Neutral Citation Number: [2019] EWHC 1560 (QB)

Case No: F90BM116

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/06/2019

Before :

MR JUSTICE WARBY

- -

Between :

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

- -
- -

Jonathan Manning (instructed by **Birmingham City Council**) for the **Claimant**
John Randall QC and James Dixon (instructed by **Safaaz Solicitors**) for the **First to Third Defendants**

Hearing date: 10 June 2019

- -

Approved Judgment

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

....

CLIVE SHELDON QC

MR JUSTICE WARBY:

1. This case is about a protest which has been carried on outside a primary school, Anderton Park School (the "School"), against aspects of the teaching at the School. The case involves a conflict between a number of important civil rights, some of them fundamental human rights. The case will have to go to trial. This judgment follows an interim, pre-trial hearing on Monday 10 June 2019. At that hearing I gave directions for the case to be tried before the end of July. I then heard an application by the first to third defendants, for the discharge of injunctions that had been granted at a hearing without notice on 31 May 2019, and an application by the claimant to continue those injunctions until after judgment at the trial.

2. At the end of the hearing, I announced my decision. I granted the defendants' application for discharge of the existing injunctions, with costs, on the grounds of failures to comply with the duty of full and frank disclosure owed by those who seek injunctions without giving notice to other parties. But I upheld the claimant's application, and granted fresh interim injunctions, so that protection remains in place pending trial, with costs. I did so on the basis that the claimant was likely to succeed at trial in showing that restraint on the way the protests were being conducted was justified. I said that my reasons would follow. These are those reasons.

The factual background: outline

3. The protest involves parents of pupils at the school, relatives of theirs, and other individuals opposed to some of the ways the school is teaching its pupils. It began on or about 18 March 2019, and has been going on for a number of weeks, attracting a degree of publicity. The focus of the protest has been the teaching of matters relating to sexual behaviour, sexuality, and gender. The named defendants and, it would appear, a significant proportion of the protestors are of the Muslim faith, advocating what some have described as the "conservative values" of their community.

4. At the end of May, Birmingham City Council applied to Court for an injunction to restrain aspects of this protest. There were four named defendants. The first three were individuals, Shakeel Afsar, Rosina Afsar and Amir Ahmed. The fourth defendant was "Persons Unknown", a category designed to cover persons interested in protesting at or near the school. The application was prompted by what the Council saw as an escalation in the protests, particularly in the last week of the first half of term. It was made without notice to any of the defendants. It was heard on the last day of the half-term break, Friday 31 May 2019, in the Interim Applications Court in London, by Moulder J, DBE. The Judge granted orders against all of the defendants.

5. In summary, the injunctions against the named defendants contain (1) an exclusion zone order, prohibiting entry into an area around the School, (2) a prohibition on conduct which harasses, alarms or causes distress to others, (3) a ban on approaching staff of the school or witnesses in the case, (4) and (5) prohibitions on the use of social media to offend or abuse teachers, and (6) a ban on otherwise engaging in or encouraging others to protest within the exclusion zone. The precise terms of the injunction granted against the second defendant are set out in Appendix A to this judgment. It contains exceptions reflecting the status of the second defendant as the mother of two children at the School. The orders against the first defendant (brother of the second defendant) and the third defendant (an organiser of the protests) were in the same terms, but without

those exceptions. They did contain the exception allowing access to the mosque. These Orders were made pursuant to the Local Government Act 1972 (s 222), and the Anti-Social Behaviour, Crime and Policing Act 2014 ("the 2014 Act") (s 7).

6. The terms of the injunction granted against Persons Unknown are set out in Appendix B. They reflect paragraphs 5 and 6 of the orders against the named defendants, with the addition of a prohibition on "engaging" in protest. These orders were made pursuant to the Local Government Act 1972 (s 222), Highways Act 1980 (s 130), and the Localism Act 2011 (s 1). This injunction order had a Schedule containing provisions as to service. Service was to be effected by placing signs informing people of the Order and the area in which it has effect "in prominent locations along the boundary" of the exclusion zone, at the School entrances, in a newspaper, on the Council's website, Facebook page, Twitter account and other social media.

7. The injunctions were served on the named defendants on Monday 3 June 2019. I have no evidence of this, but I take it that the signs and other notices in respect of the Persons Unknown injunction were put up, posted, published or circulated the same day, 3 June. The following day, Tuesday 4 June 2019, the Council applied for and obtained an extension of the exclusion zone, at a hearing before Moulder J which was again conducted without notice to any of the defendants.

8. All the orders were expressed to "continue until the hearing of the claim unless previously varied or discharged by further Order of the Court". But each order provided that it should "in any event, be reconsidered at a further hearing at 10.30 am on 10 June 2019 at the Birmingham Civil & Family Justice Centre, Priory Law Courts, 33 Bull Street, Birmingham B4 6DS."

9. At that hearing, before me, Mr Manning on behalf of the Council applied to continue the injunction until trial. Mr Randall QC appeared with Mr Dixon for the first three defendants, to resist that application and to seek the discharge of the order granted by Moulder J, on the grounds of material non-disclosure. These applications gave rise to three main issues for decision: (1) Should the existing order be discharged? (2) Regardless of the answer to that question, what if any injunction should be granted pending the trial of the claim? (3) What directions are required in order to ensure that the case is resolved swiftly, expeditiously and fairly?

10. A fourth issue arose for my consideration: what if any injunction should be put in place for the future against Persons Unknown? I was bound to address that issue as a matter of principle, despite the fact that nobody appeared at the hearing to identify themselves as the, or a, fourth defendant, or a representative of any Person Unknown.

The legal context

Substantive law

11. Section 1 of the 2014 Act allows the Court to grant a final injunction if (a) the court is satisfied, on the balance of probabilities, that the defendant has engaged or threatens to engage in anti-social behaviour and (b) considers it just and convenient to grant the injunction for the purpose of preventing the defendant from engaging in anti-social behaviour. Section 7 allows the court to grant an interim injunction pending a final hearing if it "thinks it just to do so". This power is available on a without-notice

application (s.7(1), (3)-(4)). Anti-social behaviour is defined by s 2(1), to encompass conduct “that has caused, or is likely to cause, harassment, alarm or distress to any person”, or is “capable of causing nuisance or annoyance to a person in relation to that person’s occupation of residential premises.”

12. These provisions, like those of any statute, must be interpreted and applied in conformity with the European Convention on Human Rights (‘the Convention) and other statutory provisions. The rights to protest, to associate with others for that purpose, and to express one’s religious views, are all aspects of the fundamental human rights protected by the Convention and the Human Rights Act 1998 (“HRA”). They are rights safeguarded by Articles 9, 10 and 11 of the Convention. Article 2 of the First Protocol (“A2P1”) is also relevant, or at least arguably so, insofar as it requires the state to respect the right of parents to ensure that education and teaching is in conformity with their own religious and philosophical convictions. There would seem to be an overlap here with the right to respect for one’s private and family life, protected by Article 8.

