRATT** appeared on behalf of the Claimant
The Defendants did not appear and were not represented

JUDGMENT

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(Official Shorthand Writers to the Court)

1. MR JUSTICE BUTCHER: On 21 May 2024, I heard the relisted final hearing of this claim for injunctive relief against various named Defendants and two defined categories of Persons Unknown. The injunction which was being sought is what has been called a 'traveller injunction' in that it prohibits the formation of unauthorised encampments and the depositing of controlled waste.

2. Interim relief was granted by Garnham J on 19 February 2018. The present claim was then caught up in what has been called the Barking and Dagenham litigation after *London Borough of Barking and Dagenham & Ors v Persons Unknown & Ors* which led to the reported decision of [2022] EWCA Civ 13 and which culminated in the appeal to the Supreme Court in *Wolverhampton City Council v London Gypsies and Travellers* [2023] UKSC 47 or, as I will refer to it, "*Wolverhampton*". As such, these proceedings have a complex procedural history which it is unnecessary to consider in detail. It is, however, germane to record that this final hearing was previously listed to be heard on 22 November 2022, but was adjourned in the light of developments in the *Wolverhampton* appeal on the morning of trial.

3. The appellants in *Wolverhampton* have been notified of this final hearing. None indicated an intention or desire to take part or make submissions and none appeared or was represented at the hearing. No named Defendant formally acknowledged service or defended the claim.

4. I should deal at the outset with two outstanding applications, both of which are dated 7 November 2022 and which were outstanding at the time of the hearing before me. By the first of those applications the Claimant applied for permission to rely on the sixth witness statement of Adriam Graham. I have read that witness statement and formally grant permission. Secondly, the Claimant made a further application to deal with a number of outstanding procedural matters in this claim being, first, discontinuing against a further 20 Defendants whom it had not been possible to serve with Scott Schedules. Permission was required pursuant to CPR 38.2(2)(a)(i). And, secondly, amending the spelling of the name of Defendant 20. I grant those applications.

The Parties

5. The Claimant is the local authority for the administrative area of Rochdale. The Borough of Rochdale is located within Greater Manchester. The mid-year estimates in 2015 estimated the borough's population at 214,195 people. The Claimant brings this claim in its capacity as a local authority and in the discharge of its administrative duties and functions for the benefit of all the inhabitants of the borough. Specifically, the claim is brought pursuant to the Local Government Act 1972, section 222 and the Town and Country Planning Act 1990, section 187B. In relation to the latter, the Claimant is the local planning authority for the borough and accordingly has the additional administrative function of enforcing planning control within the borough.

The Named Defendants

6. The claim as originally issued was against 89 named Defendants and Persons Unknown. The claim has since been discontinued against several of those named Defendants and two further named Defendants added, such that the claim remains live against, as I believe, 51 named Defendants. The injunction is sought against the named Defendants on a borough-wide basis. There are Scott Schedules which set out the case against the remaining named Defendants. Where the name of a person alleged to have committed the wrongs complained of is known, that person has been named as a Defendant in the proceedings on the basis that they are not a person unknown.

Persons Unknown

7. The 90th Defendant to the claim is "Persons unknown being members of the travelling community who have unlawfully encamped within the borough". The Claimant also obtained the court's permission to add the 93rd Defendant, "Persons unknown forming unauthorised encampments in the Metropolitan Borough of Rochdale". The injunction is not sought against those Persons Unknown on a borough-wide basis; rather the Persons Unknown injunction is sought only in relation to a specific list of sites within the borough. At the hearing before me it was clarified that the Claimant seeks this protection in relation to 334 sites, comprised of the 325 sites protected by the interim injunction order and 9 additional sites added to the claim by way of the amended Claim Form dated 1 September 2021.

8. From the second witness statement of Peter Maynard, which I have read, it appears that the Borough of Rochdale has a total area of 158 square kilometres. The total area of land that is sought to be protected by the Persons Unknown order, is 15.3 square kilometres, which equates to 9.7 per cent of the land of the borough.

9. As is explained in the sixth witness statement of Adrian Graham, the sites which have been chosen for protection against persons unknown are those which have been or are likely to be targeted by unauthorised encampments. The latter are sites of the same nature as those which have been targeted in the past, especially where unauthorised encampments would be particularly harmful to the land and the inhabitants of the borough. The Claimant accepts that it has not and cannot assess the welfare needs of all persons unknown who may enter the borough and form an unauthorised encampment, such that it would be inappropriate to seek a precautionary borough-wide injunction against those persons. The order sought, and which has been granted on an interim basis, does not prohibit lawful encampments.

