IN THE HIGH COURT OF JUSTICE **Claim No. KB-2026-001144**

KING'S BENCH DIVISION

IN THE MATTER OF S.187B OF THE TOWN AND COUNTRY PLANNING ACT 1990

B E T W E E N : -

TUNBRIDGE WELLS BOROUGH COUNCIL

Claimant

and

(1) DANNY MAURICE DARLING

(2) PERSONS UNKNOWN (being those with an interest in or intending to undertake works or intending to occupy the land known as "Land Lying to the South East of Redwings Lane, Pembury, Tunbridge Wells"

Defendants

BUNDLE FOR HEARING
20 APRIL 2026

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IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Claim No: KB-2026-001144

IN THE MATTER OF PROCEEDINGS

B E T W E E N:-

TUNBRIDGE WELLS BOROUGH COUNCIL

Claimant

and

(1) DANNY MAURICE DARLING

(2) PERSONS UNKNOWN (being those with an interest in or intending to undertake works or intending to occupy the land known as "Land lying to the South East of Redwings Lane, Pembury, Tunbridge Wells")

Defendants

SKELETON ARGUMENT ON BEHALF OF THE CLAIMANT IN SUPPORT OF AN APPLICATION FOR AN INJUNCTION

References are to [Number] Witness Statement paragraphs [Number/WS/X]

Essential Reading:

1. Application Notice
2. Draft Order
3. Witness Statements Leanne Tarling

INTRODUCTION

1. Tunbridge Wells Borough Council ("the Claimant") seeks the continuation of an interim injunction order ("the First Order") in relation to the land known as "Land lying to the south east of Redwings Lane, Pembury, Tunbridge Wells" ("the Land")

shown edged black on the plan attached to the draft order. The Claimant obtained an interim injunction granted by Mrs Justice Stacey on 10th April 2026 on a without notice basis.

2. The Claimant is the Local Planning Authority within the meaning of the Town and Country Planning Act 1990 (as amended) ("the 1990 Act") for an area including the Land.

The current defendants

3. The First Defendant is the owner of the Land as registered at HM Land Registry. It is not known if he is still the owner. Attempts to contact him by telephone on 10th April were not successful and, despite leaving a message for him, he has not contacted the Claimant (3WS/9).

4. The Second Defendant identified only as "Persons Unknown" refers to those persons who are not named Defendants to this Claim who have an interest in the land or in undertaking works to the Land or intending to undertake works to the Land or entering onto the Land intending to occupy the Land in breach of planning control. The Claimant relies upon paragraph 21.2 of the Practice Direction Part 49E and s.187B (3) of the 1990 Act in support of seeking an Order against "Persons Unknown".

5. The Claimant is aware of the guidance of the Supreme Court in *Wolverhampton City Council and Others v London Gypsies and Travellers and Others* [2023] UKSC47. The *Wolverhampton* judgment of the Supreme Court provides that the granting of injunctions against "newcomers" is not constitutionally improper [170] and, in relation to breaches of public law, including planning law, local authorities are empowered to seek injunctions by statutory provisions.

6. In section 5 of the judgment [187ff] the Supreme Court considered the practical application of the principles affecting an application for a newcomer injunction against Gypsies and Travellers and the safeguards and provided the guidance. It is submitted that the safeguards are met in this case:

i. Compelling justification for the remedy. This includes consideration of the obligation/duty to provide sites for Gypsies and Travellers [190], Needs assessments, planning policy, other statutory powers available and byelaws. The Claimant confirms that it does not have a 5 year supply of pitches (1WS/46(i)). However, it has a recently adopted Local Plan which has been through an extensive examination process. Policy H9 is a policy specifically for Traveller Accommodation. Planning applications should comply with policy H9 and the development on the Land is contrary to planning policy and other statutory powers are not effective;

ii. Evidence of threat of abusive trespass or planning breach – it is submitted that there is more than a sufficiently real and imminent risk as evidence shows that works have already been undertaken (1WS/29) and the lack of engagement (e.g. providing names and details) leads the Council to believe that further breaches are imminent, and that "Man A" noted a "whole deal" (1WS/25).

iii. Identification or other definition of the intended respondents to the application - it is impossible to name the persons as (a) it is not known those undertaking works and (b) it is not known who future potential occupants may be but the Claimant has attempted to define them as precisely as possible;

iv. The prohibited acts - the terms of the injunction correspond to breaches that are feared will take place if not restrained and it is submitted that the terms of the injunction order are clear and precise – furthermore, the terms simply tell those potentially affected not to do that which they are not allowed to do without express planning permission;

v. Geographical and temporal limits - the injunction has clear geographical limits as outlined on the plan attached to it and has temporal limits in that it lasts for 12 months;

vi. Effective notice of the order - it is possible to give effective notice by virtue of the Alternative Service provision;

vii. Liberty to apply has been included;

viii. Costs protection – there is no evidence that this is appropriate in this matter;

ix. Cross-undertaking - there is no cross-undertaking and it is submitted this is not appropriate in this case.

7. The Claimant is of the view that actual breaches of planning control have taken place, and there is a real risk of further breaches and it apprehends further operational development and material change of uses taking place in breach of planning control The order simply holds the ring and maintains the status quo.

Service

8. Evidence of service of the First Order is within the third witness statement of Leanne Tarling.

9. The sealed order was served on 10th May 2026 as follows:

Defendant	When served	What was served	Comments
Danny Maurice Darling D1	Served by first class post – 3WS/4	See Leanne Tarling 3WS/4 and 3WS/6	As requested by Mrs Justice Stacey, and as set out in the Interim Injunction Order, Leanne Tarling attempted to contact D1 twice on 10th April 2026 and left a voicemail.
Persons Unknown	10th April 2026 on a gate on the nearby PROW, on a stake on the Land, on the gate at the entrance to the Land – 3 LS/5	See 3LS/5	

10. The Claimant submits that good service has been effected as per the terms of the First Order.

THE POWER TO GRANT AN INJUNCTION

11. Section 187B of the Town and Country Planning Act 1990 (as amended) ('the 1990 Act') provides 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 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."*

12. The leading authority on the exercise of the Court's discretion to grant injunctions pursuant to section 187B of the 1990 Act is the decision of the House of Lords in the combined appeals known as *South Bucks District Council v. Porter* [2003] UKHL 558;

[2003] 2 AC 558 [**[20**]] approving the judgment of the Court of Appeal [2001] EWCA Civ 1549; [2002] 1 WLR 1359.

13. The decision of the House of Lords also confirms that the Court has an original jurisdiction in respect of its exercise of discretion to grant an injunction pursuant to section 187B of the 1990 Act [**27**].

14. In *Davis v Tonbridge & Malling Borough Council* [2004] EWCA Civ 194, the Court of Appeal summarised the conclusion of the House of Lords in *South Bucks District Council v Porter* as follows [**34**]:

1) Section 187B confers on the courts an original and discretionary, not a supervisory, jurisdiction, so that a defendant seeking to resist injunctive relief is not restricted to judicial review grounds;

2) it is questionable whether Article 8 adds anything to the existing equitable duty of a court in the exercise of its discretion under section 187B;

3) the jurisdiction is to be exercised with due regard to the purpose for which was conferred, namely to restrain breaches of planning control, and flagrant and prolonged defiance by a defendant of the relevant planning controls and procedures may weigh heavily in favour of injunctive relief;

4) however, it is inherent in the injunctive remedy that its grant depends on a court's judgment of all the circumstances of the case;

5) although a court would not examine matters of planning policy and judgment, since those lay within the exclusive purview of the responsible local planning authority, it will consider whether, and the extent to which, the local planning authority has taken account of the personal circumstances of the defendant and any hardship that injunctive relief might cause, and it is not obliged to grant relief simply because a planning authority considered it necessary or expedient to restrain a planning breach;

6) having had regard to all the circumstances of the case, the court will only grant an injunction where it is just and proportionate to do so, taking account, inter alia, of the rights of the person or persons against whom injunctive relief is sought, and of whether it is relief with which that person or persons can and reasonably ought to comply.

15. The well-known principles laid down by the House of Lords in *American Cyanamid Co. v. Ethicon Limited* [1975] AC 396 apply to the Court's exercise of discretion (see 406F, 407G, 408F).

16. It is to be noted that each of the appeals in *Porter* concerned cases where the Local Planning Authority were seeking mandatory injunction orders to remove persons who had taken up occupation of their land in breach of planning control. This application does not seek any mandatory steps. This application for an interim injunction seeks only to preserve the status quo at this point.

BREACHES OF PLANNING CONTROL

17. The evidence available to date clearly demonstrates that there have been breaches of planning control as summarised at WS/29:

    i. Operational development including altering the land levels by way of excavation of the ground and re-distributing earth to level it out, construction and laying of hardstanding;

    ii. Engineering operations and groundworks.

18. There has been a disregard for planning control and the comment from the owner as set out at para 24 (he said he "doesn't care" if the council "slap[s] a notice on the gate") reinforces the Council's concerns.

Consequences of the breaches

19. These breaches do not just cause in principle planning harm. The Council has serious concerns about wider public safety. During an appeal into an adjacent area of land where caravans have been stationed, South East Water participated due to its concerns. Ms Tarling notes at para 38 of her witness statement that the Inspector concluded there was "an inherent and plausible risk to public water supply" with the "potential to affect some 50,000 people".

20. There are numerous other planning harms including to the countryside, the National Landscape and the Metropolitan Green Belt.

THE NEED FOR AN INJUNCTION

21. At 1WS/36, Ms Tarling sets out why other enforcement options are not appropriate in this case. Firstly, an Enforcement Notice cannot attack an anticipated breach of planning control of which further breaches are expected. Secondly, the process is lengthy. Thirdly, the ultimate sanction for breaching an enforcement notice or a stop notice is criminal proceedings but the penalty is a fine. By the time the Council waits for further breaches to take place, even more harm will have been caused. Furthermore, if residential occupation is the goal of those doing the works, it can be taken up very quickly and once occupants are on site it is a very lengthy process to remove them.

22. Applying the approach in *American Cyanamid* the Claimant submits that:

    i. There is a compelling case that works which have taken place will lead to further breaches of planning control on the Land. Those breaches make it

more likely that there will be similar breaches of planning control. In other words, there is a serious question to be tried; and

ii. The Local Planning Authority cannot adequately be compensated in damages for a breach of planning control.

23. In the premises, the balance of convenience lies in preserving the lawful use of the land and enforcing proper planning control in the public interest.

CONCLUSIONS

24. In the circumstances of the present case, the Claimant submits that an injunction in the terms sought will not involve an interference with the Defendants' Human Rights (as no occupation has been taken up) or, alternatively, any such interference is necessary and proportionate having regard to all the circumstances known to the Claimant at present and the public interest in protecting the environs.

25. The Defendants can continue to use their land without breaching planning control and can apply for planning permission in the usual way for works that require consent.

26. In the premises, the Claimant submits that it is appropriate for an injunction to be granted in the terms of the draft Order. There are serious concerns for public safety in relation to water contamination.

27. The Claimant also seeks an Order for alternative service of any injunction order granted to ensure the earliest possible compliance with proper planning control. In the circumstances, the Court can be satisfied that service by way of the alternative method proposed will come to the attention of the Defendants and will assist in preserving the lawful use of the Land.

28. The Claimant is willing to give the undertakings listed in the draft Order. There is no undertaking as to damages. From *Kirklees MBC v Wickes Building Supplies Ltd* [1993] A.C. 227, the court may exercise its discretion not to require such an undertaking, taking into account the circumstances of the case and that the claimant is a local authority with the function of enforcing the law in its district in the public interest. This has more recently been considered in the context of s.187B in the cases of *Basingstoke & Deane BC v Loveridge* [2018] EWHC 2228 (QB) [**16**] and *South Downs National Park Authority v Daroubaix* [2018] EWHC 1903 (QB) [**16**].

EMMALINE LAMBERT
CORNERSTONE BARRISTERS
2-3 GRAY'S INN SQUARE
LONDON
15th April 2026

IN THE HIGH COURT OF JUSTICE **Claim No. KB-2026-001144**

KING'S BENCH DIVISION

DATED 20 April 2026

MR[S] JUSTICE

IN THE MATTER

B E T W E E N : -

TUNBRIDGE WELLS BOROUGH COUNCIL

Claimant

and

(1) DANNY MAURICE DARLING
(2) PERSONS UNKNOWN (THOSE WITH AN INTEREST IN OR INTENDING TO UNDERTAKE WORKS OR INTENDING TO OCCUPY THE LAND KNOWN AS "LAND LYING TO THE SOUTH EAST OF REDWINGS LANE, PEMBURY, TUNBRIDGE WELLS"

Defendants

INJUNCTION ORDER

PENAL NOTICE

IF YOU THE WITHIN NAMED: DANNY MAURICE DARLING AND PERSONS UNKNOWN ***DISOBEY THIS ORDER YOU MAY BE HELD TO BE IN CONTEMPT OF COURT AND LIABLE TO IMPRISONMENT OR FINED OR YOUR ASSETS SEIZED. ANY OTHER PERSON WHO KNOWS OF THIS ORDER AND DOES ANYTHING WHICH HELPS OR PERMITS THE DEFENDANTS TO BREACH THE TERMS OF THIS ORDER MAY ALSO BE HELD TO BE IN CONTEMPT OF COURT AND MAY BE IMPRISONED, FINED OR HAVE THEIR ASSETS SEIZED.***

IMPORTANT

1. This Order prohibits you from doing the acts set out in this Order. You should read the terms of the Order and the guidance notes very carefully. You are advised to consult a solicitor as soon as possible. You have a right to ask the Court to vary or discharge the Order.

2. If you disobey this Order you may be found guilty of Contempt of Court and may be sent to prison or fined. In the case of a Corporate Defendant, it may be fined, its Directors may be sent to prison or fined or its assets may be seized.

UPON the Claimant's urgent application without notice for an injunction pursuant to section 187B of the Town and Country Planning Act 1990.

AND UPON the Claimant's application for an interim injunction being heard without notice on 10 April 2026 by the Honourable Mrs. Justice Stacey.

AND FURTHER TO the interim injunction order made in proceedings KB-2026-001144 which was granted on an urgent without notice basis by Mrs. Justice Stacy following a hearing on 10 April 2026 and sealed on 10 April 2026.

AND UPON READING the Claim Form, the Application Notice, the Details of the Claim, the witness statements of the Claimant as set out under Schedule A and accepted the undertaking listed in Schedule B at the end of this Order.

AND UPON no Defendants attending the return date hearing on 20 April 2026.

AND UPON the Court deciding to proceed in the absence of the First Defendant.

AND UPON HEARING from counsel for the Claimant, Ms Lambert at the return date hearing before [ ] on 20 April 2026.

AND UPON noting that the Order by Mrs. Justice Stacey was due to expire, in accordance with the terms of that Order.

IT IS ORDERED THAT FROM ALTERNATIVE SERVICE BEING EFFECTED UNTIL 20 APRIL 2028 OR FURTHER ORDER:

THE INJUNCTION

1. In relation to the Land known as "Land lying to the south east of Redwings Lane, Pembury, Tunbridge Wells" registered with HM Land Registry under title number TT164814 ("the Land") as shown edged black on the attached plan, the Defendants, whether by themselves or by instructing, encouraging or permitting any other person, must not:

    (i) Allow the use of the Land for human habitation or residential occupation or any other purpose in breach of planning control;

(ii) Bring onto the Land any caravans and/or mobile homes for the purpose of human habitation or residential occupation or any other purpose in breach of planning control;

(iii) Bring/erect/install any buildings or structures on the Land for the purposes of human habitation or residential occupation or any other purpose in breach of planning control;

(iv) Bring onto the Land any portable structures including portable toilets for purposes associated with human habitation or residential occupation or any other purpose in breach of planning control;

(v) Bring onto the Land any further waste materials and/or hardcore and/or like materials for any purpose, including the further creation/laying of hardstandings or hard surfaces, in association with the use of Land for the stationing of caravans and/or mobile homes for the purpose of human habitation or residential occupation or any other purpose in breach of planning control;

(vi) Carry out any further works in relation to the formation of paths, roadways or any works including the provision of sewerage, water and electricity infrastructure associated with the use of caravans and/or mobile homes for the purpose of human habitation or residential occupation or any other purpose in breach of planning control;

(vii) Carry out any further works to the Land associated with or in preparation for its use for stationing caravans and/or mobile homes or for the erection of a building and/or any structure for human habitation or residential occupation or any other purpose in breach of planning control;

(viii) Erect any fencing on the Land associated with or in preparation for the use of the Land for the stationing of caravans and/or use of the buildings/structures on the Land for the purpose of human habitation or residential occupation or any other purpose in breach of planning control;

(ix) Undertake any further development on the Land as defined in section 55 of the Town and Country Planning Act 1990 without the express grant of planning permission.

IT IS FURTHER ORDERED THAT:

ALTERNATIVE SERVICE

1. Pursuant to CPR 6.15 and 6.27, permission for alternative service of the order on the Defendants is granted.

2. Service of this Order on all Defendants may be effected by the Claimant:

a. Affixing sealed copies of the Order in transparent waterproof envelopes at conspicuous locations including on the gate at the vehicle entrance to the Land, on a stake on the Land and on a gate on the Public Right of Way close to the Land;
b. Posting by way of first class post sealed copies of the Order to the address of the Defendants known to the Claimant.

3. This shall be deemed to be good and sufficient service of this Order on all of the Defendants and the need for personal service of this Order is dispensed with in relation to each of the Defendants for the purposes of CPR Part 81.

4. The Claimant shall also provide a QR code with the Order providing access to the Application Notice, the Claim Form, Counsel's skeleton argument and evidence in support of the Application.

5. The Claimant shall publish a sealed copy of this Order on the Claimant's website (where details including the time, place and date of any hearing shall also be published).

6. Subject to further order, copies of any future documentation may be validly served on the Defendants in the ways specified above.

VARIATION OR DISCHARGE OF THIS ORDER

7. The Defendants may each of them (or anyone notified of this Order) apply to the Court on 48 hours written notice to the Claimant's legal representatives to vary or discharge this Order (or so much of it as affects that person). Except that the hours between 5pm on any Friday and 9am on any Monday cannot be counted as part of the 48 hours' notice period.

8. Any person, other than the First Defendant, who wishes to be heard under must apply to the court to be added as a named defendant to these proceedings and must provide their names and contact details in the application.

COSTS OF THE APPLICATION

9. Costs reserved.

10. Liberty to apply.

GUIDANCE NOTES

Effect of this Order – The Defendants

A Defendant who is an individual who is ordered not to do something must not do it himself or in any other way. He must not do it through others acting on his behalf or on his instructions or with his encouragement.

Effect of this Order - Parties other than the Claimant and Defendants

It is a Contempt of Court for any person notified of this Order knowingly to assist in or permit a breach of this Order. Any person doing so may be sent to prison, fined or have his assets seized.

Interpretation of this Order

1. In this Order, the words "the Land" means land known as "Land lying to the south east of Redwings Lane, Pembury, Tunbridge Wells" registered with HM Land Registry under title number TT164814 ("the Land").

2. In this Order, where there is more than one Defendant (unless otherwise stated) references to "the Defendants" means each or all of them.

3. A requirement to serve on "the Defendants" means on each of them. However, the Order is effective against any Defendant on whom it is served.

4. An Order requiring "the Defendants" not to do anything applies to all Defendants.

5. In this Order, the Second Defendant identified only as "Persons Unknown" refers to those adult persons who are not named Defendants to this Application who have an interest in the Land and/or intend to carry out further works to the Land and/or are intending to occupy the Land or any other purpose in breach of planning control.

Communications with the Court

All communications to the Court about this Order should be sent to Room WG08, Royal Courts of Justice, Strand, London, WC2A 2LL (020 7947 6010). The offices are open between 10 a.m. and 4.30 p.m. Monday to Friday except holidays.

SCHEDULE A

Evidence

The Judge read the following written evidence before making this Order:-

1. First Witness Statement of Leanne Tarling dated 9 April 2026
2. Second Witness Statement of Leanne Tarling dated 9 April 2026
3. Third Witness Statement of Leanne Tarling dated 16 April 2026

SCHEDULE B

Undertakings given to the Court by the Claimant:-

1. As soon as practicable the Claimant will serve on the named Defendants a sealed copy of this Order and pursuant to the Order for alternative service herein.
2. To use the Claimant's best endeavours to effect personal service on the named Defendants.

Name and Address of Claimant's Legal Representatives:-

Mid Kent Legal Services
Tunbridge Wells Borough Council
Town Hall
Mount Pleasant Road
Tunbridge Wells
Kent
TN1 1RS

Tel: 01622 602126
Email: heather.stevens@midkent.gov.uk

Claim No. KB-2026-001144

IN THE HIGH COURT OF JUSTICE

KING'S BENCH DIVISION

DATED 20 April 2026

IN THE MATTER

B E T W E E N:-

TUNBRIDGE WELLS BOROUGH COUNCIL
Claimant

-and-

(1) DANNY MAURICE DARLING
(2) PERSONS UNKNOWN (THOSE WITH AN INTEREST IN OR INTENDING TO UNDERTAKE WORKS OR INTENDING TO OCCUPY THE LAND KNOWN AS "LAND LYING TO THE SOUTH EAST OF REDWINGS LANE, PEMBURY, TUNBRIDGE WELLS")
Defendants

INJUNCTION ORDER

PENAL NOTICE
IF YOU THE WITHIN NAMED DEFENDANTS, DANNY MAURICE DARLING AND PERSONS UNKNOWN

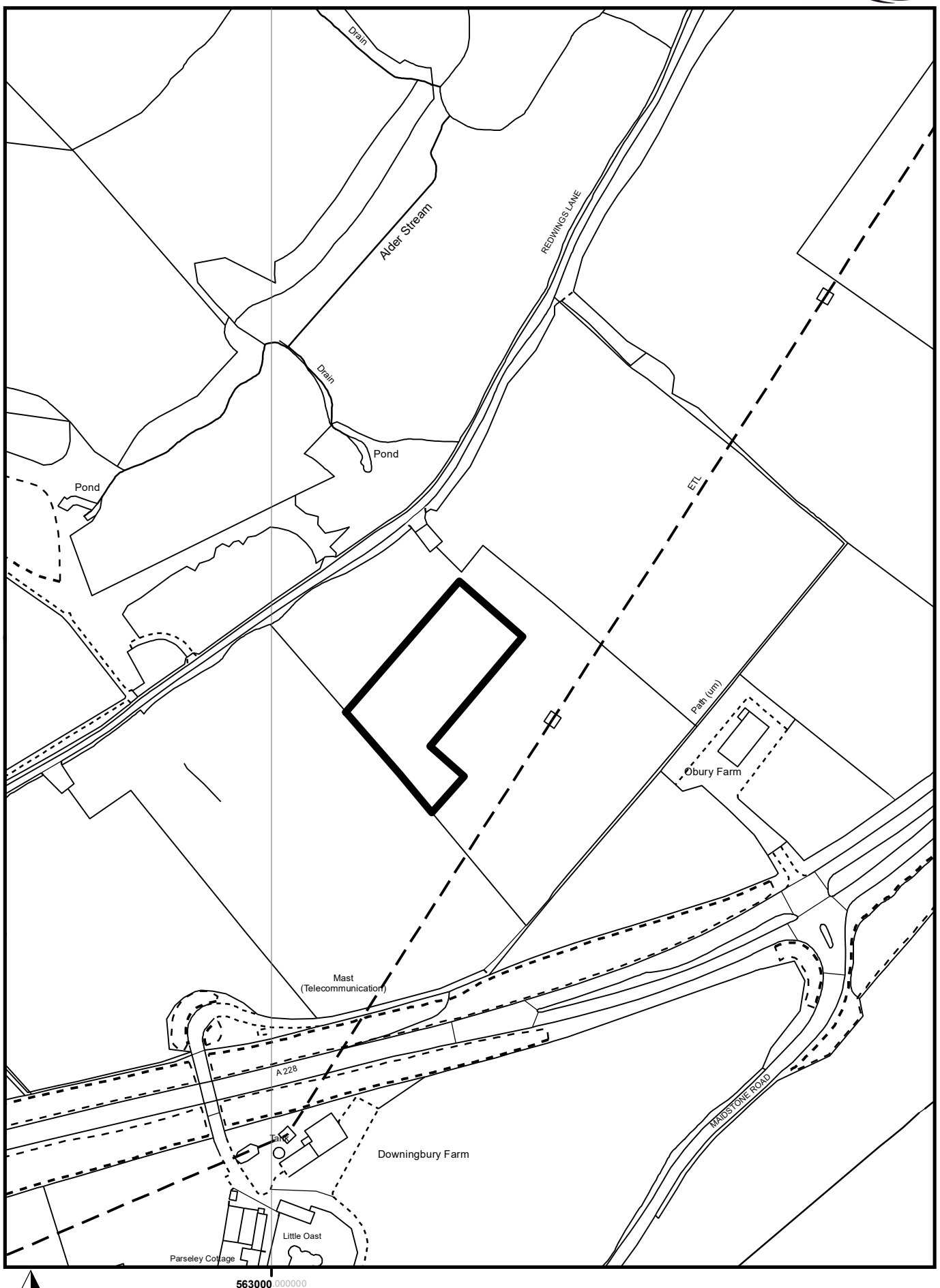
DISOBEY THIS ORDER YOU MAY BE HELD TO BE IN CONTEMPT OF COURT AND LIABLE TO IMPRISONMENT OR FINED OR YOUR ASSETS SEIZED

Mid Kent Legal Services
Town Hall
Mount Pleasant Road
Tunbridge Wells
Kent
TN1 1RS

Tel: 01622 602126
Solicitors for Tunbridge Wells Borough Council

INJUNCTION

Land lying to the southeast of Redwings Lane, Pembury, Tunbridge Wells



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Map Dated: April 2026

IN THE HIGH COURT OF JUSTICE **Claim No. KB-2026-001144**

KING'S BENCH DIVISION

DATED 10 April 2026

MRS JUSTICE STACEY

IN THE MATTER

B E T W E E N : -

TUNBRIDGE WELLS BOROUGH COUNCIL

Claimant

and

(1) DANNY MAURICE DARLING
(2) PERSONS UNKNOWN (THOSE WITH AN INTEREST IN OR INTENDING TO UNDERTAKE WORKS OR INTENDING TO OCCUPY THE LAND KNOWN AS "LAND LYING TO THE SOUTH EAST OF REDWINGS LANE, PEMBURY, TUNBRIDGE WELLS"

Defendants

INJUNCTION ORDER

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IMPORTANT

1. This Order prohibits you from doing the acts set out in this Order. You should read the terms of the Order and the guidance notes very carefully. You are advised to consult a solicitor as soon as possible. You have a right to ask the Court to vary or discharge the Order.

2. If you disobey this Order you may be found guilty of Contempt of Court and may be sent to prison or fined. In the case of a Corporate Defendant, it may be fined, its Directors may be sent to prison or fined or its assets may be seized.

On the 10 April 2026 Mrs Justice Stacey considered the Application brought by Tunbridge Wells Borough Council ("the Claimant") for an injunction supported by the Witness Statement(s) listed in Schedule A and accepted the undertakings listed in Schedule B at the end of this Order.

UPON hearing Counsel for the Claimant, upon reading the Witness Statement(s) listed in Schedule A and upon accepting the undertakings listed in Schedule B

IT IS ORDERED THAT FROM ALTERNATIVE SERVICE BEING EFFECTED UNTIL 20 April 2026 (the Return Date) OR FURTHER ORDER:

THE INJUNCTION

1. In relation to the Land known as "Land lying to the south east of Redwings Lane, Pembury, Tunbridge Wells" registered with HM Land Registry under title number TT164814 ("the Land") as shown edged black on the attached plan, the Defendants, whether by themselves or by instructing, encouraging or permitting any other person, must not:

    (i) Allow the use of the Land for human habitation or residential occupation or any other purpose in breach of planning control;
    (ii) Bring onto the Land any caravans and/or mobile homes for the purpose of human habitation or residential occupation or any other purpose in breach of planning control;
    (iii) Bring/erect/install any buildings or structures on the Land for the purposes of human habitation or residential occupation or any other purpose in breach of planning control;
    (iv) Bring onto the Land any portable structures including portable toilets for purposes associated with human habitation or residential occupation or any other purpose in breach of planning control;
    (v) Bring onto the Land any further waste materials and/or hardcore and/or like materials for any purpose, including the further creation/laying of hardstandings or hard surfaces, in

association with the use of Land for the stationing of caravans and/or mobile homes for the purpose of human habitation or residential occupation or any other purpose in breach of planning control;

(vi) Carry out any further works in relation to the formation of paths, roadways or any works including the provision of sewerage, water and electricity infrastructure associated with the use of caravans and/or mobile homes for the purpose of human habitation or residential occupation or any other purpose in breach of planning control;

(vii) Carry out any further works to the Land associated with or in preparation for its use for stationing caravans and/or mobile homes or for the erection of a building and/or any structure for human habitation or residential occupation or any other purpose in breach of planning control;

(viii) Erect any fencing on the Land associated with or in preparation for the use of the Land for the stationing of caravans and/or use of the buildings/structures on the Land for the purpose of human habitation or residential occupation or any other purpose in breach of planning control;

(ix) Undertake any further development on the Land as defined in section 55 of the Town and Country Planning Act 1990 without the express grant of planning permission.

IT IS FURTHER ORDERED THAT:

ALTERNATIVE SERVICE

1. Pursuant to CPR 6.15 and 6.27, permission for alternative service of the order on the Defendants is granted.
2. Service of this Order on all Defendants may be effected by the Claimant:
    a. Affixing sealed copies of the Order in transparent waterproof envelopes at conspicuous locations including on the gate at the vehicle entrance to the Land, on a stake on the Land and on a gate on the Public Right of Way close to the Land;
    b. Posting by way of first class post sealed copies of the Order to the address of the Defendants known to the Claimant and, as an additional recommended method of drawing the matter to the attention of the First Defendant (but not relevant to good and sufficient service), by attempting to notify him via the telephone number the Claimant holds on record from 2024.
3. This shall be deemed to be good and sufficient service of this Order on all of the Defendants and the need for personal service of this Order is dispensed with in relation to each of the Defendants for the purposes of CPR Part 81.
4. The Claimant shall also provide a QR code with the Order providing access to the Application Notice, the Claim Form, Counsel's skeleton argument and evidence in support of the Application.

5. The Claimant shall publish a sealed copy of this Order on the Claimant's website (where details including the time, place and date of any hearing shall also be published).
6. Subject to further order, copies of any future documentation may be validly served on the Defendants in the ways specified above.

THE RETURN DATE

7. There shall be a hearing at 10.30am on 20 April 2026 (the Return Date) at the Royal Courts of Justice with a time estimate of 1 hour, unless the named parties consent in writing that no such hearing is necessary. On the Return Date, the Defendants can make, if so advised, representations in relation to the continuation, variation or discharge of the Order.

VARIATION OR DISCHARGE OF THIS ORDER

8. The Defendants may each of them (or anyone notified of this Order) apply to the Court on 48 hours written notice to the Claimant's legal representatives to vary or discharge this Order (or so much of it as affects that person). Except that the hours between 5pm on any Friday and 9am on any Monday cannot be counted as part of the 48 hours' notice period.

9. Any person, other than the First Defendant, who wishes to be heard under must apply to the court to be added as a named defendant to these proceedings and must provide their names and contact details in the application.

COSTS OF THE APPLICATION

10. Costs reserved.

11. Liberty to apply.

GUIDANCE NOTES

Effect of this Order – The Defendants

A Defendant who is an individual who is ordered not to do something must not do it himself or in any other way. He must not do it through others acting on his behalf or on his instructions or with his encouragement.

Effect of this Order - Parties other than the Claimant and Defendants

It is a Contempt of Court for any person notified of this Order knowingly to assist in or permit a breach of this Order. Any person doing so may be sent to prison, fined or have his assets seized.

Interpretation of this Order

1. In this Order, the words "the Land" means land known as "Land lying to the south east of Redwings Lane, Pembury, Tunbridge Wells" registered with HM Land Registry under title number TT164814 ("the Land").

2. In this Order, where there is more than one Defendant (unless otherwise stated) references to "the Defendants" means each or all of them.

3. A requirement to serve on "the Defendants" means on each of them. However, the Order is effective against any Defendant on whom it is served.

4. An Order requiring "the Defendants" not to do anything applies to all Defendants.

5. In this Order, the Second Defendant identified only as "Persons Unknown" refers to those adult persons who are not named Defendants to this Application who have an interest in the Land and/or intend to carry out further works to the Land and/or are intending to occupy the Land or any other purpose in breach of planning control.

Communications with the Court

All communications to the Court about this Order should be sent to Room WG08, Royal Courts of Justice, Strand, London, WC2A 2LL (020 7947 6010). The offices are open between 10 a.m. and 4.30 p.m. Monday to Friday except holidays.

SCHEDULE A

Evidence

The Judge read the following written evidence before making this Order:-

1. First Witness Statement of Leanne Tarling dated 9 April 2026
2. Second Witness Statement of Leanne Tarling dated 10 April 2026

SCHEDULE B

Undertakings given to the Court by the Claimant:-

1. As soon as practicable the Claimant will serve on the named Defendants a sealed copy of this Order and pursuant to the Order for alternative service herein.
2. As soon as practicable the Claimant will serve on the named Defendants the sealed Claim Form in this action claiming the appropriate relief.
3. To use the Claimant's best endeavours to effect personal service on the named Defendants.

Name and Address of Claimant's Legal Representatives:-

Mid Kent Legal Services
Tunbridge Wells Borough Council
Town Hall
Mount Pleasant Road
Tunbridge Wells
Kent
TN1 1RS

Tel: 01622 602126
Email: heather.stevens@midkent.gov.uk

Claim No. KB-2026-001144

IN THE HIGH COURT OF JUSTICE

KING'S BENCH DIVISION

DATED 10 April 2026

IN THE MATTER

B E T W E E N:-

TUNBRIDGE WELLS BOROUGH COUNCIL
Claimant

-and-

(1) DANNY MAURICE DARLING
(2) PERSONS UNKNOWN (THOSE WITH AN INTEREST IN OR INTENDING TO UNDERTAKE WORKS OR INTENDING TO OCCUPY THE LAND KNOWN AS "LAND LYING TO THE SOUTH EAST OF REDWINGS LANE, PEMBURY, TUNBRIDGE WELLS")
Defendants

INJUNCTION ORDER

PENAL NOTICE
IF YOU THE WITHIN NAMED DEFENDANTS, DANNY MAURICE DARLING AND PERSONS UNKNOWN

DISOBEY THIS ORDER YOU MAY BE HELD TO BE IN CONTEMPT OF COURT AND LIABLE TO IMPRISONMENT OR FINED OR YOUR ASSETS SEIZED

Mid Kent Legal Services
Town Hall
Mount Pleasant Road
Tunbridge Wells
Kent
TN1 1RS

Tel: 01622 602126
Solicitors for Tunbridge Wells Borough Council

N244

Application notice

For help in completing this form please read the notes for guidance form N244Notes.

Find out how HM Courts and Tribunals Service uses personal information you give them when you fill in a form: https://www.gov.uk/government/organisations/hm-courts-and-tribunals-service/about/personal-information-charter

Name of court High Court of Justice, KBD	**Claim no.** KB-2026-001144
Fee account no. (if applicable)	**Help with Fees – Ref. no.** (if applicable)
PBA0087587	H W F – –
Warrant no. (if applicable)	
Claimant's name (including ref.) Tunbridge Wells Borough Council	
Defendant's name (including ref.) 1. Danny Maurice Darling 2. Persons Unknown	
Date 10/04/26	

HIGH COURT OF JUSTICE
10 Apr 2026
QUEEN'S BENCH DIVISION
KB-2026-001144
Sub Event ID: 5

1. What is your name or, if you are a legal representative, the name of your firm?
   Mid Kent Legal Services

2. Are you a ☐ Claimant ☐ Defendant ☑ Legal Representative
   ☐ Other (please specify)

   If you are a legal representative whom do you represent? Claimant

3. What order are you asking the court to make and why?
   A continuation of the injunction order of Mrs Justice Stacey dated 10 April 2026 for the reasons set out in the witness statements of Leanne Tarling (dated 9 April 2026) with exhibits.

4. Have you attached a draft of the order you are applying for? ☑ Yes ☐ No

5. How do you want to have this application dealt with? ☑ at a hearing ☐ without a hearing
   ☐ at a remote hearing

6. How long do you think the hearing will last? 1 Hours Minutes
   Is this time estimate agreed by all parties? ☐ Yes ☑ No

7. Give details of any fixed trial date or period

8. What level of Judge does your hearing need? High Court

9. Who should be served with this application? Defendants

9a. Please give the service address, (other than details of the claimant or defendant) of any party named in question 9.

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10. What information will you be relying on, in support of your application?

- ☐ the attached witness statement
- ☐ the statement of case
- ☑ the evidence set out in the box below

If necessary, please continue on a separate sheet.

1. Witness statements of Leanne Tarling (dated 09/04/26) and exhibits.

11. Do you believe you, or a witness who will give evidence on your behalf, are vulnerable in any way which the court needs to consider?

☐ Yes. Please explain in what way you or the witness are vulnerable and what steps, support or adjustments you wish the court and the judge to consider.

☑ No

Statement of Truth

I understand that proceedings for contempt of court may be brought against a person who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

☐ **I believe** that the facts stated in section 10 (and any continuation sheets) are true.

☑ **The applicant believes** that the facts stated in section 10 (and any continuation sheets) are true. **I am authorised** by the applicant to sign this statement.

Signature

Claudette Valmond

☐ Applicant

☐ Litigation friend (where applicant is a child or a Protected Party)

☑ Applicant's legal representative (as defined by CPR 2.3(1))

Date

Day	Month	Year
1 0	0 4	2 0 2 6

Full name

Claudette Valmond

Name of applicant's legal representative's firm

Mid Kent Legal Services

If signing on behalf of firm or company give position or office held

Head of Legal Partnership

Applicant's address to which documents should be sent.

Building and street

Town Hall, Mount Pleasant Road

Second line of address

Town or city

Tunbridge Wells

County (optional)

Kent

Postcode

T	N	1		1	R	S

If applicable

Phone number

01622 602126

Fax phone number

DX number

Your Ref.

T021864

Email

heather.stevens@midkent.gov.uk

N244

Application notice

For help in completing this form please read the notes for guidance form N244Notes.

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Name of court High Court of Justice, KBD	**Claim no.**
Fee account no. (if applicable)	**Help with Fees – Ref. no.** (if applicable)
PBA0087587	H W F – –
Warrant no. (if applicable)	
Claimant's name (including ref.) Tunbridge Wells Borough Council	
Defendant's name (including ref.) 1. Danny Maurice Darling 2. Persons Unknown	
Date	09/04/26

1. What is your name or, if you are a legal representative, the name of your firm?
   Mid Kent Legal Services

2. Are you a ☐ Claimant ☐ Defendant ☑ Legal Representative
   ☐ Other (please specify)

   If you are a legal representative whom do you represent? Claimant

3. What order are you asking the court to make and why?
   An injunction pursuant to s.187B Town and Country Planning Act 1990 (as amended) to prevent breaches of planning control for the reasons set out in the witness statement of Leanne Tarling (dated 09/04/26) with its exhibits.

4. Have you attached a draft of the order you are applying for? ☑ Yes ☐ No

5. How do you want to have this application dealt with? ☑ at a hearing ☐ without a hearing
   ☐ at a remote hearing

6. How long do you think the hearing will last? ☐ Hours 30 Minutes
   Is this time estimate agreed by all parties? ☐ Yes ☑ No

7. Give details of any fixed trial date or period

8. What level of Judge does your hearing need? High Court

9. Who should be served with this application?

9a. Please give the service address, (other than details of the claimant or defendant) of any party named in question 9.

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10. What information will you be relying on, in support of your application?

- [x] the attached witness statement
- [ ] the statement of case
- [ ] the evidence set out in the box below

If necessary, please continue on a separate sheet.

1. Witness statement of Leanne Tarling (dated 09/04/26) and its exhibits.

11. Do you believe you, or a witness who will give evidence on your behalf, are vulnerable in any way which the court needs to consider?

☐ Yes. Please explain in what way you or the witness are vulnerable and what steps, support or adjustments you wish the court and the judge to consider.

☑ No

Statement of Truth

I understand that proceedings for contempt of court may be brought against a person who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

☐ **I believe** that the facts stated in section 10 (and any continuation sheets) are true.

☑ **The applicant believes** that the facts stated in section 10 (and any continuation sheets) are true. **I am authorised** by the applicant to sign this statement.

Signature

Claudette Valmond

☐ Applicant

☐ Litigation friend (where applicant is a child or a Protected Party)

☑ Applicant's legal representative (as defined by CPR 2.3(1))

Date

Day	Month	Year
0 9	0 4	2 0 2 6

Full name

Claudette Valmond

Name of applicant's legal representative's firm

Mid Kent Legal Services

If signing on behalf of firm or company give position or office held

Head of Legal Partnership

Applicant's address to which documents should be sent.

Building and street

Town Hall, Mount Pleasant Road

Second line of address

Town or city

Tunbridge Wells

County (optional)

Kent

Postcode

T	N	1		1	R	S

If applicable

Phone number

01622 602126

Fax phone number

DX number

Your Ref.

T021864

Email

heather.stevens@midkent.gov.uk

Claim Form (CPR Part 8)

In the	High Court of Justice, King's Bench Division Royal Courts of Justice
Claim no.	
Fee Account no.	PBA0087587
Help with Fees - Ref no. (if applicable)	H W F – –

Claimant

Tunbridge Wells Borough Council

Mid Kent Legal Services, Town Hall, Mount Pleasant Road, Tunbridge Wells, TN1 1RS

HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
09 Apr 2026
KB-2026-001144

Defendant(s)

1. Danny Maurice Darling, 1 Newbury Avenue, Enfield, EN3 6ED and Land lying to the southeast of Redwings Lane, Pembury, Tunbridge Wells

2. Persons Unknown, Land lying to the southeast of Redwings Lane, Pembury, Tunbridge Wells

Does your claim include any issues under the Human Rights Act 1998? ☑ Yes ☐ No

Details of claim (see also overleaf)

1. The Claimant seeks an injunction pursuant to Section 187B of the Town and Country Planning Act 1990 (as amended) to prevent continuing breaches of planning control.

2. The Claimant is the Local Planning Authority for the area including the Land known as "Land lying to the south east of Redwings Lane, Pembury, Tunbridge Wells" registered with HM Land Registry under title number TT164814 ("the Land").

3. Section 187B of the Town and Country Planning Act 1990 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.

Defendant's name and address

Danny Maurice Darling
1 Newbury Avenue, Enfield, EN3 6ED
and at Land lying to the southeast
of Redwings Lane, Pembury, Tunbridge
Wells

	£
Court fee	646
Legal representative's costs	to be assessed
Issue date	

For further details of the courts www.gov.uk/find-court-tribunal.
When corresponding with the Court, please address forms or letters to the Manager and always quote the claim number.

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Claim no.	

Details of claim (continued)

4. As set out in the witness statement of Leanne Tarling, Planning Investigation Officer employed by the Claimant, development has taken place in breach of planning control and it is the Council's position that works have been undertaken to prepare the Land for residential occupation.

5. The First Defendant is the registered owner of the Land at HM Land Registry.

6. The Second Defendant is identified only as "Persons Unknown" and refers to those persons who are not named Defendants to this Claim who may have an interest in the Land and/or intend to carry out further works to the Land and/or intend to station caravans and/or mobile homes on the Land for the purpose of residential occupation and/or intend to occupy the Land for residential purposes or other purposes in breach of planning control. The Claimant relies upon Paragraph 20.2 of the Practice Direction Part 8A of the CPR. The Claimant is unable to describe the Second Defendant with any greater particularity than the description herein.

7. The change of use of the Land is development for the purposes of Section 55 of the Town and Country Planning Act 1990 and requires planning permission. Works have already been undertaken to the Land which constitute a breach of planning control and for which planning permission was required.

8. The Land is located within the open countryside, outside of settlement boundaries, within a National Landscape and within the Metropolitan Green Belt and any change of use requires full consideration by the local planning authority.

9. The Claimant considers that it is likely that the Defendants are intending to undertake further works to facilitate the residential use of the Land.

10. In the circumstances set out in the witness statement of Ms Tarling and having regard to the provisions of section 187B of the Town and Country Planning Act 1990 and having regard to Human Rights issues and the Equality Act 2010 and all the circumstances of this matter, it is considered necessary and expedient in the public interest to seek an injunction to prevent further breaches of planning control on the Land.

11. CPR Part 8 applies to this Claim.

12. The Claimant seeks its costs for and incidental to the claim and any other relief the court considers appropriate.

heather.stevens@midkent.gov.uk

Claimant's or claimant's legal representative's address to which documents should be sent if different from overleaf. If you are prepared to accept service by DX, fax or e-mail, please add details.

Statement of Truth

I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

☐ **I believe** that the facts stated in these particulars of claim are true.

☑ **The Claimant believes** that the facts stated in these particulars of claim are true. **I am authorised** by the claimant to sign this statement.

Signature

Claudette Valmond

☐ Claimant

☐ Litigation friend (where claimant is a child or a Protected Party)

☑ Claimant's legal representative (as defined by CPR 2.3(1))

Date

Day	Month	Year
09	04	2026

Full name

Claudette Valmond

Name of claimant's legal representative's firm

Mid Kent Legal Services

If signing on behalf of firm or company give position or office held

Head of Legal Partnership

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Statement on behalf of the Claimant
Witness: Leanne Tarling
1st Statement
Dated: 08/04/26
Exhibits: LT1 - LT27

IN THE HIGH COURT OF JUSTICE **CLAIM NO.**

BETWEEN:-

TUNBRIDGE WELLS BOROUGH COUNCIL CLAIMANT

and

(1) DANNY MAURICE DARLING
(2) PERSONS UNKNOWN

DEFENDANTS

FIRST WITNESS STATEMENT OF LEANNE TARLING

I, Leanne Tarling, Planning Investigation Officer for Tunbridge Wells Borough Council of Town Hall, Royal Tunbridge Wells, Kent TN1 1RS

WILL SAY as follows:-

1. My duties as a Planning Investigation Officer include investigation of, and enforcement against, breaches of planning control in the Borough of Tunbridge Wells.

2. I make this statement in support of the Claimant's Claim for an injunction against the Defendants, pursuant to section 187B of the Town and Country Planning Act

1990 (as amended) (“the 1990 Act”). I am duly authorised by the Claimant to make this witness statement and I make it from my own information, knowledge and belief save where otherwise stated. The Claimant makes an urgent application without notice for injunctive relief.

3. This witness statement relates to Land known as – “Land lying to the southeast of Redwings Lane, Pembury, Tunbridge Wells” which is registered with HM Land Registry under Title number TT164814 (“the Land”) in the name of DANNY MAURICE DARLING of 1 Newbury Avenue, Enfield EN3 6ED, see Exhibit LT20, LT21, LT22 and LT23 and has no pending titles noted on Land Registry. The Land is approximately 0.4 HA.