13. On the other side of the argument lie the right to education, the right to impart and receive information and opinions with which others may disagree, and the right to respect for one’s private life: articles 8 and 10 of the Convention, and A2P1. The court must act compatibly with these rights: s 6 HRA. Also relevant are the civil rights of citizens to be free from threatening behaviour, unwarranted harassment, or conduct that unjustifiably causes alarm or distress. These are protected by Article 8 and by domestic law, including the statutory provisions I have cited above.

14. These competing rights are engaged in the context of a dispute over issues of social, political, and educational policy. But I repeat what I said at the hearing: it is no part of my role, at this stage of the case, to decide any question about the rights and wrongs of the views expressed by the protestors. Not only is this not the trial, it does not seem to me to be an appropriate legal vehicle for the resolution of issues of that kind. It might be open to the protestors to seek judicial review of the educational policy that has been adopted and applied here, but it is not easy to see how the merits of that policy can figure large in this case.

15. Neither side has in fact suggested that my decision should turn on the merits of the debate that is taking place. Whatever may be the Council’s opinion as to the propriety of the protestors’ views, it is no part of the Council’s case at this hearing that the Court should prevent the defendants from protesting because their views are unacceptable or wrong. Rather the contrary, Mr Manning has been at pains to emphasise that the restraints sought and imposed are not bans on the protests as such; they are limitations on where and how the protest can be carried on.

16. For their part, the named defendants do maintain that the School is behaving wrongfully, as they and their Counsel have made clear. But it is not suggested that I can or should reach a decision on those questions. This application is therefore not about the content of the expression under discussion. The injunctions were not granted to prevent the expression of particular views, but to protect against anti-social behaviour, harassment, misuse of the highways, and other interests which have to do with where and how the protestors are expressing their opinions.

Standing, jurisdiction and procedure

17. It is not in dispute that the Council has standing to seek injunctions of the kind that were sought and granted here. Nor is there any dispute that the named defendants are amenable to the Court's jurisdiction under the statutory provisions relied on.

18. The pursuit of remedies against "Persons Unknown" has been a well-trodden path, ever since *Bloomsbury Publishing Group v News Group Newspapers Ltd* [2003] EWHC 1205 (Ch) [2003] 1 WLR 1633. There is no doubt that claims of this kind are legitimate in principle, and orders have often been made against Persons Unknown, in the media context, and in the context of trespasses and protests. But the limits of the jurisdiction and the practice in such cases have come under fresh scrutiny in two recent and important judgments: that of the Supreme Court in *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] UKSC 6 [2019] 1 WLR 1471, and the subsequent decision of the Court of Appeal in *Boyd v Ineos Upstream Ltd* [2019] EWCA Civ 515. *Cameron* related to a claim against an unknown driver, alleged to be responsible for a traffic accident causing injury. *Ineos* was closer on its facts to the present case, as it related to injunctions to restrict anti-fracking protests, and thus engaged s 12 HRA.

19. The relevant procedural law is clear, and well-established, and is, or should be, well known. There has been little dispute about the applicable principles. Key points are:-

(1) Any application to the Court should ordinarily be made by application notice, filed and served on the respondent, with the supporting evidence, not less than 3 days before the hearing at which the Court is to decide whether to grant the relief sought: CPR 23.3, 23.4, 23.7(1) & (3) and PD23A para 4.1.

(2) "An application may be made without serving a copy of the application notice if this is permitted by (a) a rule; (b) a practice direction; or (c) a court order": CPR 23.4(2). "Where an application notice should be served but there is not sufficient time to do so, informal notice of the application should be given unless the circumstances of the application require secrecy": PD23A para 4.2.

(3) All of the ordinary requirements for notice and service apply to applications for interim injunctions: see Part 25 and PD25A paras 2.1 - 2.4. The regime is similar: "The Court may grant an interim remedy on an application made without notice if it appears to the Court that there are good reasons for not giving notice" (CPR 25.3(1)), but "except in cases where secrecy is essential, the applicant should take steps to notify the respondent informally of the application" (PD25A para 4.3(3)).

(4) If the applicant does make an application for an interim injunction without giving notice:-

a) "... the evidence in support of the application must state the reasons why notice has not been given": CPR 25.3(3);

b) The applicant comes under a duty to make full and frank disclosure to the Court of all matters of fact and law that are material to the application: Civil Procedure 2019 n 25.3.5. This is a broader obligation than the one specified in PD25A para 3.3 ("the evidence must set out … all material facts of which the Court should be made aware").

c) The applicant (including its Counsel and solicitors) has a duty to make a note of the hearing, including but not limited to a note of the Court's judgment, and to serve this on the respondent without delay: Civil Procedure 2019, n 25.3.10.

(5) "To ensure that court time is used efficiently there must be adequate preparation prior to the hearing. This includes the preparation and exchange of skeleton arguments, the compilation of bundles of documents …", and the preparation of lists of authorities and bundles of authorities. Skeleton arguments for substantial hearings should be prepared, filed and served not later than 10am the day before the hearing: Queen's Bench Guide 2018, para 12.3 (The Guide is "equally applicable to the work of the District Registries…" para 1.1.4; it should be borne in mind that there are some differences, but none that are relevant here).

(6) Any order for an injunction must:

a) unless the Court orders otherwise, contain undertakings to pay any damages the respondent may sustain which the Court considers the applicant should pay and, if the application was made without notice, to serve the respondent with the hearing papers; it must also contain a return date: PD25A para 5.1(1)-(3);

b) "… set out clearly what the respondent must do or not do": PD25A para 5.5.

(7) "In an interim injunction case, if the duty of full and fair disclosure is not observed, the court may discharge the injunction": Civil Procedure 2019, n 25.3.6. The court will then consider whether to re-grant the order: Civil Procedure 2019, n 25.3.8.

20. It is worth expanding a little on some of these points, starting with the question of applications without notice. A series of authorities has emphasised how exceptional it is for the Court to grant an injunction or other order against an absent party, who has not had notice of the application and a chance to dispute it. The principle that the Court should hear both sides of the argument is an "elementary" rule of justice and "[a]s a matter of principle no order should be made in civil or family proceedings without notice to the other side unless there is very good reason for departing from the general rule that notice should be given": *Moat Housing Group South Ltd v Harris* [2005] EWCA Civ 287 [2006] QB 606 [63], [71-72] (a case of alleged anti-social behaviour by a tenant). The law is particularly strict when it comes to applications for relief which, if granted, would interfere with the Convention right to freedom of expression. Section 12 of the Human Rights Act 1998 applies in all such cases: see s 12(1). Section 12(2) provides that in such a case

> "If the person against whom the application for relief is made ("the respondent") is neither present nor represented, no such relief is to be granted unless the court is satisfied-
>
> (a) that the applicant has taken all practicable steps to notify the respondent; or
>
> (b) that there are compelling reasons why the respondent should not be notified."

This is a jurisdictional threshold; unless the requirements of s 12(2)(a) or (b) are satisfied the Court has no power to grant an injunction. The Court has repeatedly deprecated the making of applications without notice in cases which engage s 12 HRA, without adhering to the requirements of the applicable rules and practice: see, for example, *ND v KP* [2011] EWHC 457 (Fam); *O'Farrell v O'Farrell* [2012] EWHC 123 (QB) [66], *Bristol City Council v News Group Newspapers Ltd* [2012] EWHC 3748 (Fam) [2013] 1 FLR 1205 [23-24] (Baker J).

