OPUS₂

MBR Acres Limited & Others v Free the MBR Beagles & Others

Day 15

May 22, 2023

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1	Monday, 22 May 2023
2	(10.30 am)
3	(Proceedings delayed)
4	(10.50 am)
5	MR JUSTICE NICKLIN: Yes, Ms Bolton.
6	MS BOLTON: My Lord, good morning. My Lord, you should have
7	the claimants' closing submissions.
8	MR JUSTICE NICKLIN: I do. Thank you very much.
9	MS BOLTON: I also have made some $$ I took on board what
10	your Lordship was saying about stripping down the
11	injunction order for Mr Curtin only, which we've done.
12	I have had this morning, obviously, to be still
13	receiving bits of plans, et cetera, my Lord, and we have
14	noticed an error in the draft which we've just sent
15	through to be reprinted $$
16	MR JUSTICE NICKLIN: Okay.
17	MS BOLTON: $$ so before I hand that up, if that's okay.
18	MR JUSTICE NICKLIN: Yes.
19	MS BOLTON: My Lord, I'm in the court's hands. I can go
20	through these and read them out if that's what
21	your Lordship is content for me to do. I appreciate,
22	though, we have effectively given a fairly complete
23	document so I'm in the court's hands, I'm afraid.
24	MR JUSTICE NICKLIN: I've literally only just seen it so
25	I think it would be useful if you took me through the
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1	L:_L!:_L.
1	highlights .

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2	MS BOLTON: Indeed.
3	Closing submissions by MS BOLTON
4	MS BOLTON: My Lord, in summary, the claimants submit that,
5	one, Mr Curtin has committed acts of trespass on the
6	first claimants' land, both by himself entering the land
7	and by the use of the drone; two, Mr Curtin has
8	interfered with the first claimant's common law right to
9	access the highway from its land, that being the Wyton
10	site; three, Mr Curtin has obstructed the highway, that
11	being a public nuisance, in particular by slowing down,
12	stopping and holding up vehicles driven by the first
13	claimant's staff and members of the second claimant
14	class; and, four, Mr Curtin has harassed the first
15	claimant's staff and members of the second claimant
16	class contrary to and within the meaning of Protection
17	from Harassment Act 1997.
18	Background.
19	Mr Curtin is a senior figure in the Camp Beagle
20	campaign and the animal liberation movement more
21	generally. In particular, and in his opening
22	submissions that were later confirmed on oath, Mr Curtin
23	confirmed that he has physically been at Camp Beagle and
24	living there for 22 months and repeatedly made reference
25	to his 40 years as a protestor and involvement within

1 the animal liberation movement. 2 Mr Curtin has, in the past, been involved in 3 criminal activity in pursuit of his process including at 4 the Wyton site. For example, Mr Curtin explored with 5 the claimants' witnesses and himself confirmed in his 6 opening submissions that he was imprisoned for $18 \mbox{ months}$ 7 for involvement in a break-in at the Wyton site in which 8 82 dogs were stolen. Mr Curtin refers to this incident 9 as him "liberating dogs" and has expressed his pride at 10 doing so. 11 Notwithstanding his conviction, it is apparent that 12 Mr Curtin continues to consider that there was not 13 anything inherently wrong in his actions. He also 14 refers to more recent break-ins at the Wyton site by 15 Animal Rebellion activists as "liberating dogs" and says 16 that, "It warms my heart that other people do illegal 17 actions [as read]", whilst saying that he stopped doing 18 the same a long time ago. 19 It is notable that, when the court asked Mr Curtin 20 if he would describe himself as having taken a more 21 activist approach in his youth but that his approach to 22 protesting had evolved over time, such that he now 23 adopts protest methods that are within the law, 24 Mr Curtin replied, "That wouldn't be how I would put it. 25 My defence wouldn't be that I was a crazy kid, I was 3

1	naive and I grew up [as read]". Rather, Mr Curtin
2	describes that Britain and the animal liberation
3	movement are now different places and that the animal
4	liberation movement happens changed and he has moved
5	with it.
6	The claimants submit below that Mr Curtin's actions
7	are determined and will only be tempered to that which
8	is lawful and reasonable by the imposition of an
9	injunction. It is submitted that the evidence clearly
10	shows that, without the red line of an injunction,
11	Mr Curtin does not protest and act in a lawful manner.
12	Further, the claimants submit that Mr Curtin has,
13	through these proceedings and during the course of his
14	evidence and cross—examining the claimants' witnesses,
15	demonstrated that he lacks insight into what is and is
16	not reasonable conduct; for example, Mr Curtin believes
17	that his obstructions of cars driven by the first
18	claimant's staff and members of the second claimant
19	class, the shouting of abuse such as "Puppy killer",
20	"Shit shoveler" and "Moron" and the daily ritual,
21	so-called, are evidence of him calling love and
22	compassion to those people. The claimants submit that
23	is simply incredible and that this cannot be a belief
24	sincerely held by Mr Curtin or, if it is a sincerely
25	held belief, that it is evidence that Mr Curtin has an

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1	irrational and unreasonable view of what is and is not
2	lawful and peaceful protest.
3	MR JUSTICE NICKLIN: Can we just deal with what $$ the word
4	"peaceful" applied to protest is seriously apt to
5	mislead. It's better to say "lawful protest".
6	MS BOLTON: I agree, my Lord.
7	MR JUSTICE NICKLIN: Yes, because people think that
8	"peaceful" means standing quietly and that doesn't $$
9	MS BOLTON: No, indeed. It can be loud, yes.
10	It is Mr Curtin's lack of insight, awareness and
11	introspection as to what is and is not lawful protest
12	and what is appropriate and reasonable conduct that
13	causes the grant of a final injunctive relief to be both
14	just and convenient. Without such an injunction, it is
15	clear that Mr Curtin will not temper his behaviour and
16	the claimants will continue to suffer the commission of
17	civil wrongs and harm resulting from the same. It is
18	submitted that a clear and unequivocal final injunction
19	order that Mr Curtin can understand and obey is clearly
20	required in this case.
21	Further, it is submitted that it is clear that such
22	an injunction is required by reason of, one, Mr Curtin's
23	senior role in the protest camp. Many of the claimants'
24	witnesses described Mr Curtin as appearing to have some
25	sort of leadership role, although Mr Curtin rejected
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1	this characterisation in cross—examination. If the
2	leader or a senior member of camp cannot behave
3	reasonably and protest within the boundaries of the law,
4	it is reasonable for the claimant to apprehend that
5	others may follow suit and further harm will be
6	suffered.
7	MR JUSTICE NICKLIN: Can we be clear about what you say
8	about Mr Curtin's role? Mr Curtin has described in his
9	evidence that he doesn't really want to accept the title
10	"leader" because "leader" suggests that people — he can
11	give instructions and commands to others who will then
12	follow them. His role, as described, is a little bit
13	more nuanced than that.
14	MS BOLTON: Yes.
15	MR JUSTICE NICKLIN: He's recognised as an experienced
16	protestor. He shares his thoughts with others who are
17	protesting at the site. They may or may not follow what
18	he says. He has no way of $$ there's no structure.
19	It's not like they've all signed up to be members of the
20	same organisation and they've elected him as the leader.
21	MS BOLTON: Indeed.

21 MS BOLTON: Indeed.

22 MR JUSTICE NICKLIN: So do you challenge his evidence in 23 relation to that?

- 24 MS BOLTON: No, my Lord. It's how you characterise it.
- 25 Mr Curtin is clearly a senior figure in this protest.

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1 He clearly, we can see, we would say -- in examples such 2 as the Anglian Water video and some of the other videos, 3 holding up the staff, we would say $\ensuremath{\mathsf{Mr}}$ Curtin is 4 effectively in charge of that incident and directing people where to stand and what to do. 5 6 So we say in that respect he has a senior 7 figure/leadership-type role. But I accept -- we're not 8 suggesting that he's been elected to that role, which is 9 effectively the equivalent of the director of 10 Camp Beagle. We're not putting him in that role but we say he is a senior person that others will follow and go 11 12 along with what he asks them to do. 13 MR JUSTICE NICKLIN: Yes. 14 MS BOLTON: Two, Mr Curtin has repeatedly tried to 15 characterise himself when giving evidence and 16 ${\sf cross-examining}$ the claimants' witnesses as 17 a facilitator -- I'm going to say -- of lawful protest 18 and not an agitator. While the claimants do not accept 19 that characterisation, if Mr Curtin is correct, it is 20 even more important that the facilitator has a clear 21 understanding and appreciation of what is and is not 2.2 lawful protest. It is submitted that Mr Curtin has 23 demonstrated that, absent an injunction, he does not 24 have that understanding. 25 Three, it has become clear throughout the course of

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1	Mr Curtin's evidence and his cross—examination of the
2	claimants' witnesses that he considers that, because the
3	first claimant and its staff are engaged in what he
4	calls a "controversial industry", they should expect the
5	protests of the nature in which he engages. Mr Curtin
6	appears to hold the belief that his status as
7	a protestor permits him to commit civil wrongs without
8	consequence, which is simply not the case.
9	MR JUSTICE NICKLIN: I think his argument is more nuanced
10	than that. It's not that he's claiming that he's
11	entitled to break the law; he's claiming that, in the
12	balancing of the competing rights, his behaviour, he
13	says, stays the right side of the line.
14	Now, we can leave aside trespass $$
15	MS BOLTON: Yes.
16	MR JUSTICE NICKLIN: $$ and we can largely leave aside
17	obstructing vehicles, although we will need to look
18	actually at a slightly more difficult issue which
19	relates to the extent to which a protestor can attempt
20	to engage the driver of a vehicle that isn't an employee
21	vehicle in discussion and with a view to handing over
22	leaflets , et cetera.
23	MS BOLTON: Yes.
24	MR JUSTICE NICKLIN: Now, there's a delicate line between
25	let's say, for the sake of argument, that I accept your

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- 1 submissions, you're not entitled to stop a vehicle by 2 standing in front of it, but the more difficult question 3 is whether a protestor can flag down a vehicle with 4 a view to speaking with the driver and passing on the 5 protest message. That seems to me to be arguably the other side of the line. That will work out in the 6 7 question of how any injunction is to be framed. But it 8 seems to me that any citizen is entitled to try and 9 engage a fellow citizen , whether driving a vehicle or 10 not, and pass on a protest message. What you can't do 11 is make the person listen. In the same way that I can't 12 hold somebody hostage in the street and pass on my 13 complaints about whatever I want to protest about, 14 I can't stop vehicles deliberately and then force my 15 message upon them. But, like most of these things, 16 everything is in the detail. 17 MS BOLTON: My Lord, indeed, and, my Lord, when we get to 18 the interference of the common law right. I'll be making 19 submissions on where that should be because that engages
- 20 a private law right and the extent of that private law 21 right. Obviously, as you say, the devil is in the
- 22 detail . When we talk about flagging down a driver, again
- 23 it would depend on how that's done, where that's done
- 24 and are we talking about standing in a road to flag down 25 that driver or simply a sign saying, "Please stop and

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1	collect a leaflet ", or waving that to them to slow down.
2	Where is the line?
3	MR JUSTICE NICKLIN: Well, if it hadn't been for the
4	exclusion zone, the obvious place at which the
5	protestors would try and engage the driver would be
6	while they were waiting to access the site . You know,
7	I can't myself see that $$ if I were coming at this
8	fresh and I didn't have the history of what had happened
9	at this site, a group of protestors standing at the side
10	of the road and currently in $$ off the carriageway but
11	in the access road, not the bit that you own, and then
12	when the car stops for the gate to open, tapping on the
13	window and saying, "Excuse me, can I just hand you my
14	leaflet ? We're protesting about these premises and what
15	they do" $$ there can be no objection to that.
16	MS BOLTON: My Lord, yes and no. There's two points $$
17	well, three points. One, we're not coming to that from
18	that background, so we have the apprehension and the
19	knowledge of what has happened and what is likely to
20	happen without the right prohibitions. Secondly, one of
21	the things I will take you to in closing $$ we've looked
22	at the Marshall case on interference with the common law
23	right, but one of the points I'm particularly going to
24	take the court to is the first instance decision in
25	Marshall, where the definition of the private law right

4 the sub-soil, having an immediate right of possession to 5 the sub-soil up to the midpoint of the highway, and that you have the reversionary interest on the materials and 6 7 scrapings and the fact that, up to that point, whilst 8 your rights have been tempered by the adoption, you are 9 still accessing by a private law right. So that does 10 need to be factored in. 11 If you recall in my opening submissions, I said that 12 I think we can anchor a lot of the exclusion zone to 13 that particular cause of action and I' II be making 14 submissions on why that's the case later on because of 15 how that right operates and where it operates to. So the question would still be, would you be $--\ensuremath{\mathsf{is}}$ is 16 17 that still part of an interference, could it still be 18 part of an interference --MR JUSTICE NICKLIN: Okay. Hang on a minute then. Are you 19 saying that tapping on the window of somebody who is 20 21 coming into the Wyton site and offering them a leaflet 2.2 is an interference with the common law right? 23 MS BOLTON: No, and we wouldn't be here if that is what had 24 been happening. 25 MR JUSTICE NICKLIN: Yes, sure. That's why I'm testing this 11

and its scope is dealt with and then endorsed in the

House of Lords as a definition which they cannot improve

upon. That deals with this additional point of owning

1 because, if any injunction I grant interferes with that, 2 that is a significant interference with the Article 10 3 right and the Article 11 right because it's the critical 4 moment where you actually get -- the protestors get an 5 opportunity to try and persuade those who are supplying 6 the claimant that they really ought to think carefully 7 about whether they would want to do so. Now, there's 8 nothing wrong with that. 9 MS BOLTON: Yes, my Lord, but because that right exists, 10 it's not unqualified against the other rights which have been quite -- which would, in my submission, be quite 11 12 significantly impacted upon if there was --MR JUSTICE NICKLIN: Well, if I grant an exclusion zone --13 let's not beat around the bush -- I'm going to 14 15 extinguish that aspect of the protest right. 16 MS BOLTON: Yes. MR JUSTICE NICKLIN: So in terms of the parallel analysis 17 18 between the engaged rights -- and this is even allowing 19 you to try -- I mean, it's not like an 2.0 Article 8/Article 10 classic parallel analysis where 21 there's no presumptive priority. There is a presumptive priority with Article 10/Article 11. Yes, they both

- 2.2
- 23 recognise that they can be qualified by reference to the 2.4

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rights of others, but it's not like a straight up 25

conflict between two human rights where there's no

1	presumptive priority between the rights. There is
2	a presumptive priority in relation to Article 10 and
3	Article 11.
4	MS BOLTON: My Lord, there is, but this is the difficulty
5	with this case, because of the common law right to
6	access the highway and because $$
7	MR JUSTICE NICKLIN: Well, put it this way: I'm not going to
8	allow this obscure tort to ride roughshod over protest
9	rights .
10	MS BOLTON: My Lord, it's not an obscure tort and it was $$
11	MR JUSTICE NICKLIN: It's got this much text in
12	Clerk & Lindsell.
13	MS BOLTON: And it was again approved in the Supreme Court
14	in the Cusack case in 2013 and that definition was
15	approved and it is still the case that that is a very
16	important right and the only party that can cut that
17	right back is the Highways Authority.
18	It is still a fact that it all ties in with the
19	ownership of the land and the dedication of the highway
20	being the only reason why that's not an immediate right
21	to possession, so it's a very important land law right.
22	It's not obscure. It's simply $$ and that will have to
23	be considered.
24	MR JUSTICE NICKLIN: No, I recognise it has to be
25	considered, but it takes its place. Like most of these
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1	13 things, the law has to find an answer with any of these
2	things, the law has to find an answer with any of these activities . Trespass is the only one that trumps $$
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2 3 4	things, the law has to find an answer with any of these activities . Trespass is the only one that trumps $$ I mean, you don't have the right to trespass on people's land in order to protest, so that's clear. The rest of
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2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20	 things, the law has to find an answer with any of these activities. Trespass is the only one that trumps — I mean, you don't have the right to trespass on people's land in order to protest, so that's clear. The rest of them take their place, as the law is required to do, to ensure that the protest rights are not unduly interfered with. MS BOLTON: My Lord, in my submission, it may be more nuanced than that when it comes to this right. We set that out in detail later in this submission. So there is a slightly different balance to do here. MR JUSTICE NICKLIN: How could it be different? MS BOLTON: Because the claimants are exercising their private law right up to the midpoint of the highway and that's — they might also — they are not accessing the highway purely under a public law right. That is the critical point here. So up to that point, they have private law rights. Article 10 and 11 doesn't trump that. There is still a balance to be ——

- 24 have that right. It's the common law right to access
- 25 the highway for them, so anybody who is a licensee or

1 assignor has the right. It is simply a case of -- but 2 I accept this is still a court discretion point, but it 3 is a slightly different balance. 4 So that is why we're saying that the court does have 5 something more concrete concerning the exclusion zone in part -- not entirely because the exclusion zone went 6 7 further than that, especially to one side of the site -8 but it does have that ability in this case because of 9 those private law rights. 10 It's likely that if you were turning right outside 11 the Wyton site, you couldn't rely on it to the extent of 12 the exclusion zone as it currently stands, but you certainly could to the left and you certainly could to 13 14 the access road and a very smaller part of the grass 15 verge to the right. 16 So that would be the extent of the common law right 17 and so we say the balance is -- it's still a discretion 18 point for the court, but we would say that the balance 19 is different and a little bit more nuanced in this case 20 than it would be in a case where the common law right 21 wasn't part of the claim. 22 Even if Mr Curtin, whilst not being able to 23 acknowledge that his actions are not always reasonable, 24 does at least himself acknowledge that he may not have 25 been the most objective view of his conduct -- "All the 15

1 things -- the loudhailers, the protesting, all things 2 I've seen in the 40 years that I've -- perhaps there's 3 something wrong with me and protesting has become 4 normalised [as read]". 5 Trespass. The claimants allege at paragraphs 170.1 6 to 170.10 of the particulars of claim nine incidents of 7 trespass against Mr Curtin. Of those incidents, one, 8 two relate to incidents of trespass alleged to have 9 occurred on the driveway -- my Lord, that's the bit up 10 to the metal strip -- and, two, six relate to incidents 11 of trespass alleged to have occurred on the access land. 12 A seventh incident was pleaded at paragraph 170.4 of the 13 particulars of claim but it is no longer relied upon. 14 And, three, one incident relates to trespass alleged to 15 have been committed by the flying of a drone directly 16 over the Wyton site. 17 Legal principles . Trespass to land is the 18 interference with possession or the right to possession 19 and includes instances in which a person intrudes upon 2.0 the land of another without legal justification . The 21 key and well-established legal features of trespass are, 2.2 one, it is a strict liability tort, such that the defendant need not know that they are committing 23 2.4 a trespass to be liable for the same, and, two, the tort 25 is actionable per se, such that the claimant does not

1	have to either seek or prove damage to establish	1
2	liability for the tort.	2
3	Further, it is well established that the extent of	3
4	the trespass is irrelevant to the finding of liability	4
5	in trespass. The same was made clear by Lord Coleridge,	5
6	Chief Justice in Ellis v Loftus Iron Company, (1874–75)	6
7	LR 10 CP 10, where his Lordship stated at page 12:	7
8	"It is clear that, in determining the question of	8
9	trespass or no trespass, the Court cannot measure the	9
10	amount of the alleged trespass; if the defendant place	10
11	a part of his foot on the plaintiff 's land unlawfully,	11
12	it is in law as much a trespass as if he had walked half	12
13	a mile on it."	13
14	Further, it is clear from Ellis, a case in which	14
15	a horse's leg strayed onto neighbouring land, that	15
16	placing anything on or in land in the possession of	16
17	another is also a trespass; see also Clerk and Lindsell	17
18	on Torts, 23rd edition, at paragraph 18–02.	18
19	A person shall not commit a trespass where they	19
20	enter and remain on the land of another pursuant to	20
21	a licence, whether express or implied. Accordingly,	21
22	a licence is a legal justification for intrusion on the	22
23	land of another. However, a person who enters land	23
24	pursuant to a licence, but who proceeds to act in such	24
25	a way that it exceeds the scope of the licence, or who	25
	17	
1	remains on the land after expiration of the licence	1
2	commits a trespass."	2
3	That proposition was considered by Lord Atkin in	3
4	Hillen v ICI Limited [1936] AC 65 at 69, where his	4
5	Lordship stated:	5
6	"My Lords, in my opinion this duty to an invitee	6
7	only extends so long as and so far as the invitee is	7
8	making what can reasonably be contemplated as an	8
9	ordinary and reasonable use of the premises by the	9
10	invitee for the purposes for which he has been invited.	10
11	He is not invited to use any part of the premises for	11
12	purposes which he knows are wrongfully dangerous and	12
13	constitute an improper use. As Scrutton LJ in the	13
14	Calgarth has pointedly said: 'When you invite a person	14
15	into your house to use the staircase you do not invite	14
16	him to slide down the bannisters'. So far as he sets	15
17	foot on so much of the premises as lie outside the	10
18	invitation or uses them for purposes which are alien to	18
10 19	the invitation he is not an invitee but a trespasser.	10
19	the invitation he is not an invitee but a trespasser,	19

20 and his rights must be determined accordingly."

