

OPUS2

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

Day 2

April 26, 2023

Opus 2 - Official Court Reporters

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1 Wednesday, 26 April 2023
 2 (10.30 am)
 3 MR JUSTICE NICKLIN: Right. Ms Jaffray, can you hear me?
 4 MS JAFFRAY: I can, yes.
 5 MR JUSTICE NICKLIN: Good. Thank you very much. We're
 6 going to take a break in the morning because we've got
 7 the transcribers, but I think -- are we ready to start,
 8 Ms Bolton?
 9 MS BOLTON: My Lord, we are. My Lord, may I just check how
 10 your Lordship wishes to proceed this morning? We still
 11 have some housekeeping matters as well as opening.
 12 Would you prefer me to deal with the housekeeping
 13 matters first?
 14 MR JUSTICE NICKLIN: Yes, go on then.
 15 Housekeeping
 16 MS BOLTON: My Lord, first of all, obviously Mr Curtin has
 17 now filed and served witness evidence. He obviously
 18 needs to make an application to you, my Lord, orally for
 19 the admission of that. My Lord very briefly, we're not
 20 opposing the admission of his witness evidence save the
 21 exhibit C because that is a video. I think it's a video
 22 that was obtained by putting a camera on a stick through
 23 the MBR air vents, but we're not sure. We're not sure
 24 if it's Mr Curtin's video. He needs to explain who the
 25 video was made by because it's covert. And the second

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1 half of that video looks to be a recording from
 2 a laboratory some time ago that's nothing to do with the
 3 claimant. It's obviously quite upsetting but it's
 4 nothing to do with the claimants in these proceedings or
 5 their laboratories or anything that they have been
 6 involved in.
 7 So we say there's -- if Mr Curtin wishes to refer to
 8 the newspaper clippings of the various parts of the
 9 protest, we don't have any objection to that, but that
 10 particular video would appear, one, to be trespass, if
 11 we've understood how it's been obtained, and, two, it
 12 needs a statement from the maker of the covert
 13 recording. So that's the only thing we object to, but,
 14 generally, we don't make any objection to Mr Curtin's
 15 relief from sanctions application.
 16 MR JUSTICE NICKLIN: Why does the fact that it's been
 17 obtained by trespass, assuming for the purposes of these
 18 arguments that it has -- why does that make any
 19 difference to the admissibility of the evidence?
 20 MS BOLTON: My Lord, it doesn't. It's the fact that who
 21 made the covert recording.
 22 MR JUSTICE NICKLIN: Why does that matter?
 23 MS BOLTON: That's Civil Evidence Act, my Lord. So I'm
 24 simply saying we just need to know who the maker is --
 25 it may be Mr Curtin. It may have been that camera on

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1 the pole that has been referred to previously in the
 2 evidence. I suspect it is because it's quite --
 3 MR JUSTICE NICKLIN: Why is it hearsay? Why is it hearsay?
 4 MS BOLTON: Well, there's no notice again, my Lord.
 5 MR JUSTICE NICKLIN: Why is it hearsay? Why do you say it's
 6 hearsay evidence?
 7 MS BOLTON: Well, my Lord --
 8 MR JUSTICE NICKLIN: It's real evidence.
 9 MS BOLTON: But from where? It's being said it's MBR Acres,
 10 so is that the case --
 11 MR JUSTICE NICKLIN: Well, your first submission, which was
 12 it was obtained by trespass, was based upon, I assumed,
 13 the acceptance that it was a video of your premises.
 14 MS BOLTON: No, we take the view, my Lord, that if it is
 15 a video of our premises, it's the one that was on the
 16 stick which was put through the vents, but if it's not,
 17 then who made this video and how because it's not clear.
 18 That's all we're asking for to be clarified there. The
 19 second part of our objection is the second part has
 20 absolutely nothing to do with MBR Acres at all.
 21 MR JUSTICE NICKLIN: That's fine. I understand that bit.
 22 MS BOLTON: That's all we're asking for clarification on.
 23 If Mr Curtin wishes to give that clarification, then
 24 fine, but if he doesn't, it's not clear where that
 25 evidence has come from, how it has been obtained and

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1 whether or not it's our facility. If it's our facility,
 2 it's our facility because it's come through the air
 3 vents, we can work that out and I'm not going to make
 4 a fuss about that.
 5 MR JUSTICE NICKLIN: Well, surely you can recognise the
 6 premises from the video. I haven't seen it.
 7 MS BOLTON: Sorry, I've been told it's -- I might have the
 8 attachment wrong. Let me just check.
 9 MR JUSTICE NICKLIN: Is it E?
 10 MS BOLTON: I think that's correct, my Lord. I'm just
 11 checking.
 12 MR JUSTICE NICKLIN: Right.
 13 MS BOLTON: Yes, apologies, my Lord, it's E. It's number 7.
 14 MR JUSTICE NICKLIN: Wasn't I sent this this morning?
 15 MS BOLTON: My Lord, apologies. You don't have the bundle.
 16 May I hand up the bundle? It's Mr Curtin's evidence.
 17 MR JUSTICE NICKLIN: Oh, right. I think I got an electronic
 18 version of it this morning. (Handed)
 19 Thank you. I had better watch it if we're going
 20 to ...
 21 MS BOLTON: It's narrated by Mr Curtin, my Lord, and I'm
 22 assuming it's a recording by Mr Curtin, but if it's not,
 23 then that needs to be explained.
 24 MR JUSTICE NICKLIN: "E. Undercover footage".
 25 MS BOLTON: Yes.

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1 MR JUSTICE NICKLIN: Right.
 2 Okay, there's a section at the beginning of the
 3 video which has -- or it must be about 5 seconds long --
 4 that has pictures which could be inside a facility .
 5 MS BOLTON: Yes. It may be something Mr Curtin can clarify
 6 in a very straightforward way --
 7 MR CURTIN: Yes.
 8 MR JUSTICE NICKLIN: Go on then, Mr Curtin.
 9 MS BOLTON: -- but we're being provided with something where
 10 we're not really told where it's come from and how --
 11 MR JUSTICE NICKLIN: Right.
 12 MS BOLTON: -- and when --
 13 MR JUSTICE NICKLIN: Okay.
 14 MS BOLTON: -- which is also quite relevant, because if it's
 15 something to do with his defence over the protest,
 16 where, when, how, is going to be quite important. The
 17 second half, as I say, doesn't have anything to do with
 18 MBR's premises at all, there can't be any argument over
 19 that because it's clearly a laboratory, but the first
 20 half, that's what's being said and we would just like
 21 that clarified .
 22 MR JUSTICE NICKLIN: Okay. Mr Curtin, can you help me with
 23 what this is?
 24 MR CURTIN: Yes. It is footage that was gathered from like
 25 an extremely long fishing rod, further than from me to

1 you, with a small pinhole camera. I was part of the
 2 team. I do take some responsibility for taking that
 3 footage. It isn't inside at MBR. As to when it was
 4 taken, I wouldn't be able to give an answer to you
 5 standing up now, but I'll be able to do this in the
 6 dinner break. But it is footage of inside MBR which
 7 I had a hand in being responsible for, if that helps.
 8 MR JUSTICE NICKLIN: Okay.
 9 MR CURTIN: And I understand the point that -- for the case
 10 of the trial, whether the dogs are kept in such dirty
 11 conditions or not, it doesn't give people the right to
 12 block the roads, et cetera, et cetera. It's just
 13 something I'm bound to want to refer to during the
 14 course of my defence.
 15 MR JUSTICE NICKLIN: Okay.
 16 MS BOLTON: My Lord, from five minutes and 54 seconds in,
 17 we're not dealing with an MBR premises and we look like
 18 we're dealing with a very old, covert recording from
 19 a laboratory somewhere.
 20 MR CURTIN: Is it the punching?
 21 MS BOLTON: Yes, it's the whole -- that's not relevant at
 22 all to this case.
 23 MR CURTIN: That was taken at Huntingdon Life Sciences,
 24 which is a few miles up the road, which is supplied to
 25 by MBR, and was actually set up by the same ... There

1 is a link, but -- yes, it's not MBR, but it is one of
 2 the suppliers .
 3 MS BOLTON: One, there's no link. Two, there's no date on
 4 this and, looking just at the video, it's quite clear
 5 it's very old and so it's completely irrelevant to these
 6 proceedings.
 7 MR JUSTICE NICKLIN: Right. It's likely to have only
 8 peripheral relevance to the extent that what motivates
 9 people to protest about the rearing of animals for
 10 research is that -- whether they're right or wrong about
 11 the conditions in which animals are then subject to
 12 experiments is what drives their commitment, so it has
 13 that relevance. So it is footage like that which is
 14 largely a factor or at least some part of people's
 15 motivation to protest against the rearing of animals for
 16 research .
 17 MS BOLTON: It goes to the test of sincerely held belief,
 18 my Lord, as to --
 19 MR JUSTICE NICKLIN: Well, I don't think you're -- I've not
 20 detected that you're challenging that they sincerely
 21 hold their beliefs .
 22 MS BOLTON: That's one of my points as well. We say it's
 23 irrelevant because it's not MBR, but, in any event,
 24 that's not being challenged.
 25 MR JUSTICE NICKLIN: Yes, right. Okay. So you now know

1 about the provenance of this video.
 2 MS BOLTON: We don't know much about the date of the other
 3 part of the video, but --
 4 MR JUSTICE NICKLIN: Well, Mr Curtin is going to get back to
 5 you on that.
 6 MR CURTIN: Could I suggest we -- because my case isn't
 7 going to rest on exhibit C --
 8 MS BOLTON: Sorry. It was my mistake. It's E.
 9 MR CURTIN: At E. Could we discuss it when the time comes,
 10 whether it's inadmissible, because it really doesn't --
 11 my defence doesn't rest on it, as we speak.
 12 MS BOLTON: I'm quite content to deal with it in that way,
 13 my Lord. I'm simply flagging it now. Mr Curtin
 14 obviously then needs to make an application to you.
 15 That application isn't going to be opposed.
 16 We also have a difficulty with Ms Jaffray in that we
 17 still don't have any witness evidence from Ms Jaffray so
 18 I don't see how she can make an application for relief
 19 from sanction because she hasn't effectively done
 20 anything to cure that problem. So we have no witness
 21 evidence. We say she shouldn't be cross-examining,
 22 advancing a positive case, and she shouldn't be allowed
 23 to give oral evidence because she has to have relief to
 24 do that and she's not provided what's needed to obtain
 25 relief . So we still have that difficulty with

1 Ms Jaffray.
 2 MR JUSTICE NICKLIN: Right.
 3 Ms Jaffray -- I've always thought your name is
 4 pronounced "Jaff-rey". Am I wrong about that?
 5 MS JAFFRAY: It's "Jaffray".
 6 MR JUSTICE NICKLIN: Right. I'm sorry that I've been
 7 getting it wrong all this time.
 8 MS JAFFRAY: That's fine.
 9 MS BOLTON: That's possibly my fault, my Lord, because
 10 originally I was. I think I've got it right now. It
 11 sounds like I have.
 12 MR JUSTICE NICKLIN: Okay. Just to explain, Ms Jaffray, you
 13 may have picked up -- because I think you told me you'd
 14 read the transcript of what happened on Monday, which is
 15 the court's procedures are that ordinarily parties to
 16 litigation, including the defendants, are required to
 17 provide any evidence they want to rely upon. That
 18 includes a witness statement from themselves,
 19 essentially setting out what they want to say about what
 20 has happened or the allegations that are being made in
 21 the proceedings.
 22 Ms Bolton is objecting on the basis that you haven't
 23 provided such a document and she says the consequences
 24 of that are that you are not entitled to rely upon any
 25 evidence and that would mean that you would not be able

1 to give evidence in your own defence. Now, can I just
 2 clarify first of all whether you were intending to give
 3 evidence in the proceedings?
 4 MS JAFFRAY: Yes. I sent off some photos and some videos
 5 and I did email into MBR injunction(?) to say my witness
 6 evidence made the same as what was submitted last year.
 7 MR JUSTICE NICKLIN: What did you submit last year?
 8 MS JAFFRAY: I sent off a statement last year.
 9 MR CURTIN: It's a similar case to mine. I thought my
 10 defence witness -- I thought -- I didn't know the big
 11 difference between submit a defence and a witness
 12 statement.
 13 MS BOLTON: My Lord, the difficulty with that is, one, we
 14 raised it at the PTR and made it clear that that was
 15 still missing; secondly, we've written to the defendants
 16 and made it clear that that's still missing.
 17 MR JUSTICE NICKLIN: What is the document that she's
 18 referring to from last year?
 19 MS BOLTON: She's referring to her defence.
 20 MR JUSTICE NICKLIN: Oh, the defence.
 21 MS BOLTON: Which didn't have a statement of truth on it,
 22 which --
 23 MS JAFFRAY: It does. It does.
 24 MS BOLTON: You ordered that to be signed at the PTR by
 25 a certain date, which we're not taking any issue with,

1 but that wasn't achieved until much later, and we raised
 2 the fact that we didn't have witness evidence from these
 3 witnesses as well. We've written to the defendants over
 4 the lack of witness evidence. So it's not a case of
 5 misunderstanding the directions from the court, and also
 6 that was May last year. The directions you were given
 7 were January. We have explained what's needed, but it's
 8 not been forthcoming.
 9 MR JUSTICE NICKLIN: Right. Let me look at the -- where's
 10 the relevant document?
 11 MS BOLTON: The defence is in Ms Jaffray's defendant bundle.
 12 MR JUSTICE NICKLIN: It will be in bundle 2. It will be the
 13 first bundle, the pleading one.
 14 MS BOLTON: It's section 2, pages 61 to 62.
 15 MR JUSTICE NICKLIN: Ms Jaffray, do you have a copy of the
 16 bundles? The important bundles for this trial are the
 17 ones that relate to you, so far as you're concerned.
 18 MS JAFFRAY: Yes.
 19 MR JUSTICE NICKLIN: I'm looking at tab 2 in that. Do you
 20 have them?
 21 MS JAFFRAY: Yes, let me just grab them.
 22 MR JUSTICE NICKLIN: So it's the first of the two
 23 ring-binders and it's divider 2 in the bundle.
 24 MS JAFFRAY: Yes. What am I looking for?
 25 MR JUSTICE NICKLIN: That's the document that you -- is that

1 what you're referring to, when you said to me you'd
 2 filed something last year?
 3 MS JAFFRAY: So it's the one that starts off with "My right
 4 to protest".
 5 MR JUSTICE NICKLIN: The document starts on page 61 and
 6 says, "Under Article 11 of the European Convention of
 7 Human Rights". Do you have the same document?
 8 MS JAFFRAY: Yes.
 9 MR JUSTICE NICKLIN: Right, okay.
 10 I notice that what you say on the second page of the
 11 document is in the second paragraph you said:
 12 "I had initially planned to address each of the
 13 points made against me, although I have instead decided
 14 that this will only add to the copious amount of
 15 paperwork already received by the court [as read]."
 16 Then you deal two paragraphs down with one of the
 17 allegations specifically about you striking a worker's
 18 car.
 19 MS JAFFRAY: Yes.
 20 MR JUSTICE NICKLIN: And then that's the extent of what you
 21 say about the individual events that are alleged against
 22 you. Now, it's important that I know whether you intend
 23 to dispute any of the other allegations that are made
 24 against you by MBR Acres, in other words, because if you
 25 do, then I need to know, and so do the claimants, what

1 you say about that.
 2 MS JAFFRAY: Okay. I think most of my cross-examining was
 3 going to be about the protests and the effect that it's
 4 had on the claimants as they stated it had quite
 5 a severe impact on them.
 6 MR JUSTICE NICKLIN: I don't know whether you've seen
 7 Mr Curtin's document that he's filed this morning. Have
 8 you seen that?
 9 MS JAFFRAY: No.
 10 MR JUSTICE NICKLIN: Right. Mr Curtin, have you sent it to
 11 Ms Jaffray? I'm not suggesting you should have done.
 12 MR CURTIN: No, it's something I forgot to do.
 13 MR JUSTICE NICKLIN: That's all right. Could you possibly
 14 send it to her?
 15 MR CURTIN: I could, yes.
 16 MR JUSTICE NICKLIN: The reason I'm saying that is Mr Curtin
 17 has done quite a good job of setting out what he wants
 18 to say and it sounds to me as if you're taking a similar
 19 position, which is -- I don't want to put words in your
 20 mouth and you'll tell me if I'm wrong about this, but
 21 broadly I think your case is, "I accept what is shown on
 22 the video footage of me doing. What I'm doing is
 23 protesting and I dispute that my protests have caused
 24 any real anxiety or upset to the MBR workers".
 25 MS JAFFRAY: Yes, exactly that, yes. And then it's one of

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1 the fine points of, one, me using NHS systems, one where
 2 I was supposed to obstruct the car and the others
 3 where -- just the impact the workers said that protest
 4 has had on them for each of the allegations.
 5 MR JUSTICE NICKLIN: Well, what I'm going to ask you to do
 6 is to have a look at Mr Curtin's statement because it
 7 may help you as something as a model that you may be
 8 able to adjust -- and obviously your position is
 9 different from his, but you will see what he's filed as
 10 a way of trying to advance a witness statement.
 11 I do appreciate the difficulty that a litigant in
 12 person has because you're not used to having to produce
 13 witness statements and I would imagine that most people
 14 who have no legal experience are not familiar with what
 15 is required, but if you have a look at that, it may tell
 16 you or give you an indication, it may make you think
 17 about certain things like -- for example, the allegation
 18 that you've been using NHS systems, then you need to
 19 include your denial and anything you want to say about
 20 that, in relation to that, by way of an explanation.
 21 MS JAFFRAY: Okay.
 22 MR JUSTICE NICKLIN: Just to explain to you so that you
 23 understand why this is important, it is because we can't
 24 have a trial at which witnesses give evidence and the
 25 first time that the opposing party learns what is being

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1 said is when the witness gives the evidence. It
 2 wouldn't be fair on you -- for example, it wouldn't be
 3 fair on you if MBR staff climbed into the witness box in
 4 court 13 and it was the first time that you heard what
 5 they were alleging against you, and so they have been
 6 required to provide a statement so that you know what
 7 they are saying, so that you have an opportunity to
 8 consider what they are saying and the purpose is for you
 9 to be able to raise any evidence that you want to rely
 10 upon in answer to that.
 11 MS JAFFRAY: Okay.
 12 MR JUSTICE NICKLIN: What's missing in the jigsaw at the
 13 moment is your bit, where you tell me and the claimants
 14 what you intend to say in broad terms in your evidence
 15 when you come to give it in the trial.
 16 MS JAFFRAY: Okay.
 17 MR JUSTICE NICKLIN: All right?
 18 MS JAFFRAY: Yes. I can do that by the end of tonight if
 19 that's okay.
 20 MR JUSTICE NICKLIN: That's fine. As soon as possible,
 21 please.
 22 MS JAFFRAY: Yes.
 23 MS BOLTON: My Lord, one further point is Ms Jaffray has now
 24 provided a list of who she wishes to cross-examine, and
 25 one of the things that she refers to in relation to her

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1 denial over her using her position at the NHS is
 2 a report that she has. If she's going to say, "I have
 3 a report that clears me", that ought to also be part of
 4 her evidence because that is what the employees have
 5 been told by the police, so that's their understanding
 6 of how the prosecution which has recently taken place
 7 arose. So that's the information they have and if it's
 8 going to be contradicted -- it may very well be that the
 9 police got that wrong, but if it's going to be
 10 contradicted, it ought to be provided.
 11 MR JUSTICE NICKLIN: Ms Jaffray, you've apparently referred
 12 to a report. Have you provided that to the claimants?
 13 MS JAFFRAY: I haven't, no. So I actually had the court
 14 case on Monday about this one and there's absolutely no
 15 mention of me using NHS systems. I used my NHS black
 16 book but I didn't use systems to get any details about
 17 members of staff. I can look for that report and I'll
 18 give just a screenshot, if I may.
 19 MR JUSTICE NICKLIN: Well, do you not have an electronic
 20 version of it?
 21 MS JAFFRAY: Yes, I just didn't want to send off the whole
 22 report, unless it's just to yourself.
 23 MR JUSTICE NICKLIN: Well, I can't see evidence that the
 24 other parties don't see. Is your concern that the
 25 report contains other material that's not relevant to

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1 you or —
 2 MS JAFFRAY: Yes.
 3 MR JUSTICE NICKLIN: You are entitled to redact — that
 4 means block out or withhold — bits that you say are
 5 irrelevant and you can send the relevant part to the
 6 claimants' solicitors. They may argue that they need to
 7 see the whole document, but we can do it in stages.
 8 MS JAFFRAY: Okay.
 9 MR JUSTICE NICKLIN: So in the first instance sit down, when
 10 you've got a moment, look through the document, decide
 11 which parts of it are relevant to you and the point that
 12 you're making, relying upon that document, and then you
 13 can — either with a big black marker or by withholding
 14 whole pages, you can then send them the relevant part of
 15 that; all right?
 16 MS JAFFRAY: Yes, okay.
 17 MR JUSTICE NICKLIN: Then we'll have a look at that some
 18 time later in the trial.
 19 MS JAFFRAY: Okay, yes. I can do that tonight as well.
 20 MR JUSTICE NICKLIN: Okay. Right.
 21 I think, Ms Bolton, of course there are procedural
 22 steps that need to be put in order, but there aren't any
 23 huge surprises coming your way on this front, so if
 24 you're content, I would prefer to deal with it in
 25 stages. Let's get the material; you see it; we'll

