



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

Day 15

May 22, 2023

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Monday, 22 May 2023

1  
 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

1

1 highlights.  
 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

2

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 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

4

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

5

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.  
 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.

6

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 Mr Curtin is  
 4 effectively in charge of that incident and directing  
 5 people where to stand and what to do.  
 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  
 11 say he is a senior person that others will follow and go  
 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 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  
 22 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

7

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

8

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  
 6 other side of the line. That will work out in the  
 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

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

1 and its scope is dealt with and then endorsed in the  
 2 House of Lords as a definition which they cannot improve  
 3 upon. That deals with this additional point of owning  
 4 the sub-soil, having an immediate right of possession to  
 5 the sub-soil up to the midpoint of the highway, and that  
 6 you have the reversionary interest on the materials and  
 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'll be making  
 14 submissions on why that's the case later on because of  
 15 how that right operates and where it operates to.

16 So the question would still be, would you be -- is  
 17 that still part of an interference, could it still be  
 18 part of an interference --

19 MR JUSTICE NICKLIN: Okay. Hang on a minute then. Are you  
 20 saying that tapping on the window of somebody who is  
 21 coming into the Wyton site and offering them a leaflet  
 22 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

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  
 11 been quite -- which would, in my submission, be quite  
 12 significantly impacted upon if there was --

13 MR JUSTICE NICKLIN: Well, if I grant an exclusion zone --  
 14 let's not beat around the bush -- I'm going to  
 15 extinguish that aspect of the protest right.

16 MS BOLTON: Yes.

17 MR JUSTICE NICKLIN: So in terms of the parallel analysis  
 18 between the engaged rights -- and this is even allowing  
 19 you to try -- I mean, it's not like an  
 20 Article 8/Article 10 classic parallel analysis where  
 21 there's no presumptive priority. There is a presumptive  
 22 priority with Article 10/Article 11. Yes, they both  
 23 recognise that they can be qualified by reference to the  
 24 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

1 things, the law has to find an answer with any of these  
 2 activities. Trespass is the only one that trumps ---  
 3 I mean, you don't have the right to trespass on people's  
 4 land in order to protest, so that's clear. The rest of  
 5 them take their place, as the law is required to do, to  
 6 ensure that the protest rights are not unduly interfered  
 7 with.  
 8 MS BOLTON: My Lord, in my submission, it may be more  
 9 nuanced than that when it comes to this right. We set  
 10 that out in detail later in this submission. So there  
 11 is a slightly different balance to do here.  
 12 MR JUSTICE NICKLIN: How could it be different?  
 13 MS BOLTON: Because the claimants are exercising their  
 14 private law right up to the midpoint of the highway and  
 15 that's --- they might also --- they are not accessing the  
 16 highway purely under a public law right. That is the  
 17 critical point here. So up to that point, they have  
 18 private law rights. Article 10 and 11 doesn't trump  
 19 that. There is still a balance to be ---  
 20 MR JUSTICE NICKLIN: Hold on a minute. You, the claimants,  
 21 have that right. The contractors that visit your  
 22 premises do not.  
 23 MS BOLTON: The licencees and assignors of the claimant do  
 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  
 6 part --- not entirely because the exclusion zone went  
 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  
 13 certainly could to the left and you certainly could to  
 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

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  
 20 the land of another without legal justification. The  
 21 key and well-established legal features of trespass are,  
 22 one, it is a strict liability tort, such that the  
 23 defendant need not know that they are committing  
 24 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  
 2 liability for the tort.  
 3 Further, it is well established that the extent of  
 4 the trespass is irrelevant to the finding of liability  
 5 in trespass. The same was made clear by Lord Coleridge,  
 6 Chief Justice in *Ellis v Loftus Iron Company*, (1874–75)  
 7 LR 10 CP 10, where his Lordship stated at page 12:  
 8 "It is clear that, in determining the question of  
 9 trespass or no trespass, the Court cannot measure the  
 10 amount of the alleged trespass; if the defendant place  
 11 a part of his foot on the plaintiff's land unlawfully,  
 12 it is in law as much a trespass as if he had walked half  
 13 a mile on it."  
 14 Further, it is clear from *Ellis*, a case in which  
 15 a horse's leg strayed onto neighbouring land, that  
 16 placing anything on or in land in the possession of  
 17 another is also a trespass; see also *Clerk and Lindsell*  
 18 on Torts, 23rd edition, at paragraph 18–02.  
 19 A person shall not commit a trespass where they  
 20 enter and remain on the land of another pursuant to  
 21 a licence, whether express or implied. Accordingly,  
 22 a licence is a legal justification for intrusion on the  
 23 land of another. However, a person who enters land  
 24 pursuant to a licence, but who proceeds to act in such  
 25 a way that it exceeds the scope of the licence, or who

1 remains on the land after expiration of the licence  
 2 commits a trespass."  
 3 That proposition was considered by Lord Atkin in  
 4 *Hillen v ICI Limited* [1936] AC 65 at 69, where his  
 5 Lordship stated:  
 6 "My Lords, in my opinion this duty to an invitee  
 7 only extends so long as and so far as the invitee is  
 8 making what can reasonably be contemplated as an  
 9 ordinary and reasonable use of the premises by the  
 10 invitee for the purposes for which he has been invited.  
 11 He is not invited to use any part of the premises for  
 12 purposes which he knows are wrongfully dangerous and  
 13 constitute an improper use. As *Scrutton LJ* in the  
 14 *Calgarth* has pointedly said: 'When you invite a person  
 15 into your house to use the staircase you do not invite  
 16 him to slide down the bannisters'. So far as he sets  
 17 foot on so much of the premises as lie outside the  
 18 invitation or uses them for purposes which are alien to  
 19 the invitation he is not an invitee but a trespasser,  
 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

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

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

1 upon that there is a height at which the trespass cannot  
2 reach.

