Neutral Citation Number: [2022] EWHC 684 (Ch)

Claim No: HC-2017-002125

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

Royal Courts of Justice, Rolls Building,
Fetter Lane, London, EC4A 1NL

Date: 25/03/2022

**Before**:

**HH JUDGE KLEIN SITTING AS A HIGH COURT JUDGE**

- - - - - - - - - - - - - - - - - - - - -

**Between:**

**(1) INEOS UPSTREAM LIMITED**
**(2) INEOS 120 EXPLORATION LIMITED**
**(3) INEOS PROPERTIES LIMITED**
**(4) INEOS INDUSTRIES LIMITED**
**(5) JOHN BARRIE PALFREYMAN**
**(6) ALAN JOHN SKEPPER**
**(7) JANETTE MARY SKEPPER**
**(8) STEVEN JOHN SKEPPER**
**(9) JOHN AMBROSE HOLLINGWORTH**
**(10) LINDA KATHARINA HOLLINGWORTH** — **Claimants**

**- and -**

**(1) PERSONS UNKNOWN ENTERING OR REMAINING WITHOUT THE CONSENT OF THE CLAIMANT(S) ON LAND AND BUILDINGS SHOWN SHADED RED ON THE PLANS ATTACHED TO THE AMENDED CLAIM FORM**
**(2) PERSONS UNKNOWN INTERFERING WITH THE FIRST AND SECOND CLAIMANTS' RIGHTS TO PASS AND REPASS WITH OR WITHOUT VEHICLES, MATERIALS AND EQUIPMENT OVER PRIVATE ACCESS ROADS ON LAND SHOWN SHADED ORANGE ON THE PLANS ANNEXED TO THE AMENDED CLAIM FORM WITHOUT THE CONSENT OF THE CLAIMANT(S)**
**(6) JOSEPH BOYD**
**(7) JOSEPH CORRÉ** — **Defendants**

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**Alan Maclean QC** (instructed by **Fieldfisher LLP**) for the **Claimants**
**Stephen Simblet QC** (instructed by **Bhatt Murphy Ltd.**) for the **Seventh Defendant**

Hearing date: 16 March 2022

- - - - - - - - - - - - - - - - - - - - -

# Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.............................

HH JUDGE KLEIN

**HH Judge Klein:**

1. This is the judgment following the hearing of two applications; the first by the Seventh Defendant ("the Defendant"), the second by the Claimants.

2. By an application notice, dated 8 December 2021, the Defendant seeks an order that "the Claimants' claim is struck out as an abuse of process of the court" and an order for costs. There is one obvious infelicity on the face of the application notice. The court does not strike out claims. Rather, it has the power to strike out statements of case, and to make consequential orders such as the dismissal of a claim, and it may do so even if the statement of case is viable, if, for example, a party's conduct has been sufficiently improper. Neither in the application notice itself nor in the accompanying witness statement did the Defendant identify the statement of case he seeks to have struck out, although Mr Simblet QC, who appeared for the Defendant, confirmed, in his skeleton argument and at the hearing, that it is the claim form which the Defendant seeks to have struck out.

3. By an application notice, dated 11 March 2022, the Claimants seek an order that the injunctions ("the injunction") they obtained from Morgan J on 12 December 2017, as varied by an order of the Court of Appeal on 3 April 2019, "shall apply until the service" of the court's order on their application "but not (subject to paragraph 2 [of the application notice]) thereafter". By paragraph 2 of their application notice, the Claimants seek the following order:

> "The Claimants shall have permission to apply to the Court to reinstate the whole or any part of the Injunction Order within 3 months of any material change of circumstances, including in particular i) any substantive amendments to and/or lifting of HM Government's moratorium concerning hydraulic fracturing operations in England, ii) HM Government and/or the Oil & Gas Authority giving formal notice of its/their intention to amend and/or lift the said moratorium, or iii) the making of any planning application and/or the grant of any planning permission in relation to any of the Sites (as defined in the Injunction Order)."

4. The Claimants also seek a general stay of the claim with liberty to apply and they invite the court to make no order for costs on their application.

Background

5. To understand the bases for the applications, I need to set out some background. The parties have told me very little indeed about the case or its procedural history. Much of what I set out here has been gleaned from what little they have told me and from the 3 April 2019 Court of Appeal judgment, the neutral citation for which is [2019] EWCA Civ 515.

6. The Claimants are a group of companies in the INEOS group and a number of individuals. The INEOS group is a high profile global manufacturer of chemicals and oil products, and has an interest in shale gas extraction through hydraulic fracturing, known as "fracking". The group explores fracking possibilities mainly through the

First Claimant. The group is the largest participant in the UK onshore fracking sector. The claim concerns a number of sites. Three of the sites are the group's business premises and the remaining five sites, some or all of which are owned by the individual claimants, have previously been identified as possible sites for fracking exploration by the group.

7. Concerned about protests against fracking at the sites, the Claimants began the claim, for injunctions, by a Part 8 claim form on 26 July 2017.

8. At the time the claim was begun, there was no planning permission which permitted fracking exploration (or fracking itself) at any of the sites (although applications for planning permission in relation to the two of the five exploration sites had been submitted). However, as Morgan J explained at [21] in his judgment (the neutral citation for which is [2017] EWHC 3427 (Ch)) following the on notice interim injunction hearing which I mention in a moment:

> "The evidence shows clearly that the protestors object to the whole industry of shale gas exploration and they do not distinguish between some operators and other operators. This indicates to me that what has happened to other operators in the past will happen to Ineos at some point, in the absence of injunctions. Further, the evidence makes it clear that, before the commencement of these proceedings, the protestors were aware of Ineos as an active, or at least an intending, operator in the industry. There is absolutely no reason to think that the protestors will exempt Ineos from their protest activities. Before the commencement of these proceedings, the protestors were also aware of some or all of the sites which are the subject of these proceedings. In addition, the existence of these proceedings has drawn attention to the eight Sites described earlier."

