Neutral Citation Number: [2020] EWHC 864 (QB)

Case No: F90BM116

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY

Sitting at the Royal Courts of Justice
Strand, London, WC2A 2LL

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be as shown opposite:

Date: 8 April 2020

Before:

MR JUSTICE WARBY

- -

Between:

Birmingham City Council	**Claimant**
- and -	
(1) Mr Shakeel Afsar	
(2) Ms Rosina Afsar	
(3) Mr Amir Ahmed	
(4) Persons Unknown	
(5) John William Allman	**Defendants**

- -
- -

Jonathan Manning and Clara Zang (instructed by **Birmingham City Council**) for the **Claimant**
Ramby de Mello and Tony Muman (instructed by **J. M. Wilson Solicitors**) for the **First to Third Defendants**
Paul Diamond and Thomas Green (public access barristers) for the **Fifth Defendant**
The Fourth Defendants did not appear and were not represented

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE WARBY

MR JUSTICE WARBY:

1. On 26 November 2019, following a trial, I handed down judgment in this action ("the Trial Judgment"). In the light of that judgment I made an order ("the Final Order") which included an Annex with injunctions against four of the five defendants, but left some issues for later resolution. This judgment deals with three applications that have been made since the Trial Judgment and Final Order. The applications raise issues about whether one of the injunctions contained in the Annex to the Final Order should be continued, whether two others should be varied, and whether the Trial Judgment should be amended.

The procedural background

2. This is a claim for injunctions to restrict protests outside a primary school ("the School"), aimed at teaching about "LGBT issues". The claim form was issued on 29 May 2019, and on 31 May 2019 interim relief was granted following an application without notice. I continued that interim relief on 18 June 2019: see [2019] EWHC 1560 (QB) ("the Interim Judgment"). After a trial between 14 and 18 October 2019, I handed down the Trial Judgment: [2019] EWHC 3217 (QB). For the reasons set out in the Trial Judgment I concluded that there should be injunctions against the first four defendants, but not against the fifth defendant.

3. The first three defendants are individuals. The Fourth Defendant is "Persons Unknown". I explained the nature and status of the injunctions I considered appropriate as follows:

> "132. … it seems to me – subject to any further argument - that the final order against Persons Unknown in this case can only be made against persons who are parties to the action at this point in time. It cannot be framed in such a way as to extend to all members of the "transient, mobile" class described in the Particulars of Claim. It can only be made in terms that confine its effect to those who have been served with the proceedings prior to trial. It may be that the Council will have to give undertakings to use reasonable efforts to trace and identify those who do fall within the class of Persons Unknown who remain defendants to the claim, and targets of the final order.
>
> 133. The precise terms of the final order to be granted will remain to be settled by agreement or, failing that, by a decision from me. But the shape of the final relief I will grant should be clear enough from what I have said above. The individual defendants' freedom to protest in the street in ways that are anti-social, cause a public nuisance, or obstruct the highway, will continue to be curtailed to an extent that I consider is convincingly shown to be necessary in a democratic society in the pursuit of the legitimate aims I have spelled out. Persons Unknown, who have had proper notice of this claim, will be similarly restrained."

4. At the hand-down hearing on 26 November 2019, I heard submissions from Counsel for all parties, and dealt with a number of consequential matters. In due course the Final Order was approved, sealed and issued, giving effect to the Trial Judgment. This took a little time, but on 16 January 2020 I approved a form of final order reflecting my decisions. It was dated 26 November 2019 because that is the date of the decisions which it recorded. The Final Order contained the following provisions:

> 1. (For the reasons and to the extent set out in the Judgment) the Claimant's claim for an injunction against the First, Second, Third and Fourth Defendants is granted.
>
> 2. The Claimant's claim for an injunction against the Fifth Defendant is dismissed.
>
> 3. The precise terms of the final injunctions to give effect to paragraph 1 above will be settled at a further hearing, and there shall be further submissions as to the basis and terms of the injunction against the Fourth Defendant and the scope of class of persons included within the definition of "persons unknown" ("the Remaining Issues") as follows:
>
>   3.1 the Claimant shall file and serve written submissions by 16 January 2020;
>
>   3.2 the Defendants shall file and serve any written submissions in response by 4.00 pm on 24 January 2020;
>
>   3.3 the Claimant shall, if so advised, file and serve written submissions in reply by 4.00 pm on 30 January 2020;
>
> 4. For the purposes identified in paragraph 3 above the trial is adjourned to a date to be fixed ("the Adjourned Hearing"). Pending the Adjourned Hearing there shall be injunctions in the terms set out or identified in Annexe 1.
>
> 5. The Adjourned Hearing, at which the court will hear oral submissions on the matters identified at 3 above, may be listed on the first open date after 3 February 2020. Parties must provide the court with their dates of availability by 20 January 2020.
>
> …
>
> 9. For the purposes of CPR 52.3(2)(a) "the hearing at which the decision is made", and hence the hearing at which any application to this Court for permission to appeal must be made, shall be
>
>   9.1 in relation to the claims against the First, Second, and Third Defendants, the Adjourned Hearing;

> 9.2 in relation to the claims against the Fourth Defendant, the Adjourned Hearing or, if judgment on the Remaining Issues is reserved, the hearing at which that reserved judgment is handed down.
>
> 10. Pursuant to CPR 52.12(2)(a), time for any party to file an Appellant's Notice at the appeal court in relation to the claims against the First, Second, Third and Fourth Defendants is extended until 21 days after the date of "the hearing at which the decision is made", as identified in paragraph 9 above.