3 MS BOLTON: Yes.

4 MR JUSTICE NICKLIN: What's difficult for you is actually  
5 you could fly a drone at 200 metres, but if it was  
6 a sophisticated, highly specialised and high-spec drone  
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  
12 and it's going to be a consistent theme, which is you  
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  
22 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.

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  
5 the site, at whatever height, which doesn't have the  
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 -- I accept that it's an  
12 interference --

13 MS BOLTON: Yes.

14 MR JUSTICE NICKLIN: -- but it's not a trespass. It's  
15 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.

24 MS BOLTON: Indeed, and I accept that that's the case. But  
25 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  
 25 quote, "... 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

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.  
 15 Your definition of "trespass" depends upon whether or  
 16 not anybody is annoyed or has their activity interfered  
 17 with.  
 18 MS BOLTON: In which case --- well, indeed there's security  
 19 on the site 24/7.  
 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  
 23 some of what happens with the protests, vans have gone  
 24 in in the early hours of the morning. It's capable of  
 25 being a trespass at any time.

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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.  
 5 MS BOLTON: Yes.  
 6 MR JUSTICE NICKLIN: But drone is --- I mean, if you flew  
 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,  
 20 then it is a trespass, and that is why it's my  
 21 submission that the primary position should be that you  
 22 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  
 4 point, that it does interfere. If it does, it's  
 5 trespass. And I think that that moves away from height  
 6 restriction issues and how that's proved and how that  
 7 works ---  
 8 MR JUSTICE NICKLIN: Well, of course it's more convenient  
 9 for you, but it's arguably arrogating to you a right  
 10 you'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.  
 14 MR JUSTICE NICKLIN: And your evidence of Mr Curtin flying  
 15 drones is ...?  
 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  
 2 the court did that, but again that will be a matter for  
 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  
 11 Limited [2010] EWHC 1852 (TCC) at 65 to 67, per  
 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  
 20 Lord Justice Longmore found that Articles 10 and 11 of  
 21 the European Convention on Human Rights do not include  
 22 a right to trespass when exercising those rights; see  
 23 also *High Speed Two Limited v Four Categories of Persons*  
 24 *Unknown & Monaghan and Others* [2022] EWHC 2360 (KB) at  
 25 31 per Mr Justice Julian Knowles in this regard.

32

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

33

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,  
 20 first , prima facie a landowner, whose title is not in  
 21 issue, is entitled to an injunction to restrain trespass  
 22 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  
 25 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.

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  
 5 the metal strip. However, it is submitted that  
 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  
 14 with the knowledge of the extent of the first claimant’s  
 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  
 20 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  
 25 engaging in acts of trespass such that the remedy of an

1 injunction prohibiting the same is both just and  
 2 convenient.

3 20 July 2021. The evidence of the alleged trespass  
 4 can be found in Pressick 20 at paragraph 231.3, page 108  
 5 of D11’s bundle, and in video 148. That evidence shows  
 6 Mr Curtin repeatedly crossing the metal strip and  
 7 entering the driveway. The context of this incident is  
 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  
 25 elements of the repeated trespass.

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,  
 2 shows Mr Curtin having crossed the metal strip and  
 3 pointing at a security officer of the first claimant  
 4 whilst a police officer appears to restrain him.  
 5 The cross–examination of Mr Curtin in relation to  
 6 this incident is recorded in the transcript at Day 11,  
 7 page 63, line 3, to page 72, line 18. The evidence of  
 8 Ms Pressick clearly establishes that a trespass was  
 9 committed by Mr Curtin. Further, Mr Curtin accepted the  
 10 constituent elements of the trespass during  
 11 cross–examination in that he went up to the gate and was  
 12 not invited on to the first claimant’s land; Day 11,  
 13 page 63, lines 19 to 23.  
 14 As to aggravating features of the trespass,  
 15 Mr Curtin, in cross–examination, did not accept that he  
 16 was being restrained by the police officer, that being  
 17 the evidence of Ms Pressick, transcript Day 11, page 68,  
 18 line 19, to page 69, line 10. However, Mr Curtin did  
 19 not challenge the evidence of Ms Pressick when given the  
 20 opportunity to do so.  
 21 The claimants were mindful of Mr Curtin’s status as  
 22 a litigant in person and the court’s view that  
 23 Mr Curtin’s failure to challenge Ms Pressick’s evidence  
 24 should relate only to the question of the weight to be  
 25 placed on the evidence. With that in mind, it is

