Neutral Citation Number: [2017] EWHC 2121 (QB)

Case No: D92LS739

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 August 2017

Before :

MR JUSTICE MALES

- -

Between :

SHEFFIELD CITY COUNCIL **Claimant**

- and -

(1) ALICE FAIRHALL, (2) SIMON CRUMP,
(4) ALISON TEAL, (5) DAVID DILLNER,
(6) CALVIN PAYNE, (7) PAUL BROOKE,
(8) GRAHAM TUNRBULL,
(9) ROBIN RIDLEY
(10) PERSONS UNKNOWN BEING PERSONS INTENDING TO ENTER OR REMAIN IN SAFETY ZONES ERECTED ON PUBLIC HIGHWAYS IN THE CITY OF SHEFFIELD

Defendants

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DAVID FORSDICK QC and YAASER VANDERMAN (instructed by **Sheffield City Council**) for the **Claimant**
JOHN COOPER QC and LAURA COLLIER (instructed by **Messrs, Howells Solicitors**) for the **Named Defendants**

Hearing dates: 26, 27 & 28 July 2017

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Judgment Approved by the court for handing down (subject to editorial corrections)[1]

[1] NOTE: "editorial corrections" means, and means only: typographical errors, grammatical mistakes misquotations from documents, or closely similar matters. The fact that the judgment is handed down in draft does not mean that its substance is open to further argument, other than by way of appeal. Suggsted corrections of this kind will be taken into account if provided by email by no later than midday on Thursday 17August 2017.

Mr Justice Males :

Introduction

1. The felling of trees in Sheffield is highly controversial. The city council insists that it is entitled to fell trees, including in some cases healthy trees, in performance of its statutory powers and duties to maintain the highway. It says that objectors who take action which prevents such felling from going ahead are acting unlawfully and must be restrained by an injunction. The objectors maintain that they are exercising a right of peaceful protest intended to cause the council to think again. They want the council to find alternative ways of maintaining the highway which do not involve the felling of healthy trees which, they say, add significantly to the environment, wildlife, air quality and quality of life of the people of Sheffield.

2. In this action the claimant council seeks an injunction which it hopes will bring to an end a campaign whereby objectors, notified by social media that felling work is about to take place in a given location, attend at the site and, by their presence within a safety zone erected around a tree, ensure that the work cannot be carried out safely and therefore cannot be carried out at all. The council does not seek to prevent further protests about its approach to the issue of tree felling, provided that such protests take place outside safety zones, but the objectors say that such protests would have little point as they would not prevent the felling of the trees in question.

3. The claim form in this action was issued on 12 July 2017 and was followed on 17 July by an application by the council for an interim injunction. Such an injunction, if granted, would effectively have determined the action. Once the trees have been felled, the question whether the objectors are entitled to prevent such work by maintaining a presence within a safety zone would be academic. Accordingly an order was made by HHJ Saffman, with the consent of the parties, to ensure an early trial. In those circumstances the council did not press its application for an interim injunction.

4. The trial took place before me over three days between 26 and 28 July 2017. I am grateful to all concerned for their cooperation in enabling such a prompt and efficient resolution of the dispute. However, as I shall explain, although the claim for an injunction has been rapidly determined, it represents only the latest stage in what has been a long standing dispute.

5. This judgment deals with the council's claim for an injunction. That claim is pursued against the fourth, fifth and sixth named defendants (Alison Teal, David Dillner and Calvin Payne) and also against persons unknown. The remaining named defendants have given undertakings which the council has accepted and, as a result, the claim for an injunction is no longer pursued against them. The defendants who have given undertakings have done so reluctantly, in order to avoid any potential liability to pay costs. Nevertheless, as their counsel Mr John Cooper QC confirmed, they have done so of their own free will and understand that the undertakings bind them to the same extent as if an order in the same terms had been made against them.

6. The three remaining named defendants have all engaged, or encouraged others to engage, in the campaign to prevent felling of healthy trees by maintaining a presence in a safety zone. They believe that this conduct is a lawful exercise of their right to

peaceful protest. They see no reason why they should not continue with the campaign and intend to do so.

7. I must emphasise that this judgment deals solely with the legal question whether the council is entitled to an injunction. That will include consideration of whether as a matter of law the council is entitled to exclude members of the public from safety zones around trees so that those trees can be felled and whether or to what extent those who object to this course are entitled to maintain a presence within safety zones in order to prevent the work from being carried out. However, I express no view, one way or the other, as to the merits of the council's tree felling programme or the objectors' campaign. Those are social and environmental questions which are politically controversial and can only be resolved in a political forum. They are not a matter for this court.

8. The council also has a pleaded claim to recover damages for any losses caused by the defendants' conduct. That claim is not dealt with in this judgment. If and to the extent that it arises, it will need to be dealt with at a further hearing.

Background

9. Much of the background to the present dispute is described in detail in the judgment of Gilbart J in *R (Dillner) v Sheffield City Council* [2016] EWHC 945 (Admin), [2016] Env. L.R. 31. That judgment was handed down on 27 April 2016 and should be read together with the present judgment. The account which follows is largely drawn from the judgment in *Dillner* and from the evidence of Paul Billington, who has since March 2017 been the council's Director of Culture and Environment. In that role he is responsible for highways maintenance. Although he was cross-examined aggressively, I found him to be an honest and reliable witness. He is clearly a conscientious and fair-minded council officer doing a challenging job. Similarly the three defendants against whom the injunction claim is now pursued were plainly decent and honest witnesses with a genuine and passionate belief in their cause who believed strongly in the evidence which they gave. No doubt the same is true of the other named defendants, who provided witness statements but were not required to give oral evidence.

10. Over the last 30 years or more the upkeep of roads and streets in Sheffield has suffered from a lack of investment. By 2009 a significant backlog of maintenance work had accrued. As a result the highway network, comprising some 2000 km of roads, 500 traffic signals and 68,000 street lights, was in poor condition.

11. As the highway authority for the Sheffield area the council was and is under a statutory duty to repair and maintain the highway. Work needed to be done, therefore, to clear the backlog of repair and maintenance and to maintain the highway network for the future. The council's view is that this work is not only necessary in order to perform its statutory duty but is also in the public interest because it will promote the economic development of the city.

12. The council did not have the financial resources to carry out the highway maintenance work which was needed. For want of any better alternative, it decided to outsource its highway maintenance programme by entering into a 25 year private finance initiative ("PFI") contract with Amey Hallam Highways Ltd ("Amey") on 31 July 2012. In

accordance with this contract, a total of some £2.2 billion will be payable to Amey over the 25 year term. I accept Mr Billington's evidence that many councillors had reservations about entering into a PFI contract, but concluded that there was no other way in which the necessary finance to undertake a highway maintenance programme could be obtained. For example, this enabled the council to draw down some £600 million from central government which would not otherwise have been available. Other funding was provided by financial institutions. The programme thus created is called "Streets Ahead". It is the biggest urban road upgrade programme in the United Kingdom.

13. It was apparent from the defendants' evidence, particularly that of Calvin Payne, that the defendants are opposed to the whole concept of a PFI contract and regard both the council and Amey (although not Amey's employees with whom they have developed friendly relationships) with the utmost bitterness and distrust. Nevertheless, while there may be scope for a range of opinions about the desirability of PFI contracts as a vehicle for funding public projects, the existence of the PFI contract in this case is a fact. The lawfulness of the council's decision to conclude that contract has never been challenged by judicial review although, as I shall explain, Mr Cooper did submit in the course of the hearing that the contract is unlawful.

