Neutral Citation Number: [2021] EWCA Civ 357

Appeal No: A3/2020/1909/CHANF

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST
BIRMINGHAM DICTRICT REGISTRY
Mr Justice Marcus Smith
PT-2020-BHM-00001

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 March 2021

Before:

THE RT. HON. LORD JUSTICE LEWISON
THE RT. HON. LORD JUSTICE EDIS
and
THE RT. HON. LORD JUSTICE WARBY

- -

Between:

Elliott Cuciurean	**Appellant/ Defendant**
- and –	
(1) The Secretary of State for Transport **(2) High Speed Two (HS2) Limited**	**Respondents/ Claimants**

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- -

Heather Williams QC and Adam Wagner (instructed by **Robert Lizar Solicitors**) for the **Appellant**
Richard Kimblin QC and Michael Fry (instructed by **DLA Piper UK LLP**) **for the Respondents**

Hearing dates: 16-17 February 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:00am, 15/03/2021.

Lord Justice Warby:

Introduction

1. This is an appeal against findings of contempt of court by breach of an injunction prohibiting trespass on land, and against the sanctions imposed.

2. The land is woodland near Kenilworth, Warwickshire, which has been defined for the purposes of these proceedings as "the Crackley Land". It is held by the claimants in these proceedings for the purposes of the well-known high-speed rail transport infrastructure project known for short as HS2.

3. The first claimant, and first respondent to the appeal, is the Secretary of State for Transport ("the SST"). The second claimant/respondent is the company responsible for the HS2 project ("HS2 Ltd"). The appellant is Elliott Cuciurean, an objector to the environmental impact of the HS2 project.

4. The injunction ("the March Order") was granted on 17 March 2020 by Andrews J, DBE, as she then was, on the application of the SST and HS2 Ltd. It was, in its material part, an injunction against Persons Unknown. Andrews J gave her reasons in a reserved judgment dated 20 March 2020 ("the Andrews Judgment", [2020] EWHC 671 (Ch)).

5. The appellant was not a named defendant to the claim. On 9 June 2020, however, the SST and HS2 issued a contempt application against him ("the Application"), alleging that he was one of the Persons Unknown against whom the claim was brought, and that he had wilfully broken the injunction on at least 17 occasions by entering and remaining on the Crackley Land.

6. The Application was heard by Marcus Smith J over three days, on 30 and 31 July and 17 September 2020. In his reserved judgment dated 13 October 2020 ("the Liability Judgment", [2020] EWHC 2614 (Ch)), the Judge found the appellant in breach in 12 respects. On 16 October 2020, there was a hearing on sanction. In respect of each breach the Judge made an order for committal to prison for six months, suspended for 12 months, all such orders to run concurrently. His reasoning was explained in a further judgment, dated 16 October 2020 ("the Sanctions Judgment", [2020] EWHC 2723 (Ch)).

7. The appellant's case before this Court is that the findings of contempt were wrong in law. He has four grounds of appeal. I shall come to the detail, but in summary the appellant's case is that the evidence before the Judge was incapable of establishing (1) that he encroached on the Crackley Land on any of the 12 occasions, or (2) that he had sufficient notice of the March Order to justify a finding that any such encroachment amounted to contempt. He further submits that the Judge erred in law in two respects: by requiring the appellant to establish that the position on notice was such that it would be unjust to find him in contempt, thereby reversing the burden of proof; and by leaving out of account the claimants' failure to comply with one of the service provisions of the March Order. In the alternative, the appellant contends that the penalties imposed were wrong in principle and/or excessive and disproportionate.

8. We heard argument on the appeal on 16 and 17 February 2021, following which we reserved judgment. I wish to pay tribute to the high quality of the submissions on both

sides. Having reflected on the arguments, and for the reasons that follow, my conclusion is that the liability appeal should be dismissed. I would also reject the appellant's contention that his conduct did not justify any custodial sanction. But in my judgement, we should allow the sanctions appeal to the extent of reducing the sanction to one of committal for three months, suspended for the same period and on the same conditions as were set by the Judge.

The legal framework

Context

9. The following general principles are well-settled, and uncontroversial on this appeal.

(1) Peaceful protest falls within the scope of the fundamental rights of free speech and freedom of assembly guaranteed by Articles 10(1) and 11(1) of the European Convention on Human Rights and Fundamental Freedoms. Interferences with those rights can only be justified if they are necessary in a democratic society and proportionate in pursuit of one of the legitimate aims specified in Articles 10(2) and 11(2). Authoritative statements on these topics can be found in *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23 [43] (Laws LJ) and *City of London v Samede* [2012] EWCA Civ 160 [2012] 2 All ER 1039, reflecting the Strasbourg jurisprudence.

(2) But the right to property is also a Convention right, protected by Article 1 of the First Protocol ("A1P1"). In a democratic society, the protection of property rights is a legitimate aim, which may justify interference with the rights guaranteed by Article 10 and 11. Trespass is an interference with A1P1 rights, which in turn requires justification. In a democratic society, Articles 10 and 11 cannot normally justify a person in trespassing on land of which another has the right to possession, just because the defendant wishes to do so for the purposes of protest against government policy. Interference by trespass will rarely be a necessary and proportionate way of pursuing the right to make such a protest. Like Marcus Smith J, I would adopt paragraph [35] of the Andrews Judgment, where she said:

> "…the simple fact remains that, other than when exercising the legal rights that attach to public or private rights of way, no member of the public has any right at all to come onto these two parcels of land, even if their motives are simply to engage in peaceful protest or monitor the activities of the contractors to ensure that they behave properly…"

(3) It is established that proceedings may be brought, and an interim injunction granted against Persons Unknown in certain circumstances: *Canada Goose UK Retail Ltd v Persons Unknown* [2020] EWCA Civ 303 [2020] 1 WLR 280 [57], and cases there cited. This is a tool that can properly be used in support of the legitimate aim of protecting property rights The Court must keep a watchful eye on the use of this jurisdiction, and it may not be used where the defendants' identities are known: *GYH v Persons Unknown* [2017] EWHC 3360 (QB) [10], *Canada Goose* [82(1), (5)]. But this is a common and, in principle, an unobjectionable mechanism for bringing proceedings against unidentified persons who will or are likely in the future to trespass on land (or commit another civil wrong), against whom a *quia*

timet injunction is sought: *South Cambridgeshire District Council v Gammell* [2005] EWCA Civ 1429 [32], *Canada Goose* [63].

(4) Where the Court, having conducted the necessary balancing process, has granted an injunction, that order must be obeyed unless and until it has been set aside. The issue was examined, and this principle was re-affirmed, by the Divisional Court in *Re Yaxley-Lennon (No 2)* [2019] EWHC 1791 (QB) [2020] 3 All ER 477 [49]. It follows that a person accused of contempt by disobedience to an order may not seek to revisit the merits of the original injunction as a means of securing an acquittal, although these matters may in some cases be relevant to sanction.

(5) So, at the liability stage of a contempt application such as this, the underlying importance or merits of the HS2 project, the policy and the merits of the opposition to it are all irrelevant, as is the fact that the case involves speech or protest or assembly. As Marcus Smith J observed in the Liability Judgment at [10]:-

> "This Application is concerned only with (i) whether the Order has been breached and (ii) whether the circumstances of those breaches – if they occurred – are such as to trigger the contempt jurisdiction. These are extremely important questions to do with the consequences of an alleged breach of a court order. Their resolution does not depend on the merits or otherwise of the HS2 Scheme or the extent of a person's right of protest to that Scheme.
>
> …
>
> why the order is breached is irrelevant to the contempt jurisdiction, although it may be relevant to the question of sanction."