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1 decide what we do about it in the course of the trial.
 2 MS BOLTON: My Lord, indeed. My Lord, I'm sorry, I only
 3 flag it because —
 4 MR JUSTICE NICKLIN: No, that's perfectly sensible.
 5 MS BOLTON: — under practice — PD32, the defence can't
 6 stand as the evidence at final hearing, so it just needs
 7 to be formalised and then we do need to see it because,
 8 even Mr Curtin's evidence, whilst none of it comes as
 9 a surprise, it does change what I needed to ask and how
 10 I need to ask it and, as I'm sure your Lordship can
 11 appreciate, that takes time. Without having had any
 12 evidence, my approach had been to look at the
 13 allegations and the evidence and prep as much as I could
 14 on the basis of what may or may not happen at trial, but
 15 it all has to be then worked into that already—done
 16 preparation. So as long as we can have some time with
 17 it, I'm content for it to be dealt with in stages.
 18 MR JUSTICE NICKLIN: Sure.
 19 MS BOLTON: My Lord, the other matter is the summary
 20 judgment application. I hear what your Lordship was
 21 saying on Monday. We're obviously not pursuing summary
 22 judgment applications now against Mr Curtin and it's
 23 unlikely we're pursuing ones against Ms Jaffray unless
 24 evidence doesn't turn up and we find ourselves in
 25 a difficulty on moving forwards. In relation to persons

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1 unknown, my Lord, as I think was explained in the
 2 application, it's more there so the court can take
 3 a view on how much it needs to see as that evidence is
 4 looked at because obviously there's a recent Court of
 5 Appeal decision which suggests it should be dealt with
 6 in a summary basis, but we're at trial, we do accept
 7 that the court is going to be looking at a — it can
 8 take as many of the incidents — it can be taken through
 9 it or not. We can take it as a sampling exercise, but
 10 it's there for your assistance.
 11 MR JUSTICE NICKLIN: Yes, the Court of Appeal's decision is
 12 useful insofar as it goes because, of course, the Court
 13 of Appeal considers the points that are appealed. The
 14 point that was relevant in that case was that the judge
 15 refused to grant summary judgment —
 16 MS BOLTON: Yes.
 17 MR JUSTICE NICKLIN: — and the Court of Appeal says, "No,
 18 summary judgment is available".
 19 MS BOLTON: Yes.
 20 MR JUSTICE NICKLIN: It leaves unaddressed the question
 21 which is, "Okay, so you grant summary judgment, what
 22 next?". You don't get summary judgment and then, right,
 23 injunction. It doesn't work like that. So the
 24 difficulty — that's why I said on Monday, regarding
 25 summary judgment against persons unknown, rather like

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1 default judgment, it might be thought to be procedurally
 2 straightforward, but it belies the real complexity,
 3 which is: what injunction are you going to grant and
 4 against whom?
 5 MS BOLTON: Exactly.
 6 MR JUSTICE NICKLIN: So it's not — much as though we would
 7 like a simple answer in this area of the law, that isn't
 8 going to produce it.
 9 MS BOLTON: And, my Lord, I think we tried to make that
 10 clear in the application.
 11 MR JUSTICE NICKLIN: That's a fair point.
 12 MS BOLTON: Really, it's there from the point of view of if
 13 the court gets to a point where it says, "Actually I've
 14 seen enough on the trespass persons unknown ..." —
 15 MR JUSTICE NICKLIN: Yes, I think I can do that without
 16 resort to summary judgment.
 17 MS BOLTON: It's there to assist the court more than
 18 anything, my Lord.
 19 MR JUSTICE NICKLIN: That's fine. Right.
 20 MS BOLTON: My Lord, so unless — one last matter, my Lord,
 21 is the timetable, which we've rejigged on the basis that
 22 there has been an indication of cross-examination being
 23 required, so if I may hand that up so everyone knows
 24 where we are going.
 25 MR JUSTICE NICKLIN: That's helpful. Thank you very much.

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1 (Handed)
 2 It's most important for Ms Jaffray and Mr Curtin.
 3 Are you able to email a copy to Ms Jaffray?
 4 MS BOLTON: We will indeed.
 5 MR JUSTICE NICKLIN: Thank you very much. The importance of
 6 this for both of you is that you know who is coming when
 7 so that the night before you can concentrate on the
 8 questions you want to ask each of these witnesses. So
 9 it's an orderly process of the witnesses being called so
 10 that you know what's coming up.
 11 MR CURTIN: Excellent.
 12 MS JAFFRAY: Okay.
 13 MS BOLTON: So, my Lord, that's the timetable.
 14 The other point on the timetable, my Lord, is that
 15 Employees C and I were never being called. There was
 16 a hearsay notice and they weren't challenged so we're
 17 not proposing to call those, so their evidence we are
 18 proposing stands. And Employee P is signed off work
 19 with -- which is, as I understand it, mental health
 20 issues as a result of the -- and Ms Read because of her
 21 ill health, my Lord. So I flag that -- you'll see in
 22 the timetable we're not proposing to call them. We're
 23 asking for their evidence to stand. I appreciate there
 24 has been some issues raised very late in the day about
 25 them, but the hearsay notices weren't challenged and

1 I think that will have to be a matter of submission.
 2 MR JUSTICE NICKLIN: Yes.
 3 Just so that you're -- Ms Jaffray and Mr Curtin, the
 4 law permits the court to receive evidence in a written
 5 statement in civil proceedings where a Civil Evidence
 6 Act notice has been served, as it has been, in relation
 7 to those witnesses you just heard. That doesn't mean to
 8 say the court accepts automatically what they say and
 9 you and Ms Jaffray have the opportunity to write down --
 10 what's usually most helpful -- any questions that you
 11 would have wanted to ask them or any points that you
 12 would have wanted to put to them in your
 13 cross-examination and then, ultimately, I will have to
 14 decide what weight, that means the importance that I can
 15 attach to the evidence, bearing in mind that the witness
 16 hasn't been cross-examined by you and Ms Jaffray. All
 17 right?
 18 MR CURTIN: Yes.
 19 MR JUSTICE NICKLIN: So in respect of those, were there four
 20 witnesses?
 21 MS BOLTON: My Lord, yes.
 22 MR JUSTICE NICKLIN: Four witnesses. Can you just make sure
 23 that you send an email to both Mr Curtin and Ms Jaffray
 24 reminding them what those four witnesses are so they
 25 can --

1 MS BOLTON: My Lord, indeed. I'm just checking but -- no,
 2 our timetable only flags the one who is no longer able
 3 to attend because the others were already covered by
 4 hearsay notices, so we'll do that.
 5 MR JUSTICE NICKLIN: If you can do that, and then you'll
 6 know that those are the ones that you need to
 7 concentrate on in terms of what would you have asked
 8 them, what do you want to say to me about these
 9 witnesses; all right?
 10 MS BOLTON: My Lord, you'll see from the timetable on
 11 Wednesday, 10 May and Thursday, 11 May, so the afternoon
 12 of the 10th and the morning of the 11th, is Ms Jaffray's
 13 case, so that's when she needs to make any opening
 14 submissions and make herself available for
 15 cross-examination.
 16 MR JUSTICE NICKLIN: Yes, Ms Jaffray --
 17 MS BOLTON: It's 10 May, which is one day where we would say
 18 there needs to be some arrangement -- I appreciate she
 19 may not be able to attend for most of this hearing, but
 20 she either needs to be, we would say, in the same
 21 situation as the claimants' witnesses at a solicitors'
 22 office or here because it's cross-examination, my Lord.
 23 MR JUSTICE NICKLIN: Ms Jaffray, that's important for you.
 24 On the timetable -- you'll be sent this by email, the
 25 updated timetable. The important day for you, a date

1 for your diary, is 10 May. That's a day when you really
 2 need to be here; all right?
 3 MS JAFFRAY: Yes, that's fine.
 4 MR JUSTICE NICKLIN: Okay. Thank you.
 5 MS BOLTON: My Lord, we changed this timetable slightly this
 6 morning because we noticed something that needed to move
 7 and I apologise it hasn't saved properly. We're aware
 8 that your Lordship isn't available on the afternoon of
 9 3 May.
 10 MR JUSTICE NICKLIN: Correct.
 11 MS BOLTON: I apologise. It does all still fit, the other
 12 dates.
 13 MR JUSTICE NICKLIN: Okay. That's fine. Well, just rejig
 14 it. I mean, the reality may be --
 15 MS BOLTON: Mr Jacklin should be 4 May, not the 3rd, and the
 16 same would be the case then for --
 17 MR JUSTICE NICKLIN: Well, just recirculate the updated
 18 version.
 19 MS BOLTON: I apologise. The only difficulty, my Lord, is
 20 with 3 and 4 May. They just need swapping round and
 21 then they work, so it doesn't affect either of these
 22 defendants.
 23 MR JUSTICE NICKLIN: Right. Well, it affects their
 24 preparation so we need you just to circulate the updated
 25 version.

1 MS BOLTON: We will make sure they are given those today,
2 my Lord.
3 MR JUSTICE NICKLIN: Okay. Thank you very much.
4 Right. So, with that, are we ready to start?
5 MS BOLTON: My Lord, indeed we are.
6 MR JUSTICE NICKLIN: Right.
7 MR CURTIN: I have one little caveat. I don't know whether
8 we need to do it now. I would like to have some
9 discussion about Wendy Jarrett's evidence before she
10 gives evidence.
11 MR JUSTICE NICKLIN: That's fine. We'll do that on the day;
12 all right?
13 Oh, and Mr Curtin, I'm taking it that you're asking
14 me to admit your witness statement, although it's late?
15 MR CURTIN: Yes. Can I also add by close of today -- and
16 the only reason I didn't do it was some sort of form of
17 overwhelming -- convert my original defence statement.
18 It doesn't have too many -- it's very generic, my right
19 to protest -- convert my original defence statement into
20 a witness statement. Is that possible?
21 MR JUSTICE NICKLIN: You can just adopt it. All you need to
22 do is you need to put a sentence in the witness
23 statement that you've prepared for me and say, "I adopt
24 what I've said in my defence statement"; all right?
25 MR CURTIN: Could we do that in person today?

25

1 MR JUSTICE NICKLIN: That's fine. So I'm treating you as
2 making an application for relief from sanction for the
3 lateness of your witness statement. It's not opposed so
4 I grant it.
5 MR CURTIN: Thank you very much.
6 MR JUSTICE NICKLIN: Right. You judge where we need the
7 break, Ms Bolton -- all right? -- because I'm liable to
8 forget. This clock is wrong.
9 Opening submissions by MS BOLTON
10 MS BOLTON: My Lord, the claimants seek final and injunctive
11 relief against two named defendants, those being the
12 11th and 20th defendants, Mr Curtin and Ms Jaffray, and
13 six categories of persons unknown, being the 28th to the
14 31st defendants and the 33rd to the 36th defendants.
15 Injunction is sought to prevent acts which the claimants
16 say are unlawful and cannot reasonably be characterised
17 as lawful protest.
18 All the other named defendants have compromised the
19 claim in terms identical or similar to the terms sought
20 by the claimants at trial, save the third defendant,
21 Mel Broughton, against whom the claim has been stayed as
22 he is currently on remand in prison. The claimants have
23 been unable to secure undertakings for the 11th
24 defendant and the 20th defendant.
25 The first claimant, MBR Acres Limited, and the third

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1 claimant, B&K Universal Limited, are subsidiaries of the
2 Marshall Farm Group Limited, incorporated in the US and
3 trading as Marshall Bioresources. The first claimant
4 conducts its business from premises in Wyton in
5 Huntingdon, which is referred to in the claim as the
6 "Wyton site". The first and third claimants breed
7 animals for biomedical research. The first and third
8 claimants are licensed by the Secretary of State under
9 section 2(b) and 2(b) of the Animals (Scientific
10 Procedures) Act 1986 to breed animals for supply to
11 licensed entities authorised to conduct animal testing
12 and research.

13 It is a legal requirement in both the United Kingdom
14 and globally that, with very limited exception, all
15 potential new medicines intended for human use are
16 tested on two species of mammal in pre-clinical trials
17 before they are tested on human volunteers in clinical
18 trials. Those limited exceptions are explained in the
19 witness evidence of Wendy Jarrett. That said, my Lord,
20 nothing that has been said in these proceedings disputes
21 that. What is disputed and what is at the heart of the
22 protesters' objections and protests is their belief that
23 it is wrong.

24 As the claimants' evidence explains, one of the key
25 reasons for testing on animals is to ensure that

27

1 potential new medicine is safe prior to it being given
2 over to human volunteers in clinical trials. It is
3 required to ensure the safety of human volunteers in
4 clinical trials. The second claimant representative,
5 Demetris Markou, is an employee of the first claimant
6 and the line manager of the first claimant. Mr Markou
7 represents the second claimant class pursuant to
8 CPR 19.6.

9 The fourth claimant representative, Susan Pressick,
10 is an employee of the third claimant and holds the
11 position of site manager and UK administrator and
12 European quality manager for the UK subsidiaries of the
13 Marshall Farm Group Limited. Ms Pressick represents the
14 fourth claimant class pursuant to CPR 19.6.

15 My Lord, you will recall that there were questions
16 over Ms Pressick's ability to represent the first
17 claimant. Ms Pressick explains at paragraph 2 of her
18 20th witness statement that she has nationwide
19 responsibilities with the Marshall Bioresources Group in
20 the UK and has been authorised by the board of both the
21 first and third claimants to act for the first claimant.
22 My Lord, that evidence can be found for the purpose of
23 Mr Curtin at page 67 in his bundle and for the purpose
24 of Ms Jaffray at page 65 and for the purpose of persons
25 unknown, page 447.

28

1 The remaining defendants are all protesters who the
 2 claimants allege have committed or in the case of
 3 persons unknown apprehend will commit significant
 4 unlawful acts against the claimants and particularly the
 5 first and second claimants, such that the third and
 6 fourth claimants apprehend that the same shall happen to
 7 them. The basis for the apprehension, my Lord, of the
 8 third and fourth claimants is set out in again the
 9 20th witness statement of Susan Pressick at
 10 paragraphs 85 to 101. Again, for the purpose of
 11 Mr Curtin, that's paragraphs 89 to 93 of her witness
 12 statement in his bundle, for the purpose of Ms Jaffray,
 13 that's paragraphs 87 to 91 of Susan Pressick's witness
 14 statement in her bundle and for persons unknown, that's
 15 page 469 to 473 in the persons unknown bundle.

16 The summary of the alleged unlawful acts of the
 17 defendants.
 18 The goal of the defendants is to cause the staff of
 19 the first and third claimants to leave their jobs and
 20 bring an end to the lawful and necessary activities of
 21 the first and third claimants; see especially the
 22 defence of Mr Curtin at pages 63 to 64 of his bundle.
 23 If the defendants were successful in that aim, there
 24 would be a significant adverse impact on medical
 25 research and the development of new drug treatments in

1 the UK.
 2 The claimants accept that medical research involving
 3 animals, whilst required by law, is an emotive subject
 4 and that the degree of protest by those opposed to
 5 medical research which involves animals is inevitable.
 6 After all, in this case, we are talking about species
 7 that, for many years, have been characterised as man's
 8 best friend. That does not, however, justify trespass,
 9 it does not justify interference with the claimants'
 10 common law right to access the highway and it doesn't
 11 justify obstruction of the highway and harassment.

12 It is plain that these protests are driven by
 13 emotion and genuine personal belief that the use of
 14 animals in medical research is wrong. It is, however,
 15 the law and debates on whether it is morally right to do
 16 so are for the ballot box and not these proceedings.
 17 The claimants, however, understand the strength of
 18 feeling these issues provide and have no interest in
 19 prohibiting and no intention to prohibit peaceful
 20 protest and recognise the rights of others to peacefully
 21 protest. The claimants seek only to prohibit unlawful
 22 instances of trespass at the first and third claimants'
 23 sites and the other torts complained of in the
 24 claimants' particulars of claim and the witnesses'
 25 evidence.

1 In respect of the first claimant, these alleged
 2 unlawful activities have become a relentless aspect of
 3 the defendants' protest, which campaign has been
 4 significantly tempered by the interim injunction order
 5 and associated committal applications. Unlawful acts,
 6 though, do persist even after the grant of the
 7 injunction, albeit in a much more tempered way.

8 At the time the interim injunction was sought, the
 9 defendants were dictating who they would let on and off
 10 the Wyton site, with significant obstruction of the
 11 highway being caused by the defendants as well as acts
 12 of trespass and interference with the first claimant's
 13 common law right to access the highway. On occasion the
 14 obstructions and interference with the first claimant's
 15 common law right to access the highway was so great that
 16 the access to and exit from the Wyton site was delayed
 17 for hours and the B1090 highway, the highway immediately
 18 outside the site, was impassable.

19 Your Lordship will be referred to incidents such as
 20 that of 9 July 2021, as described in the served witness
 21 evidence of Mr Manning in his second statement at
 22 paragraphs 50 to 55, Employee P at paragraph 17 to 23,
 23 Employee A at paragraphs 23 to 29, Ms Read at
 24 paragraphs 34 to 43, Production Manager at paragraphs 24
 25 to 32, Employee B at paragraphs 21 to 28 and Employee F

1 at paragraphs 43 to 55.

2 Even when permitted to enter or exit the Wyton site,
 3 the defendants have targeted the first claimant's staff
 4 by abusing them and surrounding their cars when they
 5 enter and exit the site. The court is familiar with
 6 these activities, the claimants having brought several
 7 committal actions concerning these activities, and the
 8 court is respectfully minded of the incident from
 9 20 November 2021, again after the grant of the interim
 10 injunction, and it's described in Employee F's witness
 11 statement at paragraphs 144 to 153, Employee I's witness
 12 statement at paragraphs 41 to 44, Employee P's witness
 13 statement at paragraphs 89 to 93, Mr Markou's witness
 14 statement at paragraph 37 to 43 and Employee G's
 15 evidence at paragraphs 43 to 59 and Ms Pressick's 20th
 16 witness statement, paragraphs 20 to 342.

17 The defendants, at the time at which the interim
 18 injunction was sought, were also photographing and
 19 videoing and continuing to photograph and video staff
 20 and officers of the first claimant and their vehicles
 21 and number plates and were also using drones and cameras
 22 to monitor the Wyton site. The conduct described in
 23 other means have been used to identify employees of the
 24 first claimant, several of whom have been targeted in
 25 their homes and away from the Wyton site. In

1 particular , the homes and vehicles of some employees
 2 have been vandalised, as explained in the second witness
 3 statement of Mr Manning, whose home was vandalised, at
 4 paragraphs 70 to 78, Employee L at paragraphs 28 to 44
 5 and the 20th witness statement of Susan Pressick at
 6 paragraph 346.
 7 MR JUSTICE NICKLIN: Just as a point of clarification
 8 because it's not immediately apparent to those who are
 9 present in court that are following these proceedings,
 10 but you are going through the evidence that is relevant
 11 both to the two individual defendants but also the
 12 persons unknown claim?
 13 MS BOLTON: My Lord, yes.
 14 MR JUSTICE NICKLIN: I think that probably in fairness,
 15 unless you say otherwise, the allegations that you're
 16 making about, for example, vandalism of Mr Manning's
 17 home are not allegations that are being made against
 18 these two individual defendants. They are in support of
 19 the persons unknown case, so it's important --
 20 MS BOLTON: Yes.
 21 MR JUSTICE NICKLIN: I think those who are listening or may
 22 be reporting, it's important -- although there's an
 23 obvious focus because we have two defendants in the
 24 proceedings, but what you're saying is not -- unless you
 25 say it's an allegation against them, it's not an

1 allegation against them; it's an allegation generally.
 2 It's complained of by the claimants in support of their
 3 claim against persons unknown.
 4 MS BOLTON: My Lord, indeed, and my very next part of my
 5 opening deals with where we say that may be different --
 6 MR JUSTICE NICKLIN: Okay.
 7 MS BOLTON: -- and that the rest are persons unknown.
 8 MR JUSTICE NICKLIN: Right. Thank you.
 9 MS BOLTON: My Lord, that identification of employees'
 10 addresses, which we say have come through both the
 11 recording of employees' number plates and the following
 12 of employees, have also been obtained by other means
 13 and, as a result, employees have been targeted in their
 14 homes in the following ways: one in relation -- which
 15 directly concerns the 20th defendant, Ms Jaffray, was
 16 the sending of funeral plans to the homes of employees,
 17 James Hardy, formerly known as Employee F, and
 18 David Manning.
 19 My Lord, the relevant paragraphs of that are
 20 paragraphs 79 to 81 of Mr Manning's witness evidence;
 21 and, in relation to persons unknown, paragraph 990,
 22 exhibit DM4, 7 to 16 -- apologies, my Lord. I do
 23 apologise. The persons unknown reference is the page
 24 number, the other is the paragraph number, so apologies.
 25 Exhibit DM4, pages 7 to 16 of the exhibit to

1 Mr Manning's witness statement, shows those documents;
 2 employee F, paragraphs 163 to 167, and that's page 1470
 3 in the persons unknown bundle; exhibit F2 of
 4 Employee F's witness statement, pages 2 to 8, exhibit
 5 those funeral plans.
 6 In addition to that, handwritten letters have been
 7 sent to employees by persons unknown. You will hear
 8 evidence of that from Mr Manning, Employee P's witness
 9 evidence, Employee Q's evidence and Mr Jacklin, formerly
 10 Employee L.
 11 Home visits and the vandalism of homes has also
 12 been a consequence of employees' homes being identified.
 13 You will hear evidence from Mr Manning as to the
 14 vandalism of the exterior of his home, Mr Jacklin,
 15 Employee K, James Hardy and Employee Q. None of those,
 16 I should say, my Lord, are anything other than
 17 references to persons unknown. There is no suggestion
 18 that any evidence has been -- in the evidence that those
 19 home visits were undertaken by Ms Jaffray or Mr Curtin.
 20 Causes of action, legal tests to be applied in these
 21 proceedings.
 22 The particulars of claim set out the causes of
 23 action relied upon by the claimants with the
 24 re-re-amended particulars of claim being the operative
 25 version of the same, which, my Lord, I will refer to