4. Tunbridge Wells Borough Council is the local planning authority (“the Council” / “the LPA”) within the meaning of the 1990 Act for an area including the Land. I make this witness statement in support of the Claimant’s application for an interim Injunction, and in support of the Claimant’s claim generally.

5. I have visited and therefore have knowledge of the Land.

6. The claimant’s evidence is that there are unauthorised works that have taken place on land without planning permission granted for such, or any change of use of the land from its current agricultural use. The land is sensitive as it outside the Limits to Built Development (LBD),within the High Weald NATIONAL LANDSCAPE (HWNL), the Metropolitan Greenbelt and also controlled under an Article 4 Direction. The Land is visible from the public realm as the public right of way WT218 wraps around the fields, see Exhibit LT13.

7. Furthermore, the Land is part of a valley sloping with the northern boundary of the field being the lowest point where the road of Redwings Lane separates the Land from the Pembury Reservoir, which is on the other side of the road with the associated water treatments works.

8. The springs and the spring system linked to Pembury Reservoir are comprised of Victorian engineering, with the tunnels and spring diversion mains being brick lined

to capture groundwater. The Lower Tunbridge Wells Sands are unconfined and therefore in direct connectivity with the ground above (which includes the land at Redwings) meaning that any fuel oils, fertiliser, manure/sewage, or other chemical applied (including veterinary medications) by way of land use at this location could pollute the underground water sources. As a result, it would be challenging to isolate water in the ground from feeding Pembury Reservoir and South East Water have raised their concerns regarding the unlawful use of a different plot approximately 160m the west of this site which has been the subject of an enforcement notice, an appeal to the secretary of state at which South East Water made representations and the appeal was dismissed .

9. The Claimant seeks, on an interim basis, a prohibitory Injunction to prevent further anticipated breaches of planning control including the unauthorised use of the Land, namely to prohibit the bringing on of any caravans, the importation of any further material, the laying of any hardsurfacing, the erection of any fencing, and any further associated unauthorised development which would facilitate the making of an unauthorised material change of use.

10. The Defendants are the registered legal owner and Persons Unknown.

Planning History

11. The lawful use of the Land is agricultural.

12. The Council's planning records show that there have been various planning applications for the land which specifically includes this plot:

- 25/00077/ARTIC4 – Article 4 Direction Immediate and Non-Immediate – Confirmed 23/09/26
- 24/00124/ARTIC4 – Article 4 Direction Immediate and Non-Immediate – Confirmed 25/10/24
- 24/00203/OPDEV - Breach of stationing of caravan without Planning Permission – case closed

- 23/02396/FULL - Change of use of land from agriculture to equine and erection of 3 stable blocks – Withdrawn
- 23/02432/ENVSCR - EIA Screening Opinion - Change of use of land from agriculture to equine and erection of 3 stable block (23/02396/FULL refers) - NOTR
- 23/01962/FULL - Construction of agricultural barn – Decline to Determine
- 18/01652/AGRIC - Prior Notification for the formation of 2 no. farm accesses with field gates – Prior Notification not required

13. In addition to the history mentioned above, there have been several other enforcement matters on neighbouring plots including: 23/00332/OPDEV and 23/00193/OPDEV which have both had notices served on them for the material change of use of the land to a mixed use of agriculture, equestrian, and the stationing of caravans and mobile homes, these have both been appealed and dismissed by the Planning Inspectorate (and an inspector appointed by the Secretary of State). These two cases are currently being assessed for prosecution for noncompliance. In addition, the refusal of 23/02302/FULL and 23/02303/FULL on the same plots which were both for Change of use of land from agricultural to provide a Gypsy and Traveller pitch (retrospective) were also upheld by PINS. Application 23/01668/FULL for Change of use of land for private equestrian activities and siting of a lodge for office and site management activities which is opposite the land was refused and upheld by PINS, see exhibit LT24. 25/00203/OPDEV is an open investigation on the adjacent plot including the Construction of fencing/gates/creation of enclosers/siting of a shipping container. This has recently had planning permission reference 25/02228/FULL refused (08.04.2026) for (Retrospective) Erection of enclosures with runs & chicken coops, storage container, fencing, polytunnel & excavation of pond. Another pending investigation on a neighbouring plot is reference 24/00199/OPDEV which includes the creation of fencing, a shed and swing, creating a recreational space.

14. The above represents the continued exploitation of the surrounding land. The field adjacent to it has been lotted up to potentially 44 plots (Exhibit LT14) of which some have been subject of enforcement enquiries.

15. Enforcement enquiry 24/00203/OPDEV was a case which involved a caravan being stationed on the same parcel of land subject to this application. A caravan was stationed on the field (Exhibit LT15), when we returned to leave a letter on it advising it to be removed a second caravan had been placed on the land (Exhibit LT16). These caravans were moved off the land, however not by the owner, but apparently, they were stolen.

Reports of unauthorised development

16. On the 8th April 2026 at 13:51 the Council received an email from a member of the public alerting us to a plot of land which had that morning had a large amount of material deposited on the land, with the complainant suggesting that it had been delivered there to facilitate the creation of a large area of hardstanding for a mobile home.

17. My colleague Andrew Culley (Compliance Officer) and I visited the Land as soon as possible; we were onsite shortly before 14:30. On arrival at the Land I noticed a security camera had been installed on a pole at the gated entrance, I did not take a photograph of this at the time. We walked up the track and I could see a digger and three men on site, one was in a white flat-bed truck (Man A), one was on the phone (Man B), another walked away and sat in his blue car (Man C). The plot which was previously an agricultural field now had a large area approximately 6m by 25-30m which had been excavated at parts and levelled out, see Exhibit LT1, LT2, LT5, and LT6.

18. As we walked towards the Land I heard the Man B state “the Council are here”. Man A drove the truck down the hilled track slightly, then stopped to speak to us. Andrew and I introduced ourselves as Council officers and explained that we were there to enquire about the activities in the field. He said that we should speak to the owner, and that he is just there to do what he’s been asked. When I asked him what they are doing, he said they are making a “base for a shed”, I replied, “that’s a pretty large shed”, to which he replied, that they were making a stable for horses. He then stopped the engine and got out of the van to call his boss.

19. Man A did not want to provide his name as he had said that this had nothing to do with him, he was simply being paid to do a job. He did however agree to call his boss to try to contact the landowner. Man B who was on the phone when we arrived had ended his conversation, but also did not want to provide details of himself or anyone else. The third person, Man C had walked over and got into a blue car which was onsite (Exhibit LT1) before we had even got onto the plot. We did not speak to him.

20. I explained to Man A that the works that were being carried out were likely to require planning permission, and therefore it would be in his and the landowners' best interest to cease all works, as if the works are not permitted and were to be refused, then they would likely have to undo all of the works and restore the land to its former condition. He understood this, but then walked away to take a phone call.

21. Walking around the Land there were wooden sleepers in position and surrounding part of the perimeter of the site waiting to level the ground, there was a level on one, see Exhibit LT3. There was a large pile of hardcore on the plot, see Exhibit LT4, and a JCB which had been used to distribute it across the excavated ground, see Exhibit LT3.

22. The earth from the excavation of the land can be seen spilling over the levelled plot in Exhibits LT8, LT9, LT10 and LT11.

23. In the distance of Exhibit LT11 nearby to the electricity pylon there are various structures, fences and other paraphernalia which are not related to this case.

24. When my colleague and I were walking around the Land Man A returned with his phone to say the landowner would speak with us on loudspeaker. He did not disclose his name, or any details about himself. He informed us that he owned the land and that we were on private property and instructed us to get off his land, that we were trespassing. He said we (the Council) cannot do anything and to go away and he doesn't care if we "slap a notice on the gate". This suggests that the owner does not respect such notices as may be issued by the council. My colleague explained that he does not have planning permission for the works carried out, and that there is no application currently pending, to which the land-owner replied that

his solicitor is dealing with it and will post the application. He would not disclose the solicitors name or company, or any details about the application he mentioned. He then told his workers to get back to it and do what they've been told. The landowners voice/tone was very stern/angry and somewhat intimidating.

25. After the phone call ended my colleague and I began to walk away from the site, when Man A expressed concerns regarding a notice, asking if he would be in trouble, how it would affect him. I explained that if we serve a temporary stop notice or any other notice, then anyone in breach of that notice would be held accountable. I strongly suggested that if a notice is served which requires works to cease, then he adheres to the notice. Man A then asked us to "hurry up and serve the notice" as he doesn't want to be there anyway. He mentioned something about the whole deal being a pain, and struggles of getting the money etc.

26. After this interaction we left the site and went back to the office to consult our head of service.

27. On the journey back to the office I took a phone call from Andrew Culley's work phone and spoke with the owner of the neighbouring plot. They wanted to speak with Andrew regarding their application which had been refused that day, and spoke of the issues on neighbouring plots, including those where there are unlawful caravans which are subject to outstanding enforcement notices, and additionally, the plot adjacent to theirs which they said they are "building a house on, laying hardstanding and pouring concrete". They did not disclose where they received this information from. This supports the Councils' concerns for what the intended use of the development may be.

28. At 21:00hrs, the Council served a Temporary Stop Notice on the Land, see Exhibit LT18 and LT19. When we arrived on site there was a large flatbed truck adjacent to the plot and a car on the plot, the same blue car as before a blue Audi with a registration of KY54 NFD. I could see a person sat in the car, possibly two, however it was pitch black by this time so I could not see who it was, nor did I wait to speak to them. As we left the Land the headlights were switched on from the car, and I heard someone get out of the car.

Works preparatory to residential use of the Land – breaches of planning control

29. There have been breaches of planning control as follows:

- Operational development including altering the land levels by way of excavation of the ground and re-distributing earth to level it out, construction/laying of hardstanding
- Engineering operations and groundworks

30. This land is approximately 0.4 Hectares so may benefit from some permitted development rights under Part 6 Clas B - agricultural development on units of less than 5 hectares of the Town and Country Planning (General Permitted Development) (England) Order 2015. The provision of a hard surface is permitted 'where the development is reasonably necessary for the purposes of agriculture within the unit'. As it has already been established that there is no agricultural activities or operational business on the land, nor has there been any communication with the Council to confirm the need, the works are unlawful. In addition, condition B.5—(1) states that Development permitted by Class B and carried out within 400 metres of the curtilage of a protected building is subject to the condition that any building which is extended or altered, or any works resulting from the development, is not used for the accommodation of livestock except in the circumstances described in paragraph D.1(3). Man A had suggested that the hardstanding could be for a stable to house horses, which as the plot is within 400m of two separate Listed Buildings, this would also make the works unlawful and require planning permission.

31. I believe that the works on the Land are intended to facilitate an unauthorised use of the Land in breach of planning control. It is my opinion that the excavation that has taken place is too extensive for a "shed" as contended whilst we were on the Land. The area excavated is, in my opinion, more likely to be preparatory to the stationing of a mobile home.

32. A further supporting factor is that on land nearby caravans have been stationed for residential use in breach of planning control. As set out above, the Council has issued enforcement notices and there has been an appeal dismissed. The Council

is now considering further action in order that the Enforcement Notice is complied with (Exhibit LT25, LT26 and LT27).

33. Lastly, the fact that those working on the Land were not forthcoming with information adds to the suspicion as to the intentions for the Land.

The need for the injunction

34. The Planning Practice Guidance provides as follows:

Injunction:050

How does a Local Authority decide whether seeking an injunction to restrain a breach of planning control is appropriate?

The PPG states that 'in deciding whether it is necessary or expedient to seek an injunction, local planning authorities may find it helpful to consider whether:

- *they have taken account of what appear to be* ***relevant considerations****, including the personal circumstances of those concerned;*
- *there is* ***clear evidence that a breach of planning control has already occurred, or is likely to occur****;*
- ***injunctive relief is a proportionate remedy in circumstances*** *of the particular case; a local planning authority can apply for an injunction whether or not it has exercised, or proposes to exercise, any of their other powers to enforce planning control. However, proceedings for an injunction are the most serious enforcement action that a local planning authority can take because if a person fails to comply with an injunction they can take be committed to prison for contempt of court. Additionally, once an injunction has been granted, it cannot be discharged except where there has been a significant change if circumstances a local planning authority should generally only apply for an injunction as a last resort and only if there have been persistent breaches of planning control over long period and/or other enforcement options have been, or would be ineffective.'* (My emphasis)

35. The Claimant considers it necessary and expedient for this application to be made, having regard to the matters set out above as it believes there are reasonable grounds that the Land is being prepared for an unauthorised use in breach of planning control.

36. The Claimant has carefully considered its options in respect of the Land and the information and evidence to hand. The Claimant could issue an enforcement notice, but this would not be effective against anticipated breaches and so would not prevent the making of an unauthorised material change of use of the land to residential and the bringing on of residential caravans. Furthermore, there is an appeal process against an enforcement notice and, in the Council's experience, it could take years to exhaust the appeals process. If the enforcement notice was eventually upheld the only sanction for breach is a fine following criminal proceedings which are also lengthy to pursue for the LPA. Other enforcement options available to the Claimant include also issuing a Stop Notice to accompany the Enforcement Notice. However, whilst there is action the Claimant could take for the breach of a Stop Notice is criminal proceedings, these proceedings are lengthy, and the only penalty is financial.

37. In the circumstances, and given the anticipated breach of planning control, the Claimant considers that an injunction is the most effective option and that it is proportionate.

38. If a planning application for a change of use of the Land were to be made, the statutory duty under s.38(6) of the Planning and Compulsory Purchase Act 2004 would require the decision maker to determine the application in accordance with the Development Plan unless material considerations indicate otherwise. It is likely that a planning application for a change of use as anticipated would be refused. This is supported by a relatively recent appeal decision on adjacent land (see Exhibit LT27) for the stationing of caravans for residential use by Gypsies and Travellers. At para 66 the Inspector concluded that the development had/would "unacceptably harmed/would unacceptably harm the character and appearance of the area" having assessed visual impact, harm to the National Landscape and openness of the Green Belt. The Inspector also found "an inherent and plausible risk to public water supply and South East Water's infrastructure arising from the

development that has taken place and proposed" and "The risk to the supply of water has the potential to affect some 50,000 people" (para 108) and concluded that "the risk to public health and the supply of drinking water outweighs the benefits to the appellants" (para 112). At that time the Council was unable to demonstrate a 5 year supply of pitches, the tilted balance applied (see para 126) but footnote 7 policies were engaged. The Inspector noted the likelihood of roadside existence, the personal circumstances of those occupants and the children. The Inspector also noted the particular sensitivities of the site and dismissed the appeals.

39. Without knowing any further information regarding possible occupants, at this point, it is the view of planning officers that the same conclusion on planning merits would be reached as the Land displays the same sensitivities and breaches of Development Plan policy.

40. I am of the view that the anticipated development would result in further unauthorised development and the residential use of the Land will have a significant impact on the landscape and visual amenity of this part of the countryside in the National Landscape and Green Belt. Whatever is intended on the Land could also have a serious impact on water supply. Planning decisions must be made in accordance with the Development Plan unless material considerations indicate otherwise (s.38(6) Planning and Compulsory Purchase Act 2004). It is unlikely that officers would support granting planning permission for a change of use of the Land for the reasons set out.

41. It is important to take into account Human Rights issues, especially Article 8 (Right to respect for private and family life) and Article 1 of the Frist Protocol (Right to enjoy property), relevant to this development. It is considered that the assessment represents an appropriate balance between the rights of the landowner subject to reasonable and proportionate controls by a public authority and the wider public interest.

42. The application for an injunction could be interpreted as an interference. Such interference is permitted if it is in the general interest but it must be proportionate

and not in excess of what is needed to prevent harm to the general interest. The Council considers this application proportionate in all the circumstances.

Application without notice

43. This application is being made without notice to the named Defendants. This is because if notice is given, the Defendants would not be prevented in the interim from continuing to undertake further operational development such as the bringing on to the Land of further material and the laying of further hardsurfacing In my experience, by their very nature, a residential caravan can be brought on to Land and stationed, being put to a residential use within hours regardless of whether hardsurfacing or any other infrastructure is in place. It is for this reason that the Claimant does not want to provide even short notice of the application. It is the Claimant's experience that a change of use can take place within an extremely short time frame. he Claimant is of the view that providing the Defendants with notice would provide them with time to bring further caravans on to the Land and/or allow unauthorised residential occupation of the Land immediately even if earlier than originally planned and regardless of any further works being carried out and the Claimant's experience is that it is then a lengthy process to secure cessation of unlawful residential occupation.

44. The Claimant is not satisfied that these works are being undertaken for any lawful use.

45. It is submitted that it is proper to apply for this Order without notice. Experience shows that if residential occupation is taken up efforts to secure compliance with an enforcement notice will be time-consuming. On nearby land, the unauthorised occupation continues in breach of enforcement notices which have been upheld on appeal. Continued damage to the Land and to the environs would be inevitable. Given the sensitivity of the Land the Order is urgent to protect further harm which cannot be remedied. An Injunction Order granted now, without notice, only to maintain the status quo, and before the Defendants can carry out further unauthorised operational development, bring caravans on to the Land will deal effectively with any further risks to the environs.

PERSONS UNKNOWN

46. With regard to the Fifth Defendant, I am aware of the guidance of the Supreme Court in Wolverhampton City Council and others v London Gypsies and Travellers and others [2023] UKSC 47 and the Council is of the view that this is justified as:

(i) There is a compelling justification for the remedy. This includes consideration of the obligation/duty to provide sites for Gypsies and Travellers [190] (the Council accepts that it does not have a 5 year supply of pitches), Needs assessments, planning policy, other statutory powers available and bylaws. Tunbridge Wells Borough Council has a Local Plan with a policy specifically for Traveller Accommodation. Planning applications should comply with policy and the development on the Land is contrary to planning policy and other statutory powers are not effective;

(ii) There are adequate procedural safeguards in both the application and the draft order including an obligation to take all reasonable steps to draw the application and any order made to the attention of those likely to be affected by it and to provide generous provision for liberty to apply to have the injunction varied or set aside;

(iii) The Council has considered any matter which a newcomer might raise to oppose the making of the order;

(iv) The order has clear geographical limits as outlined on the plan attached and temporal limits – there is a Return Date;

(v) It is just and convenient that an injunction be granted for the reasons set out in this witness statement.

47. For completeness, at para 187 and following of the Supreme Court Judgment, the Supreme Court made clear that the Court must have regard to whether there is:

i) Compelling justification for the remedy.

ii) Evidence of threat of abusive trespass or planning breach

iii) Identification or other definition of the intended respondents to the application (if this is not possible, explain why)

iv) The prohibited acts (do the terms of the injunction correspond to the apprehended breaches and are the terms clear and precise?)

v) Geographical and temporal limits

vi) Effective notice of the order. (Can effective notice be given by alternative service?)

vii) Liberty to apply (will be included)

viii) Costs protection (not appropriate in this matter)

ix) Cross undertaking (not appropriate)

Alternative Service

48. The Claimant therefore also applies for an Order for service of any Injunction Order the Court may grant by way of the alternative method set out in the draft attached hereto.

49. There is an urgent need to serve any Order granted to restrain further breaches of planning control. It is the Claimant's experience that Orders served in the manner proposed are effective in bringing such Orders to the attention of the Defendants and also its servants or agents.

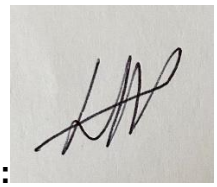
Conclusions

50. Ultimately the injunction is being sought to prevent any further works from being undertaken and to apprehend the anticipated breach of planning control by preventing the stationing of residential caravans on the Land and the carrying out of any further unauthorised facilitating development on the Land. Whilst there are other options available to the Council, such as an enforcement notice, this would not have immediate effect, would not prevent the occurrence of the anticipated unauthorised development and is likely to result in a lengthy appeal timetable and would not prevent further works at the site. In the circumstances, it is considered that there is sufficient evidence of a further intended breach of planning control. The Land is so sensitive, and damage has already been caused.

51. For the reasons stated herein, the Claimant contends that it is necessary and expedient to restrain the Defendants in the manner sought in the draft Order.

I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who

makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Signed: 

Date: 09.04.2026

Exhibit LT1

Exhibit LT2

Exhibit LT3

Exhibit LT4

Exhibit LT5

Exhibit LT6

Exhibit LT7

Exhibit LT8

Exhibit LT9

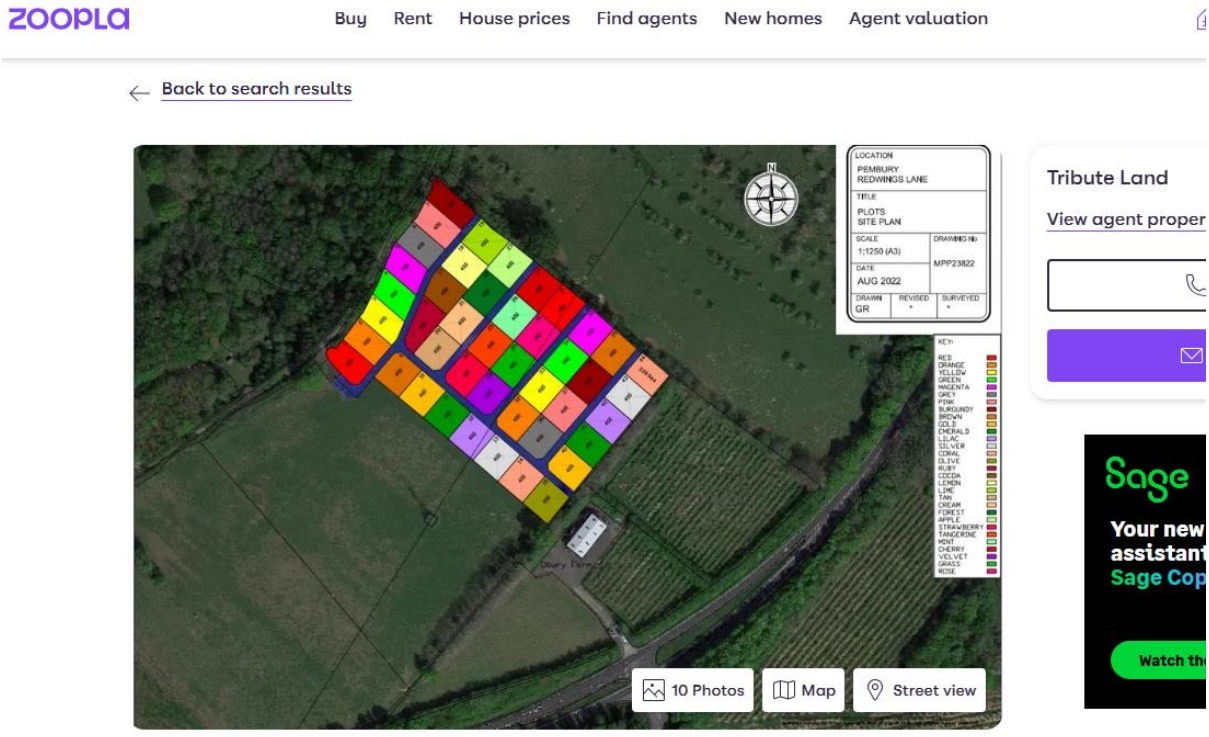
Exhibit LT10

Exhibit LT11

Exhibit LT12

Exhibit LT13

Exhibit LT14



ExhibitLT15

Exhibit LT16

Exhibit LT17

Exhibit LT18

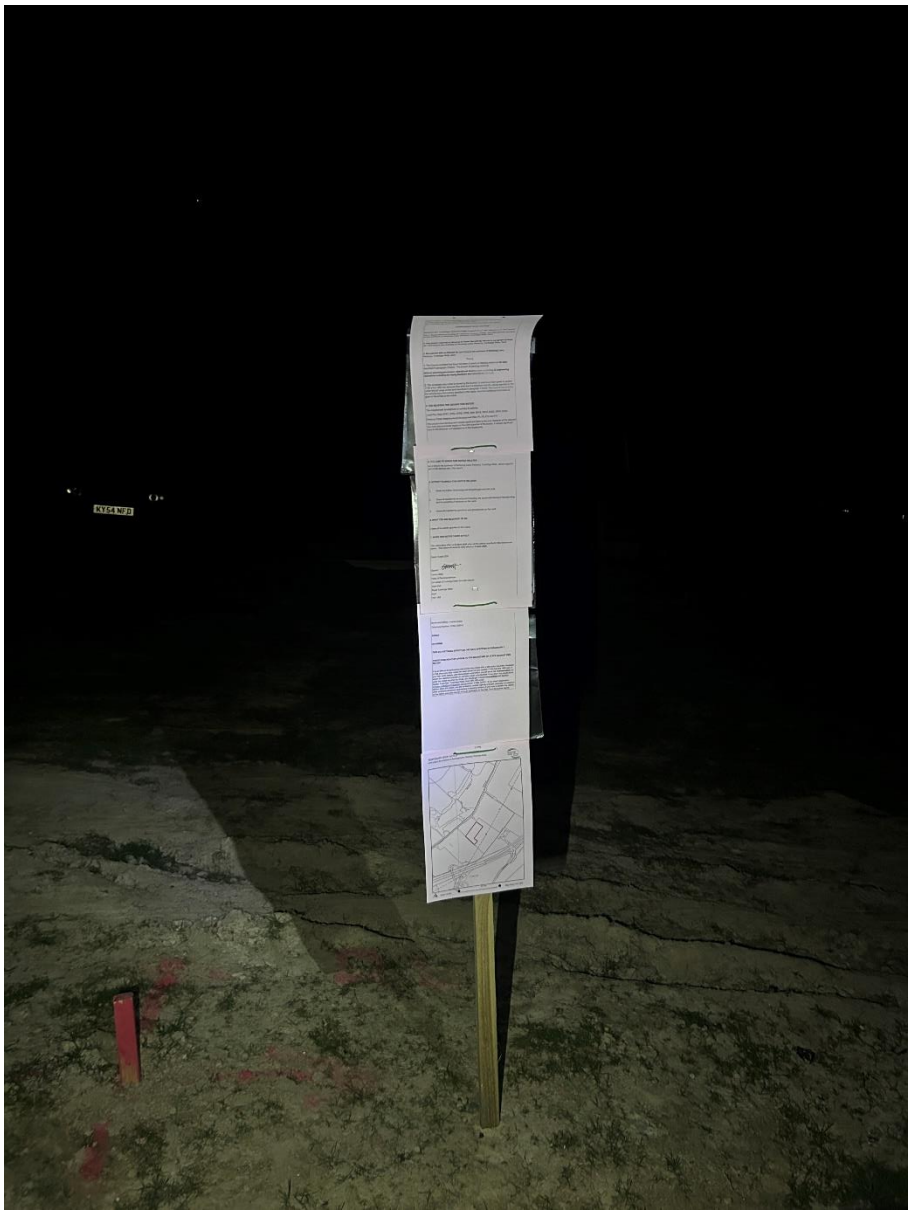


Exhibit LT19

Exhibit LT20

THIS IS A PRINT OF THE VIEW OF THE REGISTER OBTAINED FROM HM LAND REGISTRY SHOWING THE ENTRIES SUBSISTING IN THE REGISTER ON 8 APR 2026 AT 15:21:03. BUT PLEASE NOTE THAT THIS REGISTER VIEW IS NOT ADMISSIBLE IN A COURT IN THE SAME WAY AS AN OFFICIAL COPY WITHIN THE MEANING OF S.67 LAND REGISTRATION ACT 2002. UNLIKE AN OFFICIAL COPY, IT MAY NOT ENTITLE A PERSON TO BE INDEMNIFIED BY THE REGISTRAR IF HE OR SHE SUFFERS LOSS BY REASON OF A MISTAKE CONTAINED WITHIN IT. THE ENTRIES SHOWN DO NOT TAKE ACCOUNT OF ANY APPLICATIONS PENDING IN HM LAND REGISTRY. FOR SEARCH PURPOSES THE ABOVE DATE SHOULD BE USED AS THE SEARCH FROM DATE.

THIS TITLE IS DEALT WITH BY HM LAND REGISTRY, NOTTINGHAM OFFICE.

TITLE NUMBER: TT164814

There is no application or official search pending against this title.

A: Property Register

This register describes the land and estate comprised in the title.

KENT : TUNBRIDGE WELLS

1 (22.03.1984) The Freehold land shown edged with red on the plan of the above title filed at the Registry and being Land lying to the south-east of Redwings Lane, Pembury, Tunbridge Wells.

2 The land has the benefit of the following rights granted by the Conveyance dated 28 February 1984 referred to in the Charges Register:-

"A right of way for agricultural purposes only over and along the roadways and tracks coloured orange on the said plan which are situated upon the retained land

3. The benefit of easements rights quasi easements and quasi rights over the retained land

4. A right to use all the services over on in or under the retained land together with the right to enter onto the retained land for the purpose of cleansing maintaining repairing and renewing the same making good nevertheless as part of the expense of carrying out such work all damage or disturbance which may be caused to the surface of the retained land."

NOTE: The retained land coloured blue referred to lies to the south of the land in this title adjacent to Maidstone Road. The orange track referred to is hatched brown on the title plan

3 (23.11.2017) The land has the benefit of any legal easements granted by a Transfer which included the land in this title and other land dated 14 November 2017 made between (1) Geoffrey Dennis Burdge and (2) Stephen Timothy Morgan.

NOTE: Copy filed under TT73465.

4 (23.11.2017) The Transfer dated 14 November 2017 referred to above contains a provision as to light or air and a provision relating to the passing of easements as therein mentioned.

5 (24.05.2021) The land has the benefit of any legal easements reserved by a Transfer of land lying to the south-east of the land in this title dated 13 May 2021 made between (1) Stephen Timothy Morgan and (2) Oscar George Wickens and Orson Leonard Wickens but is subject to any rights that are granted by the said deed and affect the registered land.

NOTE: Copy filed under TT124446.

6 (05.10.2022) The land has the benefit of any legal easements reserved by a Transfer which included land lying to the north-east side of the land in this title dated 29 September 2022 made between (1) Stephen Timothy Morgan and (2) Equine Welfare Limited but is subject to any rights that are granted by the said deed and affect the registered land.

NOTE: Copy filed under TT148205.

Exhibit LT21

Title number TT164814

A: Property Register continued

7 (13.02.2023) The land has the benefit of any legal easements granted by the Transfer dated 3 February 2023 referred to in the Charges Register but is subject to any rights that are reserved by the said deed and affect the registered land.

8 (13.02.2023) The Transfer dated 3 February 2023 referred to above contains a provision as to light or air and a provision relating to the creation and/or passing of easements.

9 (13.02.2024) The land has the benefit of any legal easements granted by the Transfer dated 8 February 2024 referred to in the Charges Register but is subject to any rights that are reserved by the said deed and affect the registered land.

10 (13.02.2024) The Transfer dated 8 February 2024 referred to above contains a provision as to light or air and a provision relating to the creation and/or passing of easements.

B: Proprietorship Register

This register specifies the class of title and identifies the owner. It contains any entries that affect the right of disposal.

Title absolute

1 (13.02.2024) PROPRIETOR: DANNY MAURICE DARLING of 1 Newbury Avenue, Enfield EN3 6ED.

2 (13.02.2024) The price stated to have been paid on 8 February 2024 was £35,000.

3 (13.02.2024) RESTRICTION: No disposition of the registered estate (other than a charge) by the proprietor of the registered estate , or by the proprietor of any registered charge, not being a charge registered before the entry of this restriction, is to be registered without a certificate signed by a conveyancer that the provisions of Clause 12.6.1 of a Transfer dated 8 February 2024 and made between (1) Equine Welfare Limited and (2) Danny Maurice Darling have been complied with or that they do not apply to the disposition.

C: Charges Register

This register contains any charges and other matters that affect the land.

1 The land is subject to the following rights contained in a Conveyance dated 31 December 1867 made between (1) The Most Honourable John Charles and Marquis Camden (2) The Most Honourable Clementine Augusta Spencer Marchioness Camden (3) The Honourable Edward Stanhope and The Honourable Alan Spencer Churchill and (4) The Tunbridge Wells Improvement Commissioners:-

"Full and free right and liberty to drive and construct and during such time or successive times as the Commissioners their successors or assigns may deem expedient or for ever to maintain a tunnel with proper and sufficient works and conveniences connected therewith in and through those parts of "the secondly scheduled land" situate in the Parish of Capel aforesaid which are Numbered 16, 18 and 21 as well in the second column of the said second Schedule hereunder written in the said deposited plans and deposited books or reference respectively mentioned in the said Tunbridge Wells Water Act One thousand eight hundred and sixty five and in and through likewise those parts of the Secondly Scheduled land" situate in the Parish of Pembury aforesaid which are Numbered and lettered 20, 20a and 21 as well in the second column of the said second Schedule hereunder written as in the deposited plans and deposited books of reference last hereinbefore referred to And also full and free right and liberty to lay and during such time or successive times as the Commissioners their successors or

Exhibit LT22

Title number TT164814

C: Charges Register continued

assigns may deem expedient or for ever to maintain a conduit or line of pipes in and under and for the purpose of conveying water through that part of "the secondly Scheduled land" situate in the said Parish of Pembury which is Numbered 28 as well in the second column of the said second Schedule hereunder written as in the said deposited plans and deposited books of reference AND ALSO full and free right and liberty to lay and during such time or successive times as the Commissioners their successors or assigns may deem expedient or for ever to maintain 2 conduits or lines of pipes in and under and for the purpose of conveying water through that part of "the Secondly Scheduled land" situate in the said Parish of Pembury which is Numbered 28 as well in the second column of the said second Schedule hereunder written as in the said deposited plans and deposited books of reference But so always as that the several parts of the "secondly scheduled land" to be used by the Commissioners their successors or assigns for the purpose of the aforesaid several rights and liberties or easements or any of them shall be those parts only of the same land which are distinguished by the colour green in the said plan drawn on the fourth skin of these presents and of which the respective quantities or contents are set forth in the fourth column of the said second Schedule hereunder written And also by way of further grant or assurance and not of qualification or exception full and free right and liberty to such and during the progress of the works of the Commissioners their successors or assigns or during any less period to maintain a shaft in those parts of "the Secondly Scheduled land" situate in the Parish of Capel aforesaid which are as aforesaid Numbered 16 and 18 (conjointly) and 21 And also full and free right and liberty to deposit and leave on both or either of those parts of "The secondly Schedule land" situate in the Parish of Capel aforesaid which are as aforesaid Numbered 16 and 21 or any part thereof respectively all or any of the spoil which has been or shall be taken from the said tunnel and other the works of the Commissioners in or upon the land comprised in and affected by these presents and other land through which the tunnel passes And also full and free right and liberty to take collect divert impound and use the waters of the spring called Redwing Spring situate in that part of "the First Scheduled land" in the said Parish of Pembury which is Numbered 24 as well in the second column of the said First Schedule hereunder written as in the said deposited plans and deposited books of reference And also full and free right and liberty at all times of ingress egress and regress into from and upon the before mentioned farm lands and premises for the purpose of inspecting repairing replacing or renewing any pipes or apparatus which have been or shall be laid down or works constructed by the Commissioners their successors or assigns in "the First Scheduled land" and "the Second Scheduled land" respectively or either of them or any part thereof respectively subject to their making compensation for any damage occasioned thereby."

NOTE 1: No plan referred to parcels 16 and 18 was supplied on first registration

NOTE 2: Copy plan filed under K567256.

2 The land is subject to the following rights reserved by a Conveyance of the land in this title and other land dated 28 February 1984 made between (1) Tunbridge Wells Borough Council and (2) Geoffrey Dennis Burdge and Cathrine Lilian Burdge:-

"1. A right of way on foot only for the Council and its successors in title the owner or owners for the time being of the retained land shown coloured blue on the said plan and all persons authorised by them in common with the Purchasers or the owner or owners of the land hereby conveyed at all times and for all purposes in connection with the retained land shown coloured blue over the roadways and tracks coloured orange on the said plan

2. A right for the benefit of the Council and its successors in title the owner or owners for the time being of the retained land to use all the services over or in or under the property hereby conveyed together with the right for the Council and its successors in title the owner or owners for the time being of the retained land to enter onto the property hereby conveyed for the purpose of cleansing maintaining repairing and renewing the said services making good nevertheless as part of the expenses of carrying out such work all damage or

Exhibit LT23

Title number TT164814

C: Charges Register continued

disturbance which may be caused to the surface of the property hereby conveyed

3. All easements and rights quasi easements and quasi rights and privileges used or enjoyed by the retained land in over under or in relation to the property hereby conveyed as would be deemed to exist if the property hereby conveyed and the retained land has been in separate ownership for 20 years or more but in their present respective states and such easements and right and quasi easements and quasi rights and privileges had been acquired by prescription."

NOTE: The roadways and tracks coloured orange referred to are hatched brown on the title plan.

3 (14.08.1995) By a Conveyance of other land dated 30 September 1991 made between (1) Tunbridge Wells Borough Council and (2) Geoffrey Dennis Burdge and Cathrine Lilian Burdge the right reserved by paragraph 1 of the Conveyance dated 28 February 1984 referred to above was expressed to be released.

4 (13.02.2023) A Transfer of the land in this title dated 3 February 2023 made between (1) Stephen Timothy Morgan and (2) Equine Welfare Limited contains restrictive covenants.

NOTE: Copy filed under TT151144.

5 (13.02.2024) A Transfer of the land in this title dated 8 February 2024 made between (1) Equine Welfare Limited and (2) Danny Maurice Darling contains restrictive covenants.

NOTE: Copy filed.

End of register

The Planning Inspectorate

Appeal Decision

Site visit made on 7 October 2024

by L Francis BA (Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 6th November 2024

Appeal Ref: APP/M2270/W/24/3339009
Plot 9-11, Land off Redwings Lane, Pembury, Kent TN2 4AD

- The appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) against a refusal to grant planning permission.
- The appeal is made by Mr Frankie Dunphy against the decision of Tunbridge Wells Borough Council.
- The application Ref is 23/01668/FULL.
- The development proposed is change of use of land for private equestrian activities and siting of a lodge for office and site management activities.

Decision

1. The appeal is dismissed.

Preliminary Matters

2. In 2023, designated Areas of Outstanding Natural Beauty in England and Wales became "National Landscapes". The appeal site falls within the High Weald Area of Outstanding Natural Beauty (the AONB) which has become the High Weald National Landscape (HWNL).

3. Section 245 of the Levelling Up and Regeneration Act 2023 (LURA) amended the duty on relevant authorities in respect of their interactions with statutory purposes of National Landscapes, as set out in Section 85 of the Countryside and Rights of Way Act 2000 (as amended) (CRWA). In so far as it relates to this appeal, the amendment now requires relevant authorities "in exercising or performing any function in relation to or so as to affect land in an AONB… to seek to further the purpose of conserving and enhancing the natural beauty of the AONB"[1]. As such, it is incumbent on me to evidence consideration of ways to further the purpose of conserving and enhancing the natural beauty of the HWNL.

4. After the planning application was refused and before the submission of the appeal, the Pembury Neighbourhood Plan 2020-2038 (PNP) was made in October 2023. I have been directed to the relevant policies.

5. The Council has brought my attention to policies within the emerging Tunbridge Wells Borough Local Plan which is currently at examination. Although the Council has provided a number of emerging policies, these were not referred to in the reasons for refusal and their relevance to this proposal has not been explained within the Council's case. As I have no evidence as to whether there are outstanding objections to the policies put to me, or how

[1] AONB and National Landscapes are interchangeable terms.

they might relate to the proposal, I can attach no more than limited weight to them.

Main Issues

6. The main issues are:

- whether the proposal would be inappropriate development in the Green Belt, including any effect on openness having regard to the National Planning Policy Framework (the Framework) and any relevant development plan policies;
- the effect of the proposal on the character and appearance of the area, with particular regard to whether the proposal would conserve and enhance the landscape, scenic and natural beauty of the HWNL;
- the effect of the proposal on ground water, surface water and drainage; and,
- whether any harm by reason of inappropriateness, and any other harm, would be clearly outweighed by other considerations, so as to amount to the 'very special circumstances' required to justify the proposal.

Reasons

Whether Inappropriate Development

7. The appeal site comprises a parcel of land located centrally within a large field bounded by Redwings Lane and Maidstone Road, A228. The land has been in agricultural use though is not currently cultivated. It runs from a belt of trees and vegetation bordering the A228 downhill towards Redwings Lane, beyond which is a reservoir before the land rises to the north. The land is very open, with far reaching views across the valley to the north and west. The vehicular access to the field off the single-track Redwings Lane is located adjacent to the appeal site. A Public Right of Way (PRoW) runs along the ridge next to the belt of trees and the outbuildings of another farm.

8. It is proposed to use the site for equestrian purposes. An access track would be provided from the nearby field access, along with parking for six vehicles. Two new single storey buildings are proposed, labelled on the drawings as a stable and a lodge. The appellant indicates the lodge would be for site management purposes. The submitted drawings, however, show the lodge laid out as a two-bedroom single storey dwelling.

9. The Framework identifies that the construction of new buildings in the Green Belt is inappropriate development. However, paragraph 154 sets out several exceptions to this. Paragraph 154(b) allows the provision of appropriate facilities (in connection with the existing use of land or change of use) for, amongst other things, outdoor sport and outdoor recreation, as long as the facilities preserve the openness of the Green Belt and do not conflict with the purposes of including land within it. Policy MGB1 of the Tunbridge Wells Borough Local Plan 2006 (Local Plan) and Core Policy 2 of the Tunbridge Wells Borough Core Strategy Development Plan Document 2010 (Core Strategy) broadly reflect the approach of the Framework.

10. The facilities proposed in connection with the change of use to be considered under 154(b) would be the stable building along with the single storey lodge

laid out as a two-bedroom dwelling. The appellant states the lodge would be for site management purposes and would not be used as a dwelling, yet the drawings clearly show two bedrooms, a living area, kitchen and bathroom. The evidence provided does not indicate why a two bedroomed dwelling would be required as an appropriate facility in connection with the equestrian use. On the basis of the evidence submitted with the appeal, the proposed lodge would not be an appropriate facility in connection with the change of use.

11. Openness is an essential characteristic of the Green Belt; it can be perceived both spatially and visually. The footprint of the proposed buildings in relation to the overall size of the appeal site would be significant. Given that the land is currently undeveloped, the proposed buildings would significantly reduce the spatial openness of the Green Belt in this location.

12. In visual terms, I accept that visibility from Redwings Lane itself and from the A228 would be limited due to the extent of trees and vegetation lining both roads. Nevertheless, given their prominent central location within the field, the proposed buildings and parking area would be visible from the main vehicular access from Redwings Lane and from the PRoW running along the ridge. As such, there would also be a harmful effect upon the visual openness of the Green Belt as a result of the proposed buildings.

13. The Framework describes the Green Belt as serving five purposes. The appellant states that the proposal would meet paragraph 143(c) in that it would assist in safeguarding the countryside from encroachment. The effect of development as encroachment on the countryside may be in the form of loss of openness or intrusion, and through the loss of openness, there can be an intrusion or encroachment into the countryside. The proposal would have a greater impact on the openness of the Green Belt, result in an encroachment onto undeveloped land and therefore would be contrary to the purpose of including land within it.

14. The proposed development, when judged against the criteria of paragraph 154 of the Framework, Policy MGB1 of the Local Plan and Core Policy 2 of the Core Strategy is therefore inappropriate development in the Green Belt.

15. The Council has also referred to Local Plan Policy LBD1 in its reason for refusal. This policy relates to the limits to built development and does not directly reference the Green Belt, as such I find that it is not determinative on this matter.

Character and Appearance

16. Planning Practice Guidance (PPG) refers to the relevance of management plans for National Landscapes for assessing planning applications. Whilst these do not form part of the development plan, they help to set out the strategic context for development and provide evidence of the value and special qualities of these areas. In this case, there is a management plan, The High Weald AONB Management Plan 2019-2024 (AONB Management Plan), which is therefore a material consideration. The AONB Management Plan finds that the HWNL in this area is characterised by a historic irregular field pattern, surrounded by hedges and areas of dense woodland. Its outstanding beauty derives from its essentially rural and human scale character, high proportion of natural surfaces, tranquillity and dark skies.

17. There is sporadic development in the area around Redwings Lane and the A228. Notably, the barn and other outbuildings at Obury Farm are located between the A228 and the appeal site, along with converted farm buildings at Spring Grove Farm further along Redwings Lane. Notwithstanding this, the appeal site is a small part of a much larger open field that is free from built development. The open undeveloped land of the appeal site contributes positively to the character and appearance of the HWNL. Although I acknowledge that equestrian uses are supported by the Framework in certain circumstances, in this location the introduction of the proposed buildings and parking would be a prominent and intrusive feature in an open, rural landscape. The extent of built development and hardstanding would have an urbanising effect on the appeal site and would potentially introduce clutter from domestic paraphernalia on the site given the proposed layout of the lodge.

18. The proposed development would be highly visible from the vehicular entrance from Redwings Lane, as well as from the PRoW running along the ridge, which has extensive views across the field and beyond the reservoir. This view is specifically identified by Policy P11 of the PNP as a locally significant view which should be protected.

19. The proposed mitigation in the form of hedgerow planting around the appeal site, whilst potentially providing some screening once mature, would also have the effect of enclosing the appeal site as a small area within a larger open field. This would not respect or reflect the landscape characteristic of the HWNL where hedgerows would generally be located along field boundaries.

20. Whilst the appellant has drawn my attention to the presence of other buildings in the area, I have not been provided with any specific details or context of where planning permission has been granted for other similar developments to the appeal scheme. In any event, the appeal scheme is necessarily considered on its own merits.

21. Taken together, the buildings and hardstanding would harm the rural character and appearance of the area. The proposal would neither conserve nor enhance the landscape, scenic and natural beauty of the HWNL. As such, the proposal would fail to accord with Section 85 of the CRWA, as amended by LURA; the aims regarding the built and natural environment of the Borough, particularly to the landscape of the HWNL, as expressed in Core Strategy Core Policies 4 and 14, Local Plan Policies EN1 and EN25, along with Policy P11 of the PNP insofar as it seeks to protect locally significant views. It would also fail to comply with Local Plan Policy LBD1, which cross references proposals outside the limits to built development with other relevant policies in the Local Plan.

22. The Council has also referred to Core Strategy Core Policy 6 in its reason for refusal. This policy relates to housing provision and is not therefore relevant to the character and appearance of the area. As such, it is not determinative on this matter.

Ground Water

23. The appeal site is located close to Pembury's reservoir. The objections raised by both the Environment Agency and South East Water indicate that the proposal would lead to a significant risk of contamination to the ground water

and surface water that feed into the reservoir, and that there is no mains sewer in this location for the proposed lodge to connect with. No substantive evidence was submitted with the appeal to demonstrate that any assessment of the contamination risk has been undertaken, or how it could effectively be mitigated. Similarly there are no details with the appeal of how the drainage to the lodge would be dealt with, beyond the appellant in the planning application form confirming their intention to connect to a mains sewer.