21. The principles relating to the duty of full and frank disclosure of facts are summarised in a judgment of mine, *YXB v TNO* [2015] EWHC 826 (QB), in terms with which neither Counsel has taken issue:

> "19 …
>
> ii) The duty requires the applicant to make a full and fair disclosure of those facts which it is material for the court to know: *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350, 1356 (1) and (2) (Ralph Gibson LJ). Put another way, disclosure should be made of "any matter, which, if the other party were represented, that party would wish the court to be aware of": *ABCI v Banque Franco-Tunisienne* [1996] 1 Lloyd's Rep 485, 489 (Waller J).
>
> iii) Non-disclosure of material facts on an application made without notice may lead to the setting aside of the order obtained, without examination of the merits. It is important to uphold the requirement of full and frank disclosure.
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> iv) But the court has a discretion to set aside or to continue the order. Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues that were to be decided. The answer to the question whether the non-disclosure was innocent is an important, though not decisive, consideration. See *Brink's Mat* at pp1357 (6) and (7) and 1358 (Balcombe LJ).
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> 20. Further points to be derived from *Brink's Mat* are:-
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> i) The duty applies to facts known to the applicant and additional facts which he would have known if he had made proper inquiries before the application (1356H, Ralph Gibson LJ).
>
> ii) If material non-disclosure is established the court will be "astute to ensure" that a claimant who has obtained an injunction without notice and without full disclosure

"is deprived of any advantage he may have gained" (1357C, Ralph Gibson LJ).

iii) The rule in favour of discharge also operates as a deterrent to ensure that those who make applications without notice realise the existence and potential consequences of non-disclosure (1358D-E, Balcombe LJ).

iv) The discretion to continue the injunction, or to grant a fresh one in its place, is necessary if the rule is not "to become an instrument of injustice"; it is to be exercised "sparingly", but there is no set limit on the circumstances in which it can be exercised (1358E-F, Balcombe LJ)."

22. These are the principles relating to disclosure of facts. As to the law, the authorities are clear: there is a "high duty to make full, fair and accurate disclosure … and to draw the court's attention to significant ... legal and procedural aspects of the case": *Memory Corp v Sidhu (No 2)* [2001] 1 WLR 1443 (CA), 1459-60. The duty is owed by the lawyers also. "It is the particular duty of the advocate to see that … at the hearing the court's attention is drawn by him to … the applicable law and to the formalities and procedure to be observed": *Memory Corp*, ibid.

23. There is one important statutory provision that requires mention. On applications for injunctions which would interfere with freedom of expression before trial, HRA s 12(3) prescribes a unique threshold test: "no such relief is to be granted unless the court is satisfied that the applicant is likely to show that publication should not be allowed". I set out what this means in *Linklaters LLP v Mellish* [2019] EWHC 177 (QB) [29]:

> "This requirement looks forward to the time of a trial, and to what would happen then. "Likely" in this context normally means "more likely than not", though a lesser prospect of success may suffice where the Court needs a short time to consider evidence/argument, or where the adverse consequences of publication might be extremely serious: *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253 [16]-[23] (Lord Nicholls); *ABC v Telegraph Media Group Ltd* [2018] EWCA Civ 2329 [2019] EMLR 5 [16]. "

Unsurprisingly, it has been held that the duty of full and frank disclosure requires a party, that applies without notice for an interim injunction to restrain freedom of expression, to draw the Court's attention not only to s 12(2) HRA, but also to the requirements of s 12(3), identifying the statutory threshold for the grant of any such relief: see *Doncaster Metropolitan Borough Council v BBC* [2010] EWHC 53 (QB) [29], [34-35] (Tugendhat J), *Dar al Arkan Real Estate Development Co v Al Refai* [2012] EWHC 3539 (Comm) [136-140] (Andrew Smith J).

24. There is no rule as to the means by which this duty is to be performed. But it is well recognised that the applicant's skeleton argument is a convenient vehicle for the discharge of this duty. It is common practice for the skeleton argument to contain a

distinct section headed (for instance) "What the respondent might say". Sometimes the evidence also deals separately with the duty of full and frank disclosure. This helps concentrate the minds of the applicant, the applicant's legal team, and the Judge on the facts and arguments that would or might be put forward by the absent respondent.

25. Since 2011, there has been a helpful and authoritative summary of all the key principles regarding applications of the present kind, collected in a single place for easy reference. Applications for interim injunctions that impinge on the right to freedom of expression are subject to the *Practice Guidance: Interim Non-Disclosure Orders* issued by the Master of the Rolls following the "super-injunction" furore of 2011, and reported at [2012] 1 W.L.R. 1003. The scope and purposes of the Practice Guidance are explained in its opening paragraph:

> "1. This Guidance sets out recommended practice regarding any application for interim injunctive relief in civil proceedings to restrain the publication of information: an interim non-disclosure order. It is issued as guidance (not as a Practice Direction) by the Master of the Rolls, as Head of Civil Justice. Such applications may be founded on rights guaranteed by the European Convention on Human Rights (the Convention), or on grounds of privacy or confidentiality. They may also be made in respect of a threatened contempt of court, a threatened libel or malicious falsehood, harassment, or a *Norwich Pharmacal* application in support of such actions. All such orders will seek to restrict the exercise of the Article 10 Convention right of freedom of expression through prohibiting the disclosure of information."

26. The Guidance goes on to provide a convenient summary of the applicable principles, of which the following extracts are pertinent to the present case:-

> "**Statutory provisions**
>
> 4. Applications which seek to restrain publication of information engage Article 10 of the Convention and s12 of the Human Rights Act 1998 (HRA). In some, but not all, cases they will also engage Article 8 of the Convention. Articles 8 and 10 of the Convention have equal status and, when both have to be considered, neither has automatic precedence over the other. The court's approach is set out in *Re S (a child)* [2004] UKHL 47, [2005] 1 AC 593 at [17].
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> 5. HRA s12 applies whenever the court is considering whether to grant relief which might affect the exercise of the Article 10 Convention right. HRA s12(2) requires advance notice to be given to persons against whom the application is made, except in the exceptional circumstances set out in HRA s12(2)(a) and (b).
>
> …

Civil Procedure Rules

8. CPR 25.3 and CPR PD25A (1) – (5) apply to all interim injunction applications, including those for interim non-disclosure orders.

….

Notice of Application

19. HRA s12(2) applies in respect of both (a) respondents to the proceedings and (b) any non-parties who are to be served with or otherwise notified of the order, because they have an existing interest in the information which is to be protected by an injunction (*X & Y v Persons Unknown* [2007] EMLR 290 at [10] – [12]). Both respondents and any non-parties to be served with the order are therefore entitled to advance notice of the application hearing and should be served with a copy of the Application Notice and any supporting documentation before that hearing.

20. Applicants will need to satisfy the court that all reasonable and practical steps have been taken to provide advance notice of the application. At the hearing they should inform the court of any non-party which they intend to notify of the order as the court is required to ensure that the requirements of HRA s12(2) are fulfilled in respect of each of them. A schedule to any interim non-disclosure order granted should provide details of all such non-parties.

