



Neutral Citation Number: [2018] EWHC 3139 (QB)

Case No: IHQ18/0595

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/11/2018

Before :

MR JUSTICE FREEDMAN

Between :

- (1) FITZWILLIAM LAND COMPANY
- (2) MILTON (PETERBOROUGH) ESTATES COMPANY
- (3) SIR PHILIP VYVIAN NAYLOR-LEYLAND BT
- (4) HIGHWOODS FARMS LIMITED

Claimants

- and -

- (1) GARETH CHEESMAN
- (2) LISA JACKSON
- (3) PAUL BENTON
- (4) STEVEN MILTON
- (5) PHIL GARRARD
- (6) PHIL JOSEPH WALTERS
- (7) PAULA LAMONT
- (8) DAVID BLENKINSOPP
- (9) MATTHEW SPENCER
- (10) CLIVE RICHARDSON
- (11) MICKEY BRYCE
- (12) RUTH NICHOLLS
- (13) JENNIFER ALFRETON
- (14) EMILY HEPBURN
- (15) PERSONS UNKNOWN ENTERING OR REMAINING WITHOUT THE CONSENT OF THE CLAIMANT(S) ON THE LAND IDENTIFIED IN THE SECOND SCHEDULE TO THE BRIEF DETAILS OF CLAIM AND NOT SUBJECT TO PUBLIC RIGHTS OF WAY WITH A VIEW TO PROTESTING AGAINST THE FITZWILLIAM (MILTON) HUNT ("THE HUNT") OR OTHERWISE OBSTRUCTING THE HUNT

Defendants

Mr Greville Healey (instructed by Clarke Willmott) for the Claimants
Mr Ashley Underwood QC and Mr Adam Tear (instructed by Howe & Co) for the First to
Seventh, Tenth and Fourteenth Defendants

Hearing date: 1 November 2018

Approved Judgment

Mr Justice Freedman :

Introduction

1. This is a case for interim relief arising out of a dispute between landowners and operators of what is called the Fitzwilliam (Milton) Hunt (“the Hunt”) and Defendants protesting about the Hunt. The Claimants comprise the First Claimant which operates the Hunt (“C1”), the Second to Fourth Claimants who are the registered proprietors of the Land identified in the draft Order provided to the Court and the Third Claimant (“C3”) is also joint Master of the Hunt a director of other Claimants. Injunctive relief of a quia timet nature is sought on the grounds of future unlawful conduct which is said to be highly probable if no injunctive relief is in place. The injunctions seek to restrain trespass to land and trespass to goods in particular to animals and chattels of the Claimants.
2. The Claimants claim for themselves and also as a representative class for the persons identified in the body of the draft order: see *Oxford University v Broughton* [2004] EWHC 2543 (QB) for an example of a case where this was done.
3. The Defendants comprise identified persons, some of whom are represented and some of whom are unrepresented. The represented persons who are identified comprise D1-D7, D10 and D14. Those who are identified and not represented comprise D8, D9 and D11-D13. The case against D15 is no longer pursued and he was removed from the action by an order dated 2 November 2018 (since I heard the application) as a result of which D15 is no longer a party to this action. There is a further category comprising persons unknown, namely “persons unknown entering or remaining without the consent of the Claimants on the land identified in the Second Schedule to the brief details of claim and not subject to public rights of way with a view to protesting against the Fitzwilliam (Milton) Hunt (“the Hunt”) or otherwise obstructing the Hunt” (“Persons Unknown”).
4. The Claimants’ evidence is that the Hunt lays and follows scent trails to mimic traditional fox hunting. It also uses a bird of prey, an eagle, to dispatch foxes which are flushed out by the hounds. The Defendants are opposed to hunting foxes and seek to bring to an end the fox hunting. It is apparent that they keep an eye on the Hunt and seek to organise protests with a view to bringing to an end the hunting. Some of the activities are co-ordinated on social media.
5. The thrust of the Represented Defendants’ evidence is that they do not trespass. They do not leave public footpaths and other public rights of way: see D1 witness statement paragraph 2. The Claimants say that there is evidence that they have trespassed by going on the Claimants’ land even where there is no right of way. The Represented Defendants say that this is not the case, and in any event, the Claimants have not proven the trespass.
6. The Represented Defendants say that the hunting activities are illegal, and infringe the Hunting Act 2004. They first say that despite the Claimants’ evidence, they were not in fact doing what they claim to be doing and they were carrying out illegal hunting. Further, they say that even if the Claimants were doing what they say, they do not come within the exemption(s) under the 2004 Act. The Defendants have recognised in their skeleton argument (paragraph 5c) that *“the issue whether the Claimants’ activities are illegal is plainly a factor to be weighed in the balance when this Court conducts the proportionality exercise...At this stage these Defendants recognise that*

the Court will not have sufficient evidence on which to decide the illegality issue in relation to whether there is an arguable case...”

7. The Claimants say that even if there was illegality, which they deny, it is not capable of justifying the trespass. They further submit that this is not a bar to an injunction. The Defendants claim that this is a relevant matter to the balance of convenience.
8. As regards the issues to be considered, they are as follows:
 - (1) The parties are agreed that the threshold is not *American Cyanamid*, but whether it is more likely than not that the Claimants will establish a need for an injunction at trial. In this regard, is it more likely than not that there has been a trespass to land? By reference especially to photographic evidence, the Claimants say yes, but the Defendants deny this;
 - (2) Related to the above, there is a question as to whether the Claimants have shown to the level required an “imminent and real risk” of future trespass to the Claimants;
 - (3) There are balance of convenience issues to consider including
 - a. The evidence as to whether the activities of the Defendants are illegal;
 - b. The effect of convictions of persons within the Claimants’ camp;
 - c. The evidence of assaults committed by persons within the Claimants’ camp.

