Neutral Citation Number: [2018] EWHC 2252 (Ch)

CLAIM NO. PT-2018-000160

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST (CH)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/09/2018

Before :

Mr John Male QC
(sitting as a Judge of the Chancery Division)

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Between :

(1) UK OIL & GAS INVESTMENTS PLC **(2) KIMMERIDGE OIL & GAS LIMITED** **(3) MAGELLAN PETROLEUM (UK) LIMITED** **(4) HORSE HILL DEVELOPMENTS LTD** **(5) UKOG (GB) LIMITED**	**Claimants**
- and –	
PERSONS UNKNOWN WHO ARE PROTESTORS AGAINST THE EXPLORATION AND/OR EXTRACTION OF MINERAL OIL OR RELATIVE HYDROCARBON OR NATURAL GAS BY THE CLAIMANT(S) AND WHO ARE INVOLVED IN THE FOLLOWING ACTS OR ANY OF THEM: **(1) ENTERING OR REMAINING WITHOUT THE CONSENT OF THE CLAIMANT(S) ON LAND AND BUILDINGS SHOWN EDGED RED ON THE PLANS ANNEXED TO THE AMENDED CLAIM FORM ("THE LAND");** **(2) OBSTRUCTING OR INTERFERING WITH THE RIGHTS OF WAY ENJOYED BY THE CLAIMANT(S) AND EACH OF ITS AND THEIR AGENTS, SERVANTS, CONTRACTORS,SUB-CONTRACTORS, & LICENCEES ("THE PROTECTED PERSONS"), OVER THE PUBLIC HIGHWAY AND/OR THEIR ACCESS TO AND FROM THE LAND.**	**Defendants**

(3) COMBINING TOGETHER TO COMMIT THE OFFENCES AS DEFINED IN THE ORDER ANNEXED TO THE AMENDED CLAIM FORM ("THE ORDER") WITH THE INTENTION SET OUT THEREIN.

(4) INTERFERING WITH THE CLAIMANT(S) ECONOMIC INTERESTS BY THE COMMISSION OF UNLAWFUL ACTS AND/OR DIRECT ACTION AS DEFINED IN THE AMENDED PARTICULARS OF CLAIM;

(5) WATCHING, BESETTING, INTIMIDATING OR ASSAULTING THE CLAIMANT(S) AND EACH OF THE PROTECTED PERSONS.

(7) MS ANN STEWART

(8) MS SUE JAMESON

(9) MS NATASHA DOANE

(10) MS VICKI ELCOATE

(11) MS CONSTANCE WHISTON

(12) MS JACQUI HAMLIN

(13) FRIENDS OF THE EARTH LIMITED

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Mr Timothy Polli QC and Mr Sam Madge-Wyld (instructed by Hill Dickinson LLP) for the Claimants
Ms Stephanie Harrison QC, Mr Stephen Simblet, Mr Tim Baldwin and Mr Owen Greenhall (instructed by Bhatt Murphy) for the Seventh to Twelfth Defendants
Mr Stephen Simblet and Ms Ruth Brander (instructed by Bhatt Murphy) for Friends of the Earth Limited
Hearing dates: 2nd, 3rd, 4th and 5th July 2018
Further written submissions on behalf of the Seventh to Twelfth Defendants and Friends of the Earth Limited: 13th July 2018
Further written submissions on behalf of the Claimants: 17th July 2018

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Judgment Approved by the court for handing down (subject to editorial corrections)

If this Judgment has been emailed to you it is to be treated as 'read-only'. You should send any suggested amendments as a separate Word document.

Mr John Male QC (sitting as a Judge of the Chancery Division) :

Introduction

1. This is an application by the Claimants for interim injunctions until trial or further order. The injunctions sought relate to protests at sites in Surrey and Sussex where the Claimants carry out conventional oil or gas exploration and/or extraction and at the First Claimant's headquarters offices in Guildford.

2. The Claimants were represented by Mr Timothy Polli QC and Mr Sam Madge-Wyld. The Seventh to Twelfth Defendants were represented by Ms Stephanie Harrison QC, Mr Stephen Simblet, Mr Tim Baldwin and Mr Owen Greenhall. During the course of the hearing, Friends of the Earth Limited ("FOE"), who were represented by Mr Simblet and Ms Brander, were joined as the Thirteenth Defendant. I heard argument on the application from 2 to 5 July 2018. After the hearing I received further written submissions on 13 and 17 July 2018.

3. The skeleton arguments on behalf of the Seventh to Twelfth Defendants and FOE ran to almost 90 pages. In addition to their skeleton in support of the application, the Claimants provided a Supplementary Skeleton in reply to the skeletons of the Seventh to Twelfth Defendants and FOE. Further written submissions were made after the hearing. I was also provided with five bundles of authorities running to almost 90 enclosures. Making allowance for half a day of reading, I was addressed orally for about three and a half days.

4. I have carefully considered all the arguments raised by Counsel. I cannot deal with each and every argument, but I will deal with the main points. Accordingly, I will deal with the following matters:

    (1) The parties and the sites.

    (2) Procedural matters.

    (3) The Ineos case.

    (4) Events at the sites.

    (5) The level of recent and current activity at the sites.

    (6) The particular causes of action relied upon by the Claimants.

    (7) The Human Rights Act 1998.

    (8) Use of the persons unknown procedure.

    (9) The appropriate tests for injunctive relief.

    (10) FOE's concerns, including chilling effect.

(11) Whether I should grant any relief.

(12) Summary and relief.

(1) The parties and the sites

The Claimants

5. The First Claimant, UK Oil & Gas Investments PLC ("UKOG"), is an oil and gas investment company. It is the most active onshore exploration company in the United Kingdom and is the largest Petroleum Exploration and Development Licence ("PEDL") holder in the south of England. It is behind various exploration, appraisal and oil production projects in the UK. The Second Claimant, Kimmeridge Oil & Gas Limited ("KOGL"), is a wholly owned subsidiary of UKOG. It occupies the Broadford Bridge Site described below. The Third Claimant, Magellan Petroleum (UK) Limited ("Magellan"), is a company that is an indirect wholly owned subsidiary of Tellurian Inc., which is a multi-national company incorporated in Delaware USA, but operationally based in Houston, Texas. The Fourth Claimant, Horse Hill Developments Ltd ("HHDL"), is a company which is the operator and partner of Magellan in the Horse Hill Site described below. It is 49.9% owned by UKOG. The Fifth Claimant, UKOG (GB) Limited ("UKOG GB"), is a wholly owned subsidiary of the First Claimant. It is the operator of the Markwells Wood Site mentioned below.

6. UKOG's and HHDL's commercial activities include onshore oil and gas exploration and extraction, appraisal and development activities which utilise conventional exploration, drilling and production techniques. UKOG does not undertake the process of massive hydraulic fracturing of rock formations, commonly known as "fracking".

7. Oil and gas exploration can only be carried out under a PEDL issued by the Oil and Gas Authority ("OGA"), on behalf of the UK Government. It also requires planning permission from a local planning authority, environmental permits from the Environment Agency ("EA") and the consent of the Health and Safety Executive. UKOG has interests, held directly or indirectly, in a portfolio of UK onshore oil and gas assets held under PEDLs. UKOG's assets are located in the Weald Basin, in the south of England, where there is a long history of low impact well construction and production operations. Oil and gas drilling activities in the Weald have taken place for over 100 years with approximately 170 wells drilled to date. Thirteen sites currently produce oil and gas in the Weald.

The sites

8. Before I describe the Defendants, it is convenient next to identify the three sites with which this application is concerned. Using the definitions in the draft injunction order, they are as follows. First, there is the Broadford Bridge Site which is an area of land forming part of Woodbarn Farm, Broadford Bridge, Billingshurst, West Sussex. Secondly, there is the Horse Hill Site which is an area of land on the west side of Horse Hill, Horley, Surrey. Thirdly, there is the Head Office, which comprises the premises known as Crossweys House, 28-30 High Street, Guildford. At one time, the Claimants also sought an order in relation to a site at Markwells Wood, but that is no longer pursued.

The Broadford Bridge Site

9. KOGL occupies the Broadford Bridge Site pursuant to an Exploration Agreement dated 4 May 2012, made between the freehold owners of that Site and KOGL under its previous name, Celtique Energie Weald Limited. Pursuant to this agreement, KOGL were granted "exclusive possession of the Site [defined as comprising 4.76 acres at Woodbarn Farm] for the purpose of enabling the Company to undertake exploration and to search for petroleum including the drilling and testing of wells and to grant a lease of the Site if required by the Company and to exercise the other rights and interests referred to herein on the terms set out below." Under this agreement, KOGL is entitled to exclusive use and occupation of the Broadford Bridge Site, together with access to it. There was no dispute that that right to exclusive use and occupation entitled KOGL to maintain a claim in trespass.

10. KOGL owns a PEDL which permits it to drill at the Broadford Bridge Site. Planning permission was obtained from West Sussex County Council in February 2013 for the development of a temporary bore hole, well site compound and access road including ancillary infrastructure. That planning permission expired in September 2017. KOGL applied successfully to extend the permission to September 2018. Environment Agency permission to operate a mining waste operation was granted in 2014 and again in 2017.

11. The well at the Broadford Bridge Site was drilled to target Kimmeridge Limestone rocks (at a depth of approximately 2,500 to 4,000 feet below the surface). The Kimmeridge Limestone rock intervals are extensively naturally fractured which enables oil to flow into a well at good rates. As a result, the well does not involve the use of fracking.

12. According to the evidence of Mr Kevin Lee, the Solicitor acting for the Claimants, the construction of the Broadford Bridge Site is complete and drilling has also been completed. However, Mr Lee also says that KOGL's activities on site will continue in 2018 in accordance with the relevant permissions. The extent of such activities was the subject of further written submissions after the hearing.

The Horse Hill Site

13. Magellan is the registered proprietor of a leasehold interest in the Horse Hill Site. HHDL is the operator at the Horse Hill Site, which is sometimes referred to as the "Gatwick Gusher". Magellan and HHDL jointly hold the PEDL relating to this Site. HHDL is a special purpose company that owns a 65% participating interest in the PEDL and also in an adjacent PEDL. UKOG holds a 42% shareholding in HHDL and has a close link to the Horse Hill Site. Mr Stephen Sanderson is the Chairman of both UKOG and HHDL. He provided four witness statements in support of this application.

14. Planning permission was granted by Surrey County Council on 16 January 2012 for the construction at the Horse Hill Site of an exploratory well site, the use of the well site for the drilling of one exploratory bore hole and the subsequent short-term testing of hydrocarbons, together with access and the erection of fencing. In accordance with this permission, the well site was constructed in 2014 and the short term testing was carried out in February and March 2016. Thereafter the site was dormant for a while.

15. That planning permission permitted short-term testing only. A subsequent planning application was made in October 2016 for the retention of the existing exploratory well site and vehicular access to the Horse Hill Site, the appraisal and further flow testing of the existing bore hole (Horse Hill-1) for hydrocarbons including the drilling of a (deflated) side track well and flow testing for hydrocarbons; installation of a second well cellar and drilling a second (deviated) bore hole (Horse Hill-2) and flow testing for hydrocarbons; erection of security fencing on an extended site area; erection of acoustic/light barriers; modifications to the internal access track; and installations of plant cabins and equipment. Planning permission was granted in October 2017.

16. HHDL also applied to the Environment Agency in December 2016 for a bespoke permit to drill a new well, drill a side track to the existing well and to carry out flow testing. On 10 July 2017 the Environment Agency stated that it was minded to approve HHDL's application. The permit was granted on 31 August 2017. Mr Lee says in his first witness statement that, now that the relevant permissions have been granted, it is expected that there will be quite a bit of activity at the Horse Hill Site in 2018. During the course of the hearing I was told that this activity had started the week before.

The Head Office

17. This is the head office of UKOG. The office is shared with a number of other companies, with a common entrance at the ground floor and a receptionist on the first floor. The main entrance door is locked so that entry is controlled only to those permitted to enter. The car park serving the Head Office has a security barrier.

