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**EDO Technology Limited (“EDO”), Paul Hills (in substitution for David Anthony Jones), Managing Director of EDO (for and on behalf of the employees of EDO)
v Campaign to Smash EDO and Others**

Case No: HQ05X00791

High Court of Justice

23 March 2006

[2006] EWHC 598 (QB)

2006 WL 1078898

Before : Mr. Justice Walker

Date: 23rd March 2006, Hearing dates: 13, 14, 15 February 2006

Representation

- Mr Robert Englehart QC and Mr Clive Jones (instructed by Lawson-Cruttendon & Co) for the claimants.
- Ms Stephanie Harrison instructed by Moss & Co for D3 (Mathew Axworthy), D4 (Simon Levin), D8 (Elizabeth Welch), D11 (Tom Daly), D12 (Jaya Nyanajoti), D14 (James Fenn) and D15 (Paul Fenn).
- D5 (Mr Christopher Osmond), D10 (Ms Lorna Marcham), D17 (Mr Ceri Gibbons) in person.
- D1 and D2 struck out; D6 (Anthony Parker), D7 (Cynthia Schwartz), D9 (Penny Steel) D13 (Thomas Gittoes) and D16 (Richard Hollis) did not attend and were not represented.

Approved Judgment

Mr Justice Walker:

Introduction

1 In this judgment I deal with the adjourned hearing of two applications. In circumstances noted below under the heading “Procedural History”, the applications in question were adjourned by me on 1.12.05, and now concern a reduced number of defendants. Of that reduced number only the 5th and 10th defendants have taken an active part in the proceedings. Both the 5th and the 10th defendants act as litigants in person. Mr Robert Englehart QC and Mr Clive Jones act on behalf of the claimants following the adjournment of the applications. They did not act for the claimants at any earlier stage.

2 The first application is set out in Application Notice number 953 issued by the 5th defendant, Mr Christopher Osmond, on 4 November 2005. The formal application seeks orders in respect of the claimants' disclosure and witness statements. As developed orally, however, the purpose of the application is to seek orders either that the claim should be struck out by reason of various alleged failings on the part of the claimants or that the claimants should lose the benefit of an interim injunction granted by Gross J on 29 April 2005 (“the April Injunction”). Although issued by the 5th defendant alone, this application is supported by the 10th defendant, Ms Lorna Marcham. Mr Englehart has indicated that the claimants have no objection to the 10th defendant seeking similar orders to those sought by the 5th defendant. I shall refer to this application as “the D5 Abuse of Process Application.”

3 The other application dealt with in this judgment is set out in Application Notice number 970. This was issued by the claimants on 9 November 2005, and seeks permission to amend the particulars of claim. I shall refer to this as “the Amendment Application.” A draft amended particulars of claim accompanied that application, and I shall call it “Draft 1”. It has been superseded by subsequent drafts, the latest of which I shall call “Draft 4”. Mr Englehart accepts

that Draft 4 requires further revision.

4 I shall give summaries of the claimants' case as originally formulated, of the issues arising from the defences, and of the procedural history, before turning to deal with the Amendment Application and the D5 Abuse of Process Application.

Summary of the claimants' original case

5 The first claimant ("EDO") is a company incorporated in this country. It has a factory in Brighton ("the Property") where it designs and makes weapons and related equipment. The equipment made in Brighton is sold to the governments of the United Kingdom and the United States of America. The defendants allege that it is also sold to the government of Israel. Mr David Jones was the managing director of EDO and as second claimant brought these proceedings for and on behalf of the employees of EDO pursuant to [CPR 19.6](#). He has now retired. His successor, Mr Paul Hills, has taken his place as second claimant. I shall refer to Mr Jones, Mr Hills and other employees of EDO as the "second claimants."

6 The second claimants maintain that the defendants have, through a protest campaign conducted by themselves and other activists, pursued a course of conduct against the second claimants amounting to harassment under the [Protection From Harassment Act 1997](#) ("the PHA 1997"). When issuing these proceedings on 22nd March 2005 they sought an injunction prohibiting certain future conduct. The cause of action for seeking an injunction was explained in this way in paragraphs 11 and 25 of the particulars of claim:

"11. The claimants' case is that the activities of the defendants/activists together constitute a course of conduct which amounts to unlawful harassment contrary to the [Protection From Harassment Act 1997](#) ... The claimants support this claim with ... particulars which they say establish that they have been the subject of unlawful harassment and consequently that they are likely to be the subject of unlawful harassment in the future."

....

"25. Accordingly, the claimants claim that unless the defendants and the unknown and unnamed protesters working in association with them are restrained the claimants are likely to be unlawfully harassed by the defendants/protesters contrary to the [Protection From Harassment Act 1997](#)."