9. As I understand it, at the time the claim was begun (save perhaps for one or two incidents at one or two of the exploration sites), and apparently for much of its existence, there had, and have, also been no protests at any of the sites. As Morgan J explained in his judgment, at [87]:

> "The interim injunctions which are sought are mostly, but not exclusively, claimed on a quia timet basis. There are respects in which the Claimants can argue that there have already been interferences with their rights and so the injunctions are to prevent repetitions of those interferences and are not therefore claimed on a quia timet basis. Examples of interferences in the past are said to be acts on trespass on Site 1, theft of, and criminal damage to, seismic testing equipment and various acts of harassment. However, the greater part of the relief is claimed on the basis that the Claimants reasonably apprehend the commission of unlawful acts in the future and they wish to have the protection of orders from the court at this stage to prevent those acts being committed. Accordingly, I will

> approach the present applications as if they are made solely on the quia timet basis."

10. Save at the margins, the Claimants' claim has always therefore been for quia timet (or anticipatory) relief. Because of the nature of the relief sought (in the particular circumstances of the case), the claim was begun against "Persons Unknown" falling into different categories, in each case by reference to particular characteristics. For example, the "First Defendant" is "Persons Unknown entering or remaining with the consent of the Claimants on land and buildings shown shaded red on the plans attached to the amended claim form". The identification of a defendant in this way gives rise to procedural complexities, although many of those complexities have been addressed by the Court of Appeal and the Supreme Court, most recently by the Court of Appeal in *LB of Barking and Dagenham v. Persons Unknown* [2022] EWCA Civ 13, where the Master of the Rolls reaffirmed what Sir Anthony Clarke MR explained in *South Cambridgeshire DC v. Gammell* [2006] 1 WLR 658 at [32]; namely, that, when an injunction is made against Persons Unknown who meet particular characteristics, someone who only later does an act knowingly in breach of it (referred to, in the cases, as a "newcomer") then, and only then, automatically becomes a defendant to the claim.

11. It was against the factual background I have set out that, on 28 July 2017, Morgan J made a without notice interim injunction on the Claimants' application. On the return date of the application, Morgan J added the Sixth Defendant and the Defendant as parties to the claim. As far as I can deduce, the Defendant had applied to be added as a defendant to the claim because, although he had not then become a newcomer, he speculated that he might become one, so that he wanted to make submissions in relation to the continuation of the interim injunction. To allow him time to properly prepare for the hearing, the judge continued the interim injunction until a further hearing, which took place before him between 31 October and 2 November 2017, following which he handed down judgment on 23 November 2017. The judge partially continued the interim injunction until trial or further order (but not against the Fourth Defendant – one of the categories of Persons Unknown). Perhaps significantly, he did not make any injunction against the Defendant; presumably because the Claimants did not ask for one and because the Defendant was not at that stage (and probably, from what little I know about the case, has so far) not been a newcomer. Indeed, the injunction (both in the form then made and following variation by the Court of Appeal) has contained the following recital:

> "AND UPON the Claimants having confirmed to the Court that they make no allegations of tortious conduct or of likely tortious conduct on the part of the Seventh Defendant."

12. In due course, Asplin LJ gave limited permission to the Sixth Defendant and the Defendant to appeal and, Friends of the Earth having been given permission by the Court of Appeal to intervene, the Court of Appeal substantially (at least) allowed the appeal. By an order made on 3 April 2019, the Court of Appeal:

    i) discharged the injunction against the Third and Fifth Defendants (some of the categories of Persons Unknown) and dismissed the claim against them;

ii) ordered, in relation to two of the categories of Persons Unknown, the First and Second Defendants, that the injunction (as varied by the Court of Appeal) was "maintained, pending remission to the court below for reconsideration as to whether interim relief should be granted in the light of section 12(3) of the Human Rights Act 1998, and, if it is so granted, what temporal limit is appropriate".

13. Broadly, the injunction as it was maintained restrains newcomers from entering the sites and from damaging or removing equipment from some of the sites. It also restrains newcomers from substantially interfering with certain private rights of way.

14. On 19 June 2019, the Court of Appeal also remitted the first instance costs for reconsideration by the judge on the remission ordered by the court's 3 April 2019 order.

15. Since then, hardly anything has happened.

16. On 10 May 2019, the Claimants' solicitors had written to the "Chancery Division" at the Rolls Building, enclosing the Court of Appeal's 3 April 2019 order. They requested a listing appointment so that a directions hearing could be listed. They referred to a directions hearing in part because the judge had ordered that a directions hearing was to be listed within 3 months of his order or within 28 days of the final determination of the appeal, whichever was the later. The Claimants' solicitors apparently got no response to their letter, but did nothing about that until 8 February 2021 (that is, for about twenty months), when they wrote again asking for "the listing of the remission hearing". They apparently got no response to that letter either, but did nothing about that. In fact, the inactive approach the Claimants have taken to the listing of what has been a necessary further hearing is symptomatic of their approach to the proceedings generally. They have been dilatory in responding substantively to correspondence from the Defendant's solicitors and, whilst their solicitors have (on instructions no doubt) professed in correspondence that the Claimants were taking steps to progress the claim, there is no evidence to corroborate that, at least until a few days before the hearing before me, when the Claimants' application was issued, even though, as I shall explain, that application may have been in the Claimants' contemplation for over a year (and was, I am satisfied, on the evidence, in the Claimants' contemplation for at least five months).

17. It must be noted, however, that the Defendant has apparently not contacted the court in almost three years to obtain a date for the directions hearing contemplated by the judge or the remission hearing contemplated by the Court of Appeal, even though he might have had an interest in doing so, because the first instance costs have been at large as a result of the Court of Appeal's 19 June 2019 order. Instead, the Defendant made his strike out application. In fairness to the Defendant, the evidence does establish that, for some of the period in question, he was being given the apparently false impression by the Claimants that they were actively taking steps to progress the claim and he was encouraged by them not to take steps in the proceedings.