5. The injunctions in Annex 1 provided for an "exclusion zone" around the School. The injunctions against the first, second and third defendants prohibited them from entering that zone except for specified purposes. In the case of the first defendant, the sole excepted purpose was to enter a specified mosque, from a specified road. The injunction against the second defendant contained the same exception, and two more: taking her children to the School, or collecting them, or for any pre-arranged meeting at the School. The Order against the Fourth Defendant was in these terms:

> On 26 November 2019, the court gave judgment on a claim for final injunctions against the Fourth Defendant, but directed that there should be a further hearing ("the Adjourned Hearing") to resolve the Remaining Issues (as defined in the body of the order dated 26 November 2019)
>
> The Court Ordered that until after judgment on the Remaining Issues the interim injunction dated 10 June 2019 shall continue against the Fourth Defendant

6. I duly received further submissions from the claimant and the defendants about whether any and if so what relief can and should be granted against the Fourth Defendant. Those further submissions were in writing. They were delayed, initially due to a bereavement, arriving in January 2020. Then came a decision of the Court of Appeal that is directly in point. This led to a further round of written submissions on that issue. In the meantime, on 6 February 2020, the first and second defendants applied in writing for some further exceptions to be made to the exclusion zone order. They wish to be allowed to enter the exclusion zone for the purpose of visiting family members. On 16 March 2020, the claimants applied in writing for the "reinstatement" of part of the draft judgment circulated before the hand-down on 26 November 2020. Written submissions opposing that application were received on 24 March 2020. Meanwhile, on 19 March 2020, written grounds of appeal against the Trial Judgment and Final Order were submitted on behalf of the second and third defendants,

The Issues

7. These various communications give rise to six applications for resolution:-

(1) The Claimant's application for the Court to grant a final injunction against the fourth defendant ("the Persons Unknown Application");

and

(2) and
(3) The applications of the First and Second Defendants, for the variation of the terms of the injunctions against them contained in Annex 1 to the Final Order ("the Variation Applications");

(4) The Claimant's application for the "reinstatement" of part of the draft judgment; this, on analysis, is an application to waive confidentiality in part of the draft of the Trial Judgment, so I will call it "the Waiver Application";

and

(5) and
(6) The applications of the Second and Third Defendants, for permission to appeal ("the Permission Applications").

Determination without a hearing

8. Whilst all this was going on, and I was in the process of considering the parties' submissions, the Covid-19 pandemic struck the nation. On 23 March 2020, the Prime Minister announced what has since become known as "lock-down", instructing everyone to stay at home and not to travel, save in specified circumstances. Legislation has since been passed to that effect. It has nevertheless been possible to conduct much of the Court's business in civil matters by remote hearing, using video conferencing or telephone hearings in place of hearings in open Court. But I concluded that in all the circumstances it is appropriate to exercise the Court's jurisdiction to determine these applications without a hearing, pursuant to CPR 23.8(c). On Monday 6 April 2020 I made an order accordingly.

9. This case has been hanging over all parties for a very considerable time. That is no fault of anyone, but a further hearing could not take place for several weeks, on any view. Remote hearings are undoubtedly less satisfactory than those that take place in a Court room. I am very familiar with the case, and I have received very full submissions and every assistance from Counsel. I have reached some clear conclusions. It is possible that oral argument would alter those conclusions, but also possible that would not be so. In my judgment it is better that I set them out in this judgment. Experience suggests that decisions made "on paper" are often accepted by the parties, or challenged by way of appeal rather than application to vary or discharge. In accordance with the CPR, my order records that the parties have a right to apply to discharge or vary it. The order made to give effect to this judgment will do likewise in relation to the substantive decisions at which I have arrived (see 23 APD para 11.2 and CPR 3.3(4)-(6)). I have borne in mind, of course, that the parties could alternatively seek permission to appeal.

The Persons Unknown Application

10. The fourth defendant was at all times a group of unidentified individuals who had been sued with a view to preventing them from taking part in the protests, organised by the first to third defendants, which were the subject of the claim. At the start of the claim, the fourth defendant was designated as "Persons Unknown." In the Interim Judgment, I concluded that this was too wide a description and limited the injunction I granted to a group designated as "Persons Unknown seeking to express opinions about the teaching at Anderton Park Primary School": Interim Judgment [69-70]. At the end of the trial I

concluded that it was "necessary to look at this issue afresh", in the light of the authorities: Final Judgment [130].