Leith Hill

18. While it is not the subject of these proceedings, I should also mention this site and its geographical relationship to the Horse Hill and Broadford Bridge Sites. UKOG holds a 40% interest in PEDL 143 which is located immediately to the west of Horse Hill PEDL 137. PEDL143 is operated by Europa Oil and Gas (Holdings) Plc ("Europa"). Europa was granted a lease by the Secretary of State for the Environment, Food and Rural Affairs of land at Bury Hill Woodlands, Dorking, Surrey in September 2012. This lease was renewed in November 2015. This site is more commonly known as Leith Hill.

19. In August 2015, Europa was granted planning permission on appeal for the construction at Leith Hill of an exploratory drill site, including plant buildings and equipment; the use of the drill site for the drilling of one exploratory borehole and subsequent short term testing for hydrocarbons; the erection of security fencing; to undertake the necessary groundwater monitoring; and the carrying out of associated access and track works. The planning permission runs for a period of three years from 7 August 2015.

20. Leith Hill is in close proximity to the Horse Hill and Broadford Bridge Sites. The Horse Hill Site is approximately 10 miles east of Leith Hill. The Broadford Bridge Site is approximately 17 miles south of Leith Hill. All three sites are therefore within a very close area. There have been significant and widely publicised anti-fracking

protests at Leith Hill. These resulted in Europa obtaining an order for possession and injunctions in January 2017. The injunctions were extended in January 2018.

21. Europa did not attempt to enforce the order for possession until June 2017. The protestors had built a substantial fortress and had dug a tunnel system. The eviction proved to be a difficult operation. It took enforcement officers and removal experts two days to clear the camp. Following the eviction, the protestors established a new camp in the vicinity of the access to Leith Hill.

The Defendants

22. The Defendants can be divided into three categories. The first category is the First to Fifth Defendants who are various different groups of "Persons Unknown". All five are introduced by the words which I set out in the next paragraph. There then follow five separate descriptions which are to be read together with those introductory words and which are intended to provide a definition of the persons who fall into each group. Although all those descriptions appear above in the title of this action, I will set them out below as they were the subject of criticism by the Named Defendants and FOE. The definitions in the five separate descriptions are intended to reflect the ingredients of different unlawful acts. There was a Sixth Defendant described in a similar way, but it was removed on amendment of the claim. The second category is the six named Defendants. They are the Seventh to Twelfth Defendants. The third category is FOE which is the Thirteenth Defendant. After an unsuccessful application to intervene, FOE was joined by consent as a named Defendant during the hearing of the application. I will say a little more about each of the three categories in the following paragraphs.

Persons Unknown

23. Starting with the first category of Defendants, all five groups of "Persons Unknown" are introduced by the following words:

> "Persons unknown who are protestors against the exploration and/or extraction of mineral oil or relative hydrocarbon or natural gas by the Claimant(s) and who are involved in the following acts or any of them".

24. The "following acts" are then described in further wording appropriate to each Defendant. So, the further wording for the First Defendant is:

> "(1) Entering or remaining without the consent of the Claimant(s) on land and buildings shown edged red on the plans annexed to the Amended Claim Form ("the Land")."

25. The further wording for the Second Defendant is:

> "(2) Obstructing or interfering with the rights of way enjoyed by the Claimant(s) and each of its and their agents, servants, contractors, sub-contractors, & licensees ("the protected persons"), over the public highway and/or their access to and from the land."

26. The further wording for the Third Defendant is:

> "(3) Combining together to commit the offences as defined in the order annexed to the Amended Claim Form ("the Order") with the intention set out therein".

27. The further wording for the Fourth Defendant is:

> "(4) Interfering with the Claimant(s) economic interests by the commission of unlawful acts and/or direct action as defined in the Amended Particulars of Claim."

28. The further wording for the Fifth Defendant is:

> "(5) Watching, besetting, intimidating or assaulting the Claimant(s) and each of the protected persons".

The Seventh to Twelfth Defendants

29. The Seventh to Twelfth Defendants are Ms Ann Stewart, Ms Sue Jameson, Ms Natasha Doane, Ms Vicki Elcoate, Ms Constance Whiston and Ms Jacqui Hamlin. I will refer to them as the Named Defendants. They are campaigners or protestors against the Claimants' proposed and existing oil exploration and extraction. Some of them object to the use of the word "protestors" and prefer to describe themselves as "protectors". Their campaign has been going on for some time. There was opposition to the original proposals in 2009. In October 2013, October 2014, November 2014 and February 2016, there were local public meetings. Ms Harrison therefore relies upon the fact that, in contrast to the Ineos case mentioned below, I am concerned with an existing protest which has been going on for a while.

30. The Named Defendants have provided witness statements which explain the nature of their objections. Parts of their evidence were directed to the activities at Leith Hill, which is not the subject of these proceedings. Also, parts of their evidence were devoted to fracking, whereas the Claimants carry out conventional oil exploration and not fracking. Their reasons for objecting to the Claimants' activities include objections to the hydrocarbon industry generally, concern about risks to underground aquifers and the water table, and concerns about the extraction of oil and natural gas in areas of great natural beauty.

31. The Claimants accept that the Named Defendants' views are genuinely held. The Claimants also accept that much of the protest by the Named Defendants is lawful, the main exceptions being events which obstruct the entrances to the two Sites and "slow walking". The Claimants say in their skeleton that they recognise the importance of the right to protest lawfully and peacefully in a democratic society and that these proceedings do not concern such lawful protest. The Claimants say that in their draft injunction order they seek only to restrain unlawful "direct action" which directly infringes their rights and/or is directed at their suppliers in an attempt to hinder or stop the Claimants' lawful activities and/or to force their suppliers to stop dealing with the Claimants.

FOE

32. The Thirteenth Defendant is FOE. It is the well-known campaigning environmental organisation founded in 1971. FOE has a long history of campaigning on environmental issues. Mr David Timms, a senior campaigner, provided a witness statement explaining FOE's concerns about these proceedings and also about the order sought and its potentially chilling effect. FOE is especially concerned about the extent of that order with its use of the "persons unknown" procedure and with the order extending to persons "instructing", "encouraging" or "combining together". Amongst other things, FOE is concerned that the order sought may inhibit it in its campaigning activities and its members who join in protests.

(2) Procedural matters

33. On 1 March 2018, Chief Master Marsh made an order upon the Claimants' without notice application dated 28 February 2018. By that application the Claimants applied for permission to effect service by alternative methods and/or at alternative places.

34. By paragraph 1 of the order, the Claimants were permitted to serve the Claim Form and Documents (as defined in the order) by the methods and at the places detailed in Schedule 2 to the order. Schedule 2 set out various different methods of service. The methods included posting on the websites of various groups who were potentially interested in the claim. They also included sending a message to various Facebook accounts for certain named individuals who were also potentially interested in the claim.

35. By paragraph 3 of the order, permission was granted to any person not a named party to the proceedings to apply to the Court at any time to be added as a named party.

36. By paragraph 5 of the order, the hearing of the injunction application was to be heard on 19 March 2018.

37. At the hearing on 19 March 2018, five of the Named Defendants were joined to the proceedings as the Seventh to Eleventh Defendants. Directions were given for the filing of evidence in opposition and in response and for the exchange of skeleton arguments. The application for an injunction was adjourned to a date to be fixed with a time estimate of three days. Directions were also given in relation to possible applications for a costs capping order or a protective costs order ("PCO"). As matters turned out, agreement was later reached between the then named parties that no party would seek costs against the other unless costs were incurred as a consequence of another party's unreasonable complaint. This agreement (which does not apply to FOE) is recorded in an order dated 10 April 2018. Also by that order, Ms Hamlin was joined as the Twelfth Defendant.

38. On the first day of the hearing, I sought clarification from Mr Polli as to what order, if any, the Claimants were seeking against the Named Defendants. Mr Polli confirmed that the Claimants sought no order against any of them.

39. Also on the first day, I heard applications by the Claimants and the Named Defendants to rely upon further evidence. I allowed the Claimants' application to rely upon the fourth witness statement of Mr Sanderson which provided evidence relating

to the Claimants' ability to meet any liability on the cross-undertaking in damages. I also allowed the Named Defendants' application to rely upon late evidence in the form of a witness statement dated 23 May 2018 by Lorraine Inglis. I did so on the basis that the Claimants could rely upon Mr Sanderson's third witness statement in response. Ms Harrison opposed that third witness statement being admitted, primarily on the grounds that it contained new evidence and was not truly evidence in response. I was satisfied that in substance it did comprise evidence in response, I therefore thought it right to allow the Claimants to rely upon it. I rejected the Named Defendants' application to rely on further late evidence dated 29 June 2018 as to the effect of the injunction in the Ineos case. I did so because Mr Polli said that he would have been able to bring evidence in reply to a different effect. That being so, it seemed to me that I could not properly allow the Named Defendants' late evidence without giving the Claimants an opportunity to reply which time did not permit.

40. Also on the first day, I heard an application by FOE to intervene. I rejected that application for reasons which I gave shortly at the start of the second day. I said then that I would give more detailed reasons for my decision in this judgment. However, during the hearing the Claimants agreed that FOE should be joined as a named Defendant. I will therefore say no more about FOE's application to intervene.

41. FOE and the Claimants did not agree whether FOE should enjoy the same costs protection as the Named Defendants. As a result, when Mr Simblet addressed me on behalf of FOE, he applied for a PCO. The criteria for making such an order are set out in the notes in Volume 1 of the White Book at 48GP.76. Applying these criteria, I am not satisfied that the issues raised are of general public importance. Also, as I read the notes, while there is no reason in principle why a PCO might, in an appropriate case, extend to protect the position of a defendant, such an order would be unusual. I am not satisfied that the circumstances of this case justify that unusual order.

42. It may be that the practical result desired by FOE is reached by another route because Mr Simblet had another point on costs. It was that FOE's presence had not added to the overall costs of the application. As things turned out, that was correct. However, I agree with Mr Polli that this point does not go to whether or not I should make a PCO. Instead it goes to whether or not I should make any order for costs against FOE. In case it assists the parties in any discussions they may have about costs, my provisional view (without yet having heard the parties) is that there should be no order for costs as between FOE and the Claimants.

43. While dealing with these procedural matters, it is convenient at this stage to mention some other points raised by the Named Defendants. Again, I concentrate on the main points.

44. First, it was suggested by the Named Defendants that the Amended Particulars of Claim failed adequately to particularise the incidents relied upon by the Claimants as unlawful acts. I disagree. As Mr Polli pointed out in his reply, both the original Particulars of Claim and the Amended Particulars of Claim incorporate what is called "the Chronology of Incidents". I am satisfied that this Chronology sufficiently particularises the Claimants' case. Indeed, parts of the argument on the facts revolved around this Chronology which the Named Defendants helpfully annotated.

45. Secondly, the Named Defendants sought to set aside the order for service and/or strike out the proceedings against the Persons Unknown. For reasons I explain later under the heading "Persons Unknown", I will neither set aside the order for service nor strike out the proceedings.

46. Thirdly, the Named Defendants made various criticisms of the Claimants' conduct. They suggested that the Claimants had breached the duty of candour owed by them to the Court. However, no without notice injunction was sought or granted in this case. The application before me was made on notice. In Ineos, a without notice injunction was granted and then continued by Morgan J. Extensive criticisms were made by the named defendants in that case of the Claimants' conduct of the without notice application. These criticisms were considered by Morgan J at [131] to [140]. As the application before me was made on notice, I consider that I do not need to go into the sort of issues discussed by Morgan J in those paragraphs. Instead, what I will do is weigh the Named Defendants' criticisms in the balance when I come to consider whether or not to grant any injunction.

47. Fourthly, although this was not pursued in oral argument, in their skeleton argument the Named Defendants suggested that the Claimants could not satisfy the cross undertaking. In view of what Mr Sanderson says in his fourth witness statement, I am satisfied that the Claimants could do so.