21. Failure to provide advance notice can only be justified, on clear and cogent evidence, by compelling reasons. Examples which may amount to compelling reasons, depending on the facts of the case, are: that there is a real prospect that were a respondent or non-party to be notified they would take steps to defeat the order's purpose (*RST v UVW* [2009] EWHC 24 at [7] and [13]), for instance, where there is convincing evidence that the respondent is seeking to blackmail the applicant (*ASG v GSA* [2009] EWCA Civ 1574 at [3]; *DFT* at [7]).

…

Hearing – Scrutiny of Application

29. The onus is on the applicant to satisfy the court that an interim non-disclosure order is justified. Where the applicant seeks derogations from open justice reference should be made to paragraphs 8 – 13 of this Guidance.

30. Particular care should be taken in every application for an interim non-disclosure order, and especially where an

application is made without-notice, by applicants to comply with the high duty to make full, fair and accurate disclosure of all material information to the court and to draw the court's attention to significant factual, legal and procedural aspects of the case. The applicant's advocate, so far as it is consistent with the urgency of the application, has a particular duty to see that the correct legal procedures and forms are used; that a written skeleton argument and a properly drafted order are prepared personally by her or him and lodged with the court before the oral hearing; and that, at the hearing, the court's attention is drawn to unusual features of the evidence adduced, to the applicable law and to the formalities and procedure to be observed including how, if at all, the order submitted departs from the model order.

31. Applications, especially those which seek derogations from open justice, must be supported with clear and cogent evidence which demonstrates that without the specific exception, justice could not be done.

32. Each application shall be subject to intense scrutiny. The need for intense scrutiny is particularly acute on without-notice applications …

…

Explanatory Notes

33. It is helpful if applications and orders are accompanied by an Explanatory Note, from which persons served can (a) readily understand the nature of the case, (b) ascertain whether they wish to attend the application hearing, and/or be legally represented at it, or, (c) where the application was heard without-notice, whether they wish to challenge the order.

…

Hearing Notes and Judgments

40. It is of particular importance that a full and accurate note of the hearing is taken of a without-notice hearing: *G & G v Wikimedia* [2010] EMLR 14 at [28] – [32]. It is the duty of counsel and solicitors to ensure that such a note is taken during the hearing, or, if that is not possible, to prepare such a note after the hearing is over. The note should be drafted so that anyone supplied with a copy of it is properly informed of: what documents were put before the court at the hearing; which legal authorities were relied on by the applicant; and what the court was told in the course of the hearing."

27. I have set all this out in some detail because of its importance to this case.

The applications without notice

The factual background

28. The Council's evidence makes clear that over the weeks leading to its application to Moulder J, it perceived a "dramatic" escalation in the scale of the protests. As early as 2 May 2019, the Council served a Community Protection Warning Notice ("CPW") on the first defendant. This is a document, served pursuant to the 2014 Act, asserting that his behaviour was having a detrimental effect, of a persistent or continuing nature, on the quality of life of those in the locality of the School, and was unreasonable. It warned him to stop, failing which the Council would serve a Community Protection Notice (CPN), making continuation of his conduct a criminal offence. He was given 24 hours to desist.

29. On 9 May 2019, a letter went out from the Chair of the School's Governing Body to parents and carers of pupils at the School. It asked those who were participating in the protests to consider the wellbeing of the children as they made final preparations for checks and SATs. On the same day, a Council official phoned the first defendant and left a message, with a view to reasoning with her to bring an end to the disruption. The first defendant did not respond. Protests continued.

30. The Council then gathered evidence of what it considered to be conduct contrary to the CPW, showing the impact on individuals, including pupils, staff members, parents, visitors and governors as well as residents of the locality. Statements dated variously between 10 and 23 May 2019 are in evidence, attesting to the effects of the protests on individuals within these categories. The statements were obtained by providing the terms of the CPW to the School's Deputy Headteacher, Claire Evans, who then collected witness accounts of what was going on, using a form created at the school.

31. The Council also obtained a video recording of a protest on 17 May 2019, at which a speaker, who apparently came from Batley, spoke to a large crowd outside the School. On 19 May, a Sunday, a local group supporting the LGBT community came to the school and began attaching ribbons to the gates, but were pelted with eggs by protestors. On Monday 20 May, the protestors attempted to implement a boycott and blockade of the school. During that week, leaflets were distributed advising parents that there would be a "national" protest outside the school on Friday 24 May at 2:30pm.

32. On 21 May 2019, senior officials at the Council held a meeting with representatives of West Midlands Police to discuss the situation. It was decided that a CPN would no longer be suitable, due to the increased scale and nature of the protests, and the fact that it was directed at a single individual. The Council gave consideration to other means of addressing the perceived problems.

33. Police officers attended on each occasion a protest was organised, or nearly all. Statements were obtained from a number of them. These were all signed and dated 23 May 2019.

34. On 24 May 2019, there was a large protest. The school, forewarned by the leaflets, had decided to close early, at 12:00 noon, in an attempt to avoid the protest. But the protest

was brought forward. A few protestors arrived in the early morning and (according to the Council's evidence) began causing disturbance from around 11:15am. By the afternoon, there were over 300 protestors in attendance, and there was shouting with a megaphone, and chanting as well as the holding up of placards.

The application process

35. Monday 27 May 2019 was a public holiday, and staff were away. But by Tuesday 28 May 2019, the three main witness statements had been prepared in draft: those of the Headteacher, Ms Hewitt-Clarkson, her Deputy Ms Evans, and Mr James, the Council's Acting Corporate Director for Neighbourhoods. These are substantial pieces of work, with large exhibits, which fill a lever arch file. Ms Hewitt-Clarkson signed her statement on the Tuesday. The others were signed on Wednesday 29 May, along with a fourth statement from a Ms Mayne. It was on the Wednesday that papers were lodged with the Court. They consisted of a Claim Form and detailed Particulars of Claim, an application notice, draft orders (of which there were five in all) and the four witness statements I have mentioned. The Council and its lawyers must have been working hard on preparation of the application papers from Monday 27 May onwards.

36. The application notice stated that the application was to be served on all four defendants, but a decision had plainly been made to apply without notice in the first instance. This was made clear in the statements of Mr James and Ms Hewitt-Clarkson, and in a Certificate of Urgency filed with the application papers. The Certificate first explained the urgency:

> "The size of the protests and the behaviour of the protesters significantly worsened from 17 May to the last day before the half term holidays on 24 May … It is important that relief is obtained this week, during the half term holiday and the claimant is seriously concerned for the safety and security of the school, its staff, parents and pupils if the term re-starts with no protection in place".

That, of course, was a justification for applying without the full 3 days' notice required by the rules. It provided no justification for proceeding without any notice at all. The Certificate addressed that point as follows:

> "Further, the application is made without notice on the basis of secrecy pursuant to CPR Part 25 PD 25.4.3(3).
>
> It is averred that if the Defendants were put on notice, they would take action to escalate the protests as they have done in the past when warned of events that would make their protests less effective, e.g. on 24 May when the school decided to close at midday, to avoid a "national" protest scheduled to start at 2.30pm, the Defendants brought forward the start of the protest to 11.15am causing serious nuisance and disruption to classes and to staff, parents and children at midday when they were leaving to go home.