7 The particulars of past unlawful harassment promised at paragraph 11 included reference back to three events described in paragraphs 4, 5 and 6:

- (1) A road block on 20 May 2004 ("the May 2004 Roadblock"), preventing access to the Property. Protestors were chained to a cage and refused to move from 7.30 a.m. until midday. The claimants relied upon convictions of the 3rd to 8th defendants for offences connected with this incident by Brighton Magistrates Court on 14 December 2004.
- (2) The second event occurred on the same day, when the roof of the Property was occupied for 23 hours ("the May 2004 Trespass"). The claimants relied upon the conviction of the 9th to 13th Defendants for offences of aggravated trespass by Brighton Magistrates Court on 28 January 2005.
- (3) The third event was a trespass on the Property on 2 September 2004 ("the September 2004 Trespass"), involving a "sit in" by the 14th, 15th and 16th defendants, forming part of a "non-violent direct action day" organised by the 1st and 2nd defendants (whom I shall refer to as "Smash EDO" and "BOOB"). This incident was relied upon despite the subsequent acquittal of those defendants by Brighton Magistrate Court on charges of aggravated trespass.

8 The remainder of the particulars at paragraphs 12 to 25 described objectionable conduct attributed to "unknown and unnamed protestors". This included the targeting of directors' homes, threats on websites, an invitation to protestors to conduct a telephone blockade, a "week of action" commencing on 29 August 2004 involving a protest camp near the Property, the use of paint bombs and graffiti, assaults on security staff and the accosting and photographing of

employees, aggressive and alarming conduct directed at employees driving to and from the Property, noisy and aggressive protests involving obscenities and shouts of “killers”, and repeated trespasses including criminal damage to the Property, the dumping of horse manure and ballast outside doors to the Property and the insertion of superglue into locks.

9 At paragraph 3 it was asserted that since about January 2004 Smash EDO and BOOB had been conducting a concerted “anti-war campaign” with the declared object of removing EDO from Brighton, and in support of this assertion various website publications were relied on. Paragraph 9 said that actions of the 3rd to 16th defendants had been carried out “in close association” with the anti-war campaign against the claimants co-ordinated by Smash EDO and BOOB, and further website publications were relied on. However these paragraphs were not specifically the subject of reference back in the particulars at paragraphs 12 to 25.

10 The claimants relied on [s 1\(1\) of the PHA 1997](#) when seeking the April Injunction. However, it has been held that [s 1\(1\)](#) does not confer rights of action on a company. It was accordingly stated on behalf of EDO at the hearing for the April Injunction that it participated in these proceedings on the basis that it was not seeking any relief in its own right.

11 As to the cause of action under the [PHA 1997](#), the starting point is [section 1 subsections \(1\), \(1A\) and \(2\)](#), which are as follows:

“(1) A person must not pursue a course of conduct — (a) which amounts to harassment of another, and (b) which he knows or ought to know amounts to harassment of the other.

(1A) A person must not pursue a course of conduct — (a) which involves harassment of two or more persons, and (b) which he knows or ought to know involves harassment of those persons, and (c) by which he intends to persuade any person (whether or not one of those mentioned above) — (i) not to do something that he is entitled or required to do, or (ii) to do something that he is not under any obligation to do.

(2) For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to or involves harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to or involved harassment of the other.”

12 I shall return to [subsection \(3\)](#). [Section 1](#) is to be read with [section 7 subsections \(2\) to \(5\)](#) which state:

“(2) References to harassing a person include alarming the person or causing the person distress.

(3) A ‘course of conduct’ must involve — (a) in the case of conduct in relation to a single person (see section 1(1)), conduct on at least two occasions in relation to that person, or (b) in the case of conduct in relation to two or more persons (see section 1 (1A)), conduct on at least one occasion in relation to each of those persons.

(3A) A person’s conduct on any occasion should be taken, if aided, abetted, counselled or procured by another — (a) to be conduct on that occasion of the other (as well as conduct of the person whose conduct it is); and (b) to be conduct in relation to which the other’s knowledge and purpose, and what he ought to have known, are the same as they were in relation to what was contemplated or reasonably foreseeable at the time of the aiding, abetting, counselling or procuring.

(4) ‘Conduct’ includes speech.

(5) References to a person, in the context of the harassment of a person, are references to a person who is an individual.”

13 The criminal offence of harassment is created by [section 2](#) in these terms:

“(1) A person who pursues a course of conduct in breach of section 1(1) or (1A) is guilty of an offence.

(2) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding level 5 on the standard scale, or both.”

14 A civil remedy is conferred by [section 3](#). I need set out only [subsections \(1\) to \(3\)](#) as follows:

“(1) An actual or apprehended breach of section 1(1) may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question.

(2) On such a claim, damages may be awarded for (among other things) any anxiety caused by the harassment and any financial loss resulting from the harassment.