(3) The Ineos case

48. In November 2017, Morgan J gave judgment in Ineos Upstream Ltd and Others v. Persons Unknown [2017] EWHC 2945 (Ch) ("Ineos"). That case concerned applications for interim injunctions against protestors against fracking. Morgan J granted interim injunctions against various categories of persons unknown. I was provided with a copy of the order made by Morgan J in Ineos. I was also provided with documents relating to separate appeals by the two named defendants in that case, one of whom is represented by Ms Harrison and Mr Simblet. In May 2018 permission to appeal was granted by Asplin LJ on grounds relating to: (1) the use of the persons unknown procedure; (2) Morgan J's application of the test under section 12(3) of the Human Rights Act 1998 ("the HRA") and/or his analysis of the evidence for the purposes of section 12(3); and (3) the supply chain injunction which was granted in a protest related context. I was told that the appeal in Ineos was listed for March 2019.

49. At one stage it was suggested by the Claimants that Ineos provides a "road map" for the Court in deciding this application. So far as statements of the relevant legal principles are concerned, and subject (if it becomes necessary in order to deal with the arguments in this case) to considering the effect of the grant of permission to appeal, I am assisted by and I will follow what Morgan J said in Ineos. However, so far as any matters of fact are concerned, I agree with Ms Harrison that I should not rely upon facts found in Ineos. In support of her approach, Ms Harrison referred me to the decision of the Court of Appeal in Secretary of State for Trade and Industry v. Bairstow [2003] EWCA Civ. 321; [2004] Ch. 2. In that case, adverse findings of fact were made against a company director in wrongful dismissal proceedings. In subsequent director disqualification proceedings the Secretary of State sought to rely upon those adverse findings. The Court of Appeal, reversing the judge at first instance, held that the principle that judicial findings made in a previous case were not admissible in later proceedings between different parties as evidence of the facts so

found was not limited to cases on which the earlier findings had been made in criminal proceedings. The factual findings in the wrongful dismissal claim were not admissible in the disqualification proceedings as evidence of the facts so found.

50. Although Morgan J made no final findings of fact because he was dealing with an interim application, I accept Ms Harrison's submissions based on Bairstow. I will decide this application on the basis of the evidence put before me relating specifically to the sites in this case and relating more generally to the oil exploration and extraction industry in this country.

(4) Events at the sites

51. As mentioned earlier, the Claimants are engaged in the business of onshore oil and gas exploration and extraction. Their activities at the sites are lawful and in accordance with the relevant licences and permissions. They do not engage in "fracking". The Claimants recognise that some people object to their activities. The Claimants accept that they cannot challenge lawful protests at the sites and that the Court should protect rights to protest lawfully and peacefully. The Claimants' concern is to prevent unlawful "direct action".

52. I set out below a summary of events relating to such action at the Horse Hill Site and the Broadford Bridge Site. I will also mention events at Leith Hill. I will then deal shortly with the Head Office. During the course of the hearing I watched videos of some of the events which had been selected by the Claimants and the Named Defendants. Before and after the hearing I watched other videos of such events.

53. I take these events from the Chronology relied upon by the Claimants. It contains some inaccuracies which have been corrected by the Named Defendants in their annotations. So, for example, the Claimants suggest in the Chronology that there were unlawful occupations and protest camps on the Horse Hill Site in 2014. The Named Defendants rightly challenge this suggestion because the protest camps were off that Site.

The Horse Hill Site

54. Protests started in relation to this Site in October 2014. There was an event off site on 5 October 2014. Then, on 22 October 2015, two persons locked-on to one another preventing access to the Site. Protest camps were set up in the vicinity of the Site in November 2014. Also in November 2014, there was a lock-on, slow walking and climbing on vehicles, which is sometimes called lorry surfing.

55. A "lock-on" involves one or more persons fixing themselves to something or to each other with chains or locks or, in an example I saw, attached to concrete. In order to remove that person specialist cutting equipment is required. That cutting has to be carried out carefully so as not to harm the locked-on person and the process of removing the person is necessarily time consuming. If the person thereby wilfully obstructs the free passage of the highway and if done without lawful authority or excuse, which appeared to be the case in the videos I saw, it amounts to an offence under section 137 of the Highways Act 1980.

56. As to "slow walking", I have seen videos of the way in which slow walking was carried out. One type of slow walking involved protestors walking on the road in front of a vehicle belonging to the Claimants or their subcontractors or suppliers. The result was that the vehicle and all of the traffic backed up behind it was forced to proceed at the pace of the walkers. The walking was at an unnaturally slow pace. Anyone who was out for a walk or who wanted to get somewhere would not have walked at the pace I saw shown in the videos. The pace of the walking was as slow as possible, short of stopping, so as not to amount to being stationary on the highway. In Ineos Morgan J said at [111] that it was perhaps implicit in the protestors' wish not to remain stationary on the highway that they recognised that to do so would have amounted to an unreasonable use of the highway. I agree. Depending on the circumstances, slow walking may amount to an offence under section 137.

57. "Lorry surfing" is where someone climbs onto a vehicle or its trailer on the highway without the consent of the driver or owner. I saw an incident where the vehicle was moving slowly and a protestor climbed onto it. Once the protestor climbed onto the vehicle, it had to be stopped until such time as the protestor could be persuaded to come down, or be removed from, the vehicle. Lorry surfing is a trespass to goods. It is also a criminal offence contrary to section 22A of the Road Traffic Act 1988 if the person intentionally and without lawful authority or reasonable cause interferes with a motor vehicle in such circumstances that it would be obvious to a reasonable person that to do so would be dangerous.

58. Returning to the Chronology, in late 2015 UKOG announced that flow testing was to begin. A protest camp was set up outside the Site in February 2016. Also in February 2016, there was slow walking in the vicinity of the Site. Also a protestor climbed on to a trailer and remained there for four hours before being removed by police. On 11 March 2016, two or three protestors locked-on to a vehicle in the vicinity of the Site. There was also some slow walking. On 16 March 2016 a protestor climbed onto a lorry. On 18 March 2016, protestors locked-on to four vehicles and one rig.

59. There have also been various obstructions taking different forms in front of, or in the vicinity of, the Horse Hill Site. So, there was an incident on 11 March 2016, which I saw in a video, of protestors lying across the road. There have also been demonstrations in front of the entrance to the Sites where demonstrators have not moved away promptly. For example, there have been "Cake at the Gate" and "Soup at the Site" protests at the Broadford Bridge Site. These involve the staging of a coffee morning or the distribution of hot soup directly in front of the site. As explained in the Named Defendants' witness statements, those participating in such events do move aside for vehicles seeking to come and go. However, those participating do not always move aside or move aside promptly and as a result vehicles cannot pass into or out of the Site. This involves a wrongful interference with the Claimants' rights to enter onto, and leave from, the public highway.

60. In late November 2017, the Horse Hill Site was occupied by protestors. Consent was not given to the occupation. The occupation lasted between 30 November and 2 December 2017. It was only ended by a controlled removal by bailiffs and rescue specialists which the occupying protestors fought bitterly. Magellan chose to exercise its self-help rights because it was concerned that, in the time it would take it to obtain a possession order and injunction, the occupiers might construct the sort of fortress and tunnels that were constructed at Leith Hill.

61. Since December 2017, the Horse Hill Site has been protected by 24-hour security teams, including dog handlers. Magellan's security budget for 2018 for the Horse Hill Site is £636,000. During exploration drilling in 2014, Magellan's security costs for the Horse Hill Site were £450,000. In 2016, during the flow test of the Horse Hill oil discovery, the costs of security were £122,000. The cost of dealing with the protestors' occupation of the Horse Hill Site was in excess of £132,000.

62. A protestor who gave his name as "Ross Monaghan" has indicated an intention to re-occupy the Horse Hill Site in the future. Ross Monaghan was seen at the time of the occupation of the Horse Hill Site calling for more protestors to join the occupation. He was also involved in the Leith Hill protests mentioned below. On 2 December 2017 at 15:59, he posted to the Leith Hill Protection Camp group page the following:

> "Illegal eviction [at Horse Hill] resisted from 5 am this morning but off site now we will be back."

63. I read "we will be back" as indicating an intention by him and others to re-occupy the Horse Hill Site.

The Broadford Bridge Site

64. The first entry in the Chronology for this Site is in May 2017 with a reference to a protest camp being established in the vicinity of this Site. However, as the Named Defendants rightly point out, this camp was not on land owned or controlled by the Claimants and was with the permission of the owner. As I understand matters, the protest camp is still there.

65. On 5 June 2017, three protestors locked themselves together and thereby obstructed the entrance to this Site. The Chronology next mentions two incidents in June 2017 with pressure being put on suppliers to the Broadford Bridge Site. On 12 June 2017, there was a two protestor lock-on and also a three protestor slow walk.

66. The Chronology then refers to two further incidents in June 2017 relating to pressure being put on suppliers to this Site. It also refers to a minor demonstration on 24 June 2017 called "The Gathering at the Green". This is apparently a weekly event, the purpose of which is to raise awareness of the campaign by handing out leaflets and chatting to locals. I saw a video of this and it struck me as a good natured protest away from this Site, involving no unlawful acts. The Chronology for June 2017 concludes with further incidents relating to the targeting of suppliers to the Broadford Bridge Site, another of which also occurred in July 2017.

67. In September 2017, there was another slow walk. Also in September 2017, there was an incident at Pease Pottage Service Station which I describe in more detail below. Then in December 2017 there was a minor demonstration at the entrance. The final entry in the Chronology for the Broadford Bridge Site is an incident of slow walking on 26 January 2018,

68. It is clear from the Chronology that there has been targeting of some of the subcontractors or suppliers who have worked with the Claimants at the Sites, especially at the Broadford Bridge Site. I have mentioned some examples above, but I will give some more detail. JSS Scaffolding Petro-chemical Marine Limited was

targeted in August 2017 for putting up fencing at Broadford Bridge Site and at Leith Hill. A post shared to the PNR (Gates) Community Protection Group Facebook page consisted of photographs of one of the company's vehicles, referred to its work at "the Billinghurst Site in Sussex [i.e. Broadford Bridge]" and asked "people to contact them via phone, Google or FB to explain how people feel about companies who facilitate frackers". Individuals then left derogatory online reviews for the company.

69. Something similar happened to First Fence Hire and Sales who supplied fencing to the Broadford Bridge Site and were contacted by anti-fracking protestors. On 6 December 2017, someone called Jenny Harper posted on Facebook: "If anyone fancies ringing these guys, please do. They are fencing at Leith Hill and Broadford Bridge sites at the very least. Do they know what their fencing is surrounding. Time for them to find out and pull out".

70. Also targeted by protestors was British Drilling and Freezing Company Limited ("BDF"). It was engaged by the Claimants to provide and operate the drilling equipment itself at the Broadford Bridge Site. It provided the drilling rig used at that Site. Due to its size, that rig had to be delivered in component parts and erected on site. In order to deliver to the Site, the operation required 35 heavy goods vehicles which were provided by thirteen haulage companies. The first delivery to site went without incident and hauliers were able to gain access. However, thereafter BDF and its hauliers were met by protestors at the entrance to the Site which had to be dealt with by the onsite security team.

71. BDF encountered more problems caused by protestors when they and their hauliers attempted to move the rig from the Broadford Bridge Site in September 2017. Some of BDF's contracted hauliers, for example Dyce Carriers Limited ("Dyce"), withdrew from their contracts with BDF due to problems caused by protestors. Dyce cited trouble with scheduling, threats made to it by protestors, bad publicity and comments made on Facebook.

72. The same happened in relation to Williams Shipping (a company engaged by BDF to deliver the rig to the Broadford Bridge Site) which had serious concerns about protestors. On 30 August 2017, Williams advised BDF they would not be able to support moving the rig from the Broadford Bridge Site due to the unwelcome publicity from the protestors and the potential risk to safety to their staff. Williams' concerns related to potential protestors at their depot, protestors locking-on to their trailers, delays to the equipment, unwelcome social media posts and the safety of their staff.