The facts

9. The Claimants own the land which is referred to on the plan annexed in the draft Order. The Claimants’ claim issued on 5 October 2018 is for extensive relief and is not limited to trespass. It includes injunctions against harassment mirroring that sought in the final relief. In fact, the order granted on an inter partes hearing on 16th October 2018 was limited to an injunction to prevent the Defendants from trespassing on any part of the land, but carving out the right to use rights of way and the like.
10. Much of the evidence before me, contained in numerous witness statements, goes beyond trespass with allegations of intimidatory conduct and/or harassment. There are allegations going in both directions as between the Claimants and the Defendants. It is difficult to consider the allegations because there are numerous allegations contained in numerous witness statements. However, a useful way of looking at some of the evidence is by reading the first statement of Mr Cheesman (D1) and reading it alongside other evidence to which he responds. He says at paragraph 22 that his protests are peaceful, polite and do not involve any trespass (paragraph 22).
11. The way in which the application has been presented before the Court has been to major on the evidence about trespass to land and to supplement that by evidence about trespass to goods including animals. In the application before me, the Claimants have sought two elements of the final relief by way of interim injunction, namely relief in relation to trespass to land, and to animals and chattels. The reason why the Claimants seek the latter is because the Hunt uses land other than its own with the consent of third parties and wishes to protect their animals and chattels when on such other land. In view of this, there has been very limited reference by Counsel for the Claimants to the evidence about harassment and the like.

12. The relief is now sought until trial. That might be a long period of time without an order for speedy trial, but will be much shorter if a speedy trial is ordered. The relevance of this is that the shorter the period of time for which the relief is granted, the less the risk of injustice by the imposition or refusal of an injunction.
13. There is controversy as to whether there has been trespass at all. Mr Cheesman, D1, has given very extensive evidence challenging the case of the Claimants that there has been trespass. This puts under sharp focus the evidence as to the extent to which he and others have or may have trespassed. Similarly there is evidence from the other Represented Defendants putting trespass in issue. I have to consider in this regard:
 - a. numerous photographs;
 - b. video evidence;
 - c. witness evidence on behalf of the Claimants, of the named Defendants and of an anonymous witness.
14. Photographs appear in the exhibit EAT3 to the statement of Elizabeth Anne Thomas. Whilst the majority of them are said to have been on the Claimants' land, a substantial part of them are on third party land. They appear to show on numerous dates some of the named Defendants and other persons unknown on fields and crossing into fields which are said to be part of the property of the Claimants. I bear in mind the criticism that the evidence could or should have been better prepared by identifying the location of each photograph on grid reference maps so as to be more specific about the allegations of trespass, and so as to show that the persons were not exercising a public right of way.
15. Nevertheless, the schedule of the photographs identifies the Defendants by name and gives dates of the photographs and distinguishes between the Claimants' land and third-party land. I make the following observations, namely
 - (1) It is said that the photographs are off the public right of way save for photograph number 43;
 - (2) D1, who has given detailed evidence, is shown in many of the photographs apparently going across fields which are said to be owned by the Claimants. Some go back to December 2017 (e.g. 2 [23rd], 3 [30th] (this is supplemented by the evidence of Mr Baker at paragraph 34 of his statement about D1 and D2 being told that they were trespassing and saying that they thought they were on a footpath), 12 [9th], 13 [23rd], 16 [23rd] and 26-27 [23rd]) but some are also 29th September 2018 (7 and 9-11). He is also seen in photographs of 13th January 2018 (8, 41-42, 54 [all 13th]).
 - (3) D2 is shown in many photographs in December 2017 on land of the Claimants (e.g. 12 [9th] and 13, 14-16, 26 and 43 [23rd] and 3 and 17 [30th], where she appears to be touching the dogs) and 29th September 2018 (7, 9-11). She is also seen in photographs of 13th January 2018 (41-42, 50).
 - (4) D4 is shown in photographs of 9th December 2017 (20), 13th January 2018 (21), 11th March 2017 (28) (D4 has confirmed in his witness statement dated 25 October 2018 at [7-8][17/561] that photographs 20 and 21 were of him, but he says that he cannot confirm the location).

- (5) D7 is shown in photographs of 23rd December 2017 (13, 25-27) and 11th March 2017 (28) [D7 confirms that the photographs are of her, but she says that it is impossible to identify the locations or whether she is on a public right of way: see Lamont (1) para. 7 [18/566]]
 - (6) D10, the Claimants allege, is shown in photographs of 9th December 2017 (20, 32) [D1's evidence about these photographs is summarised at paragraph 30(5) below.]
 - (7) D11 in a photograph of 23rd December 2017 at the side of Hayes Wood, but where there is no footpath (44)
 - (8) D14 is shown in photographs of 11th March 2017 (28, 36-37) [D14 says that she cannot identify herself in photograph 28, thereby appearing to accept that she was in photographs 36-37: see her statement at para 12 [15/555-556].
16. Many of the photographs are about people crossing fields. The evidence generally does not identify how this was or was believed to be crossing a public right of way. Further, there is no evidence of a system with a view to ensuring that the Defendants would identify and stick to public rights of way.
 17. Some of the photographs are of persons unknown from photograph 52 onwards. There are instances of spraying citronella, and there is disputed evidence as to how harmful or otherwise this was: e.g. photographs 52 and 53. The unknown protestors can be seen with their faces largely covered (unlike most of the named Defendants who do not conceal their faces) e.g. see photographs 56-61. There is evidence from Fiona Karen Ann Silcock showing social media entries appearing to indicate that certain people wished to target and "wholeheartedly swamp" the Fitzwilliam Hunt (see 1/12/154). Remarks such as "we tailed and then pincerd the huntsmen" (1/12/158). The language of the protestors, sometimes calling themselves saboteurs or sabs, is one of seeking to prevent what they consider to be illegal hunting (1/12/153). There are also photographs of named Defendants such as D1 with persons unknown with faces largely covered, appearing to show that their presence together was more than a coincidence of timing. The protest of the named Defendants was made more effective by an apparent unity of purpose, protesting together against the Hunt. To that extent, any attempt to distance named Defendants from those who whose faces were largely covered will undoubtedly be the subject of further inquiry at trial.
 18. I now refer to the video evidence. I saw several videos in court, and then 10 videos were sent to me in drop box corresponding with that which was shown in court. The videos can be summarised as follows:
 - a. They show protesters often appearing to be well off public footpaths and attempting to find and go in the direction of the horses and hounds and the people involved in hunting;
 - b. They resist repeated requests not to trespass and to return to the public footpath.
 - c. There are repeated videos particularly of D1 and D2 engaged in these activities. In particular, the video evidence against D1 is significant. It is particularly apparent from the video GOPRO003 filmed on 9 December 2017 how D1 and D2 crossed over a barrier going into a field resisting attempts to stop them including warnings about trespassing: there is also film on the same date of at least D1 video

GOPRO007 . They do so in company with several other persons including people unidentified with some cover over parts of their faces. This is a video which also contains some evidence of assault on D2. It is nonetheless evidence as regards D1 and D2 of apparently deliberate and concerted trespass on to the Claimants' land.