(3) Where — (a) in such proceedings the High Court or a county court grants an injunction for the purpose of restraining the defendant from pursuing any conduct which amounts to harassment, and (b) the plaintiff considers that the defendant has done anything which he is prohibited from doing by the injunction, the plaintiff may apply for the issue of a warrant for the arrest of the defendant.”

15 Returning to [section 1\(3\)](#), this disapplies [section 1\(1\) and \(1A\)](#) in certain circumstances. It reads:

“(3) Subsection (1) or (1A) does not apply to a course of conduct if the person who pursued it shows — (a) that it was pursued for the purpose of preventing or detecting crime, (b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or (c) that in the particular circumstances the pursuit of the course of conduct was reasonable.”

16 The burden of proof of the matters set out in [s 1\(3\)](#) lies on the defendant. Accordingly it was not necessary for the claimants to deal with those matters in the particulars of claim, and they did not do so. However, as the claim for an injunction was founded on assertions of past breaches of [s 1](#), it was to be expected that the defendants would seek to answer those assertions by relying on [s 1\(3\)](#).

Issues arising from the defences

17 No defences were served by the 1st and 2nd defendants. Nobody acknowledged service on their behalf, and they were struck out by order of Gross J on 29.4.05.

18 The defences of the 3rd, 4th, 8th, 11th, 14th and 15th defendants were set out in a single document served on 3.6.05. A separate defence of the 12th defendant was served on 1.6.05. All these defendants were represented by Moss & Co, and I shall refer to them as “the Moss Defendants.”

19 Separate defences of the 5th and 10th defendants, each of whom was acting in person, were served on 3.6.05.

20 After the grant of the April Injunction Mr Ceri Gibbons was joined on his own application as 17th defendant. His defence, served on 3.6.05, explained that as the April Injunction applied to all those with notice of it, he had joined the proceedings to defend his interest as a lawful protestor.

21 No defences were served by the 6th, 7th, 9th, 13th and 16th defendants. They have taken no active part in the proceedings.

22 A primary head of defence emerges from the defences that were served. This is that, leaving aside [s 1\(3\)](#), the defendants deny that their actions, whether individually or taken together, contravened [s 1\(1\)](#). They say that their individual acts and the extent to which any defendant can be held responsible for the acts of others on the facts of this particular case will have to be determined at trial.

23 So far as this head of defence is concerned, it seems to me that it can succeed in one or other of two ways. One way is that if a defendant's acts, including deemed acts under [section 7\(3A\)](#),

are not shown by the claimants to constitute a course of conduct amounting to harassment then the claim against that defendant will fail. The other way is that the claimants may be unable to show that a defendant knew or ought to have known that such course of conduct, as is proven by the claimants, amounted to harassment. In that case also the claim against such a defendant will fail. On this first head of defence it is the claimants who bear the burden of proof.

24 A second head of defence will only be needed if the claimants overcome the first head of defence. It relies upon [section 1\(3\)\(c\) of the PHA 1997](#) as disapplying the operative parts of that statute. Here the defendants say that any course of conduct that the claimants may prove at trial was, in the particular circumstances, reasonable. This head of defence requires the court at trial to strike a balance between, on the one hand, legitimate protest involving a proper invocation of principles of freedom of expression and, on the other hand, interference with the rights of others.

25 It is common ground that the burden of proof under [section 1\(3\)\(c\)](#) lies on a defendant. If a defendant meets that burden of proof, establishing that the course of action in question was reasonable, then the claimants' claim fails so far as that defendant is concerned.

26 A third head of defence would only have arisen if both the first and second heads of defence failed. It said that [section 1\(3\)\(a\) of the PHA 1997](#) disapplies operative parts of the statute on the basis that any course of conduct that the claimants may prove at trial was pursued for the purposes of preventing crime. Pursuant to an order made by Simon J on 12th July 2005 a composite document particularising this head of defence was served by participating defendants on 4th August 2005. The essential thrust was that any course of conduct that the claimants might prove was pursued for the purpose of preventing (i) the crime of aggression, and/or (ii) offences under the [Geneva Conventions Act 1957](#), and/or (iii) offences against the [International Criminal Court Act 2001](#). In the light of this document at a case management conference on 9.9.05 Simon J identified questions that should be tried as preliminary issues. A trial of those preliminary issues took place before me on 1.11.04 to 3.11.04. I gave judgment on 4.11.05. My findings on the preliminary issues led me to conclude that the third head of defence was not open to the defendants, as the matters they relied upon did not fall within [s 1\(3\)\(a\)](#).

27 Thus, following my judgment of 4.11.05, the first broad issue arising at trial was whether the claimants could show conduct attributable to any particular defendant amounting to harassment and that the defendant knew or ought to have known that it amounted to harassment. If so, the second broad issue was whether that defendant could show that his or her conduct was reasonable.