73. On 6 September 2017, BDF started to move the rig from the Broadford Bridge Site to Angus Energy Oil's Lidsey site near Bognor Regis, West Sussex. The distance between the two sites is approximately 23 miles. Due to the protest at Broadford Bridge and in the expectation that the rig would be targeted by protests, it was agreed between BDF, Eclipse Strategic Security Limited ("Eclipse") (a security company engaged by the Claimants) and the local police that the rig would not proceed directly to Bognor Regis, but would park overnight at Pease Pottage services on the M23 motorway near Crawley. Arrangements were put in place with the service station and it was expected that the rig would park there for a few hours and would depart for Bognor Regis in the early hours of the morning of 7 September. However, early on 7 September an anti-fracking protestor climbed on to the rig and erected anti-fracking

banners. The protestor, referred to online as "Dave Doktor", but whose real name is Peter Whittick, refused to climb down. He remained on top of the vehicle for several hours and the Police were called to the scene. Mr Whittick was later found guilty of hindering the rig owner from carrying out its lawful business, contrary to section 241 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the Trade Union Act 1992").

Leith Hill

74. While Leith Hill is not the subject of the application, I consider that it is relevant to see what happened there because it is close to the Horse Hill Site and Broadford Bridge Site and is operated by Europa, in which the Claimants are interested. Leith Hill was occupied by protestors between October 2016 and June 2017. A fortress was constructed along with a network of tunnels. As I saw from the video evidence, these would have made the eventual eviction problematic. The eviction took place pursuant to an order for possession and injunction made by the Court on 23 January 2017. While Europa was able to remove the protestors, the protest continued from a camp across the road and attempts were made to interfere with Europa's work on site. For this reason, Europa obtained further orders on 8 January 2018.

The Head Office

75. On 24 July 2017 about six protestors gained access to the Head Office without the permission of UKOG. They did so by tailgating behind somebody with a security pass through the car park barrier and then following that person through the main entrance security doors. They then made their way up to UKOG's reception area on the first floor. It is said, although this is disputed, that they behaved in an intimidatory manner towards the receptionist and generally caused a disturbance and nuisance. The receptionist called the police and the protestors eventually left before the police arrived. They then posed for a photo outside the main entrance, which was posted immediately on Facebook.

Summary in relation to events at the sites

76. In their annotations to the Chronology, the Named Defendants challenge some of the events that the Claimants rely upon. Even making allowance for these challenges, in relation to the Horse Hill Site there is substantial evidence of trespass, obstruction of the highway, obstruction of the entrance to the Site and targeting and interference with the activities of the Claimants' subcontractors and suppliers. In relation to the Broadford Bridge Site, there is substantial evidence of targeting and interference with the activities of the Claimants' subcontractors and suppliers and obstruction of the highway and the entrance to the Site.

77. As this is an interim application, the evidence has not yet been tested. However, the evidence strongly suggests that there is the sort of campaign pleaded in paragraphs 27 and 28 of the Amended Particulars of Claim, i.e. that action is being taken by protestors against sites where the Claimants carry out the lawful use of those sites for hydrocarbon or natural gas exploration and/or extraction. That campaign includes unlawful acts such as trespass, interference with the Claimants' rights of access to land from the public highway from their land fronting upon the highway; public nuisance caused by interference with the Claimants' rights to pass and re-pass on the

highway as a result of which they have suffered damage over and above the ordinary damage suffered by the public at large; interference with the Claimants' economic interest by unlawful means such as those just mentioned and the targeting and interference with their subcontractors and suppliers. The campaign includes both the Horse Hill Site and the Broadford Bridge Site.

78. Evidence for there being such a campaign is in paragraphs 38 to 106 of Mr Lee's first witness statement, paragraphs 4 to 9 of Mr Sanderson's first witness statement and paragraphs 10 to 40 of Mr James Court's first witness statement. Mr Court is the managing director of Eclipse, the security company that I mentioned earlier. Eclipse has provided and still provides security services and assistance in relation to protests at Horse Hill, Broadford Bridge and Leith Hill. Eclipse also monitors the activities of protestors across other sites so that it is aware of protestors' activities at those sites.

79. In addition to these matters, Mr Court describes how in 2017 he has noticed a significant increase in protest activity and campaigning against his clients' activities. Likewise, Mr Lee refers to a letter from the Assistant Chief Constable of Lancashire Constabulary (Territorial Activities) to the Chief Operator of United Kingdom Onshore Oil and Gas. In summary, that letter records the increase in anti-fracking campaigns and protest activity. It also records that there were then a number of anti-fracking camps in England and Wales, including at Broadford Bridge and Leith Hill. Mr Lee summarises points made by the Assistant Chief Constable by saying that there is a high level of protest, the majority of which is peaceful, but that there is a significant hard core of activists who are prepared to resort to criminality and that the scale of that problem cannot be underestimated.

80. There is a financial cost to all of the above which is being suffered by the Claimants over and above the inconvenience caused to members of the public. In addition to the sums of money already spent on security, the Claimants are continuing to spend large amounts of money on security due to the threat of unlawful targeting. Also, as Mr Sanderson explains, staff and contractors cannot drive to work at the Sites in the way that others ordinarily travel to work. Instead they must meet elsewhere and they are then transported to their workplace under guard and secrecy. The Claimants', their subcontractors' and their suppliers' vehicles coming to the sites are delayed in carrying out their business with consequent effect on costs and their businesses. Contractors charge the Claimants more than they would charge a client in an alternative, less controversial, industry because they are aware that the direct action protests will increase their costs. Also, the protests discourage some of those contractors' competitors from dealing with the Claimants at all, so that those contractors who do deal with the Claimants can charge the Claimants more. The Claimants are therefore suffering, and will continue to suffer, substantial loss and damage as a result of the protestors' unlawful activities. This loss and damage is over and above the ordinary damage suffered by the public at large.

(5) The level of recent and current activity at the sites

81. Mr Polli and Ms Harrison addressed me on the level of recent and current activity of both the Claimants and the protestors at the Horse Hill Site and the Broadford Bridge Site. Both Counsel relied upon those levels of activity in support of their cases. I will therefore deal with this aspect of the matter under this separate heading.

82. The rival positions can be summarised as follows. The Named Defendants argued that recent protest activity at the two sites had been limited. They said this was fatal to the application for an injunction, especially as this was a *quia timet* injunction. The Named Defendants also relied upon the lack of any, or any significant, activity on the sites by the Claimants. They said that this also was fatal to the application, especially in relation to the Broadford Bridge Site. The Claimants acknowledged in their skeleton argument that there has been little recent protestor activity at the two sites. They suggested there were good reasons for this which I will consider below. As to the Claimants' activity on the sites, in the case of Horse Hill Site, they had just resumed exploration activity. In the case of the Broadford Bridge Site, the Claimants were ensuring that the site remained secure from trespassers and monitoring the wells. Also, activity would start there in due course.

83. So far as the protestors' activities at the Horse Hill Site are concerned, the most recent incident was the unlawful occupation which took place in November/December 2017. That was plainly a serious incident. Since then, there has been 24 hour security on the site. It is, therefore, perhaps not surprising that there have been no activities by protestors. Also, it is apparent from Mr Lee's evidence that there have been protests against other oil and gas companies' operations going on in other parts of England which may have taken protestors away from the Weald. In this regard, Mr Lee refers to protests in Nottingham. Also, I was told that HHJ Pelling QC recently made an injunction restraining protests against Cuadrilla's activities in Lancashire.

84. Furthermore, the fact of this application has been known since March 2018. It would therefore be surprising if there had been any, let alone any significant, protests in the run-up to the hearing before me. Also, in Mr Sanderson's third witness statement, he refers to a statement made by Ian Crane following the order made by HHJ Pelling QC. According to Mr Court's witness statement, Mr Crane is an extremely active anti-fracking campaigner who posts videos of his protest activities to his YouTube channel almost daily.

85. Mr Crane said this of that case:

> **"This injunction hearing was primarily brought about as a direct result of pronouncements of intended actions. Whether deliberately or inadvertently, these pronouncements effectively gifted the unconventional gas industry the opportunity to seek a far-reaching and chilling injunction.**
>
> **While I would be the first to applaud direct actions and recognise the sacrifice of those who participate in direct action, I believe the key element is spontaneity and surprise. Sadly, pronouncements of intended action is regarded as an imminent threat and it is very difficult to challenge the industry's request for an injunction."**

86. Mr Crane's statement suggests that it is unlikely that any direct action would be taken whilst this application was under consideration. Also, if the key element for protestors is spontaneity and surprise, the Claimants cannot be expected to know when there might be further protests involving unlawful activity.

87. In any event, it seems to me there is a good reason to believe that the Horse Hill Site is under a real and imminent threat. I mentioned earlier what Ross Monaghan said in relation to Horse Hill after the occupation in December 2017. In addition to this, in his third witness statement Mr Sanderson produced the following Facebook message posted on 13 June 2018, again involving Ross Monaghan. It is an exchange between him and another unidentified protestor as follows:

> **"Anything happening a bit closer to me. Is Leith Hill still active?"**
>
> **"The sites not but camp is and horse hill will kik** [sic] **off…soon."**

I read this reference to Horse Hill "kicking off soon" as a clear threat that Horse Hill will be targeted.

88. As to the Claimants' activities at the Horse Hill Site, on 14 June 2018 it was announced that HHDL, the operator of the Site, had received formal consent from the OGA for a forthcoming HH-1 Extended Well Test programme. All other necessary regulatory consents from Surrey County Council, the Environment Agency and the Health and Safety Executive are in place. The consent permits extended well testing for a period of 150 days. In his third witness statement, Mr Sanderson said that the commencement date was confidential, but when commenced the programme cannot be interrupted. During the course of the hearing, I was told that that programme had commenced the week before.

89. As to the protestors' activities at the Broadford Bridge Site, it can be seen from my summary above that there have been a number of threats to the suppliers to the Claimants in relation to this Site. In addition, there have been lock-ons, obstruction of the entrance and slow walking. One of the protest camps is in the vicinity of this Site. While there have been no incidents of trespass, all three sites at Horse Hill, Broadford Bridge and Leith Hill are in close proximity. As recently as November/December 2017 there was a serious incident of trespass at Horse Hill. At Leith Hill, there was a serious incident of trespass such that a possession order and injunction were made in January 2017 and the injunctions had to be extended in January 2018. If an interim injunction prohibiting trespass was to be made in relation to Horse Hill, but was not made in relation to Broadford Bridge, in circumstances where there is already an injunction in place in relation to Leith Hill, it seems to me that with this background of protest in the Weald and the evidence of the campaign, that would put Broadford Bridge at a real and imminent risk of trespass.

90. Also, for the same reasons as mentioned in paragraphs 84 to 86 above in relation to Horse Hill, it is perhaps not surprising that there has been no recent protest activity in relation to this Site.

91. As to the Claimants' activities at the Broadford Bridge Site, it was announced on 15 June 2018 that KOGL had applied to West Sussex County Council to extend that Site's planning permission for a further 18 months to 31 March 2020. The public announcement, as required by Stock Exchange rules, was that: "The extension, if granted, will provide time to incorporate the learnings from future planned Kimmeridge operations at Horse Hill and PEDL234 into the design and objectives of a possible new BB-1y side-track and test programme."

92. In the course of his reply, Mr Polli said that an application had been made for planning permission for a side-track to be drilled at Broadford Bridge. However, after the hearing, in their letter to me dated 13 July 2018 the Solicitors for the Named Defendants and FOE quoted from an email from Mr Lee, the Solicitor for the Claimants, in which he said that there was only one planning application as mentioned above and that "there is no other application pending, for a side track or anything else".

93. In their comments on this letter, the Claimants' Solicitors accepted that what Mr Polli said in his reply was incorrect. They apologised unreservedly for what they said arose from an innocent misunderstanding between Mr Polli and his instructing solicitor.