18. As I have said, belatedly, the Claimants issued their application. At one point during the hearing, Mr Maclean QC, who appeared for the Claimants, appeared to suggest that, even though the Claimants had their application in mind for some months at least, once they knew that the Defendant had issued his application, they were under

no obligation to make their application promptly because it would inevitably be heard at the same time as the Defendant's application. If that is what Mr Maclean intended to suggest, and if that is the Claimants' approach to litigation, I decry it. Such an approach is the antithesis of the overriding objective and is inimical to the efficient conduct of litigation. The Claimants cannot have been certain that their application would be accommodated at the hearing of the Defendant's application, particularly because the very short notice to the Defendant of it may have meant that I would have had to adjourn the hearing of it to give the Defendant an opportunity to file responsive evidence.

19. In any event, again very shortly before the hearing, the Claimants filed two witness statements.

20. The first witness statement is from the partner at their solicitors with conduct of the case. He refers to two letters, his firm's 8 February 2021 letter to the court, in which they said "it is the Claimants' intention to make an application to vary the injunction order, which shall be filed and served on the parties, together with supporting evidence, shortly", and their email, dated 13 October 2021, to the Defendant's solicitors, in which they said "we are in the process of finalising our client's application, which is well advanced, and would therefore request that you await out client's application so as to avoid the parties incurring unnecessary costs". He adds:

> "However, the…Defendant proceeded to issue and serve the Applications, without further reference to the Claimants (or indeed, in seeking to agree any time estimate for the Applications). This has caused the Claimants to incur time and costs in dealing with the Applications, diverting it from finalising its application to vary the Interim Injunction."

I need to make a number of points about this evidence. First, the legitimacy of the criticism made of the Defendant has to judged against what I have said, and against the fact that it was not until about two months after the 13 October 2021 email that the Defendant made his application. Secondly, it confirms that, since at least 8 February 2021, the Claimants have intended to apply to court to "vary" the injunction. Thirdly, it suggests that the Claimants' view their current application as one to "vary" the injunction. Fourthly, it can fairly be read as indicating that the application the Claimants had in mind in February 2021 is the one which they have in fact made, in March 2022.

21. The second witness statement is from a director of the First Claimant. The witness statement is said to have made been, in part, in support of the Claimants' application to "vary" the injunction. In the witness statement, the director explains that:

> "In granting protection over each of the 8 Sites, the High Court was satisfied that the absence of a planning consent did not automatically eliminate or reduce, nor was it necessarily determinative of, the risk of trespass to property. The scale and type of opposition other onshore oil and gas operators had experienced prior to making a planning application underscored the fact that highly organised and informed protesters will mobilise at the very first suggestion of operational activities."

He also draws attention to the following, from Morgan J's judgment, in relation to the experience, of other fracking exploration operators, of protests to their work:

> "These acts of trespass have frequently been of an aggravated nature. They have required protracted and expensive proceedings to clear the sites, and have given rise to extremely dangerous conditions posing a serious risk of harm to both protestors and others. The history of activity at these sites demonstrates that trespassing protestors against hydraulic fracturing are typically well-organized, coordinated, determined. Such protestors have shown themselves not to be deterred by the prospect, some months down the line, of being the subject of eviction proceedings…"

He explains the reason why the Claimants now apply for the discharge (the "variation") of the injunction in this way:

> "However, unforeseen events have altered the context from that against which the injunctions were originally sought, particularly the Government's moratorium on certain activities in the hydraulic fracturing industry, together with the subsequent and recent lapsing of the First Claimant's planning permissions relating to Bramleymoor and Harthill (Sites 1 and 2)."

He explains that the moratorium itself (announced in November 2019, about 7 months after the Court of Appeal's decision, and over two years ago) has not been, in the Claimants' view, a material change in circumstances justifying the discharge of the injunction because it permits certain onshore gas exploration, barring only certain fracking activities, and because it has not "prevent[ed] the carrying out of any of the operational activities" permitted at the sites. He adds that:

> "Rather, it has been the recent (and public) lapsing of 2 planning permissions [in June and August 2021] [and "the reporting of this in a publication which I believe is read by many anti-shale gas activists"] which the Claimants consider have significantly decreased not only the risk profile of the two subject Sites, but the risk profile of the Sites as a whole."

Nevertheless, he continues, if the moratorium is lifted or substantially eased, or if there is an indication of an intention to do so, there may be "an urgent and compelling requirement for the Claimants to seek to reinstate the interim injunctions, in order to protect the Sites form targeted protest activity". He then sets out details of significant disruptive protest activity at INEOS group sites and at the sites of other operators over the last eighteen months, and of statements from high profile groups such as Extinction Rebellion about plans to disrupt the work of operators. A recent example he gives is as follows:

> "On 14 February 2022, activists from the "Just Stop Oil" coalition delivered a letter to Downing Street, requiring the Government to provide assurances for an immediate end to

> fossil fuel investments and were reported as stating that "we need to move beyond this protest stuff which people have been doing with Extinction Rebellion and Insulate Britain, and then we need to move forward into civil resistance". The Guardian reported that the intention of Just Stop Oil was understood to target the country's oil infrastructure as a whole, "from petrol stations to fuel depots and refineries"…"

22. I confess that I am puzzled about the explanation given in the director's witness statement for why the Claimants have made their application now.

23. He says that the moratorium of itself has not been a material change in circumstances sufficient to discharge the injunction. In fact, he makes the point that even the mere intimation that the moratorium might be eased might be so serious for the protection of the sites that the Claimants may have to apply for an urgent injunction. He says that it is the lapse of planning permissions at two of the sites which has been the catalyst for the Claimants' application. Yet the injunction was sought at a time when there were no planning permissions, and he explains that Morgan J was satisfied that the absence of planning permissions was no bar to the risk of significant protest at the sites. I accept that there may be a difference between a scenario in which a planning application has been, or might be, made, and a scenario in which a planning permission has been positively allowed to lapse. Nevertheless, I am still puzzled why, in the particular circumstances of this case, the lapsing of the planning permissions and the reporting of that has led the Claimants to conclude that the risk to the sites from unlawful activities has been reduced so markedly.

24. Nor, considering the Claimants' conduct, am I left less puzzled. They view their application as one to "vary" the injunction. As I have said, a fair reading of the evidence is that they intended to make that application as long ago as February 2021. If that is so, it cannot have been the lapse of the planning permissions and their reporting which has been the catalyst for their application. The only other change of circumstances since the Court of Appeal's decision has been the announcement, and imposition, of the moratorium, but the announcement was made in November 2019 and, if it is the moratorium which is truly the catalyst for the present applications, why, I ask rhetorically, have the Claimants waited two years to make their present application?