14. The PFI contract as a whole is not publicly available although parts of it have been published on the council's website. It is described in a public council document entitled "Streets Ahead Five Year Tree Management Strategy 2012-2017" as "a 25 year partnership that seeks to upgrade Sheffield's roads, pavements, lighting and other highway assets during the first five years and then maintain the assets thereafter for the remainder of the contract term". The initial five-year period, described in contractual language as the "Core Investment Period", will come to an end on 31 December 2017. Although I was told that in some circumstances there are mechanisms for this period to be extended, at that stage the funding required to deal with the backlog of maintenance work will no longer be readily available. It is therefore important to the council that this backlog should be dealt with before the end of this year.

15. The highway network included some 36,000 trees growing on pavements and footpaths which form part of the highway. Accordingly the Streets Ahead programme work included an assessment of the condition of the trees on the highway.

16. Trees growing on the highway can cause problems and in some circumstances may need to be removed. The council has identified six categories of tree whose removal may need to be considered as part of the highway maintenance programme. These consist of (a) trees which have reached or are reaching the end of their natural life (dead, dying and decaying trees), (b) trees which are or may be a source of danger to users of the highway (dangerous trees), (c) trees which have caused or may cause damage to the highway or adjacent private property (damaging trees) and (d) trees which affect the ability of some members of the public, for example the disabled, visually impaired or those with pushchairs, to use the highway (described by the council as discriminatory trees). These categories are referred to by the council as "the 6 Ds". This categorisation is not a recognised term among professional arboriculturalists or highway engineers, but has been developed by the council together with Amey as providing criteria by reference to which the removal of trees on the highway can be considered. Despite its lack of wider professional recognition,

I see no reason to doubt that it represented a genuine attempt to develop relevant criteria for the council's decision-making.

17. Applying these criteria, the result of the maintenance backlog was the continued presence of about 6,000 trees which, in the view of the council, would have been removed and replaced earlier if proper maintenance schemes had been followed. Such tree removal was in some cases the precursor to further work, for example to repair kerbs or street lighting.

18. There is a dispute as to how decisions about which trees should be felled have been made and by whom. I accept Mr Billington's evidence about this that in every case such decisions have been made by the council and not by Amey. The process adopted was that Amey would survey all 36,000 street trees in Sheffield and would identify those which, in its view, needed to be removed. It would then be for the council (since March 2017, Mr Billington and his team) to review Amey's recommendation and make the decision. This would be done by considering the material submitted by Amey, including photographic evidence. If the photographs were not sufficiently clear, members of the council's highways department would visit the site themselves. The result of this process was that about 6,000 trees were identified as requiring removal.

19. Mr Cooper submitted that I should reject Mr Billington's evidence to the effect which I have described as untruthful and should conclude that relevant decisions were made by Amey or that Mr Billington was effectively the puppet of Amey in rubber stamping decisions to fell trees unnecessarily and without proper consideration. I regard that submission as detached from reality. It is one illustration of the complete breakdown of trust between the parties resulting in an attitude of hostility and suspicion towards the council and Amey on the part of the defendants. I accept Mr Billington's evidence that the objective of the council has been to retain trees where possible within the financial constraints under which the council has had to operate. As he said, nobody in his team wants to fell healthy trees unnecessarily. Although some mistakes have no doubt been made resulting in the removal of trees which ought to have been retained if the 6 Ds criteria had been properly applied, removal of trees for its own sake has never been an objective of the council.

20. It is not in dispute that the council's policy is to replace trees which have to be removed. Inevitably this involves the replacement of mature trees with young trees and, as a result, a reduction in the overall canopy cover, at least until those replacement trees have developed further. It is worth recalling what Gilbart J said about this in *Dillner*:

> "35. Some concern has been expressed by objectors to the scheme that, in some cases, a street has lost all of its trees. Some realism is required. Trees are not immortal, and they have a life-cycle. It cannot be surprising that trees of the same species and of similar ages on a street will reach the point at which they may require felling at about the same time.
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> 36. The replacement trees were and will be extra heavy standards, of around 8 - 10 years in age, with a girth of 14 – 16 cm and 3 metres tall depending on species. Mr Caulfield [the council's director of Development Services] explained that if they were smaller, they would be more likely to be damaged by weather or

vandalism, and if any larger, they would struggle to thrive and root quickly. Although it was part of Mr Dillner's case (and that of his witnesses) to complain that the replacement trees were not replacement of 'like for like' such a course is plainly unrealistic, and is not supported by the Claimant's own expert witness Mr Crane who offers no criticism of the choice of trees used for replacement. …"

21. There is in principle no dispute about the removal of trees which are dead, dying, decaying or dangerous, although in some cases there is an issue about whether individual trees should be so classified. However, trees which are classified by the council as "damaging" or "discriminatory" are generally healthy, mature and attractive trees. The fact that such trees were to be felled has been a matter of significant public concern for at least the last two years.

22. There is a dispute between the parties as to the extent of opposition to this programme. The council says that those who object comprise only a small minority of the citizens of Sheffield as a whole. Whether or not that is so, it is clear that opponents of felling are numerous, vocal, committed and active. There are undoubtedly strong views on both sides. Many residents support the programme with a view to achieving an improvement in the poor condition of the Sheffield highway network. These include some residents whose own property is being damaged by the unrestricted growth of tree roots and are anxious that the tree removal programme should be undertaken without delay. Some of those view the objectors' protests with frustration and (according to Alison Teal's evidence) anger. On the other side, there is no doubt that many others strongly oppose on environmental grounds the felling of healthy trees when there are ways in which such trees might be saved.

23. Those who object to the council's tree felling programme have come together under the auspices of an unincorporated group known as the "Sheffield Tree Action Group" ("STAG") founded by Mr Dillner. This is supported by various Facebook groups through which opposition to the programme is coordinated and encouraged. It appears that the number of people supporting the STAG group runs into thousands or even tens of thousands. It is reasonable to suppose that there are others who sympathise with its views.

The ITP process

24. Because of public concerns about the felling of healthy trees, in October 2015 the council decided to appoint an "Independent Tree Panel" ("the ITP") to advise whether felling was necessary. A public statement dated 4 November 2015 described the panel as consisting of a team of impartial experts who would give advice on issues relating to highway trees. The council promised that the panel would provide impartial advice to the council having taken account of all the evidence, including the views of local residents, and that the council would "listen carefully to the advice of the panel before making any final decision". It continued that the council was prepared for the panel to tell it that it "might need to think again" and that it wanted "to put people's views at the heart of its decision making". It expressed the hope that the establishment of this panel "will ease any concerns people may have".

25. It may be that this statement led people to expect greater scope for a change of mind on the part of the council than was in fact the case, although the statement did at least make clear that the council would make the final decision and that the role of the

panel was only advisory. However, if the council hoped that concerns would be eased by the appointment of the ITP it was to be disappointed.

26. The ITP was chaired by Mr Andy Buck, the chair of the local Citizens Advice Bureau and consisted of an arboriculturalist, a health and safety adviser, a highways engineer and a lay member. The procedure adopted was as follows:

(1) In each street where the council had made a decision that a tree or trees should be felled, a survey of the households in the street concerned would take place. There was one survey per household and therefore no account was taken of different views which may have existed within a household, or of the fact that some households will have had more occupiers than others.

(2) If a majority of those households who responded to the survey supported the felling, however narrow the majority and whatever the numbers responding, there would be no reference to the ITP.

(3) However, if a majority was opposed, the question would be referred to the ITP.