11. I considered the principles identified in the two leading authorities at the time, decisions of the Supreme Court in *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] UKSC 6 [2019] 1 WLR 1471, and the Court of Appeal in *Boyd v Ineos Upstream Ltd* [2019] EWCA Civ 515 [2019] 4 WLR 100. I also considered the judgment of Nicklin J in *Canada Goose UK Retail Ltd v Persons unknown who are protestors against the manufacture and sale of clothing made of or containing animal products and against the sale of such clothing at* [an address in Regent St, London W1] [2019] EWHC 2459 (QB), in particular at [144]. At paragraph [132] of the Trial Judgment, I made clear that I found the reasoning of Nicklin J persuasive, and reached the conclusions I have quoted above.

12. I allowed further argument on this issue because the issue had not been fully explored at the trial. Mr Manning took the opportunity to advance written and oral submissions at the hand-down hearing. These were brief, due to personal circumstances beyond the control of Counsel. I gave permission for further written submissions to be lodged. There was a delay due to the bereavement I have mentioned. In the meantime, the interim orders continued. In due course, I received further written submissions from Mr Manning and Ms Zang, dated 13 January 2020.

13. The overall effect of Counsel's then submissions can be summarised as follows:

    (1) The authorities which established the jurisdiction to grant injunctive relief against persons unknown - *Bloomsbury Publishing Group Plc v News Group Newspapers Ltd* [2003] EWHC 1205 (Ch) [2003] 1 WLR 1633 and *Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator Site* [2003] EWHC 1738 (Ch) [2004] Env.L.R. 9 - recognised no inherent limit on the scope of that jurisdiction. They held that it is enough for the persons unknown to be described in a way that is sufficiently certain as to identify both those who are included and those who are not: *Bloomsbury* [19-22], *Hampshire Waste* [9-10].

    (2) Neither *Cameron* nor *Boyd v Ineos* cast any doubt on those authorities, or the principles enunciated in them.

    (3) The factual situations considered by the Supreme Court in *Cameron* were wholly different from those that arise in the present case.

    (4) The description of persons unknown in the interim injunction in this case is sufficiently certain to identify those who fall within it and those who do not.

    (5) There is no good reason why a final injunction should not be granted on the same basis.

    (6) In a series of cases before, and after, *Cameron* and *Boyd v Ineos* the court has granted injunctions, including final inunctions, against persons unknown: see *Vastint Leeds BV v Persons Unknown* [2018] EWHC 2456 (Ch), [2019] 4 WLR 2, *Secretary of State for Transport v Persons Unknown* [2019] 5 WLUK 273, *Kingston Upon Thames RLBC v Persons Unknown* [2019] EWHC 1903 (QB),

Arch Co Properties v Persons Unknown [2019] EWHC 2298 (QB), all but the second of these cases being instances of final injunctions.

(7) The authorities, including *Cameron* itself, show that it may be legitimate to grant such orders on the footing that a person, through the very act of infringing the order, becomes (i) a party to the proceedings in which the order was made; (ii) bound by that order; and (iii) in breach of that order: see *Vastint* [23-24] and *Cameron* [15], approving *South Cambridgeshire District Council v Gammell* [2005] EWCA Civ 1429, [2006] 1 WLR 658.

(8) Various authorities support the proposition that different rules on service should apply to claims against persons unknown: see *TUV v Person or Persons Unknown* [2010] EWHC 853 (QB), *Middleton v Person or Persons Unknown* [2016] EWHC 2354 (QB), *Kerner v WX* [2015] EWHC 1247 (QB), the notes in the White Book 2019 at para. 19.1.3, and *Ansco Arena Limited v Law and Others* [2019] EWHC 835 (QB).

(9) In any event, the process of service by an alternative method that was approved and adopted in this case was sufficient to make everyone within the description of persons unknown a party to the action, and sufficient to satisfy the fundamental principle of justice identified by Lord Sumption in *Cameron* at [17]:

> "… that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard."

(10) The procedures adopted here afforded those affected a full and fair opportunity to participate in the proceedings, and contest the claim. Those affected will also be entitled, if they wish, to apply to vary or discharge the order after it was made.

(11) It would have been and would be disproportionate to require the Claimant to identify and serve individually all potential protesters who might be affected by the injunction, or indeed to identify all protestors who had become aware of the proceedings prior to the final hearing, which could amount to thousands of people, even if such an exercise could theoretically be undertaken.

(12) *Canada Goose* lays down no broad principle as to the permissibility of making a final injunction against a class of persons unknown, as was done in the various cases referred to above. The case is also distinguishable from the present case for the following principal reasons:

a) The claims were brought by private persons, relying on different causes of action, including harassment.

b) The final injunction was sought on an application for summary judgment.

c) The Judge was unable to assess whether there had been any breach of the claimant's Convention rights.

d) The court had not been presented with any evidence of the impact of the demonstrations on customers, visitors or staff of the claimant, which fell below the threshold for harassment.

e) The people for whose benefit the injunction was sought were also a protean class of unidentifiable individuals.

f) The definition of persons unknown was or may have been too broad.

g) There was a possibility that a lawful defence might exist, whereas the Court has held in this case that the protests were unlawful. Accordingly, the issue which could arise in the case of persons who did not take part in the trial is not whether the claim was validly made, or whether the order should have been made on the facts, but whether they should be subject to it or some future circumstance should cause the court to vary or discharge it. These issues can be considered at an application to vary or discharge.