Summary of the procedural history

28 At a hearing on 14 April 2005 Gross J gave directions to enable an application for an interim injunction to be heard later that month. At this hearing, and at all subsequent hearings until the end of last year, Mr Timothy Lawson-Crutenden of the claimants' solicitors acted as their advocate. On behalf of the claimants he put before Gross J on 14.4.05 a statement of Detective Constable Bialoszewski of Sussex Police. Exhibited to that statement were copies of the criminal records of certain of the defendants. Included in this material were records of conviction for offences committed in the course of protests against EDO at or near the Property. The records were not confined to such offences, however. Additional material included:

- (1) a printout for the 4th defendant recording his conviction by Solihull Magistrates on 17 January 2005 for criminal damage on 25 June 2004. This was an incident at premises conducting business for Caterpillar Inc, but this fact was not expressly stated in the printout.
- (2) a printout for the 5th defendant recording that he had been remanded on bail on 12 November, 2 December and 9 December 2004 in relation to an impending prosecution for aggravated trespass on 11 November 2004. The grant of bail was conditional upon not entering or going within 500 yards of Agrexco Limited, Carmel House, Swallowfield Way, Hayes.
- (3) a printout for the 6th defendant recording a conviction on 25 April 1996 for an assault on a police officer on 29 February 1996, for which he received a conditional discharge.
- (4) a printout for the 11th defendant referring to an impending prosecution of the 11th defendant for battery, he having been arrested on 5 November 2004 for that offence at a time when he was on bail.

- (5) a print out for the 12th defendant giving particulars of bail conditions imposed on him by Uxbridge Magistrate on 12 November and 2 and 9 December 2005. Condition one was that he should not enter or go to private land for the purpose of demonstration activity without permission of the land owner. Condition two was that he should not go within 500 metres of Agrexco Limited, Carmel House, Swallowfield Way, Hayes.

29 Detective Constable Bialoszewski's statement said that it and the material exhibited to it had been supplied to Timothy Lawson-Cruttendon in his formal capacity as an officer of the court and were not to be released to the parties to this action without a formal order pursuant to [section 35 of the Data Protection Act 1998](#) and [CPR 31.17](#). The claimants sought such an order from Gross J, but they were only partially successful. By paragraph 2 of his order of 14.4.05, Gross J gave leave to the claimants to adduce in evidence at the injunction application records relating only to matters listed in a document annexed to the order. For the most part the list was confined to records of conviction for offences committed in the course of protests against EDO at or near the Property. The list did not include any of the items at paragraph 28 (1) to (5) above.

30 As noted earlier, on 29th April 2005 Gross J granted the April Injunction. This was an interim injunction until trial. It was granted on the basis that there would be a speedy trial, as issues of freedom of expression were involved. At that stage it was thought that trial could take place in the summer. Eventually a fixture for 10 working days starting on 21.11.05 was obtained.

31 Following service of the defences an application notice was issued by the claimants on 14 June 2005 seeking disclosure by Sussex police of:

- (1) prosecution papers in relation to the trial leading to conviction of the 3rd to 8th defendants arising from the May 2004 Roadblock, the trial leading to the conviction of the 9th to 13th defendants arising from the May 2004 Trespass, the appeal (which was yet to be heard) from that conviction, and the trial leading to acquittal of the 14th to 16th defendants on charges arising from the September 2004 Trespass.
- (2) as regards matters which had not proceeded or were proceeding to trial, prosecution papers for "each crime identified" in an attached chronology; along with prosecution papers concerning the arrests of three protestors on 12.6.04, of the 12th defendant on 8.12.04 and 12.11.04, of the 11th defendant on 5.11.04, of the 10th and 12th defendants on 21.3.05, of the 5th, 11th and 17th defendants and other "activists" on 31.5.05, and the arrest of a Mr Lesniowski for allegedly breaching the April Injunction.
- (3) known bail or other addresses for the defendants, and bail conditions.
- (4) documentary evidence supporting warnings by police officers for incidents near the Property or outside the homes of employees, a list distinguishing lawful and unlawful protests and identifying non-compliance with the [Public Order Act 1986](#), video footage "of the main events which must undoubtedly relate to the incidents on 20.5.04, 2/9/04, 21.3.05 and 31.5.04 ...", documentary evidence of any complaints from the public concerning noise levels or activities near the Property, and a description of an incident leading to the 12th defendant receiving a custodial sentence for an assault on the police, along with appropriate documentary evidence.

32 This application, and applications against the West Midlands Police and the City of London police, came on for hearing before Simon J at a case management conference on 12 July 2005. The application against City of London police was withdrawn by the claimants. In a note for the court dated 6 July 2005 for the application against West Midlands police as regards the 4th defendant's conviction on 17 January 2005 for criminal damage, Mr Lawson-Cruttenden had referred to this as going to the issue of actual or anticipated harassment, referring to "the position concerning witness intimidation directed at Caterpillar".