 21
 The case of Hillen was more recently considered and

 22
 applied in the Jockey Club Racecourse Limited v Persons

 23
 Unknown [2019] EWHC 1026 (Ch), the latter of which also

 24
 considered the approach to trespass taken in R v Jones

 25
 and Smith [1976] 1 WLR 672, in which case it was again

18

confirmed that exceeding the scope of a licence is a trespass In the Jockey Club case, the court also considered the House of Lords' decision in Tomlinson v Congleton Borough Council and others [2004] 1 AC 46, in which a visitor to a public park who disobeyed signs that forbade swimming made himself a trespasser on entering the water. Lord Hoffmann, citing Hillen, said: "I can see no difference between a person who comes upon land without permission and one who, having come with permission, does something which he has not been given permission to do." Accordingly, the law is clear that even where a person comes on to land with permission, where that person then does something on the land that he has not been given permission to do, he becomes a trespasser. Trespass to the air space above land. Trespass is not confined to unauthorised incursions onto the surface of land, but extends also to unauthorised incursions into the air space above land. In this regard, the question for the court is twofold: one, does the first claimant have rights in the air space above the Wyton site such that interference with that air space could constitute a trespass, and, if so, two, does protestors' flying of drones in the air space

19

1	above the Wyton site in fact constitute a trespass?
2	The answer to the first of those questions is "Yes".
3	It is well established that the owner of land has rights
4	in the air space above that land, the interference with
5	which can amount to trespass; see, for example,
6	Bernstein v Skyviews & General Limited [1978] QB 479 at
7	485 to 486, per Mr Justice Griffiths, citing also Kelsen
8	v Imperial Tobacco Company (of Great Britain and
9	Ireland) Limited [1957] 2 QB, page 334.
10	As to the second question and whether flights above
11	the land of another is in fact a trespass, the answer
12	will depend on what height the plane, drone or other
13	aircraft , whether manned or unmanned, flies above the
14	land. The approach taken by the court in Bernstein and
15	the reasoning for the same can be found in pages 485
16	to 488 of the judgment where Mr Justice Griffiths
17	said $$ my Lord, I'm not going to read out the whole
18	quote, but the important part is on page 8 in bold, of
19	the quote:
20	"The problem is to balance the rights of an owner to
21	enjoy the use of his land against the rights of the
22	general public to take advantage of all that science now
23	offers in the use of air space. This balance is in my
24	judgment best struck in our present society by
25	restricting the rights of an owner in the air space

1	above his land to such height as is necessary for the
2	ordinary use and enjoyment of his land and the
3	structures upon it, and declaring that above that height
4	he has no greater rights in the air space than any other
5	member of the public."
6	So, my Lord, the question for the court when looking
7	at the drone trespass is : is the drone interfering with
8	the ordinary use and enjoyment of the claimants' land?
9	So is it changing behaviour? Is it requiring the
10	claimants to do things differently ? Is it interfering ?
11	That will be decisive for the court on whether or not
12	a drone trespass is being committed.
13	Accordingly, for trespass to air space to be
14	established, which in this case would be caused by the
15	flying of the drones above the first claimant's land at
16	the Wyton site, the first claimant will need to
17	establish that the drones are being flown at a height
18	above the land such that there is an interference with
19	the first claimant's ordinary use and enjoyment of the
20	land. If the drones are flown at such a height, the
21	strict liability tort of trespass will be established.
22	MR JUSTICE NICKLIN: What height is that?
23	MS BOLTON: Well, my Lord, we would say that the evidence of
24	the staff is that the heights the drone have been flown
25	at have caused them to have to cover their faces, change

1	how they move dogs around the site, be careful as to
2	their activities , whether they have windows closed,
3	curtains closed, and therefore it's not a particular
4	height in this case because my submission would be the
5	drones are interfering with their use and enjoyment of
6	the site.
7	MR JUSTICE NICKLIN: Okay. Well, that just shows it's
8	nothing to do with the trespass. The apprehended wrong
9	is the surveillance. The drone is the mechanism for the
10	surveillance .
11	MS BOLTON: It's still a trespass if the flying of that
12	drone over the site causes them to change what they do
13	as a result of it. It's interfering with their use and
14	enjoyment of the property.
15	My Lord, in the draft that I'm going to hand up, we
16	say what you should do is prohibit drone trespass over
17	the site . We can't do anything about $$ we accept
18	trespass doesn't go to anything that $$
19	MR JUSTICE NICKLIN: Well, that doesn't tell $$ leave aside
20	Mr Curtin, who is being schooled beautifully on the law
21	of trespass and how it applies to drones, he's unusually
22	therefore in the position of understanding the
23	discussion that we're having. But the order needs to
24	specify clearly what people or Mr Curtin can and cannot

25 do. It's clear from the decision that you've relied

22

- 1 upon that there is a height at which the trespass cannot 2 reach MS BOLTON: Yes. 3 MR JUSTICE NICKLIN: What's difficult for you is actually 4 you could fly a drone at 200 metres, but if it was 5 a sophisticated, highly specialised and high-spec drone 6 7 with a very powerful camera, it might be able to obtain 8 better footage than a lesser-equipped drone that flew at 9 50 metres. 10 MS BOLTON: Yes, my Lord, and my Lord might --11 MR JUSTICE NICKLIN: And that's why -- I've said this before and it's going to be a consistent theme, which is you 12 13 are trying to obtain a remedy using trespass which is 14 really trying to get a remedy of a different kind. What 15 you really want is an order that nobody can carry out 16 surveillance of your land or the people on it, but you 17 can't identify a tort or you can't bring yourself within 18 one of the torts that would entitle you to such an 19 order 20 MS BOLTON: My Lord, in my submission, we have to remember 21 two things. The Bernstein case is a case about taking 2.2 a photograph from a light aircraft which is at a much 23 higher altitude, the point being it couldn't possibly be 24 interfering with the use and enjoyment of the premises 25 because it didn't change anything. This is the point. 23 1 So Bernstein is a case where taking that photograph 2 doesn't change anything. It doesn't cause the claimant 3 to have to say, "Right, we need to move the dogs in 4 vans, we need to cover our heads". Flying drones over the site, at whatever height, which doesn't have the 5 6 same capabilities as a light aircraft, is doing that, it 7 is interfering , and it's designed, as your Lordship 8 quite rightly identifies , to survey the site , which in 9 itself is going to cause people to act differently and 10 do things differently -11 MR JUSTICE NICKLIN: It's not $--\mbox{I}$ accept that it's an
 - 12 interference --13 MS BOLTON: Yes
 - 14 MR JUSTICE NICKLIN: -- but it's not a trespass. It's
 - absolutely nothing to do with the enjoyment of your
 - 16 land, nothing to do with it.
 - 17 MS BOLTON: It is if it changes your conduct on your land.
 - 18 That is the very nature of it . That's the point.
 - 19 MR JUSTICE NICKLIN: No, no. If the camera were set up 20 outside -- if there were a bank of cameras on every
 - 21 flank of the site, it would interfere --- it would
 - 22 produce exactly the same interference, but it's not
 - 23 a trespass

25

- 24 MS BOLTON: Indeed, and I accept that that's the case. But
 - the drone flying over is a trespass because it's

1	affecting how the $$ that's looking at it not from the
2	way to look at the law of trespass. The law of trespass
3	isn't concerned with the fact that there are other ways
4	you could do the same thing. It's concerned
5	with: are you trespassing? There is a limit $$
6	MR JUSTICE NICKLIN: "The problem is to balance the rights
7	of an owner to enjoy the use of his land against the
8	rights of the general public to take advantage of all
9	that science now offers in the use of air space."
10	Quite prescient really when he had no idea that we
11	would have drones in 2023.
12	MS BOLTON: Yes.
13	MR JUSTICE NICKLIN: But that's a recognition that science
14	may develop and drones may exist, and if there's
15	a society problem with drones, then it's a $$ and they
16	shouldn't fly below a particular height in relation to
17	land, then Parliament can provide for that, and it has
18	done some by reference to the air navigation orders.
19	But that's a recognition that there's a height $$
20	MS BOLTON: Yes.
21	MR JUSTICE NICKLIN: $$ but you're not telling what the
22	height is.
23	MS BOLTON: Because the height isn't a particular metre
24	specification , my Lord. It's the next part of that

quote, $"\ldots\;$ is necessary for the use of the ordinary

1	enjoyment of his land and the structures upon it".
2	MR JUSTICE NICKLIN: But that then brings into the question,
3	which is, because your employees don't know the
4	specification of the drone flying at 200 metres, whether
5	or not it's capable of seeing them or whether or not
6	when flying at 500 metres it's capable of seeing them $$
7	MS BOLTON: My Lord $$
8	MR JUSTICE NICKLIN: $$ so it can't interfere with their
9	use.
10	MS BOLTON: But it does, and that was their evidence.
11	MR JUSTICE NICKLIN: I know, because largely
12	MS BOLTON: If you're within something that is interfering
13	with the use and enjoyment of the land, over the land,
14	that is trespass. At that point it is then strict. If
15	you're not, then it isn't. What we're doing is putting
16	a limit on the air space. So flying a light aircraft
17	much higher than that $$
18	MR JUSTICE NICKLIN: So you want me to just prohibit drones
19	above your site, full stop?
20	MS BOLTON: My Lord, what we've done is we've dealt with it
21	in this way in the draft order. That's my primary
22	position, that that's what you should do. That is
23	clear ——
24	MR JUSTICE NICKLIN: I know it's clear, but it goes well
25	beyond what you're entitled to.

1	MS BOLTON: Well, I don't think it does, my Lord, because
2	flying the drones over the site is what is interfering
3	with the way that they are operating. That is one of
4	the things which is interfering with the way that they
5	are operating. If you don't accept that submission, we
6	have put in square brackets in the order, you will see,
7	either 50 metres, 100 metres and 200 metres. But we say
8	that the clear way to deal with this is to say that you
9	don't fly drones over the site because other $$ no, of
10	course you can fly light aircraft over the site, that's
11	much higher. If you want to take aerial views, that's
12	much higher. But a drone flying over the site $$ and
13	you heard Mr Curtin's evidence, which was, "We stopped
14	using the bigger ones because they're much louder and
15	they could hear them", so they $$
16	MR JUSTICE NICKLIN: I think you really need to be careful
17	with the "we" there.
18	MS BOLTON: That was Mr Curtin's evidence, though, that they
19	stopped using the larger drones because they were more
20	audible.
21	MR JUSTICE NICKLIN: Yes.
22	MS BOLTON: So, my Lord, I'd ask the court to bear in mind
23	that the height isn't the right way to look at this.
24	The drones $$ on Mr Curtin's own evidence, the bigger
25	drones that can be higher, he was quite clear that that
	27

1	signalled to the staff to change their conduct because
2	they could hear them. So my submission is $$ our
3	primary submission is it should be based on not flying
4	drones over the site . If the court is not with that, we
5	have made some height suggestions of which it is
6	obviously a matter for the court.
7	MR JUSTICE NICKLIN: Yes, and one of the things that you'll
8	need to address is the fact that you have not provided
9	me with any evidence in relation to drones, heights,
10	anything like that. I said some time earlier in these
11	proceedings that you would need to provide some evidence
12	about the size of drones, their capacity, what they can
13	do, what height they fly, some expert evidence about
14	what was $$ the footage we've seen, at what height this
15	was. This is all $$ you're just making $$ I mean, the
16	50/100/200, what could I possibly base that on?
17	MS BOLTON: Well, you have the image from Mr Curtin of the
18	50 metres.
19	MR JUSTICE NICKLIN: Yes.
20	MS BOLTON: You can see what kind of definition $$ you have
21	Mr Curtin's evidence as well $$
22	MR JUSTICE NICKLIN: But that can't be relevant. What you
23	can see by the drone $$ this is the whole point. Every
24	aspect we look at on this shows me this is nothing to do
25	with trespass and everything to do with surveillance.

- 1 MS BOLTON: My Lord, it is to do with trespass. It may also
- 2 be to do with surveillance, but it is very simply
- 3 a trespass because it is interfering with use and
- 4 enjoyment of the site and it is above the site at
- 5 a height that will be a trespass. That is why we say 6 that the claimants' position is --
- 7 MR JUSTICE NICKLIN: Okay, let's just test that scenario.
- 8 Image the drone is flying at 2.00 in the morning and
 9 nobody sees it --
- 10 MS BOLTON: That's irrelevant.
- 11 MR JUSTICE NICKLIN: -- is it interfering with the user? 12 Is it?
- 13 MS BOLTON: My Lord, you're not testing it in that way.
- 14 MR JUSTICE NICKLIN: If it's a trespass, it's a trespass.
- Your definition of "trespass" depends upon whether or
 not anybody is annoyed or has their activity interfered
 with.
- 20 MR JUSTICE NICKLIN: Never mind about that.
- 21 MS BOLTON: Well, it's therefore capable of being a trespass
- 22 at any time. We've seen evidence that to try and avoid
- some of what happens with the protests, vans have gone
- in in the early hours of the morning. It's capable of
- 25 being a trespass at any time.

- 1 MR JUSTICE NICKLIN: Well, that's the problem because what 2 this is really talking about is the extent to which 3 somebody allows something to overhang the land. That 4 then interferes with the user of the land all the time. MS BOLTON: Yes. 5 MR JUSTICE NICKLIN: But drone is -- I mean, if you flew 6 7 a drone -- a tiny drone at 100 metres, nobody would see 8 it. 9 MS BOLTON: It's the point, my Lord --10 MR JUSTICE NICKLIN: But that's a trespass. 11 MS BOLTON: Yes, because it's the point -- in the judgments 12 which have been consistently, over the years, confirmed, 13 it's that example of the tow(?) being the same as 14 walking a mile. 15 MR JUSTICE NICKLIN: Okay. With all respect to my forebears 16 and their legal acumen, they were not dealing with 17 drones 18 MS BOLTON: No, but it doesn't -- unless the court rules 19 that that's not their air space and it cannot interfere, 2.0 then it is a trespass, and that is why it's my 21 submission that the primary position should be that you 2.2 prevent the drones -- you prohibit drones from flying 23 over the site . I accept that doesn't stop other types 24 of surveillance , but that is -- if it is interfering
- 25 with their use and enjoyment, it is then strict and

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- 1 that's the point. Mr Curtin's own evidence was that the 2 larger drones, which can fly higher, were more audible 3 and therefore they knew they were coming. That's the point, that it does interfere. If it does, it's 4 trespass. And I think that that moves away from height 5 restriction issues and how that's proved and how that 6 7 works ---MR JUSTICE NICKLIN: Well, of course it's more convenient 8 9 for you, but it's arguably arrogating to you a right 10 vou're not entitled to. 11 MS BOLTON: My submission is it is a right that the claimant 12 is entitled to, but, my Lord, ultimately that will be 13 a matter for the court. MR JUSTICE NICKLIN: And your evidence of Mr Curtin flying 14 drones is ...? 15 16 MS BOLTON: Well, my Lord, we've taken the court to that 17 evidence. We accept that there is only the claimants' 18 evidence, the evidence of that one occasion, but 19 Mr Curtin's evidence was that he flew the drones weekly. 20 So we say that, whilst we've only got one piece of 21 evidence of Mr Curtin flying the drones, his evidence is 22 he flies the drones weekly. 23 MR JUSTICE NICKLIN: Yes, but you need to show that in the 24 air column -- that he's flown into the air column above 25 your land. 31
 - 1 MS BOLTON: Well, we say that the evidence we provided to the court did that, but again that will be a matter for 2 3 the court. 4 Defences to trespass. As stated above, a licence, 5 whether express or implied, is a legal justification for 6 intrusion on the land of another such that it amounts to 7 a defence to trespass. It is no defence to a claim in 8 trespass that the trespass arose as a result of mistake 9 or negligence on behalf of the defendant. That's 10 Network Rail Infrastructure Limited v Conarken Group Limited [2010] EWHC 1852 (TCC) at 65 to 67, per 11 12 Mr Justice Akenhead, such is the strict liability nature 13 of the tort 14 Further, there can be no justification on the basis
 - 15 that the trespass occurred whilst the defendant is 16 exercising their Article 10 and 11 rights to freedom of 17 expression and freedom of assembly. This same was made 18 clear in Boyd v Ineos Upstream Limited and Others [2019] 19 EWCA Civ 515; [2019] 4 WLR 100 at 36 to 37, in which 2.0 Lord Justice Longmore found that Articles 10 and 11 of 21 the European Convention on Human Rights do not include 2.2 a right to trespass when exercising those rights; see 23 also High Speed Two Limited v Four Categories of Persons 2.4 Unknown & Monaghan and Others [2022] EWHC 2360 (KB) at 25 31 per Mr Justice Julian Knowles in this regard.

1	Further still , trespass is an interference with the
2	first claimant's A1P1 rights, which itself requires
3	justification . The exercising of rights under
4	Articles 10 and 11 of the European Convention on Human
5	Rights cannot normally justify a trespass, Cuciurean v
6	Secretary of State for Transport and High Speed Two
7	(HS2) Limited [2021] EWCA Civ 357 at 9(1) to 9(2) per
8	Lord Justice Warby.
9	Finally, in exceptional circumstances, necessity may
10	be a defence to trespass. The necessity defence was
11	considered and summarised by Lord Justice Mummery in
12	Monsanto v Tilly and Others [2000] Env LR 313 at 338,
13	where it is explained:
14	"The defence is only available to the individual in
15	cases of emergency where it is necessary for the private
16	citizen to act in the face of immediate and serious
17	danger to life or property and the citizen acts
18	reasonably in all the circumstances.
19	"Further, even in cases of emergency, trespass by
20	the individual, in the absence of very exceptional
21	circumstances, cannot be justified as necessary or
22	reasonable, if there exists a public authority
23	responsible for the protection of the relevant interests
24	of the public. In this case the Department for
25	Environment has such responsibility. In such cases the

1 right of the individual to trespass out of necessity, 2 whether as a defender of his own or a third party's 3 interest or as champion of the public interest, without 4 attempting to enlist the assistance of the public 5 authority, is obsolete." 6 Injunctions to restrain trespass. The claim in 7 trespass against Mr Curtin is simple in that it does not 8 engage any of the specific considerations that arise 9 when injunctive relief to restrain trespass is sought 10 against persons unknown. The claim against Mr Curtin is 11 a conventional party A v party B claim. 12 The respect for property rights is such that 13 a landowner whose title is not in question is entitled 14 to an injunction to restrain trespass on his land 15 whether or not that trespass affects him. The same is 16 made clear by Lord Justice Balcombe in Patel v WH Smith 17 Limited 1 WLR 853 at 858F to H. 18 "What, then, are the principles which a court should 19 apply in a case of this type? It seems to me that, 2.0 first, prima facie a landowner, whose title is not in 21 issue, is entitled to an injunction to restrain trespass 2.2 on his land whether or not the trespass harms him." 23 Further, when applying Patel in Fitzwilliam Land 24 Company and Others v Cheesman and Others [2018] EWHC 25 3139 (QB), Mr Justice Freedman stated, "It follows that

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1 a quia timet injunction will usually be justified as 2 long as the Claimants establish that there is 3 a substantial risk of trespass by a defendant", 4 paragraph 43. 5 In any event, it is the claimants' case that 6 Mr Curtin has in fact committed acts of trespass, such 7 that the relief sought is not pure precautionary relief. 8 Evidence: driveway trespasses. 9 In summary, it is submitted that Mr Curtin committed 10 acts of trespass on 20 July 2021 and 4 September 2021 by 11 crossing the metal strip and entering the driveway, that 12 being the first claimant's land: two. Mr Curtin knew 13 that he was trespassing at the time he entered the first 14 claimant's land, that being relevant to the remedy only 15 and not liability ; and, three, Mr Curtin has established 16 no defence to the trespasses alleged. 17 Mr Curtin's knowledge of the extent of the first 18 claimant's land, the "driveway". 19 Mr Curtin's knowledge as to the extent of the first 20 claimant's land, whilst not relevant to liability in 21 trespass, is relevant to the remedy that should be 22 granted should liability be established and specifically 23 whether an injunction should be granted to restrain 24 further acts of trespass. It is alleged that Mr Curtin 25 entered the driveway on 20 July 2021, see

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1	paragraph 170.3 of the particulars of claim, and on
2	4 September 2021, see paragraph 170.5 of the particulars
3	of claim, D11's bundle, page 20.
4	It should be remembered that "the driveway" is
5	defined in these proceedings as being the area of land
6	between the metal strip that runs the width of the
7	access land and the gate to the Wyton site; see
8	paragraph 7.1 of the particulars of claim at page 7 of
9	D11's bundle. The driveway measures approximately
10	1 metre in length.
11	Mr Curtin, in the course of cross-examination,
12	referred to the metal strip on more than one occasion as
13	"a force field ". To that end see transcript Day 10,
14	page 99, lines 9 to 12, "I treated the metal bar as
15	a bit of a force field "; two, transcript Day 11, page 2,
16	lines 13 to 17, when it was put to Mr Curtin:
17	"And I think you gave evidence yesterday that you
18	consider the metal strip to be like a force field that
19	you don't cross, but you clearly did on that day,
20	didn't you?"
21	Mr Curtin answered "Yes", before proceeding to give
22	an explanation as to why he crossed the metal strip.
23	And, three, transcript Day 11, page 6, lines 4 to 5:
24	"You can see from my conduct I must have established

by then that the metal line was a kind of force field ." 36

1	Mr Curtin later tried to renege on the
2	characterisation of the metal strip as a force field not
3	to be crossed, transcript Day 11, page 63, line 22 to
4	page 68, line 18, instead suggesting that the force
5	field characterisation referred in some way to the
6	presence of security staff.
7	It is submitted that the about-turn by Mr Curtin
8	lacks credibility given, one, the clear and unequivocal
9	evidence that Mr Curtin had already twice given as to
10	his characterisation of the metal strip and his clear
11	understanding of its importance and, two, in relation to
12	the incident on 4 September 2021, injunction proceedings
13	already having been issued and served in which the
14	extent of the first claimant's land was clearly
15	identified .
16	When this point was put to Mr Curtin in
17	cross—examination, he avoided the question and commented
18	only, "big thick marker pens, no", when it was put to
19	him that documents had been served and maps with lines
20	on it, transcript Day 11, page 68, lines 2 to 9.
21	Therefore it is submitted that the evidence is clear
22	in that Mr Curtin knew that he should not cross the
23	metal line and enter the driveway, that being the first
24	claimant's land. It is submitted that any submission to
25	the contrary by Mr Curtin is incredible .

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1 In any event, as set out above, trespass is a strict 2 liability tort, such that to be found liable for 3 trespass Mr Curtin did not need to know that he was in 4 fact entering the first claimant's land by stepping over the metal strip. However, it is submitted that 5 6 Mr Curtin's knowledge is important when the question of 7 remedy arises and whether an injunction should be 8 granted. 9 Specifically, it is submitted that it is reasonable 10 to infer that, unless restrained by way of an 11 injunction, Mr Curtin will commit further acts of 12 trespass and the first claimant reasonably apprehends 13 the same. Mr Curtin's past behaviour shows that, even with the knowledge of the extent of the first claimant's 14 15 land, Mr Curtin is willing to enter the first claimant's 16 land and commit trespass. Notably, Mr Curtin also said 17 in cross-examination in relation to the 20 July 2021 18 incident : 19 "I'm not jumping over the fence, but if [the 2.0 incident] had gone on for hours and hours, I might have 21 been contemplating doing that."

22 Transcript Day 11, page 4, lines 17 to 19.

- 23 Therefore, knowledge of the extent of the first
- 24 claimant's land alone is not enough to prevent Mr Curtin
- engaging in acts of trespass such that the remedy of an

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1 injunction prohibiting the same is both just and 2 convenient 3 20 July 2021. The evidence of the alleged trespass can be found in Pressick 20 at paragraph 231.3, page 108 4 of D11's bundle, and in video 148. That evidence shows 5 Mr Curtin repeatedly crossing the metal strip and 6 entering the driveway. The context of this incident is 7 8 that Mr Curtin, along with other protestors, are 9 expressing their displeasure that the staff of the first 10 claimant have not yet arrived at and entered the Wyton 11 site . 12 The cross-examination of Mr Curtin in relation to 13 this incident is recorded in the transcript at Day 11, 14 page 1, line 9, to page 7, line 24. 15 Mr Curtin, during cross-examination, at Day 11, 16 page 1, line 19, to page 2, line 12, one, accepted that 17 he stepped over the metal strip; two, accepted that he 18 stepped over the metal strip and onto the first 19 claimant's land on several occasions; three, accepted 20 that he banged on the gate; four, accepted that he 21 shouted bad names; and, five, accepted that he was not 22 invited onto the first claimant's land. Therefore, not 23 only does the evidence of Ms Pressick establish the 24 trespass, Mr Curtin also accepts the constituent

elements of the repeated trespass.