- d. Some of the protestors are covering parts of their faces, but not D1 and D2;
 - e. D1 and D2 appear to be walking in the same direction as other protestors, and the points made above about an apparent of unity of purpose apply;
 - f. There are 2 clips of pushing which appear to have caused D1 and D2 respectively to fall over. It is difficult to identify exactly what occurred, but my observation is that D1 and D2 did not commit an assault, and they seem to have been pushed. The scuffles came after people were coming over too close to one another and in incidents which appear to have involved trespass to land. The trespass to land does not excuse the incidents which I saw.
19. I have been unable to identify persons other than D1 and D2, but the videos appear to show that persons unknown have been trespassing. There is one video where people were running towards the hounds and were shouting supporting the allegation that they were trying to get the hounds to be out of control.
 20. I have seen photographs also of people on other third-party land and this is relied upon to show evidence of a course of conduct. However, this is of limited assistance, and I am not prepared to use this to show that a named Defendant will therefore be likely to go over the land of the Claimants.
 21. More specifically as regards the evidence relating to the Claimants' land, this appears to show that certain named Defendants made no attempt or pretence of an attempt to stick to the footpaths. Some were saying that they were entitled to deviate from footpaths to prevent crimes (under the Hunting Act 2004) from being committed. Sometimes it was said that they had the landowner's permission. In order to stop the hunting, there were clips of protestors jumping over ditches and climbing over fences to follow the horses and hounds.
 22. If there was an intention in the first instance to stick to footpaths, the videos and the pictures evidence that that they did not stick to that intention. In the activities which were being undertaken, it appears to me to have been the case that they were unable to avoid trespassing. In my judgment, the only way in which this trespassing could be brought to an end would be an injunction. The question arises as to whether it is right in all the circumstances for an injunction to be granted, bearing in mind the balance of convenience and the like.
 23. There is also limited evidence of protestors going up to the hounds and touching them. There is some photographic evidence e.g. photograph 8 where a person with a covered face touches a hound in the presence of D1. There are close-up pictures of D2 doing the same at photographs 14, 15 and 16.
 24. There are other photographs of Defendants on third party land, which are said to demonstrate a propensity to go on the land. There are pictures here of D6, D8 and D12 in addition to the persons named above.
 25. The evidence about trespass to land has been supplemented by witness evidence. Ms Thomas in her second statement at paragraph 9, referring to an incident of 2

December 2017, states that D1, D2 and D3 arrived in a vehicle ST53 GGZ and that D4, D5 and D7 (and Andrew Duff) arrived in other vehicles EJ04 YOG and L621 HAA. The evidence is not specific as to the roles of the persons other than D1-D3, who, she said, caught up with her on her horse or about their trespass. Whilst there is photographic evidence of D1 and D2 on 2 December 2018, there is no photographic evidence of D3 and the evidence is unspecific about her alleged trespass. Thus, although there are references by Ms Thomas to D3-D5 and D7, the evidence is unspecific about trespass. D1 has provided detailed evidence in response, taking issue with much of the evidence and contending in respect of 2 December 2017 that it was highly likely that he was on a bridleway or footpath following a horse (paragraph 34 of his first statement).

26. The evidence contains a large amount of controversy about conduct going far beyond trespass to land. I have been significantly assisted by a schedule cross referencing the allegations made by the Claimants and by the evidence in response especially by D1 and D2, but also of the other Represented Defendants. The evidence of D1 and D2 often is more precise than that of the Claimants and it frequently tends to cast into doubt the reliability of the Claimants' evidence. I have borne this in mind in connection with whether I am able to form a view about the existence of the trespass, but notwithstanding this, I am of the overall impression that the Claimants will be able to prove repeated instances of trespass to their land.
27. I bear in mind the criticisms that the evidence could or should have been more precise about the location of each photograph. A photograph in isolation will not necessarily prove a trespass, but the photographs and the video evidence as a whole provide a collective picture of persons not seeking to restrict themselves to rights of way in the pursuit of the objective of attempting to prevent what they regard is illegal behaviour and/or what they believe to be cruelty to animals.
28. The suggestion has been made that the Claimants have been cherry-picking in order to prove their point, and even editing videos to miss out evidence of or relating to an assault. There are questions in respect of the pushing and shoving/assaults about the angle of the photography and as to whether it starts at a point where one can see the whole of it. I have assessed this in forming a view as to whether the pictures as a whole tell the story so that I can appraise whether or not there is sufficient evidence of trespass so as to show that it is likely that this will be established at trial. I am clearly of the view that there is sufficient evidence.
29. It is also suggested that it will be difficult to appraise whether the individual acts have been on the rights of way or so close to the rights of way that the trespass is not serious. Before granting an injunction, it will be necessary to have annexed a plan which is sufficiently clear to identify what is the land owned by the Claimants and where are the public rights of way. That is a problem which is familiar to the Courts in such cases, and the fact that there might be arguments at the peripheries of the land is not usually a good reason for leaving the landowner without a remedy. Subject to reviewing the precise plans to be annexed to an order, that does not seem to me to be a sufficient reason by itself not to have an injunction in this case.
30. In respect of the Defendants named above where there is evidence of trespass, I have considered the effect of their evidence in my consideration of whether it is more likely than not that an injunction based on trespass to the Claimants' land would be ordered

at trial. As regards each of them, the following emerges from their respective evidence as to trespass:

- (1) D1: whilst he contends that he moves along the bridleways and footpaths (paragraph 20 of his first statement): by way of example, as regards 2 December 2017 that “it was highly likely that I was actually on a bridleway or footpath” (paragraph 35 of his first statement), and as regards 30 December 2017 that he does not commit acts of trespass and sticks to rights of way as he told Mr Baker (paragraph 47 of his first statement). He raises an issue as to where the right of way was in respect of photograph 12 (paragraph 39 of his statement). He raises further issues about a right of way in respect of photographs of D1 on third party land. However, I am satisfied that it is more likely than not that D1 has been trespassing on the Claimants’ land based on the photographs and videos which I have seen and the absence of evidence of the kind identified in paragraph 16 above about steps taken to avoid trespassing on land.