The nature and purposes of the civil contempt jurisdiction

10. As the passage just cited emphasises, the essence of the wrong is disobedience to an order. Disobedience to an order made in civil proceedings is known as "civil contempt". The contempt proceedings are brought in the civil not the criminal courts. The procedure is regulated by common law and Part 81 of the Civil Procedure Rules. The proceedings are not brought by the state, through the Attorney General or otherwise, in the public interest. They are normally brought by the beneficiary of the order that is said to have been disobeyed, whose main if not sole purpose will be to uphold and ensure compliance with the order. In summary, this is "contempt which is not itself a crime": *R v O'Brien* [2014] UKSC 23 [2014] AC 1246 [42] (Lord Toulson). Hence the use of language such as "liability" and "sanction" rather than "conviction" and "sentence".

11. Sometimes, it may be possible to secure compliance by procedural means, such as striking out a case; but that will not always be possible. And the court also has an interest in deterring disobedience to its orders and upholding the rule of law. To advance these purposes the court has power in an appropriate case to impose a fine, or a custodial order. Custody in cases of contempt is known as committal. It is not the same as a prison sentence – there are several ways in which those committed for contempt are treated differently from convicted criminals sentenced to a term of imprisonment. But it is

probably for this reason that civil contempt is sometimes called *sui generis*. In no other context can proceedings classified as "civil" lead to a custodial sanction or even a fine (punitive damages are not the same thing). It is certainly for this reason that the law has imported some elements of criminal procedure.

Burden and standard of proof

12. The long-established rule is that the essential ingredients of civil contempt must be proved by the applicant to the criminal standard: *Re Bramblevale Ltd* [1970] Ch 128 (CA). The burden also lies on the applicant to satisfy the court to the criminal standard that the applicable procedural requirements have been met.

The ingredients of civil contempt

13. The ingredients of civil contempt are not laid down by statute but established by common law authorities. In this case, both parties have relied on the following summary by Proudman J, DBE in *FW Farnsworth Ltd v Lacy* [2013] EWHC 3487 (Ch) [20], approved by this Court in *Cuadrilla Bowland Ltd v Persons Unknown* [2020] EWCA Civ 9, [2020] 4 WLR 29 [25]:

> "A person is guilty of contempt by breach of an order only if all the following factors are proved to the relevant standard: (a) having received notice of the order the contemnor did an act prohibited by the order or failed to do an act required by the order within the time set by the order; (b) he intended to do the act or failed to do the act as the case may be; (c) he had knowledge of all the facts which would make the carrying out of the prohibited act or the omission to do the required act a breach of the order. The act constituting the breach must be deliberate rather than merely inadvertent, but an intention to commit a breach is not necessary, although intention or lack of intention to flout the court's order is relevant to penalty."

It is accepted that the appellant had the intention required by element (b) which is, as Marcus Smith J held, an "attenuated" requirement; as indicated by the last sentence of this citation, it is enough that the alleged contemnor intended to perform the act, rather than doing it by accident. It is not in dispute that element (c) was satisfied here. It is element (a) that has been the focus of the argument before us.

Service

14. Rule 81.5 as it stood at the material time provided that a judgment or order could not be enforced by contempt proceedings unless "a copy of it has been served on the person required to … not do the act in question" or "the court dispenses with service under rule 81.8". The primary rule required personal service of the order, as defined in CPR 6.5(3). In the case of an individual, this is "(a) … leaving it with that individual". The exceptions were provided for in Rule 81.8 as follows:-

> "(1) In the case of a judgment or order requiring a person not to do an act, the court may dispense with service of a copy of the

> judgment or order in accordance with rules 81.5 to 81.7 if it is satisfied that the person has had notice of it—
>
> (a) by being present when the judgment or order was given or made; or
>
> (b) by being notified of its terms by telephone, email or otherwise.
>
> (2) In the case of any judgment or order the court may—
>
> (a) dispense with service under rules 81.5 to 81.7 if the court thinks it just to do so; or
>
> (b) make an order in respect of service by an alternative method or at an alternative place."

15. In this case there was no question of dispensing with service. We are concerned with r 81.8(2)(b): service by an alternative method. Personal service on someone whose identity is unknown can pose difficulties. As the Court pointed out in *Canada Goose* at [82(1)], persons unknown defendants "are, by definition, people who have not been identified at the time of the commencement of the proceedings". But they must be

> "people who … 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."

The Court went on to state at [82(5)] that where alternative service is ordered, "the method … must be set out in the order." Methods of alternative service vary considerably but typically, in trespass cases, alternative service will involve the display of notices on the land, coupled with other measures such as online and other advertising.

Sanctions

16. The law as to sanctions for contempt is also *sui generis*: a mixture of common law and statute. By statute, the maximum sanction that may be imposed on any one occasion is committal to prison for a fixed term not exceeding 2 years: Contempt of Court Act 1981, s 14(1). The court retains its common law power to order that the execution of a committal order be suspended for such period or on such terms or conditions as it may specify. The only alternative sanctions of relevance are financial: a fine, or sequestration of assets. The Court may also order the contemnor to pay costs, and to do so on an indemnity basis, but this is compensation not a sanction.

17. In line with general principles, any sanction must be just and proportionate and not excessive. The purposes of sanction in cases of civil contempt are, however, different from those of criminal sentencing. They include punishment and rehabilitation, but an important aspect of the harm is the breach of the Court's order. An important objective of the sanction is to ensure future compliance with that order: *Willoughby v Solihull Metropolitan Borough Council* [2013] EWCA Civ 699 [20] (Pitchford LJ). This would explain why the laws and guidelines that govern criminal sentencing do not apply directly, but only by analogy, and then with appropriate caution: see for instance *Venables v News Group Newspapers Ltd* [2019] EWHC 241 (QB). It would also explain why the custody threshold test is not the same (see, for instance, *McKendrick v*

Financial Conduct Authority [2019] EWCA Civ 524 [40]), and why suspended committal orders feature prominently in the case law.

18. The approach to sanctions in protest cases has been considered in two cases about "fracking": the criminal appeal of *R v Roberts (Richard)* [2018] EWCA Crim 2739 [2019] 1 WLR 2577 and the contempt case of *Cuadrilla.*

(1) In *Roberts* (at [34]) Lord Burnett CJ said this:

> "… the conscientious motives of protestors will be taken into account when they are sentenced for their offences but that there is in essence a bargain or mutual understanding operating in such cases. A sense of proportion on the part of the offenders in avoiding excessive damage or inconvenience is matched by a relatively benign approach to sentencing."

(2) In *Cuadrilla* this Court gave guidance addressing (at [91-95]) the relevance of a contemnor's motives to the application of the custody threshold, and (at [97]) reasons for showing clemency in cases of "civil disobedience", which it defined (quoting the legal philosopher John Rawls) as

> "a public, non-violent, conscientious act contrary to law, done with the aim of bringing about a change in the law or policies of the government (or possibly, though this is controversial, of private organisations)."

At [98], Lord Justice Leggatt referred to the "moral difference" between "ordinary law-breakers" and protestors, which would ordinarily mean that "less severe punishment is necessary to deter such a person from further law breaking". He also identified the need for judicial restraint, to help achieve one purpose of sanctions in such cases, namely

> "to engage in a dialogue with the defendant so that he or she appreciates the reasons why in a democratic society it is the duty of responsible citizens to obey the law and respect the rights of others, even where the law or other people's activities are contrary to the protestor's own moral convictions."

<u>The standard of review on appeal</u>

19. An appeal of this kind is not a re-hearing, but a review of the decision of the lower court: CPR 52.21(1). This Court will interfere only if it is satisfied that the decision under appeal is "(a) wrong, or (b) unjust because of a serious procedural or other irregularity" in the proceedings below: r 52.21(3). If the lower court is found to have erred in law, the Court will be ready to intervene, if the error is material. The Court will not interfere with a finding of fact unless it determines that the "finding of fact is unsupported by the evidence or where the decision is one which no reasonable judge could have reached": *Haringey LBC v Ahmed* [2017] EWCA Civ 1861 [31]. The approach to be taken is discussed in *Dupont de Nemours (EI) & Co v ST Dupont (Note)* [2003] EWCA Civ 1368 [2006] 1 WLR 2793 [94]. It will always be relevant to consider

the extent to which the trial judge had an advantage by virtue of seeing and hearing witnesses give evidence. That is particularly so, where credibility was in issue.