24. I note the view of the appellant that planning conditions could be used to secure appropriate details of drainage and treatment of waste from the proposed use, along with conditions stipulating that no manure or waste materials shall be burned and to require details of a sustainable urban drainage scheme. However, given the degree of uncertainty as to the magnitude of risk to groundwater and surface water, I do not consider the matter can reasonably be dealt with by planning condition.

25. My attention has been drawn to an extract of consultation responses provided by the Environment Agency and South East Water in relation to another planning application. There is no context to explain the response and how it specifically relates to the appeal proposal and as such I attribute it little weight in my assessment of the appeal scheme.

26. I have also been referred to two examples of Screening Opinions made under the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 for similar development for equestrian use off Redwings Lane, where it was determined that the proposal was not Environmental Impact Assessment (EIA) development. I also note that a Screening Opinion has been issued in relation to the appeal scheme itself, also confirming that it would not be EIA development. Nevertheless, this does not mean that it is accepted that the proposals would have no effects on the local environment that would not need to be assessed against the development plan.

27. It has therefore not been demonstrated that the proposal would not result in unacceptable contamination to water that drains into the reservoir. Without these matters being resolved or having sufficient information to show they are capable of being resolved, the development conflicts with Local Plan Policies EN1 and EN16, Core Strategy Core Policy 5 and PNP Policy P5. Taken together and amongst other things, these policies require the proposed use to be compatible with neighbouring uses and ensure that there would be no unacceptable effect upon the quality of groundwater and no adverse impact on the water quality within, or water supply to, lakes, ponds, wetlands and other watercourses.

Green Belt Balance

28. I have found that the proposal would be inappropriate development in the Green Belt, a matter to which the Framework requires me to attach substantial weight. Paragraph 182 of the Framework sets out that great weight should be given to conserving and enhancing the landscape and scenic beauty of these areas. This is supported by Core Policies 4 and 14 of the Core Strategy and Local Plan Policy EN25. I therefore attach great weight to the harm I have identified to the landscape, scenic and natural beauty of the HWNL. It has also not been demonstrated that the proposal would not result in unacceptable contamination to water that drains into the reservoir, to which I attach moderate weight.

29. I acknowledge that equestrian uses can sometimes be classed as not inappropriate development in the Green Belt and that they are a commonly occurring use in the countryside. However, for the reasons set out above, the proposal would be inappropriate development within the Green Belt. I also acknowledge that the scheme would assist in the development and diversification of a land-based rural business, as supported by paragraph 88 of the Framework. I attribute this benefit moderate weight.

30. The Council do not consider that the proposals would be harmful to the living conditions of nearby residents or to highway safety and the detailed design and materials of the buildings would be appropriate. The evidence does not lead me to disagree with these conclusions. The absence of harm in these respects is a neutral factor which does not weigh for or against the proposal.

31. Therefore, the other considerations are not matters that clearly outweigh the harm arising from inappropriateness, including the harm to the character and appearance of the countryside with particular regard to the HWNL, and harm to groundwater and surface water. Consequently, the 'very special circumstances' necessary to justify the development do not exist.

Conclusion

32. For the reasons set out above, the proposal would conflict with the development plan when read as a whole. The material considerations in this case, including the Framework, do not indicate that the decision should be taken otherwise than in accordance with the development plan.

33. For the reasons given above the appeal should be dismissed.

L Francis

INSPECTOR

IMPORTANT - THIS COMMUNICATION AFFECTS YOUR PROPERTY

TOWN AND COUNTRY PLANNING ACT 1990
(as amended by the Planning and Compensation Act 1991)

ENFORCEMENT NOTICE "B"

MATERIAL CHANGE OF USE

ISSUED BY: TUNBRIDGE WELLS BOROUGH COUNCIL

1. **THIS IS A FORMAL NOTICE** which is issued by the Council because it appears to them that there has been a breach of planning control, under Section 171A(1)(a) of the above Act at the Land described below. They consider that it is expedient to issue this Notice, having regard to the provisions of the Development Plan and to other material planning considerations. The Annex at the end of this Notice and the enclosures to which it refers contain important additional information.

2. THE LAND AFFECTED

Land at North Eastern Plot, The Ranch UK, Redwings Lane, Pembury, Tunbridge Wells, Kent, TN2 4AD shown edged red on the attached plan ("the Land")

3. THE BREACH OF PLANNING CONTROL ALLEGED

Without planning permission the material change of use of the Land from agricultural to the mixed use of agriculture, equestrian use and the stationing of a caravan and portable toilet for residential use, along with the associated storage of vehicle trailers, domestic vehicles and the construction of a gravel hard surface.

4. REASONS FOR ISSUING THIS NOTICE

4.1 It appears to the Council that the above breach of planning control has occurred within the last ten years. (Section 171B(3).

4.2 The Land is within the Metropolitan Greenbelt and the development by virtue of its siting and scale on currently open and undeveloped land, fails to preserve the openness of the Green Belt, thus causing significant harm. The borough does not have any identified unmet Gypsy and Traveller need, and there are not considered to be any personal circumstances that warrant Very Special Circumstances for the inappropriate development within the Green Belt. Consequently, the unauthorised development fails to accord with Paragraphs 152-155 of the National Planning Policy Framework 2023, Paragraphs 4, 16, 17, 24, and 27 of Planning Policy for Traveller Sites 2015, Policy MGB1 of the Tunbridge Wells Borough Local Plan 2006, as well as Core Policy 2 of the Tunbridge Wells Borough Core Strategy 2010.

4.3 The development causes significant harm to the rural character of the area and has more than a minimal impact on the landscape character of the locality. It causes significant harm to the character and appearance of the countryside, the Land's rural lane setting and fails to conserve the landscape and scenic beauty of the Area of Outstanding Natural Beauty. As such the proposal is contrary to Paragraphs 180 and 182 of the National Planning Policy Framework 2023, Paragraphs 25 and 26 of Planning Policy for Traveller Sites 2015; Policies EN1, EN25, and H4 of the Tunbridge Wells Borough Local Plan 2006,

Core Policies 4, 5, and 14 of the Tunbridge Wells Borough Core Strategy 2010, and Policies P1, P3, and P11 of the Pembury Neighbourhood Development Plan. The proposal also conflicts with the objectives of the Tunbridge Wells Borough Landscape Character Assessment, the High Weald Area of Outstanding Natural Beauty Management Plan, and the Tunbridge Wells Borough Rural Lanes Supplementary Planning Document.

4.4 There is insufficient evidence before the Council for it to be satisfied that the development does not have a detrimental impact upon the biodiversity of the Land, including the number and location of protected species. No ecological survey or net gain calculation have been submitted and therefore it is not possible for the Council to assess the impact of development and whether it results in harm to a species or its habitat or achieve net gain. As such, the proposal is contrary to Paragraphs 180 and 186 of the National Planning Policy Framework 2023, Policy EN1 of the Tunbridge Wells Borough Local Plan 2006, Core Policies 4, 5, and 14 of the Tunbridge Wells Borough Core Strategy 2010, and Policies P8 and P10 of the Pembury Neighbourhood Development Plan.

4.5 There is insufficient evidence before the Council for it to be satisfied that the development does not have a detrimental impact upon the quality or potential yield of groundwater from the drainage and storage of wastewater/sewage and other potential contaminants such as chemicals, hazardous substances, animal waste and veterinary medicines, and fuel storage. Given the Land's location within a Source Protection (inner) Zone 1 and upon a Secondary A aquifer, and the close proximity to the Pembury Reservoir, this information is required to ensure that there is not an unacceptable effect on the quality or potential yield of groundwater. The development therefore fails to accord with Paragraph 180 of the National Planning Policy Framework 2023, Policy EN16 of the Tunbridge Wells Borough Local Plan 2006, and Core Policy 5 of the Tunbridge Wells Borough Core Strategy 2010.

5. WHAT YOU ARE REQUIRED TO DO

1. Cease the residential use of the Land.
2. Cease the equestrian use of the Land.
3. Permanently remove the caravan from the Land.
4. Permanently remove the portable toilet, all vehicle trailers and all domestic vehicles from the Land.
5. Dig up and remove the hard gravel surface from the Land and backfill the same area with topsoil.
6. Permanently remove all domestic paraphernalia, all materials, rubble and rubbish arising from compliance with steps 1 – 5 above from the Land.

6. TIME FOR COMPLIANCE

Six (6) calendar months after this Notice takes effect.

7. WHEN THIS NOTICE TAKES EFFECT

This Notice takes effect on 23 February 2024 unless an appeal is made against it beforehand.

ISSUED: 19 January 2024

SIGNED:

Claudette Valmond
Head of Legal Partnership
On behalf of Tunbridge Wells Borough Council
Town Hall
Tunbridge Wells
Kent
TN1 1RS

Ref : Js/T019044

YOUR RIGHT OF APPEAL

You can appeal against this Notice, but any appeal must be received, or posted in time to be received, by the Secretary of State before the date specified in paragraph 7 of the Notice.

FEE PAYABLE FOR THE DEEMED APPLICATION

If you make an appeal against this Notice under ground (a) 'that planning permission should be granted' the deemed application fee is £1,156 (being twice the amount of the usual fee payable in respect of an application for planning permission).

The fee must be payable by way of a cheque made to Tunbridge Wells Borough Council. The fee can be sent with your appeal form.

Please see the enclosed notes for guidance from the Planning Inspectorate.

WHAT HAPPENS IF YOU DO NOT APPEAL

If you do not appeal against this Enforcement Notice, it will take effect on the date specified in paragraph 7 of the Notice and you must then ensure that the required step(s) for complying with it, for which you may be held responsible, are taken within the period(s) specified in paragraph 6 of the Notice. Failure to comply with an Enforcement Notice which has taken effect can result in prosecution and/or remedial action by the Council.

Enforcement Notice

Land at North Eastern Plot, The Ranch UK, Redwings Lane, Pembury, Tunbridge Wells, Kent, TN2 4AD

List of Persons Served

Name	Address 1	Address 2
Timothy Morgan	Orchard Place Farm Pearsons Green Road Paddock Wood Tonbridge Kent TN12 6NY	North Eastern Plot The Ranch UK Redwings Lane Pembury Tunbridge Wells Kent TN2 4AD
Frank Smith	North Eastern Plot The Ranch UK Redwings Lane Pembury Tunbridge Wells Kent TN2 4AD	
Debbie Alketton	North Eastern Plot The Ranch UK Redwings Lane Pembury Tunbridge Wells Kent TN2 4AD	
The Occupier(s)	North Eastern Plot The Ranch UK Redwings Lane Pembury Tunbridge Wells Kent TN2 4AD	
The Owner(s)	North Eastern Plot The Ranch UK Redwings Lane Pembury Tunbridge Wells Kent TN2 4AD	
Any other person known to have an interest in	North Eastern Plot The Ranch UK Redwings Lane Pembury Tunbridge Wells Kent TN2 4AD	

Js/T019044

IMPORTANT - THIS COMMUNICATION AFFECTS YOUR PROPERTY

TOWN AND COUNTRY PLANNING ACT 1990
(as amended by the Planning and Compensation Act 1991)

ENFORCEMENT NOTICE "A"

MATERIAL CHANGE OF USE

ISSUED BY: TUNBRIDGE WELLS BOROUGH COUNCIL ("the Council")

1. **THIS IS A FORMAL NOTICE** which is issued by the Council because it appears to them that there has been a breach of planning control, under Section 171A(1)(a) of the above Act at the Land described below. They consider that it is expedient to issue this Notice, having regard to the provisions of the Development Plan and to other material planning considerations. The Annex at the end of this Notice and the enclosures to which it refers contain important additional information.

2. THE LAND AFFECTED

Land at the South Western Plot, The Ranch UK, Redwings Lane, Pembury, Tunbridge Wells, Kent TN2 4AD shown edged red on the attached plan ("the Land")

3. THE BREACH OF PLANNING CONTROL ALLEGED

Without planning permission the material change of use of Land from agriculture to a mixed use of agriculture, equestrian and the stationing of two caravans in residential use including a timber lean to, a portable toilet along with the associated storage of vehicle trailers, two storage containers, domestic vehicles and the construction of a timber framed building and hard gravel surface.

4. REASONS FOR ISSUING THIS NOTICE

4.1 It appears to the Council that the above breach of planning control has occurred within the last ten years. (Section 171B(3)).

4.2 The Land is within the Metropolitan Greenbelt and the development by virtue of its siting and scale on currently open and undeveloped land, would fail to preserve the openness of the Green Belt, thus causing significant harm. The borough does not have any identified unmet Gypsy and Traveller need, and there are not considered to be any personal circumstances that warrant Very Special Circumstances for the inappropriate development within the Green Belt. Consequently, the proposal would fail to accord with Paragraphs 152-155 of the National Planning Policy Framework 2023, Paragraphs 4, 16, 17, 24, and 27 of Planning Policy for Traveller Sites 2015, Policy MGB1 of the Tunbridge Wells Borough Local Plan 2006, as well as Core Policy 2 of the Tunbridge Wells Borough Core Strategy 2010

4.2 The development causes significant harm to the rural character of the area and would have more than a minimal impact on the landscape character of the locality. It would cause significant harm to the character and appearance of the countryside, the Land's rural lane setting and fails to conserve the landscape and scenic beauty of the Area of Outstanding Natural Beauty. As such the development is contrary to Paragraphs 180 and 182 of the National Planning Policy Framework 2023, Paragraphs 25 and 26 of Planning

Policy for Traveller Sites 2015, Policies EN1, EN25, and H4 of the Tunbridge Wells Borough Local Plan 2006, Core Policies 4, 5, and 14 of the Tunbridge Wells Borough Core Strategy 2010, and Policies P1, P3, and P11 of the Pembury Neighbourhood Development Plan. The development also conflicts with the objectives of the Tunbridge Wells Borough Landscape Character Assessment, The High Weald Area of Outstanding Natural Beauty Management Plan, and the Tunbridge Wells Borough Rural Lanes Supplementary Planning Document.

4.3 There is insufficient evidence before the Council for it to be satisfied that the development does not have a detrimental impact upon the biodiversity of the Land, including the number and location of protected species. No ecological survey or net gain calculation have been submitted in relation to the development and therefore it is not possible for the Council to assess the impact of development and whether it would result in harm to a species or its habitat or achieve net gain. As such, the development is contrary to Paragraphs 180 and 186 of the National Planning Policy Framework 2023, Policy EN1 of the Tunbridge Wells Borough Local Plan 2006, Core Policies 4, 5, and 14 of the Tunbridge Wells Borough Core Strategy 2010, and Policies P8 and P10 of the Pembury Neighbourhood Development Plan.

4.4 There is insufficient evidence before the Council for it to be satisfied that the proposed development does not have a detrimental impact upon the quality or potential yield of groundwater from the drainage and storage of wastewater/sewage and other potential contaminants such as chemicals, hazardous substances, animal waste and veterinary medicines, and fuel storage. Given the location of the Land within a Source Protection (inner) Zone 1 and upon a Secondary A aquifer, and the close proximity to the Pembury Reservoir, the development fails to accord with Paragraph 180 of the National Planning Policy Framework 2023, Policy EN16 of the Tunbridge Wells Borough Local Plan 2006, and Core Policy 5 of the Tunbridge Wells Borough Core Strategy 2010.

5. WHAT YOU ARE REQUIRED TO DO

1. Cease the residential use of the Land.

2. Cease the equestrian use of the Land.

3. Permanently remove from the Land all caravans (shown in their current approximate locations marked X & Y on the attached plan).

4. Permanently remove from the Land the timber lean to shown in its approximate location with a black circle adjacent to caravan ‘X’ from the Land.

5. Permanently remove from the Land the timber framed building shown in its approximate position marked with a triangle on the attached plan.

6. Permanently remove the portable toilet, all vehicle trailers, all storage containers and all domestic vehicles from the Land.

7. Dig up and remove the gravel hard surface from the Land and backfill the same area with topsoil.

8. Permanently remove all paraphernalia associated with the unauthorised residential and equestrian use from the Land.

9. Permanently remove all materials, rubble and rubbish arising from compliance with steps 1 – 8 above from the Land.

6. TIME FOR COMPLIANCE

Six (6) calendar months after this Notice takes effect.

7. WHEN THIS NOTICE TAKES EFFECT

This Notice takes effect on 23 February 2024 unless an appeal is made against it beforehand.

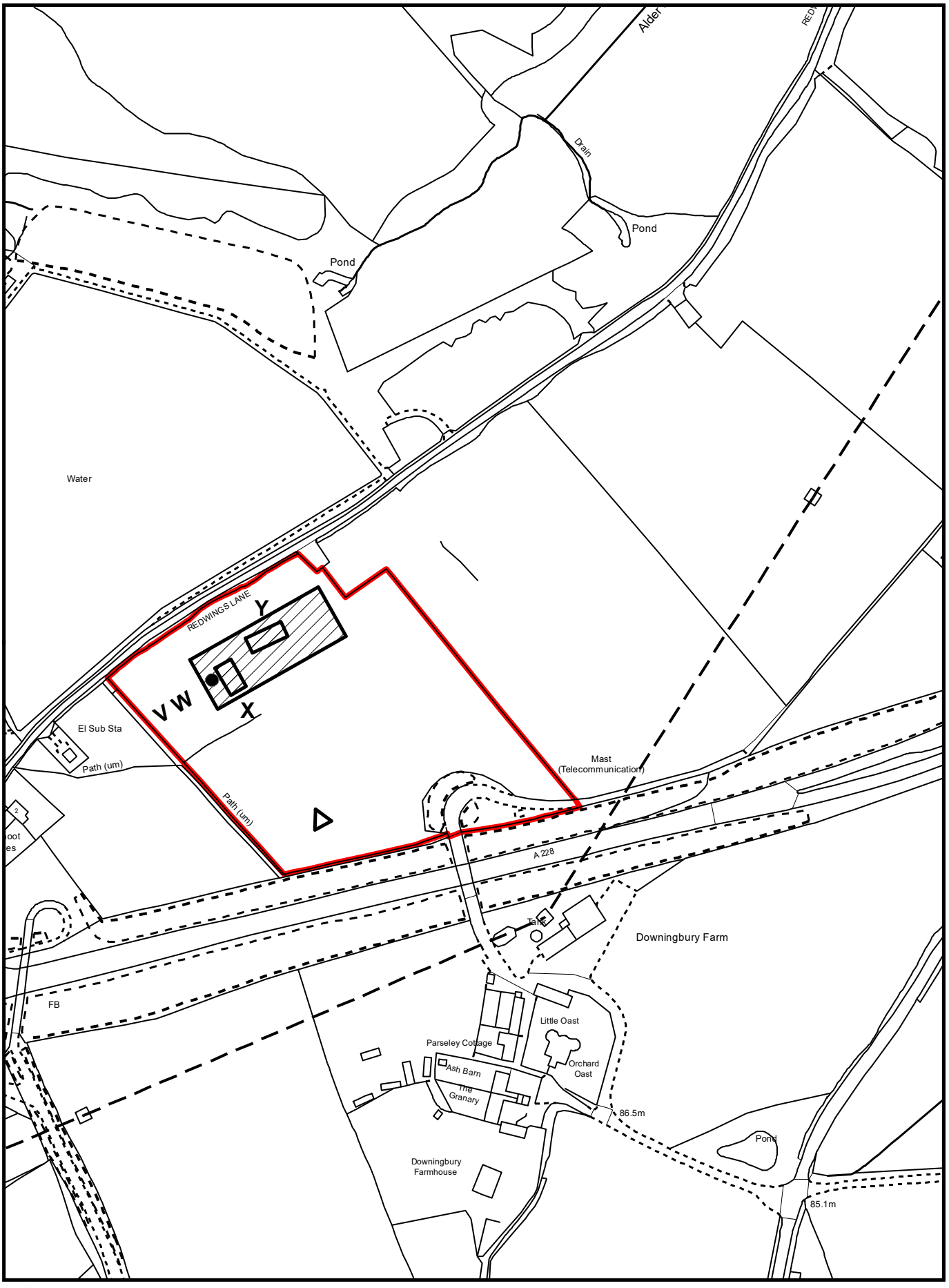
ISSUED: 19 January 2024

SIGNED:

Claudette Valmond
Head of Legal Partnership
On behalf of Tunbridge Wells Borough Council
Town Hall
Tunbridge Wells
Kent
TN1 1RS

Ref : Js/T019044

Land at Redwings Lane, Pembury, Tunbridge Wells, Kent



Scale 1:2,500

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Map Dated: November 2023

YOUR RIGHT OF APPEAL

You can appeal against this Notice, but any appeal must be received, or posted in time to be received, by the Secretary of State before the date specified in paragraph 7 of the Notice.

FEE PAYABLE FOR THE DEEMED APPLICATION

If you make an appeal against this Notice under ground (a) 'that planning permission should be granted' the deemed application fee is £1,156.00 (being twice the amount of the usual fee payable in respect of an application for planning permission).

The fee must be payable by way of a cheque made to Tunbridge Wells Borough Council. The fee can be sent with your appeal form.

Please see the enclosed notes for guidance from the Planning Inspectorate.

WHAT HAPPENS IF YOU DO NOT APPEAL

If you do not appeal against this Enforcement Notice, it will take effect on the date specified in paragraph 7 of the Notice and you must then ensure that the required step(s) for complying with it, for which you may be held responsible, are taken within the period(s) specified in paragraph 6 of the Notice. Failure to comply with an Enforcement Notice which has taken effect can result in prosecution and/or remedial action by the Council.

The Planning Inspectorate

CST Room 3/13
Temple Quay House
2 The Square
Temple Quay
Bristol BS1 6PN

Direct Line 0303-444 5000

THIS IS IMPORTANT

If you want to appeal against this enforcement notice you can do it:-

- on-line at the Appeals Casework Portal (https://acp.planninginspectorate.gov.uk/); or

- by getting enforcement appeal forms by phoning us on 0303 444 5000 or by emailing us at enquiries@pins.gsi.gov.uk

You MUST make sure that we receive your appeal before the effective date on the enforcement notice.

In exceptional circumstances you may give notice of appeal by letter. You should include:-

- the name of the local planning authority;
- the site address;
- your address; and
- the effective date of the enforcement notice.

We MUST receive this before the effective date on the enforcement notice. This should **immediately** be followed by your completed appeal forms.

Enforcement Notice

Land at South Western Plot, The Ranch UK, Redwings Lane, Pembury, Tunbridge Wells, Kent TN2 4AD

List of Persons Served

Name	Address 1	Address 2
Timothy Morgan	Orchard Place Farm Pearsons Green Road Paddock Wood Tonbridge Kent TN12 6NY	South Western Plot The Ranch UK Redwings Lane Pembury Tunbridge Wells Kent TN2 4AD
Billy Smith	South Western Plot The Ranch UK Redwings Lane Pembury Tunbridge Wells Kent TN2 4AD	
Charlotte Vine	South Western Plot The Ranch UK Redwings Lane Pembury Tunbridge Wells Kent TN2 4AD	
The Occupier(s)	South Western Plot The Ranch UK Redwings Lane Pembury Tunbridge Wells Kent TN2 4AD	
The Owner(s)	South Western Plot The Ranch UK Redwings Lane Pembury Tunbridge Wells Kent TN2 4AD	
Any other person known to have an interest in	South Western Plot The Ranch UK Redwings Lane Pembury Tunbridge Wells Kent TN2 4AD	

Js/T019044

The Planning Inspectorate

Appeal Decisions

Hearing Held on 8 and 9 October 2024

Site visit made on 4 December 2024

by Paul Freer BA (Hons) LLM PhD MRTPI

an Inspector appointed by the Secretary of State for Housing, Communities and Local Government

Decision date: 23 January 2025

Appeal A Ref: APP/M2270/C/24/3339249
Land at North Eastern Plot, The Ranch UK, Redwings Lane, Pembury, Tunbridge Wells, Kent TN2 4AD

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mr Frank Smith against an enforcement notice issued by Tunbridge Wells Borough Council.
- The enforcement notice was issued on 19 January 2024.
- The breach of planning control as alleged in the notice is, without planning permission, the material change of use of the Land from agricultural to mixed use of agriculture, equestrian use and the stationing of a caravan and portable toilet for residential use, along with the associated storage of vehicle trailers, domestic vehicles and the construction of a gravel hard surface.
- The requirements of the notice are:
  1. Cease the residential use of the Land.
  2. Cease the equestrian use of the land.
  3. Permanently remove the caravan from the Land
  4. Permanently remove the portable toilet, all vehicle trailers and all domestic vehicles from the Land.
  5. Dig up and remove the hard gravel surface from the Land and backfill the same area with topsoil.
  6. Permanently remove all domestic paraphernalia, all materials, rubble, rubble and rubbish arising from compliance with steps 1 – 5 above from the Land.
- The period for compliance with the requirements is six (6) calendar months.
- The appeal is proceeding on the grounds set out in section 174(2) (a) and (g) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act falls to be considered.

Appeal B Ref: APP/M2270/C/24/3339251
Land at South Western Plot, The Ranch UK, Redwings Lane, Pembury, Tunbridge Wells, Kent TN2 4AD

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mr Billie Smith against an enforcement notice issued by Tunbridge Wells Borough Council.
- The enforcement notice was issued on 19 January 2024.
- The breach of planning control as alleged in the notice is, without planning permission, the material change of use of Land from agriculture to a mixed use of agriculture, equestrian and the stationing of two caravans in residential use including a timber lean-to, a portable toilet along with the associated storage of vehicle trailers, two storage containers, domestic vehicles and the construction of a timber-framed building and hard

gravel surface.
- The requirements of the notice are:
  1. Cease the residential use of the Land.
  2. Cease the equestrian use of the Land.
  3. Permanently remove from the Land all caravans.
  4. Permanently remove from the Land the timber lean-to.
  5. Permanently remove the timber-framed building.
  6. Permanently remove the portable toilet, all vehicle trailers, two storage containers, and all domestic vehicles from the Land.
  7. Dig up and remove the gravel hard surface from the Land.
  8. Permanently remove all paraphernalia associated with the unauthorised residential and equestrian use from the Land.
  9. Permanently remove all materials, rubble and rubbish arising from compliance with steps 1-8 above from the Land.
- The period for compliance with the requirements is six (6) calendar months.
- The appeal is proceeding on the grounds set out in section 174(2) (a) and (g) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act fall to be considered.

Appeal C Ref: APP/M2270/W/24/3339337
The Ranch UK, Redwings Lane, Pembury, Tunbridge Wells, Kent

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
- The appeal is made by Mr Frank Smith against the decision of Tunbridge Wells Borough Council.
- The application Ref 23/02302/FULL, dated 21 August 2023, was refused by notice dated 26 October 2023.
- The development proposed is the change of use of land from agricultural to provide a Gypsy and Traveller pitch (retrospective).

Appeal D Ref: APP/M2270/W/24/3339338
The Ranch UK, Redwings Lane, Pembury, Tunbridge Wells, Kent

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
- The appeal is made by Mr Billie Smith against the decision of Tunbridge Wells Borough Council.
- The application Ref 23/0203/FULL, dated 21 August 2023, was refused by notice dated 26 October 2023.
- The development proposed is the change of use of land from agricultural to provide a Gypsy and Traveller pitch (retrospective).

Summary Decisions:

Appeal A is dismissed and the enforcement notice is upheld with corrections.

Appeal B is dismissed and the enforcement notice is upheld with corrections.

Appeal C is dismissed

Appeal D is dismissed

Procedural Matters

1. These appeals all relate to the same two plots of land located on the south side of Redwings Lane, just to the east of its junction with Old Church Road and to the south of Pembury Reservoir. The address of the two plots is variously described in the enforcement notices and planning applications as the North Eastern Plot and South Western Plot, or Pitch 1 and Pitch 2. In the interest of consistency, I will refer to these two plots as Pitch 1 and Pitch 2. The former is occupied by Mr Frank Smith and his family. The latter is occupied by Mr Billie Smith and his family. Appeals A and C relate to Pitch 1. Appeals B and D relate to Pitch 2.

2. In its representations in relation to these appeals, South East Water indicated that a redacted version had been provided and that sensitive information related to site security at Pembury Reservoir contained in the original had been omitted. It was also indicated in the representation that a copy of the unredacted version could be made available to me if required. During the course of discussion at the Hearing, it became apparent to me that I required sight of the original unredacted version in order to fully understand the evidence presented by South East Water.

3. The Planning Inspectorate is committed to the key guiding principles of openness, fairness and impartiality, known as the Franks Principles. It followed that if I was provided with an unredacted version of the representation made by South East Water, then so too must the appellant and Council have sight of it. It emerged at the Hearing that the Council has already been provided with a copy of the unredacted version on a confidential basis.

4. Understandably, in view of the security implications, South East Water were initially reluctant to provide the unredacted version. However, following discussion, a pragmatic solution was agreed whereby the appellant's agent and myself would both be provided with a copy of the unredacted version subject to signing a Non-Disclosure Agreement. This was done. The appellant's agent is duty bound by his professional Code of Conduct to act in the best interest of his clients. South East Water subsequently agreed that the appellant's specialist witness in relation to this issue could also have sight of the unredacted document.

5. Consequently, even though the appellant's themselves did not have sight of the unredacted version of South East Water's representation, I am satisfied that this solution accorded with the Franks Principles and did not cause any prejudice to the appellant or the Council.

6. At the Hearing, I was made aware of a then outstanding appeal relating to a site close this one, known as Plot 9-11, Land off Redwings Lane, Pembury, Kent TN2 4AD (APP/M2270/W/24/3339009). The appeal was made under section 78 of the 1990 Act against the refusal of planning permission for the change of use of land for private equestrian activities and siting of a lodge for office and site management activities. That appeal was determined on 6 November 2024 and, whilst it related to a different form of development, is nonetheless a material consideration in the determination of this appeal. The appellants and the Council were afforded the opportunity to comment on that decision. I have taken all comments made into account.

7. The revised National Planning Policy Framework (Framework) and the revised Planning Policy for Traveller Sites (PPTS) were both published on 12 December 2024, after the Hearing and shortly after the site visit. I invited the appellant and the Council to comment on the changes made in these two documents in writing. I have taken any comments made into account. Any reference to these documents in my Decision should be taken to be in relation to the 2024 version of these documents, unless specifically stated.

8. In any event, there is no dispute that the occupiers of the sites meet the definition of gypsies and travellers as defined at Annex A of the PPTS. In addition, the appellants are ethnic Romany Gypsies. Their families are local to Kent and have lived and worked in the area for generations, travelling for work seasonally doing fruit and vegetable picking in Kent, Essex and Cambridgeshire.

The Enforcement Notices

9. The requirements of both notices include the word 'permanently.' Having regard to the provisions of Section 181(1) of the 1990 Act, which states that compliance with an enforcement notice shall not discharge that notice, the word 'permanently' is unnecessary. I shall therefore delete it from both notices. I am satisfied that no injustice would be caused by so doing.

Appeals A and B: the appeals on ground (a) and the deemed planning applications, and Appeals C and D

10. The ground of appeal is that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted. The appeal site is within the Green Belt and a National Landscape.

11. Paragraph 16 of the PPTS states that: "Inappropriate development is harmful to the Green Belt and should not be approved, except in very special circumstances. Traveller sites (temporary or permanent) in the Green Belt are inappropriate development unless the exceptions set out in Chapter 13 of the National Planning Policy Framework apply". This is the starting point.

12. In my view, the first exception set out in Chapter 13 of the Framework that potentially applies to the development subject to these appeals is that at Paragraph 156(h)(v), relating to material changes in the use of land (such as changes of use for outdoor sport or recreation, or for cemeteries and burial grounds). However, that is not applicable in this case because that exception does not encompass any change to residential use. Furthermore, for the reasons that I set out below, the development subject to these appeals does not preserve the openness of the Green Belt and conflicts with the purposes of including land within it.

13. One of the changes made to the Framework in December 2024 was at paragraph 155, which now states that the development of homes, commercial and other development in the Green Belt should not be regarded as inappropriate in certain circumstances set out in that paragraph. It is helpful to set out Paragraph 155 of the Framework in full:

The development of homes, commercial and other development in the Green Belt should also not be regarded as inappropriate where: a. The development

would utilise grey belt land and would not fundamentally undermine the purposes (taken together) of the remaining Green Belt across the area of the plan; b. There is a demonstrable unmet need for the type of development proposed; c. The development would be in a sustainable location, with particular reference to paragraphs 110 and 115 of this Framework; and d. Where applicable the development proposed meets the 'Golden Rules' requirements set out in paragraphs 156-157 below.

14. In relation to criterion (b), Footnote 56 of the Framework clarifies that, in the case of traveller sites, this means the lack of a five-year supply of deliverable traveller sites assessed in line with the PPTS. In relation to criterion (c), Footnote 57 of the Framework indicates that in the case of development involving the provision of traveller sites, particular reference should be made to Planning Policy for Traveller Sites paragraph 13.

15. Paragraph 8 of the PPTS is explicit that the Golden Rules do not apply to Traveler sites, such that only criteria (a), (b) and (c) need to be met in this case. On my reading of paragraph 155 of the Framework, the word 'and' between criteria c. and d. is crucial. The inclusion of that word requires that for a development to be found to be not inappropriate in the Green Belt, all relevant criteria set out in paragraph 155 must be complied with. I have approached my consideration of that paragraph on that basis.

16. The development does not/would not utilise 'Grey Belt' land as defined at Annex 2 of the Framework, not least because 'Grey Belt' excludes land where the application of the policies relating to the areas or assets in footnote 7 of the Framework (such as National Landscapes) would provide a strong reason for refusing or restricting development. For the reasons that I set out later in this Decision, I have concluded that the Council cannot demonstrate a five-year supply of sites and that there is a demonstrable unmet need for that type of development. The site is in a sustainable location in the context of paragraph 13 of the PPTS.

17. Consequently, the development alleged in the enforcement notice and proposed in the section 78 appeals does not accord with one of the three criteria set out in paragraph 155 of the Framework that are relevant in this case. This leads me to the conclusion that the development subject to these appeals is inappropriate development in the Green Belt.

18. In reaching that conclusion, I recognise that both enforcement notices allege a mixed use comprised of agriculture, equestrian use and the stationing of a caravan for residential use. A mixed use must be treated as a single entity, even if some components of that mixed use (such as agriculture) would be not inappropriate development within the Green Belt. For that reason, the mixed use alleged in the enforcement notices must be regarded as being inappropriate development in the Green Belt for the purposes of the Framework and the PPTS.

19. The development plan for the area in part comprises the Tunbridge Wells Borough Core Strategy (Core Strategy), adopted in 2010; the Tunbridge Wells Borough Local Plan (Local Plan), adopted in March 1999; and the Pembury Neighbourhood Development Plan (Neighbourhood Plan), adopted in 2023.

20. In relation to development within the Green Belt, Core Policy 2 of the Core Strategy provides that there will be a general presumption against inappropriate development that would not preserve the openness of the Green Belt, or which would conflict with the purpose of including land within it. It goes on to indicate that any new development should accord with the national planning provisions of Planning Policy Guidance Note 2: Green Belts (PPG2) or its replacement.

21. The Local Plan includes Policy MGB1 which provides, amongst other things, that the openness of the Metropolitan Green Belt, as defined on the Proposals Map, will be preserved and no development which would conflict with the purposes of including land within it will be permitted. Policy MGB1 goes on to state that, within the Metropolitan Green Belt, planning permission will not be granted other than for the types of development set out in the policy. The latter includes the carrying out of an engineering or other operation or the making of any material change in the use of land, provided that it maintains the openness of the Metropolitan Green Belt and does not conflict with its purposes.

22. Both policies are predicated on the previous guidance formerly set out in Planning Policy Guidance 2 (PG2), which was published in 1995 and therefore before the publication in 2012 of the first iteration of the Framework. As such, they must be considered out of date in that respect.

23. Nevertheless, the list of development types that could be acceptable in the Green Belt set out in Policy MGB1 is very similar to those set out in the Framework. The only significant difference is the language used: Policy MGB1 does not employ the terms 'inappropriate' and 'not inappropriate' used in the Framework. Apart from that, in practical terms the approach taken in Policy MGB1 is very similar to that taken in the Framework. This brings the breach of planning control alleged in the notice squarely within the remit of Core Policy 2 of the Core Strategy and Policy MGB1 of the Local Plan, notwithstanding that they might be out of date in other respects.

24. The Council has stated four substantive reasons for issuing the enforcement notices, from which the main issues raised are:

    - the effect of the development on the openness of the Green Belt and purposes of including land in the Green Belt
    - the effect of the development on the character and appearance of the area
    - whether the development impacts biodiversity on the Land, including in relation to protected species
    - the effect of the development on the quality and potential yield of groundwater, and
    - whether the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations, so as to amount to the very special circumstances necessary to justify the development.

    Appeals C and D raise the same main issues.

Effect on the openness of the Green Belt

25. The Courts have held that matters relevant to the openness of the Green Belt are a matter of planning judgement, and that openness can have both a spatial aspect as well as a visual aspect.

26. In spatial terms, the caravans on Pitch 1 and Pitch 2 harm the openness of the Green Belt. The timber-framed building, the timber lean-to, portable toilet and the two storage containers on Pitch 2 also erode of the openness of the Green Belt. However, even collectively, the harm to the openness of the Green Belt in spatial terms is moderate.

27. The harm in visual terms in more significant. With the exception of an electricity sub-station to the west of the appeal site and a telecommunications mast south of the appeal site, this side of the valley is generally devoid of built structures. The Green Belt in this location therefore exhibits a considerable degree of visual openness. Consequently, the stationing of the caravans on Pitch 1 and Pitch 2, together with proliferation of small structures such as the timber-framed building, the timber lean-to and the two storage containers on Pitch 2 all significantly harm the openness of the Green Belt in visual terms. This is exacerbated by the parking of vehicles and trailers. Consequently, the overall harm to the openness of the Green Belt is significant.

28. The Council has referred me to an appeal decision in which the Inspector accepted the proposition that allowing the appeal would potentially result in pressure to erect an additional outbuilding or outbuildings at the appeal site for the storage of garden equipment, vehicle parking or horse stables, that latter taking into account the extensive paddocks associated with the property (APP/M2270/W/17/3173199). The Council is concerned that the same pressure could apply in this case, given that the appellants keep horses on the appeal site.

29. The Council's concerns in this respect are understandable. A planning application for a change of use of Pitch 2 to equestrian and the erection of a 2-bay stable block with store has already been submitted (Council Ref:23/03376/FULL). I understand that this application is currently pending consideration. A plan submitted at the Hearing also clearly showed the location of proposed stables and a new sand school, and may have come from that the application. The plan carried the name of Mr B Smith, and it is therefore obvious that the appellants have ambitions in this respect.

30. I agree with the Council insofar as, if the appeals were allowed and a permanent presence established on the land, there would be pressure on the Council to allow developments on this site, such as stables. That pressure may be difficult to resist. This would then adversely affect the openness of the Green Belt in this location, including the potential cumulative effect.

31. There would, however, be other considerations in respect of any such applications in addition to the openness of the Green Belt. It is also a fundamental principle of planning control that each application must be determined in its own merits. I therefore attach only limited weight to the Council's concerns in this respect.

Purposes of including land in the Green Belt

32. Paragraph 143 of the Framework states that Green Belt serves five purposes:

a) to check the unrestricted sprawl of large built-up areas

b) to prevent neighbouring towns merging into one another

c) to assist in safeguarding the countryside from encroachment

d) to preserve the setting and special character of historic towns, and

e) to assist in urban regeneration, by encouraging the recycling of derelict and other urban land.

33. Purposes b), d) and e) are not relevant in this case. In my view, the A228 (Maidstone Road) serves as a physical barrier that would prevent the check the unrestricted sprawl of Pembury before it reached the appeal site. I therefore consider that the development on the appeal site does not/would not offend purpose a) as set out in the Framework.

34. This leaves purpose c) to assist in safeguarding the countryside from encroachment. The development that has taken place on the appeal site is not for agricultural purposes and therefore, by definition, it does/would encroach into the countryside. However, the extent of the development is not significant. Consequently, the harm to the purposes of including land in the Green Belt is limited.

35. I note that the Inspector reached a similar conclusion in dismissing the appeal in relation to the appeal on Plots 9-11 (APP/M2270/W/24/3339009). In that appeal, the Inspector found that the proposal would have a greater impact on the openness of the Green Belt, result in an encroachment onto undeveloped land and therefore would be contrary to the purpose of including land within it. Although relating to a different development, as a matter of principle this finding reinforces my own conclusions in relation to the developments subject to these appeals.

Character and appearance

36. The appeal site is within High Weald National Landscape[1]. Section 245 of the Levelling Up and Regeneration Act 2023 amended the duty on relevant authorities in respect of their interactions with statutory purposes of National Landscapes, as set out in Section 85 of the Countryside and Rights of Way Act 2000 (as amended). Insofar as it relates to this appeal, the amendment now requires relevant authorities "in exercising or performing any function in relation to or so as to affect land in an AONB… to seek to further the purpose of conserving and enhancing the natural beauty of the AONB". As such, it is incumbent on me to evidence consideration of ways to further the purpose of conserving and enhancing the natural beauty of the High Weald National Landscape.

[1] In 2023, designated Areas of Outstanding Natural Beauty in England and Wales became "National Landscapes". In that sense, the terms AONB and National Landscape are interchangeable.

37. The Borough Landscape Character Assessment Supplementary Planning Document (Landscape SPD) summarises the character for the whole Borough as:

"It is predominantly a rural, agricultural landscape of grazed pastures and arable fields highlighted with broad belts of orchards and occasional hop gardens, all set within a framework of woodland. The landscape presents a peaceful and tranquil character, often with a sense of rural remoteness, which belies its location in the populous South East of England. The strong wooded framework is provided by the upland blankets of coniferous plantation, irregular blocks of ancient woodland, thin ghyll woodlands nest led in the valleys and woodland shaw boundaries that harmoniously knit the various agricultural landscapes together".

38. The appeal site is within Landscape Character Area 14: Pembury/Capel Forested Plateau (LCA14), as defined in the Tunbridge Wells Borough Landscape Assessment Supplementary Planning Document (Landscape Assessment), adopted in December 2017. The key characteristics of LCA14 include:

- sandstone forming a high plateau rising to rounded hill tops in the centre of the forest, cut by long valleys of streams flowing northwards to the Medway, creating the locally characteristic topography of deep valleys and ghylls
- extensive woodland and forest cover dominates and tends to conceal local topographic variations and limits views both within the area and beyond
- a relative sense of remoteness
- a self-contained landscape with a 'remote' secretive character with comparatively little settlement apart from Pembury village
- occasional rural lanes, vernacular buildings and small-scale irregular fields provide an intricate pattern and human scale as well as a sense of history.

39. These characteristics are reaffirmed in the Statement of Significance in the High Weald AONB Management Plan which, insofar as relevant to these appeals, identifies the components as including:

- Geology, landform and water systems – a deeply incised, ridged and faulted landform of clays and sandstone with numerous gill streams
- Routeways – a dense network of historic routeways
- Woodland – abundance of ancient woodland, highly interconnected and in smallholdings
- Field and Heath – small, irregular and productive fields, bounded by hedgerows and woods, and typically used for livestock grazing; with distinctive zones of lowland heaths, and inned river valleys.

40. The appeal site displays many of the characteristics of LCA14, insofar as it lies within a valley formed by the Alder Stream. It therefore forms part of the locally characteristic topography of deep valleys and ghylls. The appeal site sits within a self-contained landscape with a 'remote' secretive character with

comparatively little built development. Occasional lanes are a key characteristic of LCA14: Redwings Lane is a Rural Lane as defined by the Councils Rural Land Supplementary Planning Document. The appeal site adjoins a Rural Lane and, despite the proximity to the A228, exhibits a relative sense of remoteness. The immediate setting of the appeal site comprises paddocks which, whilst not characteristic of LCA14 as a whole, emphasise the different character in the valleys that itself informs the local characteristic topography of deep valleys and ghylls.

41. Although not specifically mentioned in the Landscape Assessment, Pembury Reservoir itself makes an important contribution to the character and appearance of immediate area surrounding the appeal site. The group of buildings and other built development associated with the reservoir do introduce an urbanising feature into the landscape but, as an open body of water, the reservoir itself makes an important contribution to the distinctiveness of the location. Consequently, looked at in the round, Pembury Reservoir is a positive element in the landscape. Other urbanising features in the landscape, such as the telecommunication mast, electricity pylons and electricity sub-station, detract from but do not undermine the overall character of LCA14.

42. The appellants have commissioned a Landscape Hearing Statement. I have some difficulties with this statement. Firstly, the statement does not follow a recognised methodology such as the Guidelines for Landscape and Visual Assessments (GLVIA). Neither does it set out the methodology that it has followed. There is no systematic analysis of the visual effect of the development from a range of viewpoints within an identified Zone of Visual Influence or equivalent. Indeed, there is very little by way of description or analysis of the development or its effect in visual terms. Consequently, the statement lacks robustness.

43. Secondly, the existing development clearly formed part of the baseline. That is wrong. The baseline should be the site as it existed immediately prior to the breach of planning control taking place. For that reason, I attach only limited weight to the findings in this statement.

44. A further Landscape Rebuttal was produced in May 2024 which corrected some, but by no means all, of the omissions in the earlier report. The Landscape Rebuttal purports to have been produced in accordance with the GVLIA. However, as the Council points out, although the new work follows more closely the GLVIA it is not entirely consistent with it and does not conform with the guidance. Nevertheless, the Landscape Rebuttal does consider the visual effects from a range of viewpoints, albeit not from the opposite side of the valley. I have therefore afforded this document only moderate weight.

45. As part of my site visit, I viewed the appeal site from all the positions identified by the parties at the Hearing. I have categorized the effect of the development on the landscape on a scale potentially ranging from 'Major Positive' to 'No Change' to 'Major Adverse'. In doing so, I recognise that the sensitivity to changes in the landscape varies between different receptors. In particular, I am mindful that many of the positions from which I viewed the site are public rights of way used principally for recreational purposes. The users of those rights of way are therefore highly receptive to change in the landscape, such that the magnitude of effects would typically be higher. In the absence of

more recent evidence, I have adopted an aerial photograph taken in 2020 and the photographs in the Sales Brochure for the plots (date unknown) as my baseline, at which time the appeal site was all put to pasture.

46. Before assessing the effect of the development from those viewpoints, it is necessary to comment on the principle of Gypsy and Traveller development in the countryside. The appellant has referred to two appeal decisions in which the Inspectors remarked that Gypsy and Traveller sites are not intrinsically discordant or out of character in the countryside (APP/G1630/W/17/3192162 & APP/R3705/W/18/3199149). Whilst I do not disagree with those comments, the key word there is 'intrinsically'. These decisions must therefore be considered in context.

47. The first appeal (3192162) related to a site in the suburbs of Cheltenham. The site was within the Green Belt but did not have any landscape designations. As such, the Inspector did not carry out a detailed analysis of the effect of the development on the character and appearance of the area, dealing with that issue in a single sentence. In the second appeal (3199149), the landscape character area was influenced by the M6 motorway, pylons and many suburban elements. The site itself was well-screened and, the Inspector found, was neither prominent nor discordant.