1 simply as "the particulars of claim". The causes of
 2 action are trespass, interference with the first
 3 claimant's common law right to access the highway,
 4 public nuisance and harassment.
 5 In addition to these causes of action and the law
 6 surrounding these causes of action, the courts will have
 7 to consider and apply the following: the relevant legal
 8 test for granting precautionary relief, the test for
 9 granting injunctive relief that will bind a newcomer
 10 following the decision which is pending from the
 11 Supreme Court in Wolverhampton City Council v London
 12 Gypsies and Travellers.
 13 The law on trespass, my Lord, first of all, that the
 14 court needs to consider in this case.
 15 The claimants' trespass claim arises out of numerous
 16 incidents of trespass that have occurred at the Wyton
 17 site, some of which involve the 11th and 20th
 18 defendants, some of which involve persons unknown. The
 19 claimants' position will be that the following is clear
 20 concerning the law of trespass: the defendants do not
 21 have any right to trespass on the land of the first and
 22 third claimants. Peaceful protest is not
 23 a justification for trespass, there being no issue of
 24 balancing the claimants' rights with the defendants'
 25 rights of freedom of expression or freedom of assembly

1 under Articles 10 and 11 of the ECHR —
 2 MR JUSTICE NICKLIN: The Convention, yes.
 3 MS BOLTON: Sorry, the European Convention on Human Rights.
 4 I was thinking — my Lord, apologies. Blank moment and
 5 I was thinking European Court. What are we saying?
 6 Apologies.
 7 A landowner or person or legal entity with an
 8 immediate right to possession of land has the benefit of
 9 right pursuant to Article 1 of the First Protocol, what
 10 we call the "A1P1 right". Trespass is an interference
 11 with A1P1 rights, which requires justification. The
 12 exercise of Articles 10 and 11 rights cannot normally
 13 justify trespass.
 14 My Lord, we will take the court in closing to the
 15 details on that which — the case law in Cuciurean v
 16 The Secretary of State for Transport and High Speed Two
 17 Limited [2021] EWCA Civ 357 and Boyd v Ineos Upstream
 18 Limited [2019] EWCA, Civ 515 and [2019] 4 WLR 100.
 19 My Lord, trespass is strict liability tort and it's
 20 actionable per se. Accordingly it does not require the
 21 claimants to prove loss or damage and the claimants
 22 bring no claim for loss or damage in trespass.
 23 As the court is aware, the trespass claim has
 24 expanded more recently concerning the access land. The
 25 claimants' pleaded case asserts that the first claimant

1 is the freehold owner of the Wyton site, including the
 2 driveway. That's the area, my Lord, between the
 3 gates — we've defined the "Driveway" as the area
 4 between the gates and the metal strip. That's outlined
 5 in red on the plan which you can find in the core
 6 supplemental bundle at page 8.
 7 MR JUSTICE NICKLIN: Is this the yellow strip or orange
 8 strip —
 9 MS BOLTON: My Lord, indeed it is.
 10 My Lord, as I say, the "Driveway" is defined in the
 11 particulars of claim as the land between the front gates
 12 of the Wyton site and the metal strip. The first
 13 claimant also, though, holds the freehold title to the
 14 access land, that being the area of the land on the
 15 access road, measuring 2.85 metres forward of the
 16 boundary of the Wyton site, the latter of which includes
 17 a ditch. The described land is highlighted in orange on
 18 the plan at core supplemental bundle 8, which I think is
 19 up on the screen.
 20 MR JUSTICE NICKLIN: It is, yes.
 21 MS BOLTON: My Lord, the legal analysis relevant to the
 22 ownership of the access land and the ditch — that's the
 23 shaded orange area — is as follows: one, the first
 24 claimant is presumed, by reason of its ownership of land
 25 adjoining the highway and, unless contrary is proven, to

1 own the land up to the midpoint of the highway. The
 2 presumption is known as the "ad medium filum viae
 3 presumption", which for the purpose of the transcription
 4 and everybody is "up to the middle line". The
 5 presumption and its operational and constituent elements
 6 were discussed and summarised in detail by
 7 Mr Justice Morgan in Paton v Todd. My Lord, I don't
 8 intend to take the court to that in opening. It is
 9 a matter for closing, if necessary. It is the
 10 claimants' position, though, that by reason of this
 11 presumption, the claimant holds both its registered
 12 title to the Wyton site and also the unregistered
 13 freehold title to the midpoint of the highway.
 14 Secondly, whilst an adjoining landowner may hold the
 15 freehold title to land up to the midpoint of the
 16 highway, where the relevant land is adopted highway, the
 17 material and scrapings vest in the local highways
 18 authority. That's pursuant to section 263 of the
 19 Highways Act 1980. Accordingly, where the land forms
 20 part of an adopted highway and the landowner does not
 21 have an immediate right to possession of the materials
 22 and scrapings, they only have a right to possession of
 23 the sub-soil.
 24 As such, the key question for the court when
 25 deciding the scope of the trespass claim in these

1 proceedings is what is the extent of the adopted
 2 highway. Where the highway adjoining the first
 3 claimant's land is adopted highway, the first claimant
 4 cannot maintain an action in trespass on that land, it
 5 not having an immediate right to possession. Where the
 6 land is not adopted highway, the first claimant can, by
 7 reason of its immediate right to possession, maintain an
 8 action in trespass.
 9 As explained in the 20th witness statement of
 10 Susan Pressick, paragraphs 68 to 77, the claimants
 11 submit that the orange shaded land on the plan at page 8
 12 of the supplemental bundle is land to which the first
 13 claimant holds the freehold title and is not adopted
 14 highway, such that the first claimant can maintain an
 15 action in trespass over that land. As Ms Pressick
 16 explains, that analysis is supported and indeed was
 17 first raised by the local highway authority itself.
 18 The presumption that allows the first claimant to
 19 assert rights over the access land is rebuttable but
 20 only by evidence, and that evidence must show that
 21 someone else has better title to the land. There is no
 22 such evidence before the court in relation to the extent
 23 of the adopted highway.
 24 One, there is a rebuttal presumption that the
 25 highway will extend over a wayside strip, ie a verge,

1 but the sub-soil belongs to an adjoining landowner, and,
 2 two, there is a rebuttable presumption that where there
 3 is a ditch on the wayside strip and the ditch has not
 4 been adopted for the exercise of the public or their
 5 rights to pass and repass, the ditch does not form part
 6 of the highway.
 7 As I've said, my Lord, no evidence has been put
 8 forward to rebut the presumption and the claimant
 9 submits that no circumstances exist to rebut the
 10 presumption. The only party that could have a better
 11 claim is the Local Highways Authority and they have made
 12 their position clear. Further, the court heard several
 13 times at the pre-trial review that the ditch is covered
 14 in brambles and is unusable by the public, which
 15 supports again the presumption that the ditch does not
 16 form part of the highway.
 17 Applying the above presumptions and remembering that
 18 the orange-shaded land comprises a ditch and that the
 19 access land tracks the passage of the ditch under the
 20 access road, it is submitted that, one, the
 21 orange-shaded land is within the freehold ownership of
 22 the first claimant, two, the orange-shaded land is not
 23 adopted highway and, three, the first claimant has an
 24 immediate right to possession of the orange-shaded land
 25 and can maintain an action in trespass over the same.

1 As I said earlier, my Lord, trespass is a strict
 2 liability tort. Trespass to land is an interference
 3 with possession of the rights of the landowner and
 4 includes instances in which a person intrudes upon
 5 a land without legal justification. It is well
 6 established that the extent of trespass is irrelevant
 7 for the finding of liability in trespass. The same was
 8 made clear by Chief Justice Lord Coleridge in *Ellis v*
 9 *Loftus Iron Company* (1874 to 75) LR 10 CP 10, where his
 10 Lordship stated:
 11 "It is clear that, in determining the question of
 12 trespass or no trespass, the court cannot measure the
 13 amount of the alleged trespass. If the defendant places
 14 a part of his foot on the plaintiff's land unlawfully,
 15 it is in law as much a trespass as if he had walked half
 16 a mile on it [as read]."
 17 The case is particularly illustrative of the
 18 principle as it highlights that even a minor trespass,
 19 in that case such as a horse's leg trespassing onto
 20 a neighbouring field by kicking through the fence, is
 21 sufficient to establish a trespass. Further, it is
 22 clear from *Ellis* that placing anything on or in land in
 23 possession of another is also a trespass.
 24 One of the questions the court will need to consider
 25 in that case, given the defences advanced in particular

1 by Ms Jaffray, is: what if the person enters the land
 2 pursuant to a licence or it is not initially clear
 3 whether they are a trespasser? A person shall not
 4 commit a trespass where they enter or remain on land of
 5 another pursuant to a licence, whether express or
 6 implied. Accordingly, a licence is a legal
 7 justification for intrusion on the land of another.
 8 However, an important point in this case is that persons
 9 who enter land pursuant to a licence but who proceed to
 10 act in such a way that exceeds the scope of that licence
 11 or who remain on the land after the expiration of that
 12 licence commit a trespass.
 13 That is important to consider in this case, where
 14 arguments have been raised in defence case statements of
 15 a noticeboard near the gate to the Wyton site being an
 16 excuse for trespass. Whilst the claimants' case will be
 17 that no such justification can be relied upon in these
 18 proceedings, even if it could be, the law is clear that
 19 the minute a person exceeds the scope of the licence,
 20 they become a trespasser. The proposition was
 21 considered by Lord Atkin in *Hillen v ICI Limited*, where
 22 his Lordship quoted from the judgment of
 23 Lord Justice Scrutton in *The Calgarth*, where he makes
 24 the comment:
 25 "When you invite a person into your house to use

1 a staircase, you do not invite him to slide down the
 2 bannisters [as read]."
 3 The case of *Hillen* was more recently considered and
 4 applied in the *Jockey Club Racecourse Limited v Persons*
 5 *Unknown* case [2019] EWHC 1026 (Ch), the latter of which
 6 also considered the approach to trespass taken in *R v*
 7 *Jones and Smith* [1976] 1 WLR 672, in which case it was
 8 again confirmed that exceeding the scope of the licence
 9 is a trespass.
 10 In the *Jockey Club* case, the court also considered
 11 the House of Lords' decision in *Tomlinson v Congleton*
 12 *Borough Council and Others* [2004] 1 AC 46, in which
 13 a visitor to a public park who disobeyed signs that
 14 forbade swimming made himself a trespasser on entering
 15 the water. Lord Hoffmann, citing *Hillen*, said:
 16 "I can see no difference between a person who comes
 17 upon land without permission or one who, having come
 18 with permission, does something which he has not been
 19 given permission to do [as read]."
 20 Accordingly the law is clear that, even where
 21 a person comes on to land with permission, where the
 22 person then does something on the land that he has not
 23 been given permission to do, he becomes a trespasser.
 24 The claimants will say that analysis will apply to the
 25 circumstances where a person enters land pursuant to

1 a licence and then, without permission, proceeds to
 2 engage in an act of protest on the claimants' land.
 3 Trespass to the air space above land.
 4 My Lord, I still have a little way to go on trespass
 5 so I think that may be a good place to break and give
 6 a 15-minute break for Opus.
 7 MR JUSTICE NICKLIN: Sure. Okay. Right. We'll come back
 8 at -- let's say we'll come back at midday. Thank you,
 9 everyone.
 10 (11.43 am)
 11 (A short break)
 12 (12.04 pm)
 13 MR JUSTICE NICKLIN: There's an issue about the -- which
 14 I don't understand because this court is used regularly
 15 for extremely high profile trials in which similar
 16 facilities are provided. I'm told that it's a problem
 17 with the court wifi's bandwidth. I don't understand
 18 that because of one thing I could say about the IT that
 19 the building provides is it's very fast, very reliable
 20 internet, so I'll need -- you know, the idea we're going
 21 to up sticks and move to another courtroom because
 22 there's a problem with the wifi will have to be the last
 23 resort; okay? So we're going to try -- they should try
 24 the wifi that the court provides because, so far as I'm
 25 concerned, that's more than sufficient and it's

1 certainly robust.
 2 MS BOLTON: My Lord, I'm in the same position as you.
 3 I don't fully understand it, but I understand it's being
 4 raised as a real issue.
 5 MR JUSTICE NICKLIN: The other problem is I don't get to
 6 say, "Oh, I'll go and sit in that court then".
 7 MS BOLTON: I understand, my Lord.
 8 MR JUSTICE NICKLIN: So the inconvenience to the court
 9 system -- yesterday it was lucky we weren't sitting
 10 because there was such a pressure on courts, this court
 11 had to be used for another case. So it's not like I've
 12 got a magic wand and I can say, "Oh, we'll go and sit in
 13 some other court".
 14 MS BOLTON: I fully appreciate that, my Lord.
 15 MR JUSTICE NICKLIN: Sorry to be blunt, but if you're in the
 16 business of court transcription, you need to have
 17 a robust mechanism to operate in courtrooms. You can't
 18 just said, "Oh, I'm sorry, this courtroom isn't good
 19 enough". It doesn't work like that. So we'll try the
 20 solution of the court wifi and somebody will need to
 21 explain to me in terms that I can understand and take up
 22 with the IT system here as to why the wifi isn't robust
 23 enough to support this. I mean it's just text-based.
 24 We're not sending massive video files down this line.
 25 MS BOLTON: My Lord, we will be. That's the problem, is

1 Ms Jaffray will not be able to see anything; the
 2 witnesses won't be able to see anything. We are going
 3 to be playing videos that they won't be able to see.
 4 That's what we're being told. That's part of the
 5 problem. If it's just text, it's not a difficulty.
 6 MR JUSTICE NICKLIN: Well, it's going on the CVP platform,
 7 isn't it? What's being done with the ...?
 8 MS BOLTON: I'm going to need more information, my Lord,
 9 than what I've been told in the short break. I've
 10 simply been told that that will be the problem, that
 11 none of the witnesses will be able to see any of the
 12 video evidence. Yes, and apparently all of the video
 13 evidence is completely separate to the CVP and everybody
 14 has separate access to Opus for that purpose.
 15 MR JUSTICE NICKLIN: I've got 96 meg at the moment, sitting
 16 here. I could probably run -- you know, Heathrow Air
 17 Traffic Control could operate and set up in here with
 18 96 meg.
 19 MS BOLTON: My Lord, I'm only raising what I'm being told.
 20 MR JUSTICE NICKLIN: 93 download; 76 upload. Now, somebody
 21 is going to have to explain to me why that isn't good
 22 enough; okay?
 23 MS BOLTON: My Lord.
 24 MR JUSTICE NICKLIN: Right. Carry on.
 25 MS BOLTON: My Lord, trespass of the air space above land.

1 In addition to trespass committed by way of entry onto
 2 the first claimant's land, the first claimant also
 3 claims trespass to its air space by D11, Mr Curtin, and
 4 D33, persons unknown, flying drones above the first
 5 claimant's air space. The same is pleaded in
 6 paragraph 170.10, which is at pages 21 to 22 of
 7 Mr Curtin's bundle, and 473 to 482, which is pages 379
 8 to 384 of the persons unknown bundle, concerning the
 9 particulars of claim.
 10 The question for the court is twofold: does the
 11 first claimant have rights in the air space above the
 12 Wyton site such that interference with that air space
 13 could constitute a trespass and, if so, does the
 14 protesters' flying of drones in the air space above the
 15 Wyton site in fact constitute a trespass?
 16 The answer to the first question is "Yes". It is
 17 well established that the owner of land has rights in
 18 the air space above the land, the interference with
 19 which can amount to trespass. That was made clear in
 20 *Bernstein v Skyviews & General Limited* [1978] QB 479 at
 21 pages 485 to 486 by Mr Justice Griffiths.
 22 As to the second question on whether flight above
 23 the land of another is in fact trespass, the answer will
 24 depend on the height of the plane, drone or other
 25 aircraft, whether manned or unmanned, and where it flies

1 above the land. The approach taken by the court in
2 Bernstein and the reasoning for the same, as I say, can
3 be found at pages 485 to 488. One part of the judgment
4 in particular, my Lord, that deals with this issue is
5 that it states this:

6 "The problem is to balance the rights of an owner to
7 enjoy the use of his land against the rights of the
8 general public to take advantage of all that science now
9 offers in the use of air space. The balance is, in my
10 judgment, best struck in our present society by
11 restricting the rights of an owner in the air space
12 above his land to such height as is necessary for the
13 ordinary use and enjoyment of his land and the
14 structures upon it and declaring that above that height
15 he has no greater right in the air space than any other
16 member of the public. Accordingly, for trespass to air
17 space to be established, the first claimant will need to
18 establish that the drones that are complained of are
19 flown at a height above the land such that there is an
20 interference with the first claimant's ordinary use and
21 enjoyment of the land. If the drones are flown at such
22 a height, then strict liability towards trespass will be
23 established."

24 What is also clear from this case is that the
25 interference with the ordinary use and enjoyment of the

1 land is what it will mean is that it is likely to amount
2 to trespass. Where a business cannot operate or retain
3 its staff due in part to the flying of drones over the
4 site, recording the staff's activities, that is an
5 interference -- the claimants will say -- of an ordinary
6 use and enjoyment of the claimants' premises.
7 Accordingly, whatever the challenges that restricting
8 these activities may present, the claimants say it is
9 a trespass.

10 Can the conduct be justified?

11 So can the conduct of trespass be justified? It's
12 no defence to a claim in trespass that trespass arose as
13 a result of a mistake or negligence. My Lord, we cite
14 and rely upon the Network Rail Infrastructure Limited v
15 Cornaken Group Limited's case, [2010] EWHC 1852 (TCC),
16 in particular paragraphs 55 to 67 of the judgment of
17 Mr Justice Akenhead.

18 Further, there can be no justification on the basis
19 that the trespass occurred whilst the defendants were
20 exercising their Articles 10 and 11 rights. My Lord,
21 I've covered that earlier in this submission, but again
22 I highlight it's the Boyd v Ineos Upstream Limited case
23 and the High Speed Two case from 2022.

24 Further, trespass is an interference with the first
25 claimant's A1P1 rights and, again, my Lord, that again

1 goes to the justification issue. It can't be justified
2 there is no balancing act.

3 My Lord, considering the position in the particular
4 context of trespass, the case law concerning injunctions
5 for trespass involving protest cases points strongly in
6 favour of granting injunctions where, without the
7 injunction, the trespass will continue or is reasonably
8 anticipated. The Hampshire Waste Services Limited v
9 Intending Trespassers upon Chineham Incinerator [2003]
10 EWHC 1738 (Ch) is an example of where a claim in
11 trespass can give rise to injunctive relief and where
12 the cause of action can also be used to secure
13 injunctive relief on a precautionary basis.

14 The Supreme Court confirmed in the Secretary of
15 State for Environment, Food and Rural Affairs v Meier
16 [2009] UKSC 11 that, where there are incidents of repeat
17 trespass, the appropriate remedy is an injunction, in
18 particular, my Lord, the judgment of Lord Rodger at
19 paragraphs 1 and 2 of the judgment.

20 MR JUSTICE NICKLIN: When we come on to it, we'll need to --
21 the difficulty is you've got to concentrate -- all these
22 principles are perfectly straightforward when they're
23 applied against known defendants. Meier was a known
24 defendant case. The rather more difficult question that
25 gives rise to really important issues for consideration

1 is the idea that you show that some people have
2 trespassed and then the court grants persons unknown
3 injunction against everybody, so what the court is doing
4 then is -- and then by its enforcement powers, a private
5 citizen has achieved the criminalisation in advance of
6 trespass so it becomes almost like a privileged citizen.
7 It has managed to essentially say, "You are the
8 citizens, you'll just have to rely upon your normal
9 trespass rights. We have got an injunction from the
10 court which says that you must not -- nobody must
11 trespass on our land and, if you do, we can invoke the
12 court's punishment, including sending people to prison".