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1	Mr Curtin also accepts the aggravating features of
2	the incident, specifically , one, the repeated nature of
3	the trespass; two, the banging on the gate; three, the
4	shouting of what Mr Curtin refers to as "bad names".
5	Further, when later asked in cross-examination again as
6	to whether he had entered the first claimant's land,
7	Mr Curtin replied, "For a reason. It's not protesting".
8	As will be submitted below, the admission is notable.
9	In summary and as set out above, the exercise of
10	Article 10 and Article 11 rights do not carry with them
11	the right to trespass. Even if the exercise of those
12	rights did carry with them the right to trespass,
13	Mr Curtin cannot avail himself of any defence in this
14	regard given that, by his own admission, he did not
15	consider himself to be protesting when committing the
16	trespass.
17	In summary, it is submitted that the evidence
18	clearly shows and establishes the alleged trespass.
19	Further, Mr Curtin accepted during cross-examination the
20	constituent elements of the tort and that he entered the
21	first claimant's land. It will be submitted below that
22	Mr Curtin has established no defence.
23	4 September 2021. The evidence of the alleged
24	trespass can be found in Pressick 20 at paragraph 247 at
25	page 110 of D11's bundle and at exhibit SP28/197 at

1	page 328 of D11's bundle. That evidence, a still image,	1	4 5
2	shows Mr Curtin having crossed the metal strip and	2	
3	pointing at a security officer of the first claimant	3	cle
4	whilst a police officer appears to restrain him.	4	Fu
5	The cross-examination of Mr Curtin in relation to	5	coi
6	this incident is recorded in the transcript at Day 11,	6	fir
7	page 63, line 3, to page 72, line 18. The evidence of	7	Mr
8	Ms Pressick clearly establishes that a trespass was	8	
9	committed by Mr Curtin. Further, Mr Curtin accepted the	9	
10	constituent elements of the trespass during	10	tre
11	cross-examination in that he went up to the gate and was	11	fir
12	not invited on to the first claimant's land; Day 11,	12	to
13	page 63, lines 19 to 23.	13	cha
14	As to aggravating features of the trespass,	14	to
15	Mr Curtin, in cross-examination, did not accept that he	15	un
16	was being restrained by the police officer , that being	16	Au
17	the evidence of Ms Pressick, transcript Day 11, page 68,	17	ade
18	line 19, to page 69, line 10. However, Mr Curtin did	18	up
19	not challenge the evidence of Ms Pressick when given the	19	no
20	opportunity to do so.	20	cla
21	The claimants were mindful of Mr Curtin's status as	21	the
22	a litigant in person and the court's view that	22	tre
23	Mr Curtin's failure to challenge Ms Pressick's evidence	23	
24	should relate only to the question of the weight to be	24	on
25	placed on the evidence. With that in mind, it is	25	lin
	41		
1	submitted that, in the circumstances where Mr Curtin	1	Au
2	was, one, provided only with the sections of the	2	dri
3	particulars of claim that related to him, two, provided	3	pa
4	with an evidence bundle that related only to him and,	4	me
5	three, only engaged with the trial at a very late stage,	5	
6	submitting his own evidence after the commencement of	6	tre
7	the trial, substantial weight should be placed on	7	000
8	Mr Curtin's failure to challenge Ms Pressick's evidence.	8	pa
9	Mr Curtin ——	9	the
10	MR JUSTICE NICKLIN: Also to be balanced with that is	10	pai
11	Ms Pressick doesn't have any personal knowledge of these	11	8 5
12	things. So she's in no better position than me to	12	cla
13	interpret the evidence of the videos.	13	pa
14	MS BOLTON: Mr Curtin had been given every reasonable	14	pai
15	opportunity to challenge Ms Pressick's evidence and did	15	
16	not do so. Further, when asked by the court if he could	16	rep
17	remember the nature of the exchange between himself and	17	of
18	the police officer, Mr Curtin could not remember;	18	on
19	day 11, page 70, lines 9 to 13.	19	do
20	It is in the context of this incident that	20	in
21	Mr Curtin, in cross-examination, sought to renege on his	21	No

- 21
 Mr Curtin, in cross—examination, sought to renege on his

 22
 characterisation of the metal strip as a force field not
- 22 characterisation of the metal strip as a force field 23 to be crossed. For the reasons set out above, it is
- submitted that Mr Curtin did in fact know that he was
- 25 trespassing when crossing the metal strip on

1	4 September 2021.
2	In summary, it is submitted that the evidence
3	clearly shows and establishes the alleged trespass.
4	Further, Mr Curtin accepted during cross-examination the
5	constituent elements of the tort and that he entered the
6	first claimant's land. It will be submitted below that
7	Mr Curtin has established no defence.
8	Evidence of the access land trespass.
9	As the court is aware, the alleged incidents of
10	trespass on the access land are pleaded by reason of the
11	first claimant's understanding of the extent of the land
12	to which it has an immediate right of possession
13	changing in December 2022; Pressick 20, paragraphs 68
14	to 77, pages 84 to 86 of D11's bundle. That change of
15	understanding arose by reason of the Local Highway
16	Authority changing its position as to the extent of the
17	adopted highway. Accordingly, some incidents relied
18	upon by the claimants as obstructions of the highway may
19	now in fact have occurred on land to which the first
20	claimant has an immediate right of possession, such that
21	the appropriate and proper cause of action is instead
22	trespass.
23	The access land, as defined, is the parcel of land
24	on the access road that sits between the painted yellow

line, painted on 4 August 2022 by the Local Highway

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1	Authority, and the metal strip marking the edge of the
2	driveway; see paragraph 7.8 of the particulars of claim,
3	page 9 of D11's bundle. The length of the access land
4	measures approximately 2.85 metres.
5	In summary, it is submitted that Mr Curtin
6	trespassed on the access land on the following
7	occasions: 13 July 2021, paragraph 170.1 of the
8	particulars of claim; 17 July 2021, paragraph 170.2 of
9	the particulars of claim; 6 September 2021,
10	paragraph 170.6 of the particulars of claim;
11	8 September 2021, paragraph 170.7 of the particulars of
12	claim; 13 September 2021, paragraph 170.8 of the
13	particulars of claim, and 13 September 2021,
14	paragraph 170.9 of the particulars of claim.
15	Mr Curtin, in cross—examination, often and
16	repeatedly asserted that he did not realise at the time
17	of the alleged incidents that he was in fact trespassing
18	on the land owned by the first claimant. The claimants
19	do not challenge that assertion, given the circumstances
20	in which the alleged acts of trespass have been pleaded.
21	Nonetheless and as set out above, it is irrelevant to
22	the question of liability that Mr Curtin did not know
23	that he was entering the first claimant's land.
24	The evidence establishing each incident of trespass
25	is as follows: one, 13 July 2021, video 24. Further

1	Mr Curtin accepted in cross-examination that he entered
2	the access land and that he had not been invited by the
3	first claimant to do so; transcript Day 10, page 93,
4	line 17, to page 94, line 2.
5	Two, 17 July 2021, video 170. Further, Mr Curtin
6	accepted in $cross-examination$ that he entered the access
7	land and did not assert that he had been invited to do
8	so when expressly asked the question; transcript Day 10,
9	page 147, lines 12 to 22.
10	Three, 6 September 2021, video 240. Further,
11	Mr Curtin accepted in cross-examination that he entered
12	the access land. Transcript Day 11, page 94, line 23,
13	to page 95, line 5.
14	Four, 8 September 2021, video 253 and video 924. In
15	$\operatorname{cross-examination}$ Mr Curtin expressed the opinion that
16	he was on the edge of the access land; transcript
17	Day 11, page 97, lines 8 to 14.
18	Five, 13 September 2021, video 294 and video 290.
19	And, six, 13 September 2021, video 301 and video 300.
20	In summary, it is submitted that the evidence
21	clearly shows and establishes the alleged trespass.
22	My Lord, is that a good place to pause for an Opus
23	break?
24	MR JUSTICE NICKLIN: Yes. We'll come back at quarter past.
25	(11.59 am)

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1	(A short break)
2	MR JUSTICE NICKLIN: Yes.
3	MS BOLTON: My Lord, evidence: drone trespass.
4	The evidence of the alleged trespass can be found in
5	Pressick 20 at paragraph 285, page 118 of D11's bundle,
6	and in video 698. That evidence shows Mr Curtin flying
7	a drone which, from the video screen of the remote
8	device being used to fly the drone, can be seen to be
9	flying at a low altitude directly over the Wyton site.
10	That footage also captures a member of the first
11	claimant's staff and the second claimant class working
12	on the Wyton site.
13	The cross-examination of Mr Curtin in relation to
14	this incident is recorded in the transcript at Day 12,
15	page 82, line 1, to page 124, line 7.
16	It is notable that this incident occurred the day
17	after the question of trespass by the use of drones was
18	considered at an interim hearing in these proceedings.
19	In relation to this particular incident, Mr Curtin, in
20	cross—examination, said that he wanted to "follow what
21	[the workers] do if there is any movement of dogs or
22	trolley , that is what I'm after". Day 12, page 88,
23	line 25, to page 89, line 1, of the transcript .

 24
 Mr Curtin also confirmed in cross-examination that

 25
 he frequently flies a drone, doing so at least once

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1	a week, with drones also having crashed on the Wyton
2	site; Day 12, page 89, lines 8 to 12 of the transcript.
3	It is submitted that the flying of drones over the
4	Wyton site, including this incident captured in
5	video 698, interferes with the first claimant's ordinary
6	use and enjoyment of its land and the structures upon
7	it , as per Bernstein. In particular , one, Mr Hardy, in
8	cross—examination, confirmed that there have been
9	occasions in which working practices at the Wyton site
10	have changed because of the presence of the drone.
11	Mr Hardy gave the example of not pushing dogs around the
12	site in trolleys because the drone was "a nuisance to
13	[the staff] and we find it intimidating but also it
14	irritates the dogs as well"; Day 4, page 147, lines 13
15	to 14. Mr Hardy also confirmed that the drone had been
16	flown at a height of around seven or eight feet and
17	expressed that being followed by the drone, especially
18	at low level, was intimidating and a nuisance;
19	transcript Day 4, page 146, line 14, to page 147,
20	line 24.
21	Two, Ms Pressick also confirmed in cross-examination
22	that the drone "encroaches on our day $-to-day$ normal
23	activities ", transcript Day 3, page 74, lines 17 to 18.
24	When pressed further, Ms Pressick explained that free

movement of suppliers and supplies at the Wyton site and

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1	maintenance tasks have been hindered by the drone
2	flights and gave the specific example of the fixing of
3	a window, in which staff had to cover their faces;
4	Day 4, page 75, line 13, to page 76, line 20.
5	Ms Pressick also confirmed that drone flights
6	interfered with the transfer of dogs around the site,
7	including because the drones irritate the dogs and is a
8	welfare issue, with a van often being used rather than
9	the open cart; Day 4, page 77, line 6, to page 79, line
10	18. That evidence was consistent with Mr Hardy's
11	evidence.
12	Employee J also confirmed in cross examination that
13	the drones sometimes prevented the movement of dogs
14	around the Wyton site and that other tasks had to stop,
15	but that eventually the decision was reached that the
16	staff would conceal their identities and continue
17	necessary work; Day 5, page 173, lines 4 to 9.
18	. It is accepted that Mr Curtin did not explore the
19	use of drones with all witnesses, as the majority of the
20	evidence relating to the use of drones is contained
21	within the persons unknown evidence bundle. However,
22	what is clear from the evidence is that the ordinary use
23	and enjoyment of the Wyton site is interfered with by
24	the drone flights , which flights cause the first
25	claimant to alter the manner in which it carries out its
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1 business at the Wyton site and causes its staff and

- 2 members of the second claimant class to take measures
- 3 such as covering their faces to conceal their
- 4 identities .
- 5 Further, the first claimant is anxious about the use
- 6 of drones for the purpose of monitoring and conducting 7 surveillance of the Wyton site and the consequences of
- 8 the same, such that this represents a further
- 9 interference with the first claimant's ordinary use and 10 enjoyment of the land.
- 11 In particular Mr Curtin confirmed in
- 12 cross—examination that part of the reason for capturing
- 13drone footage and posting the same on Facebook is to14monitor the Wyton Site; Day 12, page 99, line 24, to
- 15 page 100, line 5.
- 16 Mr Curtin confirmed in cross examination that, prior 17 to the break in at the Wyton site in which 82 dogs were 18 stolen, there had been detailed surveillance of the 19 site; Day 12, page 100, lines 14 to 16. Mr Curtin 20 accepted that he entered the facility through the roof, 21 which roof can be seen clearly from the drone footage;
- Day 12, page 102 lines 6 to 12.
 When asked whether the published drone footage
- 23 When asked whether the published drone footage 24 provides anybody that sees it with an ability to better
 - understand the Wyton site, Mr Curtin replied, 'I guess

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1 it does, yes'; Day 12, page 101, lines 1 to 5. 1 2 Accordingly, it is submitted that it is reasonable 2 3 for the first claimant to apprehend a link between the 3 4 capturing of drone footage (which footage is captured in 4 5 the course of trespass), and further acts of trespass at 5 the Wyton site. Indeed, in the life cycle of these 6 6 7 7 proceedings to date, three significant incursions into 8 8 the Wyton site have been suffered, with 23 dogs having 9 9 been stolen as a result and not recovered. 10 In summary, it is submitted that Mr Curtin has, on 10 11 at least one occasion and, by inference of his admission 11 12 as to the regularity with which he uses a drone, on 12 13 several occasions, flown a drone over the Wyton site at 13 14 a height that constitutes trespass. Those drone flights 14 15 15 have interfered with the first claimant's ordinary use 16 and enjoyment of the Wyton site. Further, it is 16 17 17 reasonable for the first claimant to apprehend a link 18 between drone flights and future acts of trespass. 18 19 Accordingly, it is submitted that it is just and 19 20 2.0 convenient for the court to grant an injunction that 21 21 would restrict drone flights directly over the Wyton 2.2 2.2 site 23 23 Persons Unknown drone incidents. 24 .During the course of cross examination and at the 2.4 25 request of the court, the video footage and allegations 25

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1	of drone trespass against persons unknown were also put
2	to Mr Curtin for comment. Those allegations can be
3	found at Pressick 20, at paragraphs 319 to 336 of D11's
4	bundle, page 121 to 124. Mr Curtin was unable to confirm
5	whether any of the drone flights alleged were conducted
6	by him. All that Mr Curtin was able to confirm was,
7	one, in relation to the allegation on 17 March 2022,
8	video 657, Mr Curtin was able to confirm that he made
9	and edited the video of the drone footage, but was
10	unable to say if he captured the footage; transcript Day
11	12, page 112, line 24, to page 113, line 3.
12	Two, in relation to the allegation on
13	14 December 2022, video 929, Mr Curtin was only able to
14	confirm, "I'm there all the time. I do the narrations
15	on all the videos especially if I'm doing it. So $$ so
16	the two are not connected (inaudible) the drone and who
17	flew the drone. I'm sharing on oath now and I'm unable
18	to tell you even this. I bet you think I remember this
19	and the door was open"; transcript Day 12, page 121,
20	lines 15 to 20.
21	As to the height of the drones and other features of
22	the drone flights looked at in the course of
23	cross—examination, one, the video 150, 27 July 2021,
24	Mr Curtin accepted that the drone footage was very clear

- Mr Curtin accepted that the drone footage was very clearand the staff captured in the footage would have been
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identifiable had they not covered their faces; Day 12, page 107, lines 3 to 11.

Two, as to exhibit SP28/232, at page 331 of D11's bundle, 16 June 2022, Mr Curtin accepted that the footage was captured from an altitude of 50 metres and that the focus was "crystal". Day 12, page 115, line 16, to page 116, line 5. Mr Curtin was also able to assist the court with the meaning of the data displayed on the drone footage, but

was unable to confirm whether he was flying the drone on this occasion; Day 12, page 115, lines 23 to 24, and Day 12, page 117, line 21, to page 118, line 17. Three, as to video 929, 14 December 2022, again Mr Curtin was unable to comment on whether he was flying

the drone, but did confirm that the drone was taking footage from a low altitude; Day 12, page 122, lines 8 to 10.

8 Defences

For the reasons set out above the claimants do not accept that Mr Curtin did not know that the driveway was incorporated within the first claimant's land. In any event, as is set out above, trespass is a strict liability tort and a defendant need not know that they are committing a trespass to be liable for the same. As set out above, the exercise of Article 10 and

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cross-examination.

1 Article 11 rights do not carry with them the right to 2 trespass. Therefore, Mr Curtin exercising his protest 3 rights is no defence to trespass. In any event, it is 4 submitted that Mr Curtin could not try to avail himself 5 of such a defence in relation to the alleged incident on 20 July 2021, which he has himself stated in 6 7 cross-examination was not an act of protest. 8 During the course of cross-examination in relation 9 to the incident alleged on 20 July 2021, Mr Curtin 10 referred to himself as dealing with an animal welfare 11 emergency; see Day 11, page 2, lines 17 to 18, and page 5, lines 20 to 22. That assertion is not 12 13 sufficient for Mr Curtin to avail himself of the defence 14 of necessity, as per Monsanto, as, one, there is no 15 evidence of any immediate and serious danger to life or 16 property; two, even if there were such evidence, there 17 exists a public authority responsible for the protection 18 of the public interest, that being the Home Office 19 and/or the police, such that the trespass cannot be 20 justified as reasonable or necessary; and, three, the 21 nature of the trespass would not, in any event, have 22 remedied the emergency that Mr Curtin alleges to 23 perceive, such that the trespass cannot be justified as 24 reasonable or necessary.

Mr Curtin, in cross-examination, accepted that he

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1	was not invited onto the first claimant's land on
2	20 July and 4 September 2021. As such, Mr Curtin was
3	not an express licensee .
4	It is also submitted that Mr Curtin did not benefit
5	from an implied licence. Whilst it is accepted that the
6	first claimant's intercom is located on the driveway,
7	such that a person making enquiries of the first
8	claimant may benefit from an implied licence to enter
9	the driveway and, within reason, ring the intercom,
10	Mr Curtin did not in fact do so during the course of
11	either of the alleged driveway trespasses. Rather, two,
12	Mr Curtin entered the driveway for purposes not
13	permitted by the first claimant such that he did not
14	benefit from an implied licence in any event. Three, if
15	Mr Curtin had entered the driveway to ring the intercom,
16	he would have exceeded the scope of the implied licence
17	upon remaining on the land when the intercom went
18	unanswered and when he banged on the gate and shouted
19	abuse. Upon those actions, ${\sf Mr}$ Curtin would have become
20	a trespasser pursuant to the principles set down in and
21	consistently applied since the Calgarth.
22	Further, Mr Curtin has not sought to defend the
23	trespass on the basis of him being the beneficiary of
24	a licence, whether express or implied, despite having
25	ample opportunity to do so, including in the course of

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2 Apprehension of future wrongs. 3 It is submitted that, unless restrained by an 4 injunction, Mr Curtin will commit further acts of 5 trespass, such that it is just and convenient to grant injunctive relief and the first claimant is in any event 6 7 entitled to such relief; see Patel. The first claimant 8 apprehends the same by reason of the alleged incidents 9 of trespass that have already occurred, including, one, 10 the Driveway trespasses committed on 20 July 2021 and 4 September 2021; two, the alleged incidents of driveway 11 12 trespass having occurred despite Mr Curtin knowing the 13 extent of the first claimant's land and that the 14 driveway is within the ownership of the first claimant; 15 three, historic acts of trespass committed by Mr Curtin 16 at the Wyton site. Mr Curtin has, throughout these 17 proceedings and when giving evidence repeatedly 18 confirmed his involvement in a break-in at the site in 1990, in which 82 dogs were stolen from the site; four, 19 20 Mr Curtin's expressed desire to lay flowers at the gate

at the Wyton site, transcript Day 12, page 154, lines 16 22 to 18, which would constitute a trespass, and his 23 statement that he might have contemplated jumping over 24 the fence on 20 July 2021 had the incident continued for 25 hours.