20. A decision on sanction involves an exercise of judgment which is best made by the judge who deals with the case at first instance. An appeal court will be slow to interfere, and will generally only do so if the judge (i) made an error of principle; (ii) took into account immaterial factors or failed to take into account material factors; or (iii) reached a decision which was outside the range of decisions reasonably open to the judge: *Cuadrilla* [85].

The proceedings below

The March Order and the Andrews Judgment

21. The claim was brought, and the March Order was made, against four defendants. The third and fourth defendants were named individuals, each of whom was represented by Counsel at the hearing before Andrews J on 17 March 2020. The first and second defendants to the claim were groups of persons unknown, and unrepresented. Mr Wagner of Counsel appeared for the third defendant. He also assisted the court by drawing attention to points that might have been made on behalf of the absent persons unknown.

22. The land in respect of which the claimants sought relief was identified on two plans attached to the claim documents. Andrews J held that the claimants were "undoubtedly entitled to possession of the land" identified on these plans, and made a declaration accordingly stating, among other things, that "where the Defendants or any of them enter the said land the Claimants shall be entitled to possession of the same." That having been done, the application against the named defendants was refused, on the grounds that there was "no evidence that either … was likely to trespass on the land in future if they were required by the Court to give possession back to the claimants".

23. The Judge considered *Cuadrilla* and *Canada Goose,* and directed herself as to the tests that had to be met in order to grant relief against the other defendants. She was satisfied that the defendants' identities were not known, that they were not identifiable, that there was enough evidence to demonstrate a real risk of further trespasses by persons opposed to the HS2 project, and that the claimants were likely to obtain final relief. Accordingly, she granted the injunctions sought against the second defendants, who were defined as follows:

> "Persons Unknown entering or remaining without the consent of the Claimants on Land at Crackley Wood, Birches Wood and Broadwells Wood, Kenilworth, Warwickshire shown coloured green, blue and pink and edged red on Plan B annexed to the Particulars of Claim"

These are the parcels of land that were compendiously referred to for the purposes of the March Order as "the Crackley Land". As this wording indicates, a person could become a second defendant simply by entering on the Crackley Land without the consent of the claimants. This is standard methodology, and no point is or could be taken upon it. Whether such a person would be in contempt is of course a separate matter.

24. The substantive elements of the March Order were contained in paragraphs 3 to 7. By paragraph 3, the second defendants were obliged forthwith to give the claimants vacant possession of all the Crackley Land. Paragraph 4 forbade the second defendants from entering or remaining upon the Crackley Land with effect from 4pm on 24 March 2020. To identify that land, a copy of Plan B was attached to the March Order. Paragraph 5 contained a limited "carve-out" to that prohibition, to protect those exercising private or public rights of way. Paragraph 6 provided that the prohibition should last until trial or further order, with a long-stop date of 17 December 2020, that is 9 months from the date of the Order. Paragraph 7.2 contained the declaration.

25. The Judge referred to the *Canada Goose* guidelines on service, and had regard to CPR 81.8. The March Order made provision for service by an alternative method, including as follows:-

> "8. Pursuant to CPR 6.27 and 81.8, service of this Order on the…Second Defendants shall be dealt with as follows:
>
> 8.1 The Claimants shall affix sealed copies of this Order in transparent envelopes to posts, gates, fences and hedges at conspicuous locations around…the Crackley Land.
>
> 8.2 The Claimants shall position signs, no smaller than A3 in size, advertising the existence of this Order and providing the Claimants' solicitors contact details in case of requests for a copy of the Order or further information in relation to it.
>
> 8.3 …
>
> 8.4 …
>
> 9. The taking of the steps set out in paragraph 8 shall be good and sufficient service of this Order on the…Second Defendants and each of them. This Order shall be deemed served on those Defendants the date that the last of the above steps is taken, and shall be verified by a certificate of service.
>
> 10. The Claimants shall from time-to-time (and no less frequently than every 28 days) confirm that copies of the orders and signs referred to at paragraphs [8.1] and [8.2] remain in place and legible, and, if not, shall replace them as soon as practicable."

(Paragraphs 8.3 and 8.4 provided for notice to be given by email to a specified address and by advertisement on an HS2 website and a government website. There is no suggestion that those provisions, though doubtless worthwhile, are relevant in this case.)

26. As required by the *Canada Goose* guidelines, paragraph 15 of the March Order made provision for the defendants or any person affected by it to apply to the Court at any time to vary or discharge it.

The Application

27. Part 81, as it stood at the time, required the applicant to file a Statement of Case. This alleged that the appellant had "on … 17 separate occasions between 4 April 2020 and 26 April 2020 acted in contempt of the [March] Order by wilfully breaching paragraph 4.2 … by entering onto and remaining on the Crackley Land." A Schedule attached to the Statement of Case set out details of each of the 17 alleged acts of contempt. A Plan ("Plan E") and a photograph ("the Incident Location Photo") identified the location of each act alleged against the appellant.

The liability hearing

28. Mr Fry appeared for the respondents, Mr Wagner for the appellant. Over what he described in the Liability Judgment as two "very full days" at the end of July 2020 the Judge read, heard, and saw evidence. This included not only written and oral evidence from witnesses but also photographs, diagrams, plans, photographs, and video footage. A limited amount of further written evidence was submitted after the July hearing. Written submissions were filed, then elaborated on orally at the further 1-day hearing on 17 September 2020.

29. Two witnesses were called by the respondents, and cross-examined: Mr Bovan, a High Court Enforcement Officer, and Mr Sah, a project engineer retained by the claimants in connection with the HS2 project. Each had made one or more affidavits which stood as his evidence in chief. Among the exhibits to Mr Bovan's first affidavit was a witness statement from a process server, Mr Beim. He confirmed that service had been effected in accordance with paragraph 8 of the March Order, and his statement was not challenged. The appellant made two witness statements, which he confirmed on oath, and was then cross-examined. Evidence was adduced from a further seven witnesses in support of his case, each of whom had made a witness statement. All but one was cross-examined by Mr Fry.

The Liability Judgment

30. This contained a scrupulously careful review and assessment of the issues, evidence, and relevant law, and a clear statement of the Judge's conclusions. It is publicly available at www.bailii.org and on the judiciary website, and it is unnecessary to rehearse it in detail for present purposes. It is enough to record the following.

31. The Judge concluded that he could place "no weight" on the evidence of Mr Sah who "did not recognise the affidavit he had sworn", parts of which "appeared to have been written for him", and who "did not recognise" a plan and video exhibited to his affidavit, both provided to him by a Mr Maurice Stokes.

32. As to the other witnesses, the Judge's assessment was that with two exceptions all sought to give their evidence honestly and with the intention of doing their best to assist the court, as best they could. Mr Bovan was assessed as "a stolid witness, clearly telling what he considered to be the truth and doing his best to assist the court."

33. The relevant exception to this overall view was the evidence of Mr Cuciurean. The Judge described him as "a charming, funny but ultimately evasive witness". He was obviously very much committed to his opposition to the HS2 scheme and would go to

"very considerable lengths in order to give his objections … as much force as they possibly could have". He would regard inconvenience to, or slowing down of, the scheme as positive not negative consequences of his conduct. The Judge's overall assessment was that

> "… (having watched Mr Cucuirean carefully in the witness box) that in furtherance of this objective he was prepared to be evasive, but not to outright lie to the court. [He] was a committed opponent of the HS2 Scheme, and I must treat his evidence with considerable caution. However, I do not reject that evidence as that of a liar."