10. The Claimant's position is that injunctive relief against persons unknown is required as: (1) it has not been possible to identify all those who have unlawfully encamped on the sites in the borough for which protection is sought; (2) that it is more likely than not that, following the grant of final relief, persons who have not yet unlawfully encamped in the borough will attend the borough and form an unauthorised encampment; and (3) unless the final order in this claim captures any such newcomers, they would not be restrained from forming an unauthorised encampment and the Claimant would be put to the expense of seeking further injunctive relief, which expense would have to be met from public funds.

Factual background

11. It is necessary to say something in more detail as to the factual background of the present claim. This is derived from the witness statements before me and from the oral evidence of Mr Anthony Johns, the Environmental Quality Manager at the Claimant, which I gave the Claimant permission to call. What emerges from this evidence is that, between 2 January 2015 and 27 September 2017, which was shortly before the present claim was issued, the borough experienced 133 unauthorised encampments. The

number of instances of unauthorised encampments in the borough had been increasing in the three years immediately preceding the issue of this claim: 28 in 2015, 40 in 2016 and 65 in 2017. Those encampments were formed on both public and private land. The evidence shows that the sites targeted by Defendants when forming unauthorised encampments included recreational spaces, school and employment zones. Many of those sites were accessed through forced entry such as by the cutting of locks, ramming of gates, ripping up of security bollards and driving over grassland.

12. There is also evidence as to the cost of clean-up from those encampments. This indicates that the costs incurred by the Claimant often ran into the hundreds and sometimes into the thousands of pounds per encampment. The fifth witness statement of Adrian Graham, which I read, details that the costs incurred by the Claimant in dealing with fly tipping associated with unauthorised encampments was in the sum of £25,419.10 in 2015, £23,199.03 in 2016, and £87,895.63 in 2017. The cost of fly tipping in 2018, that is to say after the grant of the interim injunction, fell to just £944 and has been low thereafter.

13. Unauthorised encampments have not, however, stopped entirely. Mr Johns gave evidence in particular of incidents in September 2023, on 29 February 2024, on 13 March 2024 and in April 2024. In neighbouring boroughs, which do not have the benefit of any injunction, there have been ongoing and frequent unauthorised encampments. By way of example, the evidence was that Bury had had 29 encampments in the period August 2022 to February 2024, and Wigan has had to deal with 17 since April 2023.

14. There is also evidence before the court of the various adverse impacts that the unauthorised encampments have had on the borough. In brief and to summarise, the unauthorised encampments are often linked to forced entry onto the relevant land, fly tipping, often on a commercial scale, the depositing of untreated human excrement and other soiled material which are prejudicial to human health, and antisocial behaviour such as threats and intimidation, fire and health and safety hazards and defecation in public places.

The legal framework

15. The court's power to grant injunctions is derived from the Senior Courts Act 1981, section 37, which provides:

> "The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so."

16. In these proceedings more specifically, the Claimant sought and obtained the interim injunction pursuant to the Local Government Act 1972, section 222, and the Town and Country Planning Act 1990 ("TCPA") section 187B and it is on those provisions that the Claimant relies for the purposes of this hearing. I will take those two regimes in the reverse order.

17. As to TCPA, section 187B provides:

> "(1) Where a local planning authority consider it necessary or expedient for any actual or apprehended breach of planning control to be restrained by injunction, they may apply to the court for an injunction, whether or not they have exercised or are proposing to exercise any of their other powers under this Part.
>
> (2) On an application under subsection (1) the court may grant such an injunction as the court thinks appropriate for the purpose of restraining the breach.
>
> (3) Rules of court may provide for such an injunction to be issued against a person whose identity is unknown.
>
> (4) In this section 'the court' means the High Court or the county court."

18. Accordingly, the court may grant an injunction where a local planning authority considers it necessary or expedient to restrain an actual or apprehended breach of planning control. The underlying cause of action in a claim brought under section 187B is a breach of planning control.

19. TCPA, section 55(1) defines "development" as:

> "… the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land."

TCPA section 55(3) provides:

> "For the avoidance of doubt it is hereby declared that for the purposes of this section—
>
> (a) …
>
> (b) the deposit of refuse or waste materials on land involves a material change in its use, notwithstanding that the land is comprised in a site already used for that purpose, if—
>
> (i) the superficial area of the deposit is extended, or
>
> (ii) the height of the deposit is extended and exceeds the level of the land adjoining the site."

20. Pursuant to TCPA section 57(1), planning permission is required for the carrying out of any development of land. Planning permission may be obtained by way of express grant or by way of deemed grant through permitted development rights. Carrying out development as defined in the Act without the required planning permission constitutes a breach of planning control.