94. In these circumstances, I will ignore what Mr Polli said in his reply in relation to the Broadford Bridge Site about this particular aspect of the case. However, even ignoring this, it seems to me that there is a real prospect of possible further testing at Broadford Bridge. That would be within the scope of the current planning permission which the Claimants are seeking to extend beyond September 2018

95. In summary, it seems to me that the position regarding recent and current activity by the protestors and the Claimants at the two Sites is not, as Ms Harrison argued, fatal to the application. On the contrary, it seems to me that, as I understood Mr Polli to argue, and I agree, the recent and current activity of both the protestors and the Claimants at the two Sites points towards the grant of injunctive relief. In this regard, on 23 August 2018 I received an emailed application by the Claimants to rely upon a further witness statement from Mr Court regarding events at Horse Hill on Monday 20 August 2018. I will deal with that application when this judgment is handed down on 3 September 2018.

(6) The particular causes of action relied upon by the Claimants

96. In their Amended Particulars of Claim, the Claimants rely upon: (i) trespass; (ii) watching and besetting; (iii) intimidation; (iv) interference with private rights of way; (v) interference with the Claimants' right to gain access to the highway from their land which fronts upon the highway; (vi) public nuisance caused by interference with the Claimants' right to pass and repass on the highway where they had suffered particular damage over and above the ordinary damage suffered by the public at large; (vii) interference with the Claimants' economic and other interests by unlawful means; and (viii) conspiracy to injure the Claimants by unlawful means, namely by various criminal offences.

97. In Ineos, Morgan J set out the relevant legal principles to be applied to most of the above causes of action: see [38] to [46] and [56] to [73]. (In [47] to [55], he dealt with harassment which is not pleaded here). Rather than lengthen this judgment with a summary of the relevant legal principles relating to the above causes of action, I respectfully adopt what Morgan J said in those paragraphs. Applying the above legal principles, and in the light of what I have set out in sections (4) and (5) above, it seems clear to me that there have been serious and repeated incidents of trespass; interference with the Claimants' rights to gain access to and from the highway from their land which fronts upon the highway; and public nuisance causing particular loss over and above the ordinary damage suffered by the public at large. There has also been substantial interference with the Claimants' economic and other interests by

unlawful means through the targeting of the Claimants' subcontractors and suppliers. Likewise, there has been a combination by protestors to cause such interference by such means.

98. There are three additional matters that I should mention under this heading arising out of the arguments before me.

99. First, in [56] to [58], Morgan J dealt with conspiracy and referred to JSC BTA Bank v. Ablayazov (No. 14) [2017] QB 853 at [46]-[47] and [53]-54]. Since judgment was handed down by Morgan J, that case has been the subject of an appeal to the Supreme Court: [2018] UKSC 19.

100. Secondly, in the present case, in contrast to Ineos where, as I understand it, the conspiracy was founded on certain criminal offence (see [58]), the Claimants' claim in conspiracy is founded not only on those same criminal offences, but also on the fact that "It has been held that whenever an act is itself tortious, a combination to do that act is a tortious conspiracy": see Clerk & Lindsell on Torts, [2017], 22nd Ed, para. 24-101. So, as explained in their skeleton, the Claimants rely upon the acts of climbing onto vehicles, obstructing the highway and targeting subcontractors and suppliers as not only amounting to criminal offences but also as the torts of trespass to goods, public nuisance and intimidation respectively. So, it is said by the Claimants, and I agree, that as these acts are themselves tortious, so a combination to do them is a tortious conspiracy.

101. Thirdly, I was addressed at some length on slow walking and therefore I will say a little more about that matter in addition to adopting what Morgan J said in Ineos at [109] to [111]. In this regard, my attention was drawn by the Named Defendants to video evidence in which the Police supervised slow walking. It was apparent from the video, and also from the evidence of Mr Kevin Blowe relied upon by the Named Defendants, that the Police use a "five-step" warning process apparently developed by the Association of Chief Police Officers. This involves an escalating series of warnings about the possibility of arrest. The point was made that, if the Police did not arrest until after the fifth warning, there was nothing wrongful in slow walking. Also, my attention was drawn to decisions in the Magistrates' Court where defendants who had been slow walking were acquitted of obstruction of the highway at Horse Hill. Again, these related to slow walking. There was also evidence from Mr Blowe that the Police operated a "tolerated slow walking area" in the vicinity of the Broadford Bridge Site.

102. I accept that the evidence shows that the Police tolerate, indeed it might be said that the Police facilitate, slow walking. However, as Mr Polli said in his Supplementary Skeleton, this does not, without more, make it a reasonable use of the highway. The same applies to the Magistrates Court's decisions.

103. It is clear from Morgan J's analysis of the cases at [64] to [72], which I have already adopted, that there is a balance to be drawn. So, one has the right to protest, i.e. to assemble peacefully, and the right to exercise one's freedom of expression, on the highway provided that "the activity in question does not amount to a public or private nuisance and does not obstruct the highway by unreasonably impeding the primary right of the public to pass and repass": see DPP v Jones [1999] 2 AC 240 at 257D. Applying this balanced approach, the slow walking that I saw on the videos was not

reasonable. It seemed to me to be done deliberately in such a way as to prevent vehicles from passing. The purpose seems to have been to cause an obstruction. The slow walkers did not move aside until threatened with arrest or, in some cases, until arrested. This caused a build-up of traffic and queues formed. There was delay to everyone on the road. As Mr Polli said in his Supplemental Skeleton, the suggestion that this was "give and take" (see Harper v. G.N. Haden & Sons Ltd [1944] Ch. 298 per Romer LJ at p. 320) was wrong; rather it was "take" without "give" from the slow walkers.

(7) The Human Rights Act 1998

104. I was addressed at some length on human rights issues arising out of the application.

105. It was common ground between the parties, and I agree, that Articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms are engaged on the facts of this case.

106. Article 10 provides:

> **"(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers…**
>
> **(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."**

107. Article 11 provides:

> **"(1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.**
>
> **(2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the exercise of these rights by members of the armed forces, or the police, or of the administration of the State."**

108. The protests in this case involve the expressions of opinions and assembly and association with others. Hence the two Articles being engaged. However, both Articles confer qualified rights. Both Articles are qualified in relation to matters which involve public safety, matters needed for the prevention of disorder or crime and, importantly in this case, for the protection of the rights of others.

109. I was referred to various cases including Westminster CC v Haw [2002] EWHC 2073 (QB), Tabernacle v Secretary of State for Defence [2009] EWCA Civ 23, Mayor of London v Hall [2010] EWCA Civ 817, [2011] 1 WLR 504 and City of London v Samede [2012] EWCA Civ 160, [2012] 2 All ER 1039; Appleby v. United Kingdom [2003] 37 EHRR 38; and Kuznetsov v. Russia [2008] ECHR 10877/04. They are relevant in the present case as they concerned protests involving direct action.

110. In view of the importance which the Named Defendants attached to these decisions, and although it repeats some of what Morgan J said in Ineos at [74] to [83] and [103] and [104], I will summarise these cases. Much of my summary is taken from Morgan J's judgment.

111. In Westminster CC v Haw, the highway authority sought a final injunction to remove Mr Haw who was camping on the pavement opposite the Houses of Parliament. The Court asked whether Mr Haw's obstruction of the pavement was unreasonable. The Court had regard to the duration, place, purpose and effect of the obstruction as well as the fact that Mr Haw was exercising his right to freedom of expression under Article 10. It was held that the obstruction was reasonable.

112. In Tabernacle v Secretary of State for Defence, the Court of Appeal considered an application for judicial review of a bye-law made by the Secretary of State for Defence which would have the effect of banning a protest camp at Aldermaston. The Court asked itself whether the Secretary of State had justified the bye-law in a way which satisfied the requirements of Articles 10 and 11. It was held that he had not done so as the suggested justification was limited to dealing with possible nuisance created by the camp.

113. In a well-known passage, Laws LJ said at paragraph 43:

> **"Rights worth having are unruly things. Demonstrations and protests are liable to be a nuisance. They are liable to be inconvenient and tiresome, or at least perceived as such by others who are out of sympathy with them. Sometimes they are wrong-headed and misconceived. Sometimes they betray a kind of arrogance: an arrogance which assumes that spreading the word is always more important than the mess which, often literally, the exercise leaves behind. In that case, firm but balanced regulation may be well justified. In this case there is no substantial factor of that kind. As for the rest, whether or not the AWPC's cause is wrong-headed or misconceived is neither here nor there, and if their activities are inconvenient or tiresome, the Secretary of State's shoulders are surely broad enough to cope."**

114. Ms Harrison relied upon Tabernacle and reminded me that in the case before me there had been protests at the two sites for some time and that this case was not one where

there had been no previous protests. I have borne these facts well in mind when I come to consider whether or not to grant any relief.

115. In Mayor of London v Hall, the Court of Appeal refused permission to appeal to a group of protestors who were camping on Parliament Square against an order for possession and an injunction requiring their removal from the Square. The Court regarded the location of the protest as significant (in the protestors' favour) for the purpose of Articles 10 and 11. The court was required to balance the protestors' rights to protest against other matters referred to in Articles 10(2) and 11(2), including the rights of others. The trial judge had referred to issues as to public health and the prevention of criminal damage; he also referred to the rights of others to use the Square. He held that the balancing exercise resulted in it being appropriate to make the order for possession and grant the injunction. The Court of Appeal added into the balancing exercise the rights of different protestors to demonstrate in the Square. The decision in Tabernacle was distinguished. A different result was reached in relation to Mr Haw and a supporter of his and their cases were remitted for further consideration.

116. In City of London v Samede, the Court of Appeal refused permission to appeal to a group of protestors against a possession order and an injunction requiring their removal from St Paul's Churchyard. The protestors relied on Articles 10 and 11 and submitted that the trial judge had reached the wrong conclusion when carrying out the balancing exercise required by Articles 10 and 11.

117. Referring to the question, posed by the judge, as to the limits to the right of lawful assembly and protest on the highway, Lord Neuberger MR (giving the judgment of the court) said at [39]:

> **"As the judge recognised, the answer to the question which he identified at the start of his judgment is inevitably fact sensitive, and will normally depend on a number of factors. In our view, those factors include (but are not limited to) the extent to which the continuation of the protest would breach domestic law, the importance of the precise location to the protestors, the duration of the protest, the degree to which the protestors occupy the land, and the extent of the actual interference the protest causes to the rights of others, including the property rights of the owners of the land, and the rights of any members of the public."**

118. In Appleby v. United Kingdom, the first three applicants had established an environmental group to campaign against a particular development. They tried to set up stands in a privately owned shopping mall but were prevented from doing so by security guards employed by the company that owned the mall. Relying on Articles 10 and 11, the applicants complained that they had been prevented from meeting in their town centre to share information and ideas about the proposed development. The Strasbourg Court accepted that the applicants' Article 10 and 11 rights were engaged, but held (see [43]) that there was no infringement of those rights because '[r]egard must also be had to the property rights of the owner of the [privately owned] shopping centre', and there were other places where the applicants could exercise their Article 10 and 11 rights.

119. In Kuznetsov v. Russia, the Strasbourg Court discussed the level of public disruption which a protest on public land may legitimately cause before interference with Article 10 and 11 rights is justified. The demonstration in that case had lasted about half an hour, and had blocked the public passage giving access to a court-house.