25. Mr Maclean pointed out that it does not follow from the fact that the Claimants intended to apply to vary the injunction in February 2021, and that they have in fact now applied to "vary" the injunction, that they had in mind the same application on both occasions. It is possible, he said, that the application intended in February 2021 is different to the one the Claimants have in fact made. I cannot dispute that, but only because the Claimants' evidence is so lacking in particulars about their approach to the proceedings since the decision of the Court of Appeal. In any event, Mr Maclean's submission does not relieve me of my confusion.

26. What can be said is that it is the Claimants' case that it is the lapsing of the planning permissions at two of the exploration sites, and the reporting of that, against the background of the moratorium, which has brought about a material change in circumstances justifying the discharge of the injunction.

27. The decision to allow the planning permissions to lapse must have been made a little while before they were actually allowed to do so. The Claimants should therefore have appreciated, as long ago as August 2021 (when the public could have deduced that the second planning permission had been allowed to lapse), that there was a sufficient change in circumstances to justify the discharge of the injunction. Mr Simblet suggested that it is proper for me to infer that the Claimants have known for a far longer period that the injunction ought to have been discharged. I consider (and reject) that suggestion later in this judgment.

Procedural matters relating to the applications

28. A possible outcome of the Defendant's application, if it is successful, is that the claim form is struck out, and the claim is dismissed, as against him. Neither his solicitors nor counsel act for any other defendant. I mention this point because I received a letter, dated 15 March 2022, from the solicitors for the Sixth Defendant, which assumed that, if the Defendant is successful in his application, the claim will be dismissed against all the defendants, and which invited me to award the Sixth Defendant his costs of the claim even though he has made no application. It may be very likely that, if the claim against the Defendant was dismissed as a result of my decision, it ought to be dismissed against the Sixth Defendant on the same grounds too, but that is not a certainty. Each case must turn on its particular facts. In any event, the court generally makes decisions of the sort the Defendant asks me to make following the making of an application, which ought, at least unless the overriding objective requires otherwise, to be by way of a formal application notice properly served. Bearing in mind what I have already said and bearing in mind too that the Defendant's complaint is, ultimately, that the Claimants have not been procedurally compliant, it is not appropriate to entertain the request of the Sixth Defendant's solicitors made by letter only the day before the hearing.

29. Mr Simblet pointed out that the main target of the claim is Persons Unknown and that, in practice, because there are apparently no identifiable individuals who fell into that category when the claim was begun and because there have been no newcomers, they are not in a position to make a strike out application. He contended, in effect, that the court can dismiss the claim against them, if it dismisses the claim against the Defendant, on its own initiative, otherwise the claim will continue to survive for no apparent purpose. I am prepared to accept that the overriding objective allows the court to act as he proposes, but, because I have in fact decided that the claim against the Defendant should not be dismissed, I do not need to consider this matter further.

30. The next point I must consider is the service of the Claimants' application notice.

31. The Claimants have notified the Sixth Defendant and the Defendant of their application. They have also apparently given notice of their application by putting up notices at the sites one or two days before the hearing. If notification of the hearing ought to be given more generally than to the Sixth Defendant and the Defendant, that site-based notification is unsatisfactory, because it was given so close to the hearing and because there have been no protests at the sites nor apparently any particular interest in the sites for a long time (presumably even on the Claimants' case since before about August 2021). Posting notices at the sites is unlikely to have brought to anyone's attention the fact of the Claimants' application or the hearing date.

32. The question of service troubled me a great deal at the hearing for these reasons:

    i) Morgan J had devised, and the Court of Appeal had apparently approved, a much more comprehensive notification procedure in relation to the injunction.

    ii) It is imperative that justice must be administered fairly and, generally, in public;

    iii) There has been repeated emphasis in cases against Persons Unknown about the importance of giving notification to those who might be affected by the court's decisions. So, for example, as the Master of the Rolls explained in *Barking*, at [82]:

    > "…There is and was no reason why the court cannot devise procedures, when making longer term persons unknown injunctions, to deal with the situation in which persons violate the injunction and makes themselves new parties, and then apply to set aside the injunction originally violated, as happened in *Gammell* itself. Lord Sumption in *Cameron* was making the point that parties must always have the opportunity to contest orders against them. But the persons unknown in *Gammell* had just such an opportunity, even though they were held to be in contempt…"

    The Master of the Rolls also said, at [108]:

    > "…A normal procedural approach should apply to the progress of the Part 8 claims, bearing in mind the importance of serving the proceedings on those affected and giving notice of them, so far as possible, to newcomers."

33. On reflection, and bearing in mind that I have decided to refuse to stay the proceedings, I made too much of this issue, for the following reasons:

    i) Perhaps save at the margins, there is apparently no-one who fell within any of the Persons Unknown categories when the claim was begun. Nor have there been any newcomers;

    ii) In any event, the Master of the Rolls explained in *Barking* (above) that, whilst service is required on those affected by proceedings, a claimant's requirement is to notify newcomers (who only become parties to the proceedings when they knowingly breach the injunction granted);

    iii) Whilst CPR 23.4 requires that an application notice must generally be served on each respondent, it permits the court to dispense with service. Even if there are respondents to the Claimants' application (other than the Sixth Defendant and the Defendant), it is consistent with the overriding objective to dispense with service on those respondents, because I intend to discharge the injunction, which can only be to their benefit, and because, for the reasons I will give and as I have indicated, I refuse to stay the claim which is the only relief the

Claimants seek which might have been to the disadvantage of those respondents;

iv) On the same approach, if the Claimants ought to have notified their application more widely than they have done, that has not disadvantaged anyone and it benefits no-one for me to require the Claimants to notify more broadly before I discharge the injunction.