34. In relation to all the witnesses, the Judge took account of the polarisation of views on the HS2 scheme, which he considered had led each side to read the worst not the best into the conduct of the other. He bore in mind that this would have affected all the evidence before him and treated the evidence with appropriate caution.

35. On the issues before him, Marcus Smith J reached the following relevant conclusions:-

(1) The procedural requirements of CPR 81 were satisfied by proof of service in accordance with the alternative method specified in paragraph 8 the March Order.

(2) (As was undisputed) the requirements of paragraph 8 of the March Order were complied with.

(3) It was not necessary, as Mr Wagner had submitted, for the claimants to prove "something more" than compliance with the service requirements of the order.

(4) It was in principle open to the appellant to assert that, despite compliance with the formal service requirements, he had not in fact had such notice of the Order as would make it just to find him liable for contempt, and to seek the setting aside of service accordingly.

(5) But the circumstances of the case did not warrant the setting aside of service or make it unjust to proceed with the committal. In this context, the Judge rejected Mr Wagner's submission that although the appellant knew there was an order in existence, he "was unaware of its terms, and that this was enough to render it unjust to proceed with the committal." The Judge found that the appellant "not only knew of the existence of the Order, but of its material terms… [which] were not to enter upon the Crackley Land." (Liability Judgment [63(11)(b)]).

(6) It was not necessary for the claimants to establish that there had been "continuing compliance" with the requirements of paragraph 10 of the March Order, nor was it relevant that compliance with those requirements had not been established to the criminal standard.

(7) The claimants had failed to prove any of the incursions that were alleged to have been made into an unfenced part of the Crackley Land, which the Judge referred to as "Area B" of "Crackley Land (East)".

(8) But the evidence established so that the Judge was sure that on 4, 5, 7 and 14 April 2020 the appellant had acted in breach of the injunction by making a total of 12

incursions into a fenced part of the Crackley Land which the Judge referred to as "Area A" of "Crackley Land (East)".

(9) The appellant had performed those acts consciously and deliberately. The law requires no more.

(10) In case that was wrong in law, the Judge made findings of fact, including findings that the appellant entered on the Crackley Land in knowledge of the order, which he "fully understood" to be that he was not to enter upon the Crackley Land.

The Sanctions Judgment

36. The Judge conducted a thorough and careful review of the authorities on the approach to sanction, of which no criticism has been advanced. He concluded that the custody threshold, as defined in the authorities, had "clearly" been crossed. He rejected Mr Wagner's submissions, that the appellant may have known he was trespassing, but did not know he was entering on land protected by the order, as having "an air of unreality". The appellant's conduct was described as a "persistent and sustained attempt to breach, and successfully to breach, the perimeter of the Land", which had forced HS2 and its staff to operate on a "high level of alert" on a 24-hour basis, leading to a considerable risk of injury and/or disturbance. This, said the Judge, was conduct which flouted the rule of law and required firm deterrence. He described the appellant's evidence as "very frank about his approach and about his motives, although less frank in other respects".

37. Having considered the harm, culpability and the aggravating and mitigating features of the case, the Judge concluded that "if this were an ordinary case" he would be minded to impose a sanction of 18 months custody. But he took account of the fact that the case was one of protest. He considered the approach of the Court of Appeal in *Roberts* and *Cuadrilla.* He characterised the case as "undoubtedly one of civil disobedience", but one that was only "just about" non-violent. Having asked himself whether the civil disobedience was "aiming to bring about a change in law or policy" his answer was "Perhaps, but only marginally or only by making the project so expensive that the political will to continue it evaporates or diminishes". In the light of this evaluation, he reduced the sanction to one of six months.

38. The Judge then considered whether this sanction should be suspended. He was satisfied that the appellant would comply with a condition, if one was imposed. He considered suspension to be an important part of the "dialogue" referred to by Lord Burnett in *Roberts.* The committal was accordingly suspended for 12 months on condition that the appellant complied with "any order of a court in England and Wales endorsed with a penal notice and enjoining, however phrased, entry upon any land by persons including, whether named as a defendant or as a person unknown".

The appeal on liability

Grounds of appeal

39. The four grounds of appeal raise four distinct issues for review. I shall address them in the order they appear in the appeal documentation.

Ground 1: did the 12 incidents occur on the Crackley Land?

40. It is submitted on behalf of the appellant that the Judge was wrong in law to find that the 12 incidents took place on the Crackley Land as defined in the March Order. The written grounds of appeal assert that this conclusion "entailed a misapplication of the requisite standard of proof". In oral argument, Ms Williams QC clarified the appellant's position: his case is that there was no evidence capable of supporting the Judge's conclusion. It follows that we could only uphold this ground of appeal if we concluded that the Judge's findings of fact were unsustainable and perverse.

41. There are two main strands to the argument in support of this ground of appeal. First, it is said that the evidence of Mr Sah was the only evidence adduced by the claimants to establish the precise boundaries of the Crackley Land. The rejection of that evidence is said to have left the Judge with no basis for any finding to the criminal standard that Area A was within the boundaries of the Crackley Land. Secondly Ms Williams argues, on the basis of an elaborate dissection of the Liability Judgment, that the Judge failed to set out any cogent or sufficient reasons for concluding that the acts complained of were carried out on the Crackley Land. The reasons he did provide are said to be speculative and unfounded, and insufficient to satisfy the criminal standard of proof.

42. I am not persuaded by the first limb of the argument. It is true that Mr Sah was called to prove the boundaries of the Crackley Land. The demolition of his evidence was no doubt a forensic success for Mr Wagner. But it is not correct to say that his was the only evidence on the issue. Indeed, it does not seem to me that this is quite the way Mr Wagner himself approached the matter below. He did not submit, at the end of the claimants' case, that the appellant had no case to answer. In closing argument his submission was that there was no "authoritative" evidence to support this aspect of the claimants' case, or at least no sufficient evidence. This appropriately reflected the existence of evidence from Mr Bovan, and the plans, photographs, and video evidence exhibited by him, which addressed the issue quite extensively and in some detail.

43. As for the second limb of the appellant's argument, I see two difficulties with Ms Williams' approach. The first is that I find her semantic analysis artificial and ultimately unconvincing. The second is that this ground of appeal is not an attack on the sufficiency of the Judge's reasons for finding that the incidents took place on the Crackley Land. If that were the complaint, the right course would have been to ask the Judge for further reasons and/or to appeal on that ground: *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605 [2002] 1 WLR 2409. That has not been done. The challenge before us is a different one: that the finding was perverse, in the sense that it lacked any sufficient evidential basis; and in my judgement that is not a sustainable contention.

44. To put these points in context it is necessary to give some further explanation of the position as it stood before the Judge, and his findings.

    (1) All of the incidents alleged by the respondents occurred within a section of the Crackley Land which the Judge called "Crackley Land (East)".

    (2) The evidence that was before the court below, and is before us now, addressed the physical demarcation of that land. The evidence shows that – as the Judge held – Crackley Land (East) was divided by an internal boundary of Heras fencing, a form

of temporary movable metal fencing. The significance of this was that to the West of the internal boundary, the land had no visible physical perimeter; there was no fence or other visible demarcation of its outer boundary. The Judge designated this Western area as Area B. The respondents' case that the appellant had breached the March Order by incursion into this area was dismissed by the Judge.

(3) To the East of the internal boundary, however, was a part of Crackley Land (East) which the Judge called Area A. This area had fencing to all sides. The fencing was of three kinds: Heras panels, 3-metre-high hoarding ("the Hoarding Fence"), and post-and-wire. The Hoarding Fence ran across the Southern boundary of Area A, close to the location of Camp 2. The case for the respondents was that this physical fencing reflected and corresponded with the boundaries edged in red on Plan B, as attached to the March Order. Thus, it was said, proof of an incursion by the appellant into areas that were fenced in on the ground was *prima facie* an incursion into the Crackley Land as defined in the March Order.