1 submitted that, in the circumstances where Mr Curtin  
 2 was, one, provided only with the sections of the  
 3 particulars of claim that related to him, two, provided  
 4 with an evidence bundle that related only to him and,  
 5 three, only engaged with the trial at a very late stage,  
 6 submitting his own evidence after the commencement of  
 7 the trial, substantial weight should be placed on  
 8 Mr Curtin’s failure to challenge Ms Pressick’s evidence.  
 9 Mr Curtin –  
 10 MR JUSTICE NICKLIN: Also to be balanced with that is  
 11 Ms Pressick doesn’t have any personal knowledge of these  
 12 things. So she’s in no better position than me to  
 13 interpret the evidence of the videos.  
 14 MS BOLTON: Mr Curtin had been given every reasonable  
 15 opportunity to challenge Ms Pressick’s evidence and did  
 16 not do so. Further, when asked by the court if he could  
 17 remember the nature of the exchange between himself and  
 18 the police officer, Mr Curtin could not remember;  
 19 day 11, page 70, lines 9 to 13.  
 20 It is in the context of this incident that  
 21 Mr Curtin, in cross–examination, sought to renege on his  
 22 characterisation of the metal strip as a force field not  
 23 to be crossed. For the reasons set out above, it is  
 24 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  
 25 line, painted on 4 August 2022 by the Local Highway

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 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)

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

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  
 25 movement of suppliers and supplies at the Wyton site and

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

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  
 13 drone footage and posting the same on Facebook is to  
 14 monitor 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;  
 22 Day 12, page 102 lines 6 to 12.  
 23 When asked whether the published drone footage  
 24 provides anybody that sees it with an ability to better  
 25 understand the Wyton site, Mr Curtin replied, 'I guess

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

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  
 25 and the staff captured in the footage would have been

1 identifiable had they not covered their faces; Day 12,  
 2 page 107, lines 3 to 11.  
 3 Two, as to exhibit SP28/232, at page 331 of D11's  
 4 bundle, 16 June 2022, Mr Curtin accepted that the  
 5 footage was captured from an altitude of 50 metres and  
 6 that the focus was "crystal". Day 12, page 115,  
 7 line 16, to page 116, line 5.  
 8 Mr Curtin was also able to assist the court with the  
 9 meaning of the data displayed on the drone footage, but  
 10 was unable to confirm whether he was flying the drone on  
 11 this occasion; Day 12, page 115, lines 23 to 24, and  
 12 Day 12, page 117, line 21, to page 118, line 17.  
 13 Three, as to video 929, 14 December 2022, again  
 14 Mr Curtin was unable to comment on whether he was flying  
 15 the drone, but did confirm that the drone was taking  
 16 footage from a low altitude; Day 12, page 122, lines 8  
 17 to 10.  
 18 Defences.  
 19 For the reasons set out above the claimants do not  
 20 accept that Mr Curtin did not know that the driveway was  
 21 incorporated within the first claimant's land. In any  
 22 event, as is set out above, trespass is a strict  
 23 liability tort and a defendant need not know that they  
 24 are committing a trespass to be liable for the same.  
 25 As set out above, the exercise of Article 10 and

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  
 6 20 July 2021, which he has himself stated in  
 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  
 12 page 5, lines 20 to 22. That assertion is not  
 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.

25 Mr Curtin, in cross-examination, accepted that he

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, 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

1 cross-examination.

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  
 6 injunctive relief and the first claimant is in any event  
 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  
 11 4 September 2021; two, the alleged incidents of driveway  
 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  
 19 1990, in which 82 dogs were stolen from the site; four,  
 20 Mr Curtin's expressed desire to lay flowers at the gate  
 21 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.

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 .

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 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



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  
 5 materials and scrapings and the sub-soil.  
 6 That description accurately captures the first  
 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.  
 21 Accordingly, there is no protest right that can  
 22 justify interfering with the access to the highway.  
 23 There is no right to obstruct, slow down or hinder the  
 24 passage of vehicles exiting the Wyton site.  
 25 Further, the exclusion zone, provided it is worded

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 Evidence.  
 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  
 20 about a ritual. Mr Curtin explained that the ritual was  
 21 the stopping or slowing down of each car as it attempted  
 22 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  
 25 as "education".

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  
 5 clearly believes in his actions. Without an injunction  
 6 the ritual will continue and interference with the  
 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  
 25 example, as the first claimant's staff -- sorry, I'll

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.

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

1 right to access the highway to intercept the staff cars  
 2 and deliver his protest message.

3 Mr Curtin does not, however, have the right to  
 4 interfere with this important private law right. It is  
 5 plain that he considers that once you are engaged in  
 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.

14 Whilst it is not necessary to go through every  
 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  
 20 statements in regard to this incident. He suggested  
 21 that he would have moved the car if asked, but then went  
 22 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

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  
 6 common law right to access the highway. The first  
 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  
 16 shows the incident. Mr Curtin suggested that he did not  
 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  
 22 standing in front of the vehicle. He may be allowing  
 23 another protestor to get her dog out of the way but he  
 24 is not simply protecting the dog, he is holding up the  
 25 vehicle. He then moves to the side of the vehicle and

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

1 incident, to which he replied, "It's a health and safety  
 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  
 6 highway, but also that his actions risked causing an  
 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.  
 20 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

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.  
 6 Mr Curtin accepts that he can be heard shouting at the  
 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 way".  
 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?  
 14 MS BOLTON: There's audio. There's no evidence of the van  
 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,  
 20 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  
 22 signaling to the carriageway. He wanted to leave.  
 23 MR JUSTICE NICKLIN: And Mr Curtin's evidence about him  
 24 making some sort of gesture which inflames the  
 25 protestors.

