

**IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
PROPERTY, TRUSTS AND PROBATE LIST (ChD)
BIRMINGHAM DISTRICT REGISTRY**

B E T W E E N:

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

Claimants/Applicants

-and-

(1) PERSONS UNKNOWN ENTERING OR REMAINING WITHOUT THE CONSENT OF THE CLAIMANT(S) ON LAND AT SOUTH CUBBINGTON WOOD, SOUTH OF RUGBY ROAD, CUBBINGTON, LEAMINGTON SPA SHOWN COLOURED GREEN, BLUE AND PINK AND EDGED IN RED ON PLAN A ANNEXED TO THE PARTICULARS OF CLAIM

(2) PERSONS UNKNOWN ENTERING OR REMAINING WITHOUT THE CONSENT OF THE CLAIMANT(S) ON LAND AT CRACKLEY WOOD, BIRCHES WOOD AND BROADWELLS WOOD, KENILWORTH, WARWICKSHIRE SHOWN COLOURED GREEN, BLUE AND PINK AND EDGED IN RED ON PLAN B ANNEXED TO THE PARTICULARS OF CLAIM

(5) ELLIOTT CUCIUREAN

Defendants / Respondents

CLAIMANTS' SKELETON ARGUMENT

For remote hearing at 10.30 am on Thursday 14 January 2020

Pre-Reading (time estimate 2 hrs) The Court is invited to pre-read, in addition to this skeleton:

- (1) *The Application Notice & Draft Order dated 10 December 2020 (“**Extension Application**”).*
- (2) *The Judgment of Andrews J. dated 20 March 2020 which provides a summary of events giving rise to the need for the injunction granted, and explains the continuing risk of harm that the protest activity has caused the Claimants and their land (“**Judgment**”).*
- (3) *The Order made in these proceedings by Andrews J. on 17 March 2020 (“**March 2020 Order**”).*
- (4) *The first witness statement of Robert Shaw (“**Shaw 1**”), a solicitor with the Claimants’ lawyers, who provides an update on the continued protest activities since the March 2020 Injunction and sets out the evidence in support of this application.*
- (5) *The second witness statement of Robert Shaw (“**Shaw 2**”), dated 17 December 2020, which makes full and frank disclosure in relation to this application.*

- (6) *The third witness statement of Robert Shaw (“**Shaw 3**”), dated 12 January 2021, which provides a further update as to the most recent activities and evidence in support of this application.*
- (7) *The witness statement of Andy Jones (“**Jones 1**”), dated 12 January 2021- who provides evidence as to service of documents relevant to this hearing.*

Introduction

1. This is the Claimants’ skeleton argument for the hearing of the Extension Application which seeks a short extension of interim injunctions (“**Injunctions**”) made in the March 2020 Order until 17 April 2021, in order to prevent unlawful trespass and obstruction of two HS2 construction sites at South Cubbington Wood and Crackley Wood in Warwickshire (the “**Land**”), by protestors who object to that development. The Second Claimant (“**HS2 Ltd**”) is the statutory undertaker responsible for the implementation of the HS2 railway project.
2. The Injunctions were made to last until trial or further order, subject to a sunset provision which would have taken effect on 17 December 2020. The March 2020 Order provided for liberty to apply for an extension of the Injunctions.
3. On 17 December 2020, the Injunctions were extended for a limited period by order of Marcus Smith J until 31 January 2021 or further order (“**Case Management Order**”) following an *ex parte* on notice decision on the papers.
4. For the reasons set out in this skeleton argument, the Claimants’ did not initially intend to seek to extend the Injunctions. However, once they determined that an extension was required, it became apparent to the Claimants that they should apply for what is being described (for convenience) as a “**Substantive Application**” to extend the Injunctions in a number of ways:
 - 4.1 for a longer period;
 - 4.2 naming several further Defendants to be bound by the Injunctions; and possibly:
 - (i) bringing additional land within the relevant HS2 development site within the scope of the Injunctions; and
 - (ii) including a new category of persons unknown to relate to those obstructing access and egress from the injunctioned land via public highways and rights of way.
5. As is explained below, various circumstances have meant it was not been possible, practicable or convenient to make that Substantive Application in good time before 17 December 2020, or before this Extension Application hearing.