(4) There was a wrinkle, because of the "carve-out" in paragraph 5 of the Order, permitting the exercise of "rights over any public right of way over the Land". As the Judge explained in paragraphs [93-94], the respondents had provided for a temporary public right of way ("the TPROW") across Area A. This tracked the line of the Hoarding Fence. The intention had been to make it accessible from the South only, and Heras fencing was erected on either side of the TPROW to prevent users straying from it onto the prohibited part of the Crackley Land. So, if that intention had been put into effect at the material time it would have been possible to be present on the TPROW, within Area A, without breaching the March Order. But the Judge found that access to this area was not as a matter of fact available via the Southern entrance to the TPROW; the respondents had not made the TPROW available for use as a right of way. The Judge further rejected the appellant's case that, as a matter of law, he was nonetheless entitled to be on the TPROW. He found that the carve out was "not engaged". There is no appeal against these conclusions. Accordingly, the fact that several of the incidents relied on involved incursions onto or near the TPROW does not of itself assist the appellant.

(5) There is no challenge to the Judge's finding that he was "satisfied, so that I am sure", that the respondents had proved that each of these incidents, except for Incident 4, took place on "what the [respondents] contended was the Crackley Land." But that left the question of whether the respondents were correct to maintain that the fencing accurately designated the boundaries. The appellant was still entitled to say, however, that the incursions complained of all took place in the vicinity of the boundary fencing.

45. Mr Bovan was responsible for the security of aspects of the HS2 project. He was on site at the Crackley Land at all material times, in charge of a team. In his first affidavit, he stated that "day to day, 'on the ground' at the Crackley Land the perimeter of the land is generally marked by the three forms of fencing I have described, which he defined as "the Perimeter Fence". He went on to say that "… the Perimeter Fence marks the boundary of the Crackley Land …" and that the incidents relied on were occasions on which "the respondent crossed the Perimeter Fence without permission and was therefore entering upon the Crackley Land in breach of paragraph 4.2 of the [March] Order." It is clear from his affidavit that the land he was referring to as "the Crackley Land" is the land edged in red on the relevant plan. In his second affidavit Mr Bovan

produced an incident location plan and an incident location photo, showing "the approximate location" of each incident and "an idea of where each incident occurred", in relation to the land and each other. Mr Cuciurean's case was, however, that the boundaries were wrongly demarcated and did not correspond to the land edged red on Plan B. He was unable to advance any positive evidential case on the issue, but he was entitled to put the respondents to proof.

46. So, at [103] and following the Judge went on to consider whether the respondents had proved their case, and disproved that of the appellant, to the criminal standard. Having held at [109(1)-(5)] that they had failed to do so when it came to the unfenced part of Crackley Land East (Area B), the Judge went on (at [109(6)]) to distinguish the incidents that took place in Area A. He held that that "these can be pinned down to a precise geographic location, as I have described. It is thus possible to state – as I have stated – that the perimeter of Area A was breached in a very specific way." At [109(7)] he considered and dismissed "the possibility of a mismatch between the physical perimeter of Area A … and the demarcation of the Crackley Land as set out in the order". His conclusion was that "… on the evidence before me, I consider the possibility of such a mismatch to be within the realms of the theoretical".

47. The Judge provided this explanation of his overall conclusion:

> "It seems to me that Mr Cuciurean's case involves an assertion that the Claimants have been exercising possessory rights over someone else's land in a most aggressive way and in circumstances where one would expect – if that were the case – clear challenge to the exercise of those rights by those whose interests were being usurped. More specifically:
>
> (a) The physical boundaries that I have described were up at the time of Andrews J's Judgment and Order. If there was a serious argument that the Claimants were operating on land to which they had no claim, then that argument would have been articulated before Andrews J. As she noted in her Judgment, one of the purposes of the defendants before her was to monitor the conduct of the Claimants, so as to ensure they did not act unlawfully.
>
> (b) Equally, it is unlikely in the extreme that neighbouring landowners would permit the erection, on their land, of barriers like the Hoarding Fence without objection, particularly given the controversial nature of the HS2 Scheme.
>
> (c) Nor do I consider that the Claimants would dare to pursue the aggressive vindication of their rights (erecting barriers and notices; ejecting persons; arresting them; diverting and closing footpaths) without being very sure that they were acting clearly within their rights."

48. Ms Williams fastened on the language of likelihood in paragraph [109(7)(b)]. But the suggestion that the Judge did not apply the appropriate standard of proof cannot be accepted. At paragraph [20], early in the Liability Judgment, he directed himself as to the standard of proof. No criticism is or could be made of the terms in which he did so. The Judge later expressed himself as satisfied "so that I am sure" that the incidents took place in Area A. He expressly accepted the appellant's case that the respondents still bore the burden of proving to the criminal standard that they took place within the land edged red on Plan B. In this passage he was giving reasons for concluding that they had done so. The occasional use of language redolent of a lower standard is not enough to persuade me that the Judge did not faithfully apply the standard he had set himself, when reaching his conclusions on actual knowledge.

49. The point is reminiscent of an argument rejected by this Court in *JSC BTA Bank v Ablyazov* [2012] EWCA Civ 1411 [2013] 1 WLR 1441 at [51-53] (in passages cited to the Judge by Mr Wagner). This Court observed that the issue for the Judge was whether the evidence, taken overall, established the ingredients of contempt to the necessary standard. The mere use of phrases which in form refer to some standard lower than certainty is not enough to cast doubt on his approach. A court may be sure of a circumstantial case, built on strands of evidence not all of which are made out to that standard. In this case, moreover, it must not be overlooked that the Judge used the words "very sure" in paragraph [109(7)(c)], and his ultimate conclusion was not that the appellant's case was improbable, but that it fell "within the realms of the theoretical".

50. In the light of Mr Bovan's affidavits, as described above, it is not possible to maintain that there was no evidence to support the Judge's conclusion. Whether Mr Bovan's evidence should be accepted and whether, if accepted, it was sufficient to prove the case, were issues for the Judge to resolve in the light of the other evidence in the case and any inferences that could safely be drawn. It cannot be said, in my judgement, that no reasonable Judge could have accepted that the respondents' case was made out. The issue for Marcus Smith J was whether he could be sure that the respondents had accurately marked the boundaries of their land, or whether they might, in a relevant respect, have made an error in doing so. It was plainly relevant to consider the inherent probabilities, so long as he kept in mind the standard of proof and did not stray from inference into the prohibited territory of speculation. In my judgement, he observed those limits. The factors he addressed in paragraph [109(7)] were pertinent, and he was entitled to reach the conclusions he did.

51. The evidence on both sides made it perfectly clear that HS2 was a controversial project which had encountered considerable opposition, which caused disruption and expense. It was a legitimate conclusion that those responsible for the project would be scrupulous in their approach to the use of land, and take the utmost care in the enforcement of their legal rights. It was equally legitimate to suppose that opponents of the project would be quick to complain of any perceived abuse of position. There was no such contention at the hearing before Andrews J, and Marcus Smith J's observation that the boundary fences were in place at that time appears unimpeachable. The Judge was also fully entitled to infer that the owners of the land on which Camp 2 had been established were sympathetic to the protestors' cause, and for that reason would have been astute to complain if the Hoarding Fence had been erected on their land.

52. It was part of the appellant's case, as the Judge recorded, that the respondents had been asserting possessory rights over someone else's land. But trespass is an interference

with possession, not with title. If, therefore, the respondents were in possession of the land, then even if they were exercising possession on someone else's land, they were still entitled to maintain an action for trespass. Ms Williams correctly submitted that the "Crackley Land" had no independent existence apart from its designation in the March Order. The extent of the land encompassed in the order is therefore a question of construction of the plan attached to that order.