1 MS BOLTON: There's no evidence of that, my Lord.  
 2 MR JUSTICE NICKLIN: There is his evidence about it.  
 3 There's no evidence from you and the van driver, that's  
 4 true.  
 5 MS BOLTON: My Lord, none of that would justify what was  
 6 happening.  
 7 MR JUSTICE NICKLIN: Never mind about justifying it.  
 8 MS BOLTON: The incident becomes inflamed, as Mr Curtin did  
 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  
 14 might be short-lived in the sense of it's a number of  
 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.  
 22 MR JUSTICE NICKLIN: The protestors wanted to give him  
 23 a leaflet?  
 24 MS BOLTON: Yes.  
 25 MR JUSTICE NICKLIN: The driver refused it?

1 MS BOLTON: Yes.  
 2 MR JUSTICE NICKLIN: Matters escalated?  
 3 MS BOLTON: Yes.  
 4 MR JUSTICE NICKLIN: The drive had to reverse?  
 5 MS BOLTON: Yes.  
 6 MR JUSTICE NICKLIN: Eventually he left?  
 7 MS BOLTON: Yes.  
 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  
 20 Mr Curtin is referring to.  
 21 MS BOLTON: My Lord, indeed --  
 22 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  
 2 highway. There can be no justification for incidents of  
 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 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 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

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.

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.

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

1 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."  
 25 The parties in Ineos at the High Court determination

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:

81

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

82

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  
 6 approved in the Reference by the Re Abortion Services  
 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  
 5 described as de minimis. There is no defence from  
 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.

20 Ziegler is relevant in the context of the claimants'  
 21 claim brought for obstruction of the highway, and the  
 22 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  
 25 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 disruption and whether it is intentional are relevant  
 11 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

1 non—exhaustive list in Ziegler of factors to be  
 2 considered when evaluating proportionality, as set out  
 3 by Lord Neuberger, Master of the Rolls, in City of  
 4 London Corporation v Samede [2012] EWCA Civ 160, [2012]  
 5 All ER 1039 at paragraphs 39 to 41.  
 6 Paraphrasing that content, those factors are, one,  
 7 the extent to which the continuation of the protest  
 8 would breach domestic law; the importance of the precise  
 9 location to the protestors; the duration of the protest;  
 10 the degree to which the protestors occupy the land; the  
 11 extent of the actual interference the protest causes to  
 12 the rights of others, including the property rights of  
 13 the owners of the land and the rights of any members of  
 14 the public; whether the views giving rise to the protest  
 15 relate to very important issues and whether they are  
 16 views which many would see as being of considerable  
 17 breadth, depth and relevance; and whether the protestors  
 18 believed in the views that they were expressing.  
 19 For context, in Ziegler, the protestors were opposed  
 20 to the arms trade. They held a peaceful protest at the  
 21 Defence and Security International Arms Fair at the  
 22 ExCel Centre in London by laying down on one side of and  
 23 locking onto an approach road leading to the  
 24 ExCel Centre for approximately 90 minutes before they  
 25 were removed by police officers. The protest did not

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

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

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,

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 provisions 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,

1 according to the domestic classification of the measures  
 2 as civil or criminal. That is illustrated by the fact  
 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  
 24 excuse in the definition of an offence necessarily means  
 25 that a proportionality assessment in respect of

1 Convention rights is appropriate; paragraph 58 of the  
 2 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.  
 25 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

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 the point. 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  
 13 has to ask those questions.  
 14 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  
 21 established and whether that exercise can be deemed to  
 22 have 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

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  
 5 rights in Articles 10 or 11? If so, is there an  
 6 interference by a public authority with that right? If  
 7 there is an interference, is it prescribed by law? If  
 8 so, is the interference in pursuit of a legitimate aim  
 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  
 16 is proportionate. One, is the aim sufficiently  
 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  
 20 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

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 Lloyd'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*  
 20 (No 2) at 428 and *Southport Corporation v Esso* [1954]  
 21 2 QB 182 at 194 and 197.  
 22 The approach to particular damage and the ability  
 23 for it to constitute general damages rather than  
 24 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.  
 6 The particular damage of inconvenience and delay are  
 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  
 20 being distressed by "people standing in the road,  
 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  
 23 being surrounded as "very worrying"; Day 8, page 75,  
 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.  
 5 MR JUSTICE NICKLIN: Right. Which are the examples of  
 6 Mr Curtin leaving -- not the access road. This is the  
 7 public nuisance of obstruction of the highway.  
 8 MS BOLTON: My Lord, sorry, "not the access road", did you  
 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  
 14 we looked -- and indeed in cross-examination we looked  
 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?  
 22 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.

1 MR JUSTICE NICKLIN: Just so I'm clear, you're saying the  
 2 authorities permit the recovery for mere distress?  
 3 MS BOLTON: Yes. Yes, providing it is particular to them  
 4 and not --  
 5 MR JUSTICE NICKLIN: What's the best case that demonstrates  
 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  
 22 pretty limited.  
 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.  
 5 MR JUSTICE NICKLIN: Right. Let's have a look at the best  
 6 authority on that point.  
 7 MS BOLTON: I think, my Lord, we'd probably have to go  
 8 through all them because they all cover things slightly  
 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:  
 20 "In the present case the damage in question is  
 21 damage to property [as read]."  
 22 MS BOLTON: My Lord, yes, but the example being given is to  
 23 what is particular damage.  
 24 MR JUSTICE NICKLIN: "In the context of deciding what is the  
 25 difference between that and consequential damage, which

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].”  
 6 MS BOLTON: Yes, my Lord, but we don't say that these  
 7 damages are fleeting --- these losses are fleeting at  
 8 all.  
 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 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

101

1 as to why it comes into the particular damage category,  
 2 which is what was being recognised they would have to  
 3 show 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 Employee Q eventually left their job as a result of the  
 11 conduct of the protestors, which includes Mr Curtin, and  
 12 that's the Pressick 20, paragraph 348, and Pressick 22,  
 13 paragraph 7.  
 14 The next head of particular damage would be extra  
 15 security staff to assist employees ---  
 16 MR JUSTICE NICKLIN: Well, hang on. We haven't finished  
 17 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?