> The Claimant also fears that giving notice of the application would lead to further abuse of staff on social media."

37. Holgate J was sitting in Birmingham, conducting a criminal trial. The case was put to him for consideration. Just before midday on 29 May, through an email from his clerk, the Judge queried whether there was any good reason for proceeding without notice, asking for help by 2pm on the following:

> "… the question whether it would be appropriate for the matter to be dealt with ex parte. Assuming hypothetically, for example, that an injunction were to be granted ex parte, there would have to be a return date on notice after a short interval to allow respondents to make any submissions they wish about the continuation of the injunction. Quite apart from that, given that the papers will be at the court today and it is proposed to have a hearing on Friday is there a good reason for making the application ex parte without notice to the Respondents at this stage bearing in mind perhaps any time which has already elapsed since the grounds for seeking injunction arose."

38. Mr Manning replied that the Council had taken the view that "in the light of the protesters' response to the school announcing it would close early - which was to bring forward the protest - if this application were to be made on notice, there would be a similarly serious response before any protection could be put in place which would coincide with the return to school next week." It had wanted to apply on the Tuesday or the Wednesday, but the papers had taken time to get ready. Mr Manning went on to say that he did not think "we can serve and be in Court by tomorrow or Friday in any event."

39. A number of obvious comments can be made. The protestors' "response" relied on had taken place during the school term. The injunction application was prepared and ready to go by the following Wednesday, during half-term, when the pupils, their parents (and most of the staff) were not attending school. That was the very reason for applying at that time. But the reason for applying during half-term undermined the justification offered for failing to give notice. Beyond this, there was the question of whether the prospect of some escalation, or some additional abuse of teachers, really warranted a secret application to the Court. Finally, the suggestion that the Council could not serve papers for a hearing on Thursday or Friday is incomprehensible. They intended to and were able to serve all the defendants once they got the injunction orders.

40. In the event, it was not possible for Holgate J to take time out of his criminal trial to hear the application, and it was listed for hearing in the Interim Applications Court in London, where Moulder J was sitting as the duty Judge. She heard Mr Manning on Friday 31 May 2019, the last weekday of the half term holidays.

Hearing and judgment

41. The Judge was provided with a paginated bundle containing the claim form, Particulars of Claim and application papers together with a skeleton argument. No criticism has been made of the Council's compliance with these aspects of the procedural requirements. But the justification for proceeding without notice was no better than

before. The skeleton argument again spoke of "fears" that "notifying the Defendants of these proceedings without an Order in place, would further increase the likelihood and severity of an escalation in the behaviour complained of, as occurred on 24th May when the school sought to avoid (rather than prevent) the national protest planned for that day". Reference was made to passages in the statements of Mr James, Ms Hewitt-Clarkson, and Ms Evans. No reference was made to the email exchange with Holgate J, the points he had raised, or to the obvious points that I have made above. The skeleton argument did cite s 12(2) HRA, and addressed the requirement of "compelling reasons", but for reasons to which I shall come I consider that what was said on that score was seriously deficient.

42. The skeleton argument identified the human rights engaged by the application as the Article 8 rights of those affected by the protests, and the article 9, 10 and 11 rights of the protestors. It made no mention of A2P1. The skeleton argument made no mention of s 12(3) HRA, or the threshold of "likely" success at trial which it sets for interim injunctions that interfere with freedom of expression. Indeed, the text of s 12 was set out, using three dots to indicate the omission of sub-sections (3) and (4). The skeleton argument made no reference to the Master of the Rolls' Practice Guidance. Reference was made to the three-part test for justifying an interference with a Convention right (pursuit of a legitimate aim, a rational connection between the aim and the means pursued, and that no less restrictive option could be pursued). But there was no reference to *Re S,* with its requirement of a parallel analysis, and the ultimate balancing test. The skeleton identified the conditions to be satisfied as those prescribed by s 1 of the 2014 Act. The approach the Judge was invited to adopt was to grant relief on the basis that this was "proportionate, just and an appropriate exercise of discretion". The draft Order contained no undertaking in damages. It was not based on the Model Order, to which no reference was made. There was no Explanatory Note.

43. At the end of the hearing, Moulder J gave an extempore judgment explaining her reasons for granting the injunctions in the terms sought. She was persuaded that there were compelling reasons for granting relief without notice (paragraph 26), and that the Court should grant interim injunctions "including under s 1 of the 2014 Act". She referred to the requirements of s 1 and found them to be satisfied, concluding that it was "just and convenient" to grant the interim injunction sought, until a return date (paragraphs [28-30]). The Judge took into account the defendants' rights under Articles 9, 10 and 11 but held that the restrictions pursued a legitimate aim, and were necessary and proportionate.

44. I take all this from the skeleton argument and the Note of Judgment that was eventually provided by the Council, a week after the hearing had taken place. The paragraph numbers I have used are those assigned in that Note. But I can say little else about the hearing before Moulder J, as it remains the case that no other note of what took place at the hearing has ever been provided. All that I have is some statements made in the Council's reply skeleton to which I shall come, responding to complaints of non-disclosure at the hearing.

Service

45. It follows that when the orders were served on 3 June 2019, they were not accompanied by a note of the hearing. Nor were they accompanied by any note of the judgment, or by any Explanatory Note. None of those documents were available to the defendants'

legal team when they were appointed, later that week. Nor did the legal team have any note of what took place before Moulder J on 4 June, in the absence of the defendants, as the Council did not serve any note of that, either.

The 4 June application

46. This was made by formal application notice, with evidence contained in the application notice itself. The evidence explained that the purpose was to "clarify" the order by extending it to cover an area of green space on the opposite side of the road from the school, which the protestors had started to use after service of the original order. Although the order had been served, no notice was given of this application. There was no evidence that attempted to explain or justify applying without notice. No new skeleton argument appears to have been filed. There is, again, no note of the hearing. I do now have a note of the short judgment given by Moulder J. She recognised that in reality the application was to amend rather than clarify, but was satisfied the amendment was appropriate. She applied the reasoning from the previous Friday, concluding that it was "just and convenient" to grant the application. There is no reference to the question of notice. I conclude that there was no attempt by the Council to justify making this application without notice, or even to identify to the Judge the need to justify such a procedure.

The return date application

47. The Council continued to fall short of its procedural obligations, and its duty to help the Court achieve the overriding objective. It was on Thursday 6 June that I was assigned to hear the application on the return date. I had no papers. My clerk was able to obtain soft copies of the amended Orders from Mr Manning during the afternoon of that day, but no other papers were available. A bundle should have been filed by the Council on the Thursday. On the Friday morning, and early afternoon, I was busy with another urgent injunction application. Eventually I received, from the Court, the hearing bundle that had been before Moulder J. That was shortly after 1pm. It had no index. The Council never filed or even prepared an updated hearing bundle for the return date. No hard copies of the orders were provided. The Council filed no evidence as to service of the orders, or the current position on the ground. A skeleton argument for the return date should have been filed by 10:30 on the Friday. None was ever prepared. What actually happened was that, at 2 minutes to 5 on the Friday, after prompting from my clerk, I was sent the original skeleton dated 31 May 2019. I was not provided with the authorities relied on by the claimant.