21. The breaches of planning control complained of in this claim are primarily the material change in the use of the relevant land to a temporary traveller site, and by the depositing of refuse or waste materials without the requisite planning permission. The cause of action that underlies a claim brought pursuant to section 187B is not one upon which the court can adjudicate. The decision as to whether something is or is not a breach of planning control is a matter for the local planning authority or the Secretary of State on appeal and not the court. The court's power to grant an injunction under section 187B TCPA nevertheless remains a discretionary one, albeit that discretion is not unfettered. Underpinning the court's jurisdiction to grant an injunction is, as I have said, the Senior Courts Act 1981, section 37(1). The discretion must be exercised judicially meaning, in this context, and I quote from *South Buckinghamshire District Council v Porter* [2003] 2 AC 558 at [29] per Lord Bingham of Cornhill that:

> "… the power must be exercised with due regard to the purpose for which [it] was conferred: to restrain actual and threatened breaches of planning control. The power exists above all to permit abuses to be curbed and urgent solutions provided where these are called for."

22. The second regime is that of the Local Government Act 1972, section 222. That section provides:

> "(1) Where a local authority consider it expedient for the promotion or protection of the interests of the inhabitants of their area—
>
> (a) they may prosecute or defend or appear in any legal proceedings and, in the case of civil proceedings, may institute them in their own name, and
>
> (b) they may, in their own name, make representations in the interests of the inhabitants at any public inquiry held by or on behalf of any Minister or public body under any enactment."

23. Section 222 thus does not create a cause of action, rather it confers on local authorities the power to bring proceedings to enforce obedience to public law without the involvement of the Attorney General. Certain guiding principles as to the exercise of the court's discretion to grant an injunction where an action is pursued by a local authority in reliance on section 222 are identified in *City of London Corporation v Bovis Construction Limited* [1992] 3 All ER 697 at 714 per Bingham LJ and include:

> "The essential foundation for the exercise of the court's discretion to grant an injunction is not that the offender is deliberately and flagrantly flouting the law, but the need to draw the inference that the defendant's unlawful operations will continue unless and until effectively restrained by the law and that nothing short of an injunction will be effective to restrain them: see *Wychavon District Council v Midland Enterprises (Special Events) Limited* (1986) 86 LGR 83 at 89."

24. Where an injunction is granted under section 222, a power of arrest may be attached to the injunction pursuant to the Police and Justice Act 2006, section 27. That section provides, by way of subsection (2):

"If the court grants an injunction which prohibits conduct which is capable of causing nuisance or annoyance to a person it may, if subsection (3) applies, attach a power of arrest to any provision of the injunction."

25. Subsection (3) provides:

"This subsection applies if the local authority applies to the court to attach the power of arrest and the court thinks that either—

(a) the conduct mentioned in subsection (2) consists of or includes the use or threatened use of violence, or

(b) there is a significant risk of harm to the person mentioned in that subsection."

Persons Unknown: *Wolverhampton*

26. The Supreme Court in *Wolverhampton* decided many issues relating to traveller injunctions against newcomer persons unknown. The Supreme Court held that injunctive relief can be granted against newcomer persons unknown. At paragraph 167, the court said this:

"These considerations lead us to the conclusion that, although the attempts thus far to justify them are in many respects unsatisfactory, there is no immoveable obstacle in the way of granting injunctions against newcomer Travellers, on an essentially without notice basis, regardless of whether in form interim or final, either in terms of jurisdiction or principle. But this by no means leads straight to the conclusion that they ought to be granted, either generally or on the facts of any particular case. They are only likely to be justified as a novel exercise of an equitable discretionary power if:

(i) There is a compelling need, sufficiently demonstrated by the evidence, for the protection of civil rights (or, as the case may be, the enforcement of planning control, the prevention of anti-social behaviour, or such other statutory objective as may be relied upon) in the locality which is not adequately met by any other measures available to the applicant local authorities (including the making of byelaws). This is a condition which would need to be met on the particular facts about unlawful Traveller activity within the applicant local authority's boundaries.

(ii) There is procedural protection for the rights (including Convention rights) of the affected newcomers, sufficient to overcome the strong prima facie objection of subjecting them to a without notice injunction otherwise than as an emergency measure to hold the ring. This will need to include an obligation to take all reasonable steps to draw the application and any order made to the attention of all those likely to be affected by it …; and the most generous provision for liberty (ie permission) to apply to have the injunction varied or set aside, and on terms that the grant of the injunction in the meantime does not foreclose any objection of law, practice, justice or convenience which the newcomer so applying might wish to raise.

(iii) Applicant local authorities can be seen and trusted to comply with the most stringent form of disclosure duty on making an application, so as both to research for and then present to the court everything that might have been said by the targeted newcomers against the grant of injunctive relief.

(iv) The injunctions are constrained by both territorial and temporal limitations so as to ensure, as far as practicable, that they neither outflank nor outlast the compelling circumstances relied upon.