102

1 MS BOLTON: Well, Employee Q, I accept, may be difficult now  
 2 because she's left. At the time of pleading it she  
 3 hadn't but I accept that that may make that head of loss  
 4 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 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 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?

103

1 MS BOLTON: 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

104

1 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  
 4 towards the staff; the extra security staff who assist  
 5 employees accessing and exiting the highway.  
 6 MR JUSTICE NICKLIN: But your employees, for no doubt very  
 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.  
 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 £27,660.  
 22 MR JUSTICE NICKLIN: That can't all be attributed to  
 23 Mr Curtin.  
 24 MS BOLTON: Well, no, in part it's attributable to Mr Curtin  
 25 but the loss suffered is still substantial. It's as

105

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.  
 6 MS BOLTON: Well, no, my Lord, because the delay that  
 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  
 22 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

106

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  
 5 you the precise parts of it but I think it's, if I'm  
 6 right -- bear with me, my Lord, because I'm fairly sure  
 7 it's cited. Pressick 20, paragraphs 368 and 376. So  
 8 that deals with the losses suffered --  
 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.  
 12 MR JUSTICE NICKLIN: 36 ...? What did you say?  
 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.  
 19 MR CURTIN: Is this 368 in mine?  
 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

107

1 5 August?  
 2 MS BOLTON: Yes.  
 3 MR JUSTICE NICKLIN: And that's down to Mr Curtin  
 4 obstructing vehicles?  
 5 MS BOLTON: Mr Curtin and others, yes. They couldn't get  
 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.  
 20 This is part of Ms Pressick's evidence.  
 21 MR JUSTICE NICKLIN: Where does she explain this in her  
 22 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 --

108

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  
 9 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  
 17 too much control over the front of the site . That's the  
 18 level 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  
 6 over and above that suffered by other highways users, as  
 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  
 20 conducted. The same evidences the impact the protests  
 21 are having on the first claimant's staff , with four  
 22 members of staff citing the protests as either the sole  
 23 or a contributing factor to their resignation .  
 24 Further, Employee H gave evidence of having dreams  
 25 about the protestors, and specifically Mr Curtin.

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  
 5 they would dream of Mr Curtin because he was "very loud  
 6 and abusive"; transcript Day 7, page 104, line 14.  
 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  
 20 me. If there were multiple people standing away from  
 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  
 24 distresses me."  
 25 Transcript Day 5, page 95, lines 15 to 20.

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

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.

25 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  
 24 highway and with uninterrupted passage, as is the test  
 25 in Jones. The one-mile prohibition should enable the

117

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  
 5 the wider road network. Any less of a prohibition  
 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  
 13 outside the Wyton site, it is likely that Mr Curtin will  
 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  
 20 claimants and Mr Curtin. Mr Curtin is entitled and able  
 21 to protest lawfully and make his views known to the  
 22 claimants, but without obstructing the highway, whilst  
 23 allowing the claimants to freely pass along the highway  
 24 and to go about their business entering and exiting the  
 25 Wyton site.

118

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

119

1 a public nuisance --

2 MS BOLTON: Yes.

3 MR JUSTICE NICKLIN: -- in order for you to bring a civil  
 4 claim in relation to it --

5 MS BOLTON: Yes.

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  
 20 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  
 24 in the morning but no cars are present and they get up,  
 25 then no public nuisance has been caused.

120

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 --  
 24 MR JUSTICE NICKLIN: I would have thought it was the other  
 25 way around.

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

1 passing and repassing. It doesn't have to be everybody.  
 2 MR JUSTICE NICKLIN: Well, what I -- but it's not everybody.  
 3 What it is is individuals.  
 4 MS BOLTON: Yes, but that's --  
 5 MR JUSTICE NICKLIN: You see, I took this test. I followed  
 6 out of -- Ineos, paragraph 46, Mr Justice Morgan  
 7 referred to the case of R v Rimmington and Goldstein,  
 8 where he referred to paragraph 7 of that judgment --  
 9 this is the House of Lords. He referred to  
 10 paragraph 7 --  
 11 MS BOLTON: My Lord, we've been given a clear pointer on the  
 12 approach --  
 13 MR JUSTICE NICKLIN: -- and 44. And at 44 Lord Rodger says  
 14 this:  
 15 "The law of nuisance and of public nuisance can be  
 16 traced back for centuries. The answer to the questions  
 17 confronting the House are not to be found in the details  
 18 of that history ... Later writers tend to elide the  
 19 distinction between common and public nuisances but  
 20 throughout it has remained an essential characteristic  
 21 of a public nuisance that it affects the community,  
 22 members of the public as a whole, rather than merely  
 23 individuals [as read]."  
 24 Now, why I regard that as important is that the ten  
 25 people standing on the highway but not on the