120. The Court emphasised that a degree of tolerance is required from the state. It then said this:

> **"…The court considers the following elements important for the assessment of this situation. Firstly, it is undisputed that there were no complaints by anyone, whether individual visitors, judges or court employees, about the alleged obstruction of entry to the court-house by the picket participants. Secondly, even assuming that the presence of several individuals on top of the staircase did restrict access to the entrance door, it is creditable that the applicant diligently complied with the officials' request and without further argument descended the stairs onto the pavement. Thirdly, it is notable that the alleged hindrance was of an extremely short duration. Finally, as a general principle, the court reiterates that any demonstration in a public place inevitably causes a certain level of disruption to the ordinary life, including disruption of traffic, and that it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by art 11 of the convention is not to be deprived of all substance… Accordingly, the court is not satisfied that the alleged obstruction of passage, especially in the circumstances where the applicant gave evidence of his flexibility and readiness to co-operate with the authorities, was a relevant and sufficient reason for the interference."**

121. I have had regard to the approach taken by the Court in Kuznetsov which Ms Harrison relied upon and to the approach taken by the Court in Appleby which Mr Polli relied upon. Kuznetsov concerned a protest in a public place, whereas Appleby concerned interference with the property rights of the owner of privately owned property. Kuznetsov is helpful to me in considering the protests on the highway but, in the context of the interference with the Claimants' property rights which has taken place in this case, I found what was said in Appleby to be especially helpful. I consider that it supports the Claimants' approach. As was said by the Court in Appleby, regard must also be had to the Claimants' property rights and to the fact that there are other places where the Article 10 and 11 could be exercised by the protestors in this case.

122. I was also addressed on section 12 of the HRA which I will consider under the next but one heading.

(8) Use of the persons unknown procedure

123. The Named Defendants criticised the Claimants for the way in which, in the application for substituted service, in bringing the proceedings and in making the claim for an interim injunction, they sought relief solely against persons unknown. In reliance upon these criticisms, they submitted that the Court should strike out the claim brought exclusively against persons unknown or refuse in the exercise of its

discretion to make the order against persons unknown at all and/or in the terms sought by the Claimants. FOE made similar criticisms.

124. The Named Defendants submitted that bringing proceedings solely against persons unknown was an exceptional step and that strict conditions (which, they said, were not satisfied here) had to be met in order that the procedure might be used. Those strict conditions were: (i) necessity; (ii) certainty in the identification and description of the unknown Defendants; (iii) clarity and certainty in respect of the prohibited conduct; and (iv) that the interests of justice required it. In support of their submissions, the Named Defendants relied upon various cases, including Bloomsbury Publishing Group Ltd v News Group Newspapers Ltd [2003] 1 WLR 1633; Hampshire Waste Services v Intended Trespassers [2004] Env LR 196; GYH v Persons Unknown [2017] EWHC 3360 and Tendering District Council & Ors v Persons Unknown [2016] EWHC 2050 (QB).

125. In my judgment, the cases cited by the Named Defendants do not support their submissions. In Bloomsbury Publishing Group Ltd v News Group Newspapers Ltd Sir Andrew Morritt V-C said that it was not material that the description of persons unknown might apply to no one: see para. 21. In Hampshire Waste Services Ltd v Intended Trespassers [2004] Env LR 196, the same judge granted a *quia timet* injunction to restrain future trespass by protestors. The judge amended the description of the persons unknown in that case so that it referred to persons entering or remaining on the relevant land without the consent of the owner of it. This is how the Claimants have identified, for example, the First Defendants in this case

126. In Hampshire Waste Services, the judge did not favour a description which involved a legal concept such as "trespass". Nor did he favour a description which involved a person's subjective state of mind, for example, his intentions. However, there have since been cases where words such as "intending" or "proposing" have been used. Also, there have since been cases where the courts have been asked to grant, and have granted, injunctions against persons unknown, often against various kinds of protestors.

127. These two cases were discussed with approval by Lord Rodger of Earslferry in Secretary of State for the Environment, Food and Rural Affaires v Meier [2009] 1 WLR 2780 at [2].

128. Also, before the development of the law in Bloomsbury Publishing, in 1991 Parliament had introduced a new section, section 187B, into the Town and Country Planning Act 1990 which provided for the making of rules of court so as to permit a local authority in certain cases to obtain injunctive relief against persons unknown. Those powers were considered by the Court of Appeal in South Cambridgeshire DC v Gammell [2006] 1 WLR 658. At [32], Sir Anthony Clark MR described the position where an injunction had been granted against persons unknown of a certain description and following that order a person had done the thing which the order provided should not be done. It was held that when that person did the thing forbidden by that order, that person became a party to the proceedings and committed a breach of the order. It was not necessary to make a further order of the court adding that person as a party.

129. It seems to me that this provides further support for the approach taken by the Claimants in this case. If, for example, a person was to enter on the Horse Hill Site without consent, that person would then become a party to the proceedings and commit a breach of any order that had been made against persons unknown prohibiting trespass. However, as Mr Polli pointed out in his oral submissions, before any action could be taken to enforce any injunction against any such person who thereby became a party to the proceedings and committed a breach, it would be necessary to prove that that person knew of the order. As Mr Polli pointed out, and I agree, this provides a safeguard in the use of the persons unknown procedure.

130. It is right to say that in the GYH case Warby J warned against possible abuse of the "Persons Unknown" procedure. In that case the claimant applied without notice for an interim non-disclosure order to restrain what she alleged was a campaign of harassment. Warby J said this at [10]:

> **"The claimant sues "Persons Unknown", coupled with descriptive wording referring to two world wide web addresses at which content of which the claimant complains has been published. I shall refer to the defendant as "he", because it seems most likely to be one male individual. It is open to a claimant who cannot identify those responsible for the conduct complained of to sue "Persons Unknown". The principles are identified in *Bloomsbury Publishing Group plc v News Group Newspapers Ltd* [2003] EWHC 1205 (Ch) [2003] 1 WLR 1633. The court must however keep a watchful eye on claims brought against persons unknown to guard against any abuse of the facility to bring claims in this way."**

131. I do not read this passage as justifying the strict conditions argued for by the Named Defendants. Also, it seems to me that, as the Claimants said in their skeleton, in the context of that case, where there was one known perpetrator whose identity was unknown, it was only natural that Warby J should express himself as he did. The Judge referred back to Bloomsbury and did not appear to intend that anything which he said should be taken to develop the law in this area.

132. In Tendering District Council, Knowles J declined to grant an injunction against persons unknown. In doing so, he relied upon the fact that the Council did not seek an injunction specifically directed to those against whom it had previously taken action, including by way of Court proceedings, and where it could name them: see [45]. However, this was but one of his reasons. He seems also to have been influenced by the fact that the Council was a public body which had other powers to deal with the matters complained of: see [41] and [42]. Also, the Judge was concerned that the area covered by the injunction sought had increased over the years (see [46]) and might set an adverse precedent for many, if not most, public events: see [47]. In this case, the Claimants are not a public body and they do not have other powers to deal with the matters of which they complain. Nor have they taken any previous Court action. Nor are they seeking to increase any area covered by previous injunctions. Again, it seems to me that this case does not justify the strict conditions suggested by the Named Defendants.

133. In summary, I consider that the cases relied upon by the Named Defendants do not justify their assertion that I am concerned with an "exceptional" step, or that I must apply the four strict conditions which they suggested.

134. As I understand the Claimants' position, they say that I should adopt the approach taken by Morgan J in Ineos to this issue. At [123], he said:

> **"I consider that the position has now been reached that the procedure adopted by the Claimants in the present case is a course which was open to them. Although the Defendants made detailed submissions calling into question the use of this procedure, the Defendants did not focus on the words of description which were used in this case and did not suggest modifications to the wording adopted by the Claimants."**

135. If I did adopt the approach taken by Morgan J, I would conclude that there could be no objection to the course taken by the Claimants in this case. However, as I understand matters, the approach taken by Morgan J on the matter of persons unknown, and in particular what he said in [123], is one of the grounds on which Asplin LJ granted permission to appeal. In these circumstances, I will adopt the approach argued for by the Named Defendants to see whether it leads me to a different conclusion.

136. In so far as the use of the procedure solely against persons unknown might be an exceptional step, I am satisfied that the circumstances of this particular case justify its use. In particular, it seems to me that an injunction against a number of named individuals would not provide the Claimants with the protection they need. It is clear from the evidence in this case that there are numerous people who move around the UK protesting at various oil and gas sites. Only some of their identities are known and only some of those people will have protested before at the two Sites in this case. An injunction to restrain a number of named individuals could easily be circumvented by unnamed protestors moving to the two Sites and continuing the protests. Also, it seems that some protestors use aliases and so, even if they were named as defendants, they might not have been truly and properly identified.

137. As to the four strict conditions which the Named Defendants said had to be met, the first one was that the Claimants have not shown that it is necessary to use the "Persons Unknown" procedure. I disagree. I am satisfied that it was necessary for them to do so. As Mr Polli said, the protestors are an amorphous group. If the Claimants had to name all those who they feared might in the future seek to commit, or be involved in the commission of, one or more of the wrongful acts which they seek to restrain, they would have had to include as named defendants a considerable number of people. Also, the Claimants only know the names used by some of those people and the Claimants have no way of knowing whether or not those are their real names. As just mentioned, it is not unusual for protestors to adopt aliases. Furthermore, the Claimants do not know the addresses of those sorts of protestors and so service would inevitably have had to be effected by the sorts of alternative methods prescribed by Chief Master Marsh.

138. While dealing with this first suggested strict condition, I can also conveniently deal with another point raised by the Named Defendants and FOE. It was suggested that the Claimants should have proceeded by way of a claim against representative

defendants in accordance with CPR 19.6. However, as the Claimants said in their skeleton, it is not appropriate to expect them to "pick on" any particular individual or group of individuals by naming them as defendants, and thereby unilaterally burdening them with the responsibilities and risks of named litigants. This would especially be so if those individuals do not wish it.

139. As to the Named Defendants' second suggested strict condition, i.e. certainty in the identification and description of the unknown Defendants, with the exception of the Fifth Defendants (i.e. "Watching, besetting…."), I am satisfied that they are sufficiently clearly identified and described. The other four Defendants are, in my judgment, sufficiently clearly identified by reference to the ingredients of particular wrongs. I will say more about the description of the Fifth Defendants, which I regard as unsatisfactory, when I consider FOE's concerns.

140. As to the Named Defendants' third suggested strict condition, i.e. clarity and certainty in respect of the prohibited conduct, I will examine the different kinds of conduct later when I consider the order to be made. When I do so, I will indicate that some kinds of conduct need to be deleted from the draft injunction order. Subject to those deletions, I am satisfied that the prohibited conduct is sufficiently clear and certain. In this regard, it is to be borne in mind that all that the Claimants seek to do is to restrain conduct which is wrongful. They do not seek to restrain conduct which is lawful, such as lawful demonstrations on the public highway.

141. I come now to the Named Defendants' fourth suggested strict condition, i.e. that the interests of justice require it. Bearing in mind the difficulties facing the Claimants in identifying the appropriate defendants, I am satisfied that the interests of justice do require it in this case. The alternative proposed by the Named Defendants is that the Court should grant the Claimants no relief. It seems to me that it is that alternative which would be contrary to the interests of justice. As the Claimants observe in their skeleton in relation to another issue, but in my judgment the observation is equally applicable to this point, it would not be right to require the Claimants to wait for direct action to start, then to have to try to find out the names of those involved and then, upon their failing to do so, have to return to Court to restrain "Persons Unknown".

142. Accordingly, it seems to me that, whether I adopt the approach taken by Morgan J in [123] of Ineos, or whether I adopt the approach advanced by the Named Defendants in this application, I reach the same conclusion. My conclusion is that the Claimants were entitled to proceed as they did in this case by bringing the proceedings solely against the different categories of persons unknown.

143. As a sort of backstop, in his reply Mr Polli submitted that, even if there had been some procedural defect, it had been rectified. In this regard, I note that, in accordance with the order of Chief Master Marsh dated 1 March 2018, the proceedings and this application were widely publicised. I understand that, in response to this publicity, the hearing on 18 March 2018 was well attended, with the Court room packed with potentially interested parties. Likewise, all four days of argument before me were well attended with a packed Court room on each day. A range of possible Defendants put themselves forward at and after the hearing on 18 March 2018 and they were joined as the Named Defendants. They were then fully and ably represented by Ms Harrison and her team of juniors at the four day hearing before me. As will appear later, as a

result of those representations, there are a number of respects in which I consider that Ms Harrison's criticisms of the draft injunction order are justified and on account of which that draft will have to be revised. In addition, FOE were joined and made further submissions, some of which have, again, led me to accept criticisms of the draft injunction order.