The parties' applications in a little more detail

34. The basis of the Defendant's application has been a bit of a moving target. As presented at the hearing by Mr Simblet, the Defendant's application has broadly been as follows:

i) The Claimants have inexcusably delayed pursuing the claim;

ii) The Claimants ought to have pressed on with the claim because Morgan J had directed that there should be a directions hearing shortly after the final determination of the appeal and because the Court of Appeal had remitted to the judge matters for consideration. Instead, all the Claimants have done in almost three years is to write two letters to the court asking for a listing appointment;

iii) The Claimants' conduct is particularly egregious because they have the benefit of the injunction, and parties in their position have an obligation to pursue claims with alacrity, even more so in this case because the Claimants have an injunction against Persons Unknown, so that the ambit of the injunction is very wide indeed and because they have the benefit of the injunction only for the time being, the Court of Appeal having only maintained the injunction (as varied) until the injunction application was remitted to the judge for reconsideration;

iv) The Claimants' conduct is even more culpable because they have in fact warehoused the claim. Warehousing, which has become something of a term of art, refers to a circumstance in which a party (generally the claimant) does nothing to progress their claim because they do not intend to bring the claim to a conclusion, ever or at present (see per Arnold LJ in *Asturion Foundation v. Alibrahim* [2020] 1 WLR 1627 at [49]). The warehousing of a claim can amount to an abuse of process and frequently does, and can justify the summary disposal of the claim even if the defendant has not suffered prejudice and a fair trial is still possible (Mr Simblet said, relying on *Alibrahim* and the earlier authorities the judge cited there);

v) In this case, the warehousing of the claim has itself been egregious, because the Claimants made the decision to warehouse the claim either because they appreciated far earlier than they claim that the injunction was no longer maintainable or because they do not want to pay the Defendant the costs to which the Defendant is entitled;

vi) Not only has the Claimants' conduct been abusive, they have thereby failed to help the court further the overriding objective and, on this ground too (that is,

on the ground that the Claimants have failed to comply with a rule, even though this is not a ground referred to in the Defendant's application notice) the claim is liable to be summarily disposed of;

vii) The proportionate response of the court is to strike out the claim form and to dismiss the claim because of the Claimants' conduct and because the Defendant has thereby been prejudiced, because he has been kept out of costs to which he is entitled.

35. I also need to say a little more about the Claimants' application.

36. A fair reading of paragraphs 1 and 2 of their application suggests that they have not applied for the injunction to be discharged on the ground of a material change in circumstances. Rather, on that reading, what they want is as follows:

i) For the injunction to be put into some sort of suspended state, until they judge that the time has arrived when it has to be given full effect again;

ii) The right, at that point, to come back to court and persuade a judge that that time has arrived;

iii) If the judge is persuaded just of that, for the injunction to be automatically revived.

37. In fact, as Mr Maclean explained the Claimants' application to me, that is not what they are seeking. Rather, they are inviting the court to discharge the injunction on the ground that there has been a material change in circumstances. They do wish to be able to come back to court, if there is a further material change in circumstances, and make a fresh application for an interim injunction (assuming the claim is continuing), and not be disadvantaged solely because of the fact that they have previously had an injunction which has ended on the ground of a material change in circumstances. I confess that I had not thought that that was particularly controversial and Mr Simblet agreed. In those circumstances, I have not needed to determine paragraph 2 of the Claimants' application notice and, particularly because of what I say elsewhere in this judgment, it would not be right for me to determine paragraph 2. It is for any judge hearing a fresh application by the Claimants for an interim injunction to decide on the material before them and in the circumstances as they then exist whether an injunction should be made.

38. As I have noted, the Claimants have also asked for the claim to be stayed. To paraphrase Mr Maclean, the Claimants want a stay because, if I stay the claim, they will not need to begin fresh proceedings if they need to obtain further injunctive relief in relation to the sites in issue. I infer from this, and from the fact that the Claimants, by their discharge application, contend that the injunction is no long maintainable in the present circumstances, that, at least for the time being, the Claimants do want to warehouse the claim, and they want the court to approve that.

Discussion

39. I have considered the parties' written submissions, counsel's oral submissions, the authorities to which I was taken and the evidence to which I was referred. I have tried

to fairly summarise counsels' submissions in this judgment, but it is right that I record that their submissions were far more comprehensive and learned than that summary can convey. Nevertheless, as I have said, I have had in mind all that I was asked to read and all that I was told.

40. Although counsel did not refer me to the White Book notes on the striking out of statements of case, I do not regard those notes as controversial. Rather, they provide a helpful summary of how a court should deal with a strike out application when the complaint, at its heart, is that the respondent has improperly delayed proceedings. (As I have indicated, Mr Simblet sought to widen the scope of the Defendant's application at the hearing, beyond the terms of the application notice, by contending that the claim form is liable to be struck out because of a failure by the Claimants to comply with a CPR rule; namely the rule which requires them to help the court further the overriding objective. I do not think that an application on that ground takes matters any further. The result is the same whether the Defendant's application is brought on the ground that there has been improper delay which amounts to an abuse of process or on the ground that the Claimants have failed to help the court further the overriding objective).

41. Note 3.4.16 says:

> "Rule 3.4(2)(b) [(that the court may strike out a statement of case if it appears that that statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings)] is not strictly relevant where the complaint is one of delay rather than a complaint as to the form or content of a statement of case…However, in *Habib Bank Ltd. v. Jaffer (Gulzar Haider)* [2000] CPLR 438, CA, a claim was struck out where delays were caused by a claimant acting in wholesale disregard of the norms of conducting serious litigation and doing so with full awareness of the consequences (cf. *Grovit v. Doctor* [1997] 1 WLR 640)…Delay, even a long delay, cannot by itself be categorised as an abuse of process without there being some additional factor which transforms the delay into an abuse (*Icebird Ltd. v. Winegardner* [2009] UKPC 24).
>
> …
>
> In *Wearn v. HNH International Holdings Ltd.* [2014] EWHC 3542 (Ch), Barling J, the case was struck out under CPR r.3.4(2)(b) and r.3.4(2)(c) for delay and non-compliance with court orders. The claim had been ongoing for almost 14 years and the claimant was largely responsible for the delay. The court recognised that the guiding principle was that delay alone, even if it was inordinate and inexcusable, could not be an abuse of process. However, abuse of process might arise when delay was combined with some other relevant factor...In the instant case the delay was an abuse of process as the claimant acted with wholesale disregard for court orders. A further aggravating factor was that the claimant had also sought to rely

> upon expert evidence which was clearly inconsistent with the requirements of CPR Part 35 in significant respects. Allowing the expert to carry out unnecessary investigations also added considerably to the delay. For the matter to reach trial would require substantial further expenditure and the passage of time meant that the prospect of a fair trial was severely impaired."