13 MS BOLTON: My Lord, yes.

14 MR JUSTICE NICKLIN: So in simple parlance you have
15 criminalised trespass. The civil court has criminalised
16 trespass in a particular area. Now, bearing in mind
17 that there are -- that is an exercise which ought to be
18 carried out by a body with democratic legitimacy,
19 arguably, which the court doesn't have. So a PSPO, for
20 example -- looking at the exclusion zone we were talking
21 about, the exclusion zone could be achieved by a PSPO.
22 That would be done by a local authority exercising
23 powers given to it under the relevant act and it would
24 therefore have the element of democratic legitimacy.
25 Equally, I think there are specific statutory provisions

1 which govern — that make it a criminal offence to
 2 trespass at certain highly sensitive sites in the
 3 United Kingdom.
 4 MS BOLTON: Well, yes.
 5 MR JUSTICE NICKLIN: So there's already, as it were, a map
 6 which shows that if you want — so far as the law
 7 provides, there are instances where penalties can be
 8 provided for exclusion of the public generally from
 9 premises or property or land, but that this is a novel
 10 use of civil proceedings.
 11 MS BOLTON: My Lord, we say it's not a novel use because the
 12 difference in those cases is we're dealing with public
 13 land and there those —
 14 MR JUSTICE NICKLIN: No, I'm thinking of nuclear facilities.
 15 They're one that I think of, one of them. They're
 16 private land —
 17 MS BOLTON: But as a private law, it's an interference with
 18 the claimants' private law rights.
 19 MR JUSTICE NICKLIN: I understand that. You don't need to
 20 persuade me that, broadly speaking — I don't need any
 21 persuasion that the law says that the landowner has the
 22 right to exclude trespassers from its land. I don't
 23 need any persuasion on that. The question is about
 24 remedy. What you're asking the court to give you is an
 25 order that says, "Everybody is prohibited from

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1 trespassing on that land and, if you do it, you'll be in
 2 contempt of court, even though you've not been
 3 personally served with the injunction order and you were
 4 never a party to the proceedings".
 5 MS BOLTON: My Lord, indeed.
 6 MR JUSTICE NICKLIN: Yes. That's where the tension is
 7 because that is putting the court in the position of
 8 legislator.
 9 MS BOLTON: My Lord, there is authority that confirms that
 10 the court has the power to do so, that the claimant is
 11 entitled to assert those rights and seek precautionary
 12 relief to prevent further acts of trespass and for the
 13 court — what the court has to consider in whether or
 14 not to grant that relief is whether there is evidence of
 15 newcomers, whether the — the scale of that evidence and
 16 the likelihood of that continuing, bearing in mind that
 17 those who are acting lawfully or by an implied or
 18 express licence are not caught by this. It's not
 19 everyone. It's only those who are acting unlawfully
 20 that are caught by this —
 21 MR JUSTICE NICKLIN: By definition they're acting unlawfully
 22 because they're trespassing.
 23 MS BOLTON: Well, my Lord, an argument was made and has been
 24 made in these proceedings that one might have been going
 25 onto the land to read something on the noticeboard and

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1 that there might well be an argument that there's an
 2 implied licence to do that. The minute you change your
 3 conduct, though, you become a trespasser.
 4 MR JUSTICE NICKLIN: I know that, and you've raised all the
 5 reasons why that argument, you say, ought to be
 6 rejected.
 7 MS BOLTON: Yes.
 8 MR JUSTICE NICKLIN: I've got that. But what you're asking
 9 the court to order is an exclusion backed up by the
 10 court's coercive powers in civil proceedings which
 11 prohibit anybody from trespassing on your land.
 12 MS BOLTON: My Lord, yes.
 13 MR JUSTICE NICKLIN: If you're entitled to that order, why
 14 isn't anybody entitled?
 15 MS BOLTON: Well, anybody who can prove that they have been
 16 targeted in this way or have good reason to believe they
 17 will be targeted in this way can come to the court and
 18 seek that relief because it's such a significant
 19 interference with their private law rights.
 20 MR JUSTICE NICKLIN: Okay. So what about —
 21 MS BOLTON: That's why there's no —
 22 MR JUSTICE NICKLIN: What about — shoplifting is a big
 23 problem in Britain's supermarkets. Shoplifting is — if
 24 you look at it through the prism of civil law, it's
 25 conversion. What's to stop a supermarket from coming

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1 and getting a persons unknown injunction that prohibits
 2 anybody from converting the supermarket's goods?
 3 MS BOLTON: Well, my Lord, because they don't need to.
 4 MR JUSTICE NICKLIN: Why?
 5 MS BOLTON: It's not preventing people accessing and using
 6 their land.
 7 MR JUSTICE NICKLIN: Never mind about land. You're talking
 8 about different remedies. I'm talking about what is —
 9 if you're right about the court's procedures and powers
 10 entitling you to a remedy like this, why can't
 11 a supermarket come and ask for a persons unknown
 12 injunction which prohibits shoplifting, in short terms?
 13 MS BOLTON: I don't think they're the same thing, my Lord.
 14 If you're asking for an injunction to prevent
 15 shoplifting, you're not asking for an injunction to
 16 prevent trespassing. Trespass has a particular status.
 17 MR JUSTICE NICKLIN: Never mind if it's a different tort.
 18 So we're moving the tort from trespass to — the tort
 19 now is conversion rather than trespass.
 20 MS BOLTON: That's the point, my Lord. It's the
 21 interference with a very particular right that gives
 22 trespass the rights it does. It doesn't — conversion
 23 is different.
 24 MR JUSTICE NICKLIN: Well, conversion is different because
 25 in any case of conversion there's almost certainly going

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1 to be something of value that's taken so there's going
 2 to be a loss. Trespass is unusual in the sense that,
 3 for example, if I walk -- in the middle of the night, if
 4 I walk across a supermarket's car park as a short-cut to
 5 get home, arguably I'm a trespasser, but there's no
 6 loss, no damage, nothing.
 7 MS BOLTON: No, and there wouldn't be an injunction for that
 8 very reason, but --
 9 MR JUSTICE NICKLIN: Yes, but looking at it in those terms,
 10 that's a case where there's no damage and yet the court
 11 is going to grant an injunction prospectively which
 12 prohibits anybody from entering the land.
 13 MS BOLTON: Yes, as a matter of policy they don't have to
 14 require to prove damage because it's an interference
 15 with their private rights.
 16 MR JUSTICE NICKLIN: Yes.
 17 MS BOLTON: -- but if --
 18 MR JUSTICE NICKLIN: What I'm suggesting is there's a more
 19 compelling case to grant a persons unknown injunction in
 20 conversion cases because almost by definition there's
 21 going to be a loss in a conversion case.
 22 MS BOLTON: My Lord, that might depend on the individual
 23 facts. That's the point. Your Lordship makes the point
 24 of crossing the car park. Apart from the fact that some
 25 of that may or may not be all private land, the simple

1 fact of the matter is: would you restrain that? Well,
 2 no, if somebody cut across a car park. But if somebody
 3 was trespassing on a private parking space repeatedly to
 4 protest, preventing access, interfering with private
 5 rights over that land, then it becomes different.
 6 That's why it's particular --
 7 MR JUSTICE NICKLIN: In terms of conventional litigation, if
 8 you show that Mr Smith, every day -- it doesn't have to
 9 be protest -- every day parks his vehicle on private
 10 land where he's not entitled to park it, almost the
 11 natural response, the natural remedy to that, is an
 12 injunction, but it's granted against an individual
 13 person in conventional inter partes litigation. What
 14 the person doesn't get is an injunction that says,
 15 "Nobody can park their car in my parking spot and, if
 16 they do, they might go to prison".
 17 MS BOLTON: But, my Lord, as I'm about to come to, the
 18 courts have made it clear that that is available in the
 19 area of trespass and primarily one of the reasons is the
 20 interference with the A1P1 rights, but, my Lord, it's --
 21 and the courts have set out the test to be followed to
 22 do so. The claimant is here saying, "We meet those
 23 tests and that order ought to be granted". That's our
 24 position, that the law has made it clear that is
 25 available and is available against persons unknown and

1 that it's for the court to determine that based on the
 2 legal tests --
 3 MR JUSTICE NICKLIN: Well, you know as well as I do that the
 4 development of the persons unknown jurisdiction has
 5 moved from the conventional, let's say, squatter-type
 6 case, which is, "I don't know who you are but you're not
 7 entitled to be on this land and I have a right to
 8 possession of this premises and you do not. You are
 9 a trespasser. I'm going to court. I'm not going to be
 10 frustrated or the law is not going to be frustrated by
 11 the fact I don't know who you are", and so the court, in
 12 its infancy of persons unknown, used to say, "You, the
 13 people in occupation of the land, we don't know who you
 14 are but we can define you and we can point to you and we
 15 can serve you. You have to move because you're not
 16 entitled to possession of the land". In the
 17 conventional inter partes litigation scenario, that's
 18 fine, but where persons unknown has departed from that
 19 established litigation, as we know it, is to say, "Never
 20 mind about these people, we're talking about other
 21 people, so we'll talk about people generally, and you,
 22 people generally, in the future, nobody can trespass on
 23 this land".
 24 MS BOLTON: My Lord, indeed. That legal shift happened some
 25 20 years ago with Hampshire Waste. Indeed then it was

1 considered by the Court of Appeal both in *Boyd v Ineos*
 2 and the *Cuadrilla Bowland* case.
 3 MR JUSTICE NICKLIN: These are all interim injunction cases.
 4 The court has never really grappled with what this
 5 really means.
 6 MS BOLTON: My Lord, that of course is what's before the
 7 Supreme Court at the moment because, of course, the
 8 Court of Appeal in *Barking and Dagenham* said it does
 9 apply final relief. So, as the law stands at the
 10 moment, that is something which a claimant is entitled
 11 to apply for and, as your Lordship knows, we've asked
 12 for this to be kept open because we don't know what the
 13 Supreme Court will decide, but at the moment the law as
 14 it stands still follows the approach taken in
 15 *Hampshire Waste* and *Cuadrilla* and *Ineos* even at final
 16 hearing. My submissions can only be based on that until
 17 we hear from the Supreme Court as to what is the
 18 definitive position on it. That's the position of the
 19 law as it is today.
 20 MR JUSTICE NICKLIN: Right. Okay. Sorry, carry on.
 21 MS BOLTON: My Lord, as I say, I was about to come to the
 22 two cases concerning anti-fracking protests, which have
 23 confirmed the principles that apply to restraining
 24 trespass among other torts by persons unknown.
 25 Those two cases, *Boyd v Ineos Upstream Limited* and

1 Others [2019] EWCA Civ 515, in particular at
 2 paragraph 34 of the judgment of Lord Justice Longmore,
 3 and Cuadrilla Bowland v Persons Unknown [2020] EWCA
 4 Civ 9, in particular paragraph 50 of
 5 Lord Justice Leggatt, as he then was, those cases
 6 concern the principles to be followed.

7 "One, there must be sufficiently real and imminent
 8 risk of the tort being committed to justify
 9 precautionary relief; two, it must be impossible to name
 10 all those likely to commit the tort unless restrained;
 11 three, it must be possible to give effective notice of
 12 the injunction and the method of such service must be
 13 set out in the order; four, the terms of the injunction
 14 must correspond as far as possible to the threat in tort
 15 that said lawful can be restrained if the court is
 16 satisfied that such a restriction is necessary in order
 17 to afford effective protection to the rights claimed in
 18 the particular case [as read]."

19 My Lord, that may be important in this case to
 20 consider, and I highlight this is not the only way the
 21 court can approach this, but as to whether an exclusion
 22 zone should be continued to final hearing to ensure that
 23 trespass does not arise, and the extent of any exclusion
 24 zone may very well be to restrict something lawful, but
 25 it may be, in particular on the grass verge immediately

1 next to the access road, that the court deems that that
 2 is necessary to prevent tort from arising.

3 "Five, the injunction should be sufficiently clear
 4 and precise as to enable persons potentially affected to
 5 know what they must not do; and, six, the injunction
 6 should have a geographical and temporal limit [as
 7 read]."

8 My Lord, in *Wensley v Persons Unknown* [2014] EWHC
 9 3702 (Ch), the court granted final injunctive relief
 10 against persons unknown on the basis that, whilst the
 11 trespass had ceased following the grant of an interim
 12 injunction, it was likely that, if the injunction was
 13 discharged, the trespass would continue. The judge,
 14 however, recognised that an injunction to restrain
 15 trespassers should have a clear temporal limit and
 16 granted a final injunction for a further two years.

17 In this case, while the incidence of trespass
 18 reduced following the interim injunction, they did not
 19 cease and both the named defendants have engaged in
 20 further acts of trespass and persons unknown have also
 21 engaged in further acts of trespass. Accordingly, the
 22 claimants will respectfully submit that the court should
 23 grant relief to prevent further acts of trespass.

24 Interference with the first claimant's common law
 25 right to access the highway.

1 The first question the court has to ask is: what is
 2 the first claimant's right? Common law right to access
 3 the highway is explained by Lord Atkin in *Marshall v*
 4 *Blackpool Corporation* [1935] AC 16 at page 22, as:

5 "The owner of a land joining a highway has a right
 6 of access to the highway from any part of his premises.
 7 This is so whether or not his predecessors originally
 8 dedicated the highway or part of it and whether he is
 9 entitled to the whole or some interest in the grounds
 10 sub-adjacent or not. The rights of the public to pass
 11 along the highway are subject to this right of access
 12 just as the right of the access is subject to the rights
 13 of the public and must be exercised subject to the
 14 general obligations as to nuisance and the like imposed
 15 upon a person using the highway [as read]."

16 The common law right to access the highway is
 17 summarised in the 23rd edition of Clerk and Lindsell at
 18 paragraph 19.180. In that summary, it is noted that an
 19 interference with a right is actionable per se and if an
 20 interference is such as to cause loss to business, such
 21 as preventing customers entering the premises, damages
 22 can be obtained. Damages are not, however, a required
 23 element of the claim for the claim to be successful.

24 My Lord, the claimant takes this opportunity to
 25 highlight it's not particularly seeking to recover

1 damages in these claims but it does have to, for some of
 2 the claims, demonstrate the loss. But it would be
 3 content for those damages claims -- the assessment of
 4 quantification to be stayed. It's not looking for an
 5 award.

6 Mr Justice Morgan, again in the *Ineos* case, my Lord,
 7 acknowledged the existence of a private landowner's
 8 right to access the highway from his adjoining land as
 9 distinct from the right of the landowner to use the
 10 highway itself as a member of the public; in particular
 11 paragraphs 42, 101, 107 and 150 of his judgment.

12 The first claimant is the freehold owner of the land
 13 that adjoins the highway. As set out in the particulars
 14 of claim, as explained in the 20th witness statement of
 15 Susan Pressick at paragraphs 54 to 55, the first
 16 claimant's primary position is that it holds the
 17 freehold title to both the Wyton site and the access
 18 land. In the alternative, the first claimant's position
 19 is that, if it's wrong about that, it holds the freehold
 20 title for the Wyton site which adjoins the adopted
 21 highway. So, my Lord, there is an overlap between the
 22 trespass and the interference claim. As such, either
 23 way, the first claimant had its licensees including but
 24 not limited to those in the second claimant class and
 25 assign(?) to enjoy the aforementioned common law right

1 to access the highway from the first claimant's land.
 2 Whilst the statutory provisions have since reduced
 3 the scope of the rights, where interference with this
 4 right is caused by the Highways Authority -- and you'll
 5 see I've cited Ching Garage Limited v Chingford
 6 Corporation [1961] 1 WLR 470 and 478 and Cusack v Harrow
 7 LBC [2013] UKSC 40; [2013] 1 WLR 2022 -- in all other
 8 regards, the common law right to access the highway
 9 remains. So the only change, my Lord, is primarily that
 10 which involves the Highways Authority and their rights
 11 over land.

12 The common law right to access the highway from
 13 adjoining land is a right grounded in private law; see
 14 paragraph 42 of Ineos. Moreover the claimants submit
 15 that the right is proprietary and shares many of the
 16 characteristics of an easement. To that end, the
 17 claimant submits that the interference with the common
 18 law right to access the highway should be treated in the
 19 same way as trespass and not public nuisance.

20 Specifically it is submitted that the defendants'
 21 Articles 10 and 11 rights do not carry with them the
 22 right to interfere with the first claimant's common law
 23 right to access the highway. Accordingly, the claimants
 24 submit that the courts need not engage in the same
 25 balancing act it must undertake when considering the

1 public nuisance of obstructing the highway and should
 2 approach this as a private law right where no such
 3 balancing act is required. If the balancing act is
 4 required and that is the conclusion that the court
 5 reaches, then the balancing act would be the same as
 6 under that for the public nuisance cases, but we say
 7 it's a private law right and therefore that balancing
 8 act does not apply.

9 MR JUSTICE NICKLIN: You see, trespass is easy because
 10 I don't need much persuasion that you don't have any
 11 Article 10 right to trespass on somebody's land for the
 12 purpose of demonstrating. It gets a bit more
 13 complicated when -- we can take by way of an example,
 14 if, once a year, Camp Beagle decide to advertise
 15 a protest where they ask people to come and march down
 16 the B1090 and say they attract 20,000 people on their
 17 annual protest and they process down the carriageway,
 18 there is going to be, for the time of the procession, an
 19 interference with your access to the Wyton site. If the
 20 court were being asked prospectively and focusing on the
 21 demonstration to prohibit it because it would interfere
 22 with your access rights, the court would have to balance
 23 the protest right against the inconvenience.

24 The court is likely in those circumstances -- if,
 25 let's say, it takes no more than an hour for 20,000

1 people to process down the B1090, the court might reach
 2 the conclusion that the fact that you're prevented from
 3 going in and out of the Wyton site for an hour is, I'm
 4 afraid, the price you pay for the people demonstrating
 5 and exercising their rights to have a procession down
 6 the highway. It would be up to the police to decide
 7 whether that level of inconvenience might be -- require
 8 intervention or Public Order Act restrictions,
 9 et cetera. That's a separate issue.

10 So that shows you that it, in short term, it depends
 11 as to what remedy the court might grant. The problem
 12 with the persons unknown, prospective-looking anybody,
 13 the difficulty of issuing an injunction against persons
 14 unknown, saying, "Nobody can interfere with MBR Acres'
 15 ability to access its property", is that I'm then
 16 prospectively curtailing protest rights, so there is
 17 a difficulty --

18 MS BOLTON: There is, yes.

19 MR JUSTICE NICKLIN: -- because in most of the other torts
 20 that are relied upon, there is likely to be a balancing
 21 exercise at the heart which makes doing it against
 22 persons unknown and prospectively, particularly against
 23 newcomers, very difficult.

24 MS BOLTON: My Lord, indeed. One of my submissions later
 25 into this piece will be that at present the common law

1 right is protected by the exclusion zone.

2 MR JUSTICE NICKLIN: Yes, it is.

3 MS BOLTON: Now, the exclusion zone, actually as it stands
 4 at present, wouldn't prevent that march. It would
 5 prevent that march on one side of the carriageway.

6 MR JUSTICE NICKLIN: Yes.

7 MS BOLTON: The main concern for the claimant on the common
 8 law right interference is actually getting -- and you
 9 will hear this from the witnesses -- is not just
 10 physical obstruction of somebody being in front of
 11 a car, but standing on a grass verge and preventing
 12 a party being able to actually look left, look right and
 13 safely gaining access to a road which is quite busy.

14 It seems that one of the things -- and one of the
 15 things I will be submitting about the exclusion zone
 16 being anchored to a degree to the common law right is
 17 the extent of the exclusion zone that's needed. It may
 18 be that the way to deal with that is an exclusion zone
 19 which prevents the immediate use of the grass verge and
 20 not the carriageway because, as your Lordship has
 21 balanced with the highways obstruction so far in the
 22 interim injunction, there's ways of dealing with that on
 23 the highway rather than by an exclusion zone as to what
 24 is and isn't appropriate. But it seems that the issue
 25 of that difficulty for future protests is overcome by

1 the extent of the exclusion zone, which we will be
 2 submitting is one of the most appropriate ways to deal
 3 with this —
 4 MR JUSTICE NICKLIN: It's also the hardest aspect of this
 5 case. The hardest aspect of this case is the legal
 6 justification, particularly on a persons unknown basis,
 7 for an exclusion zone because that's the hardest legally
 8 to justify.
 9 MS BOLTON: Yes. There's two points. What is the
 10 interference with the common law right to access the
 11 highway? That primarily concerns the access road. That
 12 doesn't prevent a march down the highway if that is in
 13 any way covered by an exclusion zone as a way of dealing
 14 with the interference with that right, and you'll see
 15 from the videos that that is where most of that
 16 interference takes place.
 17 The question, and the more difficult one, I accept,
 18 is the grass verge outside of what is the claimants'
 19 land, but again it still doesn't prevent people marching
 20 up and down the carriageway and it would be then about
 21 extent and scope as to whether it is properly anchored
 22 to the cause of action, as to is that causing a — if
 23 that is interfering with that common law right, then
 24 that is that point in the test that comes out of Ineos
 25 and Cuadrilla of can you restrain something that's

1 lawful only if that's the effective way to ensure that
 2 that right is not infringed, and only then, and so you
 3 would have to be convinced that that is the only way to
 4 manage that. We would say if you simply were to
 5 protect, for instance, the access road, that it would be
 6 very easy to still interfere with that right by standing
 7 and blocking the driver left and right.
 8 MR JUSTICE NICKLIN: The problem you're going to encounter
 9 that we're going to have to look at is that because —
 10 let's take the demonstration. Let's take the march down
 11 the B1090 as our litmus test for this. Because that's
 12 going to engage Articles 10 and 11, then you've got the
 13 paradigmatic example of parallel analysis arguably with
 14 greater weight on the protest side because A1P1 isn't
 15 a primary — so you don't have the conventional battle
 16 that I see regularly between Article 8 and Article 10,
 17 which is the true parallel analysis. But let's assume
 18 that — so let's say that A1P1 is one of the
 19 qualifying — it's recognised in Articles 10 and 11
 20 because it's rights of others, so it broadly fits into
 21 that. If it is parallel analysis, then it's about
 22 necessity and proportionality.
 23 MS BOLTON: Yes.
 24 MR JUSTICE NICKLIN: Almost by definition an exclusion zone
 25 is going to fail proportionality even if it doesn't fail

1 necessity because there will be other ways in which the
 2 court could tackle the problem. I mean, for example,
 3 the direct order is, "You must not obstruct vehicles
 4 entering or leaving the Wyton site". That's the direct
 5 order. That would be justified by the alternative
 6 engaged right and it would go no further than is
 7 necessary to protect the right because it would be
 8 direct. It would have to have inbuilt into it, "save
 9 where ..." — because it's not a strict liability, so
 10 the fact that the procession might take half an hour to
 11 go past the entrance of the Wyton site, which means that
 12 even that couldn't be — so the order would have to
 13 provide, "save as to the extent that you are lawfully
 14 exercising a right of way along the carriageway", so
 15 that would probably cover it.
 16 MS BOLTON: Yes.
 17 MR JUSTICE NICKLIN: Then that might deal with the parallel
 18 analysis that would be required in relation to the
 19 engaged rights. Exclusion zones are very hard to
 20 justify because they are likely to fail either or both
 21 of necessity and proportionality.
 22 Not now, Mr Curtin.
 23 MS BOLTON: My Lord, I entirely accept that and I entirely
 24 accept that that is the alternative way of that right
 25 being protected by an order. We ask the court to