48. The defendants' legal team, having been instructed late, emailed a skeleton argument to my clerk at 18:50 on Friday night, following shortly afterwards by copies of the authorities relied on by them. The defendants' skeleton argument complained, among other things, of non-disclosure of matters of law and of fact, and of the failure to provide notes of the hearings and judgments. On the Saturday afternoon, I reviewed the parties' skeleton arguments, identified and collated copies of relevant authorities that had not been cited, and arranged for these to be emailed to Counsel. On the Sunday night, at 22:11, the defendants' witness statements were emailed to my clerk and to the Council's legal team. At 23:30 Mr Manning emailed my clerk with the claimant's notes of the judgments of Moulder J, and a supplementary skeleton argument. I was able to read most but not all of this before the hearing, and had to complete my reading over the midday adjournment on Monday 10 June.

Discharge for breach of the duty of full and frank disclosure

49. I have already identified some breaches of this duty, at the hearings of 31 May and 4 June 2019. I shall say a little more about those, and others. Discharge does not follow automatically, and the Court need not demand perfection. But in my judgment the breaches here are serious enough in combination to require discharge. The multiple failures by the Council to comply with its other procedural responsibilities towards the defendants and the Court provide additional reasons for exercising my discretion to discharge both of the orders granted by Moulder J even though, as will already be clear, I am satisfied that the threshold set by s 12(3) HRA is satisfied, and that injunctions should be granted. It may well be that Moulder J would have granted the orders she did, or some similar orders, if the Council had scrupulously complied with all its responsibilities. But that is not the test.

(1) *Application without notice*

50. The Council correctly identified the relevant procedural law; s 12(2) HRA was cited in Mr Manning's skeleton argument. But the evidence and argument advanced on this point fell short. I have already identified the non-disclosure of a material exchange of emails with the Court. It remains to address the way the Council put the case in relation to secrecy.

51. Paragraph 3 of the skeleton argument explained why the Council had "decided to make this application at this time, and to do so on a without notice basis in the first instance, notwithstanding that the protests have been continuing for some weeks". In this way, the argument rolled up what are on analysis three separate points, each requiring separate justification: delay in applying, applying without notice, and applying at all. Later in the skeleton argument it was submitted that "… the urgency of the need for relief and the likely adverse effect of giving notice are compelling reasons for the grant of relief without notice." The "adverse effect" relied on was the "fear" of escalation ([41] above). This was the point made in the evidence, and it is reflected in the Certificate of Urgency, on which I have already commented.

52. The skeleton argument went on to submit that "in deciding whether there is a compelling reason, the court should consider the evidence as a whole and the nature of the proposed restriction on freedom of expression". It was argued that the restrictions proposed did not prohibit protest as such, but only geographical restrictions; that the interim relief would only last for a short period, and that it would "not be a significant curtailment of the Defendants' human rights"; it was said that the protests were intimidatory and obstructive; and, finally:-

> "The harm to the staff, children and parents is severe, and is such that given the urgency of the application and the risks of an escalation in the conduct complained of, there is a compelling need for the court to impose the limited restrictions sought in relation to the street protests."

53. Urgency can only be a compelling reason for applying without notice if there is simply no time at all in which to give notice. Modern methods of communication mean that will rarely, if ever, be the case, and it was not the position here. You do not justify applying in secret by showing that your case has merit, or by saying that the relief

sought is limited in scope and time, and will have only limited impact on the respondents. These are not relevant considerations, let alone compelling reasons for proceeding without notice. The likely effect of giving notice is clearly a relevant consideration, and can be a compelling reason for applying in secret. What Tugendhat J said in *RST v UVW* [2009] EWHC 2448 (QB) [2010] EMLR 13 [7] was: "the facts are such as to give rise to a real prospect that, if notice is given, the defendant may take steps to defeat the purpose of the injunction." The Council cited this passage, but failed to properly to analyse the legal and factual position and to present a full, fair and balanced picture.

54. *RST v UVW* was a case of apparent blackmail. That is a category of case in which application without notice is often made, for good reason. Notice may lead to the carrying out of the blackmail threat. Freezing orders, where the risk is that notice will allow the respondent to spirit away the money to be frozen, provide another example. But the risk relied on here was not in reality that the respondents would take steps to "defeat the purpose of the application". Rather, it was that they would do more of what they had been doing for weeks, only worse. There were several problems with that line of argument. If the application was made on short notice, the respondents would only have a limited time and opportunity to escalate; they would probably be preoccupied by dealing with the litigation. Most importantly, though, the entire week was half-term. Notice could have been given on the Tuesday, Wednesday or Thursday for a hearing on the Friday. It is hard to see a risk of any, let alone "severe", harm to parents and children. No pupils were at school, and no parents were attending to drop them off or pick them up. Some staff may have been at the school, but the contention that notice would have given rise to a risk of "severe" harm to them does not seem persuasive.

55. In my judgment, there can be no doubt that the Council's duty of full and frank disclosure required it to provide the Court with a distinct, clear, and sufficient explanation, founded upon evidence, for making its application without notice to any of the defendants, identifying the counter-arguments which could be put forward, and explaining why those arguments should not be accepted. It failed to discharge that duty. Instead, it wove together a number of disparate strands of reasoning, some of which were irrelevant, and it put forward a confused and confusing case on this issue. The risk of escalation should have been examined much more carefully. If that had been done, it would have been incumbent on the Council to point out that there was no risk of the whole purpose of the application being defeated, and to highlight the most important fact, namely that the case could be dealt with on notice before the school went back after half term. On this ground alone, the injunctions must be discharged.

56. The breaches of duty in this respect were particularly egregious when it came to the application of 4 June. It is not easy to see what new evidence there was to justify a variation of the order which the claimant itself had sought. It is impossible to understand the grounds for making this application without notice. By that time, it could no longer be said that giving notice might prompt escalation; the Council already had in place the very relief that it had sought at the hearing on 31 May. No other basis was identified. It seems that the question of notice was simply ignored.

(2) *Failure to identify the threshold for granting an injunction*

57. The failure to cite s 12(3) HRA was clearly a deliberate omission. Not only was the subsection replaced in the skeleton argument by the ellipse "…", the skeleton argument

made no reference to the need to demonstrate a likelihood of success at trial, or to the authoritative interpretation of s 12(3) in *Cream Holdings v Banerjee*. Instead, it focused on the lawfulness and proportionality of the relief sought. The draft order prepared by the claimant reflected this approach, making no reference to s 12. It is thus apparent that the reason why s 12(3) was not cited was because nobody on the claimant's side had identified its relevance to the case.

58. This is remarkable, and at first, I found it hard to comprehend, because the applicability of s 12 as a whole had been recognised and identified to the Court. The explanation seems to lie in Mr Manning's primary submission to me on this issue. He argues that in this case it was not wrong to omit reference to s 12(3), which is irrelevant, because this case is not about "publication". That reflects a misunderstanding of the statutory and legal context in which that word is used.