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

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  
 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 re-passing, 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 whether  
 23       or not it is an obstruction of the highway. It doesn't  
 24       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,

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  
 24       that part of the road.  
 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  
 15 boundary lies between obstruction of the highway and  
 16 public nuisance.  
 17 MS BOLTON: My Lord, yes.  
 18 MR JUSTICE NICKLIN: Which is the best authority that helps  
 19 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 --  
 23 MR JUSTICE NICKLIN: Right. Let's look at Jones.  
 24 MS BOLTON: Sorry, my Lord, I'm just going back to the part  
 25 of our written submissions with all the references in

129

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  
 5 of the report and it's 309 of the bundle.  
 6 MR JUSTICE NICKLIN: Yes.  
 7 MS BOLTON: First of all, my Lord, looking at the page --  
 8 the bottom of page 306 actually.  
 9 MR JUSTICE NICKLIN: 306?  
 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  
 22 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

130

1 that you've taken me to the section where they've  
 2 already said that they were on the verge and not causing  
 3 a public nuisance?  
 4 MS BOLTON: My Lord, yes, but the point is it goes through  
 5 how you assess whether it is a reasonable use and  
 6 whether it amounts to an obstruction of the highway and  
 7 whether it amounts to a nuisance.  
 8 MR JUSTICE NICKLIN: Right. Well, whether it amounts to  
 9 a nuisance surely -- a public nuisance is a question of  
 10 fact going back to the point of what 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.  
 16 MR JUSTICE NICKLIN: I mean, to my understanding, a public  
 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

1 100 people lie down in a B-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?  
 4 MS BOLTON: No.  
 5 MR JUSTICE NICKLIN: Right.  
 6 MS BOLTON: My Lord, in my submission, on the Jones case,  
 7 though, it really is that from page 254 all the way  
 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.  
 13 MR JUSTICE NICKLIN: Well, 308 of the bundle, just below.  
 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  
 20 right of free passage ... Such an assembly would  
 21 probably also amount to a public nuisance and today  
 22 involve the commission of the offence of obstruction of  
 23 the public highway contrary to section 137(1) ... such  
 24 an assembly would probably also amount to unreasonable  
 25 user of the highway [as read]."

132

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.

1 MR JUSTICE NICKLIN: Fine. Then we move into the more  
 2 difficult case. I'm looking for the -- if there's  
 3 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,

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

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 --

1 MR JUSTICE NICKLIN: The consequence of that submission is  
 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.  
 6 MS BOLTON: The difference is this: if Anglian Water --- if  
 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 ---  
 10 MR JUSTICE NICKLIN: Hang on. If it stood on its own ---  
 11 MS BOLTON: If it was one incident --- if that was the only  
 12 incident we had before the court and we were saying,  
 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.  
 22 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  
 25 incident. One.

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

1 3.00 am example.  
 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.  
 6 What's the difference between that and the 3.00 am  
 7 example?  
 8 MS BOLTON: I guess the difference with the 3.00 am example,  
 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 just ---  
 14 MR JUSTICE NICKLIN: No, no, leave aside remedy. Let's just  
 15 deal with the tort. Is it a tort or not?  
 16 MS BOLTON: In my submission, where they have obstructed the  
 17 Anglian Water person, yes.  
 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 ---  
 22 MR JUSTICE NICKLIN: Okay, leave aside --- it probably is an  
 23 obstruction of the highway but it's not a public  
 24 nuisance because nobody has been obstructed, in fact.  
 25 MS BOLTON: Yes.

1 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 ---  
 6 MS BOLTON: Yes.  
 7 MR JUSTICE NICKLIN: --- therefore it's an individual. It's  
 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.  
 14 MR JUSTICE NICKLIN: And that's the theoretical aspect to  
 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  
 20 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  
 22 a result of the obstruction because it does spread out  
 23 into the road --- into the carriageway.  
 24 But, in my submission, if you come off of the  
 25 claimants' land and you are onto the highway and you are

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.

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 accommodation about what the protestors were going to do

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  
 23 and it's 4.20. Would it be better to start that  
 24 tomorrow morning?  
 25 MR JUSTICE NICKLIN: Yes, it would.

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  
 21 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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10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