33 Determinations made by Simon J on 12 July 2005 included the following:

- (1) he declined disclosure in relation to acquittals.
- (2) he declined disclosure of material concerning the three protestors on 12.6.04
- (3) he declined disclosure of material concerning the 11th defendant on 5.11.04, explaining that there was conflicting evidence and so he would make no order but it would be open to

the claimants to make a fresh application

- (4) he declined disclosure of material concerning 21.3.05 and 31.5.05;
- (5) having heard Mr Lawson-Cruttenden describe the 4th defendant's activities concerning Caterpillar, he declined disclosure on the basis that the incident was too remote, and whether or not it was relevant he was not persuaded that it was necessary on the present material.

34 As mentioned earlier, following service of the composite document (in relation to the third head of defence) a case management conference was held before Simon J on 9.9.05, leading to the identification of preliminary issues. Simon J was concerned that at this stage disclosure had not yet taken place. The transcript includes the following at p.180:

MR JUSTICE SIMON: The whole thing is drifting along without any thought being given about how sensibly to progress this case.

MR LAWSON-CRUTTENDEN: It is not drifting.

MR JUSTICE SIMON: Well, it is drifting along. Nothing effective has been done at all since I last saw this case other than the service of the composite defence, absolutely nothing, and there is a trial which is important to all parties in November. ... unless I am here pushing and shoving, as I put it colloquially, nothing appears to have been done at all and that is not good enough.

35 The parties were due to complete disclosure of documents on 23.9.05. On that day a further application on the part of the claimants came before Royce J. The application sought reinstatement of Smash EDO and BOOB as first and second defendants. It was rejected by Royce J as too late. He noted that if the application were allowed it would change the position on disclosure, and described that position as "wholly unsatisfactory." The proceedings could perfectly properly be determined with the existing parties.

36 Disclosure was made on 23 September 2005. The disclosure made by the claimants gave rise to many concerns on the part of the defendants. I shall describe some of those concerns in later parts of this judgment.

37 Oral argument of the preliminary issues began on 1.11.05. On the same day Application Notice number 946 was issued by the Moss Defendants. This was in terms which were to be echoed by the D5 Abuse of Process Application issued on 4.11.05, the day on which judgment was given on the preliminary issues. In the meantime Application Notice number 952 was issued on 3.11.05 by the 17th defendant, also echoing the Moss Defendants' application. The Amendment Application was then issued by the claimants on 9.11.05. Regrettably, in the first instance these applications were listed for half an hour on 10.11.05, despite the parties having indicated that a day would be required. On that day I adjourned the applications for hearing on 16.11.05, when a full day was made available. On 16.11.05, however, it became clear that the applications would require far more than a day and would have to be adjourned so that there could be an orderly presentation of further written evidence and skeleton arguments. This inevitably meant that the trial could not begin on 21.11.05 as had been scheduled. Among other directions given on 16.11.05, I required that an officer of EDO describe on affidavit which protests were said to form part of a course of conduct amounting to harassment, what visual or sound recordings were made of such protests, and what had become of them. Other directions required the claimants to respond to complaints about disclosure made by Moss and Co, in some cases nearly two months earlier.

38 Argument on the application notices began on 23.11.05, and as it was clear that the trial could not begin during the period that had been allocated, I gave directions that it should not do so. What ought to have been an efficient and focussed hearing of the applications became bogged down by a series of new points raised in succession soon after the hearing began. The details are set out in a judgment given by me on 5.12.05, having concluded on 1.12.05 that there had been a failure by the parties to identify the real matters in issue, and that the claimants' legal team, by relying on Mr Lawson-Cruttenden to combine the roles of advocate and solicitor, was severely hampered in its ability to present the claimants' case. I adjourned the hearing to the new legal term, having received from the claimants appropriate undertakings, including an

undertaking to instruct counsel. I gave directions which among other things laid down a staged procedure designed to identify the real issues. During the course of the hearing a revised draft amended particulars of claim ("Draft 2") had been proffered by Mr Lawson-Cruttenden, and this in turn had been the subject of proposed revision. In accordance with my directions a new draft of the proposed amendments, settled by counsel, was submitted on 19.1.06 ("Draft 3").

39 The adjourned hearing of the applications was fixed for 13.2.06. It had become apparent on 1.12.05 that agreement between the claimants and the 12th defendant could be reached, and one reason for the directions given on 1.12.05 was a hope that by focussing on the real issues other defendants might be able to reach agreement with the claimants. With the help of an independent mediator that hope was partially fulfilled. On 6.2.06 I was informed that the Moss Defendants had agreed terms of a settlement with the claimants, the details of which were to be contained in a consent order.