48. The situation in relation to these appeals is markedly different. The site(s) is within a National Landscape, and exhibits many of the key characteristics of the Landscape Character Area within which it is located. Caravan sites are not identified as being a key characteristic of LCA14. The considerations in this case are therefore very different to those before the Inspectors in the two cases referred to be the appellant. The findings of the Inspectors in those cases may therefore be distinguished from the circumstances in these appeals.

49. The development on the appeal site is not widely visible from Redwings Lane. Such views that are possible are glimpsed views through the hedgerow that borders the lane. Nevertheless, in those glimpsed views the development on the appeal site is clearly discernible and betrays the presence of a use with associated structures that is discordant with LCA14. I afford the weight to this harm as Minor Adverse.

50. The exception to this is the vehicular access from Redwings Lane. From this position on the public highway, the development on the appeal sites is clearly visible, including the caravan and portable toilet on Pitch 2. From this position, the development appears as an untidy and incongruous intrusion into the open fields on this side of the valley. It is wholly out of keeping with the key characteristics of LCA14, not least because the development and associated activity undermines the self-contained and 'remote' secretive character of the landscape outside of Pembury village. For that reason alone, the development on the appeal site is significantly harmful to the character and appearance of the High Weald National Landscape.

51. The development on the appeal sites is most prominent in views from public footpath WT217A, which runs in a north-south direction to the west of the appeal site. Views of the appeal sites from public footpath WT217A vary as the slope is ascended/descended. At the lower end (north), only the structures on Pitch 2 are visible. These include the timber-framed building used as a stable which, because of its isolated mid-slope position, is particularly incongruous in

this, appearing as an isolated structure with no apparent connection to the landscape its sits within.

52. In that context, there is a direct parallel with the development found to be unacceptable by the Inspector in dismissing the appeal in relation to Plots 9-11 (APP/M2270/W/24/3339009) who, in dismissing the appeal, noted that the introduction of the proposed buildings into a much larger open field that is otherwise free from built development resulted in a prominent and intrusive feature in an open, rural landscape.

53. As the slope in ascended, progressively more of the site comes into view. In these views, the development on the appeal site appears as an untidy collection of structures and stored items that is wholly incongruous with LCA14. The storage containers and lean-to structure are particularly harmful in this respect. Towards the top of the slope, the site is viewed against the background of Pembury Reservoir and the woodland beyond. This exacerbates the harm described above. For all these reasons, I afford the weight to the harm when viewed from public footpath WT217A as Major Adverse.

54. A further factor is that the activity on the appeal sites becomes very apparent in these views. This activity is contrary to the sense of remoteness that is a key characteristic of LCA14, as well as the peaceful and tranquil character referred to in the Landscape SPD.

55. Public footpath WT218 runs to the south of the appeal sites. One of views from this public footpath is identified as a Locally Significant View in the Pembury Neighbourhood Plan. However, from that particular vantage point, views of the appeal sites are largely obscured by the topography and intervening vegetation. From other vantage points along public footpath WT218 only the tops of the caravans and structures on the site can be glimpsed. Nevertheless, where visible the development on the appeal sites appears as an incongruous feature in the landscape. In all views from public footpath WT218, where visible the development on the appeal site is viewed against the backdrop of Pembury Reservoir, the buildings of Kent College and the surrounding woodland. I afford the weight to the harm when viewed from public footpath WT218 as Moderate Adverse.

56. Views of the appeal site from public vantage points on the opposite side of the valley are limited. I noted that when walking public footpath WT204A that only glimpses of the development on the appeal site are possible through the intervening vegetation, mostly from one vantage point where there is a gap in the tree cover. In those views, the development on the appeal site appears as an incongruous intrusion into the otherwise open countryside.

57. However, my site visit was undertaken during the winter when foliage on the trees was at a minimum. It is likely that the views of the development on the appeal site from public footpath WT204A would be significantly reduced during the summer months, possibly to the extent that no views would be possible at all. Accordingly, overall I afford the weight to the harm when viewed from public footpath WT204A as Minor Adverse.

58. In summary, from all the places from which I viewed the appeal site or towards it, the harm to the landscape varied between Minor Adverse at best and Major Adverse at worst. This is because the development that has taken place, by

reason of its residential character and untidy appearance, is intrinsically at odds with the clearly defined and distinctive character of the LCA14. This landscape has a strong sense of identity but the development that has taken place is far beyond the capacity of the landscape to accommodate and assimilate it.

59. I have considered the views from all these positions with or without the mitigation measures proposed to be put in place. The appellant has produced two different landscaping schemes: one in the eventuality that there is a direct connection from the site to the main sewer (Drawing No. TDA.2935.01 Rev B) and one that includes a Wetland Treatment System (Drawing No.TDA.2935.010). Both schemes feature proposed Native Hedgerow planting that, when combined with the existing hedgerow adjacent to Redwings Lane, form a rectangular screen surrounding the lower part of the appeal site.

60. The existing slope is mostly grassland, with some isolated trees. It has a generally open character and natural appearance. The rectangular 'enclosure' formed by the proposed hedgerow would introduce a man-made feature of angular form into this natural landscape. Moreover, the 'enclosure' would be the very antithesis of openness and would significantly harm the character of the valley slope in terms of its otherwise essentially open character. It would be a completely alien feature in this generally open part of the landscape. This would only serve to exacerbate the harms that I have identified above.

61. In addition, the landscape option that features the WTS would introduce an area of water within a man-made pond formed by cutting into the slope and building up the bank. The details of this were not finalised at the time of the Hearing but the version shown on Drawing No.TDA.2935.010 would represent an incongruous feature that would be out of character in this landscape. This would further exacerbate the harms that I have identified above.

62. My conclusions in this respect are reinforced by the findings of the Inspector in relation to the appeal on Plots 9-11 (APP/M2270/W/24/3339009). In dismissing the appeal, the Inspector found that the open undeveloped land of the appeal site contributes positively to the character and appearance of the High Weald National Landscape and considered that the introduction of the proposed buildings and parking would be a prominent and intrusive feature in an open, rural landscape. The Inspector went on to find that the extent of built development and hardstanding would have an urbanising effect on the appeal site and would potentially introduce clutter from domestic paraphernalia on the site.

63. I fully recognise that the development before the Inspector in that case was different in several respects from that before me in these appeals, not least in that the development before the Inspector comprised a building in the centre of the field whereas the development before me in part comprises caravans stationed on the edge of the field adjacent to a hedge. Nevertheless, in my view a direct parallel may be drawn with the findings made the Inspector in that case.

64. In particular, the Inspector noted that the proposed development would be highly visible from the vehicular entrance from Redwings Lane. The same applies in this case. Moreover, the mitigation proposed in that case took the form of hedgerow planting around the appeal site. In that respect, the

Inspector found that that whilst potentially providing some screening once mature, that would also have the effect of enclosing the appeal site as a small area within a larger open field. This would not respect or reflect the landscape characteristic of the High Weald National Landscape where hedgerows would generally be located along field boundaries. I have reached a similar conclusion in relation to the hedgerow that is proposed to enclose the caravans and hardstanding in this case.

65. Consequently, notwithstanding the differences between the two developments, in my view the conclusions reached by the Inspector in that case are a material consideration that weighs against planning permission being granted in for the developments proposed in these appeals. In the interests of consistency in decision making, I attach significant weight to that material consideration.

66. I conclude that the breach of planning control that has taken place on the appeal site and the development proposed in the planning applications has unacceptably harmed/would unacceptably harm the character and appearance of the area. I therefore conclude that the development and proposals is/would be contrary to Policies EN1, EN25 and H4 of the Tunbridge Wells Borough Local Plan (Local Plan) which indicates, amongst other things, that the design and external appearance of the proposal would respect the context of the site and that, outside of the Limits to Built Development, would have a minimal impact on the landscape character of the locality.

67. Policy H4 of the Local Plan specifically relates to proposals for the establishment of gypsy sites. This policy states that permission for gypsy sites will be permitted subject to meeting a number of criteria. Those criteria include that the proposal would not be visually intrusive, would be well-screened by existing vegetation and physically contained by landscaping. Another criterion is that proposals would not be located within an exposed position in the High Weald Area of Outstanding Natural Beauty (now National Landscape).

68. The development on the appeal site does not comply with those criteria, being visually intrusive and located in an exposed position, particularly when viewed from public footpath WT217A. The development therefore does not comply with Policy H4 when read as a whole. I recognise that Policy H4 must be considered out of date in other respects. However, I note that in places Policy H9 of the emerging Local Plan is similarly worded. I therefore consider that Policy H4 of the Local Plan remains up to date in this respect.

69. The development and proposals is/would also be contrary to policy P3 of the Neighbourhood Plan which, amongst other things, provides that proposals should incorporate a high quality of design, which responds and integrates well with its surroundings, and minimises the impact on the natural environment of the High Weald AONB. Policy P11 of the Neighbourhood Plan indicates that, as appropriate to their scale and nature, development proposals within the shaded arcs of the various views of Locally Significant Views should be designed in a way that demonstrates how it has taken into consideration the importance of the locally significant view or views, and mitigates any adverse impact on those views. In this particular case, the development does not impact on the Locally Significant View from Public footpath WT218. Nevertheless, for the reasons set out above, overall the development and proposals fail to accord with this policy.

70. The development/proposals also fail to accord with Paragraph 180 of the Framework which, amongst other things, indicates that decisions should contribute to and enhance the natural and local environment by protecting and enhancing valued landscapes and recognising the intrinsic character and beauty of the countryside. Paragraph 182 of the Framework confirms that great weight should be given to conserving and enhancing landscape and scenic beauty in National Landscapes, which have the highest status of protection in relation to these issues.

71. Finally in this context, paragraph 25 of the PPTS states that local planning authorities should very strictly limit new traveller site development in open countryside that is away from existing settlements or outside areas allocated in the development plan. The appeal site(s) is in the open countryside and away from any existing settlements and not in an area allocated in the development plan.

Biodiversity

72. The appellants have commissioned a Preliminary Ecological Appraisal and Bat Survey (PEA), dated September 2024. I have a number of difficulties with this PEA.

73. Firstly, the survey visit for the PEA was undertaken in September and concedes that any early flowering plants on site would have not been identified. The report explains that the site is dominated by common plant species and is subjected to an intensive management regime. The report therefore considers that the risk of under recording important species is likely to be very negligible, an *assumption* further reinforced by the analysis of the historical images available (emphasis added). To my mind, any report of this type that relies upon assumptions runs the risk of not capturing that baseline accurately and undervaluing the ecological value of the site. Relying on historical images is not, in my view, sufficient for that purpose.

74. The main defect with the PEA is that the habitat survey/baseline is the current condition of the site, whereas consideration of the application should be prior to the unauthorised development took place. The baseline for the assessment should be the lawful use of the land as taking place immediately before the breach of planning control took place. For example, the PEA concludes that Great Crested Newts (GCN) are 'likely absent' despite the area being noted as 'amber' for GCN and multiple records within 2km of the appeal site. The salient point is that this prediction is based on the current condition of the site and not the condition of the site before the development took place.

75. Furthermore, the guidance in the Planning Policy Guidance (PPG) indicates that if there has been degradation and there is insufficient evidence about the biodiversity value of the onsite habitat immediately before the degradation, the pre-development biodiversity value of the onsite habitat must be taken to be the highest biodiversity value of the habitat which is reasonably supported by any available evidence relating to it. The PEA contends that degradation has occurred but has not adopted the approach advocated in the PPG.

76. My primary concern with the findings in the PEA is that is dismissive of the likely presence of and effects on protected species. Having identified that the presence of some protected species is 'Likely' (in one case 'Highly Likely'), the

PEA is largely silent on what measures will be taken to avoid or mitigate any harm to those species: for example, in relation to breeding birds.

77. The PEA also appears contradictory in some respects, not recording any harm to protected species despite acknowledging the presence of suitable habitats of trees, hedgerow and grassland margins associated with the hedgerow. For example, Table 4.3 of the PEA records that Hazel dormice are likely to be present, with the commentary explaining that the native hedgerow running along the northern boundary is well connected to suitable habitats and therefore considered likely to support this species. However, without any supporting surveys or other evidence, in describing impacts and opportunities the PEA suggests that the likelihood of dormice being present as relatively low. I have great difficulty in reconciling those two statements.

78. In relation to bats, the PEA records that the site and wider landholding could provide suitable foraging habitat for a number of different species. It is accepted that the hedgerow along the northern boundary is likely to function as a commuting feature as it offers connectivity between patches of good quality roosting and foraging habitats (ancient woodland, woodland edge and water bodies). The modified grassland on site, due to its lack of structure and low biodiversity is considered to offer sub-optimal opportunities to foraging bats. Roosting opportunities within the site boundary are restricted to the presence of two mature oak trees. The wording of this last sentence – 'restricted to' - implies that bats could use the mature oaks for roosting.

79. The Council takes that view and considers that the mature oaks offer potential for roosting bats, with the boundary hedgerows and areas of scrub providing foraging and commuting opportunities. In the absence of a survey of the mature oaks for roosting potential and/or the bat population generally, it is not possible to be definitive about the presence of bats or the numbers/species that might be present. Moreover, if bats are present, they could be adversely affected by the provision of lighting on the appeal site, notwithstanding that the caravans could be re-sited further away from the existing hedgerow and the lighting controlled by a condition.

80. The PEA is just that: an initial assessment. Nonetheless, the PEA constitutes credible evidence from an appropriately qualified and experienced individual that protected species are likely (or highly likely) to be present on the site. A full Ecological Impact Assessment (EcIA) is therefore required that goes beyond just establishing the correct baseline and identifying possible constraints to development. I fully understand that the timetable for this appeal prevented such a survey being undertaken. Nevertheless, in the absence of an EcIA, the full ecological impact of the development cannot be fully understood.

81. ODPM Circular 06/2005 states that it is essential that the presence or otherwise of protected species, and the extent that they may be affected by the proposed development, is established before the planning permission is granted, otherwise all relevant material considerations may not have been addressed in making the decision. Circular 06/2005 goes on to state that the need to ensure ecological surveys are carried out should therefore only be left to coverage under planning conditions in exceptional circumstances.

82. One of the conditions put forward by the appellants is that, within three months of my decision, an Ecological Appraisal identifying biodiversity impacts

and mitigations shall be submitted to and approved in writing by the Local Planning Authority. I recognise that the appellants are living on the appeal site, albeit without the benefit of planning permission. However, I do not consider that this in itself constitutes exceptional circumstances in the context of Circular 06/2005. It therefore follows that imposing such a condition on a planning permission would not be an appropriate and acceptable way in which to address any ecological impacts arising from the development, particularly in relation to protected species.

83. The (deemed) planning applications were submitted before mandatory Biodiversity Net Gain (BNG) under the Environment Act 2021 came into force. It is not currently possible to apply a mandatory 10% biodiversity net gain to retrospective applications. The requirement for BNG in this case therefore arises out of policies in the development plan. These include Core Policy 4 of the Core Strategy which states that the objective will be to avoid net loss of biodiversity and geodiversity across the Borough as a whole. Policy P8 of the Neighbourhood Plan states that ecological assessments by a suitably qualified people must utilise the Defra biodiversity metric on all habitats to demonstrate biodiversity net gain. The supporting text to Policy P8 (albeit not the policy itself) goes on to state that where significant harm cannot be avoided, adequately mitigated or compensated for, then planning permission should be refused.

84. It is axiomatic that the pre-development biodiversity value of a site is a critical step in establishing whether the biodiversity gain objective would be met. This requires a site survey to be undertaken by a competent individual that identifies whether specific habitat types are present. In this case, whilst the PEA has been undertaken by a competent individual, the baseline adopted in that report is wrong. It follows that any calculations made in respect of BNG achievable with the development are inaccurate.

85. The Ecological Advice Service at Kent County Council, which reviews BNG statements on behalf of the Council, considers it likely that BNG could be secured by condition should the appeals be allowed. I take a different view. In the absence of an accurate baseline survey, it is not possible to know what gain over that baseline could be achieved, if any. Undertaking suitable surveys could potentially take some time, throughout which the harms set out in the Enforcement Notice in over respects would persist, with no guarantee that positive BNG could ultimately be achieved. In that scenario, seeking to secure BNG through a condition would not be appropriate.

86. I conclude that insufficient information has been submitted to adequately demonstrate that the (proposed) development could be achieved without a detrimental impact upon the biodiversity of the site, including the number and location of protected species. I therefore conclude that the development would contrary to Core Policy 4 of the Core Strategy and Policy P8 of the Neighbourhood Plan.

87. The development/proposals also fail to accord with paragraphs 180 and 182 of the Framework which, amongst other things, seek to minimise impacts on and provide net gains for biodiversity and confirm that the conservation and enhancement of wildlife is an important consideration in National Landscapes.

Groundwater

88. The development on the appeal site lies directly south of Pembury Reservoir and the associated tunnel assets. The reservoir and the associated water treatment works are operated by South East Water. South East Water strongly objects to the development based upon the risk to public drinking water supply.

89. By way of background, the springs at Pembury Reservoir are fed entirely by groundwater from the Lower Tunbridge Wells Sands aquifer. This is classified by the Environment Agency as a Secondary A Aquifer, defined as:

"Geology with a wide range of permeability and storage, supporting limited supplies at a local rather than a strategic scale, but still important for rivers, wetlands and lakes"

90. The springs and the spring system linked to Pembury Reservoir are Victorian engineering, with the tunnels and spring diversion mains being brick lined to capture groundwater. The Lower Tunbridge Wells Sands are unconfined and therefore in direct connectivity with the ground above, meaning that any fuel oils, fertiliser, manure/sewage, or other chemical applied (including veterinary medications) by way of intensive land use at this location could pollute the underground water sources. As a result, it would be challenging to isolate water in the ground from feeding Pembury Reservoir.

91. As part of my site visit, I was afforded the opportunity to visit Pembury Reservoir, accompanied by representatives of South East Water, the appellant and the Council. I was shown the brick-lined tunnels where water from the springs enters the reservoir, and also the tunnels through which water in the reservoir could be discharged into the Alder Stream if necessary. It was explained at the site visit that the water entering the reservoir is constantly tested but that, should any contamination be detected, it is not possible to treat that contamination on site. One such contaminant is cryptosporidium, a parasite that is known to contaminate lakes, streams and rivers and which originates from the intestines and faeces of animals. Contamination by Cryptosporidium was, for example, responsible for the widespread disruption of the water supplies in south-west England during July 2024.

92. The consequence of the water becoming contaminated is therefore that supplies of water from Pembury Reservoir must be immediately stopped. This underlines the importance of preventing groundwater from being contaminated at source. This is the very principle behind the designation of Source Protection Zones.

93. The appellant's initial proposals featured a Free Water Surface (FWS) wetland treatment system feeding into a Drainage Field. The proposed location of the Drainage Field is inside the Source Protection Zones 2 and 3, and also inside the Source Protection Zone 4 (Zone of Special Interest). South East Water advise that there are risks to public drinking water supply across all designated Source Protection Zones. The appellants accept that the groundwater within Source Protection Zone 4 is a primary receptor that could be affected by any contaminated discharges from the appeal site.

94. South East Water consider that the proposed drainage field and discharge presents a particular contamination risk by virtue of being positioned within the Environment Agency's Groundwater Source Protection Zone 4, 'Zone of Special Interest'. This represents surface water catchments to streams or areas of land draining into the aquifer from outside of the outcrop area, for example, for groundwater recharge. Source Protection Zone 4 contributes a significant proportion of the groundwater source yield. South East Water considers that this highlights the vulnerability of a critical strategic public water source, supplying over 50,000 household customers, large Non-Household customers and several vulnerable customers, such as schools and hospitals in the Pembury and Tunbridge Wells areas.

95. The proposed operations also fall within Source Protection Zone 1c, the 'inner zone', which is designated for the deeper abstractions from the Ashdown Beds beneath the Wadhurst Clay. These are confined and consequently there is an assumption that there is no hydraulic connection between surface waters. But, as South East Water explain, that does not take into consideration the slope and existing evidence of flooding across Redwings Lane, with surface water reaching the reservoir.

96. There was some discussion at the Hearing regarding the extent and location of the Lower Tunbridge Wells Sands Formation and its position in relation to the Source Protection Zones. The map relied upon by South East Water clearly shows the appeal site to be within the Source Protection Zones, including Zone 4 as shaded brown on that map. South East Water explain that this map is produced by overlaying 'layers' of information. The maps provided by South East Water correlate with those provided by the Environment Agency as part of their consultation response.

97. The plan relied upon by the appellants appeared to show the brown shaded area representing Zone 4 as being much smaller in extent and of a different shape. On that map, the Drainage Field would be within the Source Protection Zone but the WTS would be outside of it. However, the Legend for that map appears to suggest that information relates only to Source Protection Zone 1c. Given that the maps are produced using layers of information, I cannot discount the possibility the map relied upon by the appellants is in relation to that layer only. The map relied upon by South East Water is therefore to be preferred.

98. The appellants have commissioned a Groundwater Risk Assessment. This includes water balance calculations relating to infiltration, suggesting the wetland will not be impermeable. The underlying geology is unconfined; consequently the wetland treatment system would need to have a fully impermeable barrier, with a detailed programme of waste management, and a remediation strategy based upon wetland failure.

99. The Environment Agency have confirmed that this discharge would only fall under the General Binding Rules (GBRs) environmental permit exemption if the wetland treatment system is lined by a fully impermeable barrier. The risk assessment currently provides water balance calculations that include infiltration, suggesting the wetland will not be impermeable. Percolation tests have not been undertaken in the location of the proposed drainage field, and those that have been undertaken elsewhere on the appeal site would not be suitable for a Drainage Field. Assumptions cannot be made in this regard.

There must be at least a 1.2m unsaturated zone beneath the invert level of the drainage field pipework, at all times of year. Finally, the Environment Agency confirm that the Pembury Reservoir would have to be lined so as not to be in direct hydraulic continuity with the groundwater of the Tunbridge Wells Sands Formation.

100. If the above criteria cannot be met in full, the Environment Agency confirm that the appellants must then apply for an environmental permit (groundwater activity). The Environment Agency make it clear that there can no guarantee that a permit would be granted for this discharge in this location.

101. There are three sets of tunnels (Tunnel Springs, Source Tunnel and Alder Tunnel) set within Lower Tunbridge Wells Sands Formation, which is known for its high porosity. These tunnels are in direct hydraulic continuity with the groundwater of the Tunbridge Wells Sands Formation. As such, South East Water consider that there is a high risk from subsurface infiltration of effluent. Moreover, these tunnels link to the Alder Stream. Any contamination that reaches the spring tunnels would therefore also contaminate the Alder Stream.

102. The appellants stress that the water that percolates through the WTS and Drainage Field would meet, and possibly exceed, Drinking Water Standard (DWS). However, as South East Water explained at the Hearing, DWS is not the only standard that applies to water quality. South East Water confirmed that the water extracted from the Tunbridge Wells Sands aquifer needs to comply with all the relevant standards.

103. Furthermore, whilst the percolation tests were carried out in general accordance with best practice, the tests that have been undertaken were not carried out in the same locations as the proposed FTS or Drainage Field would be. Consequently, I cannot discount the possibility that the soil conditions (and therefore percolation rates) were not the same as where the FTS or Drainage Field would be. Moreover, questions were raised at the Hearing about the depth of the proposed Drainage Field, the potential freeboard of the FTS and the slope of the FTS. All of those factors could potentially affect the performance of the FTS or Drainage Field. This reduces the reliance that I can place on the FTS and Drainage Field to successfully treat the water to the required standard(s).

104. South East Water explain that, where development has historically taken place around Pembury Water Treatment Works, severe restrictions have been imposed that require containment of any wastewater and a prohibition upon the storage or application of chemicals or other chemical inputs, apart from animal manure. Where grazing is permitted, in order to mitigate risks of transfer of water quality issues, this is at a very low stocking level, which South East Water would class as the equivalent of one horse per hectare for year-round grazing (with no supplementary feed), and with no permanent structures to be erected.

105. I am mindful that the concerns expressed by South East water are not confined to the FTS. Concern is also expressed that the operation as an equine pasture, and storage at the site is a primary risk. In that context, South East Water maintain that there is insufficient detail regarding how the manure storage will be contained/bunded within the concrete yard to ensure that nutrients, veterinary medicines, equine parasites, cannot run off and enter the

underlying aquifer. South East Water go on to explain that even setting aside their concerns over the FTS there remains a risk to the public water supply, due to the high risk slope at this location which, particularly under heavy or prolonged rainfall events, represents a direct pathway for infiltration to the underlying aquifer and spring system, or for overland runoff to the reservoir, and nearby Alder Stream. Evidence to support that concern was provided in the unredacted statement made available by South East Water.

106. The appellants currently have up to eight horses on the land, far exceeding the maximum considered acceptable by South East Water. The appellants did accept that the number of horses kept on the land could be reduced to a number that would be acceptable to South East Water and explained that no chemicals or fuels are stored on the land. It was suggested that this could be controlled through the imposition of conditions. This would include an interceptor to capture any spilled fuel or oil washed off the hardstanding.

107. However, whilst I can understand that reducing the number of horses kept on the land to the minimum considered acceptable to South East Water could reduce the risks to an acceptable level in some respects, it seems to me that the issues relating to the storage and use of chemicals on the site would be omnipresent even if only a few horses were kept on the land. The risk of chemicals seeping into the groundwater would still be present, and I have no evidence to show that even small amounts of chemicals entering the groundwater would not pose a risk to public health. For that reason, I am not satisfied that the concerns of South East Water could be successfully addressed by the imposition of conditions.

108. On the evidence before me, there is an inherent and plausible risk to public water supply and South East Water's infrastructure arising from the development that has taken place and is proposed. Indeed, South East Water indicated that it may find it necessary to utilise its statutory powers under the Water Industry Act 1991 to prevent the (existing) land use. It would not be prudent to let the situation reach that stage. The risk to the supply of water has the potential to affect some 50,000 people, not least in relation to public health. The design of the WTS and Drainage Field have not yet been finalised and more testing is required. In my view, it would not be sensible to rely on the imposition of planning conditions where the quality and yield of drinking water to a sizeable population would be at risk.

109. The appellants initially believed that the closest connection point to the main sewer was some 300m from the appeal site. For that reason, any consideration of connecting to it was initially discounted due to cost. However, at the Hearing, it emerged that the closest connection point to the main sewer was in fact only some 120m from the appeal site. The appellants sought a revised quote for connecting to the sewer, which was acceptable to them (in the event that a permanent permission was forthcoming). This then replaced the WTS and Drainage Field as the preferred solution. South East Water confirmed that, in principle, this would overcome their objections (that is when combined with the restrictions on the number of horses kept on the land).

110. The difficulty is that there was very little preparatory work done in relation to the connection to the main sewer. Beyond being located in Old Church Road, the precise location of the main sewer has not been specified. No feasibility study has been undertaken. Consequently, there can be no

guarantee that this would even be possible. I have not been provided with detailed and fully worked out costings for connecting with the main sewer. Some opinions were expressed at the Hearing that the costs quoted were unrealistically low, based on personal experience of smaller such schemes.

111. As a result, I have no confidence that connection with the main sewer could be achieved at a cost the appellants could afford, or for that matter could even be achieved at all. The corollary is that, should on further analysis connection to the main sewer prove impractical or unaffordable, the appellants would have to revert to the WTS and Drainage Field solution that I already found to be unacceptable and which, on the evidence before me, is unlikely to receive an environmental permit in its present form. It is for this reason that, in my view, it would not be sensible to rely upon a planning condition to secure the connection to the main sewer. The stakes are too high, given the potential implications for quality and yield of the water supply to a sizeable population.

112. Given that insufficient work has been done at this time to show that connection with the main sewer is technically and financially possible, there is a realistic prospect that this may ultimately prove not to be possible. Consequently, on balance, I consider that the risk to public health and the supply of drinking water outweighs the benefits to the appellants.

113. I note that the Inspector reached a similar conclusion in relation to the risk to groundwater in dismissing the appeal in relation to the appeal on Plots 9-11 (APP/M2270/W/24/3339009). In that case, the Inspector concluded that it had not been demonstrated that the proposal would not result in unacceptable contamination to water that drains into the reservoir. Significantly and in a direct parallel with the appellant's latest position in respect of the current appeals, this conclusion was reached notwithstanding that the appellant in that case had indicated on the planning application form that it was their intention to connect to a mains sewer.

114. I do not know what evidence on this issue was before the Inspector in that case. However, it is clear from the Inspector's Decision Letter that the appellant in that case was of the view that planning conditions could be used to secure appropriate details of drainage and treatment of waste from the proposed use, along with conditions stipulating that no manure or waste materials shall be burned and to require details of a sustainable urban drainage scheme. It is therefore particularly instructive to note the Inspector's finding that*, given the degree of uncertainty as to the magnitude of risk* to groundwater and surface water, she did not consider that the matter could reasonably be dealt with by planning condition (emphasis added). That conclusion mirrors my own in relation to these appeals, and is again a material consideration to which I attach considerable weight.

115. During the site visit, the appellants drew my attention to the telecommunication mast that directly adjoins their land and to the two generators that provide power to it. The appellants point out that fuel from these generators spills onto the ground. I took a closer look at these generators as part of walk along public footpath WT218 and, whilst there was no evidence of any fuel spillage at the time of my site visit, on the limited evidence before me I do not discount that possibility. The representative of South East Water present at the site visit was aware of this issue but was not in a position to provide any further information.

116. In the absence of any detailed evidence on this matter, I am not able to determine whether this fuel spillage is a source of contamination of the groundwater feeding into the Lower Tunbridge Wells Sands Formation. Moreover, even if it was a source of contamination, that would be an entirely separate matter and would be in addition to any contaminants arising from the appeal site and not instead of it. Consequently, the possibility of contaminants entering the groundwater from the generators associated with the telecommunication mast does not justify the further risk of groundwater contamination that could potentially arise from the appeal site as a result of the development that has taken place.

117. I conclude that there is insufficient evidence to show that the development would not have a detrimental impact on the quality or potential yield of groundwater. I therefore conclude that the development would be contrary to Core Policy 5 of the Core Strategy and Policy EN16 of the Local Plan. These policies require, amongst other things, that developments will be expected to make efficient use of water resources and to protect water quality, and will only be permitted where there would be no unacceptable effect on the quality or potential yield of groundwater.

118. The development/proposals also fail to accord with paragraph 180 of the Framework which, amongst other things, seeks to prevent new development from contributing to unacceptable levels of water pollution and indicates that development should, wherever possible, help to improve water quality.

119. Finally in this respect, paragraph 25 of the PPTS states that local planning authorities should ensure that sites in rural areas should avoid placing an undue pressure on the local infrastructure. For the reasons I have set out, the development would potentially place undue pressure on the local infrastructure (albeit perhaps not in the terms envisaged in the PPTS) in terms of the supply of water.

Other considerations

The need for and supply of sites for gypsies and travellers

120. The Tunbridge Wells Borough Council Five-Year Gypsy and Traveller Pitch Supply Statement 2024 (2024 Statement) sets out the position as at 1 April 2024. The 2024 Statement is informed by the revised Gypsy and Traveller Accommodation Assessment (GTAA) produced in 2024, which updates the assessment of need within the Borough for the period from 2024 to 2039. The GTAA takes account of the revised definition of Gypsies and Travellers in the PPTS published in December 2023, but for obvious reasons not the revised definition set out in the Framework.

121. The 2024 Statement provides figures for two needs: the ethic identity definition (Ethnic), which includes all Gypsies and Travellers irrespective of whether they have ceased to travel or not: and the PPTS Definition, which includes Gypsies and Travellers who on grounds only of their own or their family's or dependants' educational or health needs or old age have ceased to travel temporarily or permanently. In the interest of simplicity, I will focus on the Ethnic Definition as being the higher need.

122. Taking the Ethnic definition, the 2024 Statement indicates that the need between April 2024 to March 2039 totals 54 pitches. The total supply during that period is anticipated to be 25 pitches, but with potential additional pitch capacity at existing sites being 12-13 pitches and potential additional pitches at new site allocations providing an additional 3 pitches. Consequently, the total supply would amount to 40-41 pitches against a total need for 54 pitches, a shortfall of 13-14 pitches. This equates to a five-year supply (Ethnic) of 3.24 years. If the PPTS definition is taken, the five-year supply would be 4.14 years.

123. It follows that whichever definition is taken, the Council is unable to demonstrate a five-year supply of Gypsy and Traveller pitches. Any shortfall would only be exacerbated by the revised definition in the Framework.

124. Paragraph 10 of the PPTS requires local planning authorities to identify and update annually a supply of specific deliverable sites sufficient to provide 5 years' worth of sites against locally set targets and identify a supply of specific developable sites or broad locations for growth for years 6-10 and, where possible, for years 11-15. It is clear that the Council has failed to accord with that requirement in the PPTS.

125. Nevertheless, the PPTS must be read as a whole. Policy E of the PPTS confirms that inappropriate development is harmful to the Green Belt and should not be approved, except in very special circumstances. Policy E of the PPTS goes on to confirm that traveller sites in the Green Belt are inappropriate development unless the unless the exceptions set out in Chapter 13 of the National Planning Policy Framework apply. When read in conjunction with Policy E of the PPTS, I am satisfied that none of the exceptions set out in Chapter 13 of the Framework apply in this case, including the exception at paragraph 154(h)(v) in relation to material changes of use of land.

126. Furthermore, paragraph 28 of the PPTS states that if a local planning authority cannot demonstrate an up-to-date 5 year supply of deliverable sites, the provisions in paragraph 11(d) of the Framework apply. For decision making, this means granting permission unless (i) the application of policies in this Framework that protect areas or assets of particular importance provides a strong reason for refusing the development proposed; or (ii) any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole, having particular regard to key policies for directing development to sustainable locations, making effective use of land, securing well-designed places and providing affordable homes, individually or in combination.

127. Footnote 7 to the Framework confirms that the policies referred to in paragraph 11(d) are those in the Framework itself (rather than those in development plans) relating to, amongst other things, land designated as Green Belt and/or a National Landscape.

128. Paragraph 153 of the Framework indicates that inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances. Policy E of the PPTS confirms that traveller sites in the Green Belt are inappropriate development.

129. Paragraph 189 of the Framework indicates that development within the setting of a National Landscape should be sensitively located and designed to

avoid or minimise adverse impacts on the designated areas. I have found that the development causes significant harm to the setting of the High Weald National Landscape.

130. In my view, paragraphs 153 and 189 of the Framework both individually and collectively provide strong reasons for refusing the development that has been carried out and which is proposed. The provision in paragraph 11(d) of the Framework is therefore disapplied in this case on the basis of the proviso in (i) alone.

131. It follows that there is strictly no need for me to go on to consider the proviso in (ii) of paragraph 11(d) of the Framework. Nevertheless, for the sake of completeness, I will do so briefly here.

132. Paragraph 8 of the Framework indicates that achieving sustainable development means that the planning system has three overarching objectives: an economic objective, a social objective and an environmental objective. My reasoning in relation to those objectives is set out elsewhere in this Decision, albeit not under those headings. The following is therefore a 'headline' balancing exercise based on that detailed reasoning.

133. In terms of the economic objective, the development that has been carried out contributes very little to the local economy in terms of re-spend and/or re-investment into that economy. In terms of the social objective, the development does provide a home for the appellants and their families, and there would be social consequences should the appeals not succeed. In terms of the environmental objective, the development causes significant harm to the Green Belt and a National Landscape, has not been demonstrated not to have a detrimental impact upon the biodiversity of the site (including in relation to protected species) and constitutes a significant and omnipresent threat to the water supply of a sizeable population.

134. In balancing those objectives, I conclude that the adverse impacts of granting planning permission would not significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework taken as a whole.

135. Having regard to all the above, in this case I attach only moderate weight to the fact that the Council cannot demonstrate a five-year supply of sites.

Availability of sites

136. It was held in *Angela Smith v Doncaster MBC* [2007] EWHC 1034 (Admin) that alternative sites must be available, affordable, acceptable and suitable. The Council accepts that there are no alternative accommodation options for the appellants and their families that meet the criteria set out in *Angela Smith*. Similarly, doubling up on existing pitches and roadside encampments are not to be considered lawful alternative sites.

137. The appellants themselves were looking for suitable sites for some 2 years before having to leave their previous site, but without success. Moreover, it is settled case law that there is no requirement for an applicant to prove that no other sites are available or that particular needs could not be met from another site.

138. The corollary is that the dismissal of these appeals would in all likelihood result in the families having to resort to an unlawful roadside existence, with all of the attendant implications. In the particular circumstances of this case, which includes the physical and mental health of some of the occupiers on the site (see below), that is a material consideration to which I attach substantial weight.

Failure of policy

139. It is clear from the shortfall of sites provided compared to the need for pitches identified on the GTAA and the 2024 Statement that the Council have not allocated sufficient sites to meet their properly assessed minimum accommodation needs. In that respect, the development plan is currently not meeting the needs of the travelling community.

140. In considering this issue, it is necessary to consider the background and context. The key element of the background is that nearly a quarter of the Borough is within the Green Belt (22%) and/or nearly three-quarters in a National Landscape (70%). It is National policy that traveller sites in the Green Belt are inappropriate development. It is also National policy that new traveller sites in open countryside should be very strictly limited in open countryside that is away from existing settlements or outside areas allocated in the development plan. That sets the context for planning policy for the Borough.

141. Looked at in the round and even taking into account all the constraints imposed by the Green Belt/National Landscapes in the Borough, it is fair to say that the Council's policy has not worked out in practice. In that sense that, there has a been a failure of policy. However, there must be more to policy failure than giving a different name to any existing unmet need or shortfall on a five-year supply of pitches or plots. I have already found that there is a shortfall in the supply of gypsy and traveller pitches when compared to identified need. Affording much weight to the failure of policy would introduce a form of double counting in which cause and effect are added together. I therefore afford this consideration limited weight.

Personal circumstances

142. The personal circumstances of the appellants and their families were set out in the written evidence and elaborated upon in oral evidence at the Hearing. It is neither necessary nor appropriate to rehearse that evidence in detail here. It is sufficient to record that several of the residents are experiencing health issues for which they require access to medical facilities. In some cases, this includes issues relating to their mental health, including anxiety around the possibility of reverting to a roadside existence. One of the residents has a medical condition that would make a roadside existence particularly problematic.

143. As noted on my site visit, the appellants are living in very cramped accommodation, with six people (including two adults) living in one of the three touring caravans on the site. Remaining on the site would not change that situation but would provide the continuing opportunity for the families to secure consistent access to health services, one of the principal aims of the PPTS. I attach significant weight to the personal circumstances of the appellants and their families.

Best interest of the child

144. There are currently 7 children living on the appeal site. At present, only one of the children residing on the site attends a local school. She is doing well there, both enjoying her education and making friends, including with children in the settled community. The other children residing on the site are home-schooled. Some of the children living on the site enjoy interacting with the horses kept there, including the driving of a trap, and this clearly benefits their well-being.

145. Having a stable base also enables the families and children to integrate into the local community, including securing regular attendance at school for the one child. I have no doubt that it would be in the best interest of all the children residing on the site to remain there as a stable base, not only from which to access education and medical facilities but also to remove the children from the prospect of the dangerous environments of a roadside existence.

146. There is, however, a further consideration in this case. It is reasonable to conclude that the population demographic for the area served by Pembury Reservoir broadly confirms to the national average in terms of age profile. The appellant does not dispute that the total population in this area is some 50,000 people. That being the case, it is likely that somewhere around 8,000 of that population are aged 15 or less. Moreover, in addition to residential properties, the area served by Pembury Reservoir includes schools and a hospital.

147. In terms of their health and well-being, it is clearly in the best interests of those children in the settled community to have a constant supply of clean water that conforms to the required standards. I have found that the development that has taken place on the appeal site has the potential to harm the quality and yield of groundwater. This would put the health and well-being of some 8,000 children at potential risk. The harms to the best interests of the children residing on the appeal site are easily identified and quantified. Not so the potential risk to children living in the area served by Pembury Reservoir. Nevertheless, given that a vastly greater number of children in the wider population would be put at risk through any degradation to the quality and yield of groundwater resulting from the use taking place on the appeal site, the collective best interests of those children outweigh that of the smaller number of children residing on the appeal site.

148. The best interest of a child is a primary consideration, and inherently carries as much weight as any other consideration.

Human Rights and the Public Sector Equality Duty

149. I am fully aware that the dismissal of this appeal would result in the appellants losing their homes. This would interfere with their rights under the European Convention of Human Rights, as incorporated into domestic law by the Human Rights Act 1998 (HRA). In particular, their rights under Article 8 (right for respect for private and family life, home and correspondence) and Article 1 of the First Protocol (right to respect to property) would be interfered with. Both of the above are qualified rights, and interference with them may be justified where lawful and in the public interest.

150. The issue of an enforcement notice is in accordance with the law, specifically section 172 of the 1990 Act. Accordingly, there is a clear legal basis for the interference with the rights under Article 8 and Article 1 of the First Protocol held by the appellant and the other occupiers of the site.

151. The appeal site is within the Green Belt, the protection of which is a long-standing and important element of National planning policy, as set out in the Framework. I have found that development that has taken place on the site and is proposed constitutes inappropriate development in the Green Belt. The Framework confirms that inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances. I have also found that the breach of planning control subject to notices and the development for which planning permission is sought both harm of the openness Green Belt and conflict with the purposes of including land in the Green Belt.

152. The appeal site is also within a National Landscape. The Framework confirms that great weight should be given to conserving and enhancing landscape and scenic beauty in National Landscapes, which have the highest status of protection in relation to these issues.

153. It is the appellant's own evidence that protected species are likely or even highly likely to be present on the land. However, the appellant's have provided insufficient evidence to demonstrate that the (proposed) development would not have a detrimental impact upon the biodiversity of the site, including the number and location of protected species.

154. The development on the appeal site lies directly south of Pembury Reservoir, which provides water for the population in the Pembury and Tunbridge Wells area. The appellant's have not provided sufficient information to demonstrate that the development would not have a detrimental impact on the quality or potential yield of groundwater, potentially affecting the public health of a population of some 50,000 people.

155. Taking all these considerations into account, dismissing the appeals and upholding the enforcement notices would clearly be in the public interest.

156. Against this harm, the occupation of their caravans stationed on the appeal site is an integral part of the ethnic identity of the appellants and their families as Romany Gypsies, reflecting the long tradition of that minority of following a travelling lifestyle. There is an unmet need for gypsy and traveller sites in the Borough. The Council cannot point to a five-year supply of sites. There are no suitable alternative sites available. Upholding the notice would, in all likelihood, compel the appellants and their families to adopt a roadside existence, with all the implications that would bring. The appellants then would not have a stable base from which to travel for work, or to access medical facilities. I also have the best interests of the children residing on the site at the forefront of my mind, including in terms of accessing schools.

157. It was held in *Chapman v UK* 33 EHRR 399 that:

"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."

158. The Council does not suggest that the breach of planning control alleged in the notices constitutes Intentional Unauthorised Development. Nevertheless, the development was undertaken without the benefit of planning permission and therefore unlawful, such that in *Chapman* terms the appellants' position in objecting to the order to move is "less strong". In *Chapman* terms, that is a "highly relevant" consideration.

159. The judgement in *Chapman* goes onto state that a further relevant consideration to be taken into account is that "….if no alternative accommodation is available the interference is more serious then where such accommodation is available. The more suitable the alternative accommodation is, the less serious the interference constituted by moving the applicant from his or her home."

160. Balancing all these factors, I consider that the interference with the Article 8 rights held by the appellant and their families would be significant, but would be both necessary and proportionate in the event that the notices are upheld or in refusing to grant a permanent planning permission. In reaching that conclusion, I am satisfied the policy objective could not be achieved by means that interfere less with the appellant's rights and those of their families.

161. As Romany Gypsies, the appellants and their families share the protected characteristic of race for the purposes of the Public Sector Equality Duty (PSED) under section 149 of the Equality Act 2010. Upholding the notice or refusing to grant a permanent permission would impact negatively on their way of life and would reduce the opportunities available to them. It would also deny or reduce the opportunities available to foster good relations with the settled community, including those of the one child who presently attends a local school. In having regard to PSED, I have taken account of all these factors in reaching my decision.

Conditions

162. A condition requiring that the development is retained in accordance with the approved plans is necessary, as is a condition restricting the number of pitches and caravans on the site(s). The submission and approval of a landscaping scheme would be necessary, albeit for the reasons set out above the submitted scheme would require extensive modification to make it acceptable. In the interests of both visual amenity and biodiversity, a condition requiring that all existing trees, hedges and hedgerows are retained would be necessary.

163. A condition requiring the submission of an Ecological Appraisal would be necessary, to include that an appropriate level of biodiversity net gain is achieved. However, I remain mindful Circular 06/2005 states that the need to ensure ecological surveys are carried out should only be left to coverage under planning conditions in exceptional circumstances. In the interests of mitigating any harm to protected species (bats), a condition requiring the submission and approval of details of external lighting would be necessary.

164. A condition requiring that no vehicle over 3.5 tonnes (save for vehicles used for the transportation of horses) shall be stationed, parked or stored on this site is necessary, as is a condition limiting and the number of commercial vehicles to one per pitch. A condition requiring that no commercial activities shall take place on the land would be necessary, but I see no reason why a livery yard should be excluded from that requirement: there is no livery yard on the site at present and that would be extending the terms of the permission sought, which is not permissible.

165. The appellants indicated at the Hearing that, on the basis of information that only emerged whilst the event was in progress, connection with the main sewer is now their preferred option for dealing with the disposal of waste water. A condition requiring details of the connection with a main sewer is therefore necessary. The difficulty is that there is very little information before me regarding the details and specifications of that connection: for example, exactly where that connection would take place, the route the pipework would take, the extent of the excavation involved and the remediation of the land after the work is complete. Moreover, no feasibility study has provided. In these circumstances, I have no confidence that connection with the main sewer is technically possible and/or a practical proposition. As it stands, imposing a condition to require connection with the main sewer would not meet the tests of precision, enforceability and reasonableness set out the PPG.

166. The situation in the event that connection with the sewer does not prove possible is no more certain. The condition in that eventuality is convoluted and requires details to be submitted and approved in relation to several matters. The condition also requires that, if any method other than a cesspit is to be used, the applicant must contact the Environment Agency to establish whether a discharge consent is required and then to provide evidence of obtaining the discharge consent. But the condition as drafted is entirely silent on what happens if a discharge consent is not forthcoming from the Environment Agency. Imposing a condition in those terms would similarly not meet the tests of precision, enforceability and reasonableness set out the PPG.

167. Similarly, in the event that the FWS is to be used, the condition in relation to that seeks the submission of various details which my mind would be essential to the eventual acceptability or otherwise of that solution. I accept that a condition could be used to control the implementation of those details when they had been provided beforehand. But in my view it would not be good practice to obtain those details for the first time through a condition. In that scenario, there could be no guarantee that an acceptable scheme would result.

168. It is the same story in relation to conditions requiring details of contamination on the site. A scheme for the capture and disposal of run-off from horse trailers and hardstandings, and the storage of manure, could be

submitted for approval but in view of the concerns expressed by South East Water there can be no guarantee that any such scheme would be effective.