145

1 INDEX  
2  
3 Closing submissions by MS BOLTON .....2  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

146

147



















112 (1) 51:11  
 113 (1) 51:11  
 114 (1) 116:4  
 115 (2) 52:6,11  
 1159 (1) 45:25  
 116 (1) 52:7  
 117 (1) 52:12  
 118 (2) 46:5 52:12  
 12 (29) 17:7 36:14 39:16  
 45:9 46:14,22 47:2,2  
 49:14,19,22,22 50:1  
 51:11,19 52:1,6,11,12,16  
 55:21 62:13 63:24 64:4  
 65:3 66:19 73:18,18,22  
 121 (2) 51:4,19  
 122 (1) 52:16  
 124 (2) 46:15 51:4  
 1248 (1) 60:15  
 13 (17) 36:16 42:19  
 44:7,12,13,25 45:18,19  
 47:14 48:4 62:11,15 63:12  
 65:10 68:10 69:8 97:18  
 133 (2) 107:17,20  
 136 (1) 69:3  
 137 (4) 87:8,21,24 89:10  
 1371 (3) 79:20 80:5 132:23  
 139 (1) 97:18  
 14 (11) 45:17 47:15,19 49:19  
 51:13 52:13 66:25,25  
 69:18 73:23 111:6  
 143 (1) 88:20  
 145 (1) 100:10  
 146 (1) 47:19  
 147 (3) 45:9 47:14,19  
 148 (2) 39:5 69:18  
 15 (6) 51:20 64:10 78:1  
 97:22 111:25 116:3  
 150 (1) 51:23  
 1504 (1) 65:10  
 154 (1) 55:21  
 16 (9) 49:19 52:4,7 55:21  
 56:14 63:24 64:4 66:25  
 97:18  
 160 (1) 86:4  
 17 (12) 36:16 38:22 44:8  
 45:4,5 47:23 51:7 52:12  
 53:11 62:12 78:4 142:13  
 170 (1) 45:5  
 1701 (2) 16:5 44:7  
 17010 (1) 16:6  
 1702 (1) 44:8  
 1703 (1) 36:1  
 1704 (1) 16:12  
 1705 (1) 36:2  
 1706 (1) 44:10  
 1707 (1) 44:11  
 1708 (1) 44:12  
 1709 (1) 44:14  
 173 (2) 48:17 100:14  
 1731 (1) 78:2  
 17316 (1) 78:5  
 17317 (1) 78:2  
 1735 (1) 78:7  
 177 (1) 97:7  
 1773 (1) 89:6  
 18 (9) 3:6 37:4 41:7 47:23  
 48:10 53:11 55:22 97:24  
 118:11  
 1802 (1) 17:18  
 1811 (1) 62:9  
 18111 (1) 62:10  
 182 (1) 96:21  
 184 (1) 119:21  
 1852 (1) 32:11  
 187475 (1) 17:6  
 19 (6) 38:22 39:16 41:13,18  
 97:18 118:11  
 1903 (1) 88:7  
 1935 (1) 56:13  
 1936 (1) 18:4  
 194 (1) 96:21  
 1954 (1) 96:20  
 1957 (1) 20:9  
 1963 (1) 96:15  
 1965 (1) 88:10  
 197 (2) 96:21 132:18

1976 (1) 18:25  
 1978 (1) 20:6  
 1980 (4) 60:24 79:19 80:4  
 87:8  
 1981 (1) 114:1  
 1983 (1) 97:3  
 1985 (1) 88:11  
 1986 (1) 88:20  
 1990 (1) 55:19  
 1997 (1) 2:17  
 1999 (2) 80:18 88:22  
 2  
 2 (29) 20:9 36:15 37:20  
 39:16 45:4 53:11 78:25  
 80:10,18,23 84:15 85:24  
 87:15 88:8,22 95:9  
 96:8,14,20,21,25 97:3,18  
 99:15 100:9,16 114:9  
 117:15 146:3  
 20 (23) 35:10,25 36:3 38:17  
 39:3,4 40:24 43:13 46:5  
 48:4 51:3,20 53:6,9,12  
 54:2 55:10,24 97:22  
 102:12 107:7 111:25  
 116:19  
 200 (4) 23:5 26:4 27:7 29:8  
 2000 (3) 33:12 96:8,25  
 2001 (1) 78:15  
 2004 (1) 19:5  
 2005 (1) 117:6  
 2010 (1) 32:11  
 2012 (4) 60:15 78:22 86:4,4  
 2013 (2) 13:14 56:10  
 2017 (1) 78:19  
 2018 (3) 34:24 89:6,6  
 2019 (3) 18:23 32:18,19  
 2021 (47) 33:7 35:10,10,25  
 36:2 37:12 38:17 39:3  
 40:23 43:1  
 44:7,8,9,11,12,13,25  
 45:5,10,14,18,19 51:23  
 53:6,9 54:2 55:10,11,24  
 62:11,12,13,13,14,15,16  
 65:10,10 66:17 67:14  
 68:5,10 69:8,21 84:7,10  
 122:11  
 2022 (14) 32:24 43:13,25  
 51:7,13 52:4,13 80:23  
 84:7,11,15 85:23 87:15  
 91:4  
 2023 (7) 1:1 25:11 80:23  
 84:15 85:24 87:15 145:2  
 208 (1) 77:23  
 21 (2) 52:12 58:6  
 22 (16) 1:1 2:24 37:3 45:9  
 53:12 56:14 62:16 65:10  
 69:3,21 78:3 89:7 97:18  
 102:12 107:25 110:16  
 23 (8) 41:13 45:12 50:8  
 52:11 69:3 84:7,11 145:2  
 2313 (1) 39:4  
 2360 (1) 32:24  
 238 (1) 88:11  
 23rd (1) 17:18  
 24 (8) 39:14 44:25 47:20  
 49:14 51:11 52:11 90:11  
 117:14  
 240 (3) 45:10 80:18 88:22  
 242 (1) 88:12  
 244 (1) 88:12  
 247 (2) 29:19 40:24  
 25 (5) 46:23 62:13 66:17  
 73:23 130:4  
 250 (1) 67:21  
 252 (1) 67:21  
 253 (1) 45:14  
 254 (6) 80:25 130:4,4,17,22  
 132:7  
 255 (4) 80:25 88:24 92:14  
 130:23  
 257 (2) 81:14 134:11  
 258259 (1) 88:22  
 261 (1) 67:15  
 263 (1) 60:24