(There is to be noted the evidence of Ms. Riddington at paragraphs 21 and 23.1 of her statement and the evidence in response of D1 at paragraphs 49-54 with allegations and counter-allegations about confrontations between Claimants and Defendants in particular involving a collision or collisions with quad bikes used to police the land. It is not possible at this stage to make findings as to whose version is correct, other than to say that this is evidence which is relevant to the concern expressed below about the risk of injury in the confrontations between demonstrators and hunters.)

- (2) D2: she associates herself with and adopts D1’s evidence to attempt to refute the evidence of trespass against her. Generally, she does not give independent evidence to this effect. This is despite detailed evidence by her about other matters including, in particular, about her being assaulted and an allegation that she was the subject of sexually charged comments to which I shall refer below (see especially paragraphs 12-16 of her statement). As in the case of D1, I am satisfied on the basis of the evidence as a whole that it is more likely than not that she has been trespassing on the Claimants’ land.
- (3) D4: as noted above, he has accepted his identification in the photographs 20-21, but has said that he is unable to identify the location. I am satisfied that it is more likely than not that D4 has trespassed on the Claimants’ land.
- (4) D7: her evidence is to accept the photographs but to say that “it is often impossible to identify locations or whether I am on the public right of way”. She then states that she only lawfully protests (paragraphs 7-8 of her statement). She does not attempt to give evidence to show how she has sought to keep to rights of way. The evidence does not refute specifically the evidence as to trespass referred to above and I am satisfied that it is more likely than not that D7 has trespassed on the Claimants’ land.
- (5) D10: he says in respect of photographs 20 and 32 that he cannot identify himself in those photographs and that they do not look like him. In the light of this evidence, as regards D10, I am unable to form a view that it is

more likely than not that he has been trespassing on the land. There is evidence of him on third-party land and contentions as to what he might have seen, but I refuse at this stage to treat this as evidence of a real and imminent risk of trespass to the Claimants' land.

(6) D11 (who is unrepresented): there is no evidence on the part of D11 to refute the evidence about photograph 44.

(7) D14: D14's evidence does not refute the identification of her in photographs 36 and 37. I am satisfied on the basis of this evidence that it is more likely than not that these Defendants save for D10 have been trespassing on the Claimants' land and there is a real and imminent risk of trespass to the Claimants' land.

31. As regards the other defendants, I can summarise the position as follows:

(1) D3 and D5: the evidence of Ms Thomas is too unspecific as referred to in paragraph 26 above on which to establish at this interim stage a likelihood that relief would be granted against them at trial in respect of trespass;

(2) D6: the evidence relates to third party land (e.g. Riddington [29], photographs 23 and 24; evidence of 6 October 2018 not alleging specifically trespass to the Claimants' land, the evidence in Thomas (2) [14] does not appear to be evidence of trespass to the Claimants' land). There is evidence of Cobden at paragraph [7] to the effect that the video evidence GPPPRO0014 and GPPPRO0015 show that various protestors passed her in the field. Mr Cobden's evidence was that D6 ignored his statement that he should not be there because this was private property, and Mr Walters stated that he was entitled to be on the land because of investigation into illegal hunting. D6's evidence is that the video evidence had omitted evidence of an assault against D1 and that he was shouting about the illegal use of force and illegal fox hunting. I am satisfied in the light of this that there is evidence of D6 trespassing on the Claimants' land such that it is more likely than not that trespass will be established against him and that a final injunction may be obtained.

(3) The evidence as to D8 and D9 (who are unrepresented) is contained in Ms Thomas's first statement at paragraph [17]. It does not amount to evidence of trespass on the Claimants' land.

(4) The evidence as regards D12 (who is unrepresented) relates to third party land (photographs 33 and 34) and is not evidence about trespass on the Claimants' land.

(5) The evidence relating to D13 (who is unrepresented) (Thomas (2)[22]) is so unspecific as not to be probative by itself.

32. In the light of the foregoing, whilst the evidence could have been better put together to have a cross reference to the grid map of each photograph, I am satisfied at this stage on the material as a whole that it has been established that it is more likely than not that trespass on the Claimants' land will be established at trial in respect of the Defendants whom I identify below and a real and imminent risk that they will carry out further acts of trespass without the restraint of a court order and without an undertaking being provided by them. I am satisfied that there is evidence of trespass in respect of the Claimants' land to a level that it is more likely than not to have taken

place as regards D1, D2, D4, D6, D7, D11 and D14. The same applies to persons unknown to whom I refer below.

33. I now turn to the evidence relating to the balance of convenience. In this regard, Mr Ashley Underwood QC developed his submissions by reference to the behaviour of the Defendants, the behaviour of the Claimants and the legal position as regards the legality or otherwise of the hunting.
34. There is challenged evidence about assaults. Mr Underwood QC submitted that the evidence was all one way, that both D1 and D2 respectively were assaulted. Without making findings as to what exactly occurred, I shall make that assumption for the purpose of this judgment. Without in any way excusing unlawful touching or force, they occurred in the context of an undesirable set of events as landowners and protestors got too close to one another. On the basis that the assaults were committed by persons within the Claimants' side, there is a concern as to whether people who behave in that way should not have an injunction in their favour. On the other hand, the encroachment on land and the desire to stop the hunting and the concomitant scuffling and in the end, assaults are part of a disturbance of public order. There is the risk of injury to people from this, and the matter is also aggravated by the presence of animals who might get out of control.
35. Mr Underwood QC has made out a persuasive argument that the hunting is illegal. In his oral submissions, he appeared to be going further than the acknowledgement in his written submissions to seek to contend that illegality could be proven. However, these were arguments only being recently developed without the parties having the opportunity to develop the evidence and the legal argument to enable the Court to come to a conclusion. Thus, the starting point in the skeleton argument is realistic. Mr Underwood QC lays particular emphasis on illegality in the context of the balance of convenience.
36. The first concern is factual that the false trails in fact attract the foxes and the hounds pick up the scent of a fox and hunt it: see D1 statement 13, 23 and 62-63. There is a suspicion that the terrier man is being used so as to ensure that the fox has nowhere to hide: see D1 statement 58. It is said that the hounds are used for hunting and not for flushing: a different kind of dog might have been used: see D1 statement 14. There is a concern that the foxes are killed by the hounds and that their bodies are removed quickly to escape detection: see D1 statement 20 and 29-30. There has already been a successful prosecution of a person within the Hunt, and notwithstanding that there is an appeal against that prosecution, that is relied upon as evidence of illegal conduct in connection with the Hunt.
37. Further, Mr Underwood QC submitted that the activities do not come within the exemption even if the evidence given by the Claimants is correct. He submitted that the Claimants have the following difficulties. First, there is a period during which the hounds pick up the scent, but before flushing from cover. That is said to be hunting for the purpose of the Hunting Act 2004, and not flushing from cover. Secondly, the flushing is not for the purpose of enabling a bird of prey to kill the wild mammal. That is because the evidence of Mr Hunter is that at that stage there are two options, namely to enable the eagle to hunt the fox or to allow the fox to escape. Since there are two options, it is said that there is not a purpose which is established at the point of the flushing. Thirdly, it is not inevitable when the hounds pick up the scent they