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1	Interference with the first claimant's common law
2	right to access the highway.
3	Legal principles .
4	The right is a private law right and there is no
5	reason to conclude that it tolerates the exercise by
6	another person the right to exercise Article 10 and 11
7	rights . Accordingly, no Article 10 and 11 rights need to
8	be balanced against this private law right.
9	As the Supreme Court acknowledged in Cusack v London
10	Borough of Harrow [2013] UKSC 40, owners of land that
11	fronts the highway have a common law right of access to
12	the highway 'without restriction from any part of the
13	property'; see Marshall v Blackpool Corporation [1935]
14	AC 16, 22 per Lord Atkin.
15	The nature of this private law right is that it is
16	enjoyed without restriction . Accordingly, the slowing
17	down, stopping or blocking of those accessing the
18	highway from the Wyton site would plainly be an
19	interference with the common law right to access the
20	highway.
21	MR JUSTICE NICKLIN: It plainly can't be without restriction
22	because let's say that there's a refuse lorry that's
23	stopped outside my property picking up bins, or anything
24	like that, there's going to be a transient restriction
25	on access to my land so it's clearly not without

1 restriction

1	restriction .
2	MS BOLTON: There is the rights of others who are passing
3	along the highway for instance $$
4	MR JUSTICE NICKLIN: Okay, well, the bin lorry isn't passing
5	on the highway; it's stopped on the highway picking up
6	refuse .
7	MS BOLTON: Yes, my Lord, and again that would be an implied
8	right to do so, yes. That's not the point. It's
9	without restriction and again we have the Highways Act
10	of course, so the local authority has different rights
11	but that is the primary position.
12	The nature of this private law right is that it is
13	enjoyed without restriction $$ sorry, I've read that
14	bit .
15	MR JUSTICE NICKLIN: Well, it can't be, can it, because we
16	all have to live in a society together, so you can't
17	have an absolute right to pass in and out of your
18	property. Some days $$ most days you may be able to do
19	it but some days there may be people outside that don't
20	allow you to do that.
21	MS BOLTON: My Lord, that's the words of the Supreme Court,
22	that without restriction $$
23	MR JUSTICE NICKLIN: Yes, it doesn't mean $$ it can't mean
24	that.
25	MS BOLTON: My Lord, I think in the context of the right it

1	does mean that and, yes, of course, no one is suggesting
2	that, for instance, a traffic build-up on the highway or
3	anything would be an interference, and that comes out as
4	I go through the first instance decision of Marshall,
5	which is where that definition comes from.
6	At page 21 of the judgment in Marshall, Lord Atkin
7	states that:
8	"My Lords, in order to construe the section it seems
9	desirable to consider what the rights of the appellants
10	would be if no such enactment were in existence."
11	That's to do with the Highways Act, my Lord.
12	"The law appears to me to be as stated by the Lord
13	Chief Justice, who has cited the relevant authorities.
14	With no hope of improving that statement."
15	This statement is important for this case, as it
16	informs the court of the extent of the area to be
17	protected by the common law right. The law as stated by
18	the Lord Chief Justice was a reference to the law as
19	stated by Lord Chief Justice Hewart at first instance in
20	Marshall at pages 692 to 693, where he states:
21	"In the case of St Mary, Newington v Jacobs,
22	Mellor J, delivering the opinion of the court of three
23	judges, said this: 'The owner, who dedicates to public
24	use as a highway a portion of his land, parts with no
25	other right than a right of passage to the public over

1	the land so dedicated, and may exercise all other rights
2	of ownership, not inconsistent therewith; and the
3	appropriation, made to and adopted by the public, of
4	a part of the street to one kind of passage, and another
5	part to another, does not deprive him of any rights, as
6	owner of the land, which are not inconsistent with the
7	right of passage by the public'. He added, on the same
8	page: 'We think that the provisions of the Highway Acts
9	and the Metropolis Local Management Act, so far as they
10	apply to roads or streets, are subordinate to the
11	paramount rights reserved by the owner. We do not deny
12	that the owner cannot derogate from the grant of roadway
13	made by him to the public, and cannot do anything which
14	would really and substantially interfere with the right
15	of passage by the public. So far as we are aware, no
16	case is to be found in the books which conflicts with
17	the view of the law above expressed, notwithstanding the
18	numerous instances which must have occurred, in which an
19	owner, rebuilding or changing the character of his
20	houses or other buildings, has made crossings of the
21	footpath, in order to carry into effect some object of
22	convenience or business'. Again, in the case of Lyon \boldsymbol{v}
23	Fishmongers' Company, Lord Selborne uses the words: 'If
24	I correctly understand the Irish case of Moore v Great
25	Southern and Western [Railways Company], which was

1	approved and followed by the English Court of Queen's
2	Bench in Chamberlain v Crystal Palace [Railway Company],
3	those authorities recognise such a right of immediate
4	access from private property to a public highway, as
5	a private right, distinct from the right of the owner of
6	that property to use the highway itself, as one of the
7	public."
8	The first claimant is presumed, by reason of its
9	ownership of land adjoining the highway and unless the
10	contrary is proven, to own the land up to the midpoint
11	of the highway. That presumption is known as the ad
12	medium filum viae presumption. The presumption and its
13	operational and constituent elements were discussed and
14	summarised in detail by Mr Justice Morgan in Paton v
15	Todd [2012] EWHC 1248 at paragraphs 30 to 37. By reason
16	of this presumption, the first claimant holds both its
17	registered freehold title to the Wyton site and also the
18	unregistered freehold title to the midpoint of the
19	highway.
20	Whilst an adjoining landowner may hold the freehold
21	title to land up to the midpoint of a highway, where the
22	relevant land is adopted highway, the materials and
23	scrapings vest in the Local Highway Authority
24	(Highways Act 1980, section 263). Accordingly, the
25	adjoining landowner's freehold interest is subject to

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as "education".

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- 1 that vesting, such that it continues to hold the 2 immediate right to possession of the sub-soil and 3 a reversionary interest in materials and scrapings, 4 whilst at all times holding the freehold title to both materials and scrapings and the sub-soil. 5 That description accurately captures the first 6 7 claimant's ownership of the B1090 adjoining its land. 8 The first claimant holds the freehold title to the land, 9 but, where that land is adopted highway, the material 10 and scrapings are vested in the Local Highway Authority, 11 such that the first claimant does not have an immediate 12 right to possession of the same and only a reversionary 13 interest 14 Accordingly, the first claimant has an immediate 15 right to access the highway from its land, which land 16 runs to the midpoint of the highway as a private right. 17 That must, therefore, entitle the court to prohibit 18 conduct under this cause of action that would prevent 19 the tyres of a vehicle entering the other side of the 20 carriageway beyond the midpoint.
- Accordingly, there is no protest right that can
 justify interfering with the access to the highway.
 There is no right to obstruct, slow down or hinder the
 passage of vehicles exiting the Wyton site.
 - Further, the exclusion zone, provided it is worded

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1 in a manner to prevent certain acts, is lawful and 2 permissible where it is limited to the area over which 3 the claimant enjoys a common law right to access the 4 highway, as the exclusion zone would be protecting that 5 private law right and could be drafted in a manner that 6 does no more than protect the private law right. 7 Fvidence 8 The incidents pleaded against Mr Curtin and relied 9 on by the claimants can be found in paragraphs 181.1 to

10 181.11 of the particulars of claim, pages 33 to 37 of 11 D11's bundle: one, two incidents on 13 July 2021, two, 12 one incident on 17 July 2021, three, one incident on 13 25 July 2021, four, one incident on 12 August 2021, 14 five, two incidents on 8 September 2021, six, two 15 incidents on 13 September 2021, seven, 1 incident on 16 22 September 2021. It is submitted that each of these 17 incidents included a clear interference with the first 18 claimant's common law right to access the highway. 19 Mr Curtin, when giving evidence, spoke repeatedly 2.0 about a ritual. Mr Curtin explained that the ritual was 21 the stopping or slowing down of each car as it attempted 2.2 to enter and exit the Wyton site each day and that each 23 car would be targeted with the protest message and made 24 to endure the protest message, which Mr Curtin described

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1 Mr Curtin does not suggest as part of his evidence 2 that he will not do these acts in the future and has 3 refused several opportunities to give an undertaking. 4 Mr Curtin has shown no remorse for his unlawful acts and clearly believes in his actions. Without an injunction 5 the ritual will continue and interference with the 6 7 common law right to access the highway will continue. 8 When giving evidence about the ritual, Mr Curtin 9 stated "people felt powerless there and by stopping 10 a worker, it gave them some sense of 'Ha-ha', some sense 11 of control, and I was working with that control"; 12 transcript Day 10, page 27, lines 10 to 13. No part of 13 lawful protest permits a protestor to have control over 14 others. They should not and cannot force others to be 15 held up to hear their protest message. Yet, every day 16 before the injunction was granted, the first claimant's 17 staff were subjected to an unacceptable ordeal of 18 varying scale, which on each occasion relied upon in 19 this claim included the unlawful act of interfering with 20 the first claimant's common law right to access the 21 highway. 22 Mr Curtin accepted that the staff were targeted, but 23 explained it as not individual targeting but targeting 24 as a group; Day 10, page 72, lines 12 to 16, for

example, as the first claimant's staff -- sorry, l'll

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1	start that again. Mr Curtin accepted that the staff
2	were targeted but explained it as not individual
3	targeting but targeting as a group; see Day 10, page 72,
4	lines 12 to 16, for example, as the first claimant's
5	staff , Day 10, page 65, line 4, for example.
6	As we explored the targeting in cross-examination,
7	it became apparent that this was specific targeting of
8	staff as Mr Curtin talked about each car having their
9	turn; see, for example, transcript Day 10, page 71,
10	lines 9 to 15. Mr Curtin repeatedly referred to the
11	staff having to put up with the ritual as they worked in
12	a controversial industry. In effect, his evidence is
13	that they were targeted because they worked for the
14	first claimant. It is not clear how on this basis the
15	ritual could be justified against all third party
16	contractors, such as Anglian Water.
17	Mr Curtin admitted slowing down cars, but denied
18	stopping them. Whilst both amount to an unlawful
19	interference with the common law right to access the
20	highway, indeed any restriction on that right would
21	amount to an interference, it is plain from the evidence
22	that Mr Curtin has both stopped and slowed down
23	vehicles . Mr Curtin's suggestion that he does not stop
24	vehicles is unrealistic and not credible on the evidence
25	before the court.

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23 24

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1	The incidents relied upon for this cause of action
2	are as follows: one, parking a car on the access road
3	from 12 noon for several hours; two, narrowing the
4	access road, causing the access to be restricted and
5	slowing the cars either to shout at them or film them or
6	both; three, stopping vehicles on the access road by
7	standing in front of them and close to the side of them,
8	sometimes obstructing their view and other times
9	standing square in front of them, such as on
10	13 September 2021 at 15.04 and on 22 September 2021, for
11	example; four, forcing vehicles to reverse back into the
12	site and not being allowed to access the highway.
13	When taken to these incidents, Mr Curtin appeared to
14	broadly accept that he was interfering with access to
15	the highway, and accepted that he was directing his
16	protest message at staff and contractors of the first
17	claimant. He maintained that he slowed down the cars
18	but did not stop them. This is not accepted by the
19	claimants, but in any event makes little difference to
20	this cause of action.
21	Mr Curtin considers this activity lawful and
22	justified and appeared to be proud of his activities .
23	He showed no signs of understanding that these
24	activities were not part of a lawful protest. He
25	accepts that he was interfering with the common law
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right to access the highway to intercept the staff cars and deliver his protest message. 2 3 Mr Curtin does not, however, have the right to 4 interfere with this important private law right. It is plain that he considers that once you are engaged in 5 6 protest, these activities are allowed. That is not what 7 the law says. The common law right to access the 8 highway is a private law right and, more importantly, it

9 is one that is linked to the claimants' A1P1 rights of 10 peaceful enjoyment of its property. Such interference, 11 which was significant in Mr Curtin's case, cannot be 12 justified by relying on the fact that the acts are 13 carried out as part of a protest. Whilst it is not necessary to go through every 14

15 incident, the court's attention is drawn to the 16 following:

17 As to the incident on 25 July 2021, Mr Curtin's car 18 was parked on the access road for several hours from 19 12 noon. Mr Curtin made a number of inconsistent 2.0 statements in regard to this incident. He suggested 21 that he would have moved the car if asked, but then went 2.2 on to say "One of the reasons [for parking the car], if 23 I remember, was in case a dog van came. I think that 24 was one of the reasons, to give some time"; transcript 25 Day 11, page 14, lines 14 to 16. Accordingly, the

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1 parking of this vehicle was not inadvertent, without 2 realising he may be interfering with the first 3 claimant's right of access; rather, it was deliberate, 4 to slow down a potential dog van. 5 The simple fact is that is an interference with the common law right to access the highway. The first 6 7 claimant does not need to show who was held up or for 8 how long. All the first claimant needs to show is that 9 Mr Curtin's actions interfered with its right to access 10 the highway without restriction. Mr Curtin is not 11 lawfully permitted for reasons of protest to interfere 12 with that private law right and such actions amount to 13 a civil wrong 14 The 8 September 2021 concerned an incident where 15 a truck attempts to leave the Wyton site. Video 261 shows the incident. Mr Curtin suggested that he did not 16 17 interfere with the vehicle's access to the highway, and 18 only stepped in front of the vehicle to protect another 19 protestor's dog. 20 The video footage is not consistent with Mr Curtin's 21

evidence. At 2.50 minutes to 2.52 minutes, Mr Curtin is standing in front of the vehicle. He may be allowing another protestor to get her dog out of the way but he is not simply protecting the dog, he is holding up the vehicle. He then moves to the side of the vehicle and

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1	continues to engage with the driver. He is plainly part
2	of this whole incident of holding up the driver and
3	interfering with the common law right to access the
4	highway. He has no lawful right to take these steps.
5	As to 8 August 2021, video 724 shows Mr Curtin
6	interfering with the right of the first claimant's staff
7	to access the highway. The incident starts from
8	0.55 seconds. The incident is a fairly aggravated
9	incident .
10	On 13 September 2021, Mr Curtin blatantly walks
11	backwards in front of staff cars and directed other
12	people where to stand as part of this interference with
13	the common law right to access the highway. He explains
14	in the video the idea is to "hold them back", which is
15	a reference to holding back the staff cars. Again, that
16	is blatant interference with the common law right to
17	access the highway. The incident is a fairly aggravated
18	incident and Mr Curtin's organisation of the
19	interference is plain from videos 290 and 294.
20	Video 289 shows the level of the interference in
21	particular with the vehicle driven by Employee B, that
22	consider being the silver Kia Sportage.
23	Whilst being cross-examined about this incident,
24	Mr Curtin was taken to video 289 and was asked about the
25	dangers of his interference and obstruction in this

- incident, to which he replied, "It's a health and safety 1
- 2 nightmare kind of thing. I get that, you know";
- 3 transcript Day 11, page 136, lines 22 to 23.
- 4 Mr Curtin's statement recognised that not only was he
- 5 interfering with Employee B's right to access the
- highway, but also that his actions risked causing an 6
- 7 accident
- 8 A further incident on 13 September 2021 was reviewed
- 9 which showed further staff leaving the site on that day.
- 10 The incident is captured in video 301. Again, this
- 11 video demonstrates an unlawful interference with the
- 12 common law right to access the highway by Mr Curtin. In
- 13 the video you can see Mr Curtin stand in front of
- 14 several cars. When Mr Curtin reviewed the video under
- 15 cross-examination, he acknowledged that when he stood in
- 16 front of the Nissan Juke his actions were "kind of
- 17 frightening for the driver"; transcript Day 11,
- 18 page 148, line 14. This is again a fairly aggravated
- 19 incident
- 2.0 A further aggravated incident occurred on
- 21 22 September 2021, which is the Anglian Water incident.
- 22 Mr Curtin accepts that he slowed the vehicle down. The
- 23 claimants submit that he stopped the vehicle and then
- 24 directed others to stand in front of the vehicle.
- 25 Mr Curtin and others prevented this vehicle leaving the

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- 1 Wyton site and Mr Curtin accepts that they would not let 2 the van driver go because he did not want to take 3 a leaflet . It is plain from the video footage that all 4 the van driver wants to do is leave the site. Mr Curtin 5 and others would not let the van driver leave the site. Mr Curtin accepts that he can be heard shouting at the 6 7 van driver and saying the words, "do you want to change 8 your mind and take a leaflet and we will let you on your 9 wav" 10 MR JUSTICE NICKLIN: Do you think or do you submit that the 11 van driver is entirely innocent in this incident? 12 MS BOLTON: My Lord, yes. There's no evidence. 13 MR JUSTICE NICKLIN: You do? MS BOLTON: There's audio. There's no evidence of the van 14 15 driver doing anything wrong or saying anything 16 aggravated. 17 MR JUSTICE NICKLIN: How about aggressively driving at the 18 protestors? 19 MS BOLTON: He doesn't aggressively drive at the protestors, 2.0 my Lord. He tries to drive forwards and they just won't 21 move out of the way. You can see his hand in the video 2.2 signaling to the carriageway. He wanted to leave. 23 MR JUSTICE NICKLIN: And Mr Curtin's evidence about him
 - making some sort of gesture which inflames the
- 25 protestors.

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- MS BOLTON: There's no evidence of that, my Lord. 1
- MR JUSTICE NICKLIN: There is his evidence about it. 2 3 There's no evidence from you and the van driver, that's
 - true
- MS BOLTON: My Lord, none of that would justify what was 5 6 happening.
- MR JUSTICE NICKLIN: Never mind about justifying it. 7
- MS BOLTON: The incident becomes inflamed, as Mr Curtin did 8
- 9 accept in cross-examination, because he wouldn't take 10
 - the leaflet
- 11 MR JUSTICE NICKLIN: Yes. It's an unfortunate situation
- 12 that gets out of hand, but it's short-lived.
- 13 MS BOLTON: It's one not short-lived in the sense of -- it
- might be short-lived in the sense of it's a number of 14
- 15 minutes but it's not an inadvertent de minimis "Oh, we
- 16 just stood in front of you for a second, please move 17
- on".
- 18 MR JUSTICE NICKLIN: Yes. If I might summarise, Ms Bolton,
- 19 what of the following do you disagree with? The van
- 20 driver was obstructed leaving the site?
- 21 MS BOLTON: Yes.
- MR JUSTICE NICKLIN: The protestors wanted to give him 22
- 23 a leaflet?
- 24 MS BOLTON: Yes
- 25 MR JUSTICE NICKLIN: The driver refused it?

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- 1 MS BOLTON: Yes
- MR JUSTICE NICKLIN: Matters escalated? 2
- MS BOLTON: Yes. 3
- 4 MR JUSTICE NICKLIN: The drive had to reverse?
- MS BOLTON: Yes. 5
- 6 MR JUSTICE NICKLIN: Eventually he left?
- MS BOLTON: Yes. 7
- 8 My Lord, Mr Curtin can also be heard shouting in
- 9 video 334 that they get people like this van driver
- 10 every few weeks, indicating that others have been
- 11 approached and detained in a similar manner.
- 12 MR JUSTICE NICKLIN: Yes, Mr Curtin has given his evidence,
- 13 which is that generally they would seek to engage with
- 14 those who were delivering to the Wyton site. The
- 15 purpose of doing so was to try and communicate. He said
- 16 some drivers would say, "Do you know, mate, I'm just
- 17 doing my job", and sometimes they'd take the leaflet and
- 18 say, "Whatever, I'll give it to my boss". Sometimes
- 19 people were more difficult about it. So that's what
- 2.0 Mr Curtin is referring to
- 21 MS BOLTON: My Lord, indeed --
- 2.2 MR JUSTICE NICKLIN: It's absolutely -- absolutely it is the 23
- absolute right of a van driver like that to refuse to 24
- accept the leaflet , but we're back into the reality of 25
 - human existence of -- between people and, you know, if

1	he'd accepted the leaflet $$ I'm not saying he was
	, , , , ,
2	required to. If he had, he would have driven off. He
3	didn't, he can't be made to, and that's what happens and
4	that's what the obstruction is in this instance.
5	MS BOLTON: My Lord, that's not quite right. The
6	obstruction happens before we even get to the leaflet
7	point ——
8	MR JUSTICE NICKLIN: Yes, yes.
9	MS BOLTON: $$ and that's critical under this cause of
10	action. Mr Curtin can also be heard shouting in
11	video 334 that they get people like this van driver
12	every few weeks, indicating that others had been
13	approached and detained in a similar manner. The person
14	driving the van eventually gives up trying to get past
15	Mr Curtin and the other protestors and reverses back
16	into the Wyton site. Mr Curtin describes the incident
17	by saying that "to some degree" the incident "gets out
18	of hand"; Day 12, page 4, line 12, of the transcript.
19	He also repeatedly blames the van driver for being
20	"obnoxious" and inflaming the situation. Mr Curtin
21	agrees that he calls the van driver "a buffoon" and even
22	says that "is not a nice thing to call someone"; Day 12,
23	page 25, line 14, of the transcript.
24	Mr Curtin's approach is to blame the van driver in
25	this incident. This is a very aggravated incident of

1 interfering with the common law right to access the highway. There can be no justification for incidents of 2 3 this nature. It is not part of lawful protest to detain 4 a vehicle because the driver will not take a leaflet . 5 This is the very conduct that can be expected to 6 continue without an injunction, with $\ensuremath{\mathsf{Mr}}$ Curtin stopping 7 staff and contractors and forcing them to endure his 8 protest message. 9 Conclusion. 10 Mr Curtin has not offered a defence to this cause of 11 action. Instead, he seems to believe it is simply his 12 right to behave in this manner as a protestor. 13 $\ensuremath{\mathsf{Mr}}$ Curtin is the only named defendant that has not 14 settled these proceedings, save, of course, my Lord, 15 Mr Broughton, for whom the claim is stayed against. He 16 suggested to the court that he did not want to give 17 undertakings as he believes he will breach the 18 injunction and be sent to prison. The simple fact is 19 that the injunction has significantly reduced incidents 20 of interference with the common law right to access the 21 highway by Mr Curtin. His conduct has been much 22 improved since the injunction was granted. There can be 23 little doubt that Mr Curtin would revert to such actions 24 if the injunction was not in place and the claimants 25 apprehend the same will occur if Mr Curtin is not

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1	restrained by an injunction.
2	When reviewing the incidents during
3	cross—examination, there were times when it was
4	suggested by Mr Curtin that the claimants only needed to
5	ask for an obstruction to be moved and it would be
6	moved. Whilst this evidence from Mr Curtin is not
7	accepted and is contradicted by incidents such as the
8	Anglian Water incident, in any event it is irrelevant .
9	The unchallenged evidence of the first claimant's staff
10	is that before the injunction they could not leave the
11	site promptly if there was an emergency.
12	The minute we approach this issue from the
13	perspective of asking, "Did you need to leave the site?
14	Did you ask to leave the site or were you refused
15	access?", we are approaching this from the wrong
16	starting point. The correct starting point is "Did you
17	have unrestricted access to the highway?", The answer to
18	which is plainly "No".
19	When the court comes to considering the exercise of
20	its discretion, it may wish to look at whether any
21	innocent and inoffensive reasons are offered for the
22	interference with the common law right to access the
23	highway. No such reasons were advanced by Mr Curtin.
24	Mr Curtin interfered with this right in the course of
25	his protest and targeted those exiting the Wyton site.
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	/3

1	That is an unlawful interference with the first
2	claimant's private law right to access the highway from
3	the Wyton site.
4	My Lord, I'm about to move on to obstruction of the
5	highway.
6	MR JUSTICE NICKLIN: Yes, we can break there. Okay.
7	MS BOLTON: My Lord, it may be a good time for me to hand up
8	the draft injunction that strips down to just Mr Curtin,
9	if I may.
10	MR JUSTICE NICKLIN: Yes.
11	MS BOLTON: My Lord, to explain, at the moment the red line
12	on annex A $$ and I'm using the plan at the moment that
13	we submitted with the original injunction $$ still shows
14	the red line as not including the access land. There's
15	two ways I can deal with that. Either after any order
16	is made we can scale that if an order is made
17	prohibiting any trespass
18	MR JUSTICE NICKLIN: If I'm minded to do this, then what
19	I want is it to be $$ you and the Highways Authority
20	agree, file an affidavit, whatever it is, stating that
21	you've painted onto the ground where the limit is and
22	that will $$ and the order will refer to that.
23	MS BOLTON: Yes.
24	MR JUSTICE NICKLIN: We're not having plans because what is
25	necessary is on the ground knowledge which nobody can

1	argue about.
2	MS BOLTON: My Lord, I hear the court on that and I simply
3	wanted to highlight that the Land Registry are in the
4	process of changing that red line so I hope in the not
5	too distant future $$
6	MR JUSTICE NICKLIN: Well, to the extent that that matters,
7	that's fine, but what is important is where I'm going to
8	be granting an injunction, that everybody knows where
9	the limit is and they just need to look at the ground.
10	MS BOLTON: My Lord, you'll see on my suggestions over the
11	exclusion zone that one of the suggestions is that it is
12	defined as adjacent to the Wyton site because everyone
13	can see where that ends, so I have tried to do that. At
14	the moment we do have plans but I do hear your Lordship
15	on making it as clear as it possibly can be.
16	I also understand this has been sent to you,
17	my Lord, but this is the hard copy of Mr Manning's
18	witness statement. It's been CE-filed.
19	MR JUSTICE NICKLIN: Okay. Thank you very much. (Handed)
20	(1.01 pm)
21	(The short adjournment)
22	(The short adjournment)
23	(2.08 pm)
24	MR JUSTICE NICKLIN: Yes, Ms Bolton.