(v) It is, on the particular facts, just and convenient that such an injunction be granted. It might well not for example be just to grant an injunction restraining Travellers from using some sites as short-term transit camps if the applicant local authority has failed to exercise its power or, as the case may be, discharge its duty to provide authorised sites for that purpose within its boundaries."

27. The practical implications of the principles affecting an application for a newcomer injunction against gypsies and travellers and the safeguards that should accompany the making of such an order, were considered in detail at paragraphs 188 to 237 of *Wolverhampton*.

Precautionary relief

28. The injunction which the Claimant seeks is to restrain apprehended breaches of planning control and the various nuisances complained of that flow from those breaches. To that end, the Claimant is seeking **quia timet** relief, or what may be called precautionary relief albeit the relief sought is not purely precautionary given that some

apprehended wrongs and resulting harm have already occurred. To the extent that it is necessary to have regard to the principles applicable in relation to the grant of precautionary relief, I was referred to what was said by Marcus Smith J in *Vastint Leeds BV v Persons Unknown* [2018] EWHC 2456, which decision has since been approved in *London Borough of Barking and Dagenham v Persons Unknown* [2022] EWCA Civ 13 by Sir Geoffrey Vos, MR at 83. The guiding principles are set out in *Vastint* at [26] to [31].

Analysis and conclusions

29. I will deal first with the application for an injunction against persons unknown and then turn to deal with that sought against the named Defendants.

Persons Unknown

30. The guidance at paragraph 167(i) of *Wolverhampton*, which I have quoted, requires there to be a compelling need sufficiently demonstrated by the evidence for the remedies that have been sought which is not adequately met by other measures available to the applicant. At paragraph 188 of *Wolverhampton*, compelling need is described as the "overarching principle that must guide the court at all stages of its consideration"; and at paragraph 218 of *Wolverhampton* it was said:

> "There must be a strong probability that a tort or breach of planning control or other aspect of public law is to be committed and that this will cause real harm."

31. Further, the guidance at paragraphs 188 to 217 of *Wolverhampton* must be considered when the court is assessing whether there is a compelling justification for the injunctive relief sought. At paragraph 189 of *Wolverhampton*, the Supreme Court said there are three preliminary questions:

> "The first is whether the local authority has complied with its obligations … to consider and provide lawful stopping places for Gypsies and Travellers … second is whether the authority has exhausted all reasonable alternatives … including whether it has engaged in a dialogue with the Gypsy and Traveller communities to try to find a way to accommodate their

> nomadic way of life by giving them time and assistance to find alternative or transit sites, or more permanent accommodation. The third is whether the authority has taken … steps to control or even prohibit unauthorised encampments and related activities by using the other measures and powers at its disposal."

32. As to the first, I am entirely satisfied that there is a strong probability that in the absence of an injunction, a tort or breach of planning control or other unlawful conduct will be committed and that this will cause real harm. The basis for this is threefold: first, what has happened in the past; second, what has happened since an interim injunction has been in place; and third, the likelihood as to what will happen if there is no injunction.

33. As to the past, as I have said, between 2 January and 27 September 2017, the borough experienced 133 unauthorised encampments. There is clear evidence as to the harms caused by such encampments of the types which I have already referred to, but which in outline were that:

(1) Sites on which unauthorised encampments were formed were often fly tipped, sometimes on a commercial scale, with waste such as rubble, asbestos, household items, felled trees, propane gas cylinders and general rubbish.

(2) Deposits of untreated human excrement and associated waste, such as soiled toilet paper and nappies occurred on many sites on which unauthorised encampments were formed, which posed a risk to public health.

(3) Unauthorised encampments often targeted business parks and industrial estates, putting in jeopardy the wealth and prosperity of the borough, especially as the formation of unauthorised encampments might discourage businesses from occupying space on the business and retail parks, in turn jeopardising the regeneration of and much-needed job creation in the borough.

(4) Some of those forming encampments were associated with some incidents of threatening and intimidating behaviour. There is a reference in the evidence

to a specific incident in which a petrol can was held above the head of a security guard at business premises whilst threats to burn the security guard were made.

(5) The unauthorised encampments often had a negative impact on open green space and, on occasion, caused damage to land.

(6) Tensions between the travelling and settled communities arose, on occasion, when unauthorised encampments were formed.

34. Each of the encampments was a breach of planning control and in the large majority of cases was also a trespass.

35. As to the second aspect, what has happened since the grant of an interim injunction, the statistics in Mr Graham's fifth witness statement, which I have read, at paragraphs 6 to 9, show that the interim injunction has been effective in reducing the frequency and duration of encampments. Nevertheless, encampments do still form and there have been, as I have said, recent incidents.