169. Conditions restricting the occupation of the caravans to gypsy and travellers, or to specific persons, would need to be considered in the context of whether the personal circumstances of the occupiers of the site is a determinative factor. Similarly, a condition restricting any permission to a temporary period would fall to be considered if a permanent permission was not appropriate.

Other matters

170. Mr Mark Slater, representing the Friends of Redwings AONB, expressed concern that allowing the appeals might set a precedent. He explained that the land between Maidstone Road and Redwings Lane (where the appeal site is located) has been divided into a number of plots and that those plots have been offered for sale on an individual basis. I understand that a number of planning applications have already been submitted in relation to these plots and at least one of those has been appealed. Mr Slater is therefore concerned that allowing these appeals would open the floodgates to other permissions and that this would irrevocably harm the character of this side of the valley.

171. There is some evidence to support the view that Mr Slater's position in this respect is more than mere fear or generalised concern: the appeal submitted in relation to Plot 9-11, for example (APP/M2270/C/24/3339009). However, that appeal has been dismissed. The dismissal of that appeal will then be a material consideration in determining any further applications and appeals for development on this side of the valley.

172. Moreover, in this case, to paraphrase, permission is sought for two Gypsy and Traveller pitches with an associated equestrian use. Aside from some relatively small structures that are ancillary or incidental to the use of the land, no built development is proposed. Consequently, even if these appeals were to be allowed and planning permission granted, it could not and would not set a precedent for any other form of development.

173. The planning consultants acting on behalf of the Friends of Redwings AONB point out that whilst the appeal site is only some 400m from the Pembury LBD, the centre of Pembury is some 2.2km away. These distances to the nearest services are considerably beyond the desirable, acceptable and preferred maximum walking distances. It is therefore likely that occupiers of the site would be highly dependent upon a vehicle to reach everyday services and facilities. Indeed, the appellants confirmed at the Hearing that they use vehicles for shopping and accessing other facilities.

174. The PPTS considers sustainability in the round. Paragraph 13 of the PPTS indicates that local planning authorities should ensure that traveller sites are sustainable economically, socially and environmentally, having regard to a range of factors (a to h inclusive) set out in that paragraph. Those factors include promoting access to appropriate health services (Criteria b) and ensuring that children can attend school on a regular basis (Criteria c).

175. The PPTS implicitly accepts that traveller sites may be located in rural areas and that this will lessen opportunities for sustainable travel. That is consideration that needs to be weighed in the overall balance, together the

benefit arising through the provision of a settled base from which the access those facilities in terms of reducing both the need for long-distance travelling and possible environmental damage caused by unauthorised encampment.

176. On balance, I conclude that the appeal site does not provide adequate accessibility to service by foot, by cycle or by public transport. However, in this particular case and having regard to the approach taken towards sustainability in the PPTS, this may be considered to be a neutral factor.

177. Both parties have submitted appeal decisions/Court Judgments in support of their respective positions. I have read all of those cases and judgements. But the circumstances in this case are unique: the site is within the Green Belt, a National Landscape, is located on an aquifer providing water to a sizeable population and with protected species highly likely to be present on the site. Furthermore, the 2024 Statement setting out the position in relation to the five-year supply of Gypsy and Traveller pitches in the borough has only recently been published. The personal circumstances of the appellants are also unique to them.

178. The facts and circumstances surrounding this case are very different to those before the Inspectors and the Judges in those other decisions and judgements. For that reason, beyond confirming some general principles that are equally applicable to the facts of this case, I find that the appeal decisions/judgments that have been submitted do not greatly assist me.

Green Belt balancing exercise

179. In accordance with paragraph 153 of the Framework, I attach substantial weight to the harm to the Green Belt by reason of the inappropriate nature of the development. In accordance with paragraph 182 of the Framework, I attach great weight to the failure of the development to conserve or enhance the landscape and scenic beauty in the National Landscape.

180. Paragraph 186(a) of the Framework indicates that if significant harm to biodiversity resulting from a development cannot be avoided, adequately mitigated, or, as a last resort, compensated for, then planning permission should be refused. In view of the potential harm to protected species that are likely or highly likely to be live or use the site, I consider that the potential harm to those protected species translates to great weight.

181. In view of the size of the population potentially at risk, the detrimental impact on the quality or potential yield of groundwater attracts great weight. To the extent that any disruption to the quality and supply of water would not be in the interests of the children within that population, that too attracts great weight.

182. These harms are intrinsic to the development that has taken place and is proposed, and could not be overcome by the imposition of suitably worded conditions, especially given the lack of a robust evidence base on which those conditions would be founded.

183. Against this, given that a significant proportion of the Borough is within the Green Belt and/or a National Landscape, I attach only moderate weight to the fact that the Council cannot demonstrate a five-year supply of sites. I attach limited weight to the failure of policy. In the particular circumstances of this

case, I attach substantial weight to the likelihood that the lack of availability of alternative sites would result in the families having to resort to an unlawful roadside existence. I also attach significant weight to the personal circumstances of the appellants and their families in this case, including that they are Romany Gypsies. I attach great weight to the best interests of the children residing on the site, but this is outweighed by the equal weight that I give to best interests of much larger number of children potentially affected by any disruption of the water supply.

184. Consequently, the harm by reason of inappropriateness and any other harm, is not clearly outweighed by other considerations, such that the very special circumstances necessary to justify the development do not exist.

185. For the reasons set out above, the breach of planning control alleged in the notice is also contrary to policies within the development plan. I have not been advised of any material considerations of sufficient weight, either taken individually or cumulatively, to indicate that determination should be made otherwise than in accordance with the development plan. Accordingly, I consider that permanent planning permission ought not to be granted for the development alleged in the notices.

Temporary and/or personal permission

186. It is axiomatic that the harms that I have identified above would be less if they only occurred on a temporary basis. The appellants initially sought a temporary permission of 10 years but, in the alternative, suggested that a temporary permission of five years would fit neatly with the education of the one child that presently attends a local school.

187. The overriding consideration in this context is the potential and plausible risk to public health resulting from contamination of the water supply and/or the potential yield of groundwater to serve a population of some 50,000 people. Because of that, in my view a temporary planning permission of any duration would not be appropriate in this case. In that context, the risk to the wider population is not outweighed by the benefit of a temporary permission in facilitating the education of the one child that presently attends a local school, even taking into account the best interests of that child. This is only compounded by the risk to the protected species that are likely or highly likely to live on or to use the appeal site(s).

188. For the same reason, a personal permission would also not be appropriate. In reaching that conclusion, I am again mindful of the medical conditions suffered by various occupiers of the site and their need to access medical facilities, including the resident that is likely to find a roadside existence to be particularly challenging on health grounds. I am also mindful that the appellants are Romany Gypsies and of my duty under the PSED in that respect.

Appeals A and B: conclusions on the appeals on ground (a) and the deemed planning applications, and Appeals C and D

189. I have a great deal of sympathy for the appellants and their families, and the predicament they now find themselves in. They were forced to move, in no uncertain terms, from the site they were previously living on following an irreconcilable dispute with another Gypsy family. They are currently living in

very cramped accommodation in relatively small touring caravans. With the dismissal of these appeals, they face the possibility of a roadside existence. This would be far from ideal for both the families and would not be in the best interest of the children residing on the site. It would also have serious implications for the health of one particular member of the families. I have all of these considerations firmly in mind.

190. Nevertheless, I am mindful of the judgement of the Court of Appeal in *Wychavon District Council v Secretary of State for Communities & Local Government, Kathleen Butler, Leonard Butler* [2008] EWCA Civ 692. In that judgment, Carnwath LJ held that:

"…..in Chapman[2] the Strasbourg court recognised that the gypsy status did not confer "immunity from general laws intended to safeguard the assets of the community as a whole, such as the environment", but added: "… the vulnerable position of Gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory planning framework and in reaching decisions in particular cases …"

Carnwath LJ then went on to say:

"…..*To this extent, there is thus a positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the Gypsy way of life. Against this background, it would be impossible in my view to hold that the loss of a gypsy family's home, with no immediate prospect of replacement, is incapable in law of being regarded as a "very special" factor for the purpose of the guidance. That, however, is far from saying that planning authorities are bound to regard this factor as sufficient in itself to justify the grant of permission in any case. The balance is one for member states and involves issues of "complexity and sensitivity" (see Chapman v UK para 94). That is a judgment of policy not law, and it needs to be addressed at two levels: one of general principle, the other particular to the individual case."*

191. Applying the principles in *Wychavon* to the facts of this case, as a general principle I fully recognise the positive obligation to facilitate the Gypsy way of life. I also fully understand all the implications that dismissing these appeals and upholding the enforcement notices would have on the appellants and their families, not least in relation to the best interests of the children residing on the site as a primary consideration.

192. However, adopting the terminology used in *Wychavon* and having regard to the facts in this case, I do not consider that these factors should be regarded as sufficient to justify the grant of planning permission. The appeal site is particularly sensitive in environmental terms. It is within the Green Belt and a National Landscape. It is highly likely that there are protected species on the site. The site adjoins a reservoir that provides water for a substantial population, such that the quality and yield of groundwater obtained is of paramount importance. Consequently, dismissing the appeals would be in the wider public interest. In weighing the balance of issues in terms of their complexity and sensitivity, I conclude that in this particular case the balance

[2] Referring there to the judgment in *Chapman v UK 33* EHRR 399

falls on the side of dismissing the appeals and upholding the enforcement notices.

193. In no small part, my conclusions flow the fact that the development that has taken place on the site(s) was carried out without the benefit of planning permission (as distinct from being intentional unauthorised development). It is a fundamental principle of planning control that planning permission should not be refused simply on the basis that the development was carried out without planning permission or is unlawful. However, the Ministerial Statement delivered on 17 December 2015 in relation to the protection of the Green Belt makes the point that in this scenario there is no opportunity to appropriately mitigate the harm that has already taken place. The development that has taken place on the appeal site is a case in point.

194. In order to make the development acceptable in certain key respects, including the quality/yield of groundwater and protected species, the appellants rely on a plethora of planning conditions. I fully recognise that a condition(s) could be worded such that the permission would cease to have effect if the condition was not discharged. In principle, such a condition would meet the six policy tests set out in the PPG.

195. However, discharging that condition would take time for the matter to be considered by the Council and possibly by the Planning Inspectorate on appeal. This could feasibly be in excess of a calendar year. Throughout that period of time, the harms and risk to the environment and the population would be both real and omnipresent.

196. Planning conditions are primarily intended to secure the implementation of details or works that have already been submitted and agreed. The difficulty in this case is that the evidence base upon which the conditions are founded is simply not present: for example, in relation to the connection with the main sewer and presence of protected species, as well as the design/performance of the FTS and Drainage Field should that be required. Without that evidence base, relying on conditions to make the development acceptable in planning terms would constitute a hostage to fortune. There can be no guarantee that a planning permission could ultimately be delivered that was acceptable in all respects. In a sensitive environment such as the appeal site, that would not be prudent.

197. Accordingly, I conclude that the appeals on ground (a) should be dismissed, as well as the appeals against the refusal of planning permission.

Appeals A and B: the appeals on ground (g)

198. The ground of appeal is that the period for compliance specified in the notice falls short of what should reasonably be allowed. The period for compliance specified in the notices is six months.

199. The appellant seeks a period of compliance of two years. Beyond a general reference to personal circumstances and the health needs of the appellant, taken together with best interests of their children, no detailed justification for the period of compliance sought has been provided. I did, however, note during my site visit that the appellants have a lot of personal possessions stored in shipping containers and various other structures on the land. The

sorting and removal of those personal items is likely to be a time-consuming operation.

200. My task in relation to this ground of appeal is to balance the public interest in securing expeditious compliance with enforcement notice against the private interest bound up in the development subject to the notice. In so doing, I must start from the position that the use of the land subject to the enforcement notice does cause the harm alleged in the reasons for issuing the notice.

201. Dismissing the appeals will force the appellants and their families to find an alternative site on which to which to live. I am aware that no alternative sites are immediately available, such that is likely that the appellants and their families would have to pursue a roadside existence until such time as they did find an alternative site. I certainly do not underestimate all the implications that would bring. I have also had due regard to the PSED, not least in terms of how not having a stable base from which to travel for work would hinder the appellants and their families from following their traditional way of life and integrating with the settled community.

202. I have considered all these in connection with the rights held be the appellants and their families under the HRA. I am aware that some of those living on the site have anxiety about adopting a roadside existence and that for one member of the families this could have significant health implications. The best interest of the children residing on the site are a primary consideration in that regard.

203. Against this, there is potential and plausible risk to public health resulting from any contamination of and/or interruption to the water supply to a population of some 50,000 people. A sizeable percentage of that population would be children under the age of 15. It would not be in the best interest of those children to have any interruption to the water supply. That is equally a primary consideration. Any risk to public health would only increase commensurate with any extension to the period of compliance. That, in my view, would not be an acceptable risk to take. Indeed, that in itself is a compelling reason for not extending the period of compliance.

204. In weighing the balance between public and private interests, for the reasons set out above I consider that the public interest in expeditious compliance with the requirements of the enforcement notice outweighs private interest in extending that period of compliance. I am therefore not persuaded that there is any need to extend the period for compliance with the notices and am satisfied the period of compliance of six months stated in the notices is a proportionate response to the breach of planning control that has occurred.

205. The appellants have referred to an appeal decision relating to a site in Frome, Somerset, where the Inspector allowed an appeal made solely on ground (g) to extend the period of compliance from nine months to two years, the same as now sought (Appeal Refs: APP/Q3305/C/08/2072342 & 2072343). Part of the Inspector's reasoning was that there was a substantial need for gypsy and traveller sites in the area, such that the appellants had considerable difficulty in finding an alternative site. There was, therefore, a clear parallel with the situation faced by the appellants in this case.

206. However, the facts on the other side of the equation were very different to those in this case. In the Frome appeal, the primary harm was the effect of the development on the character and appearance of the surrounding rural area, in particular having regard to the setting of a Grade II* listed building. That site was neither in the Green Belt nor a National Landscape. There is no indication in the Inspector's decision that there were protected species on the site. Importantly, there is no indication in the Inspector's decision that there was any risk to public health arising from that development.

207. The facts and circumstances in the Frome appeal were therefore very different to those in this case. Consequently, the Inspector's decision in the Frome appeal can be distinguished on its facts from the present case, and provides no justification for extending the period of compliance as sought by the appellants.

208. Accordingly, the appeals on ground (g) fail.

Conclusion

209. For the reasons given above, I conclude that Appeals A and B should not succeed. I shall uphold the enforcement notice with corrections and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

210. For the reasons given above, I conclude that Appeals C and D should not succeed.

Formal Decisions

Appeal A Ref: APP/M2270/C/24/3339249

211. It is directed that the enforcement notice is corrected by:

- in paragraphs 5(3), 5(4) and 5(6) of the notice, deleting the word 'permanently.'

212. Subject to the correction, the appeal is dismissed, the enforcement notice is upheld and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Appeal B Ref: APP/M2270/C/24/3339251

213. It is directed that the enforcement notice is corrected by:

- in paragraphs 5(3), 5(4), 5(5), 5(6), 5(8) and 5(9) of the notice, deleting the word 'permanently.'

214. Subject to the correction, the appeal is dismissed, the enforcement notice is upheld and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Appeal C Ref: APP/M2270/W/24/3339337

215. The appeal is dismissed.

Appeal D Ref: APP/M2270/W/24/3339338

216. The appeal is dismissed.

Paul Freer
INSPECTOR

APPEARANCES

For the appellants

Mr Frank Smith	Appellant
Mr Billie Smith	Appellant
Ms Charlotte Vine	
Ms Debbie Smith	
Mr Phil Slater	SLR Consulting Limited
Mr Rhodri Crandon	TDA
Dr Angus Murdoch	Murdoch Planning Limited

For the Local Planning Authority

Mr Thomas Vint	Principal Planning Officer
Mr Richard Hazelgrove	Development Management Team Leader
Mr David Scully	Landscape & Biodiversity Officer
Ms Maria Payne	Enforcement Officer
Ms Emma Goddard	Head of Environment, South East Water
Ms Debbie Wilkinson	Groundwater Manager, South East Water
Mr Matthew Lander	Catchment Scientist, South East Water

Interested Persons

Mr Mark Slater	Friends of Redwings AONB

DOCUMENTS SUBMITTED AT THE HEARING

1/ Tunbridge Wells Borough Council Five-Year Gypsy and Traveller Pitch Supply Statement September 2024

2/ South East Water: Position Statement

3/ Map extract titled Local Hydrology Details

4/ Map extract showing Pembury Reservoir and surrounding water infrastructure

5/ Drawing No. 002 showing Proposed Wetland Treatment and Drainage Field

6/ Amended red line plan for Pitch 1

7/ Draft planning conditions

DOCUMENTS SUBMITTED AFTER THE HEARING

1/ Unredacted version of the consultation response by South East Water dated 16 April 2024, with Appendices.

2/ Proposed Site Layout and Outline Landscape Scheme (Drawing No. TDA.2935.01 Rev B) with the FWS removed.

3/ Draft planning conditions post the 2024 revision to the Framework.

Statement on behalf of the Claimant
Witness: Leanne Tarling
2nd Statement
Dated: 09/04/26
Exhibits:

IN THE HIGH COURT OF JUSTICE **CLAIM NO.**

BETWEEN:-

TUNBRIDGE WELLS BOROUGH COUNCIL CLAIMANT

and

(1) DANNY MAURICE DARLING
(2) PERSONS UNKNOWN

DEFENDANTS

SECOND WITNESS STATEMENT OF LEANNE TARLING

I, Leanne Tarling, Planning Investigation Officer for Tunbridge Wells Borough Council of Town Hall, Royal Tunbridge Wells, Kent TN1 1RS

WILL SAY as follows:-

1. My duties as a Planning Investigation Officer include investigation of, and enforcement against, breaches of planning control in the Borough of Tunbridge Wells.

2. I make this statement further to my first witness statement in support of the Claimant's Claim for an injunction against the Defendants, pursuant to section

187B of the Town and Country Planning Act 1990 (as amended) ("the 1990 Act"). I am duly authorised by the Claimant to make this witness statement and I make it from my own information, knowledge and belief save where otherwise stated. The Claimant makes an urgent application without notice for injunctive relief.

3. At 15:25 on the 9th April 2026 I visited the Land with my colleague Andrew Culley to check on compliance of the temporary stop notice ("TSN") we had served the previous evening. On arrival we could see that the notice displayed on the stake had been repositioned from where we had placed it, see Exhibit LT31. The stake displaying the Temporary Stop Notice was now positioned on the boundary of the unlawful development within the Land rather than on the boundary of the plot where we had placed it. Onsite adjacent to the plot there was a large flatbed truck with a water pipe on the back, see Exhibits LT28, LT29 and LT40. The digger and blue Audi had been removed from the site.

4. Much of the hard-core which was piled up in the middle of the plot when we visited yesterday had been spread across the entire surface which was previously marked out along with the sleepers. More of the sleepers were now positioned and fixed in place, see Exhibits LT31, LT32, LT36, and LT39. An area at the far end does not have a sleeper in place, suggesting easier access onto the land for a roller or other machinery (Exhibit LT36). The area which is now mostly laid with hardcore is at minimum 6m by 25m, which would be sufficiently large enough to accommodate a large mobile home. The remaining hardcore on the land has been relocated onto the unmarked soil part of the land, see Exhibit LT34, LT37 and LT38.

5. It was also noted that the gate entrance at the bottom of the field had been tampered with so that the posts can now be moved with ease and both gates can now be opened sufficiently wide to enable the delivery of a large Mobile home or other unit, see Exhibits LT41, LT42 and LT43. Prior to the unlawful development on this land the gates and posts were undamaged and permanently fixed.

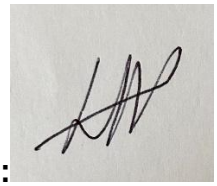
6. Due to the time of serving the temporary stop notice on the 8th of April 2026 and the low visibility with it being 9 pm I am unsure if the works witnessed today were carried out prior to the service of the TSN, or after and therefore in breach of the Temporary Stop Notice. However, I am certain that the works seen today were

carried out after we visited yesterday, advised those on the Land that planning consent was required and that works should cease.

7. To explain the surrounding developments, Exhibit LT28 shows the reservoir in the distance behind the unlawful development, Exhibit LTt32, LT33, LT36 and LT38 shows the chicken coop plot which has recently been refused planning permission, and in the rear of Exhibit LT37 the caravans can be seen which are subject to enforcement notices which have been upheld on appeal by a planning inspector.

8. Whilst leaving the Land I saw the owners of the adjacent site and I asked if they owned the camera at the bottom entrance to which they replied that they did.

I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Signed: 

Date: 09.04.2026

Exhibit LT28

Exhibit LT29

Exhibit LT30

Exhibit LT31

Exhibit LT32

Exhibit LT33

Exhibit LT34

ExhibitLT35

Exhibit LT36

Exhibit LT37

Exhibit LT38

Exhibit LT39

Exhibit LT40

Exhibit LT41

Exhibit LT42

Exhibit LT43

Statement on behalf of the Claimant
Witness: Leanne Tarling
3rd Statement
Dated: 17/04/26
Exhibits:LT44 – LT68

IN THE HIGH COURT OF JUSTICE **CLAIM NO. KB-2026-001144**

BETWEEN:-

TUNBRIDGE WELLS BOROUGH COUNCIL CLAIMANT

and

(1) DANNY MAURICE DARLING
(2) PERSONS UNKNOWN

DEFENDANTS

THIRD WITNESS STATEMENT OF LEANNE TARLING

I, Leanne Tarling, Planning Investigation Officer for Tunbridge Wells Borough Council of Town Hall, Royal Tunbridge Wells, Kent TN1 1RS

WILL SAY as follows:-

1. My duties as a Planning Investigation Officer include investigation of, and enforcement against, breaches of planning control in the Borough of Tunbridge Wells.

2. I make this statement further to my first and second witness statements in support of the Claimant's Claim for an injunction against the Defendants, pursuant to

section 187B of the Town and Country Planning Act 1990 (as amended) ("the 1990 Act"). I am duly authorised by the Claimant to make this witness statement and I make it from my own information, knowledge and belief save where otherwise stated.

3. On 10th April 2026 an interim injunction was granted by Mrs Justice Stacey at the High Court ("the Interim Injunction Order"). The application was made by the Claimant without notice as there had been breaches of planning control and the Claimant apprehended a change of use of the Land without the Interim Injunction Order.

Service

4. I posted a covering letter (Exhibit LT54) (with a QR code link to all the Application documents), sealed claim form and the sealed Interim Injunction Order to the address of the registered owner of the land, Danny Maurice Darling, by Royal Mail 1st class delivery, see Exhibit LT44.

5. My colleague, Andrew Culley, and I then visited the Land at approximately 19:00 on 10th April to serve the Interim Injunction Order on the Land in person. I served the Interim injunction Order on 'Danny Maurice Darling' and 'Persons Unknown' by displaying the injunction packs in three locations (exhibit LT45); the first on the nearest gate on the Public Right Of Way WT218 (Exhibit LT46), the second on a wooden stake hammered into the ground on the Land (Exhibit LT47 and LT48), and the third at the gated entrance, north of the Land (Exhibit LT49). The Injunction packs contained a covering letter (with a QR code link to all the Application documents), the sealed claim form, the sealed Interim Injunction Order.

6. At Exhibit (LT52) is a screenshot of the Council's website page containing all relevant application documentation. The QR code when scanned takes one to this website page. At Exhibit LT53 and LT55 are the covering letters that were served on the Defendants on the Land.

7. Exhibit LT50 shows the large flatbed truck still on the track adjacent to the Land, and also Pembury Reservoir to the north-east behind the development. LT51 shows the truck on the track, the unauthorised development on the Land on the

left with the injunction papers, and in the far north can be seen the other injunction papers served on the gates at the track entrance.

8. The development did not seem to have progressed since my visit on 9th April 2026. The stake that did have the Temporary Stop Notice on it was on the ground beside the development, however the TSN documents had all been ripped off the stake.

9. When I visited the Land on the 10th April there were no 'Persons Unknown' on the Land, nor was Danny Maurice Darling. As there was no one on the Land and there is a mobile telephone number recorded on the enforcement case 24/00203/OPDEV for Danny Maurice Darling, it was considered best practice to try to make contact via this method also, to raise awareness of the Interim Injunction Order, also suggested by Mrs Justice Stacey and recommended in the Interim Injunction Order. The call was made at 20:33 but went straight to voicemail, I tried again straight afterwards and it went to voicemail a second time. At this point I left a voicemail to explain I was calling on behalf of TWBC (Tunbridge Wells Borough Council) looking to speak with Danny Maurice Darling in relation to land he owns on Redwings Lane. I asked if he could call back at the soonest availability and speak to either myself or my colleague Andrew Culley, I left my name and direct line as a point of contact. As of 13/04/26 neither myself or my colleague have been contacted by anyone in relation to the Land.

10. On the 15.04.26 at 13:56 I received an email from a complainant to alert me to the fact that an escort vehicle had been on the Land at approximately 13:00, accompanied with a photograph, see Exhibit LT56. My colleague and I arrived at the Land at 15:30 however there were no additional vehicles on site.

11. The injunction pack and cover letters had been removed from the gated entrance, see Exhibit LT57 and LT59. In addition, Exhibit LT57 shows the driveway to the Land has been cleared of rubble and mud, whereas when we were last on site on the 10th April the entrance had rubble and mud spilt all down the access making it very slippery (see Exhibit LT58). Now that the rubble and mud has been swept clear of the access, it will be far easier to drive vehicles on and off of the Land.

12. As I walked further up to the Land where the unauthorised works are, I noticed that the stake upon which the Injunction pack and cover letter had been fixed had been removed, see Exhibit LT60, LT61 and LT62. No further works appeared to have

occurred since the previous visit on the 10th April. The injunction pack had however, been left on the gate adjacent to the Public Right Of Way.

13. As there was no one on the Land to question about the escort vehicle, I wanted to rule out any nearby possibilities so went to Pembury Reservoir to enquire if they were expecting any large deliveries which would require an escort vehicle. There was a security man at the entrance who informed me that there were no workers or management on site, and that he didn't know about deliveries or anything else.

14. I then returned to the Land to display replacement copies of the Injunction Order and cover letter to Persons Unknown at 16:30. I affixed the copies to the gated entrance as seen in Exhibit LT63 and LT64, on the Land, Exhibit LT65 and LT66, and put a copy of the cover letter to Persons Unknown adjacent to the Public Right Of Way as this had been removed, Exhibit LT67.

15. After fixing the notices in place I then spoke with a complainant over the phone to discuss the series of events over the day. The complainant confirmed that they were alerted to the arrival of the escort vehicle by a friend which is when they then contacted the Council. Once they were aware they went near the Land and could see the escort vehicle and a transit van. The driver of the escort vehicle and the transit van were seen speaking at the gate entrance though it was not confirmed what was spoken about. After some time the escort vehicle left the scene, and the transit van drove up the access track to the Land where it stayed for some time. All vehicles had left by the time I was able to get to the Land. The gates had been shut and locked after the driver of the transit van had left. The escort vehicle was a Land Rover Defender which is generally designed with enhanced off-road capability.

16. It was noted during my visit that normally at the entrance to Redwings Lane there is an old red car parked almost immediately as you enter the road. If any vehicles are parked along the Lane, it would be impossible for a wide load of any kind to travel safely along the lane. This car was not parked on Redwings Lane on the 15th April.

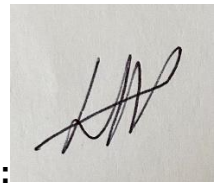
17. I have tried to contact MR Danny Darling again on the via the telephone number on record at 16:03 on 16th April 2026 but it went to voicemail again. Neither myself of my colleague have been contacted by anyone since displaying the injunctions or leaving a voicemail.

18. Referring back to my first statement dated 09.04.26, paragraphs 12 and 13, see exhibit LT68 for reference of the location of the prementioned unauthorised developments in relation to the Land.

19. Whilst no further works have taken place, the Council still apprehends further development for the following reasons:

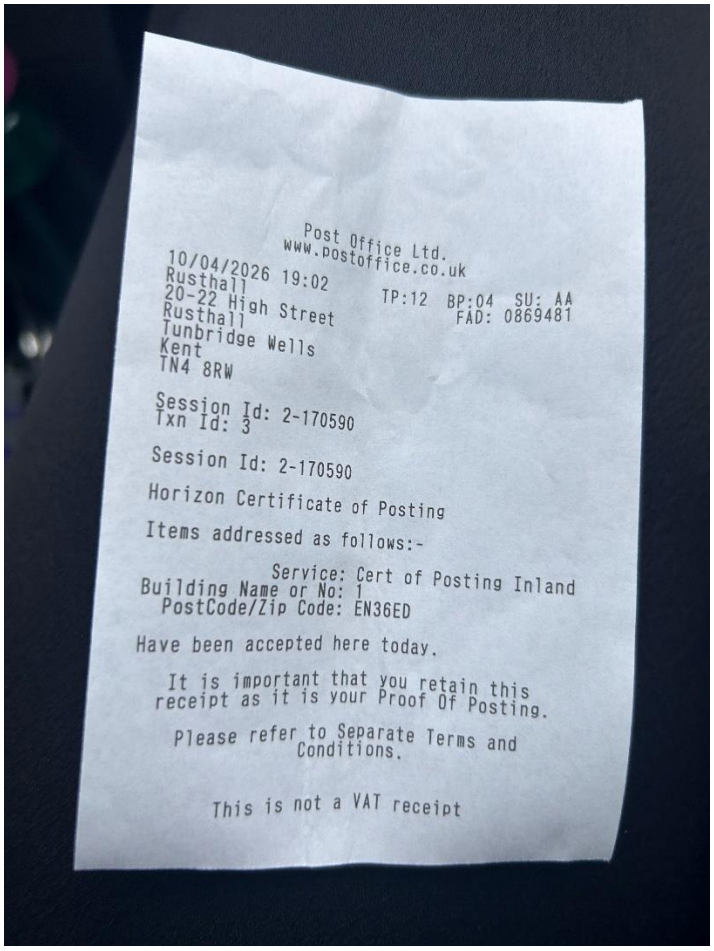
a. Temporary stop notices and injunction packs have been removed but the Council has not been contacted with any explanation;
b. The gates have been tampered with and so vehicles can enter easily;
c. Mud and rubble has been cleared since a previous visit thus facilitating access;
d. There has been recent activity on the Land as witnesses by a complainant who contacted the Council, including the observation of the escort driver assessing the land access;
e. The First Defendant has not contacted myself or my colleague.

I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Signed: 

Date: 17.04.2026

Exhibit LT44



Post Office Ltd.
www.postoffice.co.uk
10/04/2026 19:02 TP:12 BP:04 SU: AA
Rusthall FAD: 0869481
20-22 High Street
Rusthall
Tunbridge Wells
Kent
TN4 8RW

Session Id: 2-170590
Txn Id: 3

Session Id: 2-170590

Horizon Certificate of Posting

Items addressed as follows:-

Service: Cert of Posting Inland
Building Name or No: 1
PostCode/Zip Code: EN36ED

Have been accepted here today.

It is important that you retain this receipt as it is your Proof Of Posting.

Please refer to Separate Terms and Conditions.

This is not a VAT receipt

Exhibit LT45

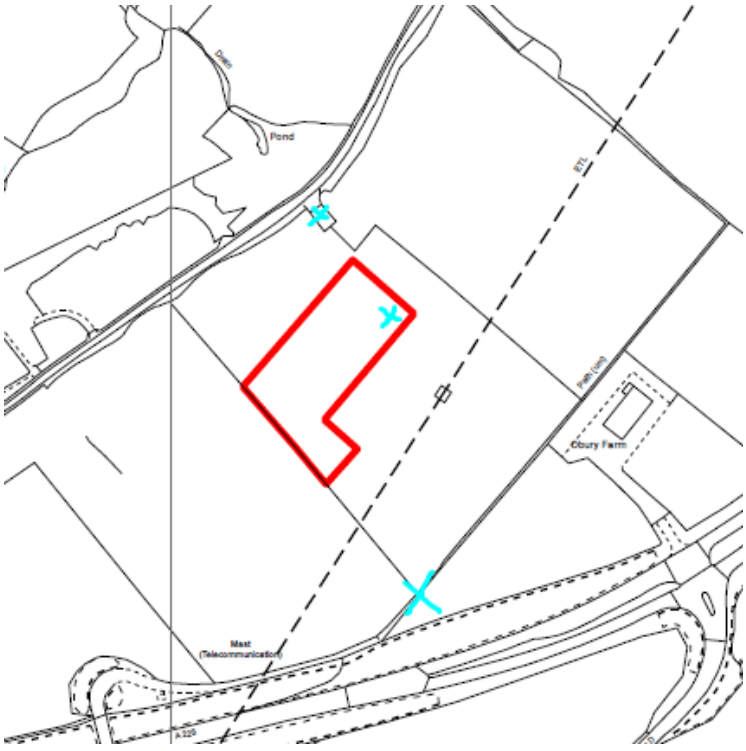


Exhibit LT46

Exhibit LT47

Exhibit LT48

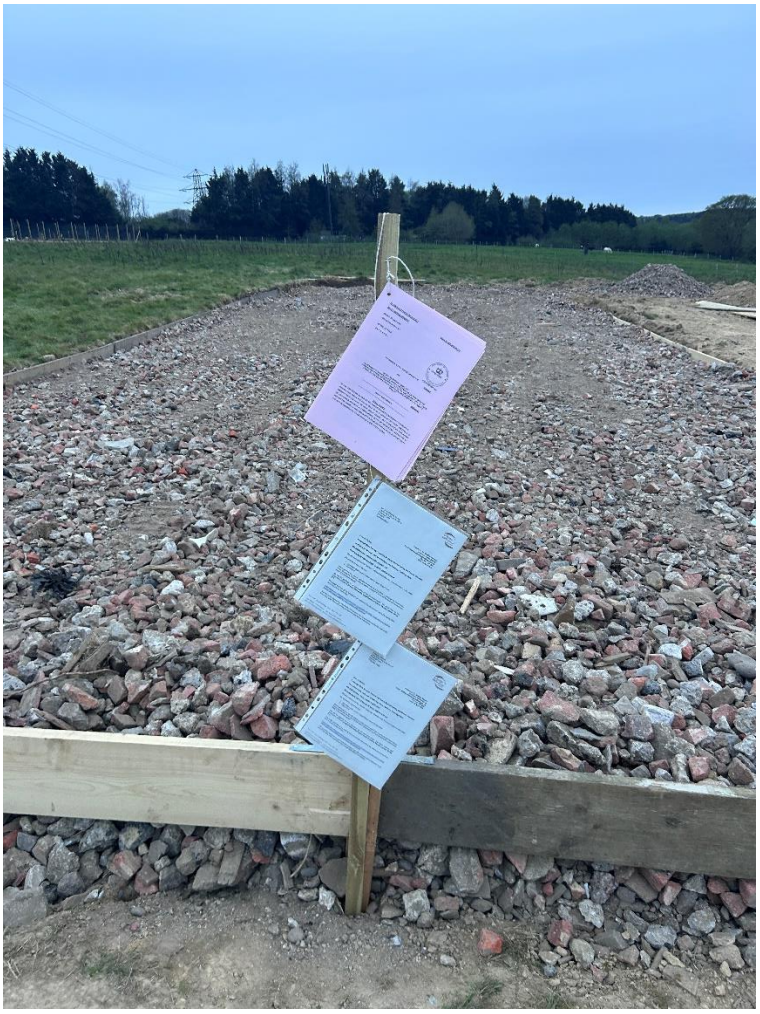


Exhibit LT49

Exhibit LT50

Exhibit LT51

Exhibit LT52

Redwings Lane

Tunbridge Wells Borough Council made an application to the High Court, Kings Bench Division for an injunction under s.187B of the Town and Country Planning Act 1990 against all persons with an interest in the **Land lying to the the South East of Redwings Lane, Pembury, Tunbridge Wells** and all persons who intend to carry out development on that land ("Persons Unknown").

There shall be a hearing at 10.30am on 20 April 2026 (the Return Date) at the Royal Courts of Justice, Strand, London, WC2A 2LL with a time estimate of 1 hour, unless the named parties consent in writing that no such hearing is necessary.

Redwings 26.00041.OPDEV Authorities Bundle	PDF 3.4 MB
Redwings 26.00041.OPDEV King's Bench Associate's-Order	PDF 222.5 KB
Redwings 26.00041.OPDEV Site Plan	PDF 265.0 KB
Redwings 26.00041.OPDEV Skeleton Argument	PDF 152.2 KB
Redwings 26.00041.OPDEV witness statement 1	PDF 218.3 KB
Redwings 26.00041.OPDEV witness statement 2	PDF 135.1 KB
Redwings 26.00041.OPDEV Witness Statement 2 Exhibits LT28 - LT43	PDF 5.0 MB
Redwings 26.00041.OPDEV Covering Letter PU (10.04.26)	PDF 176.4 KB
Redwings 26.00041.OPDEV 1844032 - Note of Court Hearing on 10 04 26	PDF 115.7 KB
Redwings 26.00041.OPDEV AT COURT N244	PDF 101.8 KB
Redwings 26.00041.OPDEV KB-2026-001144 - FINAL N244 - (for 20.04.26)	PDF 102.4 KB
Redwings 26.00041.OPDEV SEALED Claim Form	PDF 1.5 MB
Exhibits LT1 26.00041.OPDEV Redwings	PDF 6.4 MB

Exhibit LT53

Mr Danny Maurice Darling
Land lying to the south east of
Redwings Lane
Pembury
Tunbridge Wells

Please ask for: **Heather Stevens**
Telephone: **01622 602126**
Email: **heather.stevens@midkent.gov.uk**
Our Ref: **T021864**
Date: **10 April 2026**

Dear Mr Darling,

Tunbridge Wells Borough Council v Mr Danny Maurice Darling and Persons Unknown

Land lying to the south east of Redwings Lane, Pembury, Tunbridge Wells

KB-2026-001144 – HIGH COURT INJUNCTION

RETURN DATE FOR HEARING: 20 APRIL 2026 at 10:30AM

We are instructed by the Claimant Tunbridge Wells Borough Council in relation to this matter.

We enclose by way of service:

1. Injunction Order of Mrs Justice Stacey dated 10 April 2026
2. Claim Form

We must draw your specific attention to the terms of the Order in particular the Penal Notice. If you disobey the Order you may be held in contempt of court and be liable for imprisonment, fined or your assets seized.

We will be applying for a continuation of the Injunction Order. The return date for that application will be on **20 April 2026 at the Royal Courts of Justice, Strand, London, WC2A 2LL**.

The Judge and time of the hearing will be confirmed the working day before the hearing (from 3pm) and can be found here:

https://www.gov.uk/government/publications/royal-courts-of-justice-cause-list/royal-courts-of-justice-daily-cause-list#kings-bench-judges-daily-cause-list

The Injunction applications and evidence in support can be accessed via the QR code at the end of this letter. We must advise you to seek legal advice immediately.

Town Hall Royal Tunbridge Wells Kent TN1 1RS
switchboard 01892 526121 SMS (text) 07870 526121
DX 3929 Tunbridge Wells website www.tunbridgewells.gov.uk

Please acknowledge safe receipt of this letter and its enclosures.

Yours sincerely,

Heather Stevens

Team Leader (Contentious)
Mid Kent Legal Services

For and on behalf of Claudette Valmond
Head of Legal Partnership and
Monitoring Officer for Tunbridge Wells Borough Council

Exhibit LT54

Mr Danny Maurice Darling
1 Newbury Avenue
Enfield
EN3 6ED

Please ask for: **Heather Stevens**
Telephone: **01622 602126**
Email: **heather.stevens@midkent.gov.uk**
Our Ref: **T021864**
Date: **10 April 2026**

Dear Mr Darling,

Tunbridge Wells Borough Council v Mr Danny Maurice Darling and Persons Unknown

Land lying to the south east of Redwings Lane, Pembury, Tunbridge Wells

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Yours sincerely,

Heather Stevens

Team Leader (Contentious)
Mid Kent Legal Services

For and on behalf of Claudette Valmond
Head of Legal Partnership and
Monitoring Officer for Tunbridge Wells Borough Council

Town Hall Royal Tunbridge Wells Kent TN1 1RS
switchboard 01892 526121 SMS (text) 07870 526121
DX 3929 Tunbridge Wells website www.tunbridgewells.gov.uk

Exhibit LT55

Persons Unknown
Land lying to the south east of
Redwings Lane
Pembury
Tunbridge Wells

Please ask for: **Heather Stevens**
Telephone: **01622 602126**
Email: **heather.stevens@midkent.gov.uk**
Our Ref: **T021864**
Date: **10 April 2026**

Dear Sir/Madam,

Tunbridge Wells Borough Council v Mr Danny Maurice Darling and Persons Unknown

Land lying to the south east of Redwings Lane, Pembury, Tunbridge Wells

KB-2026-001144 – HIGH COURT INJUNCTION

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Heather Stevens

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Exhibit LT56

Exhibit LT57

Exhibit LT58

Exhibit LT59

Exhibit LT60

Exhibit LT61

Exhibit LT62

Exhibit LT63

Exhibit LT64

Exhibit LT65

Exhibit LT66

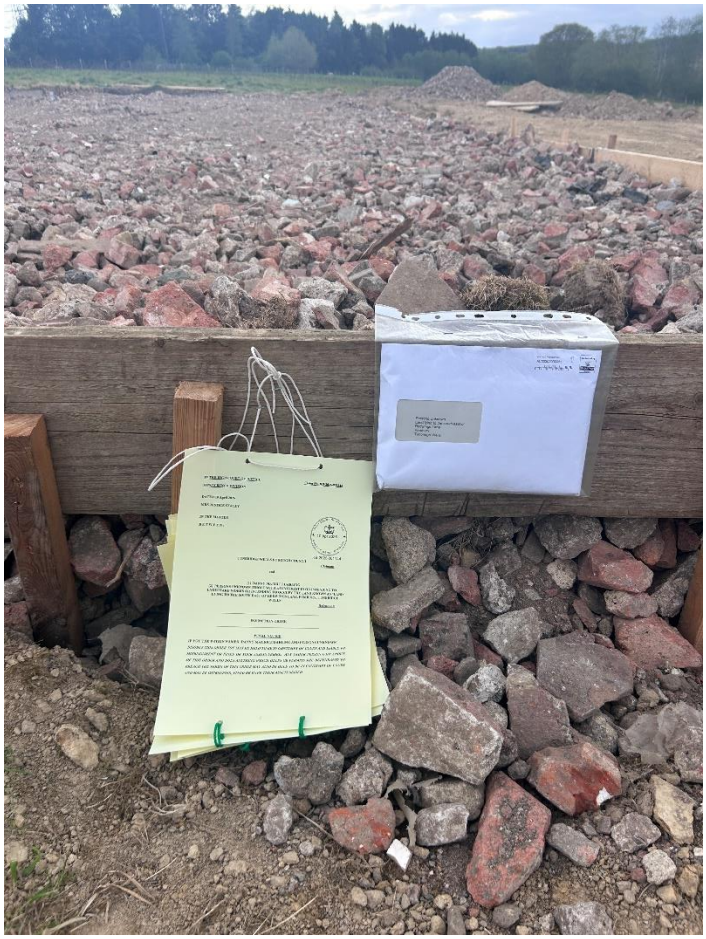
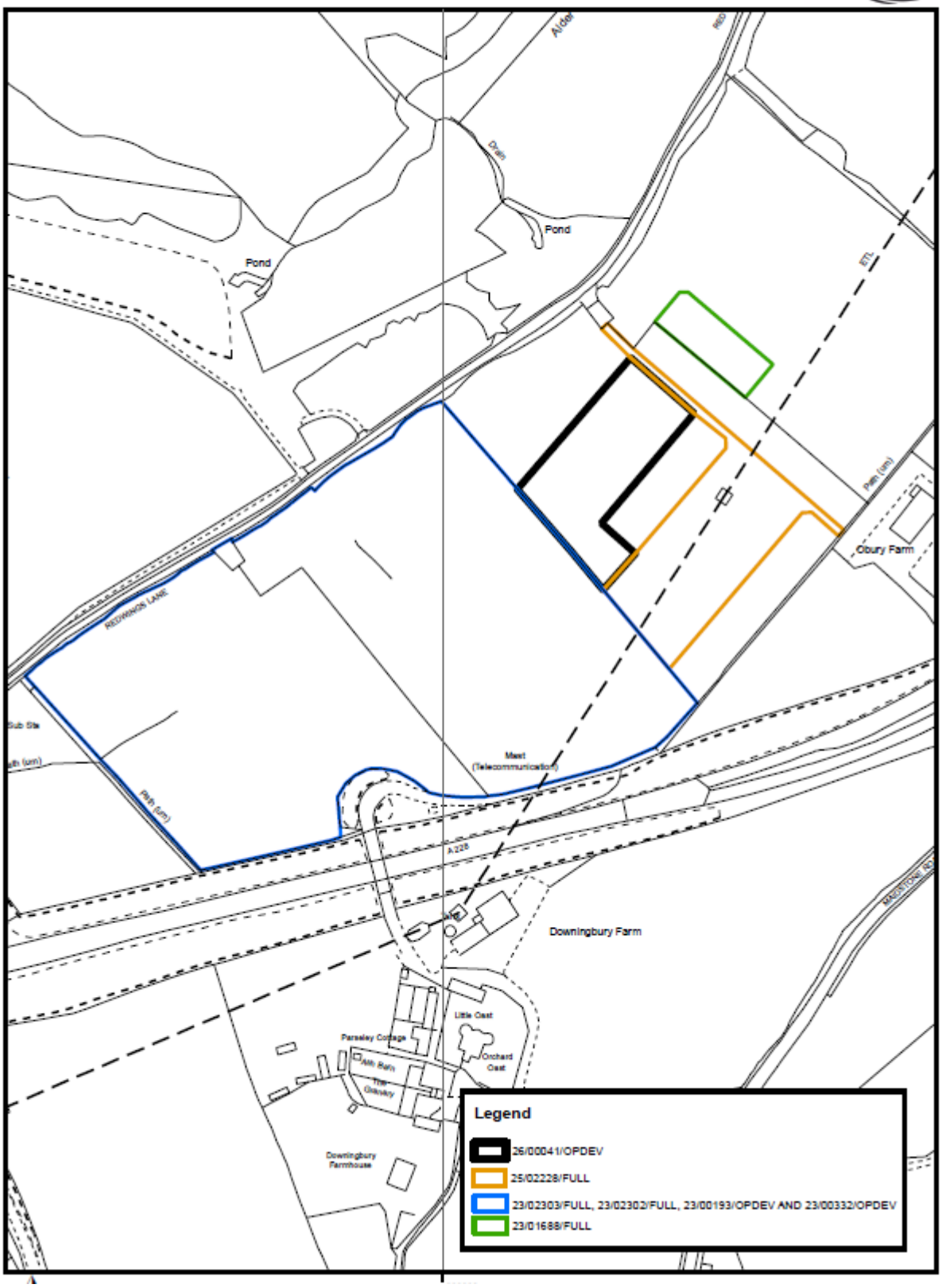


Exhibit LT67

Exhibit LT68

INJUNCTION

Land lying to the southeast of Redwings Lane, Pembury, Tunbridge Wells



IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Claim No. KB-2026-001144

Date: 10/04/26
Judge: Mrs Justice Stacey
Court 37 at 12:20

TUNBRIDGE WELLS BOROUGH COUNCIL

Claimant

and

(1) DANNY MAURICE DARLING

(2) PERSONS UNKNOWN (THOSE WITH AN INTEREST IN OR INTENDING TO UNDERTAKE WORKS OR INTENDING TO OCCUPY THE LAND KNOWN AS "LAND LYING TO THE SOUTH EAST OF REDWINGS LANE, PEMBURY, TUNBRIDGE WELLS"

Defendants

NOTE OF HEARING

Injunction Application made by Tunbridge Wells Borough Council

Judge has received the injunction application, skeleton argument (SK) and first witness statement (WS) but not second witness statement and exhibits. [Passed up on laptop.]