6. The Claimants therefore seek the Court's assistance in maintaining the protection *currently* afforded for a reasonably short further period so that it does not lapse whilst arrangements can be made for a further on-notice hearing to consider the proposed Substantive Application.
7. As is set out in Jones 1 and Shaw 3, in accordance with the service provisions set out in the Case Management Order, the Claimants have:
 - 7.1 Affixed sealed copies of the Case Management Order, the Extension Application and an Injunction Warning Notice in transparent envelopes to posts, gates, fences and hedges at conspicuous locations around the Land and handed copies of the same to protestors at the protestor camp, "Camp 2";
 - 7.2 Emailed the Case Management Order to the email addresses listed at paragraph 6.3 of the Case Management Order, and to the Fifth Defendant's solicitors and counsel; and
 - 7.3 Placed copies of the Case Management Order and the Notice of Hearing on the websites listed at paragraph 6.4 of the Case Management Order.
8. It is submitted that there has been good and sufficient service of the Case Management Order, and good and sufficient notice of this hearing.

Background

9. HS2 is a controversial project. It is, however, one that has been specifically authorised by an Act of Parliament (the High Speed Rail (London - West Midlands) Act 2017 – "the **Act**") following considerable public consultation (see Judgment at [4]-[5])¹.
10. Unfortunately, at the time of the March 2020 Order, individuals had embarked upon 'direct-action' protests at the Land and continue to do so (see Shaw 3). So far as relevant for present purposes, those unlawful acts include: (i) trespass onto the Land (in order, *inter alia*, to cause damage to HS2 contractors' equipment, impede development progress, and to seek to 'monitor' HS2 contractors); and (ii) the tort of nuisance in preventing (usually vehicular) access to and from the development sites. The incidents leading to the up to the March 2020 Order, which justified that relief, are set out at Judgment [9] to [14]. The learned judge noted that there was no right to undertake these forms of direct-action protest, even if the motives were simply to monitor contractors' activities (see [35], and [42]).

¹ That process is set out in more detail in David Holland QC's judgment in *Secretary of State for Transport and High Speed Two (HS2) Limited v Persons Unknown* [2019] EWHC 1437 (Ch) at [15] to [23], which case concerned an injunction granted to the Claimants at Harvil Road, London.

11. As at the date of the March 2020 Order, the relevant extent of the Land was as shown coloured green, pink and blue on the plans appended to the March 2020 Order. The Extension Application does not seek to include additional land within the scope of the Injunctions. The Judgment explains the basis of the Claimants' entitlement to possession of the Land at [4] - [8], and [24].
12. The names of all the persons engaged in unlawful protest activities were not known at the date of the March 2020 Order (and are still not known). That is why two categories of "persons unknown" are identified as Ds 1 & 2. That was and remains an appropriate means of seeking relief against unknown categories of people in these circumstances².
13. The Court will note that there were initially named defendants to these proceedings (D5 was later added). The Claimants had added those named defendants originally, because they were alleged to have engaged in some unlawful acts in the past. They were, however, removed by Andrews J. in March 2020 for the reasons set out in her Judgment.
14. D5 remains a named defendant. There is an outstanding appeal to the Court of Appeal against the decision of the High Court to commit D5 for contempt of the March 2020 Order.
15. On 27 August 2020, the Claimants applied for a committal order against Dr Ian "Larch" Maxey and to add him as a named defendant to these proceedings. Due to D5's outstanding appeal, that committal application has not been progressed. The application for committal has not been withdrawn, and the Claimants expect to pursue it once the Court of Appeal has handed down judgment.

Key Developments since the March 2020 Injunction

16. The evidence set out in Shaw 1 and 3 demonstrates the current and continuing risk of trespass and obstruction of access to the Land which is the subject of the Injunctions. There have been a significant number of incidents involving trespass to the Land (of which the Claimants are aware, and which were significant enough to be formally reported by their security contractors) since the March 2020 Order was made. Three recent incidents stand out in particular:
 - 16.1 On 31 October 2020 between 30 and 40 protestors trespassed on the Land, in breach of the injunction, gaining access by use of a chainsaw. Two security guards were injured, 8 were subjected to abuse, equipment was stolen and there were incidents of arson and criminal damage (Shaw 1 at [50.1], and see RS1/41-42).

² See *Boyd & Anor v Ineos Upstream Ltd & Ors* [2019] EWCA Civ 515 at [18]-[34], summarised in *Canada Goose v Persons Unknown* [2020] EWCA Civ 303 at [82] (as below).