59. The sub-section forms part of a code expressly designed to address cases where relief is sought that might interfere with freedom of expression. There is no doubt that this is such a case. The claimant acknowledged as much by citing s 12 to Moulder J. Mr Manning's argument has to be that, despite this, s 12(3) is concerned only with a sub-set of such cases: those involving "publication", meaning something other than what was going on here. He cites no authority in support of this narrow construction, and I am unaware of this point having ever been made before. It was wrong, in my judgment, to proceed without notice without reference to s 12(3), on the basis of an interpretation, unsupported by any authority, which is at odds with the Practice Guidance. If this was the view of the Council, the Judge should have had this issue drawn to her attention, along with the available counter-arguments. Those arguments would have included the approach adopted in the Practice Guidance to which, it appears, those acting for the Council had not directed their own attention let alone that of the Judge.

60. But I would go further. I am satisfied that it would be quite wrong to treat the word "publication" in s 12(3) as having a limited meaning, restricted for example (as Mr Manning's submission seemed to imply) to commercial publication. It is hard to see how that such an approach could be rationally defended. It would give commercial publishers preferential treatment compared to other defendants, such as individuals communicating for private purposes, on social media. As everybody knows, some social media accounts have larger readerships than some paid-for newspapers. But there is a more fundamental point. In the law of defamation, "publication does not mean commercial publication, but communication to a reader or hearer other than the claimant": *Lachaux v Independent Print Ltd* [2019] UKSC 27 [18] (Lord Sumption). This is generally true of the torts associated with the communication of information, sometimes known as "publication torts", and the related law (see the discussion in *Aitken v DPP* [2015] EWHC 1079 (Admin) [2016] 1 WLR 297 [41-62]). Parliament must be taken to have legislated against this well-established background. Section 12(3) applies to any application for prior restraint of any form of communication that falls within Article 10 of the Convention. This is appropriately reflected in the language of the Practice Guidance, quoted above.

61. Section 12(3) may not be relevant to every anti-social behaviour injunction. There are no doubt many ways of behaving anti-socially that do not involve speech, or writing, or other forms of expression. But there can be no doubt as to the materiality of s 12(3) in this case. It contains a statutory prohibition on the grant of a pre-trial injunction which interferes with freedom of expression, unless the Court is satisfied that the claimant is

likely to obtain a final injunction. In fairness to Mr Manning, it must be recognised that he identified that the orders sought involved interference with Article 10 rights, and addressed the Judge upon that topic. It may be that, had the Judge been directed to the statutory threshold test, she would have been satisfied that it was met. But I do not accept Mr Manning's fall-back submission that if, contrary to his primary argument, s 12(3) applied, the hearing should be treated as involving, in substance, a submission and finding that success at trial was likely. The Court could not be so satisfied of that unless it addressed its mind to the question. The Council failed to pose the question, with the result that the application was determined on the lower threshold test set out in the 2014 Act for anti-social behaviour injunctions of all kinds.

62. There is an additional point, worthy of mention. Where the Court concludes that an injunction application is, to any extent, aimed at protecting the reputation of the claimant it will normally apply a still higher threshold at the interim stage. The "defamation rule" requires an applicant to show that the claim is bound to succeed: see *LJY v Persons Unknown* [2017] EWHC 3230 [2018] EMLR 19 [41-43]. I do not rest my decision on this point, which was not argued, but there is evidence here that could be said to indicate that reputational concerns are at stake, among others, so this is something to which future applicants in cases of this kind should be alert.

(3) *Other failures to refer to or follow the Practice Guidance/Model Order*

63. Mr Manning has submitted that it is inappropriate to draw an analogy between cases involving restraints on the disclosure of private information and cases of the present kind, which do not seek to prevent the disclosure of information, but rather harassment and intimidation and the like. This is a false dichotomy and reflects a further misunderstanding. The principles identified in the Practice Guidance do not apply by analogy. They apply because the relief sought engages the right to freedom of expression, and the requirements of s 12 HRA. The Practice Guidance is primarily directed at cases involving private information, but it is not limited to such cases: see paragraph 1 of the Guidance, quoted above, which refers expressly to libel, malicious falsehood and harassment. It is true that the orders made did not stop the protestors saying what they wanted, but only where and how they did it; but it does not follow that the Practice Guidance is inapplicable. I regard the failures under this heading as significant.

(4) *A2P1*

64. The potential for an argument that A2P1 rights of the parents involved in the protest were engaged was not recognised, and hence not placed before the Judge. On the other hand, the A2P1 rights of the pupils affected were not invoked, either; and the Article 9 rights of the parents were drawn to the Judge's attention. This deficiency would not in itself have justified discharge of the orders.

(5) *Non-Disclosure: the facts*

65. Respondents against whom injunctions have been granted without notice often complain of material non-disclosure of facts or evidence. Here, Mr Randall QC has complained that Moulder J was given a "selective and partisan summary of the underlying evidence". I think that is something of an overstatement. The skeleton argument was necessarily selective. As Mr Randall conceded in oral argument, one

should not be overly pernickety about the way this is done. I doubt that I would in all the circumstances have discharged the orders on this basis; but I do agree that the Council could and should have done more to highlight what the defendants might have said in opposition to its application, had they been given the chance to have a say.

66. In the event, the response of the defendants is (in broad summary) that their rights to protest should be zealously safeguarded and protected, and interfered with only to the extent that this is imperative; and that the Council has overstated both the conduct involved, and its impact on those affected. Mr Randall submits that, even when dealing with material and views that come across as fundamentally and obviously wrong, the Court "must strive not to inhibit the freedom to express views, the freedom to demonstrate and the freedom to organise politically": *Chief Constable of Bedfordshire v Golding* [2015] EWHC 1875 (QB) [37] (Knowles J). As he points out, freedom of expression includes the right to express views which certain sections of the community would find objectionable or even offensive. On the facts, he had gone so far as to say that only someone with "snowflake sensitivity" would suffer alarm or distress as a result of what has in fact been done. This is a rhetorical flourish, but responses on these general lines were entirely foreseeable. The Council, presenting the Court with a 220-page hearing bundle, could not assume that it would all be read in the available time. It ought to have identified for the Judge the chief points that could be made by the defence, so far as the facts are concerned.

67. It is unnecessary to enter into any great detail, but three points seem to me to have particular force. The first is that the police had determined that "no-one is breaking the law". This was stated in the Headteacher's statement, at paragraph 72, but not brought to the Court's attention. This is significant because the Protection from Harassment Act 1997 makes harassment (within the meaning of that Act) a criminal offence. Secondly, although a substantial number of witness statements were provided from police officers, the Council did not draw to the Court's attention that several of these made clear in terms that the authors had not been alarmed or distressed by what was going on. Thirdly, the "chants" on which heavy reliance was placed by the Council were in reality anodyne in content rather than offensive, as would naturally have been inferred. The chants demanded that "Parent Governors – step down" "Let kids – be kids", "Listen to – parents" "Learn how to – mediate" and "We are no – homophobic." This is apparent from one of the police witness statements, but the Court was evidently not taken to that detail.