(13) Further and alternatively, *Canada Goose* was wrongly decided on its facts.

(14) Further and alternatively, the status of the claimant here, and the clear public interest in ensuring that the School and the claimant can carry out their lawful functions without interference of the kind in question here are factors that distinguish the present case (and those mentioned at 5(6) above) from cases like *Cameron, Boyd* and *Canada Goose,* and supports the grant of relief in the wider terms contended for by the claimant.

14. In the meantime, Canada Goose had appealed against the decision of Nicklin J. The appeal was heard on 4 and 5 February 2020. On 5 March 2020, the Court handed down judgment, dismissing the appeal: [2020] EWCA Civ 303. The decision is a valuable source of principles concerning the service of proceedings (see [37-52]), guidelines applicable to proceedings for interim relief against "persons unknown" in protester cases ([82]), and principles concerning final orders against persons unknown ([89-91]).

15. The judgment makes clear that a final injunction cannot be made against a person just because they have notice of an interim injunction; the proceedings themselves must be served on a person, by a method specified in the CPR, or by an order for service by an alternative method.

16. Of particular relevance to the present case are the following further passages:-

> "82. Building on *Cameron* and the *Ineos* requirements, it is now possible to set out the following procedural guidelines applicable to proceedings for interim relief against "persons unknown" in protester cases like the present one:
>
> (1) The "persons unknown" defendants in the claim form are, by definition, people who have not been identified at the time of the commencement of the proceedings. If they are known and have been identified, they must be joined as individual defendants to the proceedings. The "persons unknown"

> defendants must be people who have not been identified but are capable of being identified and served with the proceedings, if necessary by alternative service such as can reasonably be expected to bring the proceedings to their attention. In principle, such persons include both anonymous defendants who are identifiable at the time the proceedings commence but whose names are unknown and also Newcomers, that is to say people who in the future will join the protest and fall within the description of the "persons unknown".
>
> (2) The "persons unknown" must be defined in the originating process by reference to their conduct which is alleged to be unlawful.
>
> …
>
> (4) As in the case of the originating process itself, the defendants subject to the interim injunction must be individually named if known and identified or, if not and described as "persons unknown", must be capable of being identified and served with the order, if necessary by alternative service, the method of which must be set out in the order.
>
> …
>
> *"Final order against "persons unknown"*

89. A final injunction cannot be granted in a protester case against "persons unknown" who are not parties at the date of the final order, that is to say Newcomers who have not by that time committed the prohibited acts and so do not fall within the description of the "persons unknown" and who have not been served with the claim form. There are some very limited circumstances, such as in *Venables v News Group Newspapers Ltd* [2001] Fam 430, in which a final injunction may be granted against the whole world. Protester actions, like the present proceedings, do not fall within that exceptional category. The usual principle, which applies in the present case, is that a final injunction operates only between the parties to the proceedings: *Attorney-General v Times Newspapers Ltd* [1992] 1 AC 191, 224. That is consistent with the fundamental principle in *Cameron* (at [17]) that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard.

…

91. That does not mean to say that there is no scope for making "persons unknown" subject to a final injunction. That is perfectly legitimate provided the persons unknown are confined to those within Lord Sumption's Category 1 in *Cameron*, namely those anonymous defendants who are identifiable (for example,

> from CCTV or body cameras or otherwise) as having committed the relevant unlawful acts prior to the date of the final order and have been served (probably pursuant to an order for alternative service) prior to the date. The proposed final injunction which Canada Goose sought by way of summary judgment was not so limited. Nicklin J was correct (at [159]) to dismiss the summary judgment on that further ground (in addition to non-service of the proceedings). Similarly, Warby J was correct to take the same line in *Birmingham City Council v Afsar* [2019] EWHC 3217 (QB) at [132]."

17. I invited further submissions from the parties, and received these on 16 and 24 March 2020. For the claimants, Mr Manning and Ms Zang accepted that *Canada Goose* is binding on me, and that this Court can only grant a final injunction against unknown protestors of the kind indicated in the Final Judgment at [21(4)(b)] and [132]. But they argued that I could grant such an order against "persons unknown who have protested unlawfully outside Anderton Park Primary School". Their submission was that the class of persons to be sued was properly defined in the originating process, and the proceedings were properly brought to the attention of members of that class.