53. As Lewison LJ pointed out in the course of argument, where the precise location of a boundary is disputed in a conveyancing context, the court will invariably look at the topographical features on the ground at the time of the conveyance; existing boundary features such as fences, hedges, or ditches would always be of weight: see, by way of example, *Alan Wibberley Building Limited v Insley* [1999] 1 WLR 894 (HL) at 987C (Lord Hoffmann, with whom the other Members of the Appellate Committee agreed), *Pennock v Hodgson* [2010] EWCA Civ 873 at [9(3)] (Mummery LJ). The standard of proof may differ, but there does not seem to be any reason why the fact that the point arises in the context of a contempt application should change that basic approach. On the Judge's findings, the boundary fences in place at the time of the incidents were also in place at the time of the March Order. It was therefore a legitimate interpretation of the plan attached to that order that the boundary fences were intended to demarcate the land included in the scope of the order.

Ground 2: was it incumbent on the claimants to prove "something more" than service in accordance with the March Order?

54. The Judge found that the service requirements of the March Order reflected an unimpeachable application by Andrews J of the *Canada Goose* guidance, and that those requirements were complied with. The Judge noted that neither Counsel had been able to identify any authority supporting the existence of any requirement of "knowledge" of the order, independent of the requirement that the order be served. He found it hard to see "how there is space" for the existence of any such requirement. He held that it was for the judge making the order to determine whether any and if so what order for service by an alternative means was appropriate. But he did not consider that the question of service could be "altogether disregarded" on an application for committal. He concluded that, despite the absence of any rule or authority to this effect, the right approach in principle was that "provided the person alleged to be in contempt can show that the service provisions have operated unjustly … the service against that person must be set aside."

55. The complaint is that this involves an impermissible reversal of the burden of proof, requiring the appellant to prove a case for setting aside service on the grounds of injustice. The Grounds of Appeal assert that "The correct test is whether there was good service or not, which is for the claimant to prove beyond reasonable doubt, including negativing any suggestion of injustice raised by the defendant."

56. This is a problematic formulation. It assumes that in order to establish "good service" a claimant must prove not only that what was done complied with the rules or the relevant Court order but also something more, including (if the issue is raised by the defendant) that proceeding on that basis is not unjust. As the Judge observed, there is no authority to support any such proposition. More than that, the proposition appears to be contrary to authority. The effect of the authorities was summarised by Lord Oliver in *Attorney General v Times Newspapers Ltd* [1992] 1 AC 181, 217-218:

> "One particular form of contempt by a party to proceedings is that constituted by an intentional act which is in breach of the order of a competent court. Where this occurs as a result of the act of a party who is bound by the order … it constitutes a civil contempt by him which is punishable by the court at the instance of the party for whose benefit the order was made and which can be waived by him. The intention with which the act was done will, of course, be of the highest relevance in the determination of the penalty (if any) to be imposed by the court, but the liability here is a strict one in the sense that all that requires to be proved is service of the order and the subsequent doing by the party bound of that which is prohibited."

57. The proceedings in *Cuadrilla* were conducted on that basis. It was common ground that the ingredients of civil contempt were those identified in *Farnsworth* (above) but it was understood that proof that these were met would not necessarily establish knowing disobedience to the order. HHJ Pelling QC addressed the possibility that "the respondents did not, in fact, know of the terms of the order even though technically the order had been served as directed". He identified this as an issue "relevant to penalty if that stage is reached", observing that in such a case "it is highly likely that a court would consider it inappropriate to impose any penalty for the breach…": [2019] E30MA3131 [14]. On appeal, this Court endorsed this as a "sensible approach": *Cuadrilla* (above) [25].

58. These authorities indicate that (1) in this context "notice" is equivalent to "service" and *vice versa*; (2) the Court's civil contempt jurisdiction is engaged if the claimant proves to the criminal standard that the order in question was served, and that the defendant performed at least one deliberate act that, as a matter of fact, was non-compliant with the order; (3) there is no further requirement of *mens rea*, though the respondent's state of knowledge may be important in deciding what if any action to take in respect of the contempt. I agree also with the Judge's description of the appellant's argument below: "it replaces the very clear rules on service with an altogether incoherent additional criterion for the service of the order." But nor am I comfortable with the notion that service in accordance with an order properly made can be set aside if the respondent shows that it would be "unjust in the circumstances" to proceed. This is not how the Court saw the matter in *Cuadrilla,* nor is it a basis on which good service can generally be set aside. It also seems to me too nebulous a test.

59. Ms Williams may have harboured similar misgivings, as the argument she advanced at the hearing was not the same as the written ground of appeal. She accepted that the requirements of *knowledge* and *intention* in this context are limited in the ways I have indicated; but she invited us to find that the requirement of *notice* calls for more than proof that the order which it is sought to enforce was duly served. Her submission was that, the aim of service being to bring the nature and contents of the order to the attention of the respondent, it must be incumbent on the applicant to establish in addition (and to the criminal standard) that the steps taken were in fact effective for that purpose, or could reasonably be expected to be so. In support of this argument, Ms Williams referred us to *Cuadrilla* [57]ff. She cited the words of Lord Sumption in *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] UKSC 6 [2019] 1 WLR 1471 [21], those

of Longmore LJ in *Ineos Upstream Ltd v Persons Unknown* [2019] EWCA Civ 515 [2019] 4 WLR 100 [34(3)], and paragraphs [46], [82(1) and (4)] of *Canada Goose*.

60. I do not find these arguments persuasive. The cases cited were concerned with the form an order should take, and the criteria to be adopted when considering what, if any, provision to make for alternative forms of service in proceedings against persons unknown. The cases make it clear that any provision for alternative service should be such as can reasonably be expected to bring the proceedings to the attention of the defendant. But that is a standard to be applied prospectively. I can see that, in principle, a defendant joined as a person unknown might later seek to set aside or vary an order for service by alternative means, on the grounds that the Court was misinformed or otherwise erred in its assessment of what would be reasonable. But that is not this case. It is accepted that the relevant criteria were correctly identified and faithfully applied by Andrews J. None of the cases cited supports the further proposition advanced by Ms Williams, that on a committal application such as this the applicant and the Court must revisit the position retrospectively. Nor does it seem to me that we should adopt such a criterion even if (which I doubt) we were free to do so. It seems most unsatisfactory. Indeed, the concept of a hindsight assessment of what could reasonably be expected to happen is hard to grasp. It seems to me that in substance and reality the submission is that the applicant must prove actual notice, which is not what the authorities say.

61. Nor do I find persuasive Ms Williams' reliance on *Perkier Foods Ltd v Halo Foods Ltd* [2019] EWHC 3462 (QB). In that case, Chamberlain J held that where the respondent to a contempt application raises the defence that compliance with the order was impossible the applicant bears the onus of proving the contrary, to the criminal standard. The present case is not one of alleged impossibility. Ms Williams has failed to identify anything on the facts here that is akin to a defence and might be regarded as analogous.

62. One can perhaps understand the unease referred to by the Judge at the notion that a person may be held in contempt of court even though he is not shown to have had actual knowledge of the relevant order, or its relevant aspects. For my part, I doubt this is a dilemma to which a solution is required. The situation does not seem likely to occur often. And if it does then, as this Court indicated in *Cuadrilla,* no penalty would be imposed. I do not see that as problematic in principle, especially as this is a civil not a criminal jurisdiction. If there is a problem, my view is that it cannot properly be resolved by the adoption of Ms Williams' approach. Various other procedural mechanisms were canvassed as possibilities during argument in this case. They included an application to set aside the original order, with its deeming provision, and an application to stay or dismiss the contempt application as an abuse of process – both matters on which the onus would fall upon the respondent to the application. This all seems to me to be needlessly complex. But I do not think it necessary to reach a conclusion. On the evidence before the Judge, and in the light of his findings of fact, the appeal would fail even if we accepted Ms Williams' submissions on the requirement of notice.