(4) The ITP would then produce advice to the council whether the tree should be retained or removed.

(5) However, it would be for the council to make the final decision whether the tree should be felled, after taking account of the views of the ITP.

27. The defendants criticise the ITP, denying the independence of the panel members because they were appointed by the council, and identifying flaws in the procedure adopted. While there is some force in their criticisms of the process, it did at least give those most affected, the residents of the particular streets concerned, some opportunity to have a say (see *Dillner* at [208(e)]).

28. The ITP process has now been concluded. A total of 1,499 trees were included within the survey of residents. Of these, 788 were referred to the ITP, which means that in the remaining 711 cases a majority of responding households (although not necessarily of residents) supported the removal proposals. Of the 788 trees referred, the ITP agreed that 454 should be removed but advised that 316 should be retained. Some trees were removed from the process as they needed to be felled for safety reasons. The council has so far accepted the ITP's advice that trees should be retained in 73 cases, but in 223 cases has concluded that despite the views of the ITP the tree in question should be removed. In 38 cases the council has yet to make a decision. (The figures above were provided by the council during the hearing. After the hearing Mr Paul Brooke, a defendant who has provided an undertaking, sent me some further figures said to be based on information released by the council. Those did not correspond in all respects with the figures indicated above, but such differences as exist are not material to this judgment).

The council's decisions

29. As Mr Billington explained, the council's decision-making process has been largely dictated by financial considerations. Funding for some engineering solutions is within the scope of the PFI contract. These include (1) installation of thinner profile kerbs,

(2) excavation of footways for physical root examination, (3) ramping or re-profiling of footway levels over roots within acceptable deviation levels, (4) flexible paving or surfacing, (5) removal of displaced kerbs leaving a gap in the channel, (6) filling in of pavement cracks, (7) root pruning, (8) root shaving, (9) root barriers and root guidance panels, (10) excavation beneath the roots damaging the footway, (11) tree growth retardant, (12) creation of larger tree pits around existing trees, (13) heavy tree crown reduction or pollarding to stunt tree growth, and (14) retaining dead, dying, dangerous or diseased trees for their habitat value. Where a tree can be saved using one or other of these solutions, either the tree will not be identified for removal in the first place or, if it is, the council is in a position (and according to Mr Billington's evidence has been willing) to accept a recommendation by the ITP that the tree should not be felled and to insist that the solution in question should be adopted.

30. However, there are other engineering solutions which would in principle avoid the need to remove a tree, but which are not funded within the PFI contract. These include (1) line markings on the carriageway to delineate where it is not safe to drive or park, (2) building out the kerb line into the carriageway, (3) footpath deviation around the tree, (4) installation of a geo-grid under the footway to reduce reflective cracking, (5) reconstruction of the path using loose fill material rather than a sealed surface, (6) reducing the road width and widening the footways or converting them to grass verges, and (7) abandoning the existing footway and constructing a new footway elsewhere. The council's position is that it has no budget to fund such work and, accordingly, is not in a position to accept recommendations by the ITP or for that matter the representations of the defendants that removal should be avoided by adopting one or other of these solutions. It could only fund such work by taking money from some other budget which, in circumstances of financial stringency with pressing demands on budgets for other essential public services, it is not prepared to do.

31. This has led to an impasse. There have been very many meetings, both formal and informal, between council representatives including Mr Billington and objectors. These have not resulted in any agreement. Nor is there any realistic prospect that further discussions would do so. Those who object to the felling of healthy trees regard the council as having adopted an intransigent and bullying position because it is unwilling to adopt any of the alternative unfunded solutions. They regard their efforts to enter into a dialogue with the council with a view to saving the trees in question as having fallen on deaf ears. The council, on the other hand, insists that it has undertaken numerous meetings with objectors in which it has explained its position, but that at the end of the day it has no money available to spend on the solutions which the objectors propose without making cuts in other essential public services which is not prepared to make. It says that, having heard the objectors' objections and despite the strength of their views, it has now made its decision that the tree felling programme must be completed.

32. In a few cases the dialogue has progressed a little further, but any progress is more apparent than real. These concern what have been described as "iconic" trees, for example trees which were planted as war memorials at the time of the Great War or trees which have a special interest, for example as the home of a rare butterfly. In these cases the council has been willing to enter into a more extensive dialogue, but has not moved from its position that it has no money for unfunded solutions outside of

the PFI contract framework. What it has been prepared to do is to allow those who wish to save such iconic trees more time to explore alternative sources of funding. At the present time it is not apparent whether such alternative funding will be obtainable.

Dillner

33. *Dillner* was decided when the ITP process had been established and was beginning its work, but before it had got very far. It was a challenge by way of judicial review by Mr David Dillner (the fifth defendant in this action) to the lawfulness of the council's decision on 3 February 2016 to continue with (or, strictly, not to cease) felling by Amey of trees within the public highway. The grounds of challenge are identified at [5] of the judgment. They were that:

(1) the council had carried out an unfair and procedurally improper consultation (the ITP process), having given the legitimate expectation that the people of Sheffield would be consulted before the trees were felled;

(2) (a) planning permission for the felling of trees was required;

(b) there was a failure to carry out an Environmental Impact Assessment; and

(3) there was a duty under planning legislation to pay special attention to the desirability of preserving and enhancing the character of conservation areas for granting planning permission for the tree felling.

34. At a rolled-up hearing permission to bring a claim for judicial review was refused on all grounds. In very brief outline of a full and detailed judgment, Gilbart J held that:

(1) The council was under no duty to consult before entering into the PFI contract or embarking on tree felling and had made no representation capable of giving rise to a legitimate expectation of consultation. Nor was this a case where there been a conspicuous failure to consult in a case where fairness required such consultation.

(2) No planning permission was required for the felling of trees carried out in pursuance of the council's duty to maintain (and thus repair) the highway. Similarly no Environmental Impact Assessment or conservation area consent was required although as a matter of fact the council had considered the potential environmental effects, albeit that its decision was not accepted by those who objected to the removal of the trees. The council's decision to remove trees in order to carry out works of maintenance and repair of the highway was a decision for the council to make as the democratically elected decision maker. Its decision was not irrational.

(3) In any event a challenge on Grounds 2 and 3 would have been refused because of delay in bringing the claim.

The 2016 council election

35. In May 2016 there was an election in which all 84 council seats were contested. One of those elected to serve as a councillor was Alison Teal, the fourth defendant. She is strongly opposed to the tree felling programme. Her evidence was that this was a very prominent and perhaps the most important issue in the Nether Edge ward which she

now represents although in other wards the issue may have been regarded as less important. The majority group on the council continues to support the tree felling programme.

Direct action

36. Despite the failure of the challenge to the lawfulness of the council's tree felling programme in the *Dillner* case, opposition continued. It took the form of what is described by the council and by STAG on its website as "direct action". I will use that expression as a convenient label.

37. The form which the direct action takes is as follows:

(1) When tree surgeons engaged by Amey are seen to be *en route* to, or arrive at, a location where a tree is to be felled, messages are sent out via social media, in particular by members or supporters of STAG, notifying supporters of the location in question and encouraging them to take steps to prevent the tree surgeons from removing the tree.

(2) Before attempting to remove the tree, the tree surgeons erect or attempt to erect a safety barrier around the base of each tree to create a safe working area ("the safety zone").

(3) A notice is affixed to the barrier warning that entering into, or remaining within, the safety zone is unlawful.

(4) Nevertheless one or more supporters of STAG will assemble in the safety zone. This may involve standing within the zone before the barrier is erected, or alternatively passing through a gap in the barrier in order to enter the zone. Alternatively a vehicle may be deliberately parked next to a tree identified for felling.