18. It was acknowledged that the claim form and the title to the Particulars of Claim identified this defendant as "Persons Unknown" without more; but I was urged to look beyond that and consider the body of the statements of case, which was said to make clear that "the claimant's proceedings were aimed at allegedly unlawful acts and what those acts were". Attention was also drawn to the provisions for service of the interim injunction by alternative methods, which were designed to bring the proceedings to the attention of those at whom they were directed. It was submitted that the evidence made it clear that this objective had been achieved: all protests after the grant of interim relief took place outside the exclusion zone created by that order; people wrote to the court, even before the return date, identifying themselves as persons affected by the order; these included the fifth defendant, Mr Allman.

19. The first to third and fifth defendants all submitted that I should reject these arguments and refuse any final relief against the fourth defendant. Mr de Mello and Mr Muman advanced the following arguments, which were supported by Mr Diamond for Mr Allman. It was argued that the Particulars of Claim did not adequately define the target group, and further that it was abusive to sue persons unknown when the persons whom the claimants truly wished to sue were identifiable (they did not wear disguise) and could have been identified and joined by name, had the claimants taken reasonable steps to do so. Reliance was placed on the duty to join those who have been identified, mentioned in paragraph [89(1)] of *Canada Goose.* It was further submitted that the majority of those shown in the video footage of the protests were not people against whom the claimants could maintain any claim with a real prospect of success; and that the statement of case did not disclose any adequate particulars against anybody in the target group. It was argued, in addition, that the Court should refuse to grant relief as a matter of discretion for the reason (among others) that injunctions against the named defendants would be sufficient.

20. Applying the learning to be derived from *Canada Goose* to the facts of the present case, in the light of the submissions I have received, it is clear that what I said in paragraphs [132-133] of the Trial Judgment was correct in principle; but my conclusion is that, in

practice, there are no "persons unknown" who can be made subject to a final injunction in this case.

21. That is not only because the Court of Appeal has emphatically endorsed the proposition that a final injunction cannot be granted against a "transient mobile class" of people. It is for several additional, and cumulative reasons:

(1) The facility to sue individuals anonymously as "persons unknown" is a significant departure from one of the basic norms of civil litigation: that the defendant to the claim must be named. The use of this facility needs to be carefully supervised, to ensure that it is not abused. Two key requirements are that (a) the person's identity must be unknown and (b) the person must be readily identifiable as a defendant to the claim.

(2) The proceedings were, in this respect, defective at the outset; the description of "persons unknown" failed to satisfy the essential requirement of identifiability, emphasised by the Chancellor in the *Bloomsbury* case and re-emphasised by the Court of Appeal in *Canada Goose* at [82(2)]. I do not consider that the Court, or a person given notice of the proceedings, can fairly be expected to work their way through the body of a lengthy statement of case to work out whether they are a target of the claim. In the case of an intended defendant, this may not be realistic, either. I regard the failure to describe the fourth defendant with more precision as a breach of the requirement identified by the Court of Appeal in *Canada Goose,* and a fundamental defect.

(3) That defect was identified by me at the interim stage, and addressed in the interim injunction I granted. In paragraph [70] of the Interim Judgment I said this:

> "My reservations concern the identity of the fourth defendant. As things stand, this is "all persons" other than the named defendants. There is no limitation on the category, with the consequence that the order is, in form and in practice, an order against the entire world including - as I observed at the hearing – me. I have not been provided with any reasoned explanation for not limiting the category of Persons Unknown who are to be made parties to this action in the way that has been standard practice since the *Bloomsbury* case: a designation must be supplied which sets some limits upon the class in question, and enables a person to state whether any given individual is a member of the class of Persons Unknown who are targeted by the claim and the injunction. The new order will therefore be limited by such a description. Unless the parties persuade me otherwise, this will be "Persons Unknown seeking to express opinions about the teaching at the School"."

But the defect thus identified was never remedied so far as the claim form is concerned.

(4) Accordingly, although it is true that an order was made permitting service of the Claim Form and the interim order by alternative methods, and I can assume that this was done, compliance with that order cannot be relied on as amounting to service of the proceedings on anyone who qualifies as a fourth defendant.

(5) I also accept, in general terms, the submission of the named defendants that the anonymous defendants, or at least some of them, were or are identifiable and could and should have been joined by name if the claimants wished to seek injunctive relief against them. I conclude from the video evidence, coupled with the written and oral evidence of witnesses, that the claimants either did or could have identified and joined a significant number of those who had protested outside the school in ways that were unlawful, and who threatened or intended to do so again, unless restrained. That has not been done. It would be contrary to principle and unjust to restrain a group that includes individuals who, for that reason, have not been afforded the full opportunity to participate in the proceedings that would have been available, had they been named and served in the usual way.

(6) Finally, I would refuse an order on the lines now sought as a matter of discretion. In my judgment, the injunctions against the first three defendants will have a real and practical effect, even if no wider order is made. If that proves not to be the case, it will be because others have taken their places in organising or encouraging protests. The claimants will be able to pursue proceedings against those others, armed with the greater learning about injunctions of this kind that is now available as a result of the Court of Appeal's decision in *Canada Goose*.