25 MS BOLTON: My Lord, obstruction of the highway.

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1	The claimants rely on 15 incidents of obstruction of
2	the highway, pleaded at paragraphs 173.1 to 173.17 of
3	the particulars of claim, pages 22 to 28 of D11's
4	bundle. Whilst 17 incidents are pleaded, the incident
5	at paragraph 173.16, which was sought by way of
6	amendment, was not permitted and the incident pleaded at
7	paragraph 173.5 was not pursued at trial.
8	The incidents relied upon include the incidents
9	referred to above, my Lord, concerning interference with
10	the common law right to access the highway.
11	Legal principles .
12	It is well-established law that it is a public
13	nuisance to obstruct or hinder the free passage of the
14	public along the highway; East Hertfordshire District
15	Council v Isobel Hospice Trading Limited [2001] JPL,
16	597.
17	Public nuisance caused by way of the obstruction of
18	the highway was considered in Ineos Upstream Limited v
19	Persons Unknown [2017] EWHC 2945 (Ch) at paragraphs 42
20	to 46 and 64 to 65. Specifically , at paragraph 44,
21	Mr Justice Morgan extracts Halsbury's Laws fifth
22	edition, (2012) at paragraph 325, which says:
23	"(1) whether an obstruction amounts to a nuisance is
24	a question of fact;
25	"(2) an obstruction may be so inappreciable or so

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	temporary as not to amount to a nuisance;
2	"(3) generally it is a nuisance to interfere with
3	any part of the highway; and.
4	"(4) it is not a defence to show that although the
5	act complained of is a nuisance with regard to the
6	highway it is in other respects beneficial to the
7	public."
8	Further, paragraph 44 goes on to state that:
9	"The notes to paragraph 325 contain references to
10	cases where the test for obstruction is variously
11	described. Thus, it has been said that any wrongful act
12	or omission upon or near a highway whereby the public is
13	prevented from freely, safely and conveniently passing
14	along the highway is a nuisance. An obstruction is
15	caused where the highway is rendered impassable or more
16	difficult to pass along by reason of some physical
17	obstacle."
18	Obstruction of the highway may also be a criminal
19	offence pursuant to the Highways Act 1980,
20	section 137(1), which provides:
21	"If a person without lawful authority or excuse, in
22	any way wilfully obstructs the free passage along
23	a highway, he is guilty of an offence and liable to
24	a fine not exceeding level 3 on the standard scale."

The parties in Ineos at the High Court determination

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1	assumed that the same basic principles applied to public
2	nuisance and to the criminal offence. To that end, at
3	paragraph 65, Mr Justice Morgan set out that, for there
4	to be an offence under the Highways Act 1980,
5	section $137(1)$, it must be shown that:
6	"(1) There is an obstruction of the highway which is
7	more than de minimis; occupation of part of a road, thus
8	interfering with people having the use of the whole
9	road, is an obstruction;
10	"(2) the obstruction must be wilful, ie deliberate;
11	"(3) the obstruction must be without lawful
12	authority or excuse; 'without lawful excuse' may be the
13	same thing as 'unreasonably' or it may be that it must
14	be in addition be shown that the obstruction is
15	unreasonable."
16	The question of whether assembly on the highway was
17	lawful was revisited by the House of Lords in DPP v
18	Jones [1999] 2 AC 240. The case is of particular
19	importance, having been relied upon and approved of by
20	the Supreme Court in its recent decision in Reference by
21	the Attorney General for Northern Ireland–Abortion
22	Services (Safe Access Zones) (Northern Ireland) Bill
23	[2022] UKSC 32; [2023] 2 WLR 33. The following passages
24	of Jones outline relevant principles for this case:
25	"At page 254, paragraph G, to page 255, paragraph A,

1	Lord Irvine said:
2	"The question to which this appeal gives rise is
3	whether the law today should recognise that the public
4	highway is a public place on which all manner of
5	reasonable activities may go on. For the reasons I have
6	set out below in my judgment it should. Provided these
7	activities are reasonable, do not involve the commission
8	of a public or private nuisance, and do not amount to an
9	obstruction of the highway unreasonably impeding the
10	primary right of the public to pass and repass, they
11	should not constitute a trespass. Subject to these
12	qualifications, therefore, there would be a right to
13	peaceful assembly on the public highway."
14	At page 257, paragraph D, Lord Irvine concluded:
15	"I conclude therefore the law to be that the public
16	highway is a public place which the public may enjoy for
17	any reasonable purpose, provided the activity in
18	question does not amount to a public or private nuisance
19	and does not obstruct the highway by unreasonably
20	impeding the primary right of the public to pass and
21	repass: within these qualifications there is a public
22	right of peaceful assembly on the highway."
23	At page 280, paragraph D, and page 281C, Lord Clyde
24	gives further insight into what will be viewed as
25	unreasonable, where he said:

1	"So far as the manner of the exercise of the right
2	is concerned, any use of the highway must not be so
3	conducted as to interfere unreasonably with the lawful
4	use by other members of the public for passage along it.
5	The fundamental element in the right is the use of the
6	highway for undisturbed travel. Certain forms of
7	behaviour may of course constitute criminal actings in
8	themselves, such as a breach of the peace. But the
9	necessity also is that travel by the public should not
10	be obstructed. The use of the highway for passage is
11	reflected in all the limitations, whether on extent,
12	purpose or manner. While the right to use the highway
13	comprises activities within those limits, those
14	activities are subsidiary to the use for passage, and
15	they must be not only usual and reasonable but
16	consistent with that use even if they are not strictly
17	ancillary to it .
18	"In my view the argument for the defendants, and
19	indeed the reasoning of the Crown Court, went further
20	than it needed to go in suggesting that any reasonable
21	use of the highway, provided that it was peaceful and
22	not obstructive, was lawful, and so a matter of public
23	right. Such an approach opens a door of uncertain

24 dimensions into an ill –defined area of uses which might

25 erode the basic predominance of the essential use of

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1 a highway as a highway. I do not consider that by using 2 the language which it used Parliament intended to 3 include some distinct right in addition to the right to 4 use the road for the purpose of passage." 5 Jones is an important case, having been expressly approved in the Reference by the Re Abortion Services 6 7 (Safe Access Zones (Northern Ireland) Bill, considered 8 below 9 Accordingly the law is such that, one, there is 10 a right to peaceful assembly on the highway but we must 11 remember that the highway is more than the carriageway. 12 The assembly on the highway in Jones was concerned with 13 the grass verge. That right does not extend so far as 14 to allow the committing of a public nuisance. While the 15 right to use the highway comprises activities such as 16 assembly on the highway, such activities are subsidiary 17 to the use for passage and they must be not only usual 18 and reasonable but consistent with the primary use of 19 the highway to pass and repass. If you are deliberately 20 interfering with the primary use to pass and repass, you 21 are obstructing the highway. 22 That public nuisance may arise by the unreasonable 23 obstruction of the highway, such as unreasonably 24 impeding the primary right of the public to pass and 25 repass. Whether an obstruction of the highway is 83

1 unreasonable is a question of fact, but will generally 2 require that the obstruction is more than de minimis, 3 and must be wilful. The regular and ritual like acts 4 that are evidenced in the claim cannot reasonably be described as de minimis. There is no defence from 5 6 Mr Curtin that the obstructions were accidental. 7 DPP v Ziegler and Others [2021] UKSC 23; [2022] 8 AC 408. 9 Until recently, the approach in Jones appeared to be 10 modified by the case of DPP v Ziegler and Others [2021] 11 UKSC 23; [2022] AC 408. However, it is apparent from 12 paragraphs 27 to 29 of Lord Reed's judgment in Reference 13 by the Attorney General for Northern Ireland-Abortion 14 Services (Safe Access Zones (Northern Ireland) Bill 15 [2022] UKSC 32; [2023] 2 WLR 33, that Ziegler may have 16 been taken out of context and may have been 17 misunderstood to have weakened the protection to the 18 right to pass and repass without obstruction, as 19 confirmed in Jones. 2.0 Ziegler is relevant in the context of the claimants' 21 claim brought for obstruction of the highway, and the 2.2 prohibition the claimants seek requiring the defendants 23 not to approach, slow down or obstruct any vehicle which 24 is travelling to or from the first claimant's land along

the B1090 Abbots Ripton Road or within 1 mile in either 84

1	direction of the first claimant's land at the Wyton
2	site .
3	The court's attention is drawn to Ziegler at
4	paragraph 70, per Lord Hamblen and Lord Stephens, which
5	provides, after having surveyed the relevant
6	jurisprudence with the exception of Jones:
7	"It is clear from those authorities that intentional
8	actions by protestors to disrupt by obstructing others
9	enjoys the guarantees of articles 10 and 11, but both
10 11	disruption and whether it is intentional are relevant factors in relation to proportionality. Accordingly,
12	intentional action, even with an effect that is more
13	than de minimis does not automatically lead to the
14	conclusion that any interference with the protestors'
15	articles 10 and 11 rights is proportionate. Rather,
16	there must be an assessment of the facts in each
17	individual case to determine whether the interference
18	with article 10 or article 11 rights was 'necessary in
19	a democratic society'."
20	This paragraph in Ziegler is now in some doubt
21	following the decision in Reference by the Attorney
22	General for Northern Ireland-Abortion Services (Safe
23	Access Zones) (Northern Ireland) Bill [2022] UKSC 32;
24	[2023] 2 WLR 33.
25	"Their Lordships then, at paragraph 72, adopted the
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1	
1 2	non-exhaustive list in Ziegler of factors to be
2	non—exhaustive list in Ziegler of factors to be considered when evaluating proportionality, as set out
2 3	non—exhaustive list in Ziegler of factors to be considered when evaluating proportionality, as set out by Lord Neuberger, Master of the Rolls, in City of
2 3 4	non—exhaustive list in Ziegler of factors to be considered when evaluating proportionality, as set out by Lord Neuberger, Master of the Rolls, in City of London Corporation v Samede [2012] EWCA Civ 160, [2012]
2 3 4 5	non—exhaustive list in Ziegler of factors to be considered when evaluating proportionality, as set out by Lord Neuberger, Master of the Rolls, in City of London Corporation v Samede [2012] EWCA Civ 160, [2012] All ER 1039 at paragraphs 39 to 41.
2 3 4 5 6	non—exhaustive list in Ziegler of factors to be considered when evaluating proportionality, as set out by Lord Neuberger, Master of the Rolls, in City of London Corporation v Samede [2012] EWCA Civ 160, [2012] All ER 1039 at paragraphs 39 to 41. Paraphrasing that content, those factors are, one,
2 3 4 5 6 7	non-exhaustive list in Ziegler of factors to be considered when evaluating proportionality, as set out by Lord Neuberger, Master of the Rolls, in City of London Corporation v Samede [2012] EWCA Civ 160, [2012] All ER 1039 at paragraphs 39 to 41. Paraphrasing that content, those factors are, one, the extent to which the continuation of the protest
2 3 4 5 6 7 8	non—exhaustive list in Ziegler of factors to be considered when evaluating proportionality, as set out by Lord Neuberger, Master of the Rolls, in City of London Corporation v Samede [2012] EWCA Civ 160, [2012] All ER 1039 at paragraphs 39 to 41. Paraphrasing that content, those factors are, one, the extent to which the continuation of the protest would breach domestic law; the importance of the precise
2 3 4 5 6 7 8 9	non-exhaustive list in Ziegler of factors to be considered when evaluating proportionality, as set out by Lord Neuberger, Master of the Rolls, in City of London Corporation v Samede [2012] EWCA Civ 160, [2012] All ER 1039 at paragraphs 39 to 41. Paraphrasing that content, those factors are, one, the extent to which the continuation of the protest would breach domestic law; the importance of the precise location to the protestors; the duration of the protest;
2 3 4 5 6 7 8 9 10	non—exhaustive list in Ziegler of factors to be considered when evaluating proportionality, as set out by Lord Neuberger, Master of the Rolls, in City of London Corporation v Samede [2012] EWCA Civ 160, [2012] All ER 1039 at paragraphs 39 to 41. Paraphrasing that content, those factors are, one, the extent to which the continuation of the protest would breach domestic law; the importance of the precise location to the protestors; the duration of the protest; the degree to which the protestors occupy the land; the
2 3 4 5 6 7 8 9 10 11	non—exhaustive list in Ziegler of factors to be considered when evaluating proportionality, as set out by Lord Neuberger, Master of the Rolls, in City of London Corporation v Samede [2012] EWCA Civ 160, [2012] All ER 1039 at paragraphs 39 to 41. Paraphrasing that content, those factors are, one, the extent to which the continuation of the protest would breach domestic law; the importance of the precise location to the protestors; the duration of the protest; the degree to which the protestors occupy the land; the extent of the actual interference the protest causes to
2 3 4 5 6 7 8 9 10 11 12	non-exhaustive list in Ziegler of factors to be considered when evaluating proportionality, as set out by Lord Neuberger, Master of the Rolls, in City of London Corporation v Samede [2012] EWCA Civ 160, [2012] All ER 1039 at paragraphs 39 to 41. Paraphrasing that content, those factors are, one, the extent to which the continuation of the protest would breach domestic law; the importance of the precise location to the protestors; the duration of the protest; the degree to which the protestors occupy the land; the extent of the actual interference the protest causes to the rights of others, including the property rights of
2 3 4 5 6 7 8 9 10 11 12 13	non-exhaustive list in Ziegler of factors to be considered when evaluating proportionality, as set out by Lord Neuberger, Master of the Rolls, in City of London Corporation v Samede [2012] EWCA Civ 160, [2012] All ER 1039 at paragraphs 39 to 41. Paraphrasing that content, those factors are, one, the extent to which the continuation of the protest would breach domestic law; the importance of the precise location to the protestors; the duration of the protest; the degree to which the protestors occupy the land; the extent of the actual interference the protest causes to the rights of others, including the property rights of the owners of the land and the rights of any members of the public; whether the views giving rise to the protest relate to very important issues and whether they are
2 3 4 5 6 7 7 8 9 10 11 12 13 14	non-exhaustive list in Ziegler of factors to be considered when evaluating proportionality, as set out by Lord Neuberger, Master of the Rolls, in City of London Corporation v Samede [2012] EWCA Civ 160, [2012] All ER 1039 at paragraphs 39 to 41. Paraphrasing that content, those factors are, one, the extent to which the continuation of the protest would breach domestic law; the importance of the precise location to the protestors; the duration of the protest; the degree to which the protestors occupy the land; the extent of the actual interference the protest causes to the rights of others, including the property rights of the owners of the land and the rights of any members of the public; whether the views giving rise to the protest
2 3 4 5 6 7 8 9 10 11 12 13 14 15	non-exhaustive list in Ziegler of factors to be considered when evaluating proportionality, as set out by Lord Neuberger, Master of the Rolls, in City of London Corporation v Samede [2012] EWCA Civ 160, [2012] All ER 1039 at paragraphs 39 to 41. Paraphrasing that content, those factors are, one, the extent to which the continuation of the protest would breach domestic law; the importance of the precise location to the protestors; the duration of the protest; the degree to which the protestors occupy the land; the extent of the actual interference the protest causes to the rights of others, including the property rights of the owners of the land and the rights of any members of the public; whether the views giving rise to the protest relate to very important issues and whether they are views which many would see as being of considerable breadth, depth and relevance; and whether the protestors
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18	non-exhaustive list in Ziegler of factors to be considered when evaluating proportionality, as set out by Lord Neuberger, Master of the Rolls, in City of London Corporation v Samede [2012] EWCA Civ 160, [2012] All ER 1039 at paragraphs 39 to 41. Paraphrasing that content, those factors are, one, the extent to which the continuation of the protest would breach domestic law; the importance of the precise location to the protestors; the duration of the protest; the degree to which the protestors occupy the land; the extent of the actual interference the protest causes to the rights of others, including the property rights of the owners of the land and the rights of any members of the public; whether the views giving rise to the protest relate to very important issues and whether they are views which many would see as being of considerable breadth, depth and relevance; and whether the protestors believed in the views that they were expressing.
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19	non-exhaustive list in Ziegler of factors to be considered when evaluating proportionality, as set out by Lord Neuberger, Master of the Rolls, in City of London Corporation v Samede [2012] EWCA Civ 160, [2012] All ER 1039 at paragraphs 39 to 41. Paraphrasing that content, those factors are, one, the extent to which the continuation of the protest would breach domestic law; the importance of the precise location to the protestors; the duration of the protest; the degree to which the protestors occupy the land; the extent of the actual interference the protest causes to the rights of others, including the property rights of the owners of the land and the rights of any members of the public; whether the views giving rise to the protest relate to very important issues and whether they are views which many would see as being of considerable breadth, depth and relevance; and whether the protestors believed in the views that they were expressing. For context, in Ziegler, the protestors were opposed
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20	non-exhaustive list in Ziegler of factors to be considered when evaluating proportionality, as set out by Lord Neuberger, Master of the Rolls, in City of London Corporation v Samede [2012] EWCA Civ 160, [2012] All ER 1039 at paragraphs 39 to 41. Paraphrasing that content, those factors are, one, the extent to which the continuation of the protest would breach domestic law; the importance of the precise location to the protestors; the duration of the protest; the degree to which the protest causes to the rights of others, including the property rights of the owners of the land and the rights of any members of the public; whether the views giving rise to the protest relate to very important issues and whether they are views which many would see as being of considerable breadth, depth and relevance; and whether the protestors believed in the views that they were expressing. For context, in Ziegler, the protestors were opposed to the arms trade. They held a peaceful protest at the
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21	non-exhaustive list in Ziegler of factors to be considered when evaluating proportionality, as set out by Lord Neuberger, Master of the Rolls, in City of London Corporation v Samede [2012] EWCA Civ 160, [2012] All ER 1039 at paragraphs 39 to 41. Paraphrasing that content, those factors are, one, the extent to which the continuation of the protest would breach domestic law; the importance of the precise location to the protestors; the duration of the protest; the degree to which the protest causes to the rights of others, including the property rights of the owners of the land and the rights of any members of the public; whether the views giving rise to the protest relate to very important issues and whether they are views which many would see as being of considerable breadth, depth and relevance; and whether the protestors believed in the views that they were expressing. For context, in Ziegler, the protestors were opposed to the arms trade. They held a peaceful protest at the Defence and Security International Arms Fair at the
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	non-exhaustive list in Ziegler of factors to be considered when evaluating proportionality, as set out by Lord Neuberger, Master of the Rolls, in City of London Corporation v Samede [2012] EWCA Civ 160, [2012] All ER 1039 at paragraphs 39 to 41. Paraphrasing that content, those factors are, one, the extent to which the continuation of the protest would breach domestic law; the importance of the precise location to the protestors; the duration of the protest; the degree to which the protestors occupy the land; the extent of the actual interference the protest causes to the rights of others, including the property rights of the owners of the land and the rights of any members of the public; whether the views giving rise to the protest relate to very important issues and whether they are views which many would see as being of considerable breadth, depth and relevance; and whether the protestors believed in the views that they were expressing. For context, in Ziegler, the protestors were opposed to the arms trade. They held a peaceful protest at the Defence and Security International Arms Fair at the ExCel Centre in London by laying down on one side of and
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21	non-exhaustive list in Ziegler of factors to be considered when evaluating proportionality, as set out by Lord Neuberger, Master of the Rolls, in City of London Corporation v Samede [2012] EWCA Civ 160, [2012] All ER 1039 at paragraphs 39 to 41. Paraphrasing that content, those factors are, one, the extent to which the continuation of the protest would breach domestic law; the importance of the precise location to the protestors; the duration of the protest; the degree to which the protest causes to the rights of others, including the property rights of the owners of the land and the rights of any members of the public; whether the views giving rise to the protest relate to very important issues and whether they are views which many would see as being of considerable breadth, depth and relevance; and whether the protestors believed in the views that they were expressing. For context, in Ziegler, the protestors were opposed to the arms trade. They held a peaceful protest at the Defence and Security International Arms Fair at the

24ExCel Centre for approximately 90 minutes before they25were removed by police officers. The protest did not

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1	block all entry and access to the ExCel Centre, it did
2	not target specific individuals working at the ExCel
3	Centre and was part of a discrete protest and did not
4	arise out of a continuing protest which had experienced
5	multiple incidents of obstruction of the highway over
6	a period of many months or years. The order directing
7	convictions against the defendant protestors, under the
8	Highways Act 1980, section 137, were set aside and the
9	dismissal of the charges was restored.
10	The approach and decision in Ziegler was never
11	intended to have universal application. The same has
12	now been made clear by Lord Reed in his judgment in
13	reference by the Attorney General for Northern
14	Ireland—Abortion Services (Safe Access Zones) (Northern
15	Ireland) Bill [2022] UKSC 32; [2023] 2 WLR 33, in which
16	his Lordship made several important observations
17	relevant to the approach of the Supreme Court and the
18	Divisional Court in Ziegler, and the approach to cases,
19	whether civil or criminal, concerning obstructions of
20	the highway. These observations include, one:
21	"Section 137 and the equivalent predecessor
22	provisions have a long and specific history, and have
23	been the subject of a great deal of judicial
24	consideration. The approach adopted to section 137 and
25	its predecessors for over a century prior to Ziegler was

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1	rooted in authorities which treated the question to be
2	decided under the statute as similar to the question to
3	be decided in civil nuisance cases of an analogous kind.
4	On that basis, it was held that it was necessary for the
5	court to consider whether the activity being carried on
6	in the highway by the defendant was reasonable or
7	not: see, for example, Lowdens v Keaveney [1903]
8	2 IR 82, 87 and 89. That question was treated as one of
9	fact, depending on all the circumstances of the
10	case: Nagy v Weston [1965] 1 WLR 280, 284; Cooper v
11	Metropolitan Police Commissioner [1985] 82 Cr App R 238
12	[at pages] 242 and 244 That approach accorded with the
13	general treatment in the criminal law of assessments of
14	reasonableness as questions of fact. In cases where the
15	activity in question took the form of a protest or
16	demonstration, common law rights of freedom of speech
17	and freedom of assembly were treated as an important
18	factor in the assessment of reasonable user: see, for
19	example, Hirst v Chief Constable of West Yorkshire
20	[1986] 85 Cr App R 143. That approach was approved,
21	obiter, by members of the House of Lords in Director of
22	Public Prosecutions v Jones [1999] 2 AC 240 258-259
23	and 290. Lord Irvine of Lairg [Lord Chancellor]
24	summarised the position at page 255: 'the public have
25	the right to use the public highway for such reasonable