- 16.2 On 20 November there was further criminal damage to the Claimants' equipment, on investigation security staff were threatened with an axe and with a dog, a security officer was punched and assaulted, and two security staff sustained minor injuries (Shaw 1 at [50.2], and see RS1/42).
- 16.3 On 12 January 2021, the date of this skeleton argument, 4 persons unknown entered the Land by scaling the perimeter fence and climbed onto operating heavy machinery, preventing works, and resulting in the police needing to attend the Land (Shaw 3 at [14.2])
17. There have also been examples of obstruction of access to the Land (e.g. RS1/36-37, incidents 5, 6, 7, 10)
18. Government guidelines and regulations concerning the 'lockdown' during the Covid-19 pandemic do not appear to have materially (if at all) discouraged or prevented unlawful protests on the Land or at the wider Cubbington and Crackley sites by certain individuals.
19. Although therefore the Injunctions have not been wholly effective, the Claimants believe that they have nevertheless been of assistance in moderating unlawful activities on the Land, and it may be assumed that absent the Injunctions there may have been, and might be, potential for more frequent unlawful trespass by a greater number of persons unknown.
20. Generally, the Court expects its orders to be obeyed, but it is submitted that the Court should not let it count against the merits of this application that the Injunctions might be disobeyed in the future if they were to be continued. The pursuit of contempt of court proceedings against D5 and Dr Maxey (with further proceedings in contemplation) demonstrates that the Claimants are seeking to ensure compliance with the Injunctions in order to protect their interests.
21. There have been a number of other developments which also illustrate the continued risk to the Claimants' Land, particularly if the existing Injunctions were to lapse. In particular:
- 21.1 Following the making of the March 2020 Order, a High Court Writ of Possession was issued on 24 March 2020, under which a High Court Enforcement Officer (Mr Bovan) was commanded to enter the Land and cause the Claimants to have possession of it. In respect of the Cubbington Land, the protestors voluntarily vacated (although leaving behind various items on the Land). In respect of the Crackley Land however, a number of trespassers failed to comply with the Writ, and Mr Bovan and a team of enforcement officers were required from 26 March until 3 April to remove the protestors. This was

difficult and dangerous, as some trespassers were at height and refused to leave trees, and the Covid-19 pandemic had taken hold³.

- 21.2 Although possession of the Land was returned to the Claimants, protestor activity, and trespass, has continued on the Land since April 2020. Indeed, there have been an increasing number of incidents of trespass on the Land. Were the Injunctions to lapse, the Land would be under increased risk of being trespassed upon and occupied on a more permanent basis. In those circumstances, the Claimants would be obliged to seek a further Writ of Possession.
- 21.3 A protest camp (“**Camp 2**”) remains in place on third party land adjacent to the Land. There have been numerous acts of trespass on the Land as well as on other land in the vicinity under the Claimant’s possession but which is not subject of the Injunctions. It is for this reason that the Claimants are considering seeking additional injunctive relief over additional land (Shaw 1 at [49]).
- 21.4 Protestors at Camp 2 have signalled their intention to continue and increase their activities. A protestor named Mr Terry Sandison informed the Claimants’ Incident Response Team that the protestors at the Crackley land are intending on expanding their protest camp (see RS1/26). In addition, D5, immediately after the conclusion of the sentencing hearing for the contempt application suggested the suspended sentence would make little difference, that there were other people “*waiting to go back and run around the woods and stop [HS2’s] work*”, and explaining his own intention to go to other sites which were not injuncted (Shaw 1 at [52]). Given D5’s statements, it is submitted that relief against D5 in particular remains necessary.
22. The Land is an active construction works site, and the works timetable requires coordination between numerous different contractors. Works are well underway and anticipated to run until November 2029. The presence of unauthorised protestors on the Land is unsafe and usually requires works to be paused on site. Where, as has been the case in recent months, protestors actively interfere with works, this problem is more acute. The attendant delays significantly increase project costs. It is anticipated that protestor related costs at the Land presently stand at some £5.5m, with these costs anticipated to rise considerably after 14 January 2021 if the Injunctions are not extended. All such costs are borne by the public purse (Shaw 1 at [54] – [58]).