42. I also have had in mind the following notes:

> "3.4.3 Although the term "abuse of the court's process" is not defined in the rules or practice direction, it has been explained in another context as "using that process for a purpose or in a way significantly different from its ordinary and proper use" (*Attorney General v. Barker* [2000] 1 FLR 759, DC, per Lord Bingham). The categories of abuse of process are many and are not closed…The court has power to strike out a prima facie valid claim where there is abuse of process. However there has to be an abuse, and striking out has to be supportive of the overriding objective. It does not follow from this that in all cases of abuse the correct response is to strike out the claim. In a strike-out application the proportionality of the sanction is very much in issue…The striking out of a valid claim should be the last option. If the abuse can be addressed by a less draconian course, it should be."
>
> "3.4.8 In *Securum Finance Ltd. v. Ashton* [2001] Ch 291…, CA, the claimant's first action had been struck out on grounds of inordinate and inexcusable delay. The Court of Appeal concluded that the claimant's wish to have a "second bite at the cherry" has to be weighed with the overriding objective of the CPR in mind, and in particular, the court's need to allot its limited resources to other cases. The Court of Appeal ruled that the conduct which had led to the first action being struck out had been so serious as to amount to an abuse of the court's process. Although misconduct as serious as that did not by itself prevent the court from allowing a second action to proceed, the court should start with the assumption that if a party has had one action struck out for abuse of process, some special reason has to be identified to justify a second action being allowed to proceed…
>
> In *Aktas v. Adepta* [2010] EWCA Civ 1170, the claimant's first action was struck out for failure, due to mere negligence, to serve a claim form in time and a subsequent second action was also struck out as being an abuse of process. Rix LJ concluded that where the first action had been struck out for procedural failure (and had not been lost on the merits), the second action would be an abuse of process only where the conduct in the first action itself amounted to an abuse of process; and that such an abuse of process in the first action would arise where there had been (a) intentional and contumelious conduct or (b)

> want of prosecution (i.e. inordinate and inexcusable delay) or (c) wholesale disregard of rules of court: see [48], [52], [72] and [90]. Applying this approach, he concluded that a mere negligent failure to serve a claim form in the first action did not fall into any of these categories and was not an abuse of process; thus the second action was not an abuse of process (and see also [92])..."

43. I have also found it helpful to consider Gee on Commercial Injunctions (7th ed); paragraphs 24-029 to 24-032 (even though the Defendant does not apply for the injunction to be discharged on the ground of the delay):

> "The general principles [(see *Phoenix Group Foundation v. Cochrane* [2017] EWHC 418 (Comm) at [46]–[47])] are that:
>
> (1) a claimant who has obtained an injunction, search order or other interim remedy is bound to get on with his action as rapidly as he can;
>
> (2) he is not entitled to retain the relief except on the basis that the proceedings are progressed promptly and without unnecessary delay;
>
> (3) if there is delay, the relief may be discharged; and
>
> (4) in deciding whether to discharge the relief and not to re-grant it the court is exercising a wide discretion taking into account all the circumstances and bearing in mind the need to deter other litigants from delaying pursuit of proceedings in which an injunction has been granted. Therefore the exercise of the jurisdiction also has a disciplinary aspect.
>
> …Whether or not any injunction is to be discharged (or not re-granted) is a matter of discretion but in principle the court will not permit a claimant to obtain an injunction and then to rest content with that relief and not prosecute the proceedings. In *Town and Country Building Society v. Daisystar* the plaintiff had obtained Mareva relief against an individual defendant in respect of a claim for fraud, but had taken the view that the defendant did not have sufficient assets for it to be worthwhile pursuing the proceedings. After a long delay, the defendant applied to discharge the injunction, and the Court of Appeal (allowing an appeal from the decision of the judge) discharged the Mareva relief, on the grounds that it was an abuse of the jurisdiction for a plaintiff to obtain Mareva relief but then leave the proceedings in abeyance. Farquharson LJ observed that it was the duty of the plaintiff to press on with the claim so that the defendant was subjected to the Mareva injunction for as little time as possible, and that if the plaintiff wished not to proceed with the claim expeditiously, even temporarily, then it was his duty to apply to the court to discharge the injunction.

> The duty is to prosecute with expedition, the claimant being "under an obligation to press on with the action as rapidly as he can".
>
> However, the court will not always discharge the injunction where there has been delay, even though the delay has been substantial. The court will take into account all the circumstances of the case, including the following:
>
> (1) whether the delay was the result of a deliberate decision on the part of the claimant;
>
> (2) the length of the delay, and any explanations put forward by the claimant (e.g. the pursuit of settlement negotiations, or difficulties in funding the pursuit of the proceedings);
>
> (3) the degree of prejudice liable to be caused to the claimant if the injunction is discharged;
>
> (4) whether the claimant sought to rectify the position and proceed with the action or whether the delay is still continuing at the time of the hearing;
>
> (5) the degree of prejudice caused to the defendant as a result of the delay. This should be shown by evidence and not merely based on the assertions of counsel; and
>
> (6) whether the defendant has through his conduct either caused the delay or contributed to it.
>
> If an injunction is discharged because of delay in prosecuting the proceedings, a subsequent application for an injunction pre-judgment may be an abuse of the process of the court, because the discharge of the injunction is a penalty for misusing the court's process and there is a policy of deterring other litigants from acting in this way. It is similar to the discretion which falls to be exercised once material non-disclosure is shown to have occurred on a without-notice application in that whether to discharge the injunction and not to re-grant it takes into account the deterrent effect on other litigants who can see that material non-disclosure can result in the claimant being left with no remedy."

Counsel did not suggest that this is not an accurate summary of the law or is controversial.