25

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1	and usual activities as are consistent with the general
2	public's primary right to use the highway for purposes
3	of passage and repassage'. The same approach continued
4	to be followed after the Human Rights Act entered into
5	force: see, for example, Buchanan v Crown Prosecution
6	Service [2018] EWHC 1773 (Admin); [2018] LLR 668."
7	That is paragraph 22 of Abortion Services.
8	Two, one of the issues in dispute in the Ziegler
9	appeal was whether there could be a lawful excuse for
10	the purposes of section 137 in respect of deliberate,
11	physically obstructive conduct by protestors, where the
12	obstruction prevented or was capable of preventing other
13	highway users from passing along the highway.
14	Lord Hamblen and Lord Stephens concluded that there
15	could be. However, Lord Reed in Re Abortion Services
16	(Safe Access Zones) (Northern Ireland) Bill observed
17	that the case of Jones was neither cited nor referred to
18	in Ziegler, see paragraph 27 of the judgment, and it is
19	plain from his Lordship's judgment that he was citing
20	Jones with approval.
21	Three, Lord Reed observed that the dictum of
22	Lord Hamblen and Lord Stephens in Ziegler had been
23	widely treated as stating a universal rule. Lord Reed
24	said :
25	"That view is mistaken. In the first place,

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1	questions of proportionality, particularly when they
2	concern the compatibility of a rule or policy with
3	Convention rights, are often decided as a matter of
4	general principle, rather than on an evaluation of the
5	circumstances of each individual case."
6	See paragraph 29 of the judgment.
7	The determination of whether an interference with
8	a Convention right is proportionate is not an exercise
9	in fact-finding. It involves the application, in
10	a factual context, often not in material dispute, of the
11	series of legal tests, set out at paragraph 24 of the
12	judgment, together with a sophisticated body of case
13	law, and may also involve the application of statutory
14	professions such as sections 3 and 6 of the Human Rights
15	Act, or the development of the common law; see
16	paragraph 30 of the judgment.
17	Five:
18	" the European Court has repeatedly emphasised
19	that the Convention is intended to protect rights that
20	are practical and effective, and that its concern is
21	therefore with matters of substance rather than form.
22	It would be inconsistent with that approach to draw
23	a fundamental distinction in our domestic application of
24	the Convention, in relation to legal measures
25	restricting protestors' rights under articles 9 to 11,

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1	according to the domestic classification of the measures
2	as civil or criminal. That is illustrated by the fact
	5
3	that one of the government's responses to the decision
4	in Ziegler [2022] AC 408 was to obtain civil
5	injunctions, covering the national network of motorways
6	and other major roads, and prohibiting activities which
7	would obstruct them. Such injunctions, although
8	classified as civil remedies, are generally directed
9	against 'persons unknown' as well as any protestors
10	whose identities are known and contain a power of
11	arrest . They are enforceable by proceedings for
12	contempt, in which unlimited fines or sentences of
13	imprisonment can be imposed. Those are more serious
14	penalties than are available under the present Bill ."
15	See paragraph 40 of the judgment.
16	Six, a defence of lawful or reasonable excuse may
17	provide a route by which a proportionality assessment
18	can be carried out, where the defence can properly be
19	interpreted, having recourse, if need be, to section 3
20	of the Human Rights Act, as including the exercise of
21	the Convention right; paragraph 57 of the judgment.
22	Seven, the mistake should not be made of assuming
23	that the presence of a reference to lawful or reasonable

that the presence of a reference to lawful or reasonable excuse in the definition of an offence necessarily means that a proportionality assessment in respect of

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Convention rights is appropriate; paragraph 58 of the judgment.

3	Accordingly, the following can be understood from
4	Re Abortion Services (Safe Access Zones) (Northern
5	Ireland) Bill . Ziegler is not to be applied $$ I think
6	that should actually say that the principles of Ziegler
7	are not to be applied universally to cases concerning
8	obstruction of the highway and the approach is that set
9	out by Lord Irvine in Jones, namely:
10	" the public have the right to use the public
11	highway for such reasonable and usual activities as are
12	consistent with the general public's primary right to
13	use the highway for purposes of passage and repassage."
14	Page 255, paragraph F of Jones.
15	When considering Articles 10 and 11 of the
16	Convention, no fundamental distinction should be drawn
17	between the criminal and civil law, as both are capable
18	of regulating the conduct of protest on the highway, as
19	acknowledged by Lord Reed at paragraph 41 of the
20	Abortion Services case.
21	Three, not every case of obstruction on the highway
22	in the context of a protest case will require
23	a proportionality assessment. If the ingredients of the
24	tort are proved, that may strike the correct balance.

The reference in Jones to the protestors' conduct

1	needing to be consistent with the general public's
2	primary use to pass and repass may be deemed to strike
3	the right balance.
4	MR JUSTICE NICKLIN: Where does it say that in
5	Abortion Services?
6	MS BOLTON: My Lord, that's the $$ it's the point that it
7	may or may not do. We are saying that you can
8	understand that from $$ it may be, it may not be. That
9	is something that the court will have to decide, which
10	I'm going to go on to say. What the Supreme Court have
11	said is you need to look at the ingredients of the
12	offence, look at what is being relied upon.
13	MR JUSTICE NICKLIN: Well, I don't need to look at the
14	ingredients of an offence because I'm not dealing with
15	offences.
16	MS BOLTON: Sorry, you need to look at the obstruction of
17	the highway, what the test is and whether that exercise
18	will effectively be in the answer to the questions you
19	have to ask under that test. In this case you have
20	to
21	MR JUSTICE NICKLIN: Well, in the Abortion Services case
22	Lord Reed was referring to criminal offences in that
23	context and he was saying that where, for example,
24	criminal damage $$ you can't come along as a protestor
25	and say $$ demand to have a sort of proportionality
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1	assessment of the criminal offence because it's baked
2	into the offence itself . Those considerations are not
3	easy to map across to torts.
4	MS BOLTON: Well, he makes two points. He makes the point
5	of not having the civil and criminal distinction $$
6	MR JUSTICE NICKLIN: Not by way of suggesting that that rule
7	applies to the interpretation of torts.
8	MS BOLTON: But the ingredients of the tort are the same as
9	the offence on obstruction of the highway so, from that
10	point of view, that is something the court will have to

 11
 determine as to whether or not it needs to undertake

 12
 that exercise because the ingredients are the same. It

has to ask those questions.
So we make the point -- I appreciate it's not very

15 helpful as to when you do, when you don't, which is why

16 we then go on to consider it in a minute in the

17 submission, but that does appear to be what the

18 Supreme Court is saying. What it's not saying is when

19 you should and when you shouldn't. It's flagging that

20 you need to look at the ingredients of what has to be

established and whether that exercise can be deemed tohave already been done.

23 If the proportionality assessment is to be

24 undertaken, the decision in Re Abortion Services (Safe

25 Access Zones) (Northern Ireland) Bill suggests

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1 a well-recognised but slightly different set of 2 questions so Samede, albeit the differences are limited. 3 The test is as follows: 4 Is what the defendant did in exercise of one of the rights in Articles 10 or 11? If so, is there an 5 interference by a public authority with that right? If 6 7 there is an interference, is it prescribed by law? If so, is the interference in pursuit of a legitimate aim 8 9 as set out in paragraph 2 of Article 10 or Article 11, 10 for example the protection of the rights of others? If 11 so, is the interference necessary in a democratic 12 society to achieve that legitimate aim? 13 That last question will in turn require 14 consideration of the well-known set of sub-questions 15 which arise in order to assess whether an interference is proportionate. One, is the aim sufficiently 16 17 important to justify interference with a fundamental 18 right? Two, is there a rational connection between the 19 means chosen and the aim in view? Three, are there less 2.0 restrictive alternative means available to achieve that 21 aim? Four, is there a fair balance between the rights 22 of the individual and the general interest of the 23 community, including the rights of others? 24 Particular damage. 25 Obstruction of the highway is the only claim before 95

1 the court that requires the claimant to establish 2 particular damage. A private individual has a right of 3 action in respect of a public nuisance if he can prove 4 that he has sustained particular damage other than and 5 beyond the general inconvenience and injury suffered by 6 the public, and that the particular damage which he has 7 sustained is direct and substantial; See Jan De Nul case 8 [2000] 2 Lloyd's Rep 700. 9 Particular damage is not limited to special damage 10 in the sense of actual pecuniary loss. Particular 11 damage may consist of proved general damage, for example 12 inconvenience and delay, provided that it is substantial 13 and appreciably greater in degree than any damage 14 suffered by the general public; the Wagon Mound (No 2) 15 [1963] 1 Llovd's Rep 402 at 430. 16 Unlike negligence, in an action for public nuisance, 17 once the nuisance is proved and a defendant is shown to 18 have caused it, then the legal burden shifts to the 19 defendant to justify or excuse himself. The Wagon Mound 2.0 (No 2) at 428 and Southport Corporation v Esso [1954] 21 2 QB 182 at 194 and 197. 2.2 The approach to particular damage and the ability 23 for it to constitute general damages rather than 2.4 specific loss was restated by Mr Justice Moore-Bick in 25 Jan De Nul [2000] 2 Lloyd's Rep 700 at paragraphs 41 to

- 1 44, which paragraphs include consideration of the 2 House of Lords' decision in Tate & Lyle Industries 3 [1983] 2 AC 509. 4 The position is followed and accepted in Ineos, at 5 the High Court stage, at paragraph 46. The particular damage of inconvenience and delay are 6 7 pleaded at paragraphs 177 of the particulars of claim. 8 The particular damage that these highway users and the 9 first claimant have suffered is as follows: distress, 10 anxiety and worry as a result of being subjected to 11 Mr Curtin's conduct. This includes the fear that 12 Mr Curtin will continue to surround their vehicles and 13 obstruct their free passage along the highway. For 14 example, Mr Hardy described the terror that he has 15 experienced, which continues to some extent even after 16 the grant of the interim injunction because of the 17 unpredictability of the protestors; transcript Day 4, 18 page 139, lines 19 to 22, and page 16, lines 2 to 13. 19 Employee AF gave similar evidence and described being distressed by "people standing in the road, 2.0 21 blocking my path, shouting abuse at me", Day 5, page 95, 22 lines 15 to 20, as did Employee V, who described his car being surrounded as "very worrying"; Day 8, page 75, 23 24 line 18
- 25 MR JUSTICE NICKLIN: But it has to be -- for these purposes

- 1 the loss has to be caused by public nuisance of
- 2 obstruction of the highway that was carried out by
- 3 Mr Curtin.
- 4 MS BOLTON: Yes.
- MR JUSTICE NICKLIN: Right. Which are the examples of 5
- Mr Curtin leaving -- not the access road. This is the 6
- 7 public nuisance of obstruction of the highway.
- MS BOLTON: My Lord, sorry, "not the access road", did you 8 9
- say, or "on the access road"?
- 10 MR JUSTICE NICKLIN: Well, it has to be the public highway.
- 11 MS BOLTON: Yes, it has to be the public highway, my Lord, 12 which includes part of the access road and the
- 13
- carriageway. All of these employees gave evidence and we looked -- and indeed in cross-examination we looked 14
- 15 at videos of Mr Curtin holding up these employees. All
- 16 of them gave evidence that they had found Mr Curtin's
- 17 activities to be terrifying , that they had been
- 18 distressed, and the description for Employee B of being 19
- very worrying was to do --
- 20 MR JUSTICE NICKLIN: And you say the law permits distress 21 damages to be sufficient for public nuisance?
- 2.2 MS BOLTON: My Lord, indeed. It's particular and it's
- 23 particular to these highway users. It's not being
- 24 suffered by all highway users so it's a particular
- 25 damage.

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- MR JUSTICE NICKLIN: Just so I'm clear, you're saying the 1 2 authorities permit the recovery for mere distress?
- 3 MS BOLTON: Yes. Yes, providing it is particular to them 4 and not --
- MR JUSTICE NICKLIN: What's the best case that demonstrates 5 6 that?
- 7 I read last week at some point the Clerk & Lindsell
- 8 extract on public nuisance and the impression I got was
- 9 that you needed to be able to show that you'd suffered
- 10 actual damage as a result of the public nuisance.
- 11 MS BOLTON: You have to show particular damage is the
- 12 reference in Clerk & Lindsell, which is also recognised
- 13 in Ineos as well, as how the damages would have to be
- 14 established, and also in the Jan De Nul case. So it's
- 15 Jan De Nul, Tate & Lyle and the Wagon Mound (No 2) as
- 16 well. So you've got to show particular damage, which
- 17 can be general damages, provided it's only that group of
- 18 highway users ---
- 19 MR JUSTICE NICKLIN: Because it would be unusual for tort to
- 20 get into that situation because the categories that you
- 21 can recover for mere distress damages and tort are
- pretty limited 22
- 23 MS BOLTON: Yes, my Lord, but the point is, in obstruction
- 24 of the highway cases, it's this particular damage point
- 25 and so it's the case of whether -- it can be either

- 1 general damages or special damages, but it has to be 2 particular to that group of highway users and that's 3 what the authorities establish. So that is why we say 4 that that is a head of damage we can rely upon. MR JUSTICE NICKLIN: Right. Let's have a look at the best 5 6 authority on that point. MS BOLTON: I think, my Lord, we'd probably have to go 7 through all them because they all cover things slightly 8 9 differently . So the Wagon Mound (No 2), my Lord, starts 10 at page 145 in the authorities bundle. 11 MR JUSTICE NICKLIN: Yes. 12 MS BOLTON: Sorry, my Lord, I've just done something silly 13 with my electronic bundle. 14 My Lord, it starts on page 173 of the bundle, 15 page 430 of the judgment. So the first point starts in 16 the Wagon Mound (No 2). It's the last paragraph on the 17 first half of that page through to the second part of 18 the page 19 MR JUSTICE NICKLIN: Page 431, first column: 2.0 "In the present case the damage in question is 21 damage to property [as read].' 2.2 MS BOLTON: My Lord, yes, but the example being given is to 23 what is particular damage. 2.4
- MR JUSTICE NICKLIN: "In the context of deciding what is the 25 difference between that and consequential damage, which
 - 100

- 1 was always important in tort because the limits of
- 2 consequential recovery were always subject to stricter
- 3 regime. Requirement that the injury should be of
- 4 a substantial character, not fleeting or evanescent [as
- 5 read].'

all

- 6 MS BOLTON: Yes, my Lord, but we don't say that these 7 damages are fleeting -- these losses are fleeting at
- 8
- 9 MR JUSTICE NICKLIN: You see, also providing a level of
- 10 coherence in the law of tort, it would be consistent
- 11 that damage -- recognisable psychiatric harm which would
- 12 be recoverable in tort for breach of duty, negligent
- 13 situations -- so distress is fleeting; recognisable
- 14 \qquad psychiatric harm is substantial . I'm trying to find
- 15 where distress damage is because, if you're right about
- 16 this and you can claim distress damages on the basis of
- 17 public nuisance, a lot of people have got potential 18 claims
- 19 MS BOLTON: Well, my Lord, you have to not be suffering the
- 20 same as all the other highways users, so the fact, for
- 21 instance, that in a general obstruction of the highway
- 22 case everybody may be in a traffic jam wouldn't attract
- 23 those damages. So you need to be suffering something
- 24 different to the other highway users. The staff are
- 25 because they're the target of it . That's the difference

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- 1 as to why it comes into the particular damage category,
- which is what was being recognised they would have toshow in Ineos as well because it's that targeting that
- 4 puts them into that different category.
- 5 My Lord, the same points your Lordship is making
- 6 would have to be considered under the next category of
- 7 loss, which is depression and anxiety caused to
- 8 Employee Q as a result of the conduct of Mr Curtin, to
- 9 the extent that prescription medication was required.
- $10 \qquad \mbox{ Employee Q eventually left their job as a result of the }$
- 11 conduct of the protestors, which includes Mr Curtin, and
- 12that's the Pressick 20, paragraph 348, and Pressick 22,13paragraph 7.
- 14 The next head of particular damage would be extra 15 security staff to assist employees --
- MR JUSTICE NICKLIN: Well, hang on. We haven't finished
 going through the --
- 18 MS BOLTON: Apologies, my Lord. The principle is in the
- 19 Wagon Mound but I've also referred you to --
- 20 MR JUSTICE NICKLIN: Is there anything else in the Wagon 21 Mound?
- 22 MS BOLTON: I think that was the -- there's reference to 23 428.
- 24 MR JUSTICE NICKLIN: And why are you able to recover for
- 25 Employee Q's harm?

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- 1~ MS BOLTON: Well, Employee Q, I accept, may be difficult now
- 2 because she's left . At the time of pleading it she
- hadn't but I accept that that may make that head of loss
 difficult --
- 5 MR JUSTICE NICKLIN: So if I were awarding damages, who gets 6 the damages?
- 7 MS BOLTON: Well, my Lord, ordinarily that would be
- 8 a claim -- because it's a claim both by the first and
- 9 second claimants but in this case I accept that
- 10 \qquad Employee Q has left and so it would -- that would be
- 11 a difficult one for us to now establish. I accept the
- 12 difficulties with that.
- 13 $\,$ MR JUSTICE NICKLIN: Well, let's say for the purposes of the
- $14 \qquad$ argument she'd stayed on, she's not bringing a claim in
- 15 her own right --
- 16 MS BOLTON: No.
- 17 MR JUSTICE NICKLIN: -- so who gets the damages?
- 18 MS BOLTON: Well, that's still Employee Q's damages. That
- 19 would be whose damages it is. That -- I accept it can't
- 20 be a claim by the first claimant for the fact that she's
- 21 on prescription medication. The claimants' claim would
- 22 be concerned with any of the impact on staff that it has
- 23 on the claimant, not on Employee Q's prescription
- 24 medication --
- 25 MR JUSTICE NICKLIN: But you've got no losses?

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- $1 \qquad {\sf MS \ BOLTON:} \ {\sf Well, we \ do, \ my \ Lord.}$
- 2 MR JUSTICE NICKLIN: Attributable to obstruction of the 3 highway?
- 4 MS BOLTON: Yes. We set that out -- because of the cost of 5 staff absences as a result of it. So we do have a loss
- $6\,$ from it . We don't have the same loss, though, I accept.
- 7 MR JUSTICE NICKLIN: Right. Anything else in the
- 8 Wagon Mound?
- 9 MS BOLTON: So page 428 -- apologies, no, that's a different 10 point.
- 11 My Lord, the next one is the Jan De Nul case. The
- 12 relevant part starts at page 368 in the judgment at
- 13 paragraph -- it starts from paragraph 41.
- 14 MR JUSTICE NICKLIN: Sorry, where is it in the bundle?
- 15 MS BOLTON: Page 368 is the relevant page in the judgment,
- 16 my Lord, and it starts at paragraphs 41 through to 44.
- 17 So it's setting out the Benjamin v Storr requirements
- 18 again. He then goes on to consider it further.
- 19 You'll see it's that last part at paragraph 44 that
- 20 sets out the differences between -- of what particular
- 21 damages. So it's that last part where the court is
- 22 talking about the valuable analysis of the earlier
- 23 authorities carried out by Mr Justice Sholl as to how to
- 24 approach it. We say that, again, the loss over and
- 25 above what has been suffered by ordinary members of the

- public has been incurred here, both in the way of to the
- 2 individuals and to the operations of the first claimant
- 3 and that's particularised as the distress and anxiety
- towards the staff; the extra security staff who assist 4
- 5 employees accessing and exiting the highway.
- MR JUSTICE NICKLIN: But your employees, for no doubt very 6 7 good reason, do not get involved with obstructions
- 8 outside the gates
- 9 MS BOLTON: My Lord, that's not quite right. So the
- 10 additional security with the dogs -- if you look at some
- 11 of the videos, you will see that the dog handlers do
- 12 come out to assist the cars. So that's part -- it's not
- 13 simply about the break-ins that have caused the dog
- 14 handlers -- they are doing a bigger job than that and
- 15 that's present on some of the videos. I will get the 16 video references for your Lordship where you can see
- 17 that happening.