³ See Shaw 1 [14] – [23]

The intended Substantive Application

23. In these circumstances, the Claimants' intention had been (and continues to be) to make the Substantive Application to vary and extend the March 2020 Order to:
 - 23.1 further extend the injunction in time (for at least another year); and
 - 23.2 add further named defendants to the proceedings, who have been involved in such direct-action protest and whom the Claimants believe they are now able to identify.
24. The Claimants are also considering whether the Substantive Application should seek to:
 - 24.1 include additional parcels of land which have been brought into the scheme since these proceedings were last before the Court; and
 - 24.2 expand the categories of persons unknown to include those persons interfering with rights of access and egress from the Land onto the highways and rights of way network.
25. The Claimants accept it would have been desirable for that Substantive Application to have been made, on notice to the intended named defendants, in good time for it to be resolved ahead of the 17 December 2020 long-stop date. Due to a number of interrelated factors, outside the Claimants' control, that has not proved possible. Whilst the preparation of the Substantive Application and evidence is (well) in progress, the Claimants are not at present in a position to finalise and make the Substantive Application. Nor, as events have developed, is it practicable to do so currently.
26. These factors are explained in detail in Shaw 1 at [36] - [42]. In short:
 - 26.1 Uncertainty about the need for an extension: until the incidents of 31 October and 20 November 2020 (outlined at [16] above) the Claimants thought it unlikely that an extension would be necessary. It appeared that the injunction had been effective in reducing considerably the nuisance it was initially intended to prevent - trespass by those opposed to tree felling. As the felling of the trees the subject of the protests was completed in July 2020, the Claimants assumed that protest activity would move elsewhere. This assumption has been proved wrong, in particular by the aforementioned recent serious incidents, and it now appears that unlawful protesting is increasing rather than decreasing.
 - 26.2 The identity of proposed named defendants: although numerous potential defendants have been identified, further potential defendants are becoming known as time passes. The Claimants are obliged to take a proportionate approach, and a difficult balance must be struck as to whether an individual's involvement was a one-off or is evidence of a continued risk of future unlawful conduct. The Claimants are likely to face criticism (and

costs consequences) for naming people who ultimately do not pose a future threat, but conversely (in the light of the *Canada Goose* guidance) for continuing against “persons unknown” where there are additional names which are in fact known to the Claimants.

- 26.3 The D5’s outstanding appeal to the Court of Appeal against committal for contempt of court: the outcome of which may have an impact on the terms of the order sought by the Claimants (the grounds of appeal advanced by D5 include allegations that the site boundaries of the Land are unclear, complaints as to whether alternative service had been effected, and a complaint as to the terms of the March 2020 Order). The Court of Appeal hearing is listed for 16/17/18 February 2021 and the extension which the Claimants seek should allow this Court the benefit of the Court of Appeal’s judgment in due course.
- 26.4 The Covid-19 pandemic: has made the practicalities of collating and putting together the necessary evidence and paperwork inherently more difficult. The security and other operational personnel on the ground who must provide the evidence of the situation on the ground have, understandably, also had to focus on how operations are to continue in light of social distancing requirements and repeated lockdowns.
- 26.5 Hearing arrangements: it is anticipated (particularly given the experience of the Claimants in the Harvil Road injunction case) that a number of persons will likely wish to be heard in response to the Substantive Application, some of whom will be litigants in person. Given the Covid-19 restrictions, there will be obvious restraints in organising a physical hearing; arrangements for a remote hearing will likely require detailed planning between the Claimants’ representatives and the Court so as to facilitate fair access for all those who wish to be heard. If the Court’s virtual hearing systems can only accommodate a limited number of participants, that may not be adequate for all of those interested. The three-month extension which is proposed should give sufficient time for a listing of a hearing of the Substantive Application to be arranged, and for arrangements to be put in place to facilitate remote access to that hearing for anyone who wishes to be heard.

The Extension Application

27. The Claimants ask that the result of those matters should not be to leave it without any relief from 31 January 2021 (or further order), in circumstances where the evidence is that there is an acute risk of further unlawful trespass, and obstruction of access, to the Land, which risks causing real harm to progress of the Scheme and to the safety of those involved in delivering it.
28. Instead, the Claimants seek a temporary extension of the March 2020 Order for a further three months whilst the Substantive Application is finalised, issued, served and heard (with the benefit of the Court of Appeal’s judgment).