(5) Those standing within the zone refuse to leave or to remove their vehicles when asked to do so; or if some individuals do leave, they are replaced by others.

(6) The result is that felling of the tree cannot be undertaken without risk of injury or damage to property and, as a result, such work has to cease for safety reasons.

38. It is important to emphasise that the evidence before me, accepted by the council, is that the conduct of those engaging in this direct action has at all times been peaceful. It was the defendants' evidence, which I accept, that the relations on the ground between objectors and Amey's employees have been friendly and good-humoured. Although there may have been rare cases where tempers have become frayed on one side or the other, these have been the exception and, even in these cases, no violence has been used on either side.

39. In some cases the identity of those engaging in direct action is known. For example, the three named defendants make no secret of the fact that they have done so. In other cases the identity of those taking part is unknown. Photographs indicate that some of those doing so conceal their identity by wearing masks.

40. This form of direct action has been successful in impeding the council's tree felling programme, but not in inducing the council to change its approach. During June 2017, 427 tree fells were attempted, 329 of which had to be abandoned due to this direct action. In other cases the felling was delayed until the objectors' own arboricultural surveyor agreed that the tree in question presented a danger to the public, thus causing a knock on delay to the programme as a whole.

41. The direct action has been occurring for the past year or so and has been intensifying in the last few months. I accept Mr Billington's evidence that it has caused significant delay and disruption to the tree felling programme and to the further work on the highway (for example, repair of street lighting and resurfacing) which has been planned to follow tree removal. The council is concerned that this work should be completed by 31 December 2017 within the Core Investment Period of the PFI contract. It refers also to the inconvenience caused to citizens who are unable to rely on published information about the timing of road closures and whose access to public services (such as bus services, refuse collection, and social care transport) may be adversely affected. At the present time there remain about 1,000 trees which in the council's view need to be removed.

42. The council's position is that this direct action is unlawful and involves conduct which is both tortious and a breach of the criminal law. It has made this position clear to those engaging in it including the defendants. However, although there have been some arrests in the past, none of these resulted in any prosecution. The South Yorkshire Police & Crime Commissioner has indicated that the police will not arrest or prosecute anyone engaging in peaceful direct action, at any rate until the council has exhausted all civil remedies.

43. The defendants, on the other hand, believe strongly that felling of healthy trees is inappropriate, unnecessary and unjustified, that the decisions of the Council in entering into the PFI contract and in response to recommendations of the ITP are wrong, that they are justified in seeking to stop such felling, and that the direct action is lawful. The council acknowledges that these beliefs are genuinely held. In these circumstances it is clear that, unless restrained, the direct action will continue for the foreseeable future, or at least until such time if ever as the council adopts a different approach.

The council's duty to maintain the highway

44. The council's statutory duty to maintain the highway is central to this case, as it was to the decision in *Dillner*.

45. A highway is a public place which the public may enjoy for any reasonable purpose, although its principal purpose is to allow passage and repassage by the public (see e.g. *Director of Public Prosecutions v Jones* [1999] 2 AC 240 at 257D-E). For this to be achieved, the highway needs to be kept in repair. The duty to repair and maintain the highway is imposed on the highway authority which, in the case of Sheffield, is the city council. Section 41 of the Highways Act 1980 provides:

> "(1) The authority who are for the time being the highway authority for a highway maintainable at the public expense are under a duty, subject to subsections (2) and (4) below, to maintain the highway."

46. The Road Traffic Regulations Act 1984 empowers a highway authority to restrict or prohibit temporarily the use of the road by members of the public. Thus section 14(1) provides:

> "(1) If the traffic authority for a road are satisfied that traffic on the road should be restricted or prohibited –
>
> (a) because works are being or are proposed to be executed on or near the road; …
>
> the authority may by order restrict or prohibit temporarily the use of that road, or any part of it, by vehicles of any class, or by pedestrians, to such extent and subject to such conditions or exceptions as they may consider necessary."

47. Orders dated 1 June 2017 and 22 June 2017 have been made by the council in exercise of these powers. They "prohibit any person from using, including entering or remaining in, those areas of highway demarcated by the erection of safety barriers and indicated by the display of notices within the highways listed in the Schedule" to each of the orders. These orders provide the legal basis for the notices affixed to the barriers of safety zones.

Summary of the council's case

48. In summary Mr David Forsdick QC on behalf of the council submits as follows:

(1) The action of the defendants is not the exercise of a peaceful right to protest but unlawful direct action whose intended and actual effect is unlawfully to prevent the council from carrying out its statutory powers and duties with regard to highway maintenance; it is for the council as the democratically elected body to determine how those powers and duties should be exercised, subject only to the principles of public law.

(2) A public law challenge to the lawfulness of the council's decision that trees need to be felled as part of its highway maintenance programme having failed, that decision must be regarded as lawful; accordingly, the issue in this case is not whether the felling of trees is lawful, but only whether the defendants are entitled to prevent the council from giving effect to its lawful decisions.

(3) The defendants' direct action constitutes a trespass; there is no licence to use the highway for a purpose which is unreasonable or which prevents the council from carrying out its lawful powers and duties.

(4) The direct action also constitutes a number of other torts such as nuisance and unlawful interference with business.

(5) It is also a criminal offence under section 303 of the Highways Act 1980 and section 241 of the Trade Union & Labour Relations (Consolidation) Act 1992.

(6) The injunction claimed does not interfere with the defendants' rights to freedom of expression and freedom of assembly and association provided for by Articles 10 and 11 of the European Convention on Human Rights.

(7) Alternatively, if those Articles are engaged, any restriction on the exercise of these rights is prescribed by law and is necessary and proportionate in a democratic society for the protection of the rights and freedoms of others.

Summary of the defendants' case

49. Mr John Cooper QC on behalf of the defendants submits, again in summary, as follows:

(1) The PFI contract is unlawful because (a) it constitutes profiteering on the part of Amey and cost saving on the part of the council, all at the expense of important environmental obligations, and (b) Amey failed to disclose a 2008 conviction for corporate manslaughter to the council before concluding the contract.

(2) The felling of trees is not being undertaken as part of a programme of highway maintenance, but constitutes a separate tree maintenance programme which falls outside the scope of section 41 of the Highways Act 1980.

(3) The direct action does not involve the commission of any tort or criminal offence. Rather it consists of the lawful exercise of a right of peaceful protest.

(4) Even if the direct action would be unlawful as a matter of English domestic law, it constitutes a lawful exercise of the rights to freedom of expression and freedom of assembly and association protected by Articles 10 and 11 of the ECHR.

Is the felling of trees lawful?

50. As will be apparent from the foregoing summary, the parties' approaches to the question whether it is lawful for the council to remove trees which are damaging or discriminatory within the meaning of the 6 Ds classification are radically different. There are several strands to be considered here. It is convenient to begin by seeing what *Dillner* decided.

What did Dillner decide?

51. In my judgment it was an essential part of the reasoning of Gilbart J in *Dillner* that the council's decision to remove trees applying the 6 Ds criteria (and in particular to remove "damaging" and "discriminatory" trees) was a decision made pursuant to the council's statutory duty to maintain the highway contained in section 41 of the 1980 Act. Although Mr Cooper for the defendants argued that the *ratio* of the decision was limited to rejection of the three grounds of challenge identified at [5] of the judgment, that is an unduly restrictive reading of the case. The reason why those grounds were rejected was that the decision in question was a decision made pursuant to section 41. As Gilbart J put it at [29]:

> "These streets are highways, and the starting point for considering whether a tree within a highway should be retained or removed is its effect or otherwise on the role of that street as a highway – i.e. to facilitate passage and repassage, not to facilitate the creation, preservation or enhancement of an attractive environment."