25

- 18 Financial loss caused by the delay in transporting
- 19 animals from the Wyton site to its customers as a direct
- 20 result of the conduct of Mr Curtin and others, that loss
- 21 at the time of the pleading was $\pounds27,660$.
- MR JUSTICE NICKLIN: That can't all be attributed to 22 23 Mr Curtin.
- 24 MS BOLTON: Well, no, in part it's attributable to Mr Curtin
 - but the loss suffered is still substantial. It's as

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- 1 a result of those who are obstructing the highway and 2 are committing those torts. 3 MR JUSTICE NICKLIN: Well, you would have to show that 4 Mr Curtin had obstructed a dog van on at least one 5 occasion MS BOLTON: Well, no, my Lord, because the delay that 6 7 occurred wasn't simply because of dog vans. It was 8 because they couldn't even get dog vans in and out of 9 there at all for a while because the gates were being 10 occupied and people were standing in front of them the 11 whole time -12 MR JUSTICE NICKLIN: Yes, this is basic causation. You've 13 got to show that it relates to Mr Curtin's tort. 14 MS BOLTON: Well, my Lord, we say that the fact we couldn't 15 do it at all as a result of all of the protestors, they 16 all -- each one of them has contributed to that cost. 17 We accept that we can't say that it's X pounds but we 18 don't have to. We just have to show that we have 19 suffered a loss which is over and above that, even if it 20 can't be quantified, of other highways users. We've 21 suffered specific losses as a result of delay because at 2.2 one point you couldn't even have a dog van; you couldn't 23 get anything to a client. That's what we're saying in
- 24 relation to those damages.
- 25 MR JUSTICE NICKLIN: And help me with where that evidence is

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- 1 about this. Has there been any effort to attribute the 2 ...?
- 3 MS BOLTON: My Lord, the evidence concerning the losses are
- 4 in the witness statement of Susan Pressick. I will get
- you the precise parts of it but I think it's, if I'm 5
- right -- bear with me, my Lord, because I'm fairly sure 6
- 7 it's cited. Pressick 20, paragraphs 368 and 376. So
- that deals with the losses suffered --8
- 9 MR JUSTICE NICKLIN: Where is that?
- 10 MS BOLTON: That's in -- that will be in Mr Curtin's
- 11 bundle at pages 368 to 376.
- MR JUSTICE NICKLIN: 36 ...? What did you say? 12
- 13 MS BOLTON: I'm just checking that is Mr Curtin's
- 14 bundle because I can see what's happening on the screen.
- 15 MR CURTIN: I haven't got that number.
- 16 MS BOLTON: Apologies, we've cited the paragraph numbers,
- 17 not the pages. It's at page 133, my Lord, so it's
- 18 paragraphs 368 to 376. Apologies.
- MR CURTIN: Is this 368 in mine? 19
- 20 MS BOLTON: Yes, paragraph, page 133.
- 21 MR JUSTICE NICKLIN: Right. Where is SP28/343,
- 22 paragraph 372?
- 23 MS BOLTON: I'm just checking, my Lord. Page 394, my Lord.
- 24 MR JUSTICE NICKLIN: So this is alleging that there was
- 25 a delivery due on 22 July that was delayed till

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- 1 5 August? MS BOLTON: Yes. 2
- 3 MR JUSTICE NICKLIN: And that's down to Mr Curtin 4 obstructing vehicles?
- MS BOLTON: Mr Curtin and others, yes. They couldn't get 5
- 6 any deliveries out at some points. It wasn't a case of
- 7 the dog van being detained on the road. They couldn't
- 8 get them in and out. There was a significant period of
- 9 time where that was difficult and you'll see ---
- 10 MR CURTIN: My Lord, I didn't intend to say anything today,
- 11 but to help the court out, there were no dog vans for
- 12 a number of -- I think maybe perhaps a month, two
- 13 months, but it was a decision -- it was a decision taken
- 14 by MBR and perhaps the police. I don't know -- there
- 15 was never a failed attempt to get a dog van in or out.
- 16 The first dog van that went out had a huge police
- 17 escort -- huge, ten police vans -- but there hadn't been
- 18 a failed incident before that.
- 19 MS BOLTON: My Lord, you can see the dates of the delays.
- 2.0 This is part of Ms Pressick's evidence. 21
- MR JUSTICE NICKLIN: Where does she explain this in her 2.2 evidence beyond that paragraph?
- 23 MS BOLTON: No, she puts it in those paragraphs but her
- 24
- evidence is that this was as a result of the protests. 25 Indeed, looking at the --

- 1 MR JUSTICE NICKLIN: Just forgive me for a moment. None of
- 2 the evidence that I've seen has suggested to me that the
- 3 protestors were effective enough at blockading the
- 4 facility .
- 5 MS BOLTON: My Lord, we came to court at one point on the 6 interim injunction to explain that the carrier wouldn't 7 go at all . We asked for further protection on the basis 8 that Impex at one point was saying they wouldn't come
- that Impex at one point was saying they wouldn't come
 back. There has been, both at the beginning of this ---
- 10 there was inability to get the dog vans in. There has
- 11 been the protestors -- you've seen the evidence that the
- 12 protestors were controlling the gate at the time.
- 13 You've seen the blockades of crates. You've seen the
- $14\,$ difficulties that the vehicles were having. It couldn't
- 15 be done. It was at a point where there couldn't be --
- 16 they couldn't get things to clients because there was
- 17too much control over the front of the site . That's the18level of delay being caused by the significant scale of
- 19 the protests
- 20 MR JUSTICE NICKLIN: Right. Just show me what she says 21 about that.
- 22 MS BOLTON: All she has is what's set out --
- 23 MR JUSTICE NICKLIN: In 372?
- 24 MS BOLTON: It's what is set out in the exhibits and what
- 25 was in paragraph 368 to 376.

1 MR JUSTICE NICKLIN: Right. Well, if that's the evidence. 2 MS BOLTON: My Lord, you'll see that there's a specific sum 3 placed on the dog handlers' security and you'll see that 4 there is general damage claims for staff absences caused 5 by distress and anxiety, which are again inconvenience over and above that suffered by other highways users, as 6 7 a result of Mr Curtin's and others' personal conduct. 8 My Lord, again, that doesn't have to be quantified. 9 It just has to be particular to the claimants. So 10 that's also the absences as a result of the distress and 11 anxiety. So we say they're all particular damages that 12 the claimant can point to. As your Lordship is aware, 13 we're not seeking to enforce those. We are seeking to 14 demonstrate that we've suffered them. 15 The claimants have provided, my Lord, exhibited to 16 Pressick 22, the record of the exit interviews conducted 17 with employees who have left their employment with MBR 18 throughout the course of the protests, where available, 19 and the reason for resignations where no interview was 2.0 conducted. The same evidences the impact the protests 21 are having on the first claimant's staff, with four 2.2 members of staff citing the protests as either the sole

 $23 \qquad \text{ or a contributing factor to their resignation}\,.$

 24
 Further, Employee H gave evidence of having dreams

 25
 about the protestors, and specifically Mr Curtin.

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- 1 Employee H, in their witness statement at paragraph 42, 2 made clear that they would dream of Mr Curtin because of 3 the anxiety that he causes them. During 4 cross-examination, Employee H further explained that they would dream of Mr Curtin because he was "very loud 5 and abusive"; transcript Day 7, page 104, line 14. 6 7 If Mr Curtin was not standing right next to the cars 8 in which the first claimant's staff were travelling and 9 holding them up, Mr Curtin's loud and abusive behaviour 10 would be background noise of which there could be only 11 limited complaint, if any. It is the obstruction of the 12 cars and the deliberate slowing down, stopping and 13 holding up of the cars that is causing the harm. It is 14 the obstruction which is permitting, causing and 15 facilitating the harassment. The same is clear from 16 Employee AF's evidence given in cross-examination, when 17 they said: 18 "If there is just one person far enough away from 19 the gate just holding a banner, that would not distress me. If there were multiple people standing away from 2.0 21 the gate, not blocking my path, holding a banner, that 22 would not distress me. People standing in the road, 23 blocking my path, shouting abuse at me, that is what
 - distresses me."

24

25

Transcript Day 5, page 95, lines 15 to 20.

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1	Therefore it is submitted that the target of this
2	injunction should rightly be the obstructing activities
3	as that is the means by which the first claimant's staff
4	and members of the second claimant class are held
5	hostage and forced by Mr Curtin to listen to his protest
6	message and the abuse that he shouts.
7	Put simply, whilst Mr Curtin enjoys the right to
8	engage in protest and to spread his protest message, he
9	does not enjoy the right that everyone must listen to or
10	engage with him and his message. By obstructing their
11	cars on the highway, Mr Curtin is depriving the first
12	claimant's staff of their right and freedom not to
13	listen to Mr Curtin's protest message. That is
14	unacceptable and is not lawful protest. It is unlawful
15	protest and does not respect the rights of others.
16	One of the most striking parts of Mr Curtin's
17	evidence is the belief that, as a protestor, he can do
18	what others cannot, but that is not correct. It is
19	correct that there is a more lenient sentencing regime
20	for civil disobedience, such as by way of the protestor
21	bargain in contempt proceedings. Protest is not,
22	however, a free pass to break the law.
23	Proportionality .
24	For the purpose of the obstruction of the highway
25	claim, the court must consider whether a proportionality
	110

1	assessment is required. Re Abortion Services (Safe
2	Access Zones) (Northern Ireland) Bill suggests that the
3	answer in these proceedings may be that no
4	proportionality assessment is required as the cause of
5	action already builds into its constituent elements
6	consideration of whether the defendant has a reasonable
7	excuse. Further and in any event, Mr Curtin has not
8	advanced a defence of reasonable excuse.
9	Ultimately, this is a matter for the court to
10	determine whether a proportionality assessment should be
11	undertaken. If the court considers that
12	a proportionality assessment is required, the claimants
13	submit that the answers to the proportionality
14	assessment are as follows:
15	One, is what the defendant did in exercise of one of
16	their Article 10 or 11 rights? It is likely that
17	Mr Curtin would claim that to be the case.
18	MR JUSTICE NICKLIN: Do you challenge that?
19	MS BOLTON: My Lord?
20	MR JUSTICE NICKLIN: Do you challenge that?
21	MS BOLTON: No, my Lord.
22	Two, if so, is there an interference by a public
23	authority with that right? Yes. The interference is by
24	the court.

Three, if there is an interference, is it prescribed

1	by law? Yes, section 37 of the Senior Courts Act 1981.
2	MR JUSTICE NICKLIN: No, the prescription is $$ the
3	interference is prescribed by the law of obstruction.
4	That's what it would be.
5	MS BOLTON: My Lord, yes.
6	MR JUSTICE NICKLIN: Section 37 is a remedy.
7	MS BOLTON: Yes well, yes, my Lord.
8	Four, if so, is the interference in pursuit of
9	a legitimate aim as set out in paragraph 2 of Article 10
10	or Article 11? For example, the protection of the
11	rights of others. Yes, it is in pursuit of protecting
12	the claimants' legitimate interests .
13	Five, if so, is the interference necessary in
14	a democratic society to achieve that legitimate aim?
15	Yes.
16	Six, is the aim sufficiently important to justify
17	interference with a fundamental right? Yes, the
18	claimants' rights to pass and repass along the highway
19	have been repeatedly infringed and will continue to be
20	infringed unless restrained by injunction.
21	Seven, is there a rational connection between the
22	means chosen and the aim in view? Yes, an injunction
23	prohibits such conduct.
24	Eight, are there less restrictive alternative means
25	available to achieve that aim? No, although there could

1	have been had Mr Curtin provided a suitably worded
2	undertaking.
3	Nine, is there a fair balance between the rights of
4	the individual and the general interest of the
5	community, including the rights of others? Yes, the
6	injunction does not interfere with lawful protest. It
7	merely protects against civil wrongs and unlawful
8	conduct, and does not restrain lawful conduct.
9	My Lord, I'm conscious we do need an Opus break.
10	I'm a little way off finishing this section. Apologies.
11	MR JUSTICE NICKLIN: Okay, that's fine, 3.35.
12	(3.20 pm)
13	(The short adjournment)
14	(3.36 pm)
15	MR JUSTICE NICKLIN: Right, yes.
16	MS BOLTON: My Lord, if following the Abortion Services case
17	there is still a need to refer to Samede and Ziegler,
18	the claimants submit that having regard to the factors
19	set out in Samede and Ziegler, the relief sought, ie in
20	relation to the obstruction of the highway not to
21	approach, slow down or obstruct any vehicle on the B1090
22	within one mile in either direction is both necessary
23	and proportionate.
24	Considering that evidence in light of the Ziegler
25	and Samede factors, it is submitted, one, the

1	obstructions of the highway at the Wyton site by
2	Mr Curtin are not a one-off occurrence, unlike in
3	Ziegler. The claimants rely on 15 alleged incidents
4	and, my Lord, I'm conscious I skipped over paragraph 114
5	on page 32 of the submission earlier, which sets out
6	also the individual incidents which are just obstruction
7	of the highway not only the ones where it's also an
8	interference with the common law right, and obviously
9	I haven't gone into detail on those. That in particular
10	includes the committal breach.
11	Two, Mr Curtin's protest at the Wyton site at times
12	blocked the entire road such that the road is completely
13	impassable to all, including the claimants and other
14	members of the public. Again, that's unlike Ziegler.
15	Three, the road outside the Wyton site that is
16	frequently obstructed was a national speed limit B-road.
17	A temporary and now permanent speed restriction is in
18	place due to the presence of the protest camp. That's
19	dealt with in Pressick 20 at paragraph 62. Therefore,
20	the obstructions affect the public at large and not just
21	a narrow section of the public seeking to use the Wyton
22	site .
23	Four, in Ziegler, there was an alternative route of
24	access to the ExCel Centre that was not blocked by the
25	protestors. Contrastingly, no alternative access is

1	available to the Wyton site.
2	Five, the protests at the Wyton site also obstruct
3	access to and exit from the Wyton site. It should be
4	remembered that the first claimant enjoys special
5	protection under the Serious Organised Crime and Police
6	Act 2005 and carries out important and critical work for
7	the medical science industry.
8	Six, Mr Curtin, in his opening submissions that were
9	later confirmed on oath, said of the protest camp:
10	"The most important thing $$ and I talk about it
11	a lot $$ is we're physically there. It's a physical
12	thing. In this day and age of social media, it's
13	a physical entity."
14	Transcript Day 10, page 33, line 24 to page 34,
15	line 2. However, the camp and the protests can be
16	outside the Wyton site, thus fulfilling its most
17	important function, as perceived by Mr Curtin, and the
18	highway need not be obstructed in the way that it has
19	been to achieve that.
20	It is submitted that the one-mile prohibition is
21	both necessary and proportionate to allow the B1090

22 Abbots Ripton Road to function as normal and to allow 23 the claimants to pass and repass safely along the

23 the claimants to pass and repass safely along the 24 highway and with uninterrupted passage, as is the test

in Jones. The one-mile prohibition should enable the

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1 claimants' vehicles to exit the Wyton site and reach the 2 next road junction, a roundabout if you're turning left 3 and a crossroad if you're turning right, out of the 4 Wyton site, at which point those vehicles disperse on to the wider road network. Any less of a prohibition 5 6 causes the risk that, one, Mr Curtin's obstructive 7 behaviour may not be disincentivised and he may simply 8 move his obstructive activities to just beyond the 9 prohibited distance, especially as Mr Curtin has 10 acknowledged he acts tactically when complying with the 11 law; transcript Day 10, page 8, lines 18 to 19. If the 12 prohibition on obstruction is limited to immediately outside the Wyton site, it is likely that Mr Curtin will 13 14 simply obstruct vehicles outside the area. And, two, 15 any obstructions by Mr Curtin may still cause traffic 16 from the Wyton site to back up into the Wyton site 17 and/or along the highway. 18 Further, the prohibition sought strikes a fair 19 balance between the rights and interests of both the 2.0 claimants and Mr Curtin. Mr Curtin is entitled and able 21 to protest lawfully and make his views known to the 2.2 claimants, but without obstructing the highway, whilst 23

allowing the claimants to freely pass along the highwayand to go about their business entering and exiting the

25 Wyton site.

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1	Further, no part of Articles 10 or 11 are designed
2	to permit unlawful acts and civil wrongs. They are
3	important rights but they do not offer a free pass to
4	committing civil wrongs. Mr Curtin on several occasions
5	gave answers such as, "I am a protestor" and "I cannot
6	make myself transparent". He is indeed not transparent.
7	If he stands in front of vehicles or blocks their views
8	on the highway, he is causing an obstruction on the
9	highway of the nature that is not permitted under the
10	test in Jones.
11	Conclusion.
12	In summary, it is submitted that Mr Curtin has, as
13	set out above, been involved in multiple acts of
14	obstructing the highway outside the Wyton site. Those
15	acts have only been tempered by the imposition of an
16	interim injunction, such that it is clear that and the
17	claimants reasonably apprehend that, without an
18	injunction, Mr Curtin would simply continue to obstruct
19	the highway.
20	Harassment.
21	The claimants allege at paragraph 184 of the
22	particulars of claim, pages 37 to 38 of D11's bundle,
23	that Mr Curtin is liable for the tort of harassment.
24	MR JUSTICE NICKLIN: Before we move on to harassment, I just

25 want to clarify. Obstruction of the highway has to be

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1 a public nuisance --MS BOLTON: Yes. 2 3 MR JUSTICE NICKLIN: -- in order for you to bring a civil 4 claim in relation to it --MS BOLTON: Yes. 5 6 MR JUSTICE NICKLIN: -- otherwise it's crime and you're 7 caught by Gouriet v Post Office. 8 MS BOLTON: Yes, if it's not a -- obstruction of the highway 9 is a species of public nuisance, you have to establish 10 that, yes. 11 MR JUSTICE NICKLIN: And public nuisance -- an essential 12 characteristic of public nuisance is that it affects the 13 community and the members of the public as a whole, not 14 just merely individuals? 15 MS BOLTON: It has to -- it's not enough for it simply to 16 obstruct one person, no, but it can obstruct -- well, 17 there's two points. It has to -- it's part of the 18 Samede test, who it's obstructing. Public nuisance 19 doesn't have to obstruct the public as a whole. It has 2.0 to obstruct the ability to pass and repass on the 21 highway. So the Samede test asks that question. 22 MR JUSTICE NICKLIN: Okay. It can't be theoretical, so if 23 I'm on an obscure B-road and 100 people lie down at 3.00 $\,$ 2.4 in the morning but no cars are present and they get up, 25 then no public nuisance has been caused.

1	MS BOLTON: Well, no, because you'd never had had any
2	particular damage, so no.
3	MR JUSTICE NICKLIN: Leave aside this particular damage
4	thing. It has to be a public nuisance.
5	MS BOLTON: My Lord, yes, but not in the sense that it's
6	affecting everybody on the road. It has to be affecting
7	members of the public's rights to pass and repass, and
8	that's why I said the offence is one thing. The Samede
9	test is asking a slightly different set of questions as
10	to who it's affecting. As part of how you strike the
11	balance, it's one of the factors, it's not
12	a determinative factor. Secondly, there's a question
13	mark over whether you do that assessment or whether you
14	just stick to DPP v Jones. So it's a factor in the
15	balance. It's not determinative. As to how many it's
16	affecting is part of it.
17	MR JUSTICE NICKLIN: DPP v Jones is dealing with the
18	criminal offence of obstruction of the highway, not
19	public nuisance.
20	MS BOLTON: That's $$ right, two points on that, my Lord.
21	First of all, DPP v Jones is looking at it from the
22	point of view that the criminal law evolves from the
23	civil law on this. Secondly $$
2.4	MR JUSTICE NICKLIN: I would have thought it was the other

24 MR JUSTICE NICKLIN: I would have thought it was the otherway around.

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1	MS BOLTON: No, my Lord, it doesn't look like it is and
2	Abortion Services is making it clear you don't draw
3	these distinctions because it's not helpful. The point
4	is $$ and what Abortion Services is saying is the law is
5	as it's stated under DPP v Jones. How much weight,
6	therefore, you put on any of the factors in Samede and
7	Ziegler, when it's been said that that's not a universal
8	principle $$ Ziegler $$ is questionable, but it is only
9	a factor in that long list . It is not determinative.
10	MR JUSTICE NICKLIN: Okay. Let's just deal with the real
11	facts of this case. The incident in early July 2021,
12	where there are sheer numbers of protestors, meaning the
13	entire $B-road$ is blocked $$
14	MS BOLTON: Yes.
15	MR JUSTICE NICKLIN: $$ public nuisance, no difficulty. It
16	affected everybody's right to pass and repass on the
17	carriageway. Relatively straightforward.
18	The access road. If ten people stood across the
19	entrance of the gateway on the public highway but not in
20	the carriageway, they would not be obstructing the main
21	carriageway. They might be obstructing the highway but
22	they wouldn't be causing a public nuisance.
23	MS BOLTON: They would be causing a public nuisance because
24	the public nuisance of obstruction of the highway
25	applies when you obstruct members of the public from

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passing and repassing. It doesn't have to be everybody.
MR JUSTICE NICKLIN: Well, what I $$ but it's not everybody.
What it is is individuals.
MS BOLTON: Yes, but that's $$
MR JUSTICE NICKLIN: You see, I took this test. I followed
out of $$ lneos, paragraph 46, Mr Justice Morgan
referred to the case of R v Rimmington and Goldstein,
where he referred to paragraph 7 of that judgment $$
this is the House of Lords. He referred to
paragraph 7 ——
MS BOLTON: My Lord, we've been given a clear pointer on the
approach ——
MR JUSTICE NICKLIN: $$ and 44. And at 44 Lord Rodger says
this:
"The law of nuisance and of public nuisance can be
traced back for centuries. The answer to the questions
confronting the House are not to be found in the details
of that history Later writers tend to elide the
distinction between common and public nuisances but
throughout it has remained an essential characteristic
of a public nuisance that it affects the community,
members of the public as a whole, rather than merely
individuals [as read]."
Now, why I regard that as important is that the ten
people standing on the highway but not on the
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1	carriageway, blocking the entrance to the Wyton site,
2	are causing an obstruction of the highway but it's only
3	causing an obstruction to you, MBR Acres, and anybody
4	who wants to visit you. It is not affecting the
5	community as a whole.
6	MS BOLTON: My Lord, it is for a number of reasons. First
7	of all , because $$ and again, as is explored in Jones,
8	we are talking about the highway generally. So, for
9	a start, if you're standing at that $bell-mouth$ and
10	you're stopping cars, you are obstructing the public as
11	a whole because nobody can pass across that $bell-mouth$
12	as part of that highway. They can't do that.
13	MR JUSTICE NICKLIN: Well, we've seen it with the
14	Anglian Water. Anglian Water is a very good example of
15	this. A number of the individuals who are obstructing
16	that Anglian Water van are standing on the highway doing
17	so, but they aren't on the carriageway and you can see
18	other cars passing by without difficulty .
19	MS BOLTON: But there's two points. First of all, we see
20	plenty of videos where we did point out you can see that
21	those obstructions are holding up the carriageway
22	generally and secondly $$
23	MR JUSTICE NICKLIN: Sometimes. It depends on the nature,
24	but then that rather demonstrates the point. Some of
25	these obstructions may be public nuisances, others of

1	them are not. Not every obstruction of the carriageway
2	is a public nuisance.
3	MS BOLTON: It's not obstruction of the carriageway, though,
4	my Lord.
5	MR JUSTICE NICKLIN: Highway.
6	MS BOLTON: It's obstruction of the highway.
7	MR JUSTICE NICKLIN: Well, not every obstruction of the
8	highway is a public nuisance.
9	MS BOLTON: But if you're standing on the bell-mouth,
10	a person cannot walk along those grass verges and cannot
11	cross the bell-mouth.
12	MR JUSTICE NICKLIN: Why?
13	MS BOLTON: Because $$ and this is the point we talked about
14	in Jones $$ because whether an obstruction of the
15	highway would happen, for instance, on the pavement or
16	on the pathway would depend on the width of it, what's
17	going on on the pavement, can you get round it.
18	MR JUSTICE NICKLIN: Are you suggesting that a pedestrian in
19	the Anglian Water example couldn't have got past the $$
20	MS BOLTON: No, it wouldn't have been safe to do so. There
21	were people standing all the way out into the
22	carriageway. They wouldn't have been safe to do so.
23	MR JUSTICE NICKLIN: Okay. Well, I don't accept that.
24	MS BOLTON: My Lord, I think we pointed out that a number of
25	them did cause obstructions to the actual carriageway as
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	125
1	well. You could actually see that in the video and you
2	can see the cars stopped as a result of it.
3	MR JUSTICE NICKLIN: Are you submitting to me that every

2	can see the cars stopped as a result of it.
3	MR JUSTICE NICKLIN: Are you submitting to me that every
4	obstruction of the highway is a public nuisance?
5	MS BOLTON: If it is preventing the person using the highway
6	from passing and repassing, yes.
7	MR JUSTICE NICKLIN: An essential characteristic of a public
8	nuisance is that it affects the community, members of
9	the public as a whole rather than merely individuals.
10	Now, why is the example that you're giving me not an
11	example of an individual being obstructed?
12	MS BOLTON: Well, it's not because, whilst that obstruction
13	is going on, nobody can enter or exit that part of the
14	highway, but, secondly, this has been clarified as to
15	what does and doesn't constitute it by the
16	House of Lords in Jones and that's now been restated $$
17	MR JUSTICE NICKLIN: So Jones says that every obstruction of
18	the highway is a public nuisance?
19	MS BOLTON: It is $$ no. It says that every obstruction
20	of $$ it must be consistent with the right to pass and
21	repass. If it's not, then it is an obstruction.
22	MR JUSTICE NICKLIN: That answers the question as to whethe
23	or not it is an obstruction of the highway. It doesn't

- 24 \qquad answer the subsequent question, which appears to me to
- 25 be important, not least because this is your way of

1	getting the civil law to get involved in what would
2	otherwise be criminal proceedings so you have to show
3	that it's a public nuisance. So does Jones help me or
4	are you able to show me any other authority which helps
5	me decide, other than I've been quoting to you from this
6	House of Lords case, where the boundary lies between an
7	obstruction $$ when does an obstruction of the highway
8	become a public nuisance if it isn't that it affects the
9	community members as a whole?
10	MS BOLTON: My Lord, it can't be that that's the approach to
11	take because, if you look at Jones, they talk about, for
12	instance, that tents on the grass verge may be an
13	obstruction of the highway. That doesn't affect the
14	community as a whole. It talks $$
15	MR JUSTICE NICKLIN: No, no, no. You have to draw the
16	distinction between obstruction of the highway $$
17	okay? $$ that may or may not be tennis or whatever it
18	is . Obstruction of the highway doesn't require the
19	whole community to be affected. One person can be
20	affected. That's obstruction of the highway. The
21	question is : when does an obstruction of the highway
22	become a public nuisance?
23	MS BOLTON: My Lord, obstruction of the highway in a civil
24	context is a species of public nuisance.
25	MR JUSTICE NICKLIN: So go back to the submission, which is,

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1	are you submitting to me that every obstruction of the
2	highway is a public nuisance?
3	MS BOLTON: Every obstruction of the highway that we are
4	relying upon is a public nuisance, yes, as in the
5	context of that nuisance under $$ as a species of public
6	nuisance ——
7	MR JUSTICE NICKLIN: And you say that from the Anglian Water
8	van $$ you say that's because a theoretical member of
9	the public who was walking along the verge wouldn't have
10	been able to get past the $$
11	MS BOLTON: No one can pass and repass on that road either,
12	my Lord, so any number of $$
13	MR JUSTICE NICKLIN: I think we can see cars passing.
14	MS BOLTON: No, no. On the part of the road that they are
15	on, no one can come in, nobody can leave. It's not just
16	the Anglian Water. That obstruction is preventing
17	anybody accessing that part of the highway.
18	MR JUSTICE NICKLIN: That's only affecting you.
19	MS BOLTON: My Lord?
20	MR JUSTICE NICKLIN: That's only affecting merely
21	individuals .
22	MS BOLTON: No, it's affecting anybody who has a right to
23	pass and repass along the highway, who wants to access

that part of the road.