are flushing it from cover because the fox could be roaming around and not under cover.

38. The matter is set out in more detail at paragraph 23 of the written skeleton argument of Mr Underwood QC and Mr Adam Tear. Mr Healey was not able to say very much in response about the detailed arguments, but he says that there are likely to be factual matters in response and questions of construction about the Act. I shall return to the illegality in the context of balance of convenience, but noting at this stage that the arguments about illegality are at this stage persuasive, without in any way deciding the same one way or the other.
39. The Claimants rely on risks of risks of injury to people and animals, but the Defendants say that this evidence is not credible and is threadbare. They say that there is no substantial evidence of injury by citronella or otherwise. Further, if there is a risk of injury to people, it is from the assaults of people within the camp of the Claimants. Further, reference is made to the criminal damage and assault on the part of Mr Watson who was then a steward. D1 mentions this in his statement at paragraph 33 in a more detailed way than Ms Thomas. On 10 February 2018, he refers to how there was an assault on him and criminal damage to a car and that Mr Thomas smashed three windows. I note also the evidence of D2 alleging that she was assaulted by Mr Codman on 9 December 2017 rather than the reverse, and how she hurt her hand in trying to avoid him (paragraphs 12-15 of D2's first statement): she also refers to what she calls sexually charged comments directed to her after the assault. I make no specific findings as regards these matters, but for the purpose of this judgment, I shall assume that the better of the argument in respect of assaults and criminal damage are that they were caused by the Claimants. On the basis of this assumption, it is more likely than not that they will be established at trial. I take this into account in the consideration of this matter as a whole and the decision as to whether injunctive relief is appropriate.
40. The Defendants also have been able to draw attention to shortcomings in the evidence of the Claimants as is apparent especially from the evidence of D1 and D2 as referred to in the Schedule prepared since the last hearing. By way of example, D1 takes issue with evidence about his acting in an intimidatory manner or that strong language was being used in his presence or that he walked into the nose of a horse. He also makes some specific points regarding a small number of photographs largely about rights of way by reference to photographs 12, 20 and 32. It is unrealistic in this judgment to deal with each and every allegation and counter-allegation. I am concerned as to the level of proof of many of the allegations of harassment or intimidatory behaviour made by the Claimants, and I shall assume for the purpose of this judgment that they could not be established to the level of their being more likely than not. That is not to say that they cannot be established at trial.

The law

The threshold in a case engaging with freedom of expression and of assembly

41. The normal test is that stated in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 which requires that there be at least a serious question to be tried and then refers to the adequacy of damages and the balance of convenience. However, it is accepted that in the instant case due to the fact that the restraint, if granted, might affect the exercise of the European Convention right to freedom of expression as per Article 10 (and possibly also Article 11: freedom of assembly and association). There is a debate as to whether section 12 of the Human Rights Act 1998 is limited to freedom of

expression in the form of the publication of material or whether it applies to expression generally. The Claimants accept at least for the purpose of this hearing that even in the relief which they seek based on trespass that section 12 applies such that threshold is not arguable case, but whether it is more likely than not that the Claimants will succeed at trial: see *Cream Holdings v Banerjee* [2004] UKHL 44 at [22]; *Ineos Upstream Ltd and Ors v Persons Unknown & Ors* [2017] EWHC (fracking protests) per Morgan J at [84-86].

Rights of landowner in a trespass case

42. It is to be borne in mind that such is the respect to a property right that prima facie a landowner whose title is not in issue is entitled to an injunction to restrain trespass on his land whether or not the trespass affects him. This has been expressed by Balcombe LJ in *Patel v W.H.Smith (Eziot) Limited* [1987] 1 WLR 853 at 858F-H as follows:

“What, then, are the principles which a court should apply in a case of this type? It seems to me that, first, prima facie a landowner, whose title is not in issue, is entitled to an injunction to restrain trespass on his land whether or not the trespass harms him. In support of that proposition there are two comparatively recent cases at first instance. The first is *Woollerton and Wilson Ltd. v. Richard Costain Ltd.* [1970] 1 W.L.R. 411, which was a reserved judgment of Stamp J., and from the report I note that *Behrens v. Richards* [1905] 2 Ch. 614 was cited in argument, though the judge does not refer to it in his judgment. Stamp J. said, at p. 413:

“It is in my judgment well established that it is no answer to a claim for an injunction to restrain a trespass that the trespass does no harm to the plaintiff. Indeed, the very fact that no harm is done is a reason for rather than against the granting of an injunction: for if there is no damage done the damage recovered in the action will be nominal and if the injunction is refused the result will be no more nor less than a licence to continue the tort of trespass in return for a nominal payment.”

43. It follows that a quia timet injunction will usually be justified so long as the Claimants establish that there is a substantial risk of trespass by a defendant.

Defences to trespass

44. Both as regards interference which has taken place and threatened interference, there is not a defence to trespass because of a desire to express opinions: see *Sun Street Property Ltd v Persons Unknown* [2011] EWHC 3432 (Ch).