44. Mr Maclean also very fairly referred me to the decision of Eder J in *Speedier Logistics v. Aardvark Digital* [2012] EWHC 2776 (Comm), where the judge said at [25]:

> "I cannot see any reason in principle, in circumstances where the claimant becomes aware of information which renders what

> that claimant told the court originally incorrect, not being under a duty to go back before the court to inform the court that there has been that relevant change, or, at the very least, to inform the defendant of those new circumstances. Mr Piccini submitted that, even if there was such a duty in relation to what he described as a "freezing injunction", there was no equivalent duty in relation to what I might describe as an "ordinary injunction". I accept, of course, that there are important differences between a freezing injunction (which is often described as a "nuclear weapon", to the extent that it may freeze assets generally, both within the jurisdiction and outside of the jurisdiction) and other injunctions. Of course, Mr Piccini is right to say that there are differences between those injunctions. However, in relevant respects I do not accept that there is here any relevant distinction in terms of the continuing duty on a claimant who has sought the exercise of the court's discretion on a certain basis. If that basis changes, it seems to me important, as a matter of principle, that the claimant does revert to the court to inform the court of the position. The main reason for that is that the exercise of the court's discretion was originally on a particular basis and, if that basis changes, it seems to me, as a matter of principle, that the court must be informed of that change in the ordinary circumstances. Mr Piccini might be right that there is no authority in support of that general proposition, and in the time available I have not found any authority either. Nevertheless, simply as a matter of principle it seems to me that what I have just said must be right."

45. The proceedings have been delayed. Nothing has really happened in almost three years. The Claimants did not offer any, or any good, reason for the delay and I cannot think of one. They have had the benefit of an injunction. The injunction is one which is liable to be set aside depending on the outcome of the remission hearing. The injunction, being against Persons Unknown, has a broad ambit and is capable of affecting many people. Morgan J ordered that there should be a directions hearing shortly after the final determination of the appeal. It is true that, neither by Morgan J's order nor by the Court of Appeal's order, were the Claimants ordered, in terms, to take any steps to obtain a hearing, but that does not relieve them of fault. They are apparently well resourced. They have instructed specialist solicitors. It was incumbent on them to press on with the claim. Indeed, that they have appreciated that they have had an obligation to obtain a hearing is evident from the fact that they wrote to the court asking for a listing appointment. For all these reasons, I have concluded that the Claimants have been inexcusably at fault for allowing the claim to be delayed for almost three years, even taking into account the Covid pandemic (on which, in fairness to the Claimants, they do not seek to rely). Frankly, writing two letters to the court in the space of almost three years and not then following up those letters with other enquiries when they were apparently not responded to at all is unacceptable. As I have said, the Claimants are apparently well resourced and they have specialist solicitors.

46. I do not think it is right, however, to conclude that the Claimants have warehoused the claim so far (even if that is what they wish to have sanctioned for the future by their stay application), whether because they allegedly knew earlier than they claim to have done that there was a material change in circumstances but wanted to retain the benefit of the injunction, or because they did not want to pay costs, or for any other reason. There is no material in the Claimants' witness statements or in any of the contemporaneous documents which positively shows that the Claimants have consciously intended not to pursue the claim to a conclusion, even just for the time being. Nor is it fair to infer that the Claimants have had that intention because it was not until shortly before the hearing, and after the Claimants had filed their witness statements, that Mr Simblet indicated that it is the Defendant's case that the Claimants have been warehousing the claim. The Claimants have not had an opportunity to adduce evidence in response to that allegation. That is not to say, though, that I am not troubled by the lack of particularisation, and indeed explanation, in the Claimants' witness statements, of their conduct. Nor is that to say that I do not remain puzzled about the basis of their application for the injunction to be discharged.

47. I must proceed on the basis that it was only in August 2021, when the planning permissions lapsed and that could be deduced by members of the public, that the Claimants appreciated that there was a material change in circumstances which meant that the injunction should not be maintained, even though, as I have said, I am puzzled about the basis of the Claimants' application for the injunction to be discharged, for the following reasons:

    i) There is no material which clearly establishes that the Claimants consciously believed that there was a material change in circumstances before the planning permissions lapsed;

    ii) The allegation (as part of the Defendant's application) that they appreciated that earlier has only recently been made and the Claimants have not had an opportunity to respond to it;

    iii) The director has not been cross-examined on his witness statement.

    I say August 2021, because the Claimants' solicitors' October 2021 email supports that.

48. Nor am I able to say, on the material before me, that the Claimants should have appreciated that there was, or rather would be, a material change in circumstances much before then. In fact, on that material, I should not reject the Claimants' case that there was no material change in circumstances before August 2021.

49. Whilst I have said that the Claimants are at fault for the inexcusable delay before August 2021, I cannot conclude that their conduct during that period has been an abuse of process in the sense that that phrase is applied to strike out applications, because I cannot conclude that, during that period, they were positively "using [the court's] process for a purpose or in a way significantly different from its ordinary and proper use".

50. The Claimants' fault might have justified the discharge of the injunction for delay. That sanction is intended to deprive an applicant of what will always have been

intended to be a temporary benefit effectively given on condition that they pursue their claim with alacrity. However, it does not automatically follow in such circumstances that the applicant has actually been using the court's process improperly.

51. The position is different from August 2021. Since then, the Claimants have had a positive duty to apply to court, expeditiously (see Gee above) to have the injunction discharged (see *Speedier Logistics* above). From then until March 2022, by benefiting from the continuation of the injunction, which they have appreciated should not be maintained, they have been "using [the court's] process for a purpose or in a way significantly different from its ordinary and proper use". I date the Claimants' improper conduct from August 2021, because:

    i) the Claimants must have decided that the planning permissions would be allowed to lapse before then;

    ii) the interest in these sites is likely to mean that they must have appreciated that that the planning permissions had lapsed would be discovered by interested members of the public then;

    iii) their solicitors said in October 2021 that their application to "vary" the injunction was well advanced (and so they are likely to have given instructions some time before then);

    iv) they are well resourced and have specialist solicitors.