1 consider it in a less extensive way, purely — and we
 2 say the court does need to look at it, your Lordship is
 3 absolutely right, on a proportionality and necessity
 4 basis — as to when you see the evidence and you see the
 5 videos, whether you think that it probably is necessary
 6 for those to understand that that is an interference,
 7 that they should not be on that part of the grass verge
 8 because that immediate part, if you are standing there
 9 with a placard and you don't move, you will prevent
 10 visibility, and you will hear a lot from the witnesses
 11 about that. So that is why we ask, but I accept that
 12 the court may take the view that there is a more direct
 13 way.
 14 MR JUSTICE NICKLIN: You see the answer — the wider society
 15 answer to that is civil proceedings are not the remedy
 16 for this. It's either down to the local authority and
 17 the Highways Authority to regulate the position, either
 18 by physically erecting something which prevents people
 19 from standing in an area because there is risk of —
 20 this is a Highways Authority issue or alternatively it's
 21 a local authority issue, and the police say, "The way of
 22 dealing with this is to impose an exclusion zone around
 23 the entrance to the site", and you persuade the local
 24 authority to impose a PSPO.
 25 MS BOLTON: My Lord, I understand that the court will need

1 to look at the evidence and either conclude that that
 2 isn't a necessary step, because I accept that we have to
 3 demonstrate --
 4 MR JUSTICE NICKLIN: No, I know it's not a necessary step,
 5 but I've not got -- I don't consider myself, as the
 6 court, to be required to solve all the problems of the
 7 world through civil proceedings. There are some things
 8 that civil proceedings cannot resolve and they fall into
 9 other people's responsibilities. One of the arguments
 10 more broadly is the best people to decide how protests
 11 should be regulated are the police because (a) they have
 12 the powers, (b) they're on the ground, (c) they can make
 13 evidence-based decisions and exercise proportionality
 14 and necessity assessments on the ground. They are
 15 immeasurably better placed than a civil court is,
 16 prospectively trying to marshal a protest and decide
 17 what the rules are and who can do what. In a society
 18 sense, the police are better placed to decide those
 19 issues than the civil court is.
 20 MS BOLTON: My Lord, I hear what your Lordship is saying.
 21 I remind the court that, one, the police encouraged the
 22 claimant to make an application for an injunction and,
 23 two, have indicated to the court in their evidence that
 24 the injunction has assisted them. Obviously the law has
 25 developed in a way which permits the claimant to come to

1 court and ask for this assistance and it is an
 2 interference with its rights and it is seeking a remedy.
 3 I understand that what your Lordship has made very clear
 4 is what that remedy should be is very much
 5 your Lordship's focus --
 6 MR JUSTICE NICKLIN: Well, the hardest point in this case is
 7 what order the court grants.
 8 MS BOLTON: Yes.
 9 MR JUSTICE NICKLIN: There are some interesting points along
 10 the way about, for example, drones and trespass and
 11 things like that --
 12 MS BOLTON: Yes.
 13 MR JUSTICE NICKLIN: -- but, relatively speaking, that's not
 14 where the difficulty in this case lies. The difficulty
 15 in this case lies in what remedy should the court grant
 16 and against whom. Those are the really difficult
 17 issues.
 18 MS BOLTON: My Lord, I accept that.
 19 MR JUSTICE NICKLIN: And it seems to me that remedy --
 20 because it is ultimately discretionary, it does seem to
 21 me the court has got to be alert to is this the best way
 22 of dealing with this given the various downsides that
 23 can be pointed to. And the court will have to -- I'll
 24 have to grapple with those things and you'll make your
 25 submissions on them and by far and away your strongest

1 point is the civil law entitles your clients to rely
 2 on -- they can point to causes of action, they can
 3 demonstrate either past breach or threat of future
 4 breach and that, therefore, the natural result of that
 5 should be a remedy. That's by far and away the
 6 strongest argument.
 7 MS BOLTON: Yes.
 8 MR JUSTICE NICKLIN: Right. Okay. Carry on.
 9 MS BOLTON: My Lord, I'm about to move on to my submissions
 10 on public nuisance and we've only got five minutes, so
 11 I think that's a good place to break.
 12 MR JUSTICE NICKLIN: That's fine. Let me just -- because
 13 I've indicated to Mr Curtin that I wasn't going to hear
 14 him and I'm going to try to explain.
 15 Mr Curtin, what I'm doing at the moment --
 16 I probably ought to shut up really because we're going
 17 to have to cover all of this anyway. The points I'm
 18 putting to Ms Bolton are points that are occurring to me
 19 as she's making her submissions. I'm sure all these
 20 points she's aware are going to come up later in the
 21 trial and I should just let her get on with making the
 22 submissions. It's not really now the point to have the
 23 argument. I know that you've got a lot to say on these
 24 points. If there's anything you wanted to say to me in
 25 the five minutes before lunchtime, go ahead.

1 MR CURTIN: I don't want to interfere with the opening
 2 statement. It was just to perhaps suggest -- you were
 3 talking about a hypothetical demonstration point. I am
 4 already -- my alarm bells are ringing that all this talk
 5 of the ditch -- and you've talked at length today -- for
 6 two years, nearly two years, there's been Camp Beagle,
 7 which is on the verge outside of the premises. I think
 8 we're leading up to some sort of submission that that
 9 should be included. That's my fear. So if you were
 10 going to talk about a hypothetical, you don't have to
 11 talk about a march, you can talk about a day-to-day
 12 existence on the grass verge outside of MBR. So I'm
 13 pleased to -- I was worried -- I thought that there was
 14 no ...
 15 MS BOLTON: I've just assured Mr Curtin that that's not part
 16 of our submission.
 17 MR JUSTICE NICKLIN: It's not an eviction notice yet.
 18 MS BOLTON: No, it is not an eviction notice.
 19 MR JUSTICE NICKLIN: More broadly, Mr Curtin, it's important
 20 during the trial -- and you too, Ms Jaffray -- which is,
 21 if there's any part of the proceedings you don't
 22 understand as to what we're doing -- you broadly
 23 understand now that what Ms Bolton is doing is she's
 24 really setting out her stall. What she's saying is,
 25 "This is our case". Then she will call her evidence and

1 then you'll get your chance to put your questions to the
 2 witnesses and ultimately, when we move to part 2 of the
 3 trial, which is when you present your evidence, which is
 4 essentially your opportunity to give evidence, Ms Bolton
 5 will be able to ask you questions. And then we get to
 6 the end of the trial, which is after we've had all of
 7 the evidence, then both parties or the relevant parties
 8 are able to make their submissions to me as to what they
 9 say I should do on the basis of that evidence, what
 10 findings of fact I should make, what conclusions
 11 I should reach on the evidence and how the law affects
 12 that.

13 So Ms Bolton has two very important roles. One is
 14 that she's making submissions as to the law, and she has
 15 set out this morning the broad categories where she says
 16 the civil wrongs, so trespass, interference with access
 17 to the highway -- we're going to come on to the nuisance
 18 aspect and also harassment -- those are what are the
 19 legal wrongs which the claimants say have been committed
 20 by you and other people, the persons unknown, and she's
 21 going to say ultimately that those will justify the
 22 court making an order not unadjacent -- it may require
 23 some modifications, it may change slightly -- but
 24 largely the claimants would like an order that looks
 25 something similar to the interim injunction.

1 When I'm talking about "remedy", that's -- really
 2 the main thing the claimants want is the remedy of an
 3 injunction. They're not so much caring about damages.
 4 That's what Ms Bolton was saying about some of her
 5 causes of action require the claimants to demonstrate
 6 they've suffered loss and they would in theory be
 7 entitled to claim that loss as part of their remedy, but
 8 they're saying that they would be content for that
 9 aspect of the remedy to be stayed, in other words
 10 they're not really -- they recognise they have to
 11 demonstrate that part of it in order to demonstrate
 12 they're entitled to some sort of remedy or relief from
 13 the court, but their primary concern, as has been pretty
 14 clear right from the outset, is about injunction.

15 So this case at the end is going to really be about
 16 the terms of any injunction the court might grant, and
 17 you'll get plenty of opportunity, when we get to that
 18 final stage, to make your submissions, as will
 19 Ms Jaffray, about what you say the court should do in
 20 terms of any injunction, even if the court is satisfied
 21 that an injunction should be granted; all right?

22 MR CURTIN: Yes. It's not my role to object to the opening
 23 statement.

24 The other thing, I went -- before -- someone arrived
 25 yesterday at the camp and they just wanted to -- they're

1 making a documentary and they just wanted to fly the
 2 drone to literally show the buildings, the layout. You
 3 were talking about flying drones and I just wanted to
 4 give that specific example. Okay, let's talk about the
 5 drone in terms of the persons unknown. Someone has come
 6 along and they wanted to just literally -- and they
 7 don't have to even fly across the land to get the
 8 buildings. What damage, what harm, and what would this
 9 injunction ever -- how would it affect that person who
 10 just wants to make the documentary and wants to show
 11 some buildings?

12 MR JUSTICE NICKLIN: Anyway, there we are.

13 Right. Let's come back at 2 o'clock then. Thank
 14 you very much. I'll do my best not to interrupt any
 15 further.

16 (12.58 pm)

(The short adjournment)

18 (1.59 pm)

19 MR JUSTICE NICKLIN: Yes, Ms Bolton.

20 MS BOLTON: My Lord, I'm now moving on to obstruction of the
 21 highway. It's well established, my Lord, that it's
 22 a public nuisance to obstruct or hinder the free passage
 23 of the public along the highway; East Hertfordshire
 24 District Council v Isabel Hospice Trading Limited [2001]
 25 JPL 597. The first claimant's staff and members of the

1 second claimant class have endured repeated incidents of
 2 obstruction and of hindering their free passage along
 3 the highway. Public nuisance caused by way of
 4 obstruction of the highway was considered in Ineos at
 5 paragraphs 42 to 46 and 64 to 65, specifically
 6 paragraph 44. Mr Justice Morgan refers to an extract
 7 from Halsbury's, which says:

8 "One, whether an obstruction amounts to a nuisance
 9 is a question of fact; two, an obstruction may be so
 10 inappreciable or so temporary as not to amount to
 11 a nuisance; three, generally it is a nuisance to
 12 interfere with any part of the highway; and, four, it is
 13 not a defence to show that, although the act complained
 14 of is a nuisance with regard to the highway, it is in
 15 other respects beneficial to the public [as read]."

16 Further, paragraph 44 goes on to state that:

17 "The notes to paragraph 325 contain reference to
 18 a case where the test for obstruction is variously
 19 described. Thus it has been said that any wrongful act
 20 or omission upon or near a highway whereby the public is
 21 prevented from freely, safely and conveniently passing
 22 along the highway is a nuisance. An obstruction is
 23 caused where the highway is rendered impassable or more
 24 difficult to pass along by reason of some physical
 25 obstacle [as read]."

1 Obstruction of the highway may also be a criminal
 2 offence pursuant to the Highways Act, section 1371,
 3 which provides:
 4 "If a person without lawful authority or excuse in
 5 any way wilfully obstructs the free passage along the
 6 highway, he is guilty of an offence and liable to a fine
 7 not exceeding level 3 on the standard scale [as read]."
 8 The parties in Ineos assumed that the same basic
 9 principles applied to public nuisance and to the
 10 criminal offence. To that end, at paragraph 65,
 11 Mr Justice Morgan set out that, for there to be an
 12 offence under the Highways Act 1980, section 1371, it
 13 must be shown that:
 14 "One, there is an obstruction of the highway which
 15 is more than de minimis. Occupation of part of a road
 16 thus interfering with people having the use of the whole
 17 road is an obstruction; two, the obstruction must be
 18 wilful, ie deliberate; and, three, the obstruction must
 19 be without lawful authority or excuse. Without lawful
 20 excuse may be the same thing as unreasonably or it may
 21 be that it must in addition be shown that the
 22 obstruction is unreasonable [as read]."
 23 The claimants will say that that sets out the
 24 questions the court must ask. The claimants will say
 25 that the test for the obstruction can be satisfied in

1 these proceedings and that, without the benefit of an
 2 injunction, the obstruction will continue and in all
 3 likelihood increase.
 4 Ineos refers to two of the leading authorities on
 5 obstruction of the highway by way of protest; first,
 6 Hubbard v Pitt and then DPP v Jones. The question of
 7 whether assembly on the highway was lawful was revisited
 8 by the House of Lords in DPP v Jones. The case is of
 9 particular importance, having been relied upon and
 10 approved by the Supreme Court in the recent decision in
 11 Reference by the Attorney General for Northern Ireland
 12 Abortion Services (Safe Access Zones) (Northern Ireland)
 13 Bill [2022] UKSC 32 and [2023] 2 WLR 33.
 14 The following passages of Jones outline the relevant
 15 principles for this case. At page 245, paragraph G, to
 16 255, paragraph A, Lord Irvine said:
 17 "The question to which this appeal gives rise is
 18 whether the law today should recognise that the public
 19 highway is a public place on which all manner of
 20 reasonable activities may go on. For the reason I have
 21 set out below in my judgment, it should provided these
 22 activities are reasonable, do not involve the commission
 23 of a public or private nuisance and do not amount to an
 24 obstruction of the highway unreasonably impeding the
 25 primary right of the public to pass and repass. They

1 should not constitute a trespass. Subject to these
 2 qualifications, therefore, there would be a right to
 3 peaceful assembly on the public highway [as read]."
 4 Lord Irvine concluded, page 257, paragraph D:
 5 "I conclude, therefore, the law to be that the
 6 public highway is a public place which the public may
 7 enjoy for any reasonable purpose provided the activity
 8 in question does not amount to a public or private
 9 nuisance and does not obstruct the highway by
 10 unreasonably impeding the primary right of the public to
 11 pass and repass. Within these qualifications, there is
 12 a public right of peaceful assembly on the highway [as
 13 read]."
 14 At page 280, paragraph D, and page 281, paragraph C,
 15 Lord Clyde said:
 16 "So far as the manner of exercise of the right is
 17 concerned, any use of the highway must not be so
 18 conducted as to interfere unreasonably with the lawful
 19 use by other members of the public for passing along it.
 20 The fundamental element in the right is the use of the
 21 highway for undisturbed travel. Certain forms of
 22 behaviour may of course constitute criminal actings in
 23 themselves, such as the breach of the peace, but the
 24 necessity also is that travel by the public should not
 25 be obstructed. The use of the highway for passage is

1 reflected in all the limitations, whether on extent,
 2 purpose or manner. While the right to use the highway
 3 comprises activities within those limits, those
 4 activities are subsidiary to the use for passage and
 5 they must be not only usual and reasonable but
 6 consistent with the use even if they are not strictly
 7 ancillary to it. In my view, the argument for the
 8 defendants and indeed the reasoning of the Crown Court
 9 went further than it needed to go in suggesting that any
 10 reasonable use of the highway, provided that it was
 11 peaceful and not obstructive, was lawful and so a matter
 12 of public right. Such an approach opens a door of
 13 uncertain dimensions into an ill-defined area of uses
 14 which might erode the basic predominance of the
 15 essential use of the highway as a highway. I do not
 16 consider that, by using the language which it used,
 17 Parliament intended to include some distinct right in
 18 addition to the right to use the road for the purpose of
 19 passage [as read]."
 20 Accordingly, the law is such that, one, there is
 21 a right to peaceful assembly on the highway; two, that
 22 right does not extend so far as to allow the committing
 23 of public nuisance; three, while the right to use the
 24 highway comprises activities such as assembly on the
 25 highway, such activities are subsidiary to the use for

1 passage and they must be not only usual and reasonable
 2 but consistent with the primary use of the highway to
 3 pass and repass, so obstructing a driver's view or
 4 obstructing passage along the highway is likely to be
 5 inconsistent with the primary use of the highway; four,
 6 the public nuisance may arise by an unreasonable
 7 obstruction of the highway, such as unreasonably
 8 impeding the private rights of the public to pass and
 9 repass; five, whether an obstruction of the highway is
 10 unreasonable is a question of fact but will generally
 11 require that obstruction is more than de minimis and
 12 must be wilful. The claimants will say that the acts
 13 are neither individually or cumulatively de minimis.

14 DPP v Ziegler and Others.

15 Until recently, the approach to Jones appeared to be
 16 modified by the case of DPP v Ziegler and Others [2021]
 17 UKSC 23; [2022] AC 408. However, it is apparent from
 18 paragraphs 27 to 29 of Lord Reed's judgment in Reference
 19 by the Attorney General for Northern Ireland Abortion
 20 Services (Safe Access Zones) (Northern Ireland) Bill
 21 [2022] UKSC 32 and [2023] 2 WLR 33 that Ziegler may have
 22 been taken out of context and may have been
 23 misunderstood to have weakened the protection to the
 24 right to pass and repass without obstruction, as
 25 confirmed in Jones.

1 Ziegler is relevant in the context of the claimants'
 2 claim for obstruction of the highway and the prohibition
 3 the claimant seeks requiring the defendant not to
 4 approach, slow down or obstruct any vehicle which is
 5 travelling to or from the first claimant's land along
 6 the B1090, Abbots Ripton Road, or within one mile in
 7 either direction of the first claimant's land at the
 8 Wyton site. The Ziegler test will be relevant. The
 9 court's attention is drawn to Ziegler at paragraph 70,
 10 per Lord Hamblen and Lord Stephens, which provides,
 11 after having surveyed the relevant jurisprudence, that,
 12 "It is clear from those authorities that intentional
 13 actions by protesters to disrupt by obstruction others
 14 enjoys the guarantee of Article 10 and 11 [as read]",
 15 but both disruption and whether it is intentional are
 16 relevant factors in relation to proportionality.

17 Accordingly, intentional action, even with an effect
 18 that it is more than de minimis, does not automatically
 19 lead to the conclusion that any interference with the
 20 protesters' Articles 10 and 11 rights is proportionate.
 21 Rather, there must be an assessment of the facts in each
 22 individual case to determine whether the interference
 23 with Article 10 or Article 11 rights are necessary in
 24 a democratic society. Their Lordships then, at 72,
 25 adopted the non-exhaustive list of factors to consider

1 when evaluating proportionality, as set out by
 2 Lord Neuberger, Master of the Rolls, in City of London
 3 Corporation v Samede. Paraphrasing that content, those
 4 factors are, one, the extent to which the continuation
 5 of the protest would breach domestic law; two, the
 6 importance of the precise location to the protesters;
 7 three, the duration of the protest; four, the degree to
 8 which the protests occupy the land; five, the extent of
 9 the actual interference the protest causes to the rights
 10 of others, including property rights of owners of the
 11 land and the right of any member of the public; six,
 12 when of the view giving rise to the protest relates to
 13 very important issues and whether there are views which
 14 many would see as being of considerable breadth, depth
 15 and relevance; and, seven, whether the protesters
 16 believed in the views that they were expressing.

17 For context, in Ziegler, the protesters were opposed
 18 to the arms trade. They held a peaceful protest at the
 19 Defence and Security International Arms Fair at the
 20 ExCel Centre in London by laying down on one side of the
 21 road and locking on to an approach road leading to the
 22 Excel Centre for approximately 90 minutes before they
 23 were removed by police. The protest did not block all
 24 entry and access to the ExCel Centre, it did not target
 25 specific individuals working at the ExCel Centre and was

1 part of a discrete protest that did not arise out of
 2 a continuing protest which has experienced multiple
 3 incidents of obstruction of the highway over a period of
 4 many months or years.

5 The order directing convictions against the
 6 defendant protesters under the Highways Act section 137
 7 was set aside and dismissal of all charges was restored.
 8 The approach and decision in Ziegler was never intended
 9 to have universal application. The same has now been
 10 made clear by the Lord Reed in the judgment of Northern
 11 Ireland Abortion Services case, in which his Lordship
 12 made several important observations relevant to the
 13 approach of the Supreme Court and the Divisional Court
 14 in Ziegler and the approach to the case, whether civil
 15 or criminal, concerning obstruction of the highway.

16 Those observations include, one, section 137 and the
 17 equivalent predecessor provisions have a long and
 18 specific history and have been the subject of a great
 19 deal of judicial consideration. The approach adopted to
 20 section 137 and its predecessor for over a century prior
 21 to Ziegler was rooted in authorities which treated the
 22 question to be decided under the statute as similar to
 23 the question to be decided in civil nuisance cases of an
 24 analogous kind. On that basis it was held that it was
 25 necessary for the court to consider whether the activity

1 being carried on in the highway by the defendant was
 2 reasonable or not; for example, *Lowdens v Keaveney*,
 3 [1903] 2 IR 82, 87 and 89. That question was treated as
 4 one of fact depending on all the circumstances of the
 5 case; *Nagy v Weston* [1965] 1 WLR 280 and 284; *Cooper v*
 6 *Metropolitan Police Commissioner*, [1985] 82 CR App R
 7 238, 242 and 244.

8 That approach accorded with the general treatment in
 9 the criminal law of assessment of reasonableness as
 10 questions of fact. In cases where the activity in
 11 question took the form of a protest or demonstration,
 12 common law rights of freedom of speech and freedom of
 13 assembly were treated as an important factor in the
 14 assessment of reasonable user; see, for example, *Hirst v*
 15 *Chief Constable of West Yorkshire* (1986) 85 Cr App R
 16 143. That approach was approved, obiter, by members of
 17 the House of Lords in *Director of Public Prosecutions v*
 18 *Jones* [1999 2 AC 240, "Jones".

19 Lord Irvine of Lairg summarised the position at 255:
 20 "The public have the right to use the public highway
 21 for such reasonable and usual activities as are
 22 consistent with the general public's primary right to
 23 use the highway for purposes of passage and repassage.
 24 The same approach continued to be followed after the
 25 Human Rights Act entered into force: see, for example,

1 *Buchanan v Crown Prosecution Service* [2018] EWHC, 1773
 2 (Admin); [2018] LLR 668, at paragraph 22.

3 Two, one of the issues in dispute in the *Ziegler*
 4 appeal was whether there can be a lawful excuse for the
 5 purposes of section 137 in respect of deliberate
 6 physically obstructive conduct by protesters where the
 7 obstruction prevented or was capable of preventing other
 8 highway users from passing along the highway.