45. Further, if the allegations of illegality concerning the Hunt’s hunting activities turn out to be justified at trial, this does not provide a justification to trespass on the Claimants’ land. As expressed by Mummery LJ in *Monsanto v plc v Tilley & Ors* [1999] EWCA Civ 3044:

“(2) *Defence of Necessity.*

In exceptional circumstances necessity may justify trespass to land or to goods. But it is impossible to conclude from the nature of the matters which these defendants wish to establish at trial that the necessity defence has any real prospect of success in this case.

The defence is only available to the individual in cases of emergency where it is necessary for the private citizen to act in the face of immediate and serious danger to life or property and the citizen acts reasonably in all the circumstances.

The defendants do not even attempt to establish a case of emergency. The avowed symbolic significance of their actions (see the Handbook for Action paragraph 5.7.2.) and their disclaimer of an intention to pull up all GM plants are hardly consistent with acting in an emergency.

Further, even in cases of emergency, trespass by the individual, in the absence of very exceptional circumstances, cannot be justified as necessary or reasonable, if there exists a public authority responsible for the protection of the relevant interests of the public. In this case the Department of the Environment has that responsibility. In such cases the right of the individual to trespass out of necessity, whether as defender of his own or a third party's interest or as champion of the public interest, without attempting to enlist the assistance of the public authority, is obsolete.

In [Burmah Oil Co Ltd v Lord Advocate \[1965\] AC 75](#) at 164 Lord Upjohn said:

"No doubt in earlier times the individual had some such right of self-help or destruction in immediate emergency, whether caused by enemy action or fire, and the legal answer was that he could not in such circumstances be sued for trespass or destruction of his neighbour's property. Those rights of the individual are now at least obsolescent. No man now, without risking some action against him in the courts, could pull down his neighbour's house to prevent the fire spreading to his own; he would be told that he ought to have dialled 999 and summoned the local fire brigade."

46. In other words, as regards establishing the tort, absent very exceptional circumstances, the trespass is made out and there is no defence of necessity to trespass e.g. protecting the foxes. That is matter for regulatory action. It might be at trial be contended that there are very exceptional circumstances in the instant case, but at this stage it seems to me to be more likely than not that such a defence would not prevail.
47. I have been referred to the case of *Hall and others v Mayor of London* [2010] EWCA Civ 817. This is a case on its own facts in that it relates to the right to demonstrate on Parliament Square Green where ownership and control was vested in a local authority. It is very different from private land owned and controlled by a private individual or corporation and in respect of land which is not at the heart of the democracy of the nation. In that case, there is a focus on state authorities having a positive duty to ensure that lawful public demonstrations can take place and that any restraint on freedom of speech requires "the most careful scrutiny": see the citation at paragraph 42 in *Hall* from *R(Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105 at paragraphs 36-37 per Lord Bingham. In my judgment, in such a case it is easy to understand the balancing and proportionality exercise taking into account the freedom to express beliefs in public. That is far removed from a demonstration on private land which is not designated for public demonstration just outside Parliament and without a public authority being involved.

Quia timet relief

48. In *Ineos Upstream*, the Court went on to consider what is required for quia timet relief at [87-91], and especially quoting from *London Borough of Islington v Elliott* [2012] EWCA Civ 56 per Patten LJ at 29. In particular:

- a. at least in respect of a final injunction, it is not sufficient to say that the injunction only restrains the defendant from doing something which he is not entitled to do and therefore causes no harm: there must still be a real risk of the unlawful act being committed.
- b. The harm must also be imminent, meaning that the remedy sought is not premature;
- c. It can be argued that where there has been acts of trespass to land, and so an injunction to prevent the recurrence of such interference is not quia timet.

Persons unknown

49. In *Ineos Upstream*, the Court considered claims against persons unknown in the context restraining protestors. The following points are to be noted, namely

- (1) It is possible to have a quia timet injunction against protestors who have not committed a trespass against persons unknown;
- (2) Approved wording includes persons entering or remaining on the relevant land without the consent of the owner;
- (3) It is not necessary to add a person as a party in the event that someone enters land where there is an injunction against persons unknown;
- (4) It has been held that when that person did the thing forbidden by that order, that person became a party to the proceedings and committed a breach of the order.

50. That raises the question as to what occurs where a named person against whom there is no order carries out the thing forbidden by the order. That person does not become a party to the proceedings because he or she is already a party. It seems to me that in those circumstances, there are the following difficulties a person who is named as a defendant (but against whom an injunction is not granted) is not clearly apt to be characterised as a person unknown. It is artificial in respect of such a person to say that such a person became a party to the proceedings where he or she did the thing forbidden by the order. It may be that the sensible conclusion is to leave it as such and for the question only to be grappled with at an enforcement stage.

The issues

51. In the paragraphs which follow, I shall consider

- (1) Whether it is more likely than not that relief in respect of trespass will be granted at trial;
- (2) Whether damages would be an adequate remedy;
- (3) Where the balance of convenience lies;
- (4) The need for an injunction against persons unknown.

Likelihood of relief

52. As regards trespass to land, I have concluded that as regards several of the named Defendants that there is sufficient evidence of trespass in respect of the Defendants identified in the photographs as being on C's land. I refer to my summary of the photographs above where D1, D2, D4, D7, D11 and D14 are identified. I infer that it

is more likely than not based on that and the evidence that they have been trespassing on the Claimants' land. I have discussed this in detail and for the reasons already set out, I have come to that conclusion. In the circumstances, I conclude that there is a real and imminent risk that they will unless restrained trespass on the Claimants' land.