22. As I understand the law, in principle, a protestor could be subject to a final injunction against persons unknown, prohibiting participation in a protest, if (a) the originating process contained a description of "Persons Unknown" that was in line with the requirement of identifiability, (b) the person (i) fell within that description at the outset, or (ii) came within it later, as a "Newcomer", (c) the person was duly served with the proceedings, by a method prescribed by the CPR, or by an alternative method authorised under CPR 6.15, and (d) it was at the outset and remained, at the time of judgment impossible or at least impracticable to identify the person and join them as a named defendant. Proof that a specified individual fell within these criteria might be difficult in practice, but that would not be a principled objection to the grant of an order. Here, however, the defect in the designation of the fourth defendant and the failure to join those who could be identified means that, as a matter of principle, these criteria are not shown to be satisfied.

23. Accordingly, my ultimate conclusion is that the injunctions against Persons Unknown that I imposed on 26 November 2019 cannot be continued.

The Variation Application

24. This was made by email from the solicitors for the first and second defendants, on 6 February 2020. The claimants' response, by email of the following day, was to say that "Final Orders have been made and served" on those three defendants and "Any changes would have to be dealt with by way of a formal application to the Court." They observed that their understanding was that the adjourned hearing was for submissions to be made in relation to the Persons Unknown injunction. That was my intention, when approving

the Final Order, and that is what I believe it says on a proper interpretation. I would not have granted the Variation Application anyway.

25. The email of 6 February 2020 said this: "Both D1 and D2 confirm they have family with in the exclusion zone and this paragraph in its present form does not allow them to visit their family." In general terms one can see the force of that. But this is a point that was only made months after the end of the trial. There was no suggestion during or before the trial that any such exception should be made. There was ample time to make such a suggestion, and to support it with evidence. Even now, there is no evidence. I do not know what is meant by "family". That is a term with a potentially wide scope. I do not know how many or where they live in the exclusion zone, or when or how often the defendants have visited them before. I have no means of assessing the nature or extent of any intrusion into private and family life that the current order may represent. Beyond this, I do not consider the proposed amendment to be satisfactory.

26. The application reflects these difficulties. Instead of attempting to define a further exception to paragraph 1 of the injunction the first and second defendants seek its amendment so as to prohibit entry to the prohibited zone "for the purposes of carrying out any of the activities as set out in paragraph 4 below." Those activities are leafleting or protesting and other associated activities. This would involve a major reworking of the scheme of the order, settled after exhaustive submissions following a trial. In substance it represents an attempt to appeal against the form of order arrived at. I do not consider it would be practicable and workable.

The Waiver Application

27. In form, the application is for a finding of fact that was contained in the draft of the Trial Judgment which I circulated in accordance with the practice enshrined in PD40E, but not contained in the Trial Judgment as handed down, to be "reinstated". In substance, as I shall explain, it is an application for the Court to waive confidentiality in an aspect of the draft judgment. Hence the label I have given it.

28. The nature of the application coupled with my conclusions upon it mean that I cannot set out in this public judgment the entirety of the factual background, or the whole of my reasoning. The full facts and reasons are contained in this judgment, coupled with a private judgment, which is not disclosable or reportable.

29. The factual background can be shortly stated.

30. At the end of the trial I reserved judgment and in November 2019, in the usual way, I circulated a draft judgment in accordance with the practice set out in PD40E. At the top of the draft was the following rubric, following the standard form:

> "This is a judgment to which the Practice Direction supplementing CPR Part 40 applies. It will be handed down on Tuesday 26th November 2019 at 10:30 in Court No 602. This draft is confidential to the parties and their legal representatives and accordingly neither the draft itself nor its substance may be disclosed to any other person or used in the public domain. The parties must take all reasonable steps to ensure that its confidentiality is preserved. No action is to be taken (other than

> internally) in response to the draft before judgment has been formally pronounced. A breach of any of these obligations may be treated as a contempt of court. The official version of the judgment will be available from the Courts Recording and Transcription Unit of the Royal Courts of Justice once it has been approved by the judge.
>
> The court is likely to wish to hand down its judgment in an approved final form. Counsel should therefore submit any list of typing corrections and other obvious errors in writing (Nil returns are required) to the clerk to Mr Justice Warby, via email at **** @justice.gov.uk, by 4:00pm on Monday 25th November, so that changes can be incorporated, if the judge accepts them, in the handed down judgment."

31. I received suggestions for amendments to the draft judgment and acted on them. The final form of the Trial Judgment as handed down was different from the form of the draft. This is invariably the case.

32. On 16 March 2020, the claimant gave notice of an application for me to "reinstate" a part of the draft judgment which I had removed before handing down the Trial Judgment. I received written submissions from Mr Manning and Ms Zang for the claimant and from Counsel for the defendants. Those submissions included the contention that the passage omitted from the Trial Judgment might be relevant to a possible appeal by the claimant, and the following observation

> "The request that the finding be removed from the judgment was not really the sort of uncontroversial editorial correction that would normally be included in a return to a draft judgment and, regrettably, for personal reasons, did not come to the attention of counsel for the Claimant before the handing down of judgment on 26 November."