52. Moreover, Gilbart J held that it was for the council, as the highway authority, to determine within the constraints of public law how to carry out its duty to maintain

the highway, including whether this required the felling of healthy trees on the ground that they were damaging or discriminatory. This reasoning runs throughout the judgment in *Dillner*, for example in the following passages:

> "62. … The proposition that it is unacceptable in principle to consider the removal of trees from the highway … is in truth an approach which cannot be reconciled with the nature of the statutory duty imposed on SCC by HA 1980 …"

> "79. I accept that arguments on whether the test in the HA 1980 was being properly applied, or the application of the 6 criteria, were proper matters for objection to SCC. However it is not for this Court to intervene where SCC has formed a different view from an objector about the merits of removing a tree or a number of trees, provided that SCC applied its mind to the appropriate tests. It is not the function of this court to substitute its own view of the merits for that of the decision maker. …"

> "163. The duty to maintain and keep in repair relates to the fabric of the highway, serving the purposes of the highway, passage and repassage. That duty does not extend to maintaining or retaining the trees growing within it."

> "182. … a decision to carry out works of maintenance (including repair), whether or not they have adverse environmental effects, is not and was not unlawful."

> "191. … decisions in this country are taken by elected members, and not on a participatory basis. In England and Wales, a Council such as Sheffield is a creature of statute, with its members elected at elections. While a Council can elect to invite participation from members of the public in meetings or otherwise, there is no overarching right of those residents in a City/Borough/County/District who are not members of the Council to participate in decision making."

> "208. … (b) so far as the 6 Ds criteria are concerned, it cannot seriously be suggested that there is anything untoward about them, and as I have noted above, no attack on them was made before me."

> "226. The Court's task is to determine if any of the grounds have legal merit. The Court is neither an elected politician making policy decisions, nor an arboriculturalist or highway engineer carrying out an expert assessment of the effect of felling particular trees on particular streets, or of the prospects of avoiding their being felled. It is no part of the Court's role in a democratic society to substitute any view it may hold for that of the elected Council, or to seek to substitute its own view of the factual or technical merits of an arboricultural or engineering assessment, unless they reveal some error of law. The only exception to that principle would arise if the Court considered that no reasonable Council could have acted as it did, or that no reasonable assessment could have reached the findings it did. Whether one takes the traditional test of '*Wednesbury*' unreasonableness, or applies some more nuanced test, there is no basis for considering that any such case is made out, and tellingly, none of the Grounds of Claim allege it. It follows that the Court's task is directed at whether the actions of SCC and Amey have been unlawful, and should be restrained. The Claimant has contended that the conduct of SCC was legally flawed, and that this Court should

> prevent SCC and Amey from felling any more trees. The Court's task is thus to determine if that challenge is properly made."

53. It will be necessary to consider in due course whether maintaining a presence within a safety zone in order to prevent the felling of trees constitutes a reasonable and lawful use of the highway by the defendants. However, that question arises in a context where, in my judgment, *Dillner* decided as a matter of *ratio* that a decision by the council to remove a tree for the purpose of highway maintenance is lawful.

54. Even if it is not *ratio*, however, I respectfully agree with the analysis of Gilbart J.

The PFI contract – profiteering and cost saving?

55. Although there was no challenge to the lawfulness of the PFI contract in *Dillner* and there has never been such a challenge as a matter of public law, the lawfulness of the contract became a prominent issue in the course of the trial before me. As indicated above, there were two limbs to the defendants' argument. The first was that the contract constitutes profiteering on the part of Amey and cost saving on the part of the council. Although this submission was developed forcefully by Mr Cooper, so far as I could see it was unsupported by coherent legal analysis. It is obvious that Amey will have entered into the PFI contract in the hope and expectation of making a profit over its 25 year term. Amey is not a charity but a commercial organisation. Whether it was wise of the council to enter into this contract or whether the council obtained good value for money is irrelevant to the present claim. What matters is that the council has decided to perform its statutory duty to maintain the highway by entering into this contract.

56. To the extent that allegations of profiteering by Amey were particularised, the argument appeared to be that Amey is choosing to remove trees unnecessarily because streets with only young replacement trees will be less costly to maintain over the remaining term of the PFI contract. However, the defendants' suspicion that it is Amey alone which is making or controlling the decisions as to which trees should be removed and that it is doing so on cost grounds in order to maximise its profit under the contract is misplaced. It is contrary to the evidence of Mr Billington which I have accepted that such decisions are made by the council, applying the 6 Ds criteria, and that they depend upon the availability of funding within the PFI contract for engineering solutions which will avoid the need for removal.

57. It is not a valid ground of objection that the PFI contract, or the decisions which the council makes, provide cost savings to the council. The council is entitled to take account of the availability of funding within the PFI contract in making its decisions as to the application of the 6 Ds criteria and is likewise entitled not to allocate further resources if to do so would mean making cuts in other budgets. As Lord Carnwath explained in *R (Health & Safety Executive) v Wolverhampton City Council* [2012] UKSC 34, [2012] 1 WLR 2264, a public authority is entitled and sometimes obliged to take account of such matters:

> "24. I start by looking at the position in general terms, before considering whether there is anything in the particular statute, or the relevant authorities, which requires a different approach. In simple terms, the question is whether a public authority,

when deciding whether to exercise a discretionary power to achieve a public objective, is entitled to take into account the cost to the public of so doing.

25. Posed in that way, the question answers itself. As custodian of public funds, the authority not only may, but generally must, have regard to the cost to the public of its actions, at least to the extent of considering in any case whether the cost is proportionate to the aim to be achieved, and taking account of any more economic ways of achieving the same objective."

The PFI contract – failure to disclose corporate manslaughter conviction?

58. A distinct issue is Mr Cooper's submission, once again made with considerable forensic force, that the PFI contract is unlawful because of the failure of Amey to disclose a 2008 conviction for corporate manslaughter. I have to say that the way in which this issue arose was most regrettable. There was no mention of any such case in the defendants' Defence, witness evidence, skeleton argument or oral opening, as there should have been if such a case was to be run. If there had been, the facts could have been checked. As it was, the first mention of the point arose in cross examination of Mr Billington when he was asked by Mr Cooper, "were you aware before the contract that Amey was convicted of corporate manslaughter in September 2008?" If the issue was raised in this way in order to maximise dramatic effect, it appeared from the reactions of those present in court to have achieved that objective. I note also that the point received considerable press publicity. When asked why it had not been raised before, Mr Cooper said that he had received late instructions, but that this did not dilute the fact of the conviction.

59. In fact, however, neither Amey nor any other company within the same group has ever been charged with, let alone convicted of, corporate manslaughter. On one occasion before the conclusion of the PFI contract a company within the same group had pleaded guilty to an offence under section 2 of the Health & Safety at Work Act 1974 and received a fine of £30,000 for failing to keep a comprehensive record of inspections of a mobile elevated working platform vehicle. The prosecution arose following a tragic incident in which an employee died, but (as the criminal court accepted) the failure to keep records was not causative of the fatality.