9 Lord Hamblen and Lord Stephens concluded that there
 10 could be. However, Lord Reed in *Re Abortion Services*
 11 (*Safe Access Zones*) (Northern Ireland) Bill observed
 12 that the case of *Jones* was neither cited nor referred to
 13 in *Ziegler*, paragraph 27, and it is plain from his
 14 Lordship's judgment that he was citing *Jones* with
 15 approval.

16 Three, Lord Reid observed that the dictum of
 17 Lord Hamblen and Lord Stephens in *Ziegler* had been
 18 widely treated as stating a universal rule. Lord Reed
 19 said:

20 "That view is mistaken. In the first place,
 21 questions of proportionality, particularly when they
 22 concern the compatibility of a rule or policy with
 23 Convention rights, are often decided as a matter of
 24 general principle rather than an evaluation of the
 25 circumstances of each individual case [as read]."

1 That's paragraph 29.

2 Four, the determination of whether an interference
 3 with a convention right is proportionate is not an
 4 exercise in fact—finding. It involves the application
 5 in a factual context, often not in material dispute, of
 6 the series of legal tests, set out at 24, together with
 7 a sophisticated body of case law and may also involve
 8 the application of statutory provisions such as
 9 sections 3 and 6 of the Human Rights Act or the
 10 development of the common law; see paragraph 30.

11 Five:

12 " ... the European Court has repeatedly emphasised
 13 that the Convention is intended to protect rights that
 14 are practical and effective and that its concern is
 15 therefore with matters of substance rather than form.
 16 It would be inconsistent with that approach to draw
 17 a fundamental distinction in our domestic application of
 18 the Convention in relation to legal measures restricting
 19 protesters' rights under Articles 9 to 11 according to
 20 the domestic classification of the measure as civil or
 21 criminal. That is illustrated by the fact that one of
 22 the Government's responses to the decision in *Ziegler*
 23 was to obtain a civil injunction covering the national
 24 network of motorways and other major roads and
 25 prohibiting activities which would obstruct them. Such

1 injunctions, although classified as civil remedies, are
 2 generally directed against persons unknown as well as
 3 any protester whose identities are known and contain
 4 a power of arrest. They are enforceable by proceedings
 5 for contempt in which unlimited fines or sentences of
 6 imprisonment can be imposed. Those are more serious
 7 penalties than are available under the present bill."

8 That's paragraph 40.

9 Six, a defence of lawful or reasonable excuse may
 10 provide a route by which a proportionality assessment
 11 can be carried out, where the defence can properly be
 12 interpreted, having recourse, if needed, to section 3 of
 13 the Human Rights Act, as including the exercise of
 14 Convention rights; paragraph 57 of the judgment.

15 Seven, the mistake should not be made of assuming
 16 that the presence of a reference to lawful or reasonable
 17 excuse in the definition of an offence necessarily means
 18 that a proportionality assessment in respect of
 19 Convention rights is appropriate; paragraph 58 of the
 20 judgment.

21 Accordingly, the following can be understood from
 22 the Supreme Court's decision in the *Re Abortion Services*
 23 (*Safe Access Zones*) (Northern Ireland) Bill: one,
 24 *Ziegler* is not to be applied universally to cases
 25 concerning the obstruction of the highway and the

1 approach that is set out by Lord Irvine in Jones;
2 namely, "the public have the right to use the public
3 highway for such reasonable and usual activities as are
4 consistent with the general public's primary right to
5 use the highway for the purpose of passage and re passage
6 [as read]".

7 Two, when considering Articles 10 and 11 of the
8 Convention, no fundamental distinction should be drawn
9 between the criminal and civil law as both are capable
10 of regulating the conduct of protesters on the highway,
11 as acknowledged by Lord Reed at paragraph 41 of the
12 judgment.

13 Three, not every case of obstruction of the highway
14 in the context of a protest case will require
15 a proportionality assessment. If the ingredients of the
16 tort are proved, that may strike the correct balance.
17 The reference in Jones to the protesters' conduct
18 needing to be consistent with the general public's
19 primary use to pass and repass may be deemed to strike
20 the right balance. If the proportionality assessment is
21 to be undertaken, the decision in Re Abortion Services
22 (Safe Access Zones) (Northern Ireland) Bill suggests
23 a well-recognised but slightly different set of
24 questions to Samede, albeit the difference, we would
25 accept, is limited.

1 The test is as follows:
2 1. Is what the defendant did in exercise of one of
3 the rights in Article 10 or 11?
4 "2. If so, is there an interference by a public
5 authority with that right?
6 3. If there is an interference, is it prescribed by
7 law?
8 4. 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 rights
11 of others?
12 5. If so, is the interference necessary in
13 a democratic society to achieve that legitimate aim?
14 That last question will in turn require
15 consideration of the well-known set of sub-questions
16 which arise in order to assess whether the interference
17 is proportionate.
18 1. Is the aim sufficiently important to justify
19 interference with the fundamental right?
20 2. Is there a rational connection between the means
21 chosen and the aim in view?
22 3. Are there less restrictive alternative means
23 available to achieve that aim?
24 And, 4, is there a fair balance between the rights
25 of the individuals and the general interest of the

1 community, including the rights of others?

2 So, my Lord, we say that, one, you first have to
3 decide whether the proportionality balance is required
4 under obstruction of the highway in this case and
5 whether or not the test already strikes the correct
6 balance, and, two, if you do, that it is that set of
7 questions in undertaking that proportionality assessment
8 that the court must undertake.

9 My Lord, there is only one — one of the elements of
10 the obstruction of the highway case that has to be
11 established is that the claimants have suffered loss and
12 damage. Loss and damage is the principles concerning
13 the obstruction of the highway and the proof of damages
14 are as follows:

15 One, a private individual has a right of action in
16 respect of public nuisance if he can prove that he has
17 suffered particular damage other than and beyond the
18 general inconvenience and injury suffered by the public
19 and that the particular damage which he has suffered is
20 direct and substantial. That's the Jan de Nul (UK)
21 Limited case, [2000] 2 Lloyd's Rep 700.

22 Two, particular damage is not limited to special
23 damage in the sense of actual pecuniary loss.
24 Particular damage may consist of proved general damage,
25 for example inconvenience and delay, provided that it is

1 substantial and appreciably greater in degree than any
2 damage suffered by the general public.

3 My Lord, that's the part of The Wagon Mound (No 2)
4 case that wasn't overruled. That comes from [1963],
5 1 Lloyd's Rep. 402 at 430.

6 Three, unlike negligence, in an action for public
7 nuisance, once the nuisance is proved and the defendant
8 is shown to have caused it, then the legal burden shifts
9 to the defendant to justify or excuse himself. That's
10 again the Wagon Mound (No 2), page 428 and Southport
11 Corporation v Esso Petroleum [1954], 2 QB 182 at 194 and
12 197.

13 Four, the approach to particular damage and the
14 ability for it to constitute general damages rather than
15 specific loss was restated by Mr Justice Moore-Bick in
16 the Jan De Nul case, in particular paragraphs 41 to 44,
17 which paragraphs include consideration of the
18 House of Lords' decision in Tate & Lyle v Greater London
19 Council, [1983] 2 AC 509.

20 Accordingly, the quantification of damages and the
21 specific sum which could be attributed to each
22 individual defendant does not need to be established.
23 It is enough for the claimant to show that obstruction
24 has caused the claimants' damage that is different to
25 the rest of the public. That is particularly relevant

1 in these proceedings as the claimants must prove
 2 particular damage as part of the cause of action
 3 relevant relating to the obstruction of the highway.
 4 But, as I said earlier, my Lord, it is not seeking to
 5 enforce those damages as an award and would be content
 6 for the quantification of damages to be stayed.

7 Harassment.
 8 The claimants also bring a claim to restrain
 9 harassment. The claim in harassment is, in many
 10 instances, parasitic on the other causes of action in
 11 these proceedings. It is the repeated occurrence of
 12 those alleged wrongs that amount to the course of
 13 conduct required for a claim in harassment. The
 14 claimants rely upon sections 1, 1(1A), 3 and 3A of the
 15 Protection from Harassment Act 1997.

16 Where an individual is bringing the claim, that
 17 person has a cause of action under section 1(1) and
 18 where he or she is a victim of a course of conduct
 19 pursued by another person that amounts to harassment and
 20 which the other person knows or ought to have known
 21 amounts to harassment.

22 In the case of a company, the cause of action may
 23 exist under section 1(1A). In particular section 1(1A)
 24 provides that a person must not pursue a course of
 25 conduct which involves the harassment of two or more

1 persons which he knows or ought to know involves
 2 harassment of those persons and by which he intends to
 3 persuade any person, which does not necessarily have to
 4 be the same person experiencing the course of conduct,
 5 one, not to do something that he is entitled or required
 6 to do or, two, to do something that he is not under any
 7 obligation to do.

8 Accordingly, under section 1(1A) and section 3A, the
 9 first and third claimants can seek relief against a
 10 defendant who pursues or, if it is apprehended that they
 11 will pursue, a course of conduct which the defendant
 12 knows or ought to know involves harassment of two or
 13 more individuals, such as their staff, service providers
 14 and contractors, with the intention of persuading those
 15 persons, or the first and third claimants themselves,
 16 not to do something which they are entitled to do or to
 17 do something which it is not under an obligation to do.
 18 Mr Justice Morgan, paragraphs 47 [sic] to 45 of Ineos
 19 considered how these statutory provisions apply in the
 20 context of protest cases in which a company brings
 21 a claim in harassment and seeks an injunction to
 22 restrain the same.

23 References to "harassing" a person includes alarming
 24 the person or causing a person distress. It is clear
 25 from the Protection of Harassment Act, section 7(2). In

1 Majrowski v Guy's and St Thomas' NHS Trust [2006] UKHL
 2 34; [2007] 1 AC 224, as extracted at paragraph 53 of
 3 Ineos, it is said that harassment is conduct which
 4 crosses the boundary between "the regrettable to the
 5 unacceptable" and that the conduct must be "oppressive
 6 and unacceptable".

7 In Dowson v Chief Constable of Northumbria Police
 8 [2010] EWHC 2612 QB, Mr Justice Simon set out, at
 9 paragraph 142, six elements which must be established
 10 before liability for harassment can be found. He said,
 11 one, that there must be conduct which occurs on at least
 12 two occasions; two, which is targeted at the claimant
 13 although the Court of Appeal has since held that conduct
 14 merely needs to have been targeted at the individual;
 15 three, which is calculated in an objective sense to
 16 cause alarm or distress; and, four, which is objectively
 17 judged to be oppressive and unacceptable; five, what is
 18 oppressive and unacceptable may depend on the social or
 19 working context in which the conduct occurs; and, six,
 20 a line is to be drawn between conduct which is
 21 unattractive and unreasonable and conduct which has been
 22 described in various ways as "torment" of the victim "of
 23 an order that would sustain criminal liability".

24 The evidence of the claimants' witnesses show the
 25 torment they have suffered as a result of the

1 defendants' actions. Their evidence references their
 2 inability to sleep, becoming withdrawn, having to be
 3 medicated to cope with the anxiety, moving home and
 4 leaving their jobs as well as being sent funeral plans
 5 and handwritten letters threatening them.

6 Precautionary relief.

7 The test for precautionary relief.

8 Precautionary relief has been an important component
 9 of the relief granted in many protester cases. The
 10 claimants' claim is brought on the basis of past acts
 11 and feared future acts. Therefore, this is a claim
 12 seeking precautionary relief, also known as quia timet
 13 relief.

14 The flexible principles that apply to the grant of
 15 precautionary relief were revisited by Mr Justice
 16 Marcus Smith in Vastint Leeds v Persons Unknown [2019]
 17 4 WLR 2, a case approved by the Court of Appeal in
 18 London Borough of Barking and Dagenham and Persons
 19 Unknown [2022] EWCA Civ 13; [2022] 2 WLR 946 at 83.

20 The relevant principles to be applied when granting
 21 such relief are set out in paragraphs 26 to 31 of the
 22 judgment in Vastint. Paragraphs 29 to 31 of Vastint
 23 were recently quoted and reproduced in full in the
 24 judgment of Mr Justice Meade in the Philips case,
 25 [2022], EWHC 1703 (Pat) at 18. This case emphasises the

1 flexible approach the court will take to precautionary
 2 relief and considers in particular the question of
 3 reasonable apprehension when granting a prohibitory
 4 injunction. The Philips case concerns the steps
 5 a defendant would take to harm the claimants' legal
 6 proceedings by seeking an anti-suit injunction in China,
 7 which would be terminal to the legal proceedings that
 8 the claimant was bringing before the English court, such
 9 that the case concerned a prohibitory injunction.

10 In Philips the issue was the risk of the defendant
 11 bringing an anti-suit injunction proceedings in China,
 12 with the defendant disputing their intention to do so.
 13 The key concern for the court when deciding to grant
 14 injunction was the harm that could be caused if,
 15 contrary to the defendant's position, it did seek an
 16 anti-suit injunction. The court emphasised that the
 17 test for precautionary relief was multi-factorial but
 18 that the harm to the claimant if the defendant acted as
 19 apprehended by the claimant was a significant
 20 consideration.

21 Third, the courts did not simply accept the
 22 defendant's submission that it would not seek an
 23 anti-suit relief and looked at the harm that would be
 24 caused if it did. When considering the relevant test,
 25 Mr Justice Meade stated at paragraphs 19 to 20:

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1 "It is clear from the decision of Mr Justice
 2 Marcus Smith and the earlier cases that he cites,
 3 including *Islington Council v Elliot and Lloyd v Symonds*
 4 that assessment of the appropriateness of quia timet
 5 relief is not a multi-factorial test. The court is not
 6 just to assess as a percentage the likelihood of the
 7 defendants doing the act which is sought to be
 8 restrained, but must have regard to the other matters
 9 identified in those paragraphs.

10 "That is of relevance here because Philips relies on
 11 the fact, as it asserts there to be, that if the
 12 defendants had obtained an anti-suit injunction in
 13 China, that would have been irreversible and terminal
 14 for these proceedings. I accept those submissions.
 15 Nonetheless, whilst the likelihood of the defendant
 16 doing that which is sought to be restrained is not the
 17 only factor, it is clearly always going to be a very
 18 significant one and perhaps the most significant one in
 19 many cases. A central argument by the defendant on this
 20 application is that there is no likelihood of anti-suit
 21 relief being sought in the People's Republic of China
 22 [as read]."

23 The court's approach to precautionary relief in
 24 Philips as a whole can be found at paragraphs 25 to 36
 25 of the judgment. The claimants will say that that

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1 approach will be highly relevant in these proceedings.

2 Final orders against persons unknown.

3 The approach to final orders against persons unknown
 4 should be definitively determined once the Supreme Court
 5 hands down the awaited judgment in the Wolverhampton
 6 case. The current position pending that decision is as
 7 follows: London Borough of Barking and Dagenham and
 8 Others v Persons Unknown has confirmed that, where
 9 a final injunctive relief is sought against persons
 10 unknown -- sorry -- that the court can grant a final
 11 injunctive relief against persons unknown.

12 Where the final injunctive relief against persons
 13 unknown has been defined to only capture those who are
 14 engaged in the wrongdoing and those who can be served
 15 appropriately with an order for alternative service,
 16 there is no bar to granting such an order at the final
 17 hearing.

18 In Barking and Dagenham, the Court of Appeal
 19 confirmed the application of the test as set out by
 20 Lord Justice Longmore in *Ineos* and as modified by
 21 Lord Justice Leggatt, as he then was, in *Cuadrilla*, as
 22 referred to above in paragraph 52. The claimants have
 23 attempted to identify persons unknown where they can, as
 24 can be seen by the recent claims brought against
 25 Lauren Gardener and Louise Boyle, the latter of which

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1 cannot be pursued by reason of the claimant being unable
 2 to serve Ms Boyle, and the previous defendants who have
 3 been added to the claim.

4 So, my Lord, this isn't a case where no one has been
 5 identified and indeed the claimant has added on a number
 6 of occasions additional defendants to the claim form
 7 where they can identify them and serve them.

8 *Cuciurean v Secretary of State [2022] EWCA (Civ)*
 9 1519, paragraphs 37 to 47, confirm that it is not
 10 necessary to name every defendant who could come within
 11 persons unknown, an important factor in a part 7 claim
 12 as there must be a point where adding defendants would
 13 in any event jeopardise the trial timetable as they
 14 would not have the ability to serve a defence and for
 15 the witness evidence to be before the court in good
 16 time.

17 The claimants will make further submissions on
 18 persons unknown and the test to be applied following the
 19 decision of the Supreme Court as agreed with the court
 20 at the pre-trial review, but, for now, the claimant
 21 present its case on the basis of the law as it is today
 22 but recognises that that is currently fluid and may well
 23 change.

24 The named defendants.

25 As I said at the beginning of this opening, the

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1 claim has — save for being stayed against Mr Broughton
2 and the claim against the 11th defendant, Mr Curtin, and
3 the 20th defendant, Ms Jaffray, the claim against the
4 named defendants has all now been settled.

5 The claim against Mr Curtin. The allegations
6 concerning Mr Curtin can be found in the particulars of
7 claim with specific allegations found — sorry,
8 particulars of claim, which, in Mr Curtin's bundle, is
9 at pages 3 to 62 of his bundle, with specific
10 allegations found at the following paragraphs.
11 Paragraph 170.1 to 170.10 particularise ten allegations
12 of trespass that the first claimant alleges against
13 Mr Curtin between 13 July 2021 and 21 June 2022. Those
14 can be found at pages 19 to 22 in Mr Curtin's bundle.

15 Two, paragraphs 181.1 to 181.11 particularise
16 11 allegations of D11's interference with the first
17 claimant's common law right to access the highway
18 between 13 July 2021 and 22 September 2021. Those
19 allegations can be found at pages 33 to 37 in
20 Mr Curtin's bundle.

21 Three, paragraphs 173.1 to 173.17 particularise the
22 16 allegations of obstruction of the highway between
23 13 July 2021 and 11 July 2022.

24 And, four, paragraphs 184 to 188 particularised the
25 claims for harassment against Mr Curtin, which claim

1 relies on 37 allegations particularised in the other
2 causes of action, some of which are duplicates across
3 multiple causes of action, my Lord, and three
4 stand-alone incidents in relation to harassment at
5 paragraphs 184.1 to 184.3. Those can be found in
6 Mr Curtin's bundle at pages 37 to 39.

7 The claimants rely on the legal principles outlined
8 in this opening and the written submissions that it's
9 already submitted and will make further submissions on
10 the relevant tests and their applications during the
11 closing. The claimants will say that it is these
12 allegations which are the focus of this trial as it
13 relates to Mr Curtin and not the protesters' sincerely
14 held views on the claimants or their views on medical
15 research that includes the use of animals in
16 pre-clinical trials.

17 Mr Curtin does not dispute the factual allegations
18 made against him but denies that his actions would have
19 caused harassment, alarm and distress. While this
20 denial addresses some parts of the harassment claim, the
21 claimant will say that Mr Curtin has not addressed the
22 other parts of the claim brought against him.

23 Mr Curtin's recent exhibits in evidence are largely
24 relevant to the issues this court must determine, save
25 potentially in relation to the harassment claim.

1 D20, Ms Jaffray. The claimants' specific pleaded
2 case against Ms Justify can be found at paragraphs 292
3 to 312 of the particulars of claim, which are at
4 pages 19 to 37 in Ms Jaffray's bundle. The claimants
5 rely on the following causes of action:

6 Trespass. 19 allegations of trespass are made
7 against Ms Jaffray, ranging from 17 July 2021 to
8 2 July 2022. They can be found at paragraphs 294.1 to
9 294.19 of the particulars of claim, which are pages 19
10 to 23 in Ms Jaffray's bundle.

11 Two, interference with the first claimant's common
12 law right to access the highway from the Wyton site.
13 Ten allegations are made against Ms Jaffray, ranging
14 from 17 July 2021 and 23 September 2021. They can be
15 found at paragraphs 305.1 to 305.10 in the particulars
16 of claim, which are at pages 32 to 35 of Ms Jaffray's
17 bundle.

18 Public nuisance on the highway, 13 allegations are
19 made against Ms Jaffray ranging between 17 July 2021 and
20 23 September 2021; see paragraphs 297.1 to 297.13. They
21 can be found at pages 23 to 28 of the bundle.

22 Four, paragraphs 308 to 312 of the claim for
23 harassment against Ms Jaffray, which claim relies on
24 42 allegations particularised in the other causes of
25 action, some of which are duplicated, and a single

1 stand-alone incident in relation to harassment at
2 paragraph 308.1, which can be found at pages 36 to 37 of
3 the claim against Ms Jaffray.

4 Ms Jaffray appears to make several admissions in
5 relation to the trespass claim but appears to
6 erroneously assume that, one, the incidence of trespass
7 can be balanced against her Article 11 rights, which is
8 not the case, and, two, she appears to conflate the
9 exclusion zone with trespass.

10 It is submitted that no part of Ms Jaffray's defence
11 provides any answer to the claimants' claims and instead
12 broadly relies upon proportionality in Article 11. As
13 stated in these submissions, these are not even relevant
14 considerations to some of the causes of action pleaded
15 by the claimants, nor is it clear why Ms Jaffray states
16 that her actions are proportionate.

17 The same is not accepted by the claimant. The
18 claimant acknowledges, my Lord, that we're obviously
19 going to have further evidence, but on the case as
20 outlined at present that would certainly appear to be
21 the position.