29. In the circumstances, what is proposed is, in the Claimants' submission, a fair and practical approach. The short extension of the 17 December 2020 long-stop date to 17 April 2021 maintains the existing protection, pending the filing of the Substantive Application. The wording and scope of the March 2020 Order is otherwise to be left unchanged.
30. The Claimants seek by the application to obtain the minimum protection that is necessary to protect their interests. No injunction is sought at this stage over additional land or in respect of additional defendants. The extension sought is also strictly time-limited to allow the Claimants' the minimum time it considers reasonably necessary to have the Substantive Application prepared and determined (recognising, of course, that the latter part is subject to the Court's availability).
31. Whilst the Extension Application is a matter for this Court, the substantive position was properly considered by Andrews J. in the Judgment, and the passage of time has done nothing to change the facts and findings upon which basis Andrews J. made the March 2020 Order. Indeed, as has been set out, the evidence of threatened and present harm to the Claimants is now stronger than it was in March 2020.
32. There would be considerable prejudice to the Claimants if the injunction were to lapse on 31 January 2021. Conversely, it is difficult to identify prejudice to the Defendants:
- 32.1 The 17 December 2020 long-stop date was somewhat arbitrary, with liberty to apply to extend it.
- 32.2 Since the Injunctions were granted, there has been no challenge the Claimants' entitlement to substantive relief, nor any applications to amend the March 2020 Order by third parties.
- 32.3 Despite service of the Case Management Order, no Defendants have come forward expressing an interest in the Extension Application, let alone providing any grounds or argument contesting the Extension Application.
- 32.4 Trespass to the Land and obstruction of access to it are plainly unlawful acts. The Courts have emphasised repeatedly that "*there is no warrant for the court contemplating the commission of torts even if this could be described as non-violent civil disobedience*" or "*direct action*" (Judgment at [42] and [36])⁴.

⁴ See also *Harvil Road* at [136].

- 32.5 It would be most unattractive if any Defendant were to be waiting in the wings to commit unlawful acts on the lapse of the injunction on 31 January. The fact any such intention might be thwarted is not a proper ground to object to the continuation of the injunction.
- 32.6 There are plainly other means for the Defendants to protest against HS2 – e.g. on land and camps outside the injuncted Land.
33. The Court is entitled to have regard to the balance of convenience, and the appropriate weight to be had to the Defendants’ Article 10 and 11 rights (i.e. freedom of expression and assembly) ‘in the round’. However:
- 33.1 The Defendants have a right to express their points of view, and to gather together to do so, but they do not have any rights to do so on private land. Nor are they entitled to *compel* the outcome they prefer (i.e. the cancellation of HS2 via physically getting in the way of it, damaging equipment and attacking contractors).
- 33.2 Those points are particularly acute where, as here, their actions are interfering with a scheme of works which has been specifically mandated by an Act of Parliament.
- 33.3 There continues to be considerable public debate about HS2, and the Defendants therefore have numerous alternative avenues (and, indeed, locations) where they may express their views. They are not otherwise without a voice.
- 33.4 The continuation of protests of these sorts on the Land is particularly problematic in circumstances where they threaten to delay this major infrastructure project at very significant public expense.

Full & frank disclosure

34. Although this hearing is on notice, the Claimants are mindful of the fact that the Extension Application may be undefended. Whilst in those circumstances the Court should determine the Extension Application, the Claimants consider it is appropriate to draw the points set out in Shaw 2 at [8] – [12] which may tend against the grant of the Extension Application expressly to the Court’s attention.
35. However, for the reasons set out in Shaw 2, the Claimants consider that there is nothing in the points raised which indicate that the Court should refuse the Extension Application.

The Draft Order

36. The Draft Order is straightforward. Paragraphs 3 to 5 set out the terms of the March 2020 Order made by Andrews J. and state clearly that the long-stop date is extended until 17 April 2021.
37. Paragraphs 6 to 10 set out provisions for service of the Order in the form that has been adopted throughout these proceedings and which has proven successful in bringing the proceedings and orders made to the attention of the Defendants (and any potential Defendants). It is an approach that was approved by Andrews J. at Judgment [15]-[16], and adopted by the Case Management Order.
38. Paragraphs 11 to 15 provide for the Substantive Application, giving a date by which it must be made, dates for Defendants and potential Defendants to act to become party to the proceedings, dates for evidence in response, and a suggested listing window.
39. Paragraphs 16 to 17 provides a mechanism for any Defendant or other person affected by the order to apply to vary or discharge the order, and to be joined to the proceedings.
40. Paragraph 18 provides the Claimants with liberty to apply to extend or vary the Order, which the Claimants intend to do in due course in order to bring the Substantive Application. Potential defendants have a mechanism to vary or discharge the Order.
41. Subject to any modifications the Court considers appropriate, the Claimants respectfully ask that the Court make the Order in the terms sought.

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