52. What is the proportionate response to the Claimants' improper conduct?

53. The Defendant cannot say that he has been prejudiced by the continuation of the injunction, because he has never been subject to it and, as I have understood Mr Simblet's submissions, his case is that he was never going to be subject to it in its current form. The Defendant says he has been prejudiced by being kept out of costs he is entitled to. I recognise that prejudice is not a pre-requisite for a statement of case to be struck out, but, in any event, I attribute no weight to this factor for the following reasons:

    i) The court has not decided that the Defendant is entitled to the costs in issue (whether those are the costs of the claim or the remitted costs). What the Defendant has suffered is a delay in having his claim for costs determined;

    ii) The period in issue is now seven months, not almost three years;

    iii) If this was an important consideration for the Defendant he could always have instructed his solicitors to press for a hearing, but he has not done so.

54. On the other side of the scales, is the much greater prejudice that will be caused to the Claimants if the claim form is struck out. As I have shown, they would be at risk of having any future claim for injunctive relief summarily disposed of as an abuse of process, even though their legitimate business interests and property rights might be at risk of serious, and uncompensatable, damage and of being severely disrupted, and even though, left unrestrained, the activities about which they might legitimately complain could lead to breaches of the peace and serious health and safety risks.

55. I have concluded that the proportionate response in this case is to order that there is a case management hearing before the Master on the first available date, without reference to counsel's availability, for the purpose of considering (1) what directions ought to be given for the determination of the costs issue remitted by the Court of Appeal (the substantive issue remitted not actually needing determination because I will discharge the injunction) and (2) what directions ought to be given for the final determination of the claim. I have also concluded that the proportionate response in this case is to impose a sanction on the Claimants in relation to the costs of the applications. Had they not acted improperly neither application would have been required. I have no doubt that the injunction would have been discharged without a hearing had they sought to have it discharged in August 2021. I have not heard any costs submissions, so I will make a decision about precisely what the costs sanction will be after I have heard costs submissions immediately after this judgment is handed down.

56. Mr Simblet suggested that this response effectively gives the Claimants carte blanche to misuse the court's process. I disagree, for the following reasons:

   i) I will impose a sanction, principally a costs sanction, as I have indicated;

   ii) That sanction is intended to be a proportionate response to the Claimants' improper conduct, which was for a period of months, rather than years, which has caused little, if any, prejudice to the Defendant and which took place in the particular circumstances I have described;

   iii) Those circumstances will never occur again. For one thing, this judgment will have been handed down and, to the extent that it is appropriate to do so, a judge can weigh it in any balancing exercise in the future.

57. I turn to consider the Claimants' application.

58. I will discharge the injunction. No-one has applied to discharge the injunction on the ground of delay and I do not discharge the injunction on that ground. I discharge the injunction on the ground of a material change in circumstances. But I need to make this point. If the Claimants apply, in the future, for an injunction in relation to the sites, it will be a matter for the judge hearing that application whether any of the conclusions I have reached about the Claimants' conduct ought to be taken into account in determining the application before them and, if so, to what extent, just as they will take into account, to an appropriate extent, any evidence before them about the risks to people, property and businesses if an injunction is not made.

59. As I have indicated, I refuse to stay the claim, however. The claim should be stayed only if that furthers the overriding objective. Fundamentally, the overriding objective requires that cases are dealt with justly and proportionately. As a generality, that requires cases to be determined, not left to languish in a court office or on an e-filing system simply to save the claimant having to incur the issue fee payable if they have to begin a fresh claim (which is, in truth, the basis of the Claimants' application for a stay in this case). Put another way, the function of the court is to determine disputes. If a claimant does not want their case determined, because there is no longer a dispute, or because they believe that the circumstances have changed so that they will not obtain the final relief which they seek, or because they do not want to pursue their

claim, the proper course (absent the consent of their opponents) ought generally to be that they bring the proceedings to an end with all the consequences which flow from the route they take to do so. It ought not generally to be that the claim is stayed and left unresolved. As Lord Woolf said in *Grovit v. Doctor* [1997] 1 WLR 640, 647:

> "The courts exist to enable parties to have their disputes resolved…"

The judge repeated the point in *Arbuthnot Latham Bank Ltd. v. Trafalgar Holdings Ltd.* [1998] 1 WLR 1426, 1437, where he said:

> "The courts exist to assist parties to resolve disputes and they should not be used by litigants for other purposes."

It is particularly inconsistent with the overriding objective for the claim to be stayed in this case, because of the delay that the case has suffered through the Claimants' fault. Indeed, a refusal to grant a stay can be seen as an aspect of the sanction I have already imposed; namely, that the next hearing should take place with all due expedition.

60. Mr Maclean pointed out that, as the Master of the Rolls noted in *Barking*, claims for injunctions against Persons Unknown rarely go to trial. I surmise that that is because the interim injunction the claimant obtains generally has the desired effect, so that, in truth, the claimant rarely has any real opponent with an interest in pushing the claim to trial and the claimant has no interest in that either. That is not a good reason for granting a stay in this case; particularly because, as I have already noted, in *Barking* the Master of the Rolls said, at [108], that "a normal procedural approach should apply to the progress" of such claims.

Disposal

61. In summary:

 i) I refuse the strike out the claim form or dismiss the claim, even though I have found that the Claimants' conduct has been improper since August 2021;

 ii) I refuse to stay the claim;

 iii) I will order the discharge of the injunction on the ground that there has been a material change in circumstances;

 iv) I will order a case management conference before a Master on the first available date without reference to counsel's availability for the purpose of considering (1) what directions ought to be given for the determination of the costs issue remitted by the Court of Appeal and (2) what directions ought to be given for the final determination of the claim;

 v) I will impose a sanction in costs in relation to the applications on the Claimants.

62. I will need to hear further from counsel about the precise terms of the order giving effect to my decision, including the pre-case management conference directions I will

need to give to ensure that the case management conference is effective. I will also need to hear from them on costs.

63. Finally, I must express my thanks to Mr Simblet and Mr Maclean for their extremely clear and helpful skeleton arguments and for their assistance at the hearing, which was invaluable. They did not shy from answering my questions fully and they always did so with good grace.