60. In these circumstances the impression given in court was misleading and unfair.

61. In any event the existence of such a conviction would not affect the lawfulness of the council's decision that trees need to be felled as part of a highway maintenance programme. Even if it would have given the council a right to rescind the PFI contract (a point on which I express no view), that would not assist the defendants. The council has not exercised or purported to exercise any such right and accordingly the PFI contract is currently valid and binding in accordance with its terms. Moreover, it remains the case that the decision to remove trees is the decision of the council and of nobody else.

Highway maintenance or tree maintenance?

62. The next question is whether on the facts the council's decision to remove damaging and discriminatory trees was made for the purpose of highway maintenance. Although this was the basis on which *Dillner* was decided, it is challenged as a matter of fact by

the defendants. Mr Billington accepted in cross examination that there are parts of the PFI contract which deal with tree maintenance, including the inspection and pruning of trees. I can see that, save for the fact that such trees are growing on land which forms part of the highway, such work may have little or nothing to do with highway maintenance. However, I accept the evidence of Mr Billington, which in any case is a matter of common sense, that the removal of damaging or discriminatory trees is necessarily a part of highway maintenance. The definition of such trees within the 6 Ds criteria makes this conclusion inevitable. Thus damaging trees are those which cause damage to a footway, the road surface, underground cables or pipes or private property, or which by pushing kerbs out into the road are adjudged to cause a hazard to motorists and cyclists. Discriminatory trees are those which affect the ability of some users of the footpath to pass and repass.

63. Accordingly I accept the council's submission that the removal of damaging and discriminatory trees forms part of the council's highway maintenance programme and as such constitutes the lawful exercise by the council of its statutory powers and duties under the Highways Act 1980. It is for the council as the highway authority to determine how highway maintenance should be carried out. The defendants' direct action is intended to prevent and has prevented the lawful exercise of those powers and duties and must be considered in that light. This conclusion does not of itself mean that such action must be restrained by an injunction, but it represents a critical starting point in considering the cause of action on which the council relies and the scope of the defendants' right of peaceful protest.

Trespass

64. So far as a cause of action is concerned, the council's primary case is that the defendants' presence within a safety zone constitutes a trespass, that is to say an unauthorised entry onto the council's land. The council accepts that the public has a licence to use the public highway for a wide range of purposes, including for peaceful public assembly, but only if those purposes are reasonable and lawful. The leading case is *Director of Public Prosecutions v Jones* [1999] 2 AC 240. It is sufficient to cite the formulation of the law by Lord Irvine of Lairg LC at 254H-255A:

> "The question to which this appeal gives rise is whether the law today should recognise that the public highway is a public place, on which all manner of reasonable activities may go on. For the reasons I set out below in my judgment it should. Provided these activities are reasonable, do not involve the commission of a public or private nuisance, and do not amount to an obstruction of the highway unreasonably impeding the primary right of the general public to pass and repass, they should not constitute a trespass. Subject to these qualifications, therefore, there would be a public right of peaceful assembly on the public highway."

65. There is no question in the present case of the defendants' presence within a safety zone affecting the right of the public to pass and repass along the highway. To the extent that such passage is restricted, it is the erection of the safety zone and not the presence of an objector within it which causes the restriction. The issue is whether such presence within a safety zone is reasonable and lawful. The council submits that it is not, because it is unlawful, goes well beyond the kind of usual and ordinary activity referred to in *Director of Public Prosecutions v Jones*, and is contrary to the orders made by the council under section 14 of the Road Traffic Regulation Act 1984

referred to above. The defendants submit that it is, because it is the exercise of a lawful right of peaceful protest.

66. Subject to the impact of Articles 10 and 11 of the ECHR, it is clear in my judgment that the direct action is unlawful. Section 303 of the Highways Act 1980 provides that:

> "A person who wilfully obstructs any person acting in the execution of this Act or any byelaw or order made under it is, in any case for which no other provision is made by this Act, guilty of an offence and liable to a fine not exceeding level 1 on the standard scale; and if the offence is continued after conviction, he is guilty of a further offence and liable to a fine not exceeding £5 for each day on which the offence is so continued."

67. Once it is determined that the felling of trees is undertaken in the execution of the council's duty to maintain the highway under section 41 of the 1980 Act, I can see no answer to the council's submission that the direct action constitutes a wilful obstruction of persons acting in the execution of the Act. Although it is not the most serious of offences, the section makes this a criminal offence. Leaving aside the impact of Articles 10 and 11 to which I shall come, Mr Cooper advanced no submission to explain why this conclusion should not follow, beyond asserting a right of peaceful protest and relying on the decision of the police not to prosecute. However, the decision of the police not to prosecute cannot affect, let alone determine, whether the conduct in question falls within the scope of section 303. It is for the courts, not the police, to decide what conduct amounts to a criminal offence. Subject to the impact of Articles 10 and 11, there can be no right to engage in conduct which Parliament has rendered criminal and such conduct cannot be regarded as reasonable.

68. Moreover, there can be no doubt that the presence of an objector within a safety zone is contrary to the orders made by the council under section 14 of the Road Traffic Regulation Act 1984. It has not been suggested that those orders were unlawfully made. The purpose of the statutory scheme and of the orders made under that Act is to enable work on or near the highway to be carried out safely. The purpose of the direct action is to frustrate the achievement of that objective. Once again, Mr Cooper made no submission to the contrary.

69. In these circumstances I accept the council's submission that an objector maintaining a presence in a safety zone after the barriers have been erected and a notice has been displayed is committing a trespass.

70. It is therefore unnecessary to consider whether such an objector is also committing other torts such as nuisance or other offences, for example under section 241 of the Trade Union & Labour Relations (Consolidation) Act 1992. Those alternative ways in which the council puts its case raise similar issues such that they add little to the council's claim and would be unlikely to succeed if the more straightforward case of trespass were to fail.

Articles 10 and 11 of the ECHR

71. However, it remains to consider the impact of Articles 10 and 11 of the ECHR. The council would not be entitled to an injunction if its effect would be to infringe the defendants' rights under those Articles. Two questions arise. The first is whether the defendants' direct action falls within the scope of those Articles. The second is whether, if it does, the restriction on the exercise of such rights represented by an injunction can be justified.

72. Article 10 provides:

> "(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

73. Article 11 provides:

> "(1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> (2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, the police or of the administration of the State."

Are Articles 10 and 11 engaged?

74. The council's case is that maintaining a presence within a safety zone has nothing to do with freedom of expression or freedom of assembly. The defendants are free to express their opposition to the felling of trees in a variety of ways, and have done so loudly and clearly – by establishing STAG, in the local and national press, radio and television, on social media, by organising petitions which have been debated at meetings of the council, by holding public meetings and lectures, by running regular information stalls, in the case of Alison Teal as an elected councillor by making her views clear at council meetings, in the case of Calvin Payne and others by setting up a protest camp in a Sheffield park to raise awareness of the issue, and by enlisting the support of local and national celebrities, experts and Members of Parliament. There

cannot be many, if any, interested residents of Sheffield who are unaware of the issue. Indeed, it has once again received national prominence within the last few days as a result of the Secretary of State for the Environment calling on the council to end its tree felling programme, an intervention which the council has rejected as misinformed. Thus the political debate continues.

75. None of these activities would be prevented by the grant of an injunction, although once the tree felling programme is complete the exercise of any right to freedom of expression would necessarily have to be directed at protesting about what had been done rather than campaigning to prevent it from happening. The trees would have gone.