36. As to the third aspect, it appears to me to be entirely reasonable to apprehend that, if the injunction is not continued, there will be an increase in the frequency and duration of encampments approaching or perhaps exceeding pre-injunction levels. This is especially so as it is apparent that there are still encampments that frequent the borough. It is clear that historically those who form the encampments have been persistent; and from this fact and from the experience of neighbouring boroughs there is, as I find, a strong probability that such encampments would continue to be formed and harm would continue to be suffered.

37. I therefore turn to the three preliminary questions identified in *Wolverhampton*. First, the obligation to provide lawful stopping places. Ms Bolton for the Claimant was at pains to emphasise that the Claimant has been trying to assist and provide for a nomadic way of life for years. I have further been provided with detailed evidence as to the provision for travellers within the borough, both permanent and transit, in the second witness statement of Peter Maynard and the witness statement of Stuart Morris. What this indicates is that the council operates a negotiated stopping

agreement. Further, there is a toleration policy towards encampments which is described in the second witness statement of Peter Maynard and the first witness statement of Stuart Morris. The evidence is that the requirements for transit pitches was met and exceeded between 2014 and 2019 and, despite some capacity being lost in 2019, alternative arrangements were put in place whilst a further site was identified as has now happened and which site is now being used.

38. The second preliminary question is the exhaustion of all reasonable alternatives. Under this heading I will not deal with the exhaustion of alternative measures and powers, which I will come to as the third preliminary question. What is raised by paragraphs 189 and 203 of *Wolverhampton*, is the consideration that local authorities should seek to engage with gypsy and traveller communities in an attempt to encourage dialogue and cooperation, and better understand the needs of the respective parties. The evidence is that, to that end, the Claimant notified the appellants in the Supreme Court proceedings in *Wolverhampton*, being three organisations that represent the interests of the traveller and gypsy communities, of this final hearing. None of the three organisations indicated that it wished to make representations.

39. Furthermore, Gillian Lucas, the Claimant's Gypsy and Traveller Liaison Officer, gave evidence in her first witness statement that she regularly attends conferences with Leedsgate, a Gypsy and Traveller organisation that works in and across West Yorkshire, and other national Gypsy and Traveller organisations. The evidence is further that the Claimant does not adopt an uncompromising stance to enforcement and will give time for an encampment to vacate land after the encampment has been advised of the interim injunction. The evidence suggests that the Claimant's approach of engagement and toleration generally ensures that an encampment leaves the relevant land within 24 hours, thus limiting the harm and impact of the encampment, and has not yet led to the need to enforce the interim injunction by way of any further legal proceedings, either by the use of the power of arrest or committal proceedings.

40. It is, however, right to say, and the Claimant accepts, that there has not been the level of dialogue with representative groups that appears to have been contemplated by the Supreme Court in *Wolverhampton*. I do not however consider that that militates against the grant of an injunction against persons unknown here, in particular given:

first, the constructive approach to enforcement that, on the evidence, has been adopted by the Claimant; second, the frequent unwillingness of those who form unauthorised encampments to engage with the officers of the Claimant; and third, the absence of a responses from those representative groups which have been made aware of this application.

41. In relation to the third preliminary question, which is as to steps to control or prohibit unauthorised encampments by other measures and powers, I am satisfied that the Claimant has considered and/or used other measures and powers in an attempt to control and prohibit unauthorised encampments and that none has proved nearly as effective as the injunction. It appears from the witness statement of Gillian Lucas and the first witness statements of Adrian Graham, Saiqa Hussain and Stephen Pyke, that the Claimant has sought to utilise the enforcement powers available to it under the Criminal Justice and Public Order Act ("CJPOA") sections 77 to 78, with the police also exercising their powers under the CJPOA section 61.

42. That evidence persuades me that the powers under the CJPOA are, by comparison with an injunction, an ineffective and inefficient way of dealing with unauthorised encampments. In particular, Mr Pyke gives evidence that the way in which these powers were employed when it was considered necessary was that when notice of an unauthorised encampment was received, an officer of the Claimant would attend the site to engage with those forming the encampment and undertake an assessment of any welfare needs. If no welfare needs were identified, two officers of the Claimant would then attend to serve a section 77 notice and explain that the encampment had 24 hours to leave the land. If the encampment failed to vacate as directed, recourse would be had to the court.

43. As Ms Hussain says in her evidence, if section 77 or section 61 powers were used, the encampment would typically simply move to another site within the borough, meaning that the enforcement procedure needed to start afresh in relation to the new site at further expense to the Claimant. Further, the evidence indicates that, when such powers have been sought to be used, an encampment will often vacate land shortly before the court hearing, causing the proceedings to be discontinued whilst having caused expense to the Claimant.