33. The arguments in opposition to the Waiver Application included the following:

(1) Until an order is sealed, the Judge has a discretion to alter a judgment, but this should not be done save in "exceptional circumstances", or (perhaps an acceptable alternative) where there are "strong reasons": *In re Barrell Enterprises* [1973] 1 WLR 19, 23 (Russell LJ), *Compagnie Noga d'Importation et d'Exportation SA v Abacha (No 2)* [2001] 3 All ER 513 [43] (Rix LJ).

(2) The exercise of the discretion should be even rarer after the delivery of a written reserved judgment, compared to an extempore judgment, or one that has remained in draft: *Stewart v Engel (Permission to amend)* [2000] 1 WLR 2268, 2276A (Sir Christopher Slade), *Robinson v Fernsby* [2003] EWCA Civ 1820 [98] (May LJ) and [113] (Mance LJ).

(3) The claimants have failed to show that the case is exceptional or that there are any strong reasons for granting their application. The judgment is complete and sufficient; there is no need for additional findings. Nothing turns on the draft finding of fact. It is not explained how it might be relevant to an appeal.

(4) A number of other factors count against the exercise of the discretion in the claimants' favour. These included the facts that the draft was circulated in confidence, with the potential for sanctions in the event of disclosure, as the rubric shows. The claimants failed to raise any complaint when the judgment was delivered, and have delayed for months before making this application.

(5) There is an ulterior purpose to the application, which is an abuse.

(6) The contents of the finding in question should not be brought into court even if the application is granted.

34. My conclusion is that the Waiver Application should be dismissed. My reasons overlap with, but are not the same as those I have outlined.

35. The cases cited are all very different on their facts. Taking them in chronological order:-

(1) *In re Barrell Enterprises* was an attempt to re-open a final appeal against a committal order, on the grounds of fresh evidence, before the final order was drawn up. There was no application for an amendment of any draft or final judgment.

(2) In *Abacha,* the Judge having circulated a draft judgment giving reasons for dismissing the claimant's claim in contract for US$100 million, the claimant contended that the reasoning was legally flawed, and sought amendment of the judgment and reversal of the decision.

(3) In *Stewart v Engel* the claim was for damages for negligence and breach of contract. The judge gave a reasoned judgment dismissing a claim, and orally expressed an intention to do so; but before the order was drawn up the claimant applied for permission to amend to add a new cause of action in conversion. There was no challenge to the decision to dismiss the claim as originally pleaded, or to the content of the draft or final judgment that explained that decision. Permission to amend was granted. The Court of Appeal allowed the appeal, but did so on the basis that the Judge had power to grant permission, but had been wrong to do so on the facts.

(4) In *Robinson v Fernsby* a daughter claimed under the Inheritance (Provision for Family and Dependents) Act 1975, seeking reasonable financial provision out of her mother's estate. Following a trial, the Judge circulated a draft judgment awarding a further provision of £60,000. Counsel for the defendant wrote to suggest that the Judge's reasoning was flawed in law. Following written submissions from both parties, the judge circulated a revised judgment dismissing the claim. Over the objections of Counsel for the claimant, the Judge handed down this version, but gave permission to appeal. The Court of Appeal, with some hesitation, dismissed the appeal.

36. In none of these cases was there an application such as the Waiver Application here: to vary or amend a judgment that had been handed down, after circulation of a draft and representations about the draft. May LJ emphasised this point in *Robinson v Fernsby* at [86]: "The judge … did not … alter a judgment that had been given." But the cases do

contain instructive statements of principle. *Robinson v Fernsby* is the most recent of the four cases, and the most helpful. The Court considered all three of the earlier cases. I would draw the following principles from the decision:

(1) The introduction of the CPR did not affect the long-settled principle that a judge has power to recall, reconsider and alter an order made after he had given judgment at any time before the order is drawn up and sealed: [76], [78-82], [113], [120].

(2) The exercise of the jurisdiction generally requires exceptional circumstances or strong reasons, though there may be circumstances in which it must be exercised in the interests of justice: [83-86], [113], [120].

(3) Those criteria apply to the alteration of a draft judgment which has been circulated to the parties before being handed down: [96].

(4) The same criteria apply, with greater force, where the judgment is a formal written judgment in final form handed down after the parties have been given the opportunity to consider it and make representations on the draft; there are obvious reasons – including the desirability of finality - why the court should hesitate long and hard before making a material alteration to such a judgment: [80], [94].

(5) The question whether to exercise the jurisdiction can only depend on the circumstances of the particular case: [96].

(6) The decision in a particular case is an exercise of judicial discretion which will only be interfered with on appeal on the usual grounds for discharging a discretionary decision: [98].