76. Similarly, the council points out that the defendants and those who support them are free to assemble in order to protest peacefully against the felling of trees – provided that they do so outside any safety zone. The council is not seeking to prohibit public demonstrations in opposition to the felling of trees. It recognises that freedom of peaceful protest is fundamental in a democracy and that a degree of toleration of the disruption thereby caused is required, as held for example in *Kuznetsov v Russia* [2008] ECHR 10877/44 at [44]:

> "Finally, as a general principle, the Court reiterates that any demonstration in a public place inevitably causes a certain level of disruption to ordinary life, including disruption of traffic, and that it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance."

77. In this case the council is only seeking to prevent the presence of the defendants within a safety zone from which the public have been excluded pursuant to the orders made under the 1984 Act. It maintains that there is a stark distinction between peaceful protest and unlawful direct action, citing the decision of Swift J in *Heathrow Airport Ltd v Garman* [2007] EWHC 1957 (QB), a case where protesters (including a group known as "Plane Stupid") concerned about the effect of aviation on the environment sought to cause chaos inside terminal buildings, to blockade roads and railways into Heathrow, and to disrupt the supply of food for passengers using the airport. Swift J disposed of the argument that such conduct was protected by Articles 10 and 11 in short order:

> "108. Reliance is placed by the Defendants on Articles 10 and 11 of the ECHR, i.e. the rights to freedom of expression and freedom of association. These are, of course, fundamental rights, that must be carefully guarded. However, these rights do not entitle ordinary citizens, by means of mass protest or unlawful action, to stop the lawful activities of others.
>
> 109. The activity that is intended by Plane Stupid and others is not a lawful assembly for the purpose of communicating their views to members of the public. Such an assembly always carries the attendant risk of being hijacked by a minority of persons intent on behaving unlawfully. In those circumstances, the rights of the law-abiding majority should plainly not be curtailed. But the position here is very different. The activity intended is not a lawful protest. Its sole purpose is to disrupt the operation of the airport. The actions contemplated may be peaceful in that they

involve no violence. They would, however, be designed to interfere with the rights of thousands of people, acting perfectly lawfully, as well as with the lawful activities of an authority responsible for running an operation of vital importance to this country, its international communications and its commercial interests."

78. It is not surprising that the extreme activities of the defendants in the *Heathrow* case were held not to be protected by Articles 10 and 11. They appear to have accepted that they supported and encouraged "unlawful direct action" in the pursuit of their objectives (see [23] of the judgment). However, while the case supports the existence of a distinction between peaceful protest and *unlawful* direct action, "direct action" is not a term of art and it does not necessarily follow that all activities which may be so described are unlawful. Nor does it follow that every action which constitutes a trespass or is contrary to some provision of domestic criminal law is necessarily outside the scope of the Articles. So to hold would be contrary to the decision of the Court of Appeal in *City of London Corporation v Samede* [2012] EWCA Civ 160, [2012] 2 All ER 1039, where the establishment of the Occupy camp outside St Paul's Cathedral was found to be tortious and to involve the commission of a criminal offence, not least because it impeded members of the public in doing what they were lawfully entitled to do (see e.g. the judgment at first instance [2012] EWHC 34 (QB) at [92]). Despite this, the defendants' Article 10 and 11 rights were held to be engaged so that the order for possession sought by the City needed to be justified under paragraph 2 of those Articles.

79. In some cases it may not matter much whether a public protest is held in one location rather than another, while in other cases the location in which it takes place may constitute the essence of the protest itself. In such a case, to say that there is a right to assemble peacefully or to express views in one public place but not in another may be tantamount in practice to denying the right to freedom of peaceful assembly or freedom of expression altogether. In the present case, I consider that the location of the defendants' peaceful protest, within a safety zone, is an intrinsic part of the protest in question and that the presence of the defendants within such a zone is itself intended to make and does make a powerful statement about what they see as the importance of the issue.

80. In those circumstances I consider that the defendants' Articles 10 and 11 rights are engaged, but that the factors prayed in aid by the council are relevant to the issue of justification under paragraph 2 of those Articles. To that issue I now turn.

Justification

81. Neither party submitted that in the circumstances of this case there was a material distinction between paragraph 2 of Article 10 and paragraph 2 of Article 11.

82. In order to be justified a restriction must be (a) prescribed by law, (b) necessary in a democratic society in the interests of (in this case) the protection of the rights and freedoms of others, and (c) proportionate to the objective of protection of those rights and freedoms. It was not suggested that the restriction in this case is not prescribed by law or that the applicable law, contained in the statutory provisions to which I have referred and in the common law of trespass, is unclear or inaccessible.

83. The approach which must be taken to the question whether a restriction on lawful assembly is necessary and proportionate in a case of this nature, together with some of the factors which need to be taken into account, was considered in *City of London Corporation v Samede*. As Lord Neuberger MR indicated at [38], the case raised the question what were "the limits to the right of lawful assembly and protest on the highway, using the word 'protest' in its broad sense of meaning the expression and dissemination of opinions". He continued at [39]:

> "As the judge recognised, the answer to the question which he identified at the start of his judgment is inevitably fact-sensitive, and will normally depend on a number of factors. In our view, those factors include (but are not limited to) the extent to which the continuation of the protest would breach domestic law, the importance of the precise location to the protesters, the duration of the protest, the degree to which the protesters occupy the land, and the extent of the actual interference the protest causes to the rights of others, including the property rights of the owners of the land, and the rights of any members of the public."

84. Because the answer to the question whether a restriction on the right to lawful assembly depends on the facts of each individual case, there is a limit to the assistance which can be derived from comparing the facts of other cases with those of the case in issue. Nevertheless the Court of Appeal did analyse the facts of a number of cases, including *Kuznetsov v Russia*, *G v Germany* (Application 13079/87, a Commission decision on admissibility later cited with approval by the Strasbourg court) and *Mayor of London (on behalf of the Greater London Authority) v Hall* [2010] EWCA Civ 817, [2011] 1 WLR 504. Having done so, Lord Neuberger continued at [49]:

> "The essential point in *Hall*'s case and in this case is that, while the protesters' Article 10 and 11 rights are undoubtedly engaged, it is very difficult to see how they could ever prevail against the will of the landowner, when they are continuously and exclusively occupying public land, breaching not just the owner's property rights and certain statutory provisions, but significantly interfering with the public and convention rights of others, and causing other problems (connected with health, nuisance and the like), particularly in circumstances where the occupation has already continued for months, and is likely to continue indefinitely."

85. Finally, in some concluding remarks commenting on the length of the trial in that case, Lord Neuberger observed at [62] that:

> "Of course, each case turns on its facts, and where convention rights are engaged, case law indicates that the court must examine the facts under a particularly sharp focus. Nonetheless, in future cases of this nature (when the facts involve a demonstration which involves not merely occupying public land, but doing so for more than a short period and in a way which not only is in breach of statute but substantially interferes with the rights of others), it should be possible for the hearing to be disposed of at first instance more quickly than in the present case or in *Hall*'s case."

86. The clear implication is that in most such cases the balance is likely to come down firmly in favour of a restriction on the right of assembly.

87. There is no doubt that the present case is materially different from the facts of *City of London Corporation v Samede*. In particular, it contains none of the features giving rise to a risk to public health which existed in that case. Nevertheless the guidance given by the Court of Appeal is highly relevant.