44. I am satisfied on the basis of the material before me that the enforcement powers under the CJPOA sections 77 to 78, are ineffective against the Defendants and not sufficient to curb instances of unauthorised encampment in the borough. This is in particular because many encampments refuse to comply with a section 77 direction to leave the relevant land, putting the Claimant to the expense of seeking an order under section 78. The delay between the giving of a section 77 direction and enforcement of such a direction by obtaining a section 78 order can allow significant harm to the environment and amenity of the area. Those forming unauthorised encampments tend to leave the land as soon as the section 78 hearing takes place, thus avoiding any serious sanction but still putting the Claimant to trouble and expense. Further a section 78 order covers only the land upon which the unauthorised encampment has formed, such that, as I have said, those encamping unlawfully can and often do simply move to an alternative site, perhaps no more than a few hundred metres away, with the result that the enforcement process must begin afresh.

45. That assessment of the effectiveness, or rather ineffectiveness, of section 61 and sections 77 to 78 of the CJPOA is supported by Inspector Hill in his evidence which was put before me. Further, there is evidence from Chief Inspector Inglis which indicates, by reference to events in a neighbouring borough, that it is unsustainable for the police from a resourcing perspective frequently to rely on section 61.

46. I also accept what Ms Bolton submitted to the effect that reliance on another potential alternative measure, the making and enforcement of byelaws, suffers from many of the same difficulties, including in particular as to delay, as apply to the enforcement powers under sections 77 to 78 of the CJPOA.

47. It is also appropriate to say at this juncture that I have been satisfied that the Claimant has sought to identify those Defendants who can be named, including by use of vehicle registration numbers and in the course of welfare checks. I accept, however, that many individuals cannot be identified by name and others may give a false name and there will be newcomers. An injunction solely against named persons is difficult to enforce and may be largely toothless. Accordingly, the possibility of a named person injunction alone does not provide an adequate remedy for the issue facing the Claimant.

Procedural protections

48. Paragraph 167(ii) of *Wolverhampton* requires there to be procedural protections for the rights of newcomers to overcome the strong **prima facie** objection to subjecting them to a without notice injunction. Those protections should include generous liberty to apply provisions and an obligation to take all reasonable steps to bring the application and any order to the attention of those who may be affected by any order made. Those will be incorporated into the order which I will make, which I will come to consider in detail after I have concluded this judgment on principle.

Liberty to apply

49. Specifically, the injunction ought to include a generous liberty to apply, as the interim injunction does. That will be dealt with in the terms of the order.

Notification of the application and any order

50. Provision will also be made for the notification of the order which I will make.

Territorial and temporal limitations

51. Paragraph 167(iv) of *Wolverhampton* requires newcomer injunctions to be constrained by territorial and temporal limitations to ensure, as far as practicable, that they neither outflank nor outlast the compelling circumstances relied upon. That guidance is expanded upon in paragraph 225 of *Wolverhampton* where the Supreme Court highlighted the exceptional nature of the remedy and said:

> (1) "We have considerable doubt as to whether it could ever be justifiable to grant a Gypsy or Traveller injunction which is directed to persons unknown, including newcomers, and extends over the whole of a borough or for significantly more than a year."
>
> (2) "[the injunction] must be a proportionate response to the unlawful activity to which it is directed."

(3) an injunction which extends borough-wide is likely to leave the Gypsy and Traveller communities with little or no room for manoeuvre"

(4) injunctions of this kind must be reviewed periodically … and … ought to come to an end … by effluxion of time in all cases after no more than a year unless an application is made for their renewal. [Such an application should be] supported by appropriate evidence, as to how effective the order has been; whether any reasons or grounds for its discharge have emerged; whether there is any proper justification for its continuance; and whether and on what basis a further order ought to be made."

52. With regard to the guidance as to territorial limits, the interim injunction and the order sought in this claim, are not borough-wide as against persons unknown. As I have already said, the injunction at present applies to only 325 sites and the order which I intend to grant will apply to 334 sites. That I consider to be a reasonable and proportionate approach to the territorial reach of the injunction. It is an approach which seeks to protect only the most sensitive areas in which the greatest harm is likely to be suffered by reason of unauthorised encampments. About 90 per cent of the territory of the borough will not be the subject of this aspect of the injunction.

Temporal limits

53. Having had regard to the *Wolverhampton* guidance as to temporal limits, the Claimant seeks only a one-year order against persons unknown. I intend to make such an order. The Claimant can apply to extend it.

Justice and convenience

54. I have also considered the requirement of section 37 of the Senior Courts Act, repeated in paragraph 167(v) of *Wolverhampton*, that it must be just and convenient to grant the injunction.