Ground 3: did the appellant have sufficient knowledge or notice of the March Order?

63. In case he was wrong on the law, the Judge dealt with the issue of knowledge in paragraph [124] of the Liability Judgment, as follows:-

> "(1) Mr Cuciurean obviously entered the Crackley Land wilfully, intending to enter upon land where he knew he should not be … I consider his conduct in crossing the Area A perimeter in the way he did … to demonstrate a subjective understanding that he was trespassing on another's land, and that he was doing so in the face of a clear determination on the part of the claimants that he should not do so…
>
> (2) I consider that Mr Cuciurean entered upon the Crackley Land with the subjective intention to further the HS2 protest, and to inhibit or thwart the HS2 Scheme to the best of his ability.
>
> (3) I find that he did so in knowledge of the Order. I cannot say that he knew the full terms of the Order. Mr Cuciurean may very well have taken the course of adopting wilful blindness of its terms. But in light of the events described in this judgment I conclude that Mr Cuciurean fully understood the terms of paragraph 4.2 of the Order, namely that he was not to enter upon the Crackley Land."

64. The Grounds of Appeal assert that these findings involved errors of law. It is said that the appellant could not have had sufficient knowledge to justify a finding of contempt unless he knew (1) the fact that he could not enter the Crackley Land; (2) the map of the Crackley Land; and (3) the penal notice. It is alleged that there was no basis for finding that he had knowledge of all such matters. The Grounds of Appeal also assert that the Judge "misapplied" the standard of proof insofar as he concluded that the appellant knew that the March Order prohibited entry on the Crackley Land.

65. Elaborating these grounds in oral submissions, Ms Williams advanced a detailed critique of paragraph [124] of the Liability Judgment. She submitted that paragraph (1) went only to trespass, paragraph (2) to intention, and only paragraph (3) dealt with knowledge. She argued that the Judge's conclusion as to the appellant's knowledge was ambiguous and insufficient. To the extent it was a finding of actual knowledge, it could not be supported. It was not possible to identify any findings about "events described in this judgment" that could support the conclusion. She drew attention to the words "may well have", in paragraph [124(3)] pointing out that this is not the language of the criminal standard of proof. She also referred us to passages in the Sanctions Judgment, of which the same observation could be made. Her overall submission was that on a proper analysis the Judge had not made any or any clear or sufficient findings to the appropriate standard.

66. In my judgement, the appellant's points are largely semantic ones and lack substantive cogency.

67. As for the standard of proof, it is sufficient to repeat what I have already said about the use of language. As for what had to be established, it is of course true that the Judge used the term "the Crackley Land" and that this is a defined term for the purposes of the March Order. But one should not be beguiled by these linguistic points. It by no means follows that, to avoid a knowing breach of the Order, a defendant needs to read the definitions or to study Plan B. It would be enough for such a person (a) to know that there was a Court order in existence, prohibiting him from entering certain land;

and (b) to enter on land in the knowledge that it fell within the scope of the prohibition. Reading paragraph [124] in the context of the Liability Judgment as a whole, I consider that it expresses with sufficient clarity the Judge's conclusions that both these requirements were satisfied in the case of this appellant, on every occasion when the appellant encroached on what as a matter of fact and law was "the Crackley Land" for the purposes of the March Order.

68. That leads to the issue of whether those findings were open to the Judge. As with Ground 1, this is not a question of whether his reasoning is open to criticism as insufficiently detailed. Again, as Ms Williams candidly accepted before us, the true issue is whether the Judge's findings were perverse; put another way, whether there was any evidence on the basis of which he *could have* made the necessary findings to the applicable standard. I have no doubt that there was sufficient evidence.

69. Some key features of the factual scenario were not in dispute. The appellant, concerned that the HS2 project was causing environmental damage, had joined activists at a camp at Harvil Road in the Midlands. Having learned more about the project, he arrived at Crackley Wood on the evening of 4 April 2020. By this time the original protest camp (Camp 1) had been removed. The appellant went to a protest camp (Camp 2) that was in a field on privately owned land, and remained, in his words, "the activist camp". His reason for being there was to make his views known, and he was one of a number of individuals who were there for that purpose. Adjacent to Camp 2, when he arrived, was the 3-metre- high Hoarding Fence. This could not be mistaken for anything but an outward and visible sign that those in possession of the land beyond it were asserting their rights to maintain that possession.

70. On the Judge's findings, the appellant entered the Crackley Land on 12 occasions, by climbing over the Hoarding Fence, or by getting round it by using a gap between the Hoarding Fence and the adjacent Heras fencing which had been created by persons unknown.

71. The evidence before the Judge included the following:-

(1) There was uncontested evidence from Mr Beim (via Mr Bovan) that the service provisions contained in paragraph 8 of the March Order were complied with in the following ways:

(a) By 1.36pm on 25 March 2020, 17 bundles comprising copies of the March Order, Warning Notice, and A3 size colour maps were in place affixed to stakes, fences and entrance points on the perimeter of the Crackley Land. Mr Beim produced a map of the locations of these notices and gave unchallenged evidence that the documents "were displayed at all appropriate points via which any persons would usually seek to gain access" to the land. The plan was supplemented by photographs of these documents in place.

(b) At 12:40pm on the same day Mr Beim attended at the "encampment" and, in the presence of three adult males, placed one copy of a further bundle comprising the order and colour plans and Warning Notice in a prominent position on a piece of timber.

(c) Mr Beim took similar steps to serve the Order at the Cubbington Land as defined in the March Order.

(2) There was evidence of a random spot check of the Crackley Land signage on 14 June 2020, revealing that a substantial number of the notices remained in the relevant area, as the Judge found "perhaps fewer than originally placed but not materially so". Mr Bovan's evidence, which the Judge accepted, was that copies of the Order and A3 Injunction Warning notice remained in place, at that date: [72(5)].

(3) Mr Bovan's evidence was that in addition to fixing copies of the Order and the Warning Notices in accordance with the service requirements of the March Order, the respondents had positioned trespass notices around the Crackley Land at regular intervals. Photographs were exhibited. Mr Bovan's second affidavit stated that there were 56 Trespass signs on the perimeter of or throughout the Crackley Land.

(4) Mr Bovan's first affidavit asserted that he did not think it would have been possible to enter Camp 2 without seeing notices relating to the Order. His second affidavit explained that one of the photos exhibited was taken from a video of 26 March 2020, showing signs at the entrance to the camp, and that these remained up until at least 9 April 2020.

(5) Mr Bovan gave evidence that the Order was explained orally to the appellant on the evening of 4 April 2020 by the night shift team, and that on each of the further occasions on which the appellant made incursions onto the Crackley Land he was again reminded of the Order. In his second affidavit Mr Bovan asserted that he had personally and repeatedly informed the appellant of the injuncted land and his colleagues had done the same. He referred to one instance in which he had been recorded doing so. By reference to other video footage (from 21 April 2020) Mr Bovan gave a detailed account of how he provided a detailed explanation of the injuncted land to others "within earshot of" the appellant, who was seated on the ground immediately next to him as he did so.

(6) Mr Bovan's evidence was that despite repeated warnings that he was breaching the injunction, the appellant had never approached Mr Bovan or his colleagues to ask for further detail, and had ignored them when they offered to explain things to him.

(7) Mr Bovan's second affidavit also contained evidence from video footage of the incident on 15 April 2020, to the effect that the appellant could be seen climbing over the post and wire fence on the perimeter of the Crackley Land, then walking past a red Trespass sign to which was attached an A3 Injunction Warning Notice, so positioned that the appellant would have seen it just before climbing over the fence. Mr Bovan asserted that there was "no reasonable basis upon which [the appellant] could have considered that he was not on the Crackley Land".