Application for an interim injunction.

Reference to SK 9 and WS 43 onwards, in short, by virtue of s.55, planning permission is required for development, WS 29, operational development has been undertaken on the land.

Reference to photographs within the exhibits, LT1, a digger on site levelling the land, LT2 can see hardcore, photos taken on 08/04. LT3 can see sleepers and a spirit level. Man in the photo (clothed) is colleague AC.

LT8 shows how much has been excavated. Strong suspicion to facilitate a change of use, to a residential use, possibly for the stationing of caravans for G&T. Those on site did not confirm identity, people were evasive.

Land Registry says Danny Darling is the owner, but it takes a long time for the Land Registry to show a change in ownership.

Reference to appeal decisions LT24 and LT27.

These are people working on the land, owner says he does not care if the Council “slap a notice” on the land. A TSN was served at 9pm, it was dark.

Works carried on even though they were told by officers to stop work.

Application is made without notice as the Council thinks if told, works will speed up and frustrate the purpose of the application for which the order is sought.

Fear the goal is to change the use of the land, good reason for those submissions. Planning permission has not been sought, the wider land is being sold off in plots.

Reference to image from Zoopla showing land adjacent to the site (to the south-west of the marked-out plots) it gives a flavour of what is going on, on the wider land.

Thirdly the reluctance to provide information and evasive.

Works continued after site visit and there is a history on the wider land of G&T occupation.

On the adjacent land, there are two G&T traveller plots. That occupation was taken up without planning permission. Enforcement Notices were issued, appeals were dismissed, but people are still on that land.

This demonstrates a wider G&T use at this location. Reference to caravan on the site that was moved.

Also, two and a half years after Enforcement Notice on neighbouring land but still occupied.

WS 38, if PA is made, likely to be refused, due to appeal decisions. The site is highly sensitive, sits within the national landscape, within greenbelt, in the countryside.

HHJ: and the issue with the water.

Appeal decision reference LT24, private equestrian facilities and a lodge, dismissed in November 2024, Green Belt, national landscape and water. LT27, quotes from Inspector, SE Water objected and wider public safety concern. LT17 – shows Pembury Reservoir.

Could not tell whether work was done when TSN was served. But when went back yesterday, fence posts taken out so that the access is wider, Council suspects so that a mobile home could be brought on. Review of photos from yesterday.

AC has been back this morning, nothing further on the land but the TSN has been removed and stake out the ground.

There is a serious question to be tried, balance of convenience in favour of LPA, there is risk of environmental harm, cannot be compensated by damages, risk to public safety.

In relation to full and frank disclosure, there is no 5 year supply and those in response may have nowhere else to go, not sure if TSN has been breached and no further work today. But Council are only asking for an injunction to preserve the status quo.

In relation to persons unknown, in SK set out that criteria are met. SK 5 and 7, set out the safeguards, the compelling justification for the remedy. There is a duty to supply G&T sites, there is a policy in a recently adopted LP and an application could be made, but an application here has not been made.

Evidence, WS 29, operational development that has been undertaken. Man A noted “a whole deal” and people would not give names and we do not know who might want to occupy. The draft Order contains a return date and geographical limits.

HHJ: The draft Order should specify where the order is placed.

On a gate and on a stake on the land. At the moment there is one driveable access and there is a public right of way that crosses the land with gates.

There might be a phone number relating to the owner, Danny Darling, from 2023/24 application.

Will be set out in the order – conspicuous locations including (HHJ: identify the locations).

Agree we should send it to him, via mobile, not a substitute to service, but in addition, the telephone number should be used to bring it to his attention if possible.

HHJ short judgment: granting the application broadly in the terms sought with minor amendments. Satisfied that the Claimant’s application for an interim injunction has been made out for reasons set out in the SK and the two WS of LT together with exhibits attached.

The application is being brought without notice because if notice is given, I am satisfied that works would speed up, and frustrate the purpose for which the Order is sought. There is evidence to suggest that the development that has been undertaken since 8/04/26 to 10/04/26 (today TSN was removed) is in order to facilitate a change of use, I have seen hardcore, sleepers and spirit level as works being undertaken preparatory for bringing onto the land of caravans for residential occupation.

Satisfied that as history and if an application for change of use were made it would not be successful, National Landscape, Green Belt and nearby water supply.

Evidence is that those on the land and responsible for the land will continue to do so given their nature of interactions with planning officers. And removal of TSN. And interactions with owner, first Defendant were highly indicative of those involved not taking notice of advice and work continued after the compliance officers explained that the work was not authorised. Together with the history.

There is a serious issue to be tried and balance of convenience in favour of injunction.

Return date can be accommodated on 20 April and damages are not a remedy due to harm to environment in particular risk to water supply.

Finally, Persons Unknown. Satisfied that the criteria have been met, due to reasons set out in WS and SK and very helpful oral submission received today from Ms Lambert.

Amendments to be made to the Order and sent through to the Court.

IN THE HIGH COURT OF JUSTICE **Claim No:**
KING'S BENCH DIVISION

IN THE MATTER OF PROCEEDINGS

B E T W E E N:-

TUNBRIDGE WELLS BOROUGH COUNCIL

Claimant

and

(1) DANNY MAURICE DARLING

(2) PERSONS UNKNOWN (THOSE WITH AN INTEREST IN OR INTENDING TO UNDERTAKE WORKS OR INTENDING TO OCCUPY THE LAND KNOWN AS "LAND LYING TO THE SOUTH EAST OF REDWINGS LANE, PEMBURY, TUNBRIDGE WELLS")

Defendants

SKELETON ARGUMENT ON BEHALF OF THE CLAIMANT IN SUPPORT OF AN APPLICATION FOR AN INJUNCTION

References are to paragraphs in the Witness Statement of Leanne Tarling [WS/X]

Essential Reading:

1. Application Notice
2. Draft Order
3. Witness Statement of Leanne Tarling

INTRODUCTION

1. Tunbridge Wells Borough Council ("the Claimant") seeks an interim injunction in relation to the "land lying to the south east of Redwings Lane, Pembury, Tunbridge Wells" ("the Land") shown edged red on the plan attached to the draft order which is registered with HM Land Registry under title number TT164814.

2. The Claimant is the Local Planning Authority within the meaning of the Town and Country Planning Act 1990 (as amended) ("the 1990 Act") for an area including the Land.

3. The Claimant makes this application as there have been breaches of planning control on the Land. Whilst a Temporary Stop Notice has been served, the Council has concerns about its effectiveness. The breaches of planning control may have consequences for public safety.

4. The First Defendant is the registered owner of the Land.

Persons Unknown

5. The 2nd Defendant identified only as "Persons Unknown" refers to those persons who are not named Defendants to this Claim who have an interest in the land or in undertaking works to the Land or intending to undertake works to the Land or entering onto the Land intending to occupy the Land in breach of planning control. The Claimant relies upon paragraph 21.2 of the Practice Direction Part 49E and s.187B (3) of the 1990 Act in support of seeking an Order against "Persons Unknown".

6. The Claimant is aware of the guidance of the Supreme Court in *Wolverhampton City Council and Others v London Gypsies and Travellers and Others* [2023] UKSC47. The *Wolverhampton* judgment of the Supreme Court provides that the granting of injunctions against "newcomers" is not constitutionally improper [170] and, in relation to breaches of public law, including planning law, local authorities are empowered to seek injunctions by statutory provisions.

7. In section 5 of the judgment [187ff] the Supreme Court considered the practical application of the principles affecting an application for a newcomer injunction against Gypsies and Travellers and the safeguards and provided guidance. It is submitted that the safeguards are met in this case:

i. Compelling justification for the remedy. This includes consideration of the obligation/duty to provide sites for Gypsies and Travellers [190], Needs assessments, planning policy, other statutory powers available and byelaws. As set out by Ms Tarling at WS/46(i), the Claimant is not able to demonstrate a 5-year supply of Gypsy and Traveller sites. There is a specific criteria based policy for Gypsy and Traveller applications in the recently adopted Local Plan (2025) and the development on the Land is contrary to planning policy and other statutory powers are not effective (WS/46(i);

ii. Evidence of threat of abusive trespass or planning breach – it is submitted that there is more than a sufficiently real and imminent risk as evidence shows that works have already been undertaken (WS/29) and the lack of engagement (eg providing names and details) leads the Council to believe that further breaches are imminent especially when "Man A" noted a "whole deal" (WS/25).

iii. Identification or other definition of the intended respondents to the application - it is impossible to name the persons as (a) it is not known those undertaking works and (b) it is not known who future potential occupants may be and (c) there has been a reluctance for those spoken to on the Land to provide details but the Claimant has attempted to define them as precisely as possible;

iv. The prohibited acts - the terms of the injunction correspond to breaches that are feared will take place if not restrained and it is submitted that the terms of the injunction order are clear and precise – furthermore, the terms simply tell those potentially affected not to do that which they are not allowed to do without express planning permission;

v. Geographical and temporal limits - the injunction has clear geographical limits as outlined on the plan attached to it and has temporal limits in that there is a return date;

vi. Effective notice of the order - it is possible to give effective notice by virtue of the Alternative Service provision;

vii. Liberty to apply has been included;

viii. Costs protection – there is no evidence that this is appropriate in this matter;

ix. Cross-undertaking - there is no cross-undertaking and it is submitted this is not appropriate in this case.

8. The Claimant has provided strong evidence that actual breaches of planning control have taken place, and there is a real risk of further breaches and it apprehends further operational development and material change of uses taking place in breach of planning control across the Land. The order simply holds the ring and maintains the status quo.

Service

9. For the reasons set out at WS/48-49 this application is made without notice. Whilst, this is understood to be exceptional, the Claimant's position is that there are good reasons (CPR 25.3(1). in short, providing even abridged notice of this application will defeat the purpose for which it is sought. (eg *South Downs National Park Authority v Daroubaix* [2018] EWHC 1903).

THE POWER TO GRANT AN INJUNCTION

10. Section 187B of the Town and Country Planning Act 1990 (as amended) ('the 1990 Act') provides 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 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."

11. The leading authority on the exercise of the Court's discretion to grant injunctions pursuant to section 187B of the 1990 Act is the decision of the House of Lords in the combined appeals known as *South Bucks District Council v. Porter* [2003] UKHL 558; [2003] 2 AC 558 **[20]** approving the judgment of the Court of Appeal [2001] EWCA Civ 1549; [2002] 1 WLR 1359.

12. The decision of the House of Lords also confirms that the Court has an original jurisdiction in respect of its exercise of discretion to grant an injunction pursuant to section 187B of the 1990 Act [**27**].

13. In *Davis v Tonbridge & Malling Borough Council* [2004] EWCA Civ 194, the Court of Appeal summarised the conclusion of the House of Lords in *South Bucks District Council v Porter* as follows [**34**]:

1) Section 187B confers on the courts an original and discretionary, not a supervisory, jurisdiction, so that a defendant seeking to resist injunctive relief is not restricted to judicial review grounds;

2) it is questionable whether Article 8 adds anything to the existing equitable duty of a court in the exercise of its discretion under section 187B;

3) the jurisdiction is to be exercised with due regard to the purpose for which was conferred, namely to restrain breaches of planning control, and flagrant and prolonged

defiance by a defendant of the relevant planning controls and procedures may weigh heavily in favour of injunctive relief;

4) however, it is inherent in the injunctive remedy that its grant depends on a court's judgment of all the circumstances of the case;

5) although a court would not examine matters of planning policy and judgment, since those lay within the exclusive purview of the responsible local planning authority, it will consider whether, and the extent to which, the local planning authority has taken account of the personal circumstances of the defendant and any hardship that injunctive relief might cause, and it is not obliged to grant relief simply because a planning authority considered it necessary or expedient to restrain a planning breach;

6) having had regard to all the circumstances of the case, the court will only grant an injunction where it is just and proportionate to do so, taking account, inter alia, of the rights of the person or persons against whom injunctive relief is sought, and of whether it is relief with which that person or persons can and reasonably ought to comply.

14. The well-known principles laid down by the House of Lords in *American Cyanamid Co. v. Ethicon Limited* [1975] AC 396 apply to the Court's exercise of discretion (see 406F, 407G, 408F).

15. It is to be noted that each of the appeals in *Porter* concerned cases where the Local Planning Authority were seeking mandatory injunction orders to remove persons who had taken up occupation of their land in breach of planning control. This application does not seek any mandatory steps. This application for an interim injunction seeks only to preserve the status quo at this point.

BREACHES OF PLANNING CONTROL

16. The evidence available to date clearly demonstrates that there have been breaches of planning control as summarised at WS/29:

i. Operational development including altering the land levels by way of excavation of the ground and re-distributing earth to level it out, construction and laying of hardstanding;

ii. Engineering operations and groundworks.

17. There has been a disregard for planning control and the comment from the owner as set out at para 24 (he said he "doesn't care" if the council "slap[s] a notice on the gate") reinforces the Council's concerns.

Consequences of the breaches

18. These breaches do not just cause in principle planning harm. The Council has serious concerns about wider public safety. During an appeal into an adjacent area of land where caravans have been stationed, South East Water participated due to its concerns. Ms Tarling notes at para 38 of her witness statement that the Inspector concluded there was "an inherent and plausible risk to public water supply" with the "potential to affect some 50,000 people".

19. There are numerous other planning harms including to the countryside, the National Landscape and the Metropolitan Green Belt.

THE NEED FOR AN INJUNCTION

20. At WS para 36, Ms Tarling sets out why other enforcement options are not appropriate in this case. Firstly, an Enforcement Notice cannot attack an anticipated breach of planning control of which further breaches are expected. Secondly, the process is lengthy. Thirdly, the ultimate sanction for breaching an enforcement notice or a stop notice is criminal proceedings but the penalty is a fine and proceedings are lengthy. By the time the Council waits for further breaches to take place, even more harm will have been caused. Furthermore, if residential occupation is the goal of those doing the works,

it can be taken up very quickly and once occupants are on site it is a very lengthy process to remove them.

21. Applying the approach in *American Cyanamid* the Claimant submits that:

    i. There is a compelling case that works which have taken place will lead to further breaches of planning control. Those breaches make it more likely that there will be similar breaches of planning control on undeveloped land. In other words, there is a serious question to be tried; and

    ii. The Local Planning Authority cannot adequately be compensated in damages for a breach of planning control.

22. In the premises, the balance of convenience lies in preserving the lawful use of the land and enforcing proper planning control in the public interest.

FULL AND FRANK DISCLOSURE

23. The Council has considered arguments that might be made in response to this application had notice been given in order to comply with its duty to provide full and frank disclosure.

There is a need for such sites

24. The Council accepts that there is a need for Gypsy and Traveller sites. However, as demonstrated by the recent appeal decision on an adjacent site, that need is highly unlikely to outweigh the harms caused by a change of use on the Land.

The Defendants have nowhere else to go

25. The Defendants may say that they have nowhere else to go. However, the Council has been provided with no information to assess this further.

CONCLUSIONS

26. In the circumstances of the present case, the Claimant submits that an injunction in the terms sought will not involve an interference with the Defendants' Human Rights (as no occupation has yet been taken up or, alternatively, any such interference is necessary and proportionate having regard to all the circumstances known to the Claimant at present and the public interest in protecting the environs.

27. The Defendants can continue to use their land without breaching planning control and can apply for planning permission in the usual way for works that require consent.

28. In the premises, the Claimant submits that it is appropriate for an injunction to be granted in the terms of the draft Order. There are serious concerns for public safety as a result of further development of the Land.

29. The Claimant also seeks an Order for alternative service of any injunction order granted to ensure the earliest possible compliance with proper planning control. In the circumstances, the Court can be satisfied that service by way of the alternative method proposed will come to the attention of the Defendants and will assist in preserving the lawful use of the Land.

30. The Claimant is willing to give the undertakings listed in the draft Order. There is no undertaking as to damages. From *Kirklees MBC v Wickes Building Supplies Ltd* [1993] A.C. 227, the court may exercise its discretion not to require such an undertaking, taking into account the circumstances of the case and that the Claimant is a local authority with the function of enforcing the law in its district in the public interest. This has more recently been considered in the context of s.187B in the cases of *Basingstoke & Deane BC v Loveridge* [2018] EWHC 2228 (QB) [**16**] and *South Downs National Park Authority v Daroubaix* [2018] EWHC 1903 (QB) [**16**].

EMMALINE LAMBERT
CORNERSTONE BARRISTERS
2-3 GRAY'S INN SQUARE
LONDON
9 April 2026

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

IN THE MATTER

B E T W E E N : -

TUNBRIDGE WELLS BOROUGH COUNCIL

Claimant

And

(1) DANNY MAURICE DARLING
(2) PERSONS UNKNOWN (THOSE WITH AN INTEREST IN OR INTENDING TO UNDERTAKE WORKS OR INTENDING TO OCCUPY THE LAND KNOWN AS "LAND LYING TO THE SOUTH EAST OF REDWINGS LANE, PEMBURY, TUNBRIDGE WELLS"

Defendants

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Status: ✅ Law In Force

Town and Country Planning Act 1990 c. 8

Part III CONTROL OVER DEVELOPMENT

Meaning of development

This version in force from: **June 7, 2006** to **present**

(version 8 of 8)

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)

Modifications

Whole Document	Modified in relation to the transfer of functions to the National Assembly of Wales by National Assembly for Wales (Transfer of Functions) Order 1999/672, Sch. 1 para. 1
	Modified in relation to Directive waste by Waste Management Licensing Regulations 1994/1056, Sch. 4(I) para. 11
Pt III	Modified in relation to development to which SI 1992/1492 reg.3 applies by Town and Country Planning General Regulations 1992/1492, reg. 6
Pt III s. 55	Modified for the purposes of application of the legislation to the Isles of Scilly by Town and Country Planning (Isles of Scilly) Order 2005/2085, art. 4(1)(a)
	Modified in relation to the Isles of Scilly by Town and Country Planning (Isles of Scilly) Order 2013/2148, Sch. 2 para. 1, art. 4

Subject: Planning

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

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Status: ✅ Law In Force

Town and Country Planning Act 1990 c. 8

Part VII ENFORCEMENT

Injunctions

This version in force from: **November 25, 1991** to **present**

(version 1 of 1)

[

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)

Modifications

Whole Document	Modified in relation to the transfer of functions to the National Assembly of Wales by National Assembly for Wales (Transfer of Functions) Order 1999/672, Sch. 1 para. 1
	Modified in relation to Directive waste by Waste Management Licensing Regulations 1994/1056, Sch. 4(I) para. 11
Pt VII s. 187B	Modified for the purposes of application of the legislation to the Isles of Scilly by Town and Country Planning (Isles of Scilly) Order 2005/2085, art. 4(1)(a)
	Modified in relation to the Isles of Scilly by Town and Country Planning (Isles of Scilly) Order 2013/2148, Sch. 2 para. 1, art. 4

Subject: Planning

Keywords: Breach; Injunctions; Planning control

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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.

A 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
B *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
C 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
D 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

E *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)

F *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)

G *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]
H 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 do so because of distaste for the possible consequences for the law-breaker.

B 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 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 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 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] 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 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.

Straker QC replied.

The defendants in the second appeal did not appear and were not represented.

Their Lordships took time for consideration.

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

> H "would only be prepared to grant injunctive relief in cases which the 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
E 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.

"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 that the defendant has played the system by wilfully exploiting every B 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 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."

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 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 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 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 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.

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:

C

> "(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

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 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."

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 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 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:

> "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 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 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
H relator action brought in the name and with the consent of the Attorney 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

A 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 B 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 C 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 D 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. E 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 F 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.

G *Solicitors: Sharpe Pritchard; Community Law Partnership, Birmingham.*

D E C P

H

Case No: A2/2003/1260

Neutral Citation No: [2004] EWCA Civ 194
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
THE HON. MR. JUSTICE STANLEY BURNTON

Royal Courts of Justice
Strand,
London, WC2A 2LL

Thursday 26th February 2004

Before :

LORD JUSTICE AULD
LADY JUSTICE ARDEN
and
LORD JUSTICE JACOB

– –

Between :

LYN MARIE DAVIS & ORS.	Appellant
– and –	
TONBRIDGE & MALLING BOROUGH COUNCIL	Respondent

– –

(Transcript of the Handed Down Judgment of
Smith Bernal Wordwave Limited, 190 Fleet Street
London EC4A 2AG
Tel No: 020 7421 4040, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

– –

Mr Richard Drabble QC and Mr Daniel Kolinsky (instructed by Charter & Law Solicitors) for the Appellants
Mr Simon Bird (instructed by Sharpe Pritchard) for the Respondent

– –

Judgment
As Approved by the Court

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Lord Justice Auld :

1. The appellants, who are a group of fairground operators, known as "travelling showmen", and sometimes as "travelling show–people", appeal with the permission of Sedley LJ, from an order of Stanley Burnton J on 14th May 2003 granting the respondent, the Tonbridge & Malling Borough Council, the relevant planning authority, injunctive relief under section 187B of the Town and Country Planning Act 1990 in respect of their occupation in breach of planning control of a six hectares field that they owned north of Sotts Hole Cottage, Crouch Lane, Platt in Kent.

2. As the question of the entitlement of the Council to injunctive relief against the appellants is at the heart of the appeal, I should set out straightaway the provisions of section 187B of the 1990 Act:.

> (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. Prior to the appellants' occupation of the site, it was agricultural land. It is part of a swathe of open countryside, bounded by footpaths on two sides. It is set in the Green Belt and is part of a designated Special Landscape Area. Its use by the appellants is contrary to the Council's development plan policies which, in accordance with national planning policy, confer special protection against non–conforming use of land in the Green Belt and of such designation. The sole means of vehicular access to the site is along Crouch Lane, which, though largely straight along the frontage of the site, is for much of its length a narrow, winding country lane, confined with steep–sided banks and with trees and foliage overhanging it. It is unsuitable for large vehicles towing trailers and heavy goods vehicles.

4. Lyn Marie Davis, the first appellant, purchased the site in about November 2000. At about the same time, she and all or some of the other appellants, without notice to the Council and knowingly in breach of planning control, brought onto it their caravans and fairground equipment and began to fence and lay hardcore for access drives and parking areas. They have continued to use and develop the site in that way ever since, notwithstanding service on them of a number of enforcement notices which have been upheld by the Secretary of State on appeal and in respect of which the time for compliance has long since expired.

5. At the time of the proceedings before the Judge the site had been divided into 19 plots, 16 of which other appellants had purchased. All or most of the plots had been fenced off, and a significant part of the site was by then given over to access drives and hard–standing for the appellants' heavy vehicles, fairground rides, stalls and associated machinery. Some of the plots are empty or have little on them. Others have a great deal. For example, Mrs. Davis's

plot at the time of the application to the Judge had on it five trailers, a garden shed, two storage units, a big caravan, two touring caravans, four cars, seven lorries, a steel–framed workshop, a generator and some fairground rides and other attractions. In appearance, the appellants' occupation of the site constitutes a small settlement, but it is a well spread one, since the site is substantially larger than is necessary to meet their needs.

Travelling Show–people

6. Travelling show–people, as I shall call them throughout this judgment, have a long established place in English life. Their special pattern and rhythm of work has given them a distinct cultural identity, for which provision is made in national and local planning policies. On 6th December 1991 the Department of the Environment and the Welsh Office issued identical Circulars, respectively nos. 21/91 and 78/91, giving advice to local authorities about planning considerations for travelling show–people. Circular 21/91 described them and their way of life as follows:

> 2. They are self–employed business people who travel the country holding fairs, chiefly during the summer months. Although their work is of a peripatetic nature, show–people nevertheless require secure, permanent bases for the storage of their equipment and more particularly for residential purposes. Such bases are most intensively occupied during the winter, when many show–people will return there with their caravans, vehicles and fairground equipment. For this reason, these sites traditionally have been referred to as 'winter quarters'. But increasingly show–people's quarters need to be occupied by some members of the family permanently; older family members will stay on for most of the year and there are plainly advantages in children living there all year to benefit from uninterrupted education."
>
> 4. The nature of show–people's sites is unusual in planning terms. The sites illustrate the show–people's characteristic self–sufficiency by combing residential, storage and maintenance uses. Typically a site comprises areas set aside for the show–people's accommodation - usually caravans and mobile homes - and areas where vehicles and fairground equipment can be stored, repaired and tested. This means that the sites do not fit easily into the existing land–use categories. Some of the difficulties show–people have experienced with the planning system can be attributed to this."

7. However, the cultural identity of travelling show–people and their status, as a matter of planning law and policy, should not be confused with those of gypsies, for whom quite distinct provision is made; see e.g. *Wrexham CBC v. Berry & Berry and The National Assembly of Wales* [2003] EWCA Civ 835. Circular 22/91, in paragraph 3 identified some of those distinctions:

> 3. Most show–people are members of the Show–people's Guild of Great Britain and are required by the Guild to follow a code of practice on the use of their sites. Membership of the Guild provides show–people with exemption from the site licensing requirements of the Caravan sites and Control of Development Act 1960 when they are travelling for the purpose of their business, or where they occupy quarters for some period between the beginning of October and the

> end of March in the following year. However, they only enjoy permitted development rights under Part 5 of Schedule 2 to the Town and Country Planning General Development Order 1988 when travelling for the purpose of their business. They are therefore required to seek planning permission to establish all other sites. Furthermore, since show–people are specifically excluded from the definition of gypsies under the Caravan Sites Act 1968, they do not benefit from the duty on local authorities under that legislation to provide gypsy accommodation."

8. Whatever the distinctions to be drawn between gypsies and travelling show–people in terms of planning law and policy, it is plain that both groups have experienced similar difficulties over the years in matching their respective life–styles to modern–day conditions and to the often conflicting interests of the public at large, for both of which planning law and policy is intended to provide a fair balance. Circular 22/91, in paragraph 5, acknowledged an increase in the difficulties in striking the correct balance whilst avoiding hardship to show–people:

> 5. In recent years many show–people have had to leave traditional sites which have been displaced by other forms of development, sometimes following compulsory purchase. Some show–people have had considerable difficulty in obtaining alternative sites with planning permission. This has caused overcrowding on some sites, and caused some show–people to leave their home areas in attempts to find alternative sites - not always successfully. The problems show–people have experienced in obtaining planning approval for their sites have led them sometimes to occupy land in breach of planning control, resulting in lengthy enforcement proceedings. This jeopardises the show–people's livelihoods, and entails considerable cost to local planning authorities. The Government urges local planning authorities to pay close attention to this guidance with the aim of avoiding such conflict in the future".

9. Circular 22/91, in paragraph 6, went on to advise local authorities: to consider the needs of travelling show–people when preparing their local and unitary development plans; to identify existing sites with planning permission and realistically to assess the amount of accommodation required; and, where there has been a local tradition of occupation by show–people and/or a need for it, to make specific proposals for suitable locations.

10. Despite this guidance, the difficulties for show–people have continued. Nearly a decade after Circular 22/91, the Select Committee on Environment, Transport and Regional Affairs, in its 9th Report issued in June 2000, concluded that their needs - which, if anything, had become greater in the intervening period – were still not being met within the planning system. The Committee reported that many local planning authorities were not following the guidance in Circular 22/91; in particular they were not properly considering their needs in the preparation of development plans or when considering individual applications for planning permission for permanent sites. I should set out some of the Committee's observations:

> 29.The term ‘winter quarters', referring to the permanent base, or depot, to which travelling show–people return when not attending a

fair, is something of a misnomer. It is a throwback to an era when most travelling shows were held from April to late October, and show–people would travel continually during that period, returning to their permanent base only during the winter months. For many different reasons, the season is now for most show–people much more complex, necessitating a base to which they can return to live at any time and where their equipment can be stored, tested, and in some cases adapted. The evidence we received suggested that there is an increasing need for such sites.

30×.increasingly, show–people need all–year–round bases where they can leave their equipment when it is not being used; where this equipment can be serviced and safety checked; and to which they can return to live at any time.

31. Three further considerations indicate that more all–year round sites need to be provided. As with other people, show–people are on average living longer. As a result, while in the past there were a small number of retired show–people, today their numbers are increasing, and a new category is developing of people who still do a little work, but do not work all the time. Accommodation therefore needs to be available for those people, who, having travelled all their lives, cannot be expected to move away from their family unit into sheltered accommodation or nursing homes. At the other end of the age scale, the educational needs of travelling show–people's children have to be taken into account. × Finally, it is worth making the point that more and more show–people simply want the security of owning their own site.

32. Against this background, urban conditions have been changing, especially in the South East of England. Pieces of waste land have been disappearing, land values have escalated, and temporary stopping places for all travellers have been reduced. In particular many local authorities and landowners have put up barriers around vacant sites to keep out those leading an itinerant lifestyle, particularly tinkers."

Planning considerations

11. As I have indicated, the site is situated in the Green Belt and is part of an area designated in the local plan as a Special Landscape Area. Government policy, as expressed in PPG2, contains a presumption against inappropriate development in the Green Belt other than in *very special circumstances* . It defines inappropriate development as the making of material changes in the use of land unless they maintain openness and do not conflict with the purposes of including land in the Green Belt.

12. The relevant provisions of the approved Kent Structure Plan 1996 and the Tonbridge and Malling Borough Local Plan 1998, which apply to the site, require, in general, the preservation of the countryside so far as possible. The Local Plan contains specific policies relating to travelling show–people. Policy P5/7 safeguards the use of an existing show–people's site at another location. Policy 5/8 permits development within built-up areas where the proposed occupants have a clear local need for the site, where there would

be no harm to residential amenity and where measures are taken to minimise visual intrusiveness. And Policy P2/16 provides that proposals may exceptionally be permitted in the countryside in accordance with those criteria, subject to there being no overriding agricultural, conservation, including Green Belt, landscape or highway objections to the site.

13. It is common ground that the appellants' use of the site throughout has been contrary to National and local Green Belt policies and Special Landscape Area and countryside controls, and to local and structure plan polices protective of the countryside. The Inspector's description of the site in his Report was as follows:

> The appeal site is part of an area of undulating landscape of open sites, belts of trees and woodland, designated in the Local Plan as Special Landscape Area which on the Proposals Map forms part of an extensive and continuous area of high landscape quality. The site is prominently located within the SLA on account of its topography, a high plateau which falls away from the centre of the site both to the north, and more steeply, towards the south–west. This exposes it, despite belts of trees, to long views including from Wrotham Hill in the north and the A227 to the west ×"

14. There are also planning objections, albeit of a less fundamental nature, to the appellants' use of the site, in the highway danger caused by the thoroughfare of their heavy vehicles on the narrow and winding country access road, Crouch Lane, and in some loss of residential amenity.

15. The site also does not satisfy the guidance contained in Circular 22/91, which recommends certain criteria for local authorities when considering provision for travelling show–people in their local plans and applications for planning permission:

> 7. Sites should be reasonably flat, have good vehicular access, and be reasonably convenient for schools and other community facilities. They should be identified having regard to environmental considerations, including the potential nuisance to neighbours from vehicular movement and the maintenance and testing of equipment. Wherever possible sites should identified in locations with convenient and safe access to the road network; × Sites on the outskirts of built–up areas may satisfy these criteria but, where such locations are proposed, care should be taken to avoid visual encroachment into the open countryside. Sites with substantial natural screening may be particularly appropriate.
>
> 8. Where the development plan is relevant to the development proposal, local planning authorities should determine planning applications in accordance with the plan unless material considerations indicate otherwise. × Nothing in this advice contradicts that contained in other circulars and Planning Policy Guidance Notes restricting development in specially protected areas. For example, very special circumstances have to be demonstrated to

justify allowing policy development for purposes not normally appropriate in the Green Belts. ×

The Planning History and the Inspector's Report

16. The appellants made no application for planning permission before starting this unlawful development because, according to Billy Davis, the husband of the appellant, Lyn Davis, they knew that it was almost bound to be refused because planning permission for the development would involve serious breaches of planning policies.

17. I need not rehearse the history of the various enforcement measures taken by the Council other than to mention the following highlights. It took prompt enforcement action in late November 2000 as soon as it became aware of the appellants' arrival on the site, to which the appellants responded equally promptly by applying for planning permission. As a result, proceedings instituted by the Council for injunctive relief against the appellants were stayed pending the outcome of the planning application. In July 2001 the Council refused planning permission, and in October 2001, the Secretary of State's Inspector, following a hearing the month before, reported to the Secretary of State recommending dismissal of the appeals. His conclusions included the following:

> 1) *Impact on the Green Belt* – The dense coverage of the site with many caravans and large numbers of vehicles and fairground equipment, fencing of 17 family plots and construction of access tracks and hard–standings, would have "a severely detrimental impact upon the openness of the Green Belt" and, set as it was in open countryside well outside any settlement, it would also be "a serious encroachment into the countryside, in conflict with one of the main purposes of the Great Belt" and with national and local planning policies.
> 2) *Impact on the Special Landscape Area* – . The prominent position of the site in an extensive and continuous area of high landscape quality, the nature of the appellants' use of it and the difficulty of fully screening it would "represent a major change in the character of the site and a serious intrusion into an otherwise mainly unspoiled rural landscape", and "could not be justified because of the unacceptable impact on its surroundings which was not outweighed by need for sites for travelling show–people".
> 3) *Highways* - Although there was not a strong objection in terms of capacity to the appellants' use of the narrow, winding Crouch Lane for taking its vehicles to and from the site, there was "a strong highway objection to the development" because of the "fundamentally unsatisfactory nature" of the lane for such large and heavy vehicles.
> 4) *Impact on Residential amenity* - There would be "some loss of residential amenity from the appellants' use of the site", but "it would not be of serious proportions"
> 5) *Very special circumstances* - Despite the needs of the appellants and the lack of any alternative site for them, they were not such, given the special features of the site, as to amount to very special circumstances necessary to outweigh the inappropriateness of the development in the Green Belt and the other planning harms.
> 6) *Temporary planning permission* - The planning constraints on the site were of such strength that it would be inappropriate to grant temporary permission for three years sought by the appellants as an alternative to full permission, though they should be allowed 12 months for compliance.

> 7) *Human rights* The effect of upholding the enforcement notice and refusal of planning permission would deprive the appellants of their homes and would constitute an interference with their Article 8(1) rights. But the interference was lawful and in pursuit of legitimate aims, namely the protection of the Green Belt, Special Landscape Area and countryside from unnecessary and harmful development and the avoidance of highway danger. Those aims were in the national interest and served to protect the rights and freedoms of others. Enforcement action was necessary and proportionate, for nothing less than cessation by the appellants of their use of the site would achieve the aims. He added, in reliance on an observation of the European Court of Justice in *Chapman v. UK* (2001) 33 EHRR 399, at para 102, that, where, as here, homes had been established unlawfully, an objection to interference with Article 8 rights carried less weight.

The Secretary of State's decision

18. In December 2001 the Secretary of State, in his decision letter, agreed with the Inspector's conclusions and dismissed the appeals. But he granted the appellants a period of 12 months in which to vacate the site. In relation to the personal circumstances of the appellants and the lack of any alternative site in South East England, his decision letter stated that:

> 13 The Secretary of State has × considered whether there are any countervailing material considerations that would outweigh the presumption against inappropriate development in the Green Belt, the harm to the natural beauty of the Special Landscape Area and the harm arising on highway safety grounds and to the amenities of nearby residents. ×The Secretary of State has also very carefully considered the individual needs of the appellants summarised by the Inspector in × his report, and agrees with him that the appellant have a clear need for a site but that it is less clear that the specific need is for a site either in the area in which the appeal site is located or for a site of the size of the present site. ... It is accepted that the appellants have undertaken a comprehensive search for an alternative site but with no success and the Secretary of State agrees with the Inspector that the only conclusion that can be drawn from the search is that, at the present time, no alternative site for show–people can be identified either in the locality or within a wider search are of South East England. He further agrees with the Inspector that this is a substantial material consideration to weighed in the balance. However, for the reasons given by the Inspector ×, the Secretary of State concludes that the factors weighing in support of the proposed development are insufficient to outweigh the harm and conflict with national and local policy × He finds no very special circumstances to justify the grant of permission no[r] any reason for a decision otherwise than in accordance with the provisions of the development plan."

19. The appellants took no notice of the Secretary of State's decision. Far from making attempts to comply with it, they undertook further fencing and surfacing works, prompting the Council to issue and proceed with ten enforcement notices, each one of which was upheld by the Secretary of State's Inspector.

The Judge's judgment

20. In February 2003, by which time the year's grace allowed by the Secretary of State for the appellants to vacate the site had expired, the Council recommenced its proceedings for an injunction requiring the appellants to leave the site. In April 2003 the Judge heard the matter, including clear and undisputed evidence on behalf of the appellants that, despite comprehensive searches made on behalf of travelling show–people, there was no alternative site for them in the South East of England. The Council made no suggestion as to where they could take their caravans and fairground equipment. The issue for him was whether it was appropriate to grant injunctive relief under section 187B of the 1990 Act, which, as he was to acknowledge in paragraph 12 of this judgment, posed "the stark question whether the × [appellants] × should be compelled to leave the site when they have nowhere else to go".

21. In May 2003 the Judge gave judgment and granted the injunction sought. At the time of his judgment the applicable law was as stated by Simon Brown LJ, as he then was (with whom Peter Gibson and Tuckey LJJ agreed), in *South Bucks District Council v. Porter* [2002] 1 WLR 1359, though it was known that an appeal to the House of Lords was pending.

22. The Judge acknowledged, in paragraphs 37, 50 and 51 of his judgment, that the appellants would suffer "undoubted", "real" and "great" hardship from the sought injunction, and he referred also to their "desperate need" and their predicament. In approaching the question whether to grant it, he spoke, in paragraph 12, of a dichotomy of, on the one hand, hardship to the appellants, and, on the other hand, their unlawful development continuing indefinitely, with the planning decision "in practical terms set at nought".

23. The Judge set out at some length the planning conclusions of the Inspector and the decision of the Secretary of State on the planning appeals, and, as to the planning merits of the case, implicitly accepted them. He also, as I have said, acknowledged the hardship that the appellants would face if they were evicted from the site. In paragraph 40 of his judgment (which I set out in paragraph 44 below in the context of the first ground of appeal), he set the scene for his reasoning on the issue before him, – enforcement or not. He spoke of the Council and the Secretary of State having taken into account Article 8 considerations in making their planning judgments. And he commented, that, apart from the reasoning of the Court of Appeal in *Porter* and "all other things being equal", "judicial loyalty (and not merely deference)" to the planning authorities' decisions, would have required enforcement of the decision. However, as his judgment, read as a whole, makes plain, he recognised that the Court of Appeal's decision in *Porter* had established that he had to decide the enforcement issue for himself and that, on the evidence before him of the great hardship that eviction would cause the appellants, all other things were not necessarily equal.

24. In paragraphs 43 and 44 of the judgment the Judge made brief references to the remedies of self–help and criminal proceedings for non–compliance with enforcement notices, for which sections 178 and 179 of the 1990 Act respectively provide. It is plain, in my view, that he only mentioned them in order to show that he had considered them and to reject them as practical alternatives. I would not have included them in this summary of the judgment, but for the fact that they are the subject of complaint in ground 2 of the appeal, which I consider in paragraphs 56 to 58 below.

25. The Judge returned, in paragraph 49 of his judgment, to the weight to be given to the planning decisions when considering the suggestion that he should deal with the matter by refusing an injunction until another site had been found. He said that the failure of the

searches for an alternative site indicated that to postpone enforcement until one could be found would be to postpone it indefinitely. He said that it would, in effect, amount to the grant of a planning permission in circumstances in which the Inspector and the Secretary of State considered that even a temporary planning permission was not appropriate.

26. The Judge, having set out all the material considerations for and against the grant of injunctive relief, expressed his conclusions shortly in paragraphs 50 and 51 of his judgment:

> 50. The real choice, therefore, is between an injunction and no injunction. The first imposes real hardship on the Defendants; the second fails to restrain continuing unlawful occupation.
>
> 51. In my judgment, in the circumstances of this case, the Court should grant injunctive relief. The injunction will cause great hardship to the Defendants, but it is not a disproportionate response to the continuing unlawful use of the site. It is not suggested that there are matters personal to any of the individual Defendants, such as their state of health, other than those considered by the Secretary of State and the Council, which would make enforcement by injunction inappropriate. No breach of Article 8 will be involved. On the basis of the decision of the Secretary of State and those of the Claimant, an injunction is the appropriate relief to be granted."

27. The Judge, though refusing permission to appeal his judgment, extended the time for lodging an appellant's notice until fourteen days after judgment of the House of Lords in *Porter* .

28. In May 2003 the House of Lords gave judgment in *Porter* ([2003] 2 WLR 1547). They endorsed the judgment of Simon Brown LJ, but Mr. Richard Drabble, QC, on behalf of the appellants maintains that in their individual speeches, their Lordships made clearer or gave added emphasis to the two stage decision process of which Simon Brown LJ spoke in his judgment, namely that the court should normally defer to the planning authorities on the issue of planning merits, but should make its own decision on the issue of enforcement having regard to all the circumstances, including those personal to the party against whom injunctive relief was sought. The House held, as had Simon Brown LJ, that a court, in considering whether to grant injunctive relief under section 187B is addressing different questions from those for decision by a planning authority, and, accordingly, on those questions, in particular of hardship and human rights, it does not owe the same degree of deference to planning authorities as it does on the planning merits.

The law - *Chapman* and *Porter*

29. Mr. Drabble's suggestion of some material difference between the ruling of the House of Lords and the reasoning of Simon Brown LJ in *Porter* was coupled with a general submission that the Judge's necessary unawareness of what the House was going to say, led him into error as to his own role when deciding whether to grant injunctive relief. It is, therefore, necessary for me to refer to the decisions at both levels in that case in more detail than I would otherwise have done. I do so against the backcloth of the decision of the European Court of Justice in *Chapman* .

30. *Chapman* was the Judges's starting point, at paragraph 7 of his judgment, in his consideration of the law. It concerned the impact of Article 8 ECHR on the right of gypsies, within the meaning of our domestic planning law and policy, to remain on land on which they had unlawfully established themselves in breach of planning controls. The Court held that: 1) it had to look at the matter on the instant facts of each case, not as a generality according to the level or national supply of sites for gypsies' needs; 2) Article 8 does not oblige a member state to provide an individual with a home; 3) there should be a comparison in each case between, on the one hand, an individual's Article 8 rights to respect for his private and family life and his home and, on the other, to the right of the community to environmental protection; 4) the scarcer the availability of alternative accommodation the more weight should be given to the interference with the individual's article 8 rights; 5) on the other hand, if the individual has consciously established his home in a particular place unlawfully, less weight will be given to his Article 8 claim; and 6) assessment of the competing interests is one in respect of which national authorities should have a wide margin of national appreciation. Such reasoning clearly applies also to the exercise of discretion under section 187B on the question whether to grant injunctive relief to quit land against travelling show–people.

31. Our national courts have given effect to and developed the *Chapman* ruling in a number of cases, most importantly in the context of the issue in this case by the Court of Appeal and the House of Lords in *Porter* In that case, certain gypsies succeeded in challenging the grant of injunctive relief under section 187B of the 1990 Act preventing them from occupying land in breach of planning control, on the ground that the courts had failed to consider all the factors relevant to the exercise of their discretion, in particular whether the injunctive relief sought was sufficiently necessary for the legitimate aim of protecting the environment to justify overriding the gypsies' Article 8 rights. In the Court of Appeal Simon Brown LJ identified the key issue for consideration as the degree of deference, if any, that courts should show to conclusions and decisions of planning authorities whose decisions they were asked to review, or put another way:

> 4 × 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."

32. Simon Brown LJ's conclusion, which the House of Lords upheld, was that the answer differs according to whether the court is considering the planning merits or whether to enforce a planning decision against the defendant by injunctive relief. His reasoning is to be found in paragraphs 38 to 42 of his judgment, all of which their Lordships approved on appeal:

> "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 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 consideration of those matters is × "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 time to remedy the breach, then the court would obviously be the readier use its own, more coercive powers. ×."

"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 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 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 the planning authority itself coming to reach a different 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 the 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 relief (least of all immediate 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". × 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 gypsy's private life and home and the retention of his ethnic identity are at stake.

42. I do not pretend that it will always 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."

33. It is hard to think how Simon Brown LJ could have explained any more clearly, or with any greater emphasis than that, the different role of the court according to whether the matter for decision turned on the merits of the planning decision or whether and how to enforce it.

34. As I have said, the House of Lords affirmed the Court of Appeal's decision, all of their Lordships endorsing the reasoning of Simon Brown LJ in the above paragraphs. The effect of the various speeches -set out most comprehensively in the leading speech of Lord Bingham of Cornhill, was as follows: 1) section 187B confers on the courts an original and discretionary, not a supervisory, jurisdiction, so that a defendant seeking to resist injunctive relief is not restricted to judicial review grounds; 2) it is questionable whether Article 8 adds anything to the existing equitable duty of a court in the exercise of its discretion under section 187B; 3) the jurisdiction is to be exercised with due regard to the purpose for which was conferred, namely to restrain breaches of planning control, and flagrant and prolonged defiance by a defendant of the relevant planning controls and procedures may weigh heavily in favour of injunctive relief; 4) however, it is inherent in the injunctive remedy that its grant depends on a court's judgment of all the circumstances of the case; 5) although a court would not examine matters of planning policy and judgment, since those lay within the exclusive purview of the responsible local planning authority, it will consider whether, and the extent to which, the local planning authority has taken account of the personal circumstances of the defendant and any hardship that injunctive relief might cause, and it is not obliged to grant relief simply because a planning authority considered it necessary or expedient to restrain a planning breach; 6) having had regard to all the circumstances of the case, the court will only grant an injunction where it is just and proportionate to do so, taking account, inter alia, of the rights of the person or persons against whom injunctive relief is sought, and of whether it is relief with which that person or persons can and reasonably ought to comply.