88. It is implicit in the passages cited above that the lawfulness of a protest may change with time. In some circumstances it will be impossible to justify a restriction on freedom of expression or freedom of peaceful assembly which is of limited duration, even if it involves conduct which is tortious or which amounts to a criminal offence, and even if the conduct in question affects adversely the rights of others or – as in this case – prevents others from going about their lawful business. That is something which public authorities and others may have to put up with in view of the importance of these rights in a democratic society. However, a protest which starts as a legitimate exercise of Article 10 or 11 rights may become unlawful if it continues for a more extended period. The more serious the tortious or criminal conduct in question and the greater the impact on the rights of others, the shorter the period is likely to be before the initially legitimate protest becomes unlawful. Similarly, there is a distinction between a protest which is aimed at requiring a public authority, particularly an authority which is democratically accountable, to think again about a controversial decision and a protest which seeks to prevent such an authority from implementing a lawful decision reached and maintained after extensive debate.

89. In the present case it seems to me that the following factors are of importance:

(1) As I have already explained, continuation of the defendants' direct action would breach domestic law. It would constitute both a trespass (and thus an infringement of the council's rights as the owner of land comprising the highway) and a criminal offence, albeit not the most serious of offences.

(2) The defendants rely on the fact that the police are not arresting protesters as showing that at least one responsible public body (whether the police, the Police & Crime Commissioner or the Crown Prosecution Service) has decided that no criminal offence has been committed or at least that prosecution would not be in the public interest. As already indicated, I do not accept that no criminal offence has been committed, although it would not be surprising if the prosecution authorities had decided that criminal proceedings would have been somewhat heavy-handed, at any rate until potential civil remedies had been exhausted.

(3) Again as already explained, the location of the protest is fundamental, but this point cuts both ways. On the one hand, the fact that it takes place within a safety zone is an intrinsic part of the protest in question. On the other hand, that is why it constitutes an interference with the council's performance of its statutory duty and is a criminal offence.

(4) The defendants say that their presence within a safety zone is of short duration, lasting no more than a matter of hours, and that this represents a major distinction from the facts of cases such as *City of London Corporation v Samede* where the protest camp had already been in place for some months and would have continued indefinitely without the court's order. However, that is to take too narrow a view of what has been happening. The direct action has already been continuing for a number of months and has been intensifying more recently.

Although each individual protest may last no more than a few hours (or until the Amey tree surgeons give up and go away), the reality of the situation is that the direct action is intended to prevent indefinitely the felling of the remaining trees.

(5) Further, although the direct action does not involve exclusive occupation of the land within the safety zone as there is nothing to prevent the Amey tree surgeons from being present also, again the reality is that the presence of a protester within a safety zone prevents altogether the work which the council seeks to have carried out.

(6) Accordingly the interference with the property rights of the council is substantial. The result is, and is intended to be, that no felling can be undertaken, that the road maintenance programme which the council wishes to complete is significantly disrupted, and that there is a material interference with the rights of those members of the public who (even if less vocal) support the council's position and are entitled to require that the council performs its statutory duty.

(7) Moreover, as already indicated, although other forms of protest will not prevent the council from continuing with the removal of those trees identified by it as needing to be removed, there have been other means by which the defendants can express their views and assemble to protest against the council's approach.

(8) There has been an opportunity for those opposed to the council's position to challenge the lawfulness of its conduct by judicial review. The challenge failed.

90. I must consider the position as it currently stands, now that the council is seeking an injunction. In that regard it may be that the position is different now from what it was at an earlier stage such as when the direct action was first undertaken. At that stage it may well be that despite the failure of the judicial review challenge, the direct action represented a lawful exercise of rights to freedom of expression and freedom of peaceful assembly in order to demonstrate the objectors' strength of feeling and to encourage, or even require, the council to think again. However, it is apparent that the issue has been extensively debated and that the council has now thought again and has decided that it is in the interests of the people of Sheffield as a whole to maintain its policy. That was apparent from its position at the trial and is underlined by its response to the call by the Secretary of State to cease the programme of tree felling. The defendants and their supporters do not like and are entitled not to like the decision which the council has reached. They are entitled to think that it is wrong headed, foolish or even intransigent. However, it cannot sensibly be denied that the council has considered the defendants' views and has not accepted them. Despite this, the defendants and their supporters intend to continue the direct action indefinitely. Thus a protest which may have begun with a view to causing the council to think again has now become an attempt to prevent the council indefinitely from carrying out work which it considers to be in the public interest.

91. Accordingly the position has now changed. The decisive factor in my judgment is that the council is the democratically accountable statutory body charged with responsibility for determining how the highway should be repaired and maintained and how public resources should be allocated. It is required to act lawfully, but a challenge to the legality of its policy failed in *Dillner*. It may be right or it may be wrong in its view of where the public interest lies, but it is entitled to form a view

about this and is accountable to the people of Sheffield through the ballot box. The defendants, on the other hand, are not accountable to anyone. Ultimately, what has been held to be the lawful decision of the democratically elected council as to where the public interest lies must prevail over the views of individual protesters who are not entitled to prevent the council from giving effect to its lawful decisions.

92. It is unnecessary to decide precisely at what point direct action which may well have been lawful when first undertaken became unlawful. It is sufficient to conclude, as I do, that the restriction which the council seeks to impose is now justified. It follows that Articles 10 and 11 do not provide an answer to the council's case that the direct action constitutes the tort of trespass and a criminal offence under section 303 the Highways Act 1980.

Injunction

93. In these circumstances the council is entitled to an injunction in the same terms as the undertakings given by the other defendants. It is entitled to an injunction to restrain the commission of a trespass (*Patel v W.H. Smith (Eziot) Ltd* [1987] 1 WLR 853 holds that in general the landowner is entitled to an injunction to restrain a trespass even if the trespass causes him no harm; here, the disruption to the work plainly does cause the council harm) and also to take action under section 222 of the Local Government Act 1972 in support of the criminal law in circumstances where the defendants' conduct will continue unless restrained by injunction (*City of London Corporation v Bovis Construction Ltd* [1992] 3 All ER 697 at 714 g-j).

94. Accordingly I order that the three remaining named defendants must not:

(1) enter any safety zone erected around any tree within the area shown edged red on the plan which will be attached to the order (the area of Sheffield City);

(2) seek to prevent the erection of any safety zone;

(3) remain in any safety zone after it is erected;

(4) knowingly leave any vehicle in any safety zone or intentionally place a vehicle in a position so as to prevent the erection of a safety zone; or

(5) encourage, aid, counsel, direct or facilitate anybody else to do any of the matters in paragraphs 1 – 4 above including by posting social media messages.

95. There will in addition be an order in the same terms against persons unknown being persons intending to enter or remain in safety zones erected on public highways in the city of Sheffield. Such an order is appropriate in accordance with the principle established in *Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator Site* [2003] EWHC 1738 (Ch).

96. These orders will not take effect immediately in order to give the defendants an opportunity, if so advised, to seek permission to appeal. However, the council's programme has already suffered significant disruption and delay, while the end of the Core Investment Period under the PFI contract is looming. Accordingly the injunction will be in force, subject to any order made in the meanwhile, from 23:59 hours on 22

August 2017. As in the case of the undertakings, it will apply until 23:59 hours on 25 July 2018.

Disclosure of the PFI contract

97. Finally, I record that at the outset of the trial I rejected an application by the defendants for disclosure in unredacted form of the PFI contract between the council and Amey for reasons which I gave at the time. I indicated that I would keep the position under review as the trial developed. I have done so, but it remains my view that disclosure of this contract is unnecessary for resolution of the issues which I have had to determine. Although the defendants have made a number of sweeping allegations about the conduct of the council and Amey, for example that healthy trees are being felled because Amey is exercising improper influence over the council with a view to illegitimate profiteering, I have found that allegation to be detached from reality in the light of the evidence before me. A document does not become relevant and disclosable just because a party chooses to make far-fetched allegations about it.