Re-grant

68. Despite these deficiencies in the presentation of the case at the without-notice stage, I came to share the view of Moulder J that, on a proper assessment of the merits, interim injunctions are appropriate. I accept the submission of Mr Randall, that I should ask and answer the two questions I posed in an earlier protest case, *Thames Cleaning and Support Services Ltd v United Voices of the World* [2016] EWHC 1310 (QB) at [46]:

> "First, has the claimant demonstrated that it would probably succeed at a trial in showing a risk, justifying an injunction, that unless restrained the defendant will cause protest or demonstration which is unlawful, and actionable at the suit of the claimant? Secondly, if so, can an injunction be framed which

> serves to restrain the encouragement of unlawful conduct, without straying into improper restraint of lawful protest?"

I answer both questions "yes". Mr Manning has persuaded me that, on the evidence before the Court at this stage, the Council appears more likely than not to succeed at trial in obtaining injunctions – albeit rather more limited than that put in place at the outset – which serve to protect against harassment and other anti-social behaviour, whilst permitting legitimate expression of lawful dissent against the policies of the School.

Persons Unknown

69. At one stage the propriety of any order against Persons Unknown was controversial. Although Mr Randall appears only for the named defendants, he queried whether the relevant law had been properly examined. That was entirely proper, as he could not know when he raised the point what had been said to the Judge at the without notice hearing. In the event, although I have some reservations, I was satisfied that the present case falls within the scope of the principles identified in *Boyd v Ineos.*

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

Substance

71. There is much that has been said by the protestors which falls firmly within the realm of reasonable, peaceful and lawful protest, even if it is offensive. Complaint is made of placards with messages such as "Adam and Eve, not Adam and Steve". These may be upsetting to some, but must be viewed as a legitimate means of expressing a lawful opinion. Complaint is made that photographs have been taken without permission. That may in some circumstances be unlawful but hardly amounts to harassment. The Headteacher complains of being called a "liar". I do not doubt her evidence that this is distressing, but her complaint appears to be of defamation and I would not prohibit such speech without proof that the claim was bound to succeed. I do not consider it proper to grant an injunction to prohibit social media posts which are "offensive" to teachers. That would represent a vague and unjustified incursion into freedom of speech.

72. But the gravity of the conduct engaged in by some of those attending the protests, and the seriousness of its impact on others, has in my judgment been downplayed by the defendants. It is unnecessary to go into extensive detail. But the evidence discloses that allegations of paedophilia have been made during the protests, which appear to be entirely baseless. Some of the messages posted on social media are abusive, without

any informational content (the Headteacher is described as a "piece of shit"). There is evidence of aggressive shouting and the use of "extremely intimidating" body language towards staff members in the street, and of protestors blocking the path as parents seek to take their children to the School. The use of a megaphone has evidently disrupted the school's ordinary activities.

73. Members of staff have felt "quite frightened", in one description. Another phrase, used by the Headteacher, is that the protests have had "devastating effects" on children, staff, visitors, student teachers, governors, as well as herself. Reading the statement as a whole I suspect this might turn out to be something of an exaggeration, but I take particularly seriously the impact on children. The Headteacher's 16-year-old daughter has broken down in her own school due to worry over the protestors. Staff members at the School speak of children there being "very distressed" by the aggressive nature of the protests, and crying. It is to be recalled that this is a primary school.

74. The likelihood is that the Council will prevail at trial in showing that conduct that has this kind of impact is unnecessary, disproportionate and unlawful in pursuit of the protestors' aims; and that the relief I am granting, or something close to it, represents a legitimate interference with their rights.

Form

75. After argument on matters of form, I modified the original injunctions as follows. I continued the exclusion zone orders, but amended the wording so as to refer to protesting against teaching at the school rather than the "teaching of equalities". I made the same change to paragraph 6. I did so for the purpose of clarity and certainty. "Equalities" (an odd plural) is not a term of art, and it would be undesirable to set up a debate about its scope. Although the removal of this limitation expands the scope of the order in theory, it does not do so in practice, as there is no threat of any other kind of protest. I discharged paragraph 2 of the orders against the named defendants, in its entirety. Again, this was for reasons of clarity. Injunctions are commonly granted against harassment with a non-exhaustive list of activities that must not be engaged in. But an order simply not to harass is too broad. An order prohibiting the causing of "nuisance or annoyance" is far too vague and general. Mr Randall floated the idea of substituting specific orders against the use of megaphones, generally or for specific periods, but the Council had not sought such orders and did not take up the suggestion. I eliminated the prohibition on "offensive" comments about members of staff, which seemed to me far too broad and subjective. A further change to paragraph 6 was made, to clarify its true objective, which was to identify the three kinds of activity in the sub-paragraphs as non-exhaustive examples of methods of protest which were prohibited when engaged in within the exclusion zone, but not otherwise.

APPENDIX A

Without Notice Injunction against the Second Defendant

The court ordered that the Defendant, Ms Rosina Afsar (whether by herself or by instructing, encouraging or allowing any other person) SHALL NOT:

1. Enter the area shown on Map 1, attached to this Order, at Schedule 1, the boundaries of which are delineated in red except that she may enter the area for the purpose of taking her children to or collecting them from Anderton Park School (the School), or for any prearranged meeting at the School; or for the purpose of attending the Dennis Road Mosque.

2. Engage in any conduct that causes or is likely to cause nuisance, annoyance, harassment, alarm or distress to any member of staff, parent or child attending the School;

3. Approach, contact or attempt to contact any member of staff of the School, or any person who has given a witness statement relied on by the Claimant, by any means, including social media, whether directly or through any other person, except that she may contact the School In relation to matters concerning her own children using the main phone number 01214641581, and may contact any member of staff as permitted by the school.

4. Use any of the School's social media accounts.

5. Use any social media account to make offensive or abusive comments about any member or members of staff at the School In relation to the teaching of equalities at the school, including in relation to their evidence in these proceedings.

6. Organise engage in (whether by herself or with any other person) or encourage any other person to engage in any protest against the teaching of equalities at the School, within in the area shown on Map 1, including by

(i) printing or distributing leaflets for herself or others to hand out;

(ii) inviting, encouraging or arranging another person to come to attend such a protest;

(iii) encouraging or arranging for another person to congregate at any entrance to the School for the purpose of any such protest.

APPENDIX B

Without Notice Injunction against Persons Unknown

All persons except for the First, Second and Third Defendants SHALL NOT (whether by themselves or by instructing, encouraging or allowing any other person):

(a) organise, engage in (whether by himself or with any other person) or encourage any other person to engage in any protest against the teaching of equalities at Anderton Park School (the School), within in the area shown on the Map attached to this Order at Schedule 1, including by

(i) printing or distributing leaflets for herself or others to hand out;

(ii) inviting, encouraging or arranging another person to come to attend such a protest;

(iii) encouraging or arranging for another person to congregate at any entrance to the School for the purpose of any such protest;

(b) use any social media account to make offensive or abusive comments about any member or members of staff at the School in relation to the teaching of equalities at the school or in relation to their evidence in these proceedings.