37. It has been submitted by the claimants that it would be wrong in principle not to "reinstate" the passage which is the subject of the application here. The principle relied on appears to be that the Court is duty bound to take such action if it has removed a passage from a draft judgment, on which an intending appellant might reasonably seek to rely. I disagree with the principle, which seems to me to be far too broad. Nor am I persuaded that it would apply on the facts of this case. It is not suggested, nor do I consider, that the decision to edit the draft judgment as I did was wrong in principle. No settled intention to appeal has been expressed by the claimant, even four months after the Trial Judgment. No grounds of appeal have been identified. I am currently unable to identify any grounds of appeal that would have a real prospect of success. Like Counsel for the defence, I have difficulty in understanding how the passage would lend material assistance to any appeal. If I have understood the argument correctly, it seems to me that the relevant ground of appeal could adequately be advanced on the basis of the evidence led at trial, without the need to rely on the passage in question. I expand on this point in the Private Judgment. For all these reasons, I do not consider that it is necessary in the interests of justice to revoke my earlier discretionary decision.

38. Accordingly, as it seems to me, the least stringent test I should apply is that of exceptional circumstances or strong grounds. Applying that test, I would dismiss the application. In the exercise of my discretion, I decided that a passage in the draft judgment was not necessary to my decision and, for reasons that are known to the

parties, I concluded that it was better that it be removed. As the defendants have submitted, the claimants have failed to show exceptional or strong grounds for revoking that decision.

39. But in my judgment the authorities are distinguishable, indeed the time-honoured principle considered in the authorities I have cited can have no application in the present case. That is for three reasons. First, because the principle is concerned with altering judgments and orders before they are sealed. The Final Order in this case was drawn up and sealed several months ago. True, there were some further matters to be addressed. But these were confined to the Persons Unknown issue. Otherwise, the Final Order was indeed final. Secondly, the present application, unlike those in *In re Barrell, Abacha* and *Robinson v Fernsby,* does not seek to amend the substance of the Court's decision or order in the relevant proceedings; the application is to amend the wording of Trial Judgment, with no consequential effect on the outcome of the trial or the Final Order. Thirdly, unlike *Stewart v Engel*, the application does not seek amendment of the claimant's case; it seeks to amend the Trial Judgment.

40. A more relevant authority, in my view, is *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2) (Guardian News and Media Ltd & ors intervening)* [2010] EWCA Civ 158 [2011] QB 218. The claimant, Binyam Mohamed, sought judicial review of a refusal to disclose evidence which he claimed would show that he had been tortured by or on behalf of the US Government. The Divisional Court acceded to an application by the Foreign Secretary to redact some passages from its judgment, on grounds of national security. On a subsequent application it agreed, in the light of fresh evidence, to restore those paragraphs. The Foreign Secretary appealed. The Court of Appeal decided to dismiss the Foreign Secretary's appeal. It circulated a draft judgment giving effect to that decision. Representations made by letter by Counsel for the Foreign Secretary led to a paragraph of the draft judgment of Lord Neuberger being amended. At the hand down, it became apparent that by accident some of the other Counsel had not seen the representations or had the chance to comment before the amendment. Further, the letter of representation had been widely circulated, had attracted huge public attention, and was about to be published. The question arose of whether, in the circumstances, confidentiality in the text of the original draft of the paragraph concerned should be waived. In a supplemental judgment the Court held that, exceptionally, this would be done, in order to dispel any damaging myth or lingering public perception that a minister or his Counsel had been permitted to interfere with the judicial process.

41. The judgment of the Court was given by Lord Judge CJ. Plainly, the facts of this case are a very long way from those of *Mohamed.* For present purposes, the key aspects of this judgment are the following:-

(1) A judge is not bound by the terms of a draft judgment that has been circulated in confidence. The primary purpose of the practice is to enable any typographical or similar errors to be notified to the court, but on rare occasions, and in exceptional circumstances, the court may properly be invited to reconsider part of the terms of its draft: [4].

(2) Draft judgments circulated in accordance with the standard practice are confidential as are the observations and submissions of the parties about the draft judgments: [11].

(3) The minimum requirement before wider circulation of the draft would be permissible is an application to the court for the confidentiality principle or understanding to be reviewed in the context of the individual case: [11].

(4) Tempting though it would be "to declare that the confidentiality principle as it applies to draft judgments should never be waived … adamantine rigidity of this kind would fail to allow for cases of high exceptionality": [13].

42. One of the cases cited by Lord Judge as authority for the principle identified at (3) above was *Robinson v Fernsby*.

43. Accordingly, it seems to me, the proper analysis is that the claimant's application is for the waiver of confidentiality in part of the draft judgment; the application is made after the judgment has been handed down, and a final order has been made; the test to be satisfied is one of "high exceptionality", or at least as stringent as the one identified in *Robertson v Fernsby.* For the reasons already given, that test is not satisfied in this case.

The Permission Applications

44. The practice is for decisions and reasons on applications of this kind to be dealt with in a standard form document, issued to the parties. I shall adopt that practice and deal separately with my conclusions on these applications, and with any further applications for permission to appeal that I may receive in the light of this judgment.