40 I approved the consent order at the start of the hearing on 13.2.06. It provided that, the Moss Defendants having given undertakings set out in Schedule A and the claimants having given undertakings set out in Schedule B, there should be no order against the Moss Defendants in these proceedings and the April Injunction should be modified so as only to apply to defendants other than the Moss Defendants and so as not to apply to un-named persons. Paragraphs 2 and 3 of Schedule A made it clear that there was no admission of liability by the Moss Defendants. The undertakings given by the Moss Defendants contained no restriction on protest outside the Property. It was said by Ms Harrison on behalf of the Moss Defendants that they drew the balance in an appropriate way under the Convention.

41 In accordance with these arrangements I made an order for a new interim injunction ("the February Injunction") to replace the April Injunction. As the February Injunction was limited to named defendants not including the 17th defendant, it had been agreed between him and the claimants that he should cease to be a defendant and his costs should be paid by the claimants. I indicated that I would make an order accordingly. This meant that the only defendants actively participating in the proceedings were the 5th and 10th defendants, and that of the four applications which had been adjourned on 1.12.05 only two, the Amendment Application and the D5 Abuse of Process Application, remained live.

42 An initial point arose for resolution. This was that, as indicated above, Mr Jones had retired and had been replaced as managing director of EDO by Mr Hills. The claimants applied to substitute Mr Hills for Mr Jones as the named second claimant suing on behalf of EDO's employees. This was opposed by the 5th and 10th defendants on grounds which I found unpersuasive, and I allowed the claimants' application accordingly.

43 It was in those circumstances that I heard argument on the Amendment Application and the D5 Abuse of Process Application from 13.2.06 to 15.2.06.

Amendment: analysis of arguments

44 No party submitted that this case required any departure from established principles governing permission to amend. In general, the court will give permission to amend a statement of case so as to ensure that the real issues are resolved at trial, unless the grant of permission to amend would cause prejudice to another party that cannot be compensated by an order for costs.

45 There are, however, two matters of general principle which call for comment. The first concerns the approach advocated by Mr Lawson-Cruttenden at the abortive November hearing. Relying on the notes in *Civil Procedure 2005* at paragraph 32.5.4, his submission was, in effect, that if an issue was raised in witness statements or documents served by a party then that party should have permission to amend. Mr Englehart QC and Mr Clive Jones rightly did not espouse a general proposition of that kind.

46 After the exchange of witness statements there may well be occasions when an issue of fact emerges which is minor — in the sense that there is no prejudice to other parties in permitting that issue to be raised. In such circumstances there may be little difficulty in securing permission to amend. The mere fact, however, that an issue can be said to arise from witness statements or documents served by one party should not in my view lead to any general presumption in favour of permission to amend. I do not read the notes in *Civil Procedure 2005* as suggesting anything

to the contrary. Parties who are preparing for trial should at an early stage be assembling draft witness statements, relevant documents and other material. They must be alert to the possibility that this process will lead to new issues of fact or law being identified. When that happens, the party in question must consider whether the potential new issue is a matter that it should seek to have resolved at trial. It is necessary to bear in mind the principle that multiplicity of legal proceedings is to be avoided. In that regard a broad, merits-based approach is now appropriate, taking account of public and private interests involved and the facts of the case: see [Johnson v Gore-Wood \(No. 1\) \[2002\] 2 AC 1](#). If the conclusion is that the issue should be raised, then in general the appropriate course will be for that party without delay to formulate a proposal to amend its statement of case and to notify other parties of that proposal. Something less formal may of course be appropriate where the new issue is truly minor, or for other good reason, but a party who proceeds with less formality runs the risk that problems may later emerge.

47 The second matter of general principle concerns the approach to be taken where particular proposed amendments would delay trial. In the present case the trial date of 21 November has been lost. The claimants suggest that a new trial date should be fixed for a three day hearing. I suspect that double that period will be needed. Even so, I do not doubt that a new date could be given for trial in the summer term. Accordingly, if issues are raised by a particular proposed amendment which could not be tried at a hearing during the summer term then that amendment will need to be scrutinised particularly carefully, to examine whether the point raised is so important as to warrant putting back the proposed trial date. In the particular circumstances of the present case, the claimants said that they would be willing to forego a particular amendment if issues arising from it could not be dealt with at a trial in the summer term and the court thought it important to maintain such a trial date. Without in any way criticising Mr Englehart and Mr Clive Jones, I stress that I do not encourage those who are contemplating amendment of their statements of case to present the court with an option of this kind. In general, parties should rigorously evaluate their case on any proposed new issues which would be likely to delay trial. If the decision is taken that such an issue is so important that it ought to be advanced, then the application to amend should include an application for directions to enable a manageable trial date to be rearranged.

48 Turning to the position in relation to Draft 4, the 5th defendant identified relevant new developments. These included:

- (1) In December 2005 the convictions of the 10th, 11th and 12th defendants for aggravated trespass on 20 May 2004 were quashed at Hove Crown Court.
- (2) On 26 January 2006 the 5th, 12th and 17th defendants were acquitted of all charges at Uxbridge Magistrates Court in relation to Agrexco.
- (3) On 7 February 2006 charges against the 10th defendant were dropped at Brighton Magistrates Court in relation to the alleged breach of the [Public Order Act 1986](#) on 21 March 2005.