53. I also find in respect of persons unknown that there is a real and imminent risk that they will trespass on the Claimants' land. The photographs of people with their faces obscured appear to be trespassing on the Claimants' land. There is at least a prima facie inference that their faces are obscured in order to make it difficult to detect their identity. This then justifies consideration of an injunction against persons unknown in the terms identified in the order made on the earlier return day against persons unknown.
54. I have come to the view that whilst the Court might at trial consider put into the balance freedoms of expression and of assembly (Articles 10 and 11 of the European Convention), if the Court is satisfied that there have been acts of trespass by Defendants on the land of the Claimants and that there is no defence to those acts of trespass and/or that there is a real and imminent risk of further acts of trespass, then it is more likely than not that a permanent injunction will be granted. As noted above, this is private land rather than land owned by a public authority. It is necessary also to bear in mind how narrow is the defence of necessity to trespass as described above. At least at this stage, the Court is able to conclude that even the fact that at trial it might be established that the protesting is against illegal hunting does not prevent the Claimants from establishing the threshold referred to in the first sentence of this paragraph. However, the spectre of illegality is a matter which I shall take into account in connection below in assessing the balance of convenience.
55. There is substantial evidence to the effect that the Hunt was granted rights to hunt on third party land. It is not suggested at least at this stage that the degree of control which the Claimants had in respect of the third-party land was such as to entitle them to sue in trespass. Further, there is no injunction sought by the landowners of the third-party land. It is possible to use this evidence in order to seek to infer that there is a risk of trespass on the Claimants' land. However, at this interim stage and without a trial of the issues, I am not prepared to infer that allegations of trespass on third-party land are sufficient to prove by themselves that it is more likely than not that there is a real and imminent risk of trespass on the Claimants' land. Further, I do not at this stage draw that inference simply from the fact that persons may have trespassed on third party land in the company of named Defendants who are alleged to have trespassed on the Claimants' land. For the avoidance of doubt, I do not in any way exclude the possibility that in the round such evidence might suffice at trial for that purpose.

Adequacy of damages

56. Damages are not an adequate remedy. The primary reason is that the Claimants should be entitled to protect their property right: they do not wish to licence the land and obtain a licence fee for it. On the contrary, they wish to use it themselves, and their activities involve receiving an income from the use of the land by the Hunt. It would be difficult to assess what damages, if any, arose from the trespass. In any event, if there is no damage by the trespass, then damages would be only nominal and that would support the need to have an injunction for reason stated by Balcombe LJ in *Patel v W.H.Smith (Eziot) Limited* above.

57. It is also the case that damages are not an adequate remedy for the protestors. Their inability to go on to the land in order to protest is not something which has a monetary value.

58. It is therefore necessary to consider the balance of convenience.

Balance of convenience

59. The Claimants wish to prevent trespassers going on to their land. In submissions for the named Defendants, Mr Underwood QC stated that it sounded “Victorian” to wish to protect an interest in land and therefore in some way outdated. It is said that now the protection of such an interest is subject to a balancing act concerning that interest and freedoms under the European Convention on Human Rights (“the Convention”). Whilst it is true that there is a balancing act, there are various points to take into consideration. First, as noted in paragraph 41 above, it is common ground in this case that it is necessary to establish the higher threshold, higher than *American Cyanamid*, taking into account the Human Rights Act 1998. Secondly, it remains the case at common law that it is an important right to be able to protect one’s land from encroachment. Thirdly, whilst the rights under the Convention have to be taken into account, those rights themselves must be balanced. Thus, any Article 10 (freedom of expression) or Article 11 (freedom of assembly), rights must be balanced against a human right based on Article 1 of the First Protocol to the Convention that every person is entitled to the peaceful enjoyment of his possessions. This balancing act forms a part of the balance of convenience.

60. The Defendants rely upon the prospect that at trial the activities of the Claimants will turn out to be illegal and contrary to the Hunting Act 2004. They say that even if it is not a defence to trespass that the object of the protest is illegal hunting, the illegality or the possibility or even probability of illegality goes to the balance of convenience. They therefore say that this should weigh heavily, particularly in a court of equity, that it will or might by the injunction be facilitating the continuation of illegal hunting and what they contend as cruelty to foxes. It is also said that the Court must be wary about ordering an injunction which might inhibit demonstration not because it could not take place within the order (e.g. confined to the use of public rights of way), but because demonstrators may be concerned about the risk of contempt proceedings.

This is said to have happened on about 20 October 2018 following the interim injunction when according to evidence the Hunt lost control and spilled out into village with consequent risks to the public.

61. At this stage, the Court has before it persuasive arguments to the effect that there has been illegal activity contrary to the Hunting Act 2004. In the absence of injunctive relief, it is said that the Claimants can continue their activities and monitor the behaviour of the Hunt.
62. I have had regard to these considerations. However, I have done so in the context of the above law of trespass to which I have referred above and the continuing right at common law to be able to protect one's land from encroachment subject to taking into account the competing rights under the Convention. Even in the face of persuasive arguments about illegality, which remain to be explored further at trial, I find that the property rights and the entitlement of an owner to protect them against the risk of encroachment on the land weigh heavily at this stage.
63. There is a further feature which seems to me to be important. It is submitted on behalf of the Claimants that there are dangers to human life and to animal life by the protesting. In particular, they point to what happens in the event that the attempts to disrupt the Hunt leads to hounds and horses getting out of control. Similarly, they point to the flashpoints between hunters and demonstrators which could escalate to people becoming injured. There are a number of reasons for caution about this submission. First, there is a concern that such touching or assaults as have taken place appear to be from the Claimants' side against Defendants rather than the other way round. Second, the concern about harm to the animals might be overstated on the basis of the evidence before the Court. Thirdly, some of the concern might be based on evidence of harassment which might be overstated or wrong based on the response evidence in particular of D1 and D2, as to which a final form judgment cannot be found at this stage. For the purpose of this judgment, I have made assumptions in favour of the Defendants at paragraphs 34 and 39-40 above.
64. Despite the foregoing reasons for caution, I have come to the view that the evidence as a whole does lead to a concern that without protection against trespass to land, there is reason to be concerned about public order disturbances and of the possibility of injury to people as well as injury or damage to or caused by animals becoming out of control. There is substantial evidence about hunters and demonstrators facing one another, the former trying to police the land against trespass and the latter seeking to further their opposition to what they regard as illegal hunting and to protect the animals and in particular the foxes. I cannot form a view at this stage as to the extent to which there is active cooperation between the unknown persons (who rally together through social media and many of whom attend with their faces covered as if to avoid detection) and those named Defendants who do not cover their faces. However, at this stage, the evidence shows that the named and unnamed Defendants appear often to

move together in the direction of the hunters and their animals. As the demonstrators and hunters confront one another, there is an apprehension that this may escalate into injury to persons and damage to property.