144. Bearing all these matters in mind, in so far as there was a procedural defect, it seems to me that it would not be right for me to do what the Named Defendants asked the Court to do on account of that defect, i.e. to strike out the claim brought exclusively against persons unknown or to refuse to make the order sought against persons unknown at all and/or in the terms sought. The same applies to the Named Defendants' suggestion that I should set aside the order for service.

(9) The appropriate tests for injunctive relief

145. Counsel addressed me on various matters regarding the tests that I should apply in deciding whether to grant an interim injunction. As a result of those submissions, the main matters which I have to consider are: (a) the test for an interim injunction and the effect of section 12 of the HRA; (b) the test for a quia timet injunction; and (c) the likelihood of the Claimants succeeding at trial.

(a) The test for an interim injunction

146. Normally, the test is that stated in American Cynamid Co. v. Ethicon Ltd [1975] AC 396 which requires that there be at least a serious issue to be tried and then refers to the adequacy of damages for either party and the balance of convenience.

147. However, it is common ground between the parties, and I agree, that section 12 of the HRA is engaged. So far as relevant to this application, it provides as follows:

> **"12. Freedom of expression**
>
> **(1) This section applies if a court is considering whether to grant any relief which, I granted might affect the exercise of the Convention right to freedom of expression.**
>
> **(2) If the person against whom the application for relief is made ("the respondent") is neither present nor represented, no such relief is to be granted unless the court is satisfied – that the applicant has taken all practicable steps to notify the respondent; or that there are compelling reasons why the respondent should not be notified.**
>
> **(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.**
>
> **…."**

148. I was referred to Cream Holdings Ltd v Bannerjee [2004] UKHL 44; [2005] 1 AC 253 in which the House of Lords considered the meaning and application of the word "likely" in section 12(3) which imposes a threshold test to be satisfied before the

Court may grant interim injunctive relief. In that case it was held that, at the interlocutory stage, the test of likelihood was higher than the normal threshold for the grant of an interlocutory injunction in American Cynamid. It was further held that the standard is a flexible one. The degree of likelihood of success at trial needed to satisfy section 12(3) must depend on the circumstances.

149. In Ineos, Morgan J considered Cream and held (at [85]) that the appropriate test where, as here, the order sought might affect the exercise of the Convention right to freedom of expression, and so where protestors are concerned, was "more likely than not". I will adopt the same test.

150. Ms Harrison referred me to Cayne v. Global Natural Resources PLC [1984] 1 All ER 225. In particular, she relied upon the passages in the judgments in the Court of Appeal when it was suggested that the plaintiffs in that case needed to present "an overwhelming case": see per Eveleigh LJ at p.233F. However, that was a case where, as explained by the same judge at p.233e/d, "to decide in favour of the plaintiffs would mean giving them judgment against Global without permitting Global the right of trial…" That is not the position here and, in my judgment, the Claimants are not required to present "an overwhelming case" in order to be granted interim injunctive relief.

(b) Quia timet injunctions

151. Counsel also addressed me on the approach to be taken by the Court to the grant of an interim injunction on a quia timet basis. In particular, I was referred to what was said by the Court of Appeal in London Borough of Islington v. Elliott [2012] EWCA Civ. 56, per Patten LJ at 29:

> **"29. The court has an undoubted jurisdiction to grant injunctive relief on a *quia timet* basis when that is necessary in order to prevent a threatened of apprehended act of nuisance. But because this kind of relief ordinarily involves an interference with the rights and property of the defendant and may (as in this case) take a mandatory form requiring positive action and expenditure, the practice of the court has necessarily been to proceed with caution and to require to be satisfied that the risk of actual damage occurring is both imminent and real. That is particularly so when, as in this case, the injunction sought is a permanent injunction at trial rather than an interlocutory order granted on *American Cynamid* principles having regard to the balance of convenience. A permanent injunction can only be granted if the claimant has proved at the trial that there will be an actual infringement of his rights unless the injunction is granted."**

152. Most recently, in Network Rail Infrastructure Limited v. Williams [2018] EWCA Civ 1514, Sir Terence Etherton MR said the following about the grant of a quia timet injunction:

> **"71. It is usually said that there must be proof of imminent physical injury or harm for a *quia timet* injunction to be granted: *Fletcher v Bealey* (1885) 28 Ch D 688, 698; *Birmingham***

> ***Development Company Ltd v Tyler*** **[2008] EWCA Civ 859, [2008] BLR 445 at [45];** ***Islington London Borough Council v Elliott*** **[2012] EWCA Civ 57, [2012] 1 WLR 2375 at [29]. It is possible, however, that that is too prescriptive and that what matters is the probability and likely gravity of damage rather than simply its imminence:** ***Hooper v Rogers*** **[1973] 1 Ch 43 at 30;** ***Islington LBC v Elliott*** **at [31], quoting Chadwick LJ in** ***Lloyd v Symonds*** **[1998] EWCA Civ 511, and at [33]-[34], [36]; D. Nolan, 'Preventative Damages' (2016) 132 LQR 68-95.**
>
> **72. Although the point has not been considered before in the cases I see no reason why, in appropriate circumstances, as in the present case, a claimant should not be able to obtain a final mandatory injunction where the amenity value of the land is diminished by the presence of roots even though there has not yet been any physical damage."**

153. There is further support for that approach in Hooper v. Rogers [1974] 1 Ch 43: see per Russell LJ at p. 50B. The Court's approach in that case was "that "imminent" is used in the sense that the circumstances must be such that the remedy sought is not premature".

154. In considering what is meant by "imminent", Ms Harrison referred me to Laporte v. Chief Constable of Gloucestershire Constabulary [2007] 2 AC 105. In that case, the claimant was travelling by coach from London to a protest demonstration at an air base in Gloucestershire. The police believed that some, but not necessarily all, protestors were likely to cause a breach of the peace at the demonstration. The coaches were prevented from proceeding to the demonstration and forcibly returned to London. The House of Lords considered the common law power to prevent a future breach of the peace. In particular, the power of a constable, and also every citizen, to prevent a breach of the peace which is about to occur.

155. Ms Harrison drew my attention to a number of passages in that case. Central to her submissions was the argument advanced by Counsel, and accepted by the House of Lords, that the test was one of imminence: see [39] at p. 128G/H and [45] at p.130F. Lord Bingham accepted that the test "refers to an event which is imminent, on the point of happening". So, said Ms Harrison, in considering whether or not to grant a quia timet injunction, I should be considering whether or not the relevant events were on the point of happening.

156. I do not accept Ms Harrison's submissions based on Laporte, essentially for the reasons given by Mr Polli in his reply. It seems to me that the context in Laporte was very different to that concerning the grant of a quia timet injunction. I consider that I should apply the approach, explained by Russell LJ in Hooper, by Patten LJ in the Islington case and most recently by the Master of the Rolls in Network Rail. So, I must be satisfied that the risk of an infringement of the Claimants' rights causing loss and damage is both imminent and real. So far as "imminent" is concerned, "the circumstances must be such that the remedy sought is not premature".

(c) The likely result at trial

157. As Morgan J did in Ineos (see [97]), I must consider the likelihood of the Claimants succeeding at trial. I will do so below when considering whether or not to grant relief, but before I do that I will first summarise FOE's concerns.

(10) FOE's concerns, including chilling effect

158. During the course of the hearing, the Claimants agreed that FOE should be joined as a defendant to the claim. FOE was not a party in Ineos.

159. Mr Simblet addressed me on behalf of FOE on day 4. He and Ms Harrison helpfully tailored their submissions to avoid any overlap. In their skeleton FOE explained that they wished to address the Court on, amongst other things, the lack of legal certainty, the excessive breadth and the chilling effect of the draft injunction order. FOE did not accept that the test for some form of injunction is met, but recognised that the evidence and arguments going to that issue were best addressed by the individuals who are directly involved. In their skeleton, FOE joined with the Named Defendants in their criticisms of the use of the persons unknown procedure. I have dealt earlier with these criticisms.

160. FOE submits that the terms in which the Second to Fifth Defendants are identified are either overbroad and/or insufficiently clear and precise to meet the requirement of legality for the purposes of Articles 10 and 11. However, as Mr Polli explained in his reply, all that these descriptions do is to identify the ingredients of particular wrongs. Seen in this light, I consider that, with the exception of the Fifth Defendant, the descriptions are sufficiently clear.

161. However, so far as the Fifth Defendant is concerned, I agree with FOE that the terms "watching" and "besetting" are terms that are not likely to be readily understood. They are archaic legal concepts which might be misunderstood in the context of lawful protests. In so saying, I appreciate that the words "watches" or "besets" are used in section 241(1)(d) of the Trade Union Act 1992. However, in the context of FOE's lawful activities, such as monitoring what happens at particular sites, I think that there is scope for the words to be misunderstood. In view of what FOE says in its evidence, it seems to me that the use of a word such as "watching" could deter protestors simply standing close to the access to the Sites and observing the comings and goings. Likewise, the use of the expression "besetting" might cause confusion as to what a protestor outside the site in the future could and could not do. Also, in so far as the intention by the use of these words was to prevent access to and egress from land being interfered with, then that seems to me to be already covered by the description of the Second Defendants.

162. The description of the Fifth Defendant goes on to refer to the words "assaulting" or "intimidating". As FOE says, there needs to be an evidential basis for an order that prohibits specific unlawful conduct. So far as I can see, there is no evidence that the Claimants (who in any event are all corporate entities which cannot be assaulted) have been assaulted. The same applies to intimidation.

163. In these circumstances, I agree with FOE that the Fifth Defendant is not an appropriate defendant. It follows also that, in so far as the Claimants seek specific

relief mirroring the description of the Fifth Defendant and suffering from the same drawbacks as I have just identified in the previous two paragraphs, that relief should not be granted.

164. Next, FOE are concerned about the inclusion in order 1 of the draft injunction order of a prohibition on "instructing or encouraging" any other person to do the prohibited things. In paragraph 14 of his witness statement on behalf of FOE. Mr Timms expresses concern about the use of these words and the impact of such an order on FOE's staff, members or suppliers. His concern is that:

> **"…anyone like Friends of the Earth who organises, publicises or promotes a protest in the vicinity of the sites named in the injunction could, if any of the listed activity is carried out by individuals attending the protest, find themselves accused of "instructing, encouraging or combining together" to commit unlawful acts."**
>
> and
>
> "**Given that organising, publicising and promoting protest in defence of the environment is central to Friends of the Earth's organisational mission, injunctions couched in such broad terms could have very serious implications for Friends of the Earth's future campaigning activities."**

165. I attach weight to what Mr Timms says abut "instructing" or "encouraging". In these circumstances, I consider that order 1 should exclude the words "instructing" or "encouraging".

166. It can be seen that Mr Timms is also concerned about the effect of including the word "combining" in order 2 in the draft injunction order. However, the word is used there in relation to a number of criminal offences or tortious acts. Also, there is an overriding requirement in order 2 that there be the "intention of damaging the Claimants…..or interfering with [the Claimants'] lawful activities". Also, in order 3 in the draft injunction order, and as I understand it in contrast to the equivalent order made in Ineos and in relation to which Asplin LJ granted permission to appeal, the Claimants have explained what is prohibited by combining together. It seems to me that this is a further safeguard. In these circumstances, I consider that Mr Timms' objections to the use of the word "combining" do not carry the same weight as his criticisms of the words "instructing" or "encouraging".