35. On the question, on an issue of enforcement, of the degree of deference that a court should accord to local planning authority's striking of the balance between public and private interests, Lord Bingham, (with whom the other Law Lords agreed) said, at paragraph 31 of his speech, that if the local authority appears to have fully considered such matters –:

> × and nonetheless 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 ×"

36. Having set out those principles, Lord Bingham, questioned what bearing Article 8 has on the approach of a court to an application under section 187B, by which I believe him to have meant what, if anything, does it add to those principles. However, having referred to the two decisions of the European Court of Justice in *Buckley v. United Kingdom* (1996) 23 EHRR 101, and *Chapman* , he said:

> 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. ×"

37. Thus, Lord Bingham's reasoning, and that of the other Law Lords, in endorsing Simon Brown LJ's analysis of the balance to be sought between public and private interest in such cases, was to recognise two stages before, or certainly by the time, injunctive relief is sought: first, to look at the planning merits of the matter, and, in doing so, to accord respect to the local planning authority's conclusions; and second 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. Although all of their Lordships spoke in similar terms; the following passages from the speech of Lord Clyde are typical of their general approach:

> 70. But the enforcement of the planning decisions which have been reached by planning authorities does not in my view strictly involve the exercise of a planning judgment. ×
>
> 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 [a] 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.
>
> ×
>
> 73. Accordingly, in my view section 187B 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. ×."

See also per Lord Hutton, at paragraph 86 and Lord Scott of Foscote, at paragraphs 100–101 of their respective speeches.

The grounds of appeal

General

38. Underlying the whole of the challenge to the Judge's order that the appellants should vacate the site is Mr. Drabble's argument that its enforcement would violate their right to respect for their private and family life and home under Article 8. It went as follows. Travelling show–people, like gypsies, have their own particular needs within the planning system, needs, which for one or other reasons, have not been properly met. The case of these appellants reflects the national picture of under–provision and unmet need. Their lifestyle and the lack of a site suitable for their needs means that eviction from the Crouch Lane site would deprive them of their homes, damage their way of life and significantly affect their ability to work, thus engaging Article 8. Their circumstances are particularly acute in that it is common ground that there is nowhere in the South East of England for them to go. Those are matters that go to the proportionality of the decision to grant injunctive relief, and, submitted Mr. Drabble, in the light of their Lordships' decision in *Porter* , require the Court to confront, when deciding whether to uphold the Judge's decision, the question of its

enforcement in the event of breach by the appellants. He maintained that the Judge wrongly conflated the issue of planning merits, which was exclusively for the planning authorities, and the issue whether the court should enforce the planning decision by injunction. More generally, he submitted that, on a proper judicial balance of the competing public and private interests, the latter outweighed the former.

39. Mr. Simon Bird, on behalf of the Council, acknowledged that the appellants' rights under Article 8 are engaged. However, he pointed out that the Council has considered them (on three separate occasions) as has also the Inspector and the Secretary of State, and that each, after a proper balance of the competing considerations, concluded that the public interest in their removal from the site outweighed their Article 8 and planning rights.

40. Mr. Bird submitted that, for the following reasons, all of which have been accepted and expressed by the Inspector and the Secretary of State, there is no proper basis on which the Judge below or this Court could interfere with those decisions. The appellants' continued occupation of the site offends against the public interest on a number of separate levels, which cumulatively demonstrate the high sensitivity of the site to illegal occupation and use of this sort. First, it offends against the Green Belt, Special Landscape Area and countryside planning controls and the guidance for site requirements in Circular 22/91. Second, its use and that of the narrow, winding access road of Crouch Lane by large fairground heavy goods vehicles is dangerous to other road users and a nuisance to neighbouring occupiers. He added that the appellants, through abuse of planning procedures, have maintained their illegal use of the site and avoided eviction from it for some three years, having already had the benefit of a year's period of grace ordered by the Secretary of State. As to the appellants' reliance on their need for a site and its unavailability if the South East of England, Mr. Bird pointed out that none of the appellants has a local connection, and the site is substantially larger than is necessary to meet their needs, as the Inspector and the Secretary of State found.

41. In the light of all those matters, Mr Bird submitted that: 1) there were no "very special circumstances" to outweigh the inappropriateness of development in the Green Belt, quite apart from the other planning harms identified by the Inspector and confirmed by the Secretary of State; and 2) the Judge, in deciding to grant the Council injunctive relief, had exercised his own discretion in a manner that could not be faulted as a matter of law or proportionality.

Specific grounds of appeal
Ground 1 - excessive deference to planning decisions

42. The first challenge is that the Judge, in exercising his power to grant injunctive relief under 187B of the 1990 Act, was too deferential to the decision of the Council on matters of hardship and the right to respect for private and family life and home under Article 8.

43. As I have indicated, this is not a case in which the planning authorities or the Judge failed to have regard to Article 8, if and insofar as it adds anything to the exercise of discretion already required by section 187B. Here, as Mr. Bird pointed out, the evidence before the Judge showed that the Council had considered human rights issues on three occasions. The first was at the very outset in November 2000 when it compiled a human rights statement in relation to the case, and in deference to which it consented to the stay of its claim for injunctive relief. Second, it considered them again when considering the planning

application. So also, as I have indicated, did the Inspector and the Secretary of State consider the human rights aspect when respectively reaching their conclusion and decision. And third, the Council considered them further when deciding whether to proceed with the application for injunctive relief. The Judge too considered all the human rights material that had been prepared by or placed before the Council.

44. The main question on this appeal is not, therefore, whether the planning authorities have properly considered such matters and all other relevant matters, or even whether they have lawfully refused planning permission on the basis of such consideration. The question is whether the Judge, in exercise of his discretion under section 187B, exercised an original jurisdiction as required by *Porter* , or was unduly deferential to the planning authorities' necessarily overlapping conclusions on the planning merits. In addressing this issue, Mr. Drabble focused on the following reasoning of the Judge in paragraph 40 of his judgment, which I have summarised in paragraph 23 of this judgment:

> The case differs from those considered by the Court of Appeal in *Porter* in that the conflicting public and private interests have been considered and a decision made not only by the local authority, but also by the Secretary of State. It is not suggested that the Secretary of State's decision involved any breach of Article 8 or that his decision was in any way flawed: he decided that the Defendants' rights under Article 8 were outweighed by the other interests that he is entitled and bound to take into account and which are within the scope of Article 8(2). The effect of his decision is that the Defendants' continued occupation of the site is unlawful. Given that the Secretary of State took into account the matters now put forward on the Defendants' behalf, apart from what was said by the Court of Appeal in *Porter* , I should have thought that, other things being equal, judicial loyalty (and not merely deference) to the lawful decisions of the elected executive branch of government requires the enforcement of that decision. An unlawfulness against which there is no sanction is a strange creature. To some extent, the question for the Court under section 187B is not simply whether to enforce a planning decision, but whether injunction is the appropriate remedy. However, neither side suggested that some other and more appropriate remedy should be tried by the local authority. On this basis, the question is enforcement or not."

45. The flow of Mr Drabble's complaint under this ground was that: 1) the House of Lords, in *Porter* , has since indicated more clearly than did the Court of Appeal that a court, on granting an injunction under section 187B, has an original jurisdiction; 2) the Judge's approach in the above paragraph and elsewhere in his judgment does not accord with their Lordships' reasoning, in particular that of Lord Clyde, at paragraphs 70–72 (see paragraph 37 above), and of Lord Hutton, at paragraph 86, that the issues facing a court on an application for an injunction are different from those faced by a planning authority or Inspector or Secretary of State in determining an application for planning permission; and 3) the Judge was too deferential or too "loyal" to the conclusions of the Council, Inspector and Secretary of State in their favouring, both as a planning matter and under Article 8, the public interest in enforcing the law over the private interest of the appellants in protection from hardship. Mr Drabble summarised his complaint by saying that the Judge's reasoning proceeded on the basis that, once the issue of planning permission had been finally resolved,

it was the job of the court to bring the unlawful use to an end, an approach which conflicted with *Porter* .

46. Mr. Bird's response to this complaint was that the Judge's reasoning in paragraph 40 and throughout his judgment adhered to the guidance of Simon Brown LJ in the Court of Appeal in *Porter* , which guidance had been fully endorsed by the House of Lords. He pointed out that the Judge rightly observed in paragraph 40 of his judgment that there had been no suggestion of unlawfulness of the Council's, the Inspector's or the Secretary of State's reasoning on the planning issues or on Article 8 considerations, the latter of which, unlike in the *Porter* case, had been considered fully at the planning stage. It was in that context that the Judge spoke conditionally of ("judicial loyalty (and not merely deference) to the lawful decisions of the elected executive branch of government". But, said Mr. Bird, the Judge made plain throughout his judgment that the question for him was different, namely whether an injunction was appropriate in the circumstances, in particular having regard to the hardship that its grant would cause to the appellants. Mr. Bird also pointed out that the Judge had expressly qualified his remark about "judicial loyalty" in paragraph 40 by saying that it was subject to what had been said by Simon Brown LJ in *Porter* and that it only arose "other things being equal". In short, he submitted that it is unarguable that the Judge, in deciding to grant the injunction, blindly followed the planning decision without exercising his own discretion.

47. In my view, this ground of appeal should fail. First, there is no substance in the suggestion that the House of Lords in *Porter* put the law differently or more favourably to the appellants after the Judge's judgment than Simon Brown LJ had done before it. As I have already said – and I hope demonstrated by setting out the relevant passages and reasoning of both tribunals -both clearly indicated that decisions on planning merits are for the planning authorities and decisions on whether to enforce such decisions are for the courts taking into account all the relevant considerations, including, whether as a matter of Article 8, or otherwise, those of personal hardship to the party against whom injunctive relief is sought.

48. Second, the Judge's judgment, in paragraph 40, and read as a whole, demonstrates that he was well aware of and attentive to the distinction drawn by Simon Brown LJ in *Porter* between the planners' role and his. In paragraph 7 he began his discussion of the law with a reference to Article 8, and, in paragraph 8, moved straight to, and set out, paragraphs 38 to 42 of Simon Brown LJ's judgment, prefacing the latter with the following observation:

> In × *Porter* the Court of Appeal considered the approach which should be adopted by the Court when considering an application for an injunction in a case such as the present. The Court held that the grant of an injunction was not a necessary or inevitable response to an application by a local authority to enforce planning restrictions. The principles applicable were stated by Simon Brown LJ ×."

And later, in paragraph 12, having referred to the "stark question" for his decision whether the appellants should be compelled to leave the site when they had nowhere else to go, he said:

> *Porter* lays down that the decision of the Court must depend on the facts of the case, to which I therefore turn."

Thereafter, as I have indicated, the Judge gave an account of the site, the relevant planning polices, the appellant's commencement and continued use of it in deliberate defiance of the planning controls and, importantly, the appellants' needs and other considerations. Then, after rehearsing the Inspector's conclusions and the Secretary of State's decision, he returned, in paragraph 40, to the issue that he had already identified was for him to resolve, namely whether or not to enforce the planning decision.

49. As I have already indicated, my reading of paragraph 40 corresponds with that of Mr. Bird, namely that, but for the Court of Appeal's ruling in *Porter* and if "all other things were equal", judicial loyalty, not merely deference, to the planning authorities' decision would have required him, when considering enforcement, to give substantial weight to the planning decisions. His conditional reasoning is understandable since, as Mr Bird observed in argument, there is considerable overlap in the exercises of considering a planning decision and of deciding upon enforcement where the same circumstances fall to be considered at each stage, and where all that differs at the enforcement stage may be the weight that the Judge gives to some of those circumstances. Lord Bingham was to express a similar notion in paragraph 31 of his speech in *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 nonetheless 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 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 ×"

Paragraph 40 of the Judge's judgment, it seems to me, is just another way of putting what Lord Bingham was to say in that passage.

50. Third, it is plain from the Judge's treatment of the matter, following his identification of his task in paragraph 40, that he set about exercising his own jurisdiction on the issue of enforcement. He considered, in paragraphs 41 to 46, as part of the proportionality issue, the need to contemplate enforcement of any injunction granted and a number of possible alternatives to such grant. And he returned, in paragraph 47, to *Chapman* , observing that "desperate need" mitigates the strong factor in favour of enforcement identified by the European Court in that case where the party against whom an injunction is sought has consciously defied the planning prohibition. And, in paragraph 51, he gave his own answer to the question of the choice in the circumstances between the imposition of real hardship on the appellants and allowing them to continue in their unlawful occupation.

> In my judgment, in the circumstances of this case, the Court should grant injunctive relief. The injunction will cause great hardship to the Defendants, but it is not a disproportionate response to the continuing unlawful use of the site. × On the basis of the decision of the Secretary of State and those of the Claimant, an injunction is the appropriate relief to be granted."

51. Sedley LJ, in granting the appellants permission to appeal, criticised this expression by the Judge of his conclusion as "deficient as a judgment on proportionality" because "as a matter of law [it] involves quite a lot more than one sees spelt out here". I do not know how much the Judge could have been expected to say by this stage of his judgment, given his comprehensive rehearsal of the relevant planning law and polices, the facts and the competing factors on which he had to exercise his discretion. There is no criticism of him for having failed to take account of all relevant matters, or of his having taken into account irrelevant matters, or of having failed accurately to record and find the extent of the damage to the environment that would flow from refusal to grant injunctive relief, or for having failed to acknowledge the hardship that the appellants would suffer from the grant of it. At the end of the day, having set out all the competing factors, he had to make his own judgment, which, though characterised by section 187B as an exercise of discretion, is as much a matter of feel as anything else. It is not an exercise that is susceptible to fine intellectual analysis or description at the point of decision. The problematic business of weighing competing interests of so different a character, to which Simon Brown LJ referred in paragraph 42 of his judgment, is to be structured and articulated in the judgment as a whole. It is from that exercise, which, in my view, the Judge properly and carefully undertook here, that, in Simon Brown LJ's words, "the appropriate conclusion should emerge".

52. Mr. Drabble also complained under this ground that the Judge's approach, in paragraph 49 of his judgment (summarised in paragraph 25 above), of equating a decision to postpone the grant of relief until an alternative site could be found with a grant of temporary permission, contradicted Lord Clyde's rejection of such analogy, at paragraph 72 of his speech.

53. This is what the Judge said in paragraph 49:

> There is a further factor pointing against refusing an injunction until another site has been found. Who is to find it? It is unrealistic to expect the Defendants to continue to look for a site if no injunction is granted. It is unrealistic, and arguably unfair, to expect the Claimant to find them a site, certainly within its own area, which is predominantly Green Belt, but even regionally. The Defendants had no connection with the site or with the Council until they unlawfully occupied the site, which is an unsuitable site for their occupation. The shortage of sites is a regional, if not a national problem, not a local problem. In fact, however, the Claimant has searched unsuccessfully for an alternative site for the Defendants ×. The failure of the searches for an alternative site indicates that to postpone enforcement until an alternative site is found would be to postpone it indefinitely: as the Council put it, in effect to grant a planning permission in circumstances in which the Inspector and the Secretary of State considered that even a temporary planning permission was not appropriate."

54. This is what Lord Clyde said in his speech, at paragraph 72:

> 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 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."

55. The suggestion of Mr. Drabble is that the Judge wrongly conflated refusal of injunctive relief with the grant of temporary permission, Mr. Bird maintained that the Judge simply put it as a *further* factor against refusal of injunctive relief, namely that, as a matter of fact, it would have the effect of indefinite postponement. And that is how I read it, however inexact the analogy between refusal of injunctive relief and temporary planning permission. After three years in which the appellants have resolutely remained on the site in defiance of planning controls, relying on their inability to find anywhere else to live, the Judge was right, in my view, to take the view that removal of the threat of eviction would not lead to a softening of their attitude on that basis, rather it would fortify it. There was likely to be little change of the sort that Lord Clyde had in mind; the time had come for the Judge to make a decision on the question of enforcement, however stark. In my view, this complaint adds nothing of substance to the already unsubstantiated main complaint in this ground of appeal.

Ground 2 - consideration of fall–back remedies for the Council by way of self–help and/or criminal proceedings

56. Mr. Drabble maintained that the Judge, in his reference in paragraph 43 of his judgment, to the possibility of the Council resorting to self–help failed to take account of its unlikelihood and also of the fact that it too could be subject to challenge on conventional judicial review grounds, as well under Article 8. He made a similar criticism of the Judge's comparison, in paragraph 44 of his judgment, with issues that might arise in respect of a criminal prosecution for failure to comply with an enforcement notice - the important difference between them being, said Mr. Drabble, that the sanction for failure to comply with an enforcement notice is a financial penalty, whereas failure to comply with an injunction may be imprisonment. Mr. Drabble's complaints in respect of both of these alternative remedies was that the Judge wrongly treated them as fall–back positions. This is how the Judge expressed those points:

> 43. If no injunction is granted, it does not necessarily follow that the Defendants will be permitted to remain on the site. In theory at least, the Council could avail itself of the remedy of self–help created by section 178(1) of the 1990 Act. It has not sought to do so, since the remedy of injunction is seen to be, and clearly is, preferable to the disorder and trauma that might be involved in the exercise of that remedy. But given that it is accepted that the decision of the Secretary of State was a lawful decision, I have difficulty in seeing that the exercise by the Claimant of its powers under section 178(1) could be challenged, and it was not suggested that it could be.

> 44. The Council could take criminal proceedings under section 179 of the 1990 Act; but in circumstances where the appeal against the enforcement notice has been dismissed, to leave it to do so would be to pass the decision on enforcement to the magistrates or district judge, who would be faced with the same arguments as have been put before me, with possibility of appeals from their decision. In a case of the importance to the parties of this one, it seems to me that the High Court is the appropriate forum."

57. Mr. Bird submitted that this ground is "baseless", since the Judge, in paragraph 6 of his judgment, expressly acknowledged that any other sanctions would be subject to human rights defences and that, in paragraph 43, he merely stated that refusal of injunctive relief would not necessarily guarantee the appellants' tenure and that they had not suggested they could resist a self–help remedy. As to criminal proceedings, Mr Bird pointed out that there had been no suggestion that the Council should have prosecuted the appellant and that the Judge had expressed no view as to the prospects of such a course, merely observing that the High Court was the more appropriate forum.

58. I have said, in paragraph 24 of this judgment, when summarising the Judge's observations on these matters, that it seemed to me that he only mentioned them in order to show that he had considered them, with all the other relevant considerations, and to reject them as practical alternatives. Now that I have set out the Judge's words, it will be plain that he did not regard them as practical alternatives or, as Mr. Drabble describes them, as "fall–back positions". He raised them as theoretical possibilities to show that he had considered and rejected them. In my view, this ground of appeal is also without substance.

Ground 3 - disproportionality under Article 8 of injunctive relief, given the hardship it would cause to the appellants.

59. Mr Drabble put at the forefront of this ground of appeal what he described as the "stark" facts of the case that there is no acceptable answer to the question what the appellants should do if evicted from the site, and that *Porter* requires the court to "face up" to the question whether it would contemplate committal in the absence of an acceptable answer. He submitted that the Judge wrongly held that the grant of an injunction would be a proportionate interference with the appellants' Article 8 rights: 1) given the undoubted hardship that he accepted the appellants would suffer if forced to leave the site in that they had nowhere else to go; and 2) his agreement with the Inspector that the highway objections and impact on residential amenity of their use of the site were not substantial and not such, as on their own, to require their immediate eviction.

60. Mr. Bird began his submissions with some criticisms of the incompleteness and inaccuracy of the ground of appeal, as drafted. He drew attention to its failure to refer to the important planning considerations of the need to protect the Green Belt, Special Landscape Areas and open countryside and to its lack of mention of the Judge's concern, expressed in paragraph 28 his judgment, about the danger to other road users and the "substantial" safety considerations. However, his more substantial point was that the ground, and Mr. Drabble's argument in support of it, discloses no error of law on the part of the Judge, who had carried out the relevant balancing exercise between the public interest in bringing to an end the appellant's deliberate, serious and prolonged breach of planning controls, designed to

protect sensitive countryside of the sort in which this site is located, and the hardship that eviction would cause to the appellants. He suggested that Mr. Drabble's argument was tantamount to saying that, in such circumstances, Article 8 guaranteed the right to a home, and on that ground alone ought to outweigh the public interest at stake, an argument roundly rejected by the European Court of Justice in relation to gypsies in *Chapman*.

61. In my view Mr. Drabble's complaint under this ground is simply an invitation to the Court, seemingly in reliance on some shade of difference between the dicta of the House of Lords and of Simon Brown LJ in *Porter* , to substitute its own exercise of the section 187B discretion for that of the Judge. As I have said, I can find no distinction of substance between the two levels of decision, and I can find no fault with the way in which the Judge approached his exercise of discretion in reliance on Simon Brown LJ's articulation of the law. As I have said, he has shown deference to the planning decisions, but clearly made up his own mind on the issue whether to grant an injunction against the appellants. In doing so, he has, in accordance with the principles enunciated by the European Court of Justice in *Chapman,* and by Simon Brown LJ in *Porter,* subsequently approved and largely repeated by the House of Lords, given full consideration to all the relevant considerations on both sides of the argument.

62. As to the respective weight he gave to each of the important competing factors, the Judge clearly bore in mind the European Court emphasis in *Chapman* , at paragraphs 98–99 and 100–101 respectively, that Article 8 does not carry with it an entitlement to a home, and that whether there is a violation of the right under that Article to respect for a person's home is highly fact–sensitive. Clearly the most weighty considerations in this case in favour of the grant of an injunction that the Judge had to, and did consider, were: 1) the serious violations by the appellants of planning controls in relation to this sensitive site, in particular, the "severely detrimental impact on the openness of the Green Belt", as the Inspector put it, and the damage to the integrity the Special Landscape Area of which it is part; 2) that they began these violations deliberately and in full knowledge of their unlawfulness; and 3) that they have persisted in defying the law in this way for some three years. So much is plain from the principles derived from *Chapman* and *Porter,* in particular, the second of those considerations, in which the Court and the House respectively gave great weight for this purpose to deliberate unlawfulness. In *Chapman* the Court said, at paragraph 102:

> "× 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 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."

And in *Porter* , Lord Bingham said, at paragraph 29, of the power granted to the Court by section 187B:

> × the power 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 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 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 ×. , that will point strongly towards the grant of an injunction. So will a history of unsuccessful enforcement and persistent non–compliance, as will evidence that the defendant has played the system by wilfully exploiting every opportunity for prevarication and delay, × 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 defendant."

See also per Lord Scott at paragraph 102.

63. The Judge, rightly in my view, took account, in paragraphs 41 and 47 of his judgment that the appellants were, as he put it, "in planning terms, at fault (and deliberately so) in occupying the site in the first place" and that the European Court in *Chapman* had given considerable weight to such a circumstance.

64. The main consideration against the grant of an injunction was the hardship that, on the evidence before the Judge, eviction would cause the appellants because they had nowhere else to go. This was and is undoubtedly a matter of great weight, to which the Judge paid considerable attention in paragraphs 12, 24–26 and 34–37.of his judgment, and which he acknowledged in paragraphs 51 and 52 respectively as a "real" and a "great" hardship. Having considered the case on its own facts and performed his own balance of the competing factors, he concluded that that, in the circumstances, the public interest should prevail and that the grant of an injunction was a just and proportionate step in protection of that interest. As I have said, with reference to Simon Brown LJ's observations at paragraph 42 of his judgment, the striking of such a balance between competing interests so different in character is not always easy to make or to articulate. But it is plain from the Judge's reasoning that he took the view that the combination of the seriousness of the environmental damage caused by the planning violation in respect of this highly sensitive site, and the appellants' deliberately unlawful conduct in commencing and persisting in it for some three years outweighed the hardship that they would suffer in having to leave it. In my view, on all the material before him, that was a conclusion that he was entitled to reach. For what it is worth, it is a conclusion that I would have reached myself had I been the Judge, and it is one that I have reached in the light of all the material and submissions put before the Court in this appeal.

65. It is a plainly a conclusion open to the court in the light of *Chapman* and *Porter*. In *Chapman* , although the Court allowed, in paragraph 113 of its judgment, for the possibility that there were alternative sites available to the applicant in that case (see para. 113), its statement of principle in paragraph 102 contemplated the striking of a balance in a case such as this between a deliberately unlawful and environmentally damaging planning violation and a requirement of the "offender" to leave his home. It was in the context of a striking of that balance that the Court made the observation that I have set out in paragraph 62 above, an approach that, as a matter of principle, the House of Lords has followed in *Porter* in,

inter alia, the passage from the speech of Lord Bingham that I have set out in the same paragraph. Accordingly, and for those reasons, I would dismiss the third and final ground of appeal.

The Respondent's Notice

66. That is sufficient to dispose of the appeal in favour of the Council. But it may be helpful for me to outline and say a few words about a further argument of Mr. Bird against allowing the appeal. It is the subject of a Respondent's Notice and went as follows. He submitted that the argument that the appellants have nowhere else to go depends on the proposition that they must sleep in the same place as their substantial fairground equipment. Whilst that is a policy preference, it is not mandatory. If the appellants are unable to find accommodation on that basis, they should place their equipment in a plant storage facility and live separately from it in caravan parks or, if preferred, in private or public sector housing. They are not gypsies, whose peripatetic lifestyle is a large part on ethnic imperative They are business people who earn a living by moving their plant from site to site. Like other business people, they need somewhere to accommodate their plant when it is being used. If, as their modern life–style suggests, they have greater need of a permanent base throughout the year and there is no ethnic or cultural imperative to sleep with their equipment, there is no justification for their claim to be accommodated in the Green Belt, particularly on this sensitive site.

67. It does not follow, he submitted, that, because the appellants cannot find another site which they could lawfully use for their purposes, they can choose *this* sensitive site and unlawfully insist on remaining there, a point that the Judge made in paragraph 48 of his judgement when he said "the question is not whether the Defendants should occupy a site, but whether they should occupy this site"; eviction from a site with multiple sensitivities, as here, does not preclude permission on some other site with fewer sensitivities.

68. Mr. Bird also observed that: 1) the appellants had repeatedly chosen not to give evidence of their means, though it was apparent that some, at least, could afford substantial residential accommodation; 2) they had not expressed an aversion to living in conventional houses or, save in one or two instances, asserted that they could not afford a house anywhere in the South East of England; 3) they had not stated why, if they could not afford to buy or rent their own homes, they could not take advantage of public sector housing; 4) they had not claimed to have investigated the alternative of use of an ordinary storage yard; and 5) that, of the 19 plots on the site, about half are unoccupied – the evidence before the Judge was that two (nos 16 and 17) had never been occupied; two (nos. 11 and 12) have been unoccupied since November 2000; one (no. 4) has been unoccupied since June 2001; one (no.15) was unoccupied in 2002/3; and in two (nos.6 and 7) the owners are living elsewhere.

69. Mr. Drabble's short response to this argument was that national policy, as carried into the Council's local policies, recognised the traditional land–use required by travelling show–people, and that it was not for a court, or indeed this Court, by this route, to set aside such recognition.

70. There is some force in that objection of Mr Drabble, to which should be added the undesirability of this Court attempting to rule on a submission that has not been explored before the Judge and in respect of which there could well be conflicting evidence and further arguments based upon it. However, since the matter may arise again in another case, I

should note that, as Mr. Bird observed, the appellants have based their case on the proposition that Circular 22/91 expresses a preference for mixed storage and residential uses, overlooking the facts that the Circular's guidance must itself be read subject to other guidance, including Green Belt policy. It is no more than guidance material to the exercise of a discretion, not a policy imperative. More particularly, as Mr. Bird observed, it does not require planning authorities or the courts to act on the premise that travelling show–people must be accommodated along with their equipment.

71. If that lifestyle cannot as a matter of practicality be accommodated in any individual case, the travelling show–people concerned may have an alternative, for example modifying their lifestyle by putting their equipment in a separate secure yard or depot when not in use. The latter may not be so threatening to their cultural identify as it might sound. As I have indicated in paragraph 5 of this judgment, over ten years ago Circular 22/91, in paragraph 2, noted the move towards permanent all–year round occupation by older members and the children of show–people's families, the former no longer, or no longer so, peripatetic and the latter who tended increasingly to live there all year round to benefit from uninterrupted education. And, as the Select Committee, nearly ten years later, showed in paragraphs 29–30 of its June 2000 Report (see paragraph 10 above), the trend has continued towards a permanent base for some to occupy throughout the year and to which others may return from time to time as required. The Committee also noted, in paragraph 31 that "more and more show–people simply want the security of owning their own site".

72. Whilst the Committee recorded these changes, it does not appear to have considered whether they have also modified their needs, as distinct from their preferences, for living with their equipment. Their increasing assimilation with the general public in settled living and patterns of working – including the social security and other public benefits that go with the former – could arguably carry with it a lower expectation than formerly of special concessions in planning and other environmental fields based on their former traditional way of life. Thus, full examination of such considerations in another case might show, on its facts, that eviction from a site will not, or need not, result in homelessness. But, as I have said, the outcome of this appeal does not turn on such a possibility.

73. Accordingly, I would dismiss the appellants' appeal.

Lady Justice Arden:

74. I agree.

Lord Justice Jacob:

75. I also agree.

ORDER: Appeal dismissed.

(The following orders were then made by Auld and Jacob LJJ only, with the consent of the parties.)

Application for leave to appeal to House of Lords refused; order of Stanley Burnton J to stand, save as to one alteration, ie application for a stay refused, and order to be as set out in the draft order provided, save a period of 28 days to be allowed for the payment of costs under paragraph 2(iii) (to be be paid by 26th March 2004 instead of 11th March 2004); appellants' application to deal with the costs by way of reference to detailed assessment refused; costs summarily assessed at

£12,000, to be paid within 28 days (also 26th March).

(Order does not form part of the approved judgment)

[HOUSE OF LORDS]

AMERICAN CYANAMID CO. . . . . APPELLANTS

AND

ETHICON LTD. . . . . RESPONDENTS

1974 Nov. 12, 13, 14;
1975 Feb. 5

Lord Diplock, Viscount Dilhorne, Lord Cross of Chelsea, Lord Salmon and Lord Edmund-Davies

Injunction—Interlocutory—Jurisdiction to grant—Principles on which interlocutory injunction to be granted—No need to be satisfied that permanent injunction probable at trial—Protection of parties—Balance of convenience—Criteria—Rule identical in patent cases

The plaintiffs, an American company, owned a patent covering certain sterile absorbable surgical sutures. The defendants, also an American company, manufactured in the United States and were about to launch on the British market a suture which the plaintiffs claimed infringed their patent. The defendants contested its validity on divers grounds and also contended that it did not cover their product. In an action for an injunction the plaintiffs applied for an interlocutory injunction which was granted by the judge at first instance with the usual undertaking in damages by the plaintiffs. The Court of Appeal reversed his decision on the ground that no prima facie case of infringement had been made out. On the plaintiffs' appeal:

Held, allowing the appeal, (1) that in all cases, including patent cases, the court must determine the matter on a balance of convenience, there being no rule that it could not do so unless first satisfied that, if the case went to trial on no other evidence than that available at the hearing of the application, the plaintiff would be entitled to a permanent injunction in the terms of the interlocutory injunction sought; where there was a doubt as to the parties' respective remedies in damages being adequate to compensate them for loss occasioned by any restraint imposed on them, it would be prudent to preserve the status quo (post, pp. 406C–F, 407G, 408F).

(2) That in the present case there was no ground for interfering with the judge's assessment of the balance of convenience or his exercise of discretion and the injunction should be granted accordingly (post, p. 410C–E).

Hubbard v. *Vosper* [1972] 2 Q.B. 84, C.A. considered.

Decision of the Court of Appeal [1974] F.S.R. 312 reversed.

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

Donmar Productions Ltd. v. *Bart* (*Note*) [1967] 1 W.L.R. 740; [1967] 2 All E.R. 338.

Harman Pictures N.V. v. *Osborne* [1967] 1 W.L.R. 723; [1967] 2 All E.R. 324.

Hubbard v. *Vosper* [1972] 2 Q.B. 84; [1972] 2 W.L.R. 389; [1972] 1 All E.R. 1023, C.A.

Jones v. *Pacaya Rubber and Produce Co. Ltd.* [1911] 1 K.B. 455, C.A.

Preston v. *Luck* (1884) 27 Ch.D. 497, C.A.

Smith v. *Grigg Ltd.* [1924] 1 K.B. 655, C.A.
Wakefield v. *Duke of Buccleugh* (1865) 12 L.T. 628.

The following additional cases were cited in argument:

Acetylene Illuminating Co. Ltd. v. *United Alkali Co. Ltd.* (1904) 22 R.P.C. 145, H.L.(E.).
British Thomson-Houston Co. Ltd. v. *Corona Lamp Works Ltd.* (1921) 39 R.P.C. 49, H.L.(E.).
Carroll v. *Tomado Ltd.* [1971] R.P.C. 401.
Challender v. *Royle* (1887) 36 Ch.D. 425, C.A.
Elwes v. *Payne* (1879) 12 Ch.D. 468, C.A.
Evans Marshall & Co. Ltd. v. *Bertola S.A.* [1973] 1 W.L.R. 349; [1973] 1 All E.R. 992, C.A.
Hatmaker v. *Joseph Nathan & Co. Ltd.* (1919) 36 R.P.C. 231, H.L.(E.).
May & Baker Ltd. and Ciba Ltd.'s Letters Patent, In re (1948) 65 R.P.C. 255; 66 R.P.C. 8, C.A.; *sub nom. May & Baker Ltd.* v. *Boots Pure Drug Co. Ltd.* (1950) 67 R.P.C. 23, H.L.(E.).
Mitchell v. *Henry* (1880) 15 Ch.D. 181, C.A.
Mogul Steamship Co. v. *M'Gregor, Gow & Co.* (1885) 15 Q.B.D. 476.
Natural Colour Kinematograph Co. Ltd. v. *Bioschemes Ltd.* (1915) 32 R.P.C. 256, H.L.(E.).
Newman v. *British & International Proprietaries Ltd.* [1962] R.P.C. 90, C.A.
No-Fume Ltd. v. *Frank Pitchford & Co. Ltd.* (1935) 52 R.P.C. 231, C.A.
R.C.A. Photophone Ltd. v. *Gaumont-British Picture Corporation Ltd.* (1935) 53 R.P.C. 167, C.A.
Wrotham Park Estate Co. Ltd. v. *Parkside Homes Ltd.* [1974] 1 W.L.R. 798; [1974] 2 All E.R. 321.
Zaidener v. *Barrisdale Engineers Ltd.* [1968] R.P.C. 488, C.A.

APPEAL from the Court of Appeal.

This was an appeal from an order of the Court of Appeal (Russell and Stephenson L.JJ. and Foster J.) dated February 5, 1974, whereby the judgment of Graham J. dated July 30, 1973, was reversed and his order discharged on a motion for an interlocutory injunction in an action for infringement of letters patent No. 1,043,518 in which the respondents, Ethicon Ltd., were defendants and the appellants, American Cyanamid Co., were plaintiffs. The respondents counterclaimed for revocation of the patent. Graham J. granted the appellants' application for an interlocutory injunction until the trial of the action and counterclaim, but the Court of Appeal unanimously held that, on the present evidence the claims of the patent were not likely to be construed so as to cover the respondents' product, and that a prima facie case of infringement of the patent had therefore not been established. The Court of Appeal therefore discharged the interlocutory injunction ordered by Graham J. The court refrained from expressing any view on any of the other issues raised.

The facts stated in the opinion of Lord Diplock were as follows: This interlocutory appeal concerned a patent for the use as absorbable surgical sutures of filaments made of a particular kind of chain polymer known as "a poly-hydroxyacetic ester" ("PHAE"). These were sutures of a kind that disintegrated and were absorbed by the human body once they had served their purpose. The appellants ("Cyanamid"), an American com-

pany, were the registered proprietors of the patent. Its priority date in the United Kingdom was October 2, 1964. At that date the absorbable sutures in use were of natural origin. They were made from animal tissues popularly known as catgut. The respondents ("Ethicon"), a subsidiary of another American company, were the dominant suppliers of catgut sutures in the United Kingdom market.

Cyanamid introduced their patented product in 1970. The chemical substance of which it was made was a homopolymer, i.e. all the units in the chain, except the first and the last ("the end stabilisers"), consisted of glycolide radicals. Glycolide was the radical of glycolic acid, which was another name for hydroxyacetic acid. By 1973 this product had succeeded in capturing some 15 per cent. of the United Kingdom market for absorbable surgical sutures. Faced with this competition to catgut, Ethicon, who supplied 80 per cent. of the market, were proposing to introduce their own artificial suture ("XLG"). The chemical substance of which it was made was not a homopolymer but a copolymer, i.e. although 90 per cent. by weight of the units in the chain consisted of glycolide radicals, the remaining 10 per cent. are lactide radicals, which were similar in chemical properties to glycolide radicals but not identical in chemical composition.

Cyanamid contended that XLG infringed their patent, of which the principal claim was: "A sterile article for the surgical repair or replacement of living tissue, the article being readily absorbable by living tissue and being formed from a polyhydroxyacetic ester." As was disclosed in the body of the patent, neither the substance PHAE nor the method of making it into filaments was new at the priority date. Processes for manufacturing filaments from PHAE had been the subject of two earlier United States patents in 1953 (Lowe) and 1954 (Higgins). The invention claimed by Cyanamid thus consisted of the discovery of a new use for a known substance.

On March 5, 1973, Cyanamid started a quia timet action against Ethicon for an injunction to restrain the threatened infringement of their patent by supplying sutures made of XLG to surgeons in the United Kingdom. On the same day they gave notice of motion for an interlocutory injunction. Voluminous affidavits and exhibits were filed on behalf of each party. The hearing of the motion before Graham J. lasted three days. On July 30, 1973, he granted an interlocutory injunction upon the usual undertaking in damages by Cyanamid.

Ethicon appealed to the Court of Appeal. The hearing there took eight days. On February 5, 1974, the Court of Appeal gave judgment. They allowed the appeal and discharged the judge's order. Leave to appeal from that decision was granted by the House of Lords.

Andrew Bateson Q.C. and *David Young* for the appellant company. The main issue in this appeal is whether PHAE, construed in the patent in suit, covers more than the homopolymer. In holding that that had not been established prima facie the Court of Appeal was wrong and the trial judge was right in holding that what was meant by comonomer in the patent contemplated copolymers. For the purpose of deciding whether the plaintiffs have established a prima facie case the House must decide whether on the evidence the construction for which they contend is the one

A applicable to the patent in suit. On construction the case put forward by the respondents is barely arguable.

The Court of Appeal wrongly construed the claim and specification and its decision was based on a misapprehension of the evidence. It erred in holding that the appellants had not established that prima facie the patent in suit would be infringed by the marketing of the respondents' suture.

B The onus is not on the plaintiffs to establish a prima facie case of infringement before an interlocutory injunction case can be granted. "Prima facie" can have many meanings. Here, if anything, it means that the plaintiff has more than a 50 per cent. chance of success. The general rule that one must establish a probability, or a strong probability, is not correct. One must look at the whole case to see whether there is a question to be tried and, if there is, then look at the balance of con-

C venience between the parties, bearing in mind that there is good reason why the status quo should be preserved. The relevant authorities are *Preston* v. *Luck* (1884) 27 Ch.D. 497, 504–505; *Halsbury's Laws of England*, 3rd ed., vol. 21 (1957), pp. 365–366, para. 365 and *Donmar Productions Ltd.* v. *Bart* (*Note*) [1967] 1 W.L.R. 740. The shackles of *Harman Pictures N.V.* v. *Osborne* [1967] 1 W.L.R. 723 have been removed

D by *Hubbard* v. *Vosper* [1972] 2 Q.B. 84, 96, 101. See also *Evans Marshall & Co. Ltd.* v. *Bertola S.A.* [1973] 1 W.L.R. 349, 377, 379–380, 385–386; *Wrotham Park Estate Co. Ltd.* v. *Parkside Homes Ltd.* [1974] 1 W.L.R. 798, 810; *Terrell on the Law of Patents*, 12th ed. (1971), pp. 319–320, paras. 823, 824, pp. 322–323, para. 833, citing *Newman* v. *British & International Proprietaries Ltd.* [1962] R.P.C. 90, 93; *Challender* v. *Royle* (1887) 36 Ch.D. 425, 429–430, 435–436, 443; *Zaidener* v.

E *Barrisdale Engineers Ltd.* [1968] R.P.C. 488, 495 (Willmer L.J.) 497; and *Carroll* v. *Tomado Ltd.* [1971] R.P.C. 401, 405–406.

The appellants adopt the principle laid down in *Hubbard* v. *Vosper* [1972] 2 Q.B. 84, particularly the judgment of Megaw L.J. at pp. 93H–98B. There is logical reason or justification why the percentages there set out do not equally apply to plaintiffs and defendants. If there is a

F serious issue to be tried it will lead to a just result and mini-trials on the application for an interlocutory injunction would be prevented. It is undesirable to adopt any other course. When the court is considering whether or not to grant an interlocutory injunction the right approach is to ask first whether or not there is a serious question to be tried. When the court has some idea of the strength of the respective cases that is a factor to be taken into consideration.

G In the present case Graham J. placed a heavy onus on the appellants and held that they had discharged it. The differing decisions of the Court of Appeal and the judge on the merits show that there is a serious question to be tried. On the evidence the appellant should succeed. On the question of the balance of convenience reliance is placed on Graham J.'s judgment.

H *Stephen Gratwick Q.C.* and *G. D. Paterson* for the respondent company. On an application for an interlocutory injunction the court must look at the respective situations of the two contending parties. The first question to ask is why a plaintiff should not be left to fight his action and

get his relief by succeeding. The normal rule of English litigation is that a party gets no relief till he has gone to trial and persuaded the court that he has a right which has been infringed. He is not entitled to an interlocutory injunction just because he has a strong case. He is only so entitled if it is shown that there could be injustice if the defendant is left unfettered and that there is a serious risk of irreparable damage to the plaintiff. In the first place the plaintiff should show that there is some serious need for the defendant to be restrained. The law recognises that there are situations in which the property in dispute has some special quality of its own, e.g., cases where there is the danger of the collapse of a party wall, but in a patent action this is rarely the case and usually the interests of the parties are purely monetary, so that no question of irreparable damage arises. The *Evans Marshall* case [1973] 1 W.L.R. 349, 379–380 illustrates a true application of this principle. See also *Mogul Steamship Co.* v. *M'Gregor, Gow & Co.* (1885) 15 Q.B.D. 476, 484–486. The question is whether the plaintiff would suffer irreparable injury or only an injury which could be compensated in damages. One must look at the facts of each particular case to see whether irreparable damage would be caused. If there is simply a dispute between traders as to a monopoly there will be no irreparable damage. The grant of a patent is an exception recognised by the Statute of Monopolies 1623 which was designed to give everyone freedom to trade. In each case one must ask why damages are not a sufficient remedy. In the present case it could be serious for the defendants to have to put all their work into cold storage. There is no suggestion that they would not be good for any damages which might be awarded against them if they lost the action eventually. In *Preston* v. *Luck,* 27 Ch.D. 497, 508, the court acted on the basis suggested by the defendants. It should not be the policy of the court to preserve the statuts quo in all cases but only to prevent irreparable damage to the plaintiffs: see *Elwes* v. *Payne* (1879) 12 Ch.D. 468, 476, 479. As to the assessment of damages should the plaintiffs succeed, see *Terrell on the Law of Patents,* 12th ed., p. 372, para. 948. In practical experience, parties in patent litigation rarely find difficulty in reaching an agreement on damages.

If there is evidence of irreparable damage the next question is: What sort of a case has the plaintiff got? It must also be considered on what basis the defendants will defend the action. The plaintiffs must be able to show that the strength of their case is such that in the circumstances there should be an interlocutory injunction. It is accepted that there may be cases in which the risk of damage to the plaintiffs is such that an injunction should be granted (e.g., where a defendant is erecting a fence across the plaintiff's only approach to his house) regardless of the strength of the parties' cases, but in other cases the risk of damage could be very small and the respective cases must be considered.

The House should try this matter to the extent of establishing how much substance there is in the defendants' answer. For the purposes of an interlocutory injunction the case against the specification is so strong that relief should not be granted till the rights of the parties have been tested in court.

One may distinguish between a difficult question and a serious question. Problems may arise, not from the difficulty of a question of

A construction but from the amount of knowledge needed to present the case to the court in an age of increasingly complex technology, and, once this technical problem is mastered, there may be no serious difficulty over the construction of the specification. As to the contents of a specification, see *Terrell on the Law of Patents*, p. 416, para. 1134.

Patent specifications must not be ambiguous: *Natural Colour Kinematograph Co. Ltd.* v. *Bioschemes Ltd.* (1915) 32 R.P.C. 256, 266, 268–269,
B The plaintiffs are seeking equitable relief and he who comes to equity must do equity, whereas their specification is just the sort which was criticised in the *Natural Colour* case, 32 R.P.C. 256, 266, 268–269. If the plaintiffs have made their specification needlessly obscure, they should not be given interlocutory relief and should wait till they have proved their case for a monopoly in court. No sincere attempt was made to make it clear that that copolymers were included.

C If, however, the specification bears the wider meaning alleged, it is invalid for inutility, insufficiency, unfair basis and false suggestion, since the copolymers will not have, as surgical sutures, the characteristics described in the body of the patent. The specification wholly fails to meet the obligation imposed by statute to tell the reader fairly what is required to make the copolymers.

D "Ambiguity" in the present context has not the meaning which it ordinarily has in relation to the construction of documents but refers to the want of clarity which is a ground of objection under section 32 (1) (*i*) of the Patents Act 1949. Such an objection was made in the *Natural Colour* case, 32 R.P.C. 256, 259–260, and what Lord Loreburn said about it at p. 266 is what the defendants say here, since his observations are very appropriate to the present specification.

E The essence of this invention was discovering a material which would make a satisfactory suture. That puts on the inventor the burden of saying what materials serve that purpose; otherwise he is being grossly unfair to the public. It is in this context that the House of Lords should say that the strength of the defendants' case is such that there should be no interlocutory injunction.

F Two inventors may solve a problem by different methods. This has happened here, where the chief problem to be solved was that of absorbability. Someone using a copolymer is not doing something covered by this invention and he should not be held to be within the patent. For the plaintiffs there is no stopping point between a claim for a homopolymer and a wide claim for copolymers.

A patent cannot properly be held to cover things which do not operate
G in the way the inventor says they do: see *Hatmaker* v. *Joseph Nathan & Co. Ltd.* (1919) 36 R.P.C. 231, 232–233, 236–237, 239, which is applicable to the present case. The observations of the Lords were not confined to claims for processes. If an inventor says that by using his invention certain results are achieved, the patent is invalid if they are not achieved.

As to inutility, see *Terrell on the Law of Patents*, 12th ed., p. 99,
H para. 246, pp. 101–102, para. 251 and p. 103, para. 253. The trial judge wrongly applied the test of commercial utility. The plaintiffs say that the claim covers copolymers but the defendants' copolymer does not have any of the qualities which they allege. Different inventors may

arrive at commercially satisfactory ways of solving a problem by different inventions and by things which behave in different ways. This inventor solved the problem only by using homopolymers and materials which he said have certain characteristics. His patent cannot cover the case of people who solved the problem by methods which do not have those characteristics. The observations in *In re May & Baker Ltd. and Ciba Ltd.'s Letters Patent* (1948) 65 R.P.C. 255, 288–289; 66 R.P.C. 8; *sub nom. May & Baker Ltd.* v. *Boots Pure Drug Co. Ltd.* (1950) 67 R.P.C. 23 are directly applicable to the claim in the present case. In the medical field it is very wrong of an inventor to cast his claim more widely than is justified by the work he has done. Here the plaintiffs have cast their claim over a range of copolymers, the scope of which one does not know.