65. In my judgment, a limited injunction would not only protect property rights pending trial but would lead to a reduction in risks of public order disturbances and the risk of injury or damage. It is important to note that at this stage, there is no injunction sought against harassment. The injunctions which I am considering in this part of the judgment are only in the context of trespass to land and not to animals or goods. I have come to the view that an injunction restraining trespass to the Claimants' land would contain or reduce the risk of injury and damage.
66. In the end, balancing all of these matters, I have come to the view that the balance of convenience is that there is greater harm which will might be done by not ordering an injunction than by an ordering an injunction. This is especially due to the importance to be attached to the Claimants' property rights, even bearing in mind the Convention rights of freedoms of speech and assembly. I have taken into consideration especially the concerns about illegal conduct, the conviction under the Hunting Act 2004 and the evidence of assaults to D1 and D2 in particular. I have taken into account the competing evidence and submissions relating to the balance of convenience. In the end, in my judgment, taking into account all of these matters, the balance of convenience weighs heavily in favour of the Claimants.
67. In view of the competing freedoms, I wish to take steps to limit the ambit and time of the injunction as far as reasonably possible. At this stage, I have not made inferences of trespass to the Claimants' land solely arising out of trespasses to third party land. I shall also for reasons set out below at this stage not make any further injunction restraining trespass to animals and goods.
68. Further, in order to restrict the time of an interim injunction, I made enquiries about a speedy trial which could come on at earliest in about February or March 2019. Both parties are amenable in principle to a speedy trial. This too affects the balance of convenience in that to the extent that an injunction might affect human rights under Articles 10 and 11 or facilitate the carrying on of what might to turn out to be illegal activity, the duration of such interim protection would be reduced by a speedy trial. I have also considered whether the availability of an early trial might be said to reduce the need for an injunction on the basis that the period without an injunction might be confined, but I am of the view that the matters in favour of an injunction even during a relatively short period outweigh the injustice of not granting an injunction.
69. If I had taken the view that the balance of convenience was evenly balanced, I should then under American Cyanamid principles have had to consider what order would best preserve the status quo. I accept Mr Healey's submission on behalf of the

represented Defendants that this does not entitle the Defendants in this case to contend that there have been demonstrations for some time and encroachment on the land, and thus that the status quo gives rise to a factor against imposing an injunction. This is not a case where anybody contends that there are trespassers on the land: it is one where from the allegation is that people come on to the Claimants' land from time to time without the Claimants' consent. In these circumstances, maintenance of status quo is not a consideration: it has been suggested that the status quo is to preserve the absence of trespass to the land, but that seems to me to be contrived. In the circumstances, I conclude that (a) the balance of convenience is not equal but is heavily weighted in favour of granting an injunction, and (b) the status quo is not engaged in any event.

Trespass to goods and animals

70. I now consider the possibility of an injunction to prevent trespass to goods and animals. There is some photographic and witness evidence of demonstrators touching the animals. There are photographs of D2 in particular doing so with a hound. However, some of the witness evidence is hotly challenged. In particular, D1 provided his own apparently convincing account as to how he did not hit a horse.

71. There are various reasons why I am not satisfied that this injunction is required at this stage, namely

- (1) In my judgment, at this stage when temporary protection is required at this stage, and in a case like this where sensitivities, it is "just and convenient" (section 37(1) of the Senior Court Act 1981) for the Court to restrict relief over and above trespass to land only insofar as is necessary at this stage.
- (2) Insofar as the touching would take place on the Claimants' land, this is prevented by the injunction about trespass to the Claimants' land.
- (3) The logic of the injunction thus seems to be to protect the Claimants' animals and goods on third party land, yet despite considerable photographic evidence about alleged trespass on third party land, there is no request for an injunction by a third-party landowner. This seems to be an attempt to obtain an injunction to prevent indirectly such trespass, but absent an injunction being sought by such third party, the Court ought to be cautious about granting an injunction of this kind.
- (4) It would also have the effect of providing protection in the event that the animals were in the public domain, for example out of control in a village. Such an injunction could cause problems. If animals are permitted to roam in the public domain in this way, members of the public ought to be able to touch them (without harming them) if they are coming into their own space.
- (5) There could also be problems whether in third-party land or in the public domain if owners of the animals permitted the animals to roam around in the presence of the demonstrators whereby the demonstrators would have to avoid the animals so that they did not become in contempt. Unlike in the context of an injunction in the nature of trespass to land, it would be difficult for such an injunction to be properly supervised.

72. I note that no interim injunction has been ordered as regards trespass to animals and chattels thus far. I do not exclude such an injunction at the end of a trial, where there will also be consideration of harassment injunctions. However, at this stage, bearing in mind the limited evidence in this regard and the considerations above, I doubt whether a real and imminent risk of such trespass has been shown. In any event, I am of the view bearing in mind the considerations in the preceding paragraphs that the balance of convenience is that the harm that would be caused by having an injunction in the period to trial is greater than the harm of not having an injunction (and bearing in mind the injunction which is being ordered in respect of trespass to the Claimants' land). For these reasons, I reject the application for an additional injunction in respect of trespass to animals and goods.

Effect of injunction against persons unknown

73. There has been argument as to the effect of an injunction against trespass to land against persons unknown. The Claimants contended that just as a non-named defendant can become liable as a person unknown, so too a named defendant against whom there has been no order can likewise become liable as a person unknown. The represented Defendants contended that a person unknown cannot by definition include a person who is known and indeed identified as a defendant in the action. No authority was provided which casts a light on this issue, but it is not necessary to rule about this point of law, and I shall not do so. It suffices at this stage that a named Defendant against whom there is no specific injunction at this stage would find himself or herself at lowest exposed to the risk of an application for the extension of the current interim injunctions to him or her in the event of evidence of trespass on the Claimants' land by such Defendants prior to the trial.

Conclusions

74. In the circumstances, there will be injunctions ordered against D1, D2, D4, D6, D7, D11 and D14 and Unknown Persons in respect of trespass to the Claimants' land. I have referred at paragraph 29 above to suitable plans to be attached to any injunction identifying the land in question including the rights of way. I reject the application at this stage in respect of trespass to animals and chattels not covered by the injunction about trespass to land.

75. The injunctions are until trial or further order in the meantime. I shall make directions for a speedy trial in order for this matter to restrict the time period of the injunctions and to bring these matters to a final resolution at the earliest opportunity. I shall hear the parties to the extent that consequential directions are not agreed.