49 A helpful overview of draft 4 was given by Mr Englehart in his oral submissions. In broad terms that overview was as follows:

- (1) Section A described the claimants, and section B described the campaign against the claimants (“the Campaign”), which was said to be organised, either on their own or with others, by members of Smash EDO, the Brighton and Hove Palestine Solidarity Campaign (“BHPSC”) and BOOB. Section C described the defendants, and differentiated two groups. The 3rd, 4th, 8th, 11th, 12th, 14th and 15th defendants were identified as the “Defendants Who Settled”. As to the remainder, the conduct of each of the 5th, 6th, 7th, 9th, 10th, 13th and 16th defendants was said to show that each of them was one of the protestors actively engaged in the Campaign whether as members of Smash EDO, BHPSC, and BOOB, or otherwise, in order to achieve the Purpose of the Campaign [i.e. “to close down the business of EDO at the Property and to force EDO to leave Brighton.”] Paragraph 11 particularly identified the 5th defendant as involved with BHPSC, and as having been described as organiser of demonstrations carried on as part of the Campaign between 28 August to 4 September 2004 — it being noted that the telephone number used by BHPSC had appeared on leaflets during that period — and as frequently attending demonstrations at the property as part of the Campaign, including but not limited to 29 April, 4 May, 31 May and 30 September 2005.

- (2) Section D dealt with the conduct of the campaign by non-defendants. Section E dealt with the May 2004 Roadblock, identifying the conduct of the 5th to 7th defendants. Section F dealt with the May 2004 Trespass, identifying conduct on the part of the 9th, 10th and 13th defendants. In addition paragraph 29 said that on 21 March 2005 the 10th defendant with two other protestors, wearing white suits and face masks and intending to conduct “a weapons inspection” on the Property by way of trespass, were arrested for failure to comply with directions given by the Police under [Section 14 of the Public Order Act 1986](#), and had a threatening appearance causing the second claimants to fear trespass and/or harassment and interference with EDO's business. Mr Englehart accepted that a reference to the 10th defendant being charged under [Section 14](#) of the 1986 Act should be removed, as it was inappropriate to refer to criminal proceedings which resulted in acquittal.
- (3) Section G of Draft 4 concerned the 16th defendant, and his actions in the period between 28 August to 4 September 2004.
- (4) Section H of Draft 4, headed “Attribution of the Conduct of the Protestors”, asserted that those involved in the protests on 20 May 2004 aided, abetted, counselled or procured the conduct of other protestors that day. The 16th defendant was said to have aided, abetted, counselled or procured the conduct of other protestors during the period 28 August to 4 September 2004. This included aggressive and intimidating demonstrations not only outside the Property but also at family homes of Directors. Paragraphs 43 and 44 said that the 5th defendant as organiser had aided, abetted, counselled or procured these and other actions of protestors during the period 28 August to 2 September 2004.
- (5) Section I(i) of Draft 4 asserted that the actions of the 5th to 7th, 9th, 10th and 13th defendants on 20 May 2004, and the 5th defendant during the period 28 August to 2 September 2004 contravened [section 1 of PHA 1997](#), caused interruption to the business of EDO by closing that business for a day, and caused a nuisance and annoyance to EDO by unduly interfering with the comfortable and convenient enjoyment of the Property. The 5th to 7th defendants' obstruction of the highway was said to have caused EDO to suffer particular, direct and substantial damage over and above that sustained by the public at large, namely direct costs of £9,060 and indirect costs of £10,605 arising from the closure of the Premises. The 9th, 10th and 13th defendants were said to have caused the same loss and damage by trespass. Paragraph 51 of Draft 4 said that the claimants feared that the 5th to 7th, 9th, 10, and 13th defendants would repeat similar wrongful conduct unless restrained by the court.
- (6) Section I(ii) of Draft 4 alleged that the 16th defendant had been in breach of [section 1 of PHA 1997](#), had caused interference with the business of EDO, and had caused a nuisance and annoyance to EDO by unduly interfering with the comfortable and convenient enjoyment of the Property. He was also said to have trespassed and thereby interfered with the business of EDO. It was said that the claimants feared that he would repeat similar conduct. No claim for damages was made.
- (7) Section J of Draft 4 said that in support of the allegation of fear that conduct would be repeated, the claimants would rely as against the 5th and 13th defendants upon conduct directed at other companies as follows:
 - (a) A trespass on 16 March 2004 by between 16 and 20 protestors at Caterpillar Defence Products Limited (“Caterpillar”) in Shrewsbury, including the 5th and 13th defendants. The 5th defendant padlocked himself to pallet racks and refused to leave. The action was conducted by members of BHPSC against Caterpillar which was alleged to supply equipment to the Israeli defence forces. Mr Englehart accepted that an assertion that the police had arrested the 5th defendant and another protestor should be removed from Draft 4.
 - (b) On 12 November 2004 a group of activists including the 5th defendant staged a road block outside the premises of Agrexco (UK) Limited (“Agrexco”) in Hayes, Middlesex, taking action virtually identical to that taken on 20.5.04. It was said to be significant that the 5th defendant took part in both these incidents.
 - (c) At paragraph 57 of Draft 4 the claimants said they would also rely upon the fact that the Protestors included persons who while conducting the Campaign at or near the Property

carried banners against Caterpillar.