24

25 $\,$ MR JUSTICE NICKLIN: Okay. Well, that descends down into

- 1 every obstruction of the highway is a public nuisance.
- 2 MS BOLTON: If it interferes with the primary purpose of the 3 highway to pass and repass, yes. That's what Jones is
- 4 saying. That's the point.
- 5 MR JUSTICE NICKLIN: I don't think Jones mentions public 6 nuisance, does it?
- 7 MS BOLTON: My Lord, it's saying it will be an obstruction 8 and that is a nuisance and then Abortion Services ---
- 9 MR JUSTICE NICKLIN: I don't think it says that. Take me to
- 10 it if you think it does. I think Jones is dealing
- 11 with -- do try to suppress your dissatisfaction with me
- 12 trying to probe what you're submitting to me.
- 13 MS BOLTON: I'm not, my Lord. Please don't misunderstand.
- 14 MR JUSTICE NICKLIN: I'm trying to work out where the
 boundary lies between obstruction of the highway and
 public nuisance
- 17 MS BOLTON: My Lord, yes.
- 18 MR JUSTICE NICKLIN: Which is the best authority that helps19 me with that?
- 20 MS BOLTON: My Lord, my submission, that is Jones as
- 21 reconfirmed by Abortion Services because it's making it
- 22 clear --

25

- 23 MR JUSTICE NICKLIN: Right. Let's look at Jones.
- 24 MS BOLTON: Sorry, my Lord, I'm just going back to the part
 - of our written submissions with all the references in

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1 it 2 My Lord, Jones starts at page 295 in the authorities 3 bundle and we start -- our first reference to it is 4 page 254 -- sorry paragraph 25 -- sorry, it's page 254 of the report and it's 309 of the bundle. 5 6 MR JUSTICE NICKLIN: Yes. 7 MS BOLTON: First of all, my Lord, looking at the page --8 the bottom of page 306 actually. MR JUSTICE NICKLIN: 306? 9 10 MS BOLTON: Yes, it's confirming the position at an appeal 11 by way of a case stated in the Divisional Court, so on 12 this point it was assumed for the purpose of that appeal 13 that (a) the grass verge constituted part of the public 14 highway and (b) the group was peaceful, did not create 15 an obstruction and did not constitute or cause a public 16 nuisance 17 We then see page 254. From pretty much the start of 18 that page there starts to be a discussion on rights to 19 pass and repass and reasonable, usual mode of using the 20 highway and what would constitute a trespass. 21 Then you see the question -- the part of 2.2 Lord Irvine's judgment starts at the bottom of page 254. 23 Then you see, at page 255, the continued discussion 24 about the ordinary and reasonable use of the highway. 25 MR JUSTICE NICKLIN: Well, is this going to help us given

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2 already said that they were on the verge and not causing 3 a public nuisance? MS BOLTON: My Lord, yes, but the point is it goes through 4 5 how you assess whether it is a reasonable use and whether it amounts to an obstruction of the highway and 6 7 whether it amounts to a nuisance. MR JUSTICE NICKLIN: Right. Well, whether it amounts to 8 9 a nuisance surely -- a public nuisance is a question of 10 fact going back to the point of what ${\sf I}$ said about if 11 100 people lie down on a B-road at 3.00 in the morning 12 but nobody is around, it doesn't cause a public 13 nuisance. I mean, is that right? Do you accept that or 14 not? 15 MS BOLTON: My Lord, sorry, I was looking at -- apologies. MR JUSTICE NICKLIN: I mean, to my understanding, a public 16 17 nuisance needs to be demonstrated by proof: in other 18 words, it has caused a public nuisance. You can't have 19 a theoretical obstruction of a highway that causes 20 a public nuisance. 21 MS BOLTON: It's not a theoretical obstruction, my Lord, 22 because if it's part of the highway --23 MR JUSTICE NICKLIN: Okay. I'm just trying to tease out at 24 the moment, so humour me with my examples. Even if you 25 don't think they help you, they might help me. If 131

that you've taken me to the section where they've

1 100 people lie down in a $B\mathrm{-road}$ at 3.00 in the morning 2 and there's no traffic and no people in sight, it's not 3 a public nuisance? MS BOLTON: No. 4 MR JUSTICE NICKLIN: Right. 5 6 MS BOLTON: My Lord, in my submission, on the Jones case, though, it really is that from page 254 all the way 7 8 through to -- and part of it -- the part that I think 9 your Lordship will want to look at is on page 312. 10 MR JUSTICE NICKLIN: Well, under the heading "The position 11 in common law" 12 MS BOLTON: Which page, my Lord? Sorry. MR JUSTICE NICKLIN: Well, 308 of the bundle, just below. 13 14 "The position at common law. 15 "The Divisional Court's decision is founded 16 principally on three authorities ... However, Wills J, 17 giving the judgment of the court, had in mind at 18 page 197 an assembly to the detriment of others having 19 equal rights ... in its nature irreconcilable with the 2.0 right of free passage \ldots Such an assembly would 21 probably also amount to a public nuisance and today 2.2 involve the commission of the offence of obstruction of 23 the public highway contrary to section 137(1) ... such 2.4 an assembly would probably also amount to unreasonable 25 user of the highway [as read]."

1	Now, the word "probably" there would seem to me to
2	indicate that not every obstruction of the highway is
3	a public nuisance.
4	MS BOLTON: Yes.
5	MR JUSTICE NICKLIN: Right. So we're looking for the litmus
6	test, which is how will we recognise a public
7	nuisance $$ sorry, how will we recognise an obstruction
8	of the highway that amounts to public nuisance if it's
9	not what I pointed to earlier from Rimmington, which is
10	the definition Lord Rodger gave of an essential
11	characteristic of a public nuisance that it affects the
12	community, members of the public as a whole, rather than
13	merely individuals.
14	Now, going back to the oil spill from the
15	Wagon Mound, that's easy. The oil spill affected
16	everybody in the area equally so it was a community
17	impact. Similarly, taking from recent examples the
18	occasions on which carriageways have been blocked affect
19	everybody ——
20	MS BOLTON: Yes.
21	MR JUSTICE NICKLIN: $$ and then, taking the example of our
22	case, the early July incident where the carriageway is
23	totally blocked with a number of people present, public
24	nuisance.

25 MS BOLTON: Yes.

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1	MR JUSTICE NICKLIN: Fine. Then we move into the more
2	difficult case. I'm looking for the if there's
3	0
	different authority from Lord Rodger in Rimmington, then
4	we should try and find it . Now, does the Abortion
5	Clinic [sic] have anything to say about it?
6	MS BOLTON: The Abortion Services case, my Lord, is only
7	stating that you follow Jones and is concerned about the
8	broader application of Ziegler . It's $$ what I would
9	say, my Lord, is if you're looking at Jones, you'll
10	see $$ in answer to your question, you'll see on
11	page 257 $$ it's Lord Clyde's judgment, which is again
12	referred to in Abortion Services specifically $$ is $$
13	the point is from D through to G. So he starts by
14	making that reference to it causing a public or private
15	nuisance. You can see:
16	"I conclude, therefore, the law to be that the
17	public highway is a public place which the public may
18	enjoy for any reasonable purpose, provided the activity
19	in question does not amount to a public or private
20	nuisance and does not obstruct the highway by
21	unreasonably impeding the primary right of the public to
22	pass and repass: within these qualifications there is
23	a public right of peaceful assembly on the highway."
24	So pausing there.
25	"Since the law confers this public right,

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1	I deprecate any attempt artificially to restrict its
2	scope. It must be for the magistrates in every case to
3	decide whether the user of the highway under
4	consideration is both reasonable in the sense defined
5	and not inconsistent with the primary right of the
6	public to pass and repass. In particular , there can be
7	no principled basis for limiting the scope of the right
8	by reference to the subjective intentions of the persons
9	assembling. Once the right to assemble within the
10	limitations I have defined is accepted, it is
11	self—evident that it cannot be excluded by an intention
12	to exercise it . Provided an assembly is reasonable and
13	non-obstructive, taking into account its size, duration
14	and the nature of the highway on which it takes place,
15	it is irrelevant whether it is premeditated or
16	spontaneous: what matters is its objective nature. To
17	draw a distinction on the basis of anterior intention is
18	in substance to reintroduce an incidentality
19	requirement. For the reasons I have given, that
20	requirement, properly applied, would make unlawful
21	commonplace activities which are well accepted.
22	Equally, to stipulate in the abstract any maximum size
23	or duration for a lawful assembly would be an
24	unwarranted restriction on the right defined. These
25	judgments are ever ones of fact and degree for the court

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1	of trial ."
2	So what seems to be being said is all of the points
3	that your Lordship is asking, the type of road,
4	et cetera, will matter, how it's being affected will
5	matter, whether it's causing a nuisance will matter, but
6	what it isn't saying is that, because it's a part of the
7	highway that's used to access the site , it doesn't
8	affect the right to pass or repass by the public because
9	nobody, whilst the Anglian Water incident is going on,
10	can access that road.
11	MR JUSTICE NICKLIN: Nobody tries to.
12	MS BOLTON: My Lord, no, they don't, but they can't. It is
13	obstructed.
14	MR JUSTICE NICKLIN: Well, then, that is as theoretical as
15	the 100 people lying down at 3.00 am.
16	MS BOLTON: It's not, though, my Lord, because there is no
17	evidence that the people lying down were in any way
18	obstructing or trying to obstruct anybody. In the case
19	before you, there was. They weren't letting $$ nobody
20	could come or go unless the protestors let them. Nobody
21	was going to move out the way because the Anglian Water
22	person was being held up, and the Anglian Water person
23	is both a contractor visiting Wyton site and a member of
24	the public who is trying to pass along the road. He's
25	both. He is $$

incident. One.

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MR JUSTICE NICKLIN: The consequence of that submission is 1 2 there's no difference in public nuisance terms between 3 the Anglian Water incident and the incident in 4 early July. On your submission they're both public 5 nuisances. MS BOLTON: The difference is this: if Anglian Water -- if 6 7 the obstruction was the only incident where cars were 8 held up, that may be relevant to the relief that you 9 grant, but it wasn't. It's just an example --MR JUSTICE NICKLIN: Hang on. If it stood on its own --10 MS BOLTON: If it was one incident -- if that was the only 11 12 incident we had before the court and we were saving. 13 "Can we please have an injunction?", it never happened 14 before, it never happened again, nobody ever got 15 obstructed, it was one random day, we wouldn't be here, 16 but it wasn't one random day. 17 MR JUSTICE NICKLIN: Yes, but analysed in the tortious --18 and leave out of account for this purpose the private 19 law right of access to the premises, if you had brought 20 a claim solely on that incident, it would be dismissed 21 because it's not a public nuisance. 2.2 MS BOLTON: My Lord, I think if it was -- it would be 23 a public nuisance, it wouldn't be one on its own --24 MR JUSTICE NICKLIN: One person was obstructed in that

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1	MS BOLTON: Yes, my Lord, and I think the court would take
2	the view that there wouldn't be any basis for $$ it
3	wouldn't be reasonable to grant any relief because $$
4	MR JUSTICE NICKLIN: No, no, I think there's an anterior
5	problem. I think you would fail to demonstrate there
6	had been a public nuisance otherwise Lord Rodger's words
7	are totally wrong. That's the quintessential example,
8	one person, an individual, being obstructed.
9	MS BOLTON: My Lord, I think it would be different if you
10	were saying it was one person was the individual $$
11	let's, for instance, say that the target was that
12	individual and the protestors had stood in front of the
13	Anglian Water car $$ van, had created a channel and just
14	waved everybody else through and said "Keep coming
15	through. Anybody else can come through. We're not
16	stopping the whole road. We are simply going to make
17	our stand against the Anglian Water chap but we're going
18	to make sure there's enough space for everybody else to
19	get through if they want to come and go from the Wyton
20	site", that would be a difficulty , then, I think in
21	actually saying that that is an obstruction of the
22	highway. This was an obstruction of the highway. This
23	was stopping anybody passing and repassing, not just the
24	Anglian Water person.
25	MR JUSTICE NICKLIN: Yes, that's theoretical, back to the

- 2 MS BOLTON: I don't think it is the 3.00 am example because
- 3 in the 3.00 am example nobody is being obstructed.
- 4 MR JUSTICE NICKLIN: Apart from the Anglian Water driver ---5 nobody is being obstructed bar him in that example.
 - What's the difference between that and the 3.00 am
 - example?
- MS BOLTON: I guess the difference with the 3.00 am example, 8
- 9 my Lord, in one respect might depend on how the 3.00 am
- 10 example works. Are they lying down in the road because
- 11 they're intending to obstruct the highway because that
- 12 then comes into the quia timet relief issue, so was it
- 13 iust -
- MR JUSTICE NICKLIN: No, no, leave aside remedy. Let's just 14 15 deal with the tort. Is it a tort or not?
- MS BOLTON: In my submission, where they have obstructed the 16 17 Anglian Water person, ves.
- 18 MR JUSTICE NICKLIN: No, no, we're dealing with the 3.00 am
- 19 at the moment.
- 20 MS BOLTON: The 3.00 am one isn't an obstruction of the 21 highway --
- MR JUSTICE NICKLIN: Okay, leave aside -- it probably is an 2.2 23 obstruction of the highway but it's not a public
- 24 nuisance because nobody has been obstructed, in fact.
- 25 MS BOLTON: Yes.

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- MR JUSTICE NICKLIN: Okay. So apart -- and then back to our 2 Anglian Water ---3 MS BOLTON: Yes. 4 MR JUSTICE NICKLIN: -- the only person to be interfered or 5 obstructed in that is the Anglian Water vehicle --
- MS BOLTON: Yes. 6
- MR JUSTICE NICKLIN: -- therefore it's an individual. It's 7
- 8 only an individual that has been affected: it's not
- 9 a public nuisance.
- 10 MS BOLTON: But it's not only affecting individuals and
- 11 that's why I think we have to be careful with how we
- 12 interpret that. It is only holding up that individual
- 13 but nobody else can get in or out.
- MR JUSTICE NICKLIN: And that's the theoretical aspect to 14 15 it
- 16 MS BOLTON: I think that's where the difficulty rests.
- 17 What I would say, my Lord, is that we did indicate
- 18 there are a number -- even if your Lordship is of the
- 19 view that that is the difference, there are a number of
- 2.0 examples that we took you to where you can see that cars
- 21 on the main part of the highway are being held up as
- 2.2 a result of the obstruction because it does spread out
- 23 into the road -- into the carriageway.
- 2.4 But, in my submission, if you come off of the 25

claimants' land and you are onto the highway and you are

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1	preventing people passing along the highway, you are
2	creating that public nuisance because at that point
3	there are also members of the public with the right to
4	pass and repass along the highway.
5	MR JUSTICE NICKLIN: Okay. Any other authorities on that
6	point?
7	MS BOLTON: My Lord, no. I simply flag, again, this is
8	likely to feature very soon, whenever we see the
9	Supreme Court judgment, because obstruction of the
10	highway ——
11	MR JUSTICE NICKLIN: Well, they'll be well out of the $$ the
12	Supreme Court will be so far obiter dicta if they're
13	deciding points like that in the Dagenham case.
14	MS BOLTON: I'm not sure, my Lord, because one of the
15	interventions was $$ from the Secretary of State on the
16	use of injunctions, which again is referred to in
17	Abortion Services as well, is the fact that that has
18	been the approach, is to use injunctions to prohibit
19	obstruction on the highway and they intervened
20	specifically on the importance of preserving that. So
21	I'm not $$ and when you look at the Abortion Services
22	case, what the Supreme Court says initially is there has
23	been a mistake in the approach to Ziegler and this isn't
24	the time for a full review of all of this, but it then
25	goes on to do a review and say where the law is going.

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1	Then this matter arose again in the Dagenham case
2	because of the intervention and it was very clear they
3	were very anxious over the impact of obstructing the
4	highway in protest law.
5	So I think it is highly likely that it will feature
6	because it was very much a focus of that intervention
7	that they gave quite some time to and the fact that
8	I think it's been indicated that there needed to be more
9	of a review, so I think this is likely to be raised.
10	MR JUSTICE NICKLIN: Right.
11	MR CURTIN: My Lord, just to confuse things, there's an
12	instance in this case $$ and it's cited against me $$
13	it's 17 July, even though there's no witnesses $$ and
14	that's the one where, by my admission, I was beating
15	a drum. That was a sort of kind of choreographed
16	between both sides, protestors and the police, to
17	negotiate how far can we go into the road, up to the
18	40 sign, "No, that's too far". So I hear of talks of
19	public nuisance. That would be the police cooperating
20	in a public nuisance.
21	MS BOLTON: I think that's an August incident, my Lord.
22	MR JUSTICE NICKLIN: I mean, it's a point that $$ I mean,
23	I don't think $$ I'm not sure it has much legal
24	relevance, but to the extent that the police struck an
25	a second state of the state of

25 accommodation about what the protestors were going to do

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- 1 and facilitated protest activity --
- 2 $\,$ MS BOLTON: We put to Mr Curtin there's no evidence on that,
- 3 my Lord. I mean, that's the difficulty . We can't deal 4 with --
- 5 MR JUSTICE NICKLIN: Ms Bolton, I can see from the video
- 6 footage that -- I would readily infer from the video
- 7 footage that that footage supports Mr Curtin's
- 8 suggestion, that there were discussions with police
- 9 liaison officers about how the protest was going to
- $10\,$ work, because the police adopt a certain policing
- 11 strategy to it, which is certainly not one which is
- 12 taking a zero tolerance attitude to obstruction of the
- 13 highway
- 14 $\,$ MS BOLTON: It may not be a zero tolerance attitude,
- 15 my Lord, and it may very well have been borne out of
- 16 necessity of getting staff home, but it doesn't mean
- 17 it's not therefore an obstruction of the highway. That
- 18 would very much depend on what was agreed with the
- 19 police and why --
- 20 MR JUSTICE NICKLIN: No, I see that.
- 21 MS BOLTON: -- and we don't have that evidence.
- 22 My Lord, I'm conscious I'm about to start harassment
- and it's 4.20. Would it be better to start that
- 24 tomorrow morning?
- 25 MR JUSTICE NICKLIN: Yes, it would.

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- 1 MS BOLTON: You can see from my submission I don't have that
- 2 much more to go so I shouldn't eat into Mr Curtin's time 3 too much.
- 4 MR JUSTICE NICKLIN: Mr Curtin, do you know how long you'll 5 be?
- 6 MR CURTIN: No, I could go all day, so I'll finish by 7 tomorrow for sure.
- 8 MR JUSTICE NICKLIN: That's fine. Have you ever listened to 9 Just a Minute on Radio 4.
- 10 MR CURTIN: Yes.
- 11 MR JUSTICE NICKLIN: So no hesitation, deviation or
- 12 repetition; all right?
- 13 MR CURTIN: Yes.
- 14 MR JUSTICE NICKLIN: I try to play that same rule with
- 15 Ms Bolton, but it applies to both of you; all right?
- 16 MR CURTIN: Okay.
- 17 MS BOLTON: My Lord, I should say, apologies if
- 18 I occasionally exhale. I have asthma and I am
- 19 struggling a little bit, which is why I'm also taking
- 20 breaths in quite a lot and stopping, so it's certainly
- no disrespect to the court.
- 22 MR JUSTICE NICKLIN: Okay, I'm sorry. That's fine.
- 23 Understood. Thank you very much.
- 24 Right. See you tomorrow at 10.30 then.
- 25 (4.23 pm)

1	(The hearing adjourned until
2	Tuesday, 23 May 2023 at 10.30 am)
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