167. FOE deal next with the chilling effect on lawful protest and campaigning activity of prohibiting "combining together" and "encouraging" prohibited acts. So far as "encouraging" is concerned, I have already said that that word should not be included in any interim injunction. However, so far as "combining together" is concerned, as I have just said, it seems to me that those words have to be read in the context of order 2 which is directed at criminal offences or unlawful conduct with the intention of damaging the Claimants. Also, as will appear later, I was impressed by some of what Ms Harrison said about there being no evidence to support a number of the specific items in order 2. When those specific items are deleted, the remaining items are things which, I presume, FOE would not wish to see take place whether by someone on their own or in combination, such as climbing onto vehicles without consent. Furthermore,

there is a balance to be drawn in that, just as the Convention rights identified by FOE and the Named Defendants should be protected, so also should the Claimants' rights be protected.

(11) Whether I should grant any relief

Relief in relation to the Head Office

168. I will not grant any relief in relation to the Head Office. I am not satisfied that the risk of an infringement of the Claimants' rights in relation to that site is either imminent or real. The evidence shows there was one incident at the Head Office in July 2017. It was clearly a trespass and it was wrong for the trespassers to tailgate through security barriers and doors and to enter the Head Office without consent. However, on the evidence before me, that seems to have been an isolated incident. The evidence does not suggest that there is an imminent or real risk of it re-occurring. Also, it is not clear to me from the evidence what damage, let alone substantial damage, is alleged to have been suffered by the Claimants or might in future be suffered in relation to this particular site.

Relief in relation to the Horse Hill and Broadford Bridge Sites

169. I will grant relief in relation to these Sites, but in a reduced form and not in the form of the draft injunction order.

170. In their skeleton and in oral argument, the Claimants' submitted, and I agree, that their entitlement to enjoy their rights over the Sites that have been granted to them by the freeholders, to use the public highway, to enter the land which they possess from the public highway and to exit onto the highway, to enjoy the chattels which they own and to deal lawfully with their contractors and subcontractors and for their subcontractors and suppliers to deal with the Claimants without fear of reprisals or interference are all rights protected by law. The Claimants also submit, and again I agree, that the rights which the Claimants seek to protect are necessary in a democratic society and pursue legitimate aims.

171. It is clear from the evidence which I have summarised earlier that in the past there have been significant wrongful interferences with the Claimants' rights which amount variously to trespass to land, public nuisance, trespass to goods, and unlawful interference with their economic interests. It also seems clear to me that, unless an injunction is granted in appropriate terms, those wrongs will continue to occur. Damages would not be an adequate remedy in view of the nature of the losses being suffered and the difficulty of identifying those responsible. In the light of what I have set out and said under headings (4), (5) and (6), I consider that the risk of infringement of the Claimants' rights is real and imminent. At the Horse Hill Site, work has just resumed and this is likely to attract the attention of protestors using the sort of tactics which have already taken place and which I have described earlier such as trying to occupy the Site, lorry-surfing, lock-ons, slow walking and threats to suppliers. The same applies to the Broadford Bridge Site. Also, specific threats to return have been made in relation to the Horse Hill Site. It is also clear that the Claimants are suffering substantial damage from these wrongful activities, including the ongoing security costs and the interference with their business described earlier.

172. In short, it seems to me that the risks to the Claimants are sufficiently imminent and real and involve sufficiently substantial damage so as to justify appropriate intervention by the Court. I do not think that it would be right to require the Claimants to wait until direct action starts again, as I consider is likely to happen, and then to have to return to Court to restrain that action. If, for example, there was a trespass to the Claimants' land, it is clear from the evidence that it can take a considerable amount of time and cost a great deal before possession can be recovered.

173. As to the likely result at trial, my consideration of the evidence leads me to conclude that it is likely that following a trial the Court would grant a permanent injunction to prevent the wrongful interferences with the Claimants' rights. So far as trespass to land is concerned, I think that at trial the Court is likely to conclude that it is wrongful and cannot be justified by reference to Convention Rights. The same applies to trespass to goods such as lorry surfing. Likewise, in relation to the interference with the Claimants' rights to gain access to and egress from their site which is wrongful and cannot be justified by reference to Convention rights. The same applies to the obstruction of the highways as a result of which the Claimants are suffering loss over and above that suffered by other users. Likewise, the targeting of subcontractors and suppliers is also wrongful and cannot be justified by reference to Convention rights. The same applies to the claim based on conspiracy. On the evidence before me, it seems to me that following a trial the Court would be likely to grant a final injunction in relation to all these wrongs.

174. As there was considerable argument on slow walking, I will say a little more about it. Having reviewed the evidence, I think that it is likely that, following a trial on an application for a final injunction, the Court would take the view that walking so slowly as almost to be standing still in order to block the passage of vehicles on the highway because the vehicles are being used for a purpose to which the protestor objects would not be a reasonable use of the highway. I accept, of course, that the cases show the demonstrations and protests on the highway could be considered to be a reasonable use of the highway. However, it seems to me that the degree of obstruction of the highway which was contemplated in those cases as being potentially reasonable was more limited than that involved in the slow walking in this case.

175. As there was also considerable argument regarding the targeting of suppliers, I will say a little more about it. I have held, in response to FOE's submissions, that certain revisions need to be made so as to reduce the ambit of any order. I have also held that Order 3 should be included so that it is explained what combination of conduct is prohibited. In the following section, I list further revisions which I consider to be necessary and which will further reduce the ambit of the order. Having reviewed the evidence, and in the light of the evidence of a campaign, and in the light of the evidence of the targeting of subcontractors and suppliers, I am satisfied that, following a trial, the Court would be likely to grant a final injunction in these reduced terms.

176. In deciding to grant relief in relation to these two Sites, I have balanced the competing rights of those pursuing the protests and those, such as the Claimants, whose rights are thereby infringed. It seems to me that the Convention rights relied upon by the Named Defendants, such as the rights under Articles 10 and 11, do not justify the infringement of the Claimants' rights. I accept that protests on the highway are

permitted, but the rights of others also to use the highway must be respected, as also must the rights of the Claimants to pursue their lawful business activities and to enjoy their rights in land and in their chattels. In balancing the respective rights, I have accepted some of the criticisms of the draft injunction order made by the Named Defendants and FOE because it seems to me that they might restrict lawful and legitimate protest. I have also borne in mind that I am concerned with existing protests, which have been going on for a while, although they are not as longstanding as those in Tabernacle. I do not consider that the fact that these are existing protests should lead me to refuse relief.

177. I have taken account of the Named Defendants' criticisms of the Claimants' conduct of these proceedings, including the dropping of the claim in relation to Markwells Wood, the suggested lack of candour and issuing proceedings only against persons unknown. Assuming in the Named Defendants' favour that all of the various criticisms were justified, I do not think that those criticisms, whether taken individually or together, justify me in refusing the Claimants relief.

178. In her oral argument, Ms Harrison submitted that the Claimants, being either large multi-national companies or subsidiaries of such companies, were well able to bear the sort of costs I have described in this judgment. I reject that submission. It seems to me that the Claimants should not be denied relief simply because they can afford to pay for the extensive security needed to protect their Sites due to the wrongful acts of others.

179. It was also submitted that the matters complained of by the Claimants were best dealt with by the Police. I also reject that submission. The same point was made in Ineos and Morgan J dealt with it in [143]. I agree with and adopt his reasoning.

180. As I explained earlier, I cannot deal in this judgment with each and every argument raised by Counsel, but I have taken account of them all. I consider that an injunction should be granted in relation to the Horse Hill and Broadford Bridge Sites, but not in relation to the Head Office. The grant of an injunction in relation to those two Sites is both necessary and proportionate. However, the injunction must be reduced in extent as explained earlier and below. Also, of course, any injunction granted must be expressed in clear and precise terms. In this respect, I have had regard to what Lord Nicholls said in A-G v. Punch Ltd [2003] 1 AC 1046 at [35] namely:

> **"35 Here arises the practical difficulty of devising a suitable form of words. An interlocutory injunction, like any other injunction, must be expressed in terms which are clear and certain. The injunction must define precisely what acts are prohibited. The court must ensure that the language of its order makes plain what is permitted and what is prohibited. This is a well established, soundly-based principle. A person should not be put at risk of being in contempt of court by an ambiguous prohibition, or a prohibition the scope of which is obviously open to dispute. An order expressed to restrain publication of "confidential information" or "information whose disclosure risks damaging national security" would be undesirable for this reason."**

181. I will adopt this approach when I examine the particular terms proposed by the Claimants in the draft injunction order.

(12) Summary and relief

182. For the reasons set out above, I am prepared to grant an interim injunction in relation to the Horse Hill and Broadford Bridge Sites, but not in relation to the Head Office. The terms of the draft injunction order need to be amended.

183. First, for the reasons explained when dealing with FOE's case, I have decided that the Fifth Defendant is not an appropriate Defendant. Any specific orders sought in the body of the draft order mirroring the description of the Fifth Defendant and suffering from the same drawbacks as I mentioned earlier will also need to be amended to reflect this decision.

184. Next, the Named Defendants criticised that part of the Penal Notice attached to the draft order which extends the operation of order to other persons described as follows:

> "Any other person who knows of this order and does anything for the purpose of helping or permitting the Defendants or any of them to breach the terms of this order may also be held in contempt of court and may be imprisoned, fined or have their assets seized."

185. So far as I can see, this provision was not included in the order made in Ineos. I was told that this provision is a standard provision in a freezing order. However, I am not concerned with a freezing order. I cannot presently see the justification for this provision.

186. Turning to the activities in paragraph 1 of the draft order, I am prepared to make the order in paragraph 1(a). However, as Ms Harrison submitted, and I agree, there is no, or insufficient, evidence to support paragraph 1(b), i.e. causing damage to or removing equipment belonging to or in the possession of the Claimants. I am not prepared to make that part of the order. Also, as Ms Harrison submitted, and again I agree, there is no, or insufficient, evidence to support paragraph 1(c), i.e. behaving in a threatening and/or intimidating and/or abusive and/or insulting manner directed at any servant or agent of the Claimants. The same applies in relation to 1(d), i.e. making in any way whatsoever any abusive or threatening electronic communication to the Claimants, their servants or agents. So far as the order in 1(e) (blocking the public highway) and (f) (slow walking) are concerned, I am prepared to make these orders. I note what Morgan J said in [150] about orders such as these, and I consider that equivalent provisions should be included in this order. I am also prepared to make the order sought in 1(g) and (h). So far as the order in 1(i) is concerned, having looked again at the video of the self-help eviction from Horse Hill, it is not clear to me whether anybody attached themselves to any equipment. In these circumstances, I am not prepared to make the order as there seems to me to be either no, or insufficient, evidence to justify me making such an order.

187. So far as the order in 2(b) is concerned, I understand the Claimants to accept, and in any event I consider, that there is no evidence that this has happened in the past. I am not prepared to make this part of the order.

188. So far as the rest of order 2 is concerned, it should mirror what I have said above in relation to Order 1.

189. So far as order 3 is concerned, as I understand Mr Polli's submissions, this is intended to clarify order 2. That being so, I am prepared to make it, but it should be amended to reflect my decisions in relation to orders 1 and 2.

190. In so far as the injunction relates to targeting subcontractors or suppliers, I am prepared to make that in view of the substantial evidence in this case of past targeting and there being, in my view, a real and imminent risk of it continuing. I note what Morgan J said at [151] about the need to identify the suppliers in the order. The same should be done here.

191. At the risk of repetition, in arriving at my conclusions in relation to the specific provisions of the draft injunction order, I have taken into account the Convention rights relied upon by the Named Defendants and FOE. However, there is a balance to be drawn and part of that balance involves protecting the Claimants' rights. Subject to making the amendments set out above, it seems to me that those Convention rights could still be exercised and the grant of the injunction would be proportionate. What the order would prohibit is unlawful acts infringing the Claimants' rights.

192. The Claimants should prepare a revised draft injunction order to give effect to my judgment. The parties should then endeavour to agree that order. If the terms of the order are not agreed, I will determine any outstanding matters on or after the hand down of this judgment on 3 September 2018. I will also deal then with the Claimant's application to rely upon a further witness statement from Mr Court regarding events at Horse Hill on 20 August 2018.