22 In relation to some elements of the harassment
23 claim, in particular in relation to the funeral plans
24 sent to certain of the claimants' staff, Ms Jaffray has
25 pleaded guilty in the Criminal Court to the offence of

1 harassment in relation to those incidents and has been
 2 convicted. I flag to the court now, because it may
 3 ultimately be relevant to any determination, that it's
 4 understood that there is an application by the
 5 prosecution for Ms Jaffray to be the subject also of
 6 a criminal behaviour order and that therefore may have
 7 a bearing on what it is that your Lordship decides is
 8 appropriate in relation to the 20th defendant. We
 9 understand that that is to be determined later in May.
 10 So, my Lord, I flag that now.
 11 MR JUSTICE NICKLIN: That's a restraining order. "Criminal
 12 behaviour order" is the global term which embraces other
 13 types of order the Criminal Court can make but
 14 specifically in this case it's likely to be
 15 a restraining order.
 16 MS BOLTON: My Lord, indeed.
 17 MR JUSTICE NICKLIN: Yes, okay.
 18 Ms Jaffray may have — the proceedings — what,
 19 there's going to be a sentencing hearing, is there,
 20 in May?
 21 MS BOLTON: There has been a sentencing hearing. As
 22 I understand it, the prosecution applied this week for
 23 the criminal behaviour order which was opposed by the
 24 defence, so the judge has adjourned that part of it for
 25 hearing.

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1 MR JUSTICE NICKLIN: Yes.
 2 MS JAFFRAY: It's going to be heard on the — sorry.
 3 MR JUSTICE NICKLIN: Carry on, Ms Jaffray.
 4 MS JAFFRAY: Sorry, yes. That's going to be heard on the
 5 22nd and we are opposing it.
 6 MR JUSTICE NICKLIN: Do you have a copy of the terms that
 7 the prosecution are asking for the order?
 8 MS JAFFRAY: I have, yes.
 9 MR JUSTICE NICKLIN: Okay. Do you know what order — can
 10 you tell me what order they're seeking, Ms Jaffray?
 11 MS JAFFRAY: Yes, a lot of it is a standard not to contact
 12 members of staff, et cetera, but one of them is
 13 a five-year ban from attending MBR and Labcorp.
 14 MR JUSTICE NICKLIN: Okay, right.
 15 MS BOLTON: My Lord, obviously, if that was to be ordered —
 16 and I know that a similar order was made to somebody
 17 else — then obviously, depending on its terms, it may
 18 not be relevant for us to be pressing for anything
 19 further because that comes into whether you need to
 20 grant any relief.
 21 MR JUSTICE NICKLIN: Well, it's not for me to say anything
 22 about whether the Criminal Court would find itself able
 23 to grant such an order. But, yes, we'll look at that
 24 when we know what the terms of any order are.
 25 MS BOLTON: My Lord, I do have the details of the sentence

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1 so far but I don't know if the court is wanting —
 2 MR JUSTICE NICKLIN: Oh, yes.
 3 MS BOLTON: There's a 12-month community order, 200 hours of
 4 unpaid work, up to 20 days, and — your Lordship may
 5 know what this means more than I do — RAR.
 6 MR JUSTICE NICKLIN: Rehabilitation and something
 7 requirement.
 8 MS BOLTON: Cost of £200 plus £200 victim compensation. So
 9 the last part to be dealt with is the criminal behaviour
 10 order but everything else has been dealt with. As
 11 I understand it, there is another hearing but I don't
 12 know what that relates to.
 13 MR JUSTICE NICKLIN: The offence for which she received that
 14 sentence was what?
 15 MS BOLTON: That was the offence of harassment without
 16 violence, which was, as I understand it, to do with the
 17 sending of the funeral plans to the employees.
 18 MR JUSTICE NICKLIN: And was a victim statement provided to
 19 the court by the employee?
 20 MS BOLTON: I believe that there was an impact statement,
 21 yes.
 22 MR JUSTICE NICKLIN: I'll need to see that because it's
 23 potentially relevant to issues.
 24 MS BOLTON: My Lord, I will do my best, but, as
 25 your Lordship may imagine, I have been trying to obtain

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1 that information and it's not —
 2 MS JAFFRAY: I have that information.
 3 MS BOLTON: That's very helpful, then, because we haven't
 4 been able to get it from the police or the CPS. I think
 5 it's with the CPS and it seems to go into a black hole
 6 from what I understand at the moment, which
 7 I appreciate —
 8 MS JAFFRAY: I can send it all over.
 9 MR JUSTICE NICKLIN: Ms Jaffray, if you could send the
 10 victim statement, please, to me and to the claimants'
 11 side, please.
 12 MS JAFFRAY: Yes, I will do.
 13 MR JUSTICE NICKLIN: That would be very helpful. Thank you
 14 very much.
 15 MS BOLTON: My Lord, there was also an offence regarding
 16 smoke grenades, but I'm not clear whether that smoke
 17 grenade was at MBR, at Labcorp or somewhere else.
 18 MS JAFFRAY: It was at Labcorp — sorry, I may as well
 19 answer these questions.
 20 MS BOLTON: Ms Jaffray can answer the questions much better
 21 than anybody.
 22 MS JAFFRAY: Yes, so it was two smoke grenades in 2021 at
 23 the end of — at Labcorp, two separate occasions to
 24 which the police didn't on one occasion tell me I wasn't
 25 allowed to do it, therefore we are appealing.

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1 MR JUSTICE NICKLIN: Okay. I don't know what the law on
 2 smoke grenades is. Is it an offence to possess them?
 3 MS JAFFRAY: No, it's an offence to use them on a public
 4 highway. Now, I thought because the lane was almost
 5 closed because of the protest and there were no moving
 6 cars that it was safe to do so. I didn't realise that
 7 law applied.
 8 MR JUSTICE NICKLIN: Okay. Right. Thank you very much.
 9 MS BOLTON: My Lord, we don't have the details on that, but
 10 they're the two offences. I think -- Ms Jaffray will
 11 confirm if I'm wrong, but I think there's another
 12 hearing --
 13 MS JAFFRAY: That would be the appeal.
 14 MS BOLTON: Okay. That's the appeal. We have very scant
 15 details on the criminal proceedings. I think there's
 16 also a hearing on Tuesday. I don't think that's the
 17 appeal but Ms Jaffray will confirm what the position is.
 18 MR JUSTICE NICKLIN: Do you have a hearing on Tuesday,
 19 Ms Jaffray?
 20 MS JAFFRAY: No, we haven't. I asked if I could not attend
 21 court on the Tuesday --
 22 MR JUSTICE NICKLIN: My court or somewhere else?
 23 MS JAFFRAY: No, yours, yours. The Tuesday afternoon. I'm
 24 not sure if you're aware, my partner is currently on
 25 remand, I won't have seen him for three weeks and he has

1 made an appointment that afternoon. But myself and
 2 Mr Curtin, if it's okay with yourself, were going to
 3 talk through the different witnesses that we were going
 4 to call and see if we could make some kind of
 5 arrangement whereby we would share a day or share the
 6 days where we are both questioning the same witnesses --
 7 MR JUSTICE NICKLIN: Okay.
 8 MS JAFFRAY: -- so that we aren't --
 9 MR JUSTICE NICKLIN: We'll talk about that at the end of
 10 today if we can, Ms Jaffray.
 11 MS JAFFRAY: Okay.
 12 MR JUSTICE NICKLIN: Thank you.
 13 Right.
 14 MS BOLTON: My Lord, so they're submissions in relation to
 15 Ms Jaffray.
 16 Then we have persons unknown, my Lord. The
 17 categories of persons unknown that an order is sought
 18 against at trial are, one, D28, those who are, without
 19 the consent of the first claimant entering or remaining
 20 on land and in buildings outlined in red on the plan at
 21 annex 1 to the amended claim form; those being land and
 22 buildings owned by the first claimant, MBR Acres, at
 23 Wyton, Huntingdon; two, D29, are those who are
 24 interfering without lawful excuse with the first
 25 claimant's staff and the second claimant's rights to

1 pass and repass with or without vehicles, material and
 2 equipment along the highway known as B1090; three, D30
 3 are those who are obstructing vehicles exiting the first
 4 claimant's land at MBR Acres Limited, Wyton, Huntingdon,
 5 P28 2DT, and accessing the highway known as the B1090;
 6 four, D31, are those who are protesting outside the
 7 premises of the first claimant and against the first
 8 claimant's lawful business activities in pursuing
 9 a course of conduct causing alarm and/or distress to the
 10 second claimant and/or the staff at the first claimant
 11 for the purpose of convincing the second claimant and/or
 12 the staff of the first claimant not to (a) work for the
 13 first claimant and/or (b) provide services to the first
 14 claimant and/or (c) supply goods to the first claimant
 15 and/or (d) stop the first claimant's lawful business
 16 activities at MBR Acres Limited, Wyton, Huntingdon,
 17 PE28 2DT.
 18 At five, D33, are those who are, without the consent
 19 of the first claimant, trespassing on the first
 20 claimant's land by flying drones over the first
 21 claimant's land and buildings outlined in red on the
 22 plan at annex 1 to the amended claim form, that being
 23 the land and buildings owned by MBR Acres Limited,
 24 Wyton, Huntingdon, PE28 2DT; and, six, D36, who are
 25 those who are, without the consent of the first

1 claimant, entering or remaining on the land shaded in
 2 orange in the plan at annex 1 to the re--re--re amended
 3 claim form, which land measures 2.85 metres from the
 4 boundary outlined in red on the plan at annex 1 to the
 5 re--re--re-amended claim form, that boundary marking those
 6 land and buildings owned by the first claimant at
 7 MBR Acres, Wyton, Huntingdon, PE28 2DT, and only where
 8 the boundary runs adjacent to the highway known as the
 9 B1090, my Lord, that being the access land trespass
 10 category.
 11 Each of these categories of persons unknown are
 12 capable of being served by the appropriate order for
 13 alternative service, as required by Cameron. The
 14 proposed method of service is to, one, affix large signs
 15 to the perimeter fence of the Wyton site at regular
 16 intervals, including at the front and sides of the site
 17 where protesters are known to congregate. Those signs
 18 will include a weblink and QR code to the injunction
 19 website; two, stationing signs along the highway in
 20 either direction of the Wyton site such that the signs
 21 will be visible on the approach to the Wyton site.
 22 Those signs will include a weblink and a QR code to the
 23 injunction website; and, three, affix a copy of the
 24 injunction order to the noticeboard that is stationed on
 25 the grass verge opposite the gateway of the Wyton site,

1 which noticeboard is currently in use for the purpose of
 2 service .
 3 The claimants will take the court through the
 4 evidence in relation to each category of persons unknown
 5 at trial . What follows is a brief summary only. As to
 6 D28, the specified pleaded case can be found at
 7 paragraphs 431 to 436 of the particulars of claim. In
 8 the persons unknown bundle, that's pages 340 to 345.
 9 The claimants on several incidents pleaded by way of
 10 cross-reference to the pleaded case against the named
 11 defendants and 12 incidents that relate purely to
 12 persons unknown are set out in those paragraphs.
 13 Examples of such incidents include 2 July 2022,
 14 persons unknown entered the driveway for the purpose of
 15 obstructing Mr Manning's vehicle as he tried to enter
 16 the Wyton site. The evidence in relation to this
 17 incident can be found at the 20th witness statement of
 18 Susan Pressick at paragraph 287, persons unknown bundle,
 19 page 574, and the second witness statement of
 20 David Manning, paragraph 86, persons unknown bundle,
 21 page 992 and video 754; and, two, 27 June 2021, an
 22 incident of persons unknown who entered the driveway and
 23 threw and/or assisted in throwing metal barriers over
 24 the gate to the Wyton site. The evidence in relation to
 25 this incident can be found at the 20th witness statement

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1 of Susan Pressick, paragraph 220, persons unknown
 2 bundle 515 to 517 and video 1003.
 3 My Lord, we will obviously take the court through
 4 all the incidents concerning persons unknown and the
 5 video evidence to support it .
 6 As to D29, the specified pleaded case can be found
 7 at paragraphs 437 to 466 of the particulars of claim.
 8 The claimants on several incidents plead the following.
 9 On the 9 July 2021, persons unknown crowded onto the
 10 highway such that the highway was impassable and exit
 11 from the Wyton site impossible. The incident lasted for
 12 around one hour and 45 minutes. The evidence in
 13 relation to this incident can be found at the second
 14 witness statement of Mr Manning, paragraphs 50 to 55,
 15 Employee P, paragraph 17 to 23, Employee AA at
 16 paragraphs 23 to 29, Ms Read at paragraphs 34 to 43,
 17 Production Manager at paragraphs 24 to 32, Employee B at
 18 paragraphs 21 to 28 and Employee F at paragraphs 43 to
 19 55, and videos 141, 814, 815, 829 and 830.
 20 My Lord, they are persons unknown bundle page
 21 references 978 to 979, 1678 to 1679, 1301 to 1302, 1095
 22 to 1097, 1131 to 1132, 1365 to 1366, 1435 to 1437.
 23 A further incident is 20 November 2021, persons
 24 unknown obstructed and slow-walked along the highway for
 25 around 55 minutes whilst escorting Employee Q's car

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1 along the highway. The evidence in relation to this
 2 incident can be found in Employee F's statement at
 3 paragraphs 144 to 153, Employee I's statement at
 4 paragraph 4, 41 to 44, Employee P's statement at
 5 paragraphs 89 to 93, Mr Markou's statement at 37 to 43,
 6 Employee G, paragraphs 43 to 59 and the 20th witness
 7 statement of Susan Pressick at 342. And in videos 451,
 8 706, 794, 795, 796, 797, 798, 799 and 860. The page
 9 references are the persons unknown bundle pages 1464 to
 10 1466, 1591, 1704 to 1705, 1059 to 1060, 1537 to 1540 and
 11 596.
 12 As to defendant 30, the specific pleaded case can be
 13 found in paragraphs 477 to 454 of the particulars of
 14 claim at pages 359 to 365. The claimants' claim is
 15 based on several incidents, again pleaded by
 16 cross-reference to the other pleaded incidents.
 17 Examples of such incidents include 11 August 2021,
 18 persons unknown constructed a barricade of dog crates at
 19 the gate to the Wyton site and obstructed vehicles by
 20 the first claimant's staff and members of the second
 21 claimant class as they sought to exit the Wyton site and
 22 join the highway.
 23 The evidence in relation to this incident can be
 24 found in the Production Manager's witness statement at
 25 paragraph 44, Employee P's witness statement,

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1 paragraphs 45 to 62, and Employee A's witness statement,
 2 paragraphs 45 to 51, and in videos 114, 16 and 117.
 3 The 17 July incident, 17 July 2021, persons unknown
 4 prevented vehicles driven by the first claimant's staff
 5 and members of the second claimant class exiting the
 6 Wyton site and joining the highway. The evidence in
 7 relation to this incident can be found in Employee F's
 8 witness statement at paragraphs 65 to 72 and videos 25,
 9 170, 827 and 828. Those page references in the persons
 10 unknown bundle are 1139, 1688 to 1691, 1260 to 1263 and
 11 1442 to 1443.
 12 As to D31, the specific pleaded case can be found at
 13 paragraphs 455 to 463 of the particulars of claim in the
 14 persons unknown bundle at pages 366 to 374. Again, the
 15 claimants' case is based on several incidents pleaded by
 16 way of cross-reference and 12 incidents that relate
 17 purely to persons unknown. Examples of those incidents
 18 include one on 5 May 2022, persons unknown attending the
 19 home address of Employee L, Employee K and David Manning
 20 and vandalising their property with spray-paint. The
 21 evidence in relation to these incidents can be found in
 22 the second witness statement of Mr Manning at
 23 paragraphs 70 to 78, the video at 187 and 704 and the
 24 witness statement of Employee L at paragraphs 28 to 44,
 25 and that's persons unknown bundle, pages 988 to 989,

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1 1658 to 1660 and 1276 to 1277.
 2 A further incident is on 30 September 2022. Persons
 3 unknown threw an unidentified item at Employee A's car,
 4 causing the windscreen to break. The evidence in
 5 relation to this incident can be found in Employee A's
 6 witness statement at paragraphs 75 to 81 and videos 836
 7 and 839. That happened, my Lord, obviously whilst
 8 Employee A was driving along the highway. That evidence
 9 can be found at pages 1276 to 1277 in the persons
 10 unknown bundle.

11 As to D33, the specific pleaded case can be found at
 12 paragraphs 473 to 482 of the particulars of claim;
 13 persons unknown bundle, pages 379 to 384.

14 The claimants rely on nine incidents that relate
 15 purely to persons unknown. Examples of such incidents
 16 include but are not limited to, on 16 June 2022, a drone
 17 was flown at a height of 50 metres above the Wyton site.
 18 The evidence in relation to this incident can be found
 19 in the 20th witness statement of Susan Pressick at
 20 paragraph 331, page 589, in the persons unknown bundle.

21 Two, on 6 June 2022, a drone was flown at roof
 22 height over the Wyton site. The evidence in relation to
 23 this incident can be found in the 20th witness statement
 24 of Susan Pressick at paragraph 330, page 589 of the
 25 persons unknown bundle.

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1 So D36, the specific pleaded case can be found in
 2 paragraphs 531 to 536 of the particulars of claim. The
 3 claimants rely on several incidents pleaded by way of
 4 cross-reference and three incidents that relate purely
 5 to persons unknown. Examples of such incidents include
 6 but are not limited to, one, on 2 July 2022 persons
 7 unknown entered the access land for the purpose of
 8 obstructing Mr Manning's vehicle as he tried to enter
 9 the Wyton site. The evidence in relation to this
 10 incident can be found at the 20th witness statement of
 11 Susan Pressick at page 287, page 574 of the persons
 12 unknown bundle and at paragraph 86 of the second witness
 13 statement of Mr Manning, page 992 of the persons unknown
 14 bundle and video 754.

15 And on 17 July 2021, persons unknown prevented
 16 vehicles driven by the first claimant's staff and
 17 members of the second claimant class exiting the Wyton
 18 site and joining the highway. The evidence in relation
 19 to this incident can be found at paragraphs 65 to 72 of
 20 Employee F's witness statement and videos 25, 170, 827
 21 and 823.

22 Accordingly, my Lord, the claimant will say that
 23 there is evidence under each head of claim which makes
 24 out the causes of action the claimant relies upon and
 25 the claimant seeks judgment and a final injunction order

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1 against Mr Curtin, the 11th defendant, against
 2 Ms Jaffray, the 20th defendant, and against the 28th,
 3 29th, 30th, 31st, 33rd and 36th defendants, being all
 4 categories of persons unknown.

5 That order is in the form of the draft provided,
 6 my Lord, or alternatively in terms that the court thinks
 7 fit. The claimant also seeks orders for alternative
 8 service, again in the appropriate form, in relation to
 9 the various prohibitions which the claimant seeks from
 10 the court.

11 MR JUSTICE NICKLIN: Where is the draft order, please,
 12 Ms Bolton?

13 MS BOLTON: My Lord, the draft order ...

14 Bear with me. It was supposed to be attached to the
 15 particulars of claim but I think it's moved. (Pause).

16 MR JUSTICE NICKLIN: I'll tell you what. We're going to
 17 have our break shortly --

18 MS BOLTON: It's the last thing I was going to take you to,
 19 my Lord. I do apologise. It was attached to the
 20 particulars of claim, but it's moved in the bundle and
 21 I'm just --

22 MR JUSTICE NICKLIN: It must have been updated since the --

23 MS BOLTON: Yes. I'm just checking because it's not ...

24 MR JUSTICE NICKLIN: Don't worry. Let me know when we come
 25 back after the break.

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1 MS BOLTON: It was originally one of the schedules to the
 2 POCs but --

3 MR JUSTICE NICKLIN: I know I've seen it in various forms
 4 but I want to get just definitively what the order we're
 5 aiming at for the purposes of --

6 MS BOLTON: My Lord, indeed, and our case is pleaded as we
 7 understand that, one, the court has to, as part of its
 8 exercise, decide not just the appropriate relief but the
 9 exact terms of that relief. It is obviously pleaded as
 10 a case which gives the court that flexibility as to the
 11 terms. You will see when the draft materialises in
 12 a moment that it provides for an alternative service in
 13 square brackets at present because, again, depending on
 14 what the court orders, we accept that those terms will
 15 also change as to what it is the court requires us to
 16 do. But, as you have heard in the opening, we have set
 17 out all the things we can readily do for the purposes of
 18 service.

19 MR JUSTICE NICKLIN: Yes. On the alternative service, one
 20 thing that I would like your team to do, please --
 21 there's no particular urgency in it, but it needs to be
 22 something that we address at some point during the
 23 trial, which is for each of the categories of person
 24 unknown, I just want, as it were, a table telling me
 25 what was the order granting permission to amend to bring

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1 that category into the litigation , and I suspect that
2 will be the same order which will then give permission
3 to serve the claim form by alternative means.

4 In light of the McGivern judgment where there was
5 a failure to comply with the order, I just want to be
6 clear about whether there is evidence of compliance with
7 that order so as to be able to be clear that the steps
8 are being taken, and then the date on which the claim
9 form was thereafter deemed served on the relevant
10 category of persons unknown.

11 MS BOLTON: My Lord, yes.

12 MR JUSTICE NICKLIN: That's just so that I've got --

13 MS BOLTON: Yes.

14 MR JUSTICE NICKLIN: It's important because we've reached --
15 well, subject to the wrinkle in Dagenham, we've reached
16 the position, in persons unknown, which is that,
17 providing the alternative service order has been sought
18 and granted, then notwithstanding what the position is
19 in reality , the claim form is deemed served on the
20 defendants.

21 MS BOLTON: Yes.

22 MR JUSTICE NICKLIN: At that point the defendants become --
23 the category of defendant becomes a defendant in the
24 proceedings and thereafter can be bound by any order the
25 court makes and then you've got the Gammell principle

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1 that brings them into the --

2 MS BOLTON: Yes.

3 MR JUSTICE NICKLIN: At a subsequent point, if they aren't
4 already in the ... They've either already done the act,
5 in which case they're a defendant, or they do it in the
6 future and they become a defendant because of the
7 Gammell principle.