55. There are also several other points of guidance set out in paragraphs 188 to 237 of *Wolverhampton* which it is appropriate to consider within this general assessment of whether the relief is just and convenient. Those considerations include that the intended respondents to an application must be defined as precisely as possible,

identified and enjoined where possible and, if the order is sought against newcomers, the possibility of defining the class of persons by reference to conduct and/or intention should be explored and adopted if possible. The injunction should be clear and precise and use everyday terms when setting out the acts that it prohibits. The prohibited acts must correspond as closely as possible to the actual or threatened unlawful conduct and extend no further than the minimum necessary to achieve the purpose for which it is granted. The order is not an interim order in the sense that it is holding the ring until the final determination of the merits at trial, and where an application is made by a public body acting in pursuance a public duty, an undertaking in damages may not be appropriate. That said, there are some instances in which a cross-undertaking may be considered appropriate. The matter should be considered on a case-by-case basis and an applicant must equip the court with the most up to date guidance and assistance.

56. I will consider those points in turn. As to the matters set out in paragraph 221, which is in particular the identification of the intended respondents to the application as precisely as possible, the Claimant has hitherto identified a significant number of persons associated with the formation of unauthorised encampments in the borough, and those persons have been named as named Defendants to the claim. The categories of persons unknown are identified in accordance with the *Wolverhampton* guidance.

57. As to the prohibitions and the matters set out in paragraphs 222 to 224 of *Wolverhampton* which are, in particular, that the injunction should be clear and precise, the prohibitions which I intend to grant are, in my judgment, clear. As far as possible they are drafted in everyday language without reference to legal concepts or specialist language. I suggested and will suggest some further changes in the language to be used to further this desirable end.

58. I consider, however, that the prohibitions which are sought are appropriately narrowly drawn and correspond to the relevant unlawful conduct, that is to say, breach of planning control by reason of a material change of use without the requisite permission, including by the depositing of waste and the causing of nuisance. I consider that the combination of the definition of the class of persons unknown, coupled with the narrow drawing of the prohibitions, will ensure that only conduct that is in any event unlawful is prohibited by the terms of the order.

59. As to the question of an undertaking in damages, I have been persuaded that, given that these are proceedings brought by a local authority exercising a law enforcement function in the public interest, the court should not require an undertaking in damages. There does not appear to me to be any particular reason in the present case for extracting an undertaking in damages. I note that no undertaking in damages has hitherto been required in these proceedings, including when the interim order was made in 2018.

60. Furthermore, I take into account that the Claimant is responsible for the enforcement of planning control in the borough. In the absence of the Claimant taking action, no other person can or would take action to enforce against the breaches of planning control that have occurred and which are threatened; and further that any argument that the Claimant is interfering with the Article 8 right to a home of any member of the gypsy and traveller communities appears a weak one, because such persons do not have a home on land that they do not own. If and to the extent that there is any interference with the right to a family and private life, that right is in any event qualified and must be balanced against the rights of others, and it appears to me that the injunction is unlikely to cause a material loss that may be compensated by an award of damages. In any event, if a successful application for discharge or variation is made following the grant of the injunction, the court has the power to make an award in damages if it considers it appropriate to do so, with which the Claimant must comply. Accordingly, not requiring an undertaking in damages does not close the door on an order for damages being made at the point of variation or discharge.

61. For all these reasons I conclude that the requirements laid down in *Wolverhampton* have been met. I consider that there is a compelling case for the grant of an injunction. In my judgment, it is both just and convenient to grant an injunction which will be for one year against persons unknown in substantially the terms which have been sought.

62. I should say that I have also had regard to the guidance as to precautionary injunctions summarised in *Vastint*. In relation to those factors, I am satisfied that there is a strong possibility that, unless restrained by way of an injunction, the Defendant, that is to say persons unknown, will act in breach of the Claimant's rights which, in the context of this claim, must be in breach of public law, the enforcement of which is the

responsibility of the Claimant. That possibility is apparent from the continued formation of unauthorised encampments in the borough, even after the grant of the interim injunction, and from their formation in neighbouring boroughs.

63. For reasons which I have already given, I am also satisfied that nothing short of an injunction will suffice: specifically, enforcement under the CJPOA has proved and is likely in future to prove ineffective and inefficient.

64. I am also satisfied that the resulting harm of the foreseeable breaches would be of a nature that could not be adequately compensated for by damages. This is not least because the Defendants, for present purposes, are persons unknown and the likelihood of obtaining an enforceable damages award against such persons is low.

65. In addition, it is the inhabitants of the borough who, at least for the most part, suffer the harms which it is sought to prevent. A breach of planning control **per se** cannot be compensated for by way of damages, nor can various of the nuisances that flow from the breaches and which are suffered by the local inhabitants including exclusion from public amenities such as parks or the suffering of public health risks from the deposit of human waste.