It is legitimate to frame a patent widely if the invention has been so described in the body of the specification. But unless the specification is so framed, the claim cannot be made in that way: see *British Thomson-Houston Co. Ltd.* v. *Corona Lamp Works Ltd.* (1921) 39 R.P.C. 49 quoted in *Terrell on the Law of Patents*, 12th ed., p. 97, para. 242. In the present case any claim would have to be backed up by a description in the specification intimating how other groups and units would affect the properties of the suture. This specification has not been so framed. The approach which the plaintiffs seek to make is one which the specification cannot sustain: see also *No-Fume Ltd.* v. *Frank Pitchford & Co. Ltd.* (1935) 52 R.P.C. 231, 236 and *R.C.A. Photophone Ltd.* v. *Gaumont-British Picture Corporation Ltd.* (1935) 53 R.P.C. 167, 205.

Even assuming that the plaintiffs are entitled to claim in this form, the question remains whether there was infringement. The plaintiffs are debarred from maintaining that there has been infringement because a copolymer has been used, since they have not discharged the onus of proof on this point.

As to the balance of convenience, see *Mitchell* v. *Henry* (1880) 15 Ch.D. 181, 191, 195.

As to the evidence on the balance of convenience what is relevant here, so far as regards damage to the plaintiffs, is the possible impact of an interlocutory injunction on domestic sales. This is a trifling amount of the total sales of a giant corporation and irreparable damage could not conceivably be caused to the plaintiffs. At most there could only be a minor commercial set-back in the development of their business, bearing in mind their resources. The plaintiffs have not adduced any evidence of irreparable damage. Both parties are giant corporations of enormous resources. Such damage as the plaintiffs might suffer, prior to judgment, if they succeed at the trial, will not have any material effect on their annual profit and loss account and that damage can easily be met by the defendants.

So, if there is no interlocutory injunction and the plaintiffs succeed at the trial, they will recover damages under every relevant head of damage appropriate to infringement of a patent. The basis will be the amount of business done by the defendants, which can easily be ascertained from their accounts. No other head of damage would arise. The patent will not expire till 1980 and so the perpetual injunction, which will be granted if

A the plaintiffs succeed ultimately, will protect them in re-establishing a monopoly.

If an interlocutory injunction is granted and the defendants succeed at the trial, the plaintiffs will have to pay them such damages as are attributable to the injunction. There will be no simple basis on which to assess it since it must depend on an estimate of the amount of business the defendants would have done during the period of the injunction and of the B diminution caused by that injunction in the future value of that business when resumed. A further source of damage to the defendants arises out of the great expense involved in developing and preparing to market their products over many years. Any delay in marketing represents a loss in the return on the investment and a loss in its actual value because it gives more time to other competitors to develop products of their own. These losses are more difficult to assess than any which could arise if an in- C junction were not granted and the plaintiffs succeeded.

The present case resembles *Zaidener* v. *Barrisdale Engineers Ltd.* [1968] R.P.C. 488. The balance of convenience is against the granting of an interlocutory injunction. The application can be and should be refused without the court needing to form any prima facie view as to the respective rights of the parties.

D In every patent action money is at stake and there is some question of substance. If it is right to grant an interlocutory injunction in this case, where there is little evidence of the probability of irreparable damage to the plaintiffs, when would it not be right to grant such an injunction?

Paterson following. There are four points of defence: (1) On the proper construction of claim 1 of the specification there has been no infringement. (2) If on the true construction of claim 1 it is broad enough to E cover the defendants' sutures, then it is invalid on grounds of inutility, insufficiency, ambiguity, no fair basis and false suggestion: section 32 (1) (*g*) (*h*) (*i*) and (*j*) of the Patents Act 1949. (3) Each claim is invalid on the ground of obviousness: section 32 (1) (*g*). (4) The balance of convenience does not favour the grant of an interlocutory injunction.

One cannot have a patent for a new use of an old product unless F there is invention in the adaptation of the old product to the new use: *Acetylene Illuminating Co. Ltd.* v. *United Alkali Co. Ltd.* (1904) 22 R.P.C. 145, 155–156. The test is whether the new use lies in the track of the old use.

In 1963 three companies independently had the idea of using PHAE as a suture, Graham J. in rejecting the defendants' submissions on this point ignored the evidence of the history of the matter.

G [LORD DIPLOCK intimated that their Lordships only required to hear arguments in reply on the question of balance of convenience.]

Bateson Q.C. in reply. Prospective infringers should not "jump the gun." In the light of the defendants' aggressive sales policy and in view of the fact that the case cannot be finished till 1977, there is a danger that the defendants might press the sale of those sutures, not to fill a need, but H to get ahead of the plaintiffs. The balance of convenience is primarily a matter for the judge of first instance.

Their Lordships took time for consideration.

February 5, 1975. LORD DIPLOCK stated the facts and continued: My Lords, the question whether the use of XLG as an absorbable surgical suture is an infringement of Cyanamid's patent depends upon the meaning to be given to the three words " a polyhydroxyacetic ester " in the principal claim. Cyanamid's contention is that at the date of publication of the patent those words were used as a term of art in the chemistry of polymerisation not only in the narrower meaning of a homopolymer of which the units in the chain, apart from the end stabilisers, consisted solely of glycolide radicals but also in the broader meaning of a copolymer of which up to 15 per cent. of the units in the chain would be lactide radicals; and that what was said in the body of the patent made it clear that in the claim the words were used in this wider meaning.

Ethicon's first contention is that the words " a polyhydroxyacetic ester " in the principal claim bear the narrower meaning only, viz. that they are restricted to a homopolymer of which all the units in the chain except the end stabilisers consist of glycolide radicals. In the alternative, as commonly happens where the contest is between a narrower and a wider meaning in a patent specification, they attack the validity of the patent, if it bears the wider meaning, on the grounds of inutility, insufficiency, unfair basis and false suggestion. These objections are really the obverse of their argument in favour of the narrower construction. They are all different ways of saying that if the claim is construed widely it includes copolymers which will not have as surgical sutures the characteristics described in the body of the patent. Ethicon also attack the validity of the patent on the ground of obviousness.

Both Graham J. and the Court of Appeal felt constrained by authority to deal with Cyanamid's claim to an interlocutory injunction by considering first whether, upon the whole of the affidavit evidence before them, a prima facie case of infringement had been made out. As Russell L.J. put it in the concluding paragraph of his reasons for judgment with which the other members of the court agreed [1974] F.S.R. 312, 333:

> " . . . if there be no prima facie case on the point essential to entitle the plaintiffs to complain of the defendants' proposed activities, that is the end of the claim to interlocutory relief."

" Prima facie case " may in some contexts be an elusive concept, but the sense in which it was being used by Russell L.J. is apparent from an earlier passage in his judgment. After a detailed analysis of the conflicting expert testimony he said, at p. 330:

> " I am not satisfied on the present evidence that on the proper construction of this specification, addressed as it is to persons skilled in the relevant art or science, the claim extends to sterile surgical sutures produced not only from a homopolymer of glycolide but also from a copolymer of glycolide and up to 15 per cent. of lactide. That is to say that I do not consider that a prima facie case of infringement is established."

In effect what the Court of Appeal was doing was trying the issue of infringement upon the conflicting affidavit evidence as it stood, without the benefit of oral testimony or cross-examination. They were saying:

A "If we had to give judgment in the action now without any further evidence we should hold that Cyanamid had not satisfied the onus of proving that their patent would be infringed by Ethicon's selling sutures made of XLG."

The Court of Appeal accordingly did not find it necessary to go into the questions raised by Ethicon as to the validity of the patent or to consider where the balance of convenience lay.

B Graham J. had adopted the same approach as the Court of Appeal; but, upon the same evidence he had come to the contrary conclusion on the issue of infringement. He considered (at p. 321) that on the evidence as it stood Cyanamid had made out a "strong prima facie case" that their patent would be infringed by Ethicon's selling sutures made of XLG. He then went on to deal briefly with the attack upon the validity of the C patent and came to the conclusion that upon the evidence before him none of the grounds of invalidity advanced by Ethicon was likely to succeed. He therefore felt entitled to consider the balance of convenience. In his opinion it lay in favour of maintaining the status quo until the trial of the action. So he granted Cyanamid an interlocutory injunction restraining Ethicon from infringing the patent until the trial or further D order.

The grant of an interlocutory injunction is a remedy that is both temporary and discretionary. It would be most exceptional for your Lordships to give leave to appeal to this House in a case which turned upon where the balance of convenience lay. In the instant appeal, however, the question of the balance of convenience, although it had been considered by Graham J. and decided in Cyanamid's favour, was never E reached by the Court of Appeal. They considered that there was a rule of practice so well established as to constitute a rule of law that precluded them from granting any interim injunction unless upon the evidence adduced by both the parties on the hearing of the application the applicant had satisfied the court that on the balance of probabilities the acts of the other party sought to be enjoined would, if committed, violate the applicant's F legal rights. In the view of the Court of Appeal the case which the applicant had to prove before any question of balance of convenience arose was "prima facie" only in the sense that the conclusion of law reached by the court upon that evidence might need to be modified at some later date in the light of further evidence either detracting from the probative value of the evidence on which the court had acted or proving additional facts. It was in order to enable the existence of any such rule G of law to be considered by your Lordships' House that leave to appeal was granted.

The instant appeal arises in a patent case. Historically there was undoubtedly a time when in an action for infringement of a patent that was not already "well established," whatever that may have meant, an interlocutory injunction to restrain infringement would not be granted if H counsel for the defendant stated that it was intended to attack the validity of the patent.

Relics of this reluctance to enforce a monopoly that was challenged, even though the alleged grounds of invalidity were weak, are to be found

in the judgment of Scrutton L.J. as late as 1924 in *Smith* v. *Grigg Ltd.* [1924] 1 K.B. 655; but the elaborate procedure for the examination of patent specifications by expert examiners before a patent is granted, the opportunity for opposition at that stage and the provisions for appeal to the Patent Appeal Tribunal in the person of a patent judge of the High Court, make the grant of a patent nowadays a good prima facie reason, in the true sense of that term, for supposing the patent to be valid, and have rendered obsolete the former rule of practice as respects interlocutory injunctions in infringement actions. In my view the grant of interlocutory injunctions in actions for infringement of patents is governed by the same principles as in other actions. I turn to consider what those principles are.

My Lords, when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when ex hypothesi the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action. It was to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved that the practice arose of granting him relief by way of interlocutory injunction; but since the middle of the 19th century this has been made subject to his undertaking to pay damages to the defendant for any loss sustained by reason of the injunction if it should be held at the trial that the plaintiff had not been entitled to restrain the defendant from doing what he was threatening to do. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where " the balance of convenience " lies.

In those cases where the legal rights of the parties depend upon facts that are in dispute between them, the evidence available to the court at the hearing of the application for an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral cross-examination. The purpose sought to be achieved by giving to the court discretion to grant such injunctions would be stultified if the discretion were clogged by a technical rule forbidding its exercise if upon that incomplete untested evidence the court evaluated the chances of the plaintiff's ultimate success in the action at 50 per cent. or less, but permitting its exercise if the court evaluated his chances at more than 50 per cent.

The notion that it is incumbent upon the court to undertake what is in effect a preliminary trial of the action upon evidential material different from that upon which the actual trial will be conducted, is, I think, of comparatively recent origin, though it can be supported by references in

earlier cases to the need to show "a probability that the plaintiffs are entitled to relief" (*Preston* v. *Luck* (1884) 27 Ch.D. 497, 506, *per* Cotton L.J.) or "a strong prima facie case that the right which he seeks to protect in fact exists" (*Smith* v. *Grigg Ltd.* [1924] 1 K.B. 655, 659, *per* Atkin L.J.). These are to be contrasted with expressions in other cases indicating a much less onerous criterion, such as the need to show that there is "certainly a case to be tried" (*Jones* v. *Pacaya Rubber and Produce Co. Ltd.* [1911] 1 K.B. 455, 457, *per* Buckley L.J.) which corresponds more closely with what judges generally treated as sufficient to justify their considering the balance of convenience upon applications for interlocutory injunctions, at any rate up to the time when I became a member of your Lordships' House.

An attempt had been made to reconcile these apparently differing approaches to the exercise of the discretion by holding that the need to show a probability or a strong prima facie case applied only to the establishment by the plaintiff of his right, and that the lesser burden of showing an arguable case to be tried applied to the alleged violation of that right by the defendant (*Donmar Productions Ltd.* v. *Bart* (*Note*) [1967] 1 W.L.R. 740, 742, *per* Ungoed-Thomas J., *Harman Pictures N.V.* v. *Osborne* [1967] 1 W.L.R. 723, 738, *per* Goff J.). The suggested distinction between what the plaintiff must establish as respects his right and what he must show as respects its violation did not long survive. It was rejected by the Court of Appeal in *Hubbard* v. *Vosper* [1972] 2 Q.B. 84 —a case in which the plaintiff's entitlement to copyright was undisputed but an injunction was refused despite the apparent weakness of the suggested defence. The court, however, expressly deprecated any attempt to fetter the discretion of the court by laying down any rules which would have the effect of limiting the flexibility of the remedy as a means of achieving the objects that I have indicated above. Nevertheless this authority was treated by Graham J. and the Court of Appeal in the instant appeal as leaving intact the supposed rule that the court is not entitled to take any account of the balance of convenience unless it has first been satisfied that if the case went to trial upon no other evidence than is before the court at the hearing of the application the plaintiff would be entitled to judgment for a permanent injunction in the same terms as the interlocutory injunction sought.

Your Lordships should in my view take this opportunity of declaring that there is no such rule. The use of such expressions as "a probability," "a prima facie case," or "a strong prima facie case" in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.

It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages upon the

grant of an interlocutory injunction was that "it aided the court in doing that which was its great object, viz. abstaining from expressing any opinion upon the merits of the case until the hearing": *Wakefield* v. *Duke of Buccleugh* (1865) 12 L.T. 628, 629. So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

As to that, the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.

It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo. If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark upon a course of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial.

Save in the simplest cases, the decision to grant or to refuse an interlocutory injunction will cause to whichever party is unsuccessful on the application some disadvantages which his ultimate success at the trial may

show he ought to have been spared and the disadvantages may be such that the recovery of damages to which he would then be entitled either in the action or under the plaintiff's undertaking would not be sufficient to compensate him fully for all of them. The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies; and if the extent of the uncompensatable disadvantage to each party would not differ widely, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence adduced on the hearing of the application. This, however, should be done only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party. The court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits in order to evaluate the strength of either party's case.

I would reiterate that, in addition to those to which I have referred, there may be many other special factors to be taken into consideration in the particular circumstances of individual cases. The instant appeal affords one example of this.

Returning, therefore, to the instant appeal, it cannot be doubted that the affidavit evidence shows that there are serious questions to be tried. Graham J. and the Court of Appeal have already tried the question of infringement on such affidavit evidence as was available and have come to contrary conclusions. Graham J. has already also tried the question of invalidity on these affidavits and has come to the conclusion that the defendant's grounds of objection to the patent are unlikely to succeed, so it was clearly incumbent upon him and on the Court of Appeal to consider the balance of convenience.

Graham J. did so and came to the conclusion that the balance of convenience lay in favour of his exercising his discretion by granting an interlocutory injunction. As patent judge he has unrivalled experience of pharmaceutical patents and the way in which the pharmaceutical industry is carried on. Lacking in this experience, an appellate court should be hesitant to overrule his exercise of his discretion, unless they are satisfied that he has gone wrong in law.

The factors which he took into consideration, and in my view properly, were that Ethicon's sutures XLG were not yet on the market; so they had no business which would be brought to a stop by the injunction; no factories would be closed and no work-people would be thrown out of work. They held a dominant position in the United Kingdom market for absorbent surgical sutures and adopted an aggressive sales policy. Cyanamid on the other hand were in the course of establishing a growing market in PHAE surgical sutures which competed with the natural catgut sutures marketed by Ethicon. If Ethicon were entitled also to establish themselves in the market for PHAE absorbable surgical sutures until the action is tried, which may not be for two or three years yet, and possibly thereafter until the case is finally disposed of on appeal, Cyanamid, even though ultimately successful in proving infringement, would have lost its chance of continuing to increase

its share in the total market in absorbent surgical sutures which the continuation of an uninterrupted monopoly of PHAE sutures would have gained for it by the time of the expiry of the patent in 1980. It is notorious that new pharmaceutical products used exclusively by doctors or available only on prescription take a long time to become established in the market, that much of the benefit of the monopoly granted by the patent derives from the fact that the patented product is given the opportunity of becoming established and this benefit continues to be reaped after the patent has expired.

In addition there was a special factor to which Graham J. attached importance. This was that, once doctors and patients had got used to Ethicon's product XLG in the period prior to the trial, it might well be commercially impracticable for Cyanamid to deprive the public of it by insisting on a permanent injunction at the trial, owing to the damaging effect which this would have upon its goodwill in this specialised market and thus upon the sale of its other pharmaceutical products.

I can see no ground for interfering in the learned judge's assessment of the balance of convenience or for interfering with the discretion that he exercised by granting the injunction. In view of the fact that there are serious questions to be tried upon which the available evidence is incomplete, conflicting and untested, to express an opinion now as to the prospects of success of either party would only be embarrassing to the judge who will have eventually to try the case. The likelihood of such embarrassment provides an additional reason for not adopting the course that both Graham J. and the Court of Appeal thought they were bound to follow, of dealing with the existing evidence in detail and giving reasoned assessments of their views as to the relative strengths of each party's cases.

I would allow the appeal and restore the order of Graham J.

VISCOUNT DILHORNE. My Lords, I have had the advantage of reading the speech of my noble and learned friend, Lord Diplock. I agree with it and that this appeal should be allowed and the order of Graham J. restored.

LORD CROSS OF CHELSEA. My Lords, for the reasons given by my noble and learned friend, Lord Diplock, in his speech, which I have had the advantage of reading in draft, I would allow this appeal.

LORD SALMON. My Lords, I agree with the opinion of my noble and learned friend, Lord Diplock, and for the reasons he gives I would allow the appeal and restore the order of Graham J.

LORD EDMUND-DAVIES. My Lords, for the reasons given by my noble and learned friend, Lord Diplock, I would also allow this appeal.

Appeal allowed.

Solicitors: *Allen & Overy; Lovell, White & King.*

F. C.

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.

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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

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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

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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*, 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.

C

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 travellers had been stopping in Bromley for many years. Traditionally they had done so:

D

> "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 both nationally and locally. More recently Irish travellers have also visited the borough."

E

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 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.

F

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 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.

G

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 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

H

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

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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

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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." A

(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: B C

"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)." D

(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. E

(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. F

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: G

"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 H

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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

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A 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
B 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*
C *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?"

D *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
E 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
F 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
G 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
H 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.

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A **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 B 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 C 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 D 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 E 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 F 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 G 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 H 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

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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

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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

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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".

E

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.

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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

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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

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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.

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A **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
B 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
C 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.

D *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
E 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
F 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.

G **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
H 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

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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

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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.

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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).

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A (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:

B *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;
C [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)
D *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
E *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
F *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)
G *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]
H 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

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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)

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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

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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

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A 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
B 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*
C *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
D 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
E 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.

F 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
G 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
H 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

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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

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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
E Courts Act 1981, which confers jurisdiction to grant a final injunction 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,

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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.

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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

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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

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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

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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

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A 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.

B *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,

C 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

D 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

E 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.]

F 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

G (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

H 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.

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Richard Kimblin QC (instructed by *Eversheds Sutherland (International) LLP*) for High Speed Two (HS2) Ltd, intervening.

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 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* [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 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 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 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 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 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.

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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.

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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.

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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.

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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

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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.

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(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.

(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 (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.

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.

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 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 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 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.

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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

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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

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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

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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".

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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

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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.

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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

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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

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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'.

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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

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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

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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]

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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

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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.

H 75 Secondly, the judge said at para 174 that it was "fundamental to our 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

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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.

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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

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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

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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

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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.

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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

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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.

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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 injunctions against unauthorised encampments should be limited in time, B 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,

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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

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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

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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

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A 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 B 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 C 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.

D S. S.

E

[HOUSE OF LORDS]

KIRKLEES METROPOLITAN BOROUGH COUNCIL APPELLANTS

AND

F 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

G

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

H 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."

A *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).

B 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.)

C

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.

D

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.)

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.)

F

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.)

G *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.

H 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.

A *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 B *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 C 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.

D *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.

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.

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

F

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. G

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), H 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.

A 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 B 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* C *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.

D 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* E *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* F *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] G 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.

H *Lasok* replied.

Samuels Q.C. replied.

Cur. adv. vult.

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*

A *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 B 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 C 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 D 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 E 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."

F 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 . . ."

G

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 H 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.

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 . . ."

A 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 B 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 C 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 D 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 E 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 F 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 G 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 H 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.

C In *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.* (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,

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

A *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.
B 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.

C 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.

D

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
E 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
F 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
G 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
H 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

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

A 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 B 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 C 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 D 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 E 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 F 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."

G 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; H 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 E national courts to investigate any issue of proportionality, and that the *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 D Court of Justice in *Francovich v. Republic of Italy* (Joined Cases C 6/90 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.*

J. A. G.

Basingstoke & Deane Borough Council v Henry Loveridge & Others

No Substantial Judicial Treatment

Court
Queen's Bench Division

Judgment Date
30 July 2018

Claim No. HQ18/0412

High Court of Justice Queen's Bench Division

[2018] EWHC 2228 (QB), 2018 WL 03621482

Before: His Honour Judge Peter Hughes QC (Sitting as a Deputy Judge of the High Court)

Monday, 30 July 2018

Representation

Miss C. Bolton appeared on behalf of the Claimant.
The Defendants were not present and were not represented.

Judgment

The Deputy Judge:

1. This is an application for an interim injunction pursuant to section 222 of the Local Government Act 1972 and section 187B of the Town and Country Planning Act 1990 . The application is made against a large number of members of the travelling community to prevent them from encamping, unlawfully, within a defined part of the area for which the local authority is responsible.

2. The local authority says, in support of its application, that there have been now in total 160 unauthorised encampments within the relevant area since 1 April 2016, including as recently as the period of 7 to 17 July this year.

3. On 27 June last, Lambert J gave directions for the service of this application on the defendants by service on or at any caravan, vehicle or residential premises where it was believed they were living together with notice of the hearing of the injunction application today.

4. The Order provided for the defendants, on service, to acknowledge service and file any written evidence within a period of 21 days. I have seen a letter from the charity that assists gypsies and travellers, at whose premises it seems an attempt was made to serve three of the defendants, who were former clients of the charity and whose whereabouts were unknown to it, but, otherwise, there has been no response by any of the defendants to service of the papers in accordance with the judge's order.

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5. Today I have been shown a representative selection of proofs of service of the Order, either personally on some of the defendants or by giving notice on the premises, as provided in Lambert J's Order, and I am satisfied that all appropriate steps have been taken to serve the defendants and persons unknown pursuant to that Order. There are a number who are named in the application against whom it is no longer considered to be appropriate to pursue the application, either because they may not be travellers themselves and are caught up in the proceedings, because they have been the registered keeper of a vehicle that figures in the evidence, or because it has simply not been possible to trace those defendants. Against them the proceedings will be stayed but can be restored if it becomes appropriate to do so.

6. I have had the opportunity of reading the witness statements filed in support of the application and considering the extensive photographic material that is exhibited to those statements. What the evidence provides is clear *prima facie* evidence of unlawful encampments on a large scale within the area covered by the application. The sites targeted include open green spaces, business sites, sports and recreation grounds, car parks, village greens and residential areas.

7. The local authority has attempted to control the problem by other lesser means, including the erection of bollards and other means of physically discouraging the use of the land, the exercise of their powers under section 77 of the Criminal Justice and Public Order Act 1994 to direct the defendants to leave the land and, through the police, by the police exercising their powers under section 61 of the 1994 Act. What has tended to happen is that the travellers have simply moved on to another site close by and within the same area.

8. The encampments have had a number of serious deleterious consequences. Those consequences are graphically described in the witness evidence, but they fall into certain clearly-defined categories. First of all, fly tipping and the dumping of waste; secondly, the deposit, particularly, of human waste and other products that are harmful to hygiene - this is a particularly serious problem because of the nature of some of the sites that have been used and the ready access to members of the public and particularly to children - thirdly, noise, smoke and other nuisance caused by the activities of the encampers; fourthly, confrontation with landowners and also with residents; fifthly, lasting damage to the appearance of open spaces and recreation grounds. Of these at least one is an Area of Special Scientific Interest; and, sixthly and finally, the financial burden both on private landowners and on the community-charge payers of the substantial cost involved in clearing the sites. As I have said, these particular features are all detailed in the witness statements filed in support of the application, in particular the main statements of David Gilbert, Inspector Paul Pressley and Wendy Bateson, but also in the individual statements provided by local parish representatives and other residents who have directly experienced problems on a number of occasions.

9. Decisions in cases such as this can raise sensitive issues involving due consideration of the personal circumstances of those who may be affected by the granting of an injunction preventing them from living on the land and interfering with their protected rights under the European Convention. Guidance as to the proper approach to apply in cases where these issues arise was given by the House of Lords some years ago in the case of *Buckingham District Council v. Porter* and there have been more recent examples of reported cases considering these issues.

10. In this case, the local authority has quite properly carried out an Equality Impact Assessment before proceeding with this application to take account of the welfare concerns of the people who may be affected by the Order.

11. It is incumbent upon the claimant authority to satisfy the court that it is just and proportionate in all the circumstances to grant the injunction sought. The circumstances in this case, it appears to me, include the following: first of all, the persistence of the problem, the large number of the encampments over a two-year plus period in the same relatively small geographic area; secondly, the inability of other methods which have been tried to control the problem; thirdly, the deleterious consequences for those legitimately living and working in the area, problems to which I have already referred; and, fourthly, the fact that

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the defendants have not responded to service of the application and, consequently, they have not sought to put before the court evidence of their own personal and family circumstances and of their accommodation needs.

12. I am satisfied, applying the tests laid down in *American Cyanamid v Ethicon* that this is a proper application for interim relief, because there is a serious issue to be tried and because of the nuisance caused by the defendants' persistent activities, which means that damages would not be an adequate remedy.

13. I have been referred to the case of *Harlow District Council v. Stokes* , in 2015, a decision of the late Patterson J. This case very much mirrors the circumstances of that case. I am satisfied, because of the nature, extent and persistence of the problem, that the Order sought is necessary and proportionate and there is no evidence on the effect of making the Order on the defendants, their families or children which could counterbalance the justification for that Order. Care has been taken in defining the area not to seek to apply the Order to an area larger than that which is necessary and proportionate in the circumstances.

14. As Jay J recognised in the sequel to the *Harlow* case, *Harlow District Council v. McGinley* last year, the consequence of making the order can be to move the problem on to a neighbouring area and another local authority. That does not, in my view, militate against the making of the Order. The affected authority is discharging its public duty by taking appropriate measures to deal with the problem within the area for which it is responsible. If that means that the problem moves elsewhere, that may be an unfortunate consequence of the Order. It does not, though, provide a reason for refusing relief. If the problem moves elsewhere, it is the problem of the local authority for that area to assess what steps, if any, should be taken to deal with it.

15. The application seeks a power of arrest to be attached to the Order and, having regard to the threats of violence and intimidation that I am satisfied have occurred, having considered the witness evidence, it appears to me that it is necessary and proportionate that that power of arrest should be attached to this Order.

16. Finally, this is not a case in which it would be appropriate, having regard to the principles laid down by the House of Lords in *Kirklees Metropolitan Borough Council v. Wickes Building Supplies Ltd* , to require the claimant local authority to give a cross-undertaking in damages, because the claimant is exercising its functions of law enforcement for the benefit of the community as a whole.

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South Downs National Park Authority v Lara Daroubaix, Luke Daroubaix

No Substantial Judicial Treatment

Court
Queen's Bench Division

Judgment Date
10 May 2018

No. IHQ18/0285

High Court of Justice Queen's Bench Division

[2018] EWHC 1903 (QB), 2018 WL 02163680

Before: Mr John Howell QC

Thursday, 10 May 2018

Representation

Ms V. Hutton appeared on behalf of the Claimant.
The Defendants did not attend and were not represented.

Judgment

Mr John Howell QC:

1. This is an application by the South Downs National Park Authority for an *ex parte* interim injunction. The authority is the local planning authority for a field adjacent to Long Road, Soberton, in Hampshire.

2. Under section 187B of the Town and Country Planning Act 1990 , where a local planning authority considers it necessary or expedient for any actual or apprehended breach of planning control to be restrained by injunction, it may apply for such an injunction to the court, whether or not it has exercised or is proposing to exercise any of its powers under Part 7 of the 1990 Act. On such an application, the court may grant such an injunction as the court thinks appropriate for the purpose of restraining the breach. The substantive relief in the claim issued by the authority in this case is for such an injunction.

3. The approach the court should take to the grant of such a final injunction was considered by the appellate committee in *South Bucks District Council v Porter & Ors [2003] UKHL 26, [2003] 2 AC 558* . The principles were summarised by HHJ Richard Parks sitting as a Deputy High Court judge in *South Cambridgeshire District Council v Fleet Sother Cooke (aka Paul Sanderson) & Anor [2015] EWHC 3538 (QB)* at paragraph 48 in these terms:

> "(1) Section 187B confers on the court an original and discretionary (not a supervisory) jurisdiction, to be exercised with due regard for the purpose for which it is conferred, namely to restrain actual or threatened breaches of planning control.

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(2) It is inherent in the injunctive remedy that its grant depends on the court's judgment of all the circumstances of the case.

(3) The court is not required, or even entitled, to reach its own independent view of the planning merits of the case. Any actual or threatened breach of planning control is therefore a given when the court comes to exercise its discretion. But nor is the court obliged to grant an injunction because a local authority considers it necessary or expedient for a breach of planning control to be restrained by injunction.

(4) The power under s187B must be exercised with due regard to the purpose for which it was conferred, namely to restrain actual and threatened breaches of planning control. Where it appears that a breach will continue unless effectively restrained by the law, and that nothing short of an injunction will provide effective restraint, that will point strongly towards the grant of an injunction, as will a history of unsuccessful enforcement and persistent non-compliance, and evidence that the defendant has played the system by wilfully exploiting every opportunity for prevarication and delay.

(5) The court should not grant injunctive relief without having considered potential hardship for the defendant if the order is made. If it appears that the local authority has taken account of the defendant's personal circumstances and any hardship that an injunction may cause, that will ordinarily weigh in favour of granting relief, since the court must accord respect to the balance which the local planning authority, as the democratically elected and accountable body principally responsible for planning control in its area, has struck between public and private interests. But the order must be one with which the defendant can and reasonably ought to comply, given the potential consequences of non-compliance with an order of the court.

(6) It is ultimately for the court to decide whether the remedy sought is just and proportionate in all the circumstances. The need for proportionality requires not only that the injunction be appropriate and necessary for the attainment of the public interest objective sought, but also that it does not impose an excessive burden on the individual whose private interests are at stake."

4. I have taken the facts, so far as relevant for the purpose of considering the authority's application today, from two witness statements made by Mr Brian William John Gravener, a senior planning enforcement officer employed by Winchester City Council but who has been acting on behalf of the Authority.

5. In this case, the field concerned lies in open countryside within the East Hampshire Area of Outstanding Natural Beauty in the South Downs National Park. It comprises some 10.509 hectares, or 25.97 acres. In around 2002, the field was notionally divided into 121 plots each of about 0.2 acres. Each of the plots were sold off to an individual owner. One of these is Plot 107. It was subsequently acquired by the First Defendant, Ms Lara Kim Daroubaix in November 2017.

6. On 16 April 2018, Mr Gravener learned that two individuals had moved on to the land. He visited the site the next day and spoke to the First Defendant and her adult son, Luke Daroubaix, the Second Defendant. They informed him that they had recently been evicted from a property in Havant and were homeless. Mr Gravener noticed that fence posts had been erected, as had two tents, and that there were a number of personal and household items being stored under a tarpaulin. The First Defendant stated that she intended to bring a mobile home on to the land in order to take up residence. Mr Gravener handed her a letter stating that residential use of the site would be an unacceptable breach of planning control, and that she should vacate the site without delay clearing it of any moveable items. The letter warned her that enforcement action would be taken and also informed her that Winchester City Council had a team that would help consider her housing options.

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7. The First Defendant telephoned Mr Gravener on 23 April stating that she and her son were still camping on the site and that she still intended to bring a mobile home on to it but she was unsure when. Mr Gravener visited the site the following day. It was unchanged save that the fence posts were connected by wiring. Mr Gravener visited the site again on 8 May. Further fencing had been erected with an opening sufficiently wide, in his view, for a mobile home to be delivered.

8. The existing use of the site and the fencing that has been erected on it are, in the Authority's view, in breach of planning control and materially harmful to the character and appearance of the area. The Authority plans to issue an enforcement notice to remedy these breaches of planning control. However, the Authority is concerned with the expressed intention to bring a mobile home on to the land. In its view, such a structure indicates a greater degree of permanence and adversely affects the visual amenity of the landscape. There are no services on the plot and in its view permanent residential use is likely to lead to pollution and littering. The stationing of the mobile home may also require, so the Authority believes, further unauthorised operational developing to facilitate the access and siting of the mobile home. If the Defendants do what has been said will be done, the Authority considers that it will set an unacceptable precedent in planning terms given the 120 other plots on this field.

9. The Authority is accordingly seeking an injunction in these terms, namely that the Defendants be forbidden, whether by themselves, or by instructing or encouraging any other person, from siting any caravans/mobile home on the site and using any vehicle or other structure for residential purposes without the express grant of planning permission from the claimant and undertaking any operational development as defined in section 55 of the Town and Country Planning Act 1990 on the site without the express grant of planning permission from the Authority.

10. Today, Ms Hutton, who has appeared on behalf of the Authority, has made plain that the site to which the injunction relates should be the whole of the land which comprises the field and that the plan attached to the proposed draft injunction will need to be amended to make that plain and that it is clear that it is not limited simply to the land within Ms Daroubaix's ownership. That is required because the Authority is not entirely certain as to where the precise activities are taking place on the field.

11. Secondly, Ms Hutton has accepted that the terms of any injunction restricting operational development should be limited to the operational development of the types restrained by an Article 4 direction which has been approved by the Secretary of State which, in brief terms, excludes the right to erect fences and to lay out means of access which would otherwise exist under the General Permitted Development Order.

12. Today, the Authority is seeking an interim *ex parte* injunction on an application made without notice. No application notice has been served. I have earlier, as I have indicated, decided to grant the authority permission to make the application without having filed an application notice and Ms Hutton has, on behalf of the Authority, given me the appropriate undertakings to file the application notice and to pay the appropriate fee in that respect.

13. CPR 25.3(1) provides that:

> "The court may grant an interim remedy on an application made without notice if it appears to the court that there are good reasons for not giving notice."

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14. The reason given by the Authority why such an injunction should be granted *ex parte* is that it fears that if the Defendants were aware of the application they would expedite the movement of the mobile home on to the site to avoid breaching the injunction sought and thereby frustrate it. As Ms Hutton pointed out, they have already, so it would appear, made preparations as shown by the arrangement of the fencing to enable the mobile home to be delivered. In the circumstances, I am satisfied that there is a good reason for making the application without notice.

15. I am also satisfied that the Authority's application for an inunction raises a serious issue to be tried. There are clear threatened breaches of planning control. The stationing of a mobile home for residential purposes constitutes, or forms part of, a development for which planning permission is required and which has not been granted. Further operational development providing a means of access or further fencing will also require the grant of an express planning permission given the terms of what is known as an Article 4 direction which has been approved by the Secretary of State relating to the field. I am satisfied that, on the information available to me, the Authority has a real prospect of success in its claim having regard to the approach indicated by the case law to which I have referred.

16. Plainly, if such further unlawful activity is carried out, damages will provide no remedy to the Authority, even if it were entitled to them, which it would not be. Equally, in a law enforcement claim such as this, however, the Authority is not normally required to give the defendant an undertaking in damages: see *Kirklees Metropolitan Borough Council v Wicks Building Supplies Limited [1993] AC 237* .

17. In considering whether or not an interim injunction should be granted therefore, I must consider what course is likely to cause the least irremediable prejudice to one party or the other: see the *National Commercial Bank of Jamaica Ltd v Olint Corporation Ltd [2009] UKPC 16, [2009] 1 WLR 1405* .

18. If an interim injunction is refused but a final injunction is one that it transpires ultimately should have been granted then the public interest in the proper planning of the Area of Outstanding Natural Beauty in the National Park is likely to be frustrated, at least for some period, and that may lead to other unauthorised developments on other plots on the field magnifying the damage to the character and appearance of the area. If an *ex parte* injunction is not granted now then the objective of protecting the character and appearance of the area from further unlawful development may be frustrated and further proceedings may have to be taken to remove any mobile home and further unlawful development.

19. If, on the other hand, an interim injunction is granted but a final injunction is ultimately refused for some reason then the Defendants will have been restrained in the interim from doing something that is plainly unlawful. It is true that they may not have more satisfactory accommodation than their tent in which to continue to live. What consequences that may have on them and what other options they may have are not matters on which I have any information. However, they can present information about such matters on the return day for any *ex parte* injunction which I may now grant. The time for which they will be restrained from acting unlawfully before they could be heard is thus limited.

20. In conclusion, in my judgment, the balance of injustice plainly indicates that the interim injunction sought should be granted. It follows, however, from what I have said and from the exchanges during argument that the proposed order would need to be amended in a number of respects which I will discuss with counsel and that a return day will need to be fixed.

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Michaelmas Term
[2023] UKSC 47
On appeal from: [2022] EWCA Civ 13

JUDGMENT

Wolverhampton City Council and others (Respondents) *v* London Gypsies and Travellers and others (Appellants)

before

Lord Reed, President
Lord Hodge, Deputy President
Lord Lloyd-Jones
Lord Briggs
Lord Kitchin

JUDGMENT GIVEN ON
29 November 2023

Heard on 8 and 9 February 2023

Appellants
Richard Drabble KC
Marc Willers KC
Tessa Buchanan
Owen Greenhall
(Instructed by Community Law Partnership (Birmingham))

1st Respondent
Mark Anderson KC
Michelle Caney
(Instructed by Wolverhampton City Council Legal Services)

2nd Respondent
Nigel Giffin KC
Simon Birks
(Instructed by Walsall Metropolitan Borough Council Legal Services)

3rd to 10th Respondents
Caroline Bolton
Natalie Pratt
(Instructed by Sharpe Pritchard LLP and London Borough of Barking and Dagenham Legal Services)

1st Intervener
Stephanie Harrison KC
Stephen Clark
Fatima Jichi
(Instructed by Hodge Jones & Allen LLP)

2nd Intervener
Jude Bunting KC
Marlena Valles
(Instructed by Liberty)

3rd and 4th Interveners
Richard Kimblin KC
Michael Fry
(Instructed by HS2 Ltd Legal Department and the Government Legal Department)

Appellants
(1) London Gypsies and Travellers
(2) Friends, Families and Travellers
(3) Derbyshire Gypsy Liaison Group

Respondents
(1) Wolverhampton City Council
(2) Walsall Metropolitan Borough Council
(3) London Borough of Barking and Dagenham
(4) Basingstoke and Deane Borough Council and Hampshire County Council
(5) London Borough of Redbridge
(6) London Borough of Havering
(7) Nuneaton & Bedworth Borough Council and Warwickshire County Council
(8) Rochdale Metropolitan Borough Council
(9) Test Valley Borough Council and Hampshire County Council
(10) Thurrock Council
(11) Persons unknown

Interveners
(1) Friends of the Earth
(2) Liberty
(3) High Speed Two (HS2) Ltd
(4) Secretary of State for Transport

LORD REED, LORD BRIGGS AND LORD KITCHIN (with whom Lord Hodge and Lord Lloyd-Jones agree):

1. Introduction

(1) The problem

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 rule 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 rule 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* [2021] EWHC 1201 (QB); [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] EWCA Civ 303; [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* [2022] EWCA Civ 13; [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 (ie 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 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?

(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?

(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 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] UKHL 1; [2007] 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 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 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 Authority v Robinson* [2000] QB 775, paras 20-21 and *Cartier International AG v British Sky Broadcasting Ltd* [2016] EWCA Civ 658; [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* [2021] UKPC 24; [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 Compania Naviera SA v International Bulk Carriers 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* (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] UKSC 28; [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* (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 Jr 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 Order 113.

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 Order 15 rule 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, 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."

Those who are represented need not be individually named or identified. Nor need they be served. They are not parties to the proceedings: CPR rule 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 The New River Co* (1805) 11 Ves 429, 445; CPR rule 19.8(4)(a).

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 Sol Jo 597, concerned with picketing; *EMI Records Ltd v Kudhail* [1985] FSR 36, concerned with copyright 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 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, since those represented are not party to the proceedings, an injunction cannot be enforced against them without the permission of the court (CPR rule 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).

(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 (eg 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] UKSC 15; [2021] 4 WLR 103 and [2021] UKSC 58; [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 "[e]quity, 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 rule 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 rule 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* [2002] UKHL 50; [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* at p 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*"), 256. There has been a gradual but 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,* 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] HCA 18; (1999) 198 CLR 380 and *Revenue and Customs Comrs v Egleton* [2006] EWHC 2313 (Ch); [2007] Bus LR 44; [2007] 1 All ER 606).

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] UKHL 29; [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* (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*, 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 (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.

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 Liverpool Victoria Insurance Co Ltd* [2019] UKSC 6; [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 rule 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 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 rule 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 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] EWHC 1205 (Ch); [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 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 principle established in the *Venables* case - 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 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.

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] UKSC 12; [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 rule 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 rule 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, 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 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 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 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* [2003] EWHC 1738 (Ch); [2004] 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 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 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 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 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* [2005] EWCA Civ 1429; [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 Cambs District Council v Persons Unknown* [2004] EWCA Civ 1280; [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] UKHL 26; [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] UKSC 11; [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'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 expressed the view that the injunction had been rightly granted, and cited the decisions of the Vice-Chancellor 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 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 (eg *UK Oil and Gas Investments plc v Persons Unknown* [2018]

EWHC 2252 (Ch); [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* (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* (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. 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 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.

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.

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 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 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 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 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] EWCA Civ 515; [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 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 Borough Council v Persons Unknown* [2020] EWCA Civ 12; [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.

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, 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 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 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 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 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] EWCA Civ 9; [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* (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 rule 6.15) or to dispense with service (under CPR rule 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 rule 6.15 and there was never any proper basis for an order under CPR rule 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* per Lord Oliver at p 224 (quoted at para 39 above). That, the court said, 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 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*, 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.* The Court of Appeal, however, departed from that reasoning, on the basis that it had failed to have proper regard to *Gammell,* 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* 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,* 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: ie not to the power of the court, as was later confirmed by Lord Scott of Foscote in *Fourie v Le Roux* 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] EWHC 1101 (QB); [2003] EMLR 37; *Carr v News Group Newspapers Ltd* [2005] EWHC 971 (QB); *A (A Protected Party) v Persons Unknown* [2016] EWHC 3295 (Ch); [2017] EMLR 11; *RXG v Ministry of Justice* [2019] EWHC 2026 (QB); [2020] QB 703; *In re Persons formerly known as Winch* [2021] EWHC 1328 (QB); [2021] EMLR 20 and [2021] EWHC 3284 (QB); 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] EWHC 1059 (QB); [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, the facts and reasoning in which were summarised in paras 58-59 above. The case was analysed by Lord Sumption in *Cameron* 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.

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] UKSC 44; [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.

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* [2015] EWHC 2628 (QB); [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 (ie 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.

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 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 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 *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 ("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 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 Sumption's focus was particularly on the practice of the common law courts and on cases concerned with common law remedies (eg 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 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* [2018] EWHC 2230 (Comm); [2019] Lloyd's Rep FC 62. In 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: eg 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 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* solution, and its apparent approval in *Cameron* as a juridically sound means of joining unnamed defendants by their self-identification in the course of 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 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 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 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 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 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 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, 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* (cited at para 65 above) at para 32, in connection with a possible injunction against Gypsies living in caravans in breach of planning controls, "[w]hen granting an injunction the court does not contemplate that it will be disobeyed". Lord Rodger cited this with approval (at para 17) in the *Meier* case (para 67 above). Similarly, Lady Hale stated in the same case at para 39, in relation to an injunction against trespass by persons unknown, "[w]e 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* as establishing the contra mundum effect even of injunctions inter partes), American cases such as *Joel v Various John Does* 499 F Supp 791 (1980), 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 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 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 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.

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*. 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 *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 did not fall within "that exceptional category". Accordingly, "[t]he 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* … p 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 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 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 "[a]n interim injunction is temporary relief intended to hold the position until trial", and that "[o]nce 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 (eg 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 (ie in the old jargon ex parte) injunction, that is an injunction which, 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.

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 (eg 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, 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 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 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 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 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, 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 sub-paragraph (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* (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 eg *Castanho v Brown & Root (UK) Ltd* (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* (para 17 above) at paras 57-58 Lord Leggatt (giving the opinion of the majority of the Board) explained how, via *Broadmoor Special Health Authority v Robinson* and *Cartier International AG v British Sky Broadcasting Ltd*, 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 Part 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* (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 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 Lady Hale at para 25 is resonant:

> "The underlying principle is ubi ius, ibi remedium: where there is a 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* (para 130 above) at pp 499-500, cited by Sir Andrew Morritt V-C in *Bloomsbury* 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 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 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 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 development of the search order, from its original form in *Anton Piller KG v Manufacturing Processes Ltd* to the much more sophisticated current form annexed to Practice Direction 25A supplementing CPR Part 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 Compania Naviera SA v International Bulk Carriers SA*. 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* (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 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 and *Attorney General v Times Newspapers Ltd,* 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.

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* (para 41 above).

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.

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.

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.

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* at paras 11-21. This is what Lord Leggatt 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.

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* (para 20 above) per Lord Sumption 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* [2014] EWHC 3354 (Ch); [2015] Bus LR 298; [2015] RPC 7 at 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 Order 113, and is now to be found in CPR Part 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*, paras 33-36 per Lady Hale. 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 (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.

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, ie 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 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 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 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 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 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 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 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 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 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] UKSC 11; [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 paragraph 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, 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. 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 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) 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 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.

(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 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 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 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*, at para 13.

199. The system for local development planning in England is now established by the Planning and Compulsory Purchase Act 2004 ("PCPA 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, 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 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 aspect of PPTS 2015 amounts to indirect discrimination and has no proper justification: *Smith v Secretary of State for Housing, Communities and Local Government* [2022] EWCA Civ 1391; [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 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 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 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 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 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.

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 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.

(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. 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 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 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.

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*, 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*, 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.