27 (4) 51:23 63:12 84:12  
 89:18  
 27660 (1) 105:21  
 28 (1) 78:3  
 280 (2) 81:23 88:10  
 281c (1) 81:23  
 284 (1) 88:10  
 285 (2) 44:4 46:5  
 289 (2) 68:20,24  
 29 (2) 84:12 90:6  
 290 (3) 45:18 68:19 88:23  
 294 (2) 45:18 68:19  
 2945 (1) 78:19  
 295 (1) 130:2  
 3  
 3 (9) 41:7 47:23 51:11 52:2  
 79:2,24 80:11 90:14 91:19  
 30 (2) 60:15 90:16  
 300 (13) 45:19 120:23  
 131:11 132:1 136:15  
 139:1,2,3,6,8,9,18,20  
 301 (2) 45:19 69:10  
 306 (2) 130:8,9  
 308 (1) 132:13  
 309 (1) 130:5  
 31 (1) 32:25  
 312 (1) 132:9  
 313 (1) 33:12  
 3139 (1) 34:25  
 319 (1) 51:3  
 32 (5) 80:23 84:15 85:23  
 87:15 116:5  
 320 (1) 115:12  
 325 (2) 78:22 79:9  
 328 (1) 41:1  
 33 (6) 62:10 80:23 84:15  
 85:24 87:15 117:14  
 331 (1) 52:3  
 334 (3) 20:9 72:9 73:11  
 335 (1) 115:11  
 336 (2) 51:3 115:14  
 338 (1) 33:12  
 34 (1) 117:14  
 348 (1) 102:12  
 357 (1) 33:7  
 36 (2) 32:19 107:12  
 368 (7) 104:12,15  
 107:7,11,18,19 109:25  
 37 (6) 32:19 60:15 62:10  
 114:1,6 119:22  
 372 (2) 107:22 109:23  
 376 (4) 107:7,11,18 109:25  
 38 (1) 119:22  
 39 (1) 86:5  
 394 (1) 107:23  
 4  
 4 (21) 32:19 35:10 36:2,23  
 37:12 38:22 40:23 43:1,25  
 47:14,19 48:4,9,17 54:2  
 55:11 64:5 73:18 79:4  
 97:17 144:9  
 40 (5) 2:25 16:2 56:10 91:15  
 142:18  
 402 (1) 96:15  
 408 (3) 84:8,11 91:4  
 41 (5) 86:5 92:19 96:25  
 104:13,16  
 42 (2) 78:19 111:1  
 420 (1) 143:23  
 423 (1) 144:25  
 428 (3) 96:20 102:23 104:9  
 43 (1) 35:4  
 430 (2) 96:15 100:15  
 431 (1) 100:19  
 44 (7) 78:20 79:8 97:1  
 104:16,19 123:13,13  
 46 (4) 19:5 78:20 97:5 123:6  
 479 (1) 20:6  
 485 (2) 20:7,15  
 486 (1) 20:7  
 488 (1) 20:16  
 5

5 (10) 36:23 45:13 48:17  
 49:15 50:1 52:7 53:12  
 97:21 108:1 111:25  
 50 (4) 23:9 27:7 28:18 52:5  
 500 (1) 26:6  
 50100200 (1) 28:16  
 509 (1) 97:3  
 515 (1) 32:19  
 57 (1) 91:21  
 58 (1) 92:1  
 597 (1) 78:16  
 6  
 6 (6) 36:23 44:9 45:10 48:9  
 49:22 90:14  
 62 (1) 116:19  
 63 (3) 37:3 41:7,13  
 64 (1) 78:20  
 65 (5) 18:4 32:11 64:5 78:20  
 80:3  
 657 (1) 51:8  
 668 (1) 89:6  
 67 (1) 32:11  
 672 (1) 18:25  
 68 (4) 37:4,20 41:17 43:13  
 69 (2) 18:4 41:18  
 692 (1) 58:20  
 693 (1) 58:20  
 698 (2) 46:6 47:5  
 7  
 7 (7) 36:8 39:14 46:15  
 102:13 111:6 123:8,10  
 70 (2) 42:19 85:4  
 700 (2) 96:8,25  
 71 (2) 36:8 64:9  
 72 (4) 41:7 63:24 64:3 85:25  
 724 (1) 68:5  
 74 (1) 47:23  
 75 (2) 48:4 97:23  
 76 (1) 48:4  
 77 (2) 43:14 48:9  
 78 (1) 44:2  
 79 (1) 48:9  
 8  
 8 (11) 20:18 44:11 45:14,17  
 47:2 52:16 62:14 67:14  
 68:5 97:23 118:11  
 82 (6) 3:8 46:15 49:17 55:19  
 88:8,11  
 84 (1) 43:14  
 85 (1) 88:20  
 853 (1) 34:17  
 858f (1) 34:17  
 86 (1) 43:14  
 87 (1) 88:8  
 88 (1) 46:22  
 89 (3) 46:23 47:2 88:8  
 8article (1) 12:20  
 9  
 9 (8) 36:14 37:20 39:14  
 42:19 44:3 48:17 64:10  
 90:25  
 90 (1) 86:24  
 91 (1) 33:7  
 92 (1) 33:7  
 924 (1) 45:14  
 929 (2) 51:13 52:13  
 93 (1) 45:3  
 94 (2) 45:4,12  
 95 (3) 45:13 97:21 111:25  
 97 (1) 45:17  
 99 (2) 36:14 49:14