66. As to the other factors mentioned as relevant in paragraph 31(4) of Marcus Smith J's judgment in *Vastint*, first the infringements are not entirely anticipatory. Steps that a Claimant might have taken to ensure that infringements did not occur are therefore of more limited significance than in the case where the infringement can be categorised as entirely anticipatory. That said, it is apparent from the evidence, as I have already mentioned, that the Claimant has taken other steps to seek to control and prohibit encampments.

67. Secondly, the continued formation of encampments in the borough indicates that there subsists a desire and propensity to form encampments and it can be reasonably inferred, and I infer, that should the interim injunction not be continued, a greater number of encampments will be formed, as was the position prior to the interim injunction. Thirdly, the continued formation of encampments in the borough, and to a greater extent in neighbouring boroughs which do not have the benefit of an

injunction, indicates that the breaches and resulting harm are imminent and, to some extent, already occurring.

68. In the circumstances, to the extent that a consideration of the factors identified in *Vastint* adds, in the present context, to the *Wolverhampton* guidance, I am satisfied that an injunction is justified by reference to those matters as well.

Named Defendants

69. As to the Named Defendants, none has formally acknowledged service of or defended the claim. Pursuant to paragraph 3 of the order of 12 May 2022, the Claimant produced a Scott Schedule for each Named Defendant against whom the claim was proceeding, setting out the allegations against each such Defendant. Each of those allegations is of a breach of planning control and trespass and of various nuisances and harms caused by each encampment.

70. I am satisfied that applying the approach summarised in *Vastint* in relation to the Named Defendants, an injunction is justified in their case, as it is in the case of persons unknown. I accept the submission made on behalf of the Claimant that to the extent that there is limited evidence of the Named Defendants forming recent encampments in the borough, that is to say since the grant of the interim injunction, this is consistent with the interim injunction working effectively. I also accept that the reduction in the incidence of the conduct complained of since the grant of the interim injunction, is not a reason to grant final injunctive relief. I was referred to the case of *S v Poole Borough Council* [2002] EWHC 244 (Admin) at [19] per Simon Brown LJ.

71. There is no evidence of any specific hardship which will be suffered by Named Defendants to set in the balance against the legitimate desire of the Claimant to enforce planning control and prevent nuisance. In the circumstances I am satisfied that it is just and convenient to grant a final order as against the Named Defendants.

72. Though the *Wolverhampton* guidance does not apply to named Defendants, I consider that it is appropriate to set a term to that injunction and that will be a term of five years.

Power of arrest

73. The Claimant seeks that there should be a power of arrest attached both to the injunction against the Named Defendants and that against Persons Unknown. I have already referred to the fact that when an injunction is granted and an action brought pursuant to section 222 of the Local Government Act, a power of arrest may be attached to any provision of the injunction pursuant to the Police and Justice Act section 27. The interim injunction in this case was originally granted with a power of arrest that took effect against both the named defendants and persons unknown. In May 2021 Nicklin J discharged the power of arrest against persons unknown. Currently it takes effect against the Named Defendants only.

74. I consider, however, that it is appropriate and expedient that a power of arrest should be attached to the injunction against both the Named Defendants and Persons Unknown. This is a case in which, for the purposes of section 27(3) of the Police and Justice Act, there is a significant risk of harm to persons in the category mentioned in section 27(2) of the Act, and I am satisfied that a power of arrest is the most effective and efficient mechanism by which the order can be enforced, including and especially against persons unknown. I accept the submission made on behalf of the Claimant that without the power of arrest the mechanism for enforcement would be by way of committal proceedings, and that such proceedings are, at least ordinarily, only effective where the identity of the alleged contemnor is known and where they can be personally served with committal proceedings.

75. I also accept that committal proceedings are a slower enforcement mechanism than the power of arrest, which in turn enables an encampment to remain **in situ** for longer and allows further harm to be caused and accumulate in the meantime. I am satisfied that the power is unlikely to be abused. In this context I note that the Claimant has not in fact sought the arrest of any person under the power of arrest which was attached to the interim injunction.

Overall Conclusion

76. Accordingly, I will grant a five-year injunction order in substantially the same terms as the interim injunction order against the remaining Named Defendants and a one year injunction order in substantially the same terms as the interim injunction order in relation to Persons Unknown.

77. As was done in the case of *Test Valley Borough Council v Bowers* recently, I propose to adopt the course that in the case of the injunction against Persons Unknown, there should be a review hearing fixed for 50 weeks from the date of the order and if the Claimant does not at that hearing seek the continuation of the order, it will then lapse at the end of its year's term.

78. I will now review in detail the terms of the draft orders which have been submitted.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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