8 MS BOLTON: Yes.

9 MR JUSTICE NICKLIN: So it's an important, as it were,
10 pitstop on the way to the court being satisfied that
11 it's appropriate to make an order against these people.

12 MS BOLTON: My Lord, indeed.

13 My Lord, I should also just reiterate because
14 I appreciate it's been done differently and it's not in
15 substitution of that service , but one of the additional
16 things, as I've just outlined, that the claimant will do
17 is put up notices but not notices that simply say,
18 "Injunction, beware", but actually provide a QR code
19 that from some distance can be scanned which provides
20 that information.

21 MR JUSTICE NICKLIN: Somebody kindly sent me a picture of
22 a very fluorescent or reflective road sign in the
23 West Midlands that told people helpfully that there was
24 an injunction granted, but tantalisingly left out any
25 details as to whether they might be a defendant or what

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1 the injunction prohibited. Short of the elusive
2 description of "car cruising" which of course at first
3 instance sounds like quite an enjoyable pastime but
4 apparently it's not.

5 MS BOLTON: No, I believe it --

6 MR CURTIN: Just for information, in the 22 months I've been
7 there -- well, no, how long has the board been up?
8 Maybe a year. I've yet to see a single human being
9 actually read that board. You said in reality what
10 happens. It's --

11 MR JUSTICE NICKLIN: Well, Mr Curtin, the law has reached
12 the position where it doesn't matter whether anybody
13 reads it or not. But it might become important later if
14 any individual person says he didn't or she didn't read
15 it.

16 MR CURTIN: I'm just making the point in general --

17 MR JUSTICE NICKLIN: I know you are.

18 MR CURTIN: -- I've yet to see a single person read it.

19 They look at it and then they don't -- I've yet to see
20 someone read it.

21 MR JUSTICE NICKLIN: Well, there we are.

22 Right. We'll have our break now so we'll come
23 back -- is that all right with you, Ms Bolton?

24 MS BOLTON: My Lord, I think we have the bundle reference.
25 I do apologise. It was attached to the --

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1 MR JUSTICE NICKLIN: I'm sure I've seen it. I've definitely
2 seen it in pre-reading but I can't now find it.
3 I should put more tabs on things.

4 MS BOLTON: It's my fault, my Lord. I picked it up earlier,
5 I put it on a Post-it note and then I rejigged the
6 Post-it note to somewhere where it's not very helpful to
7 me, so apologies.

8 For Ms Jaffray's bundle, it's pages 50 to 57. For
9 Mr Curtin's bundle, it's pages 49 to 59. And for the
10 persons unknown bundle, it's pages 431 to 441.

11 MR JUSTICE NICKLIN: Thank you very much.

12 MR CURTIN: What's that?

13 MR JUSTICE NICKLIN: That's the order that they're actually
14 asking the court to make against you, Mr Curtin.

15 MR CURTIN: Is there a pre-planned order you've already got
16 written out then? That's one you'll be sticking to? It
17 will not depend on the evidence?

18 MR JUSTICE NICKLIN: No, that's what Ms Bolton is going to
19 be asking for. I mean -- she may have to rejig it if
20 something strange happens in the evidence but that's
21 her -- she's required to set out at the beginning what
22 she's actually going to ask the court, in fairness to
23 you, so that you can focus on what she's asking. That's
24 not a foregone conclusion, it's me that decides whether
25 that order is made and I will hear you and your

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1 arguments as to whether you say either none of it should
 2 be granted or you may have particular things to say
 3 about particular paragraphs. But that's a long way down
 4 the track. I'm just trying to get a focus on where
 5 things are. I'll get better at it as the trial goes on.
 6 I'll learn more where things are as we progress. But at
 7 the moment, because I've done general reading, I haven't
 8 done the sort of marking—up that I would do as I do
 9 during a trial .
 10 MR CURTIN: Thank you, my Lord.
 11 MS BOLTON: My Lord, it says "Further housekeeping matters"
 12 after the break and I think there are some additional
 13 dates where Ms Jaffray or Mr Curtin may not be
 14 available, so I'll try to resolve that over the break.
 15 MR JUSTICE NICKLIN: Yes. Broadly speaking, I thought it
 16 was something we would probably have to discuss together
 17 because, from my understanding of what's being asked,
 18 I'm not sure that it's going to work. I'll say this
 19 because it may help the discussions you're going to have
 20 in the break, if you are, which is it's entirely up to
 21 Ms Jaffray and Mr Curtin which parts of the trial they
 22 attend. Obviously, when a witness comes that they want
 23 to ask questions of that witness, they have to be here
 24 to ask the question or be on the videolink.
 25 I've seen reference to a proposal that Ms Jaffray

1 and Mr Curtin might divide up the questioning of the
 2 witnesses. That's fine but neither can represent the
 3 other. So, Mr Curtin, you can't represent Ms Jaffray
 4 and you can't ask questions of a witness on her behalf
 5 and vice versa.
 6 MR CURTIN: Yes, no, that was more based on a simple
 7 conversation I had with her at dinner time. Why don't
 8 we — if she can't make any dates, why don't we do the—
 9 if she knows she can't make a date, have a witness that
 10 she's not calling anyway —
 11 MR JUSTICE NICKLIN: Okay, that's fine. I'm sure that the
 12 claimants will be reasonably accommodating in relation
 13 to this but there's a limit to what they can do in terms
 14 of how they structure the witnesses.
 15 MS BOLTON: My Lord, there is indeed, in particular
 16 Ms Pressick who has already travelled for tomorrow and
 17 now we're being told Ms Jaffray may not be available
 18 tomorrow. She has a probation appointment, we've asked
 19 what time.
 20 MR JUSTICE NICKLIN: I've been told it's 10.30 and it might
 21 be capable of being moved and it could be capable of
 22 being moved to next week.
 23 MS BOLTON: Ah. I'm being told stuff has happened since
 24 I was updated.
 25 MR JUSTICE NICKLIN: Fine. You have a discussion. Let's

1 see what's going on. I'm more than happy to look at
 2 this at the end of the day.
 3 I'm sure that the parties will be reasonable about
 4 accommodating this but so that you, Mr Curtin and
 5 Ms Jaffray, know, the claimants have already been
 6 subject to orders that I've made in the way that this
 7 trial is being conducted which puts a significant burden
 8 on them. It's been done specifically to assist the two
 9 of you. Be careful in terms of not asking for too much
 10 because you're already having this trial, as it were,
 11 altered from its normal course to reflect the fact that
 12 you're litigants in person. There's a limit to how much
 13 I can impose restrictions or requirements on the
 14 claimants because it's not fair on them and it's
 15 particularly not fair on their witnesses.
 16 Just in the way that I've said you can't expect the
 17 two of you to surrender your lives for five weeks and be
 18 at the beck and call of the court, neither can
 19 I reasonably expect particularly witnesses who are not
 20 parties to the litigation similarly to put their lives
 21 on hold. Fairness to them means they've got to have
 22 a degree of certainty about when they're coming to give
 23 their evidence. Okay?
 24 MR CURTIN: Absolutely.
 25 MS BOLTON: My Lord, I've got the updated timetable, if

1 I can hand that up.
 2 MR JUSTICE NICKLIN: Good. Thank you very much. (Handed).
 3 Right. We'll come back at 3.35 if that's all right.
 4 MS BOLTON: My Lord.
 5 (3.18 pm)
 6 (A short break)
 7 (3.33 pm)
 8 MR JUSTICE NICKLIN: Right. Did you want to leave
 9 housekeeping to the end of the day? I don't want to
 10 unduly interrupt your submissions.
 11 MS BOLTON: No, my Lord, I've concluded.
 12 MR JUSTICE NICKLIN: Oh, good.
 13 MS BOLTON: Apologies. That was what I —
 14 MR JUSTICE NICKLIN: That's fine.
 15 MS BOLTON: Sorry, we had a discussion at the end over the
 16 draft order and so I didn't actually finally say that —
 17 apologies. My Lord, it's really matters of housekeeping
 18 now.
 19 MR JUSTICE NICKLIN: Yes.
 20 MS BOLTON: We have Ms Pressick and Ms Jarrett scheduled for
 21 tomorrow.
 22 MR JUSTICE NICKLIN: Yes.
 23 MS BOLTON: Ms Jaffray has indicated a problem next Tuesday.
 24 Let me make sure I've got that right — yes, next
 25 Tuesday in the afternoon. She may have some questions

1 for Employee AF. What I've suggested to her over the
 2 adjournment is that she has a look at what they are,
 3 because I think she still needs to go through that
 4 evidence, and lets us know because it may be something
 5 that we're content for her to deal with in submission,
 6 which removes the problem, otherwise we'll have to look
 7 at it again and see what we can do.
 8 MR JUSTICE NICKLIN: One obvious answer is to advance
 9 witness AF to be the first witness on that day.
 10 MS BOLTON: It may be, but I'm not sure if she has questions
 11 for the other witnesses as well though. I think what it
 12 may be, in all fairness, is that when she realised she
 13 needed to give notice, that she gave notice in a hurry,
 14 so I've asked her to have a look at who she needs.
 15 Again, if it's something quite straightforward, like,
 16 "I just want to point out in that video that that is
 17 happening", it may be something I'm happy to say,
 18 "Please deal with that in submissions". I'm not going
 19 to jump up and say, "You didn't put that to the
 20 witness", so it may resolve itself.
 21 MR JUSTICE NICKLIN: Okay. Thank you.
 22 MS BOLTON: I think, apart from that -- there's obviously
 23 a question mark over the timing for Ms Pressick tomorrow
 24 and Ms Jaffray, but it sounds like her appointment is
 25 more flexible so hopefully if we get Ms Pressick up --

1 MS JAFFRAY: Sorry, my appointment for tomorrow, probation
 2 has said that it was sent in error so tomorrow I'm
 3 available all day.
 4 MS BOLTON: Right. That resolves that problem then.
 5 MR JUSTICE NICKLIN: Good. Thank you for that, Ms Jaffray.
 6 MS BOLTON: Your Lordship will be delighted to know that the
 7 Opus issue has been resolved as well --
 8 MR JUSTICE NICKLIN: Good.
 9 MS BOLTON: -- so we don't need to move court.
 10 MR JUSTICE NICKLIN: Good. Well ...
 11 MS BOLTON: Yes, I appreciate my Lord's ...
 12 MR JUSTICE NICKLIN: As I scour the building for an empty
 13 courtroom. Right, okay.
 14 MS BOLTON: My Lord, I think for today, that's everything we
 15 need to deal with.
 16 MR JUSTICE NICKLIN: All right. Now, Mr Curtin, you wanted
 17 to address your objections to Ms Jarrett.
 18 MR CURTIN: Yes.
 19 MR JUSTICE NICKLIN: Can I ask you to do this overnight,
 20 which would help me: if you can distill your argument to
 21 one page -- it can be bullet points, that's fine -- what
 22 you object to about Ms Jarrett's evidence. It doesn't
 23 have to be a long, detailed argument; just "I object to
 24 this paragraph because ...", et cetera, et cetera, in
 25 the same way that you've gone through and you've

1 identified things you object to in your defence
 2 statement or witness statement. If you can do something
 3 similar, it doesn't have to be long, but it will help me
 4 tomorrow in understanding your argument --
 5 MR CURTIN: Okay.
 6 MR JUSTICE NICKLIN: -- because we won't have a lot of time
 7 and I need to understand immediately what your points
 8 are, so it would help me -- all right? -- for that
 9 purpose.
 10 MR CURTIN: Yes, if we could have some -- just a few minutes
 11 now to help me, a technical point. For example, I was
 12 just going through it now and there was a point -- you
 13 said 29.1 -- and this would be a classic example. I've
 14 got no problem at all with her saying what she ... my
 15 case is that she's a lobbyist, she's a professional
 16 lobbyist, her wages tomorrow will be partially paid by
 17 Marshall Bioresources. She's funded by the industry.
 18 She is, she is, and I'll be asking her. Hopefully I can
 19 ask her, "You are funded by these people, Marshall
 20 Bioresources?".
 21 But she -- to read the statement, it looked like an
 22 expert witness. I saw, just for an example, in
 23 a cursory glance, point 29.1, no dogs are being flown in
 24 from America. If you shut MBR Acres down, they would
 25 have no way of getting hold of dogs. It would be

1 unbelievable because these -- they say these drugs have
 2 to be tested. There is an argument to that. Legally as
 3 we stand today, that is the law, but that's why you have
 4 components to change the law. But, for example, that's
 5 wrong. 29.1, she doesn't know, she's got no idea.
 6 I do.
 7 I know that -- I've got the flight numbers of
 8 flights that were coming in from America, from
 9 Marshall Bioresources, this year into this country. So
 10 it's just -- so she purports to know these things and
 11 she doesn't know. She talks about China, a policy of
 12 China.
 13 So I'd be really worried if there was a jury here
 14 and she was -- and I hadn't done enough work, but you've
 15 said vivisection is not on trial so I'll have some
 16 balance and she's only here for -- like Susan Pressick,
 17 in part of her statement she gives a long sort of
 18 diatribe from the government minister, and if a jury was
 19 here, we'd be like, "Oh my God, what she misses out",
 20 and tonight I will do it -- it's very late -- the
 21 Hansard debate. I know where it is, I can refer to it,
 22 and I don't want to go into it tomorrow because you
 23 won't let me go into the intricacies, but what she's
 24 missed out is every single MP who has stood up at the
 25 committee -- at the petition -- what was it? It was

1 a hearing and a committee. Every single MP that stood
2 up was in opposition to the current situation and she
3 gave what I would call the La La Land speech, "No,
4 everything is okay". It was in direct opposition to the
5 rest of the debate.

6 So I'm worried -- I'm going to work hard on it
7 tonight and I'm not going to -- so I'm not -- if I can
8 introduce some simple -- for example, answer this one
9 more question. It's the last question I'll ask. In
10 America, at the start of this year, 1 January -- and
11 Wendy Jarrett will know all about it -- so it's not --
12 there's no rabbits out of the hat -- the FDA, the
13 Federal Drug Administration, passed a very important law
14 in America, the FDA Modernization Act -- it's what we
15 want to happen in this country -- where they took out
16 the legal requirements to do animal experiments.

17 I just wanted to know if you were aware of -- so
18 this presentation that she might give that animal
19 experiments are absolutely critical, I just want to make
20 sure that that's challenged and that she is not the
21 authority.

22 MR JUSTICE NICKLIN: Well, you can challenge that.

23 MR CURTIN: But I'm just me, a scruffy little man with a few
24 scruffy (inaudible) --

25 MR JUSTICE NICKLIN: I know you may find the process of

1 cross-examination tricky in the sense that the best
2 cross-examinations are always done when you have at your
3 fingertips evidence which you can direct the witness'
4 attention to, which impeaches their answer. Now, I'm
5 not sure that you're going to have that.

6 MR CURTIN: Isn't that rabbits out of the hat, ha ha?

7 MR JUSTICE NICKLIN: Well, you're entitled -- you have
8 given -- for example, you have talked about
9 Ms Pressick's evidence to the House of Commons.

10 MR CURTIN: Yes.

11 MR JUSTICE NICKLIN: If you've got the relevant extracts
12 from Hansard, you're perfectly entitled to question her
13 about what was said at that -- if she's brought up the
14 question of evidence to the committee, then you can ask
15 her questions about it.

16 MR CURTIN: Yes. For the sake of punctuality, I don't need
17 to go into -- I would like to, if we had three weeks,
18 but we can't --

19 MR JUSTICE NICKLIN: No, it's fine. I'm just reminding
20 myself of what my obligation is under CPR 3.1A. I am
21 ...

22 "At any hearing where the court is taking evidence
23 [so it is] this may include ascertaining from the
24 unrepresented party the matters about which the witness
25 may be able to give evidence or on which the witness

1 ought to be cross-examined [as read]."

2 Now, you'll remember that Ms Bolton said the purpose
3 of Ms Jarrett's evidence and the way the claimants are
4 relying upon it is to say that if the protest activities
5 forced the closure of MBR Acres, it will have very
6 serious repercussions for medical research in this
7 country. Now, you may say there's quite a big "if" at
8 the beginning of that sentence, which is, "If the
9 protest activities close down MBR Acres, then this will
10 follow", so that's one legal view, or a lawyer might
11 take the view that that is a matter of argument in
12 submission rather than it is evidence for the witness.
13 But it's that that is what -- if you wanted to challenge
14 it, that would be the point.

15 So if you put to her that there are other sources of
16 animals that could be brought into the country for the
17 purposes of -- or reared here for the purposes of
18 medical research, then the fact of MBR closing wouldn't
19 actually have the consequences that Ms Jarrett is
20 suggesting. But that's an area that you might want to
21 explore with her on the basis that that's what the
22 claimants have said that her evidence is relevant to.

23 MR CURTIN: Okay. My fear is that I do such a bad job with
24 the limited time. I've put myself into this position
25 now, I talked about -- I've just had a kind of

1 breakdown.

2 MR JUSTICE NICKLIN: Look. Don't get worked up about it.
3 Ms Jarrett is really quite at the periphery of this
4 case. Her evidence is not going to be particularly
5 important so don't beat yourself up about the importance
6 of asking questions.

7 MR CURTIN: I do, yes, and here I had a golden opportunity,
8 but you wanted to stop it anyway, to put vivisection --
9 wherever she is --

10 MR JUSTICE NICKLIN: No, no, it's not that I -- don't
11 characterise me as trying to prevent you asking
12 questions. I'm trying to guide you as to what is
13 relevant. What I said on Monday was to sketch out the
14 parameters of civil litigation. I can't be, however
15 much anybody would want me to be, somebody carrying out
16 a public inquiry into MBR Acres, the whole question of
17 animals being used for medical research. That's not my
18 job. As a judge involved in civil proceedings, where
19 the question is have people been trespassing on the
20 land, have people been obstructing access to the
21 facilities at the Wyton site, have people been harassing
22 the MBR Acres employees --

23 MR CURTIN: Yes, yes.

24 MR JUSTICE NICKLIN: Those are the issues I'm concerned
25 with. That's why Ms Jarrett's evidence is right at the

1 periphery of what's relevant because it's not the
 2 court's responsibility in this litigation to decide
 3 whether or not medical research should be carried out on
 4 animals. That's not my responsibility. Other people
 5 are responsible for making those decisions. Happily
 6 it's not a responsibility I have.
 7 MR CURTIN: Okay. That will help me. I can sit down now.
 8 Just on that bullet point, I know now that tomorrow
 9 morning I won't get told off, "Mr Curtin, it's too late
 10 for presenting the Hansard". And I don't ever propose
 11 to read anything in the Hansard, I would just like it
 12 there to say, "Actually you've cherry-picked the
 13 Government's statement when the debate was ..." --
 14 MR JUSTICE NICKLIN: That's fine and that's a perfectly
 15 legitimate cross-examination question and it's not
 16 rabbit out of a hat. A rabbit out of a hat would be you
 17 to say to Ms Jarrett, "Aha, Dr So--and--so is going to be
 18 coming next week and he or she is going to say the
 19 complete opposite". That is a rabbit out of the hat.
 20 You asking probing questions of Ms Jarrett about what
 21 she said to the Select Committee or whatever it was.
 22 That is legitimate cross-examination.
 23 MR CURTIN: Okay, thank you.
 24 MS BOLTON: My Lord, if it helps, the link to the full
 25 debate is actually in the witness statement. We're

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1 not -- we acknowledge that it's only an extract.
 2 MR JUSTICE NICKLIN: Right. Well, that doesn't surprise me.
 3 MS BOLTON: The other thing I have said to Mr Curtin is, if
 4 he has evidence of flights, then please provide them as
 5 soon as he can and we will look at them. If they're
 6 clearly evidence of flights in, well, I'm sure
 7 your Lordship is going to allow that in to be put to
 8 Ms Jarrett. So I've made that clear, that that's not an
 9 issue.
 10 MR JUSTICE NICKLIN: Mr Curtin, to assist me, this
 11 interchange that you have with me, with you telling me
 12 what you're concerned about a witness' evidence or the
 13 areas that you would like to explore, that's perfectly
 14 legitimate. It helps me do the job that I'm supposed to
 15 do because I can help -- either tell you that's not
 16 a relevant issue for these proceedings, in which case
 17 you don't need to worry about it, or I can say, "Well,
 18 it is something and you might want to ask these sort of
 19 questions" or "These are the topics that you ought to be
 20 probing". That is one of the responsibilities I have to
 21 assist a litigant in person. But we'll deal with
 22 that --
 23 MR CURTIN: Can I ask one more question then?
 24 MR JUSTICE NICKLIN: Go on.
 25 MR CURTIN: On Ms Pressick, it's my case that the first

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1 claimant, MBR Acres -- she does not work for MBR Acres.
 2 She does not work for the first claimant. She works for
 3 the -- they've got the same boss.
 4 MR JUSTICE NICKLIN: Well, she's given evidence about that
 5 in her 20th witness statement --
 6 MR CURTIN: She has.
 7 MR JUSTICE NICKLIN: -- so look at that first.
 8 MR CURTIN: Yes.
 9 MR JUSTICE NICKLIN: But if there remain points that you
 10 want to ask her about those paragraphs in her witness
 11 statement, that's the focus of your questions.
 12 MR CURTIN: Okay.
 13 MR JUSTICE NICKLIN: All right.
 14 MR CURTIN: Okay. Thank you.
 15 MR JUSTICE NICKLIN: Right. 10.30 tomorrow then.
 16 MS BOLTON: My Lord.
 17 MR JUSTICE NICKLIN: Thank you very much.
 18 (3.48 pm)
 19 (The hearing adjourned until
 20 Thursday, 27 April 2023 at 10.30 am)
 21
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