72. The appellant's written evidence included the proposition that Mr Bovan and his team used the phrase "writ land" to describe the HS2 land. He referred to the evidence of posts with "high court injunction in force" on them and a "small map". He denied that he had seen any of these "*around the camp*" and said "I think there may have been one on the other side of the site, but I did not see it *up close*" (my emphasis). He said he did not recall the injunction being explained to him by anybody on 4 April. He said he had asked for but been refused maps and plans. He had asked one individual whether he

could tell him where the site boundaries were, and had been told that the person had a map at home which he would give the appellant next time. This never happened.

73. On behalf of the appellant, Counsel stressed that the respondents accepted that they could not prove that the appellant saw or read the order. Ms Williams accepted that the order itself was clear and unambiguous. She submitted however that the evidence did not go further than showing that the appellant had received a "brief garbled" account of its content from "someone who is not a lawyer". Ms Williams also highlighted a number of points and items of evidence that, she suggested, tended to undermine the respondents' case and support that of the appellant. She submitted that Mr Beim's plan showed there were gaps between the notices, such that a person could have walked past them without noticing. Mr Bovan accepted in cross-examination that some of the notices were taken down by protestors (though later replaced), and that it would be possible to walk into the site via the South boundary without seeing an injunction notice. The appellant's evidence was that "it is not right to suggest that there are copies of the order clearly put up", or any that could be seen by anyone entering the field.

74. In the final analysis none of these, or the other points raised on the evidence, can be enough to show that the Judge's findings were perverse. The fact that the Judge did not find the appellant's evidence to be dishonest does not mean he was bound to accept the appellant's account of events. He clearly rejected that account in certain respects, preferring the evidence of Mr Bovan on matters in dispute. That is entirely consistent with the Judge's careful evaluation of the reliability of these and other witnesses. Mr Bovan's concession in evidence that something *could* have happened did not compel the Judge to find that it did happen, or even that it could have. There was, in my judgement, not only sufficient but ample evidence to support the Judge's factual conclusions on actual knowledge.

75. I remind myself that even if all of the above were wrong, the Grounds of Appeal that I have been addressing reflect the appellant's original case, that the law requires proof of actual knowledge. On the appellant's present legal case the test is one of "notice" and it would be enough if, with hindsight, the steps taken pursuant to paragraph 8 of the March Order could reasonably be expected to bring to the appellant's attention the existence of the order and the substance of its terms. At one point in her submissions Ms Williams complained that the Judge had made no finding on that issue. As I think she recognised, however, that was unfair. This was not an issue raised before the Judge. In any event, in my judgement, there could only be one answer to the question. Andrews J had made the assessment prior to service. There was nothing in the evidence before the Judge to cast doubt on the reliability of her forecast. On the contrary, there was ample material to support it. It was undisputed that the respondent actually did what paragraph 8 of the March Order required, and it is plain to my mind that it remained reasonable at all relevant times to suppose that this would be sufficient to draw the appellant's attention to the fact of the order and to the nature, substance and effect of the relevant provisions.

76. Finally, on this ground of appeal, the Judge did not find that the appellant was aware of the penal notice. However, the contention in the Grounds of Appeal that this is a necessary finding was not, as I understood it, part of Ms Williams' eventual case as to the law. It is unsupported by authority, and I see no merit in it. This would go beyond the CPR which require proof that the order bore a penal notice, and that the order was

served, and not more. The Judge's findings that both those requirements were satisfied are not contested, and clearly correct.

Ground 4: was it necessary or relevant to find that paragraph 10 of the March Order had been complied with?

77. I can deal with this more shortly. The written ground of appeal is that compliance with the checking requirements of paragraph 10 of the March Order was "a necessary condition of service". The Judge having found that he could not be sure there had been compliance, it followed that there was "no longer proper service". This is unsustainable. As Ms Williams accepted, the structure of the March Order is clear. Service had to be effected in the manner specified in paragraph 8. Paragraph 9 provided that if that was done, service was deemed to be good. Paragraph 10 is not a condition of good service, but a stand-alone requirement. It is not possible to construe the Order in any other way.

78. I believe this had been recognised in advance of the hearing before us, as the appellant's Skeleton Argument advanced a different contention. This was that "implicit in the grant of an alternative form of service to personal service is the understanding that it will only be effective if strictly complied with in all respects." This does not seem to me to be consistent with the appellant's revised version of Ground 3. No authority has been cited to support it. In any event, I cannot agree with it. Framed in terms of an implicit understanding, it is much too vague to be an acceptable principle of the law of service. At the same time, it places form above substance. As Ms Williams was driven to concede, on this approach a technical and inconsequential default in the checking process would enable a contemnor who contravened an injunction with full knowledge of its precise terms to escape liability.

79. This does not mean that paragraph 10 is an unimportant provision. It was plainly inserted as a procedural mechanism to assist in ensuring that the Persons Unknown got to know of the order, and had the means of informing themselves of its content. Any shortfall in compliance was available to be relied on as evidence that the defendants did not gain actual knowledge, which at least goes to culpability and sanction. It may be that other consequences might in principle follow a serious case of non-compliance with such a procedural requirement. That could, for instance, make it an abuse to pursue a contempt application based on alternative service, or place the respondents themselves in contempt. But on the facts of this case, nothing of the kind can be suggested.

The appeal on sanction

80. There are two grounds of appeal. **Ground five** is that the sanction was disproportionate: there should not have been a custodial sanction, or alternatively the period of 6 months was in all the circumstances excessive. **Ground six** is that the Judge erred in principle, by drawing a distinction between the appellant's conduct, and the kind of civil disobedience referred to by Leggatt LJ in *Cuadrilla*.

81. I see no grounds for disagreement with the Judge's conclusion that the custody threshold was crossed in this case. Contrary to the submissions of Ms Williams, there is no precise read-across from the statutory custody threshold in criminal sentencing and the standard that applies in contempt: see [18] above. The Judge cited binding

authority on the right approach in the present context, and applied it conscientiously. It is, with respect, untenable to suggest that this case could and should have been dealt with by some lesser sanction. The submission that a mere finding of contempt would have been sufficient pays no heed to the need for deterrence, and the importance of upholding the rule of law. I am not impressed with the submission that in arriving at the period of six months the Judge took too literal an approach to the number of contempts, given that there were several incidents close in time. Again, this is to examine the reasoning under a microscope, when what matters is the overall outcome.

82. I have however concluded that the Judge's approach was flawed in two respects. First, when assessing the overall seriousness of the contempts, before applying what might be called the "*Cuadrilla* discount", he took too high a starting point. Granted, there were multiple instances of deliberate defiance of the March Order. The Judge was entitled to regard this as a serious case of serial disobedience. But his conclusion that in an "ordinary" case the sanction would have been one of committal for 18 months strikes me as markedly too severe, in the context of a maximum penalty of two years. Secondly, I would accept that the Judge was rather too ready to draw distinctions between the present case and the paradigm identified by Leggatt LJ in *Cuadrilla*. I cannot agree that this appellant's aims or methods place him outside or at the very margins of the class of persons "aiming to bring about a change in law or policy". His behaviour was intended to obstruct the HS2 project. It was not engaged in for its own sake. I find it hard to agree that his conduct was likely or intended to make it financially or politically impossible to persevere with the HS2 project, or that this would take it outside the *Cuadrilla* category, if I can call it that. The appellant used a degree of force to achieve his aims, but it would be a misuse of language to term it "violence".

83. The result of these two flaws is, in my judgement, a period of committal that is greater than necessary or proportionate for the purposes in view. I would reduce the starting point and afford a slightly greater discount, with the result that the sanction is one of 3 months' committal, suspended on the terms and for the period identified by the Judge.

Lord Justice Edis:

84. I agree.

Lord Justice Lewison:

85. I also agree.