50 I accept this overview as a broadly accurate summary of Draft 4. It was common ground that the revised structure found in Draft 3 and Draft 4 was helpful, at least in terms of presentation. The body of the pleading was confined to alleged acts of identified defendants. Alleged acts of unidentified people, forming part of the Campaign, had been put in schedules.

51 In support of the Amendment Application, Mr Englehart said that the essential factual allegations had not changed. Reliance was still placed on the three events. The only substantial change was to add conventional common law torts: claims were made for trespass, nuisance both private and public, and wrongful interference with goods. These claims did not introduce any new case as to the facts. Mr Englehart noted that it had been necessary to plead damage in order to have a cause of action in public nuisance, and for the tort of interfering with business. I asked why the claimants were asserting new causes of action at this stage. Mr Englehart replied that the reason was that there was a question whether what the defendants had done amounted to a course of conduct for the purposes of the [PHA 1997](#). The claimants did not believe that the defendants would escape liability under that Act, but in case they were wrong they said that what had been done was unlawful at common law. Further, in relation to freedom of expression, the claimants' case was that the law should draw the line at the commission of a tort.

52 I turn to analyse the objections as to Draft 4. I have been greatly assisted by the parties' detailed written and oral submissions, which have enabled me to group the objections into a number of categories. My analysis for each category is as follows:

- (1) The defendants say EDO should not be permitted to introduce claims in its own right. It is true that originally EDO made no claim in its own right. I approach this matter by asking whether it would have been just and convenient for EDO to be added as a claimant at this stage, if it had not been a claimant already. That in my view is entirely dependent upon whether there is any good ground for objecting to the introduction of the particular claims which EDO wishes to make. If those claims can conveniently be examined at a trial in the summer term, then the mere fact that a new party is being introduced should not, in my view, prevent those claims from being examined. The question whether they can be conveniently dealt with at a trial in the summer term is examined below.
- (2) I turn to an argument which has been labelled, "Fruits of the Poisoned Tree." Many of the proposed amendments were advanced in early November 2005, at a time when in my view they could not manageably have been dealt with during the proposed trial period beginning on 21 November 2005. Prominent examples are the Caterpillar and Agrexco assertions. Moreover, it was said with force that the proposed amendments had been unduly delayed, that they could and should have been put forward much earlier, and that by delaying the application the claimants secured the benefit of adjournment of the trial date with continuance of the April Injunction beyond the period contemplated by Gross J. I shall examine when I consider the Abuse of Process Application whether the proposals for these amendments were unduly delayed and led to the loss of the trial date. In relation to certain of the proposed amendments, among them the Caterpillar and Agrexco assertions, it is said that the attempt to raise them is contrary to decisions of the court at earlier hearings, or at least contrary to the spirit of those decisions. Looking at all these criticisms generally, I certainly accept that if they or any of them are sound, then there can be consideration of whether it is right to deprive the claimants of the benefit of the interim injunction, or to deny them any other relief which the court might otherwise provide. In the circumstances of this case it seems to me preferable to consider in the context of the Abuse of Process Application whether such a penalty should extend to denial of an application to amend which would otherwise have succeeded.
- (3) Putting on one side the "Fruits of the Poisoned Tree" argument, the Caterpillar and Agrexco assertions involve the introduction of substantial new potential issues of fact. That course of action calls for justification. In the light of the limited, and very specific, reliance on these matters pleaded in Draft 4, however, I conclude that there is an arguable case of relevance, and that allowing such a case to be made will not give rise to issues that cannot be dealt with at a trial in the summer term.
- (4) A procedural deficiency was alleged by the 10th defendant, in that the draft amendment did not contain a statement of truth. In my view it will suffice if, as the claimants have

proposed, the new statement of case will be served with a signed statement of truth. A contention was also made that draft 4 ought to have been marked up with coloured underlining and crossing out in order to show the various changes. In the circumstances of this case, a document of that kind would be of little value and involve waste of resources. The claimants served a schedule of changes explaining the differences between draft 3 and previous drafts. Draft 4 has been revised solely in order to take account of the settlement with the Moss defendants. There is no prejudice to the remaining defendants in the lack of a marked up document.

- (5) Reference was made to the burdens on the defendants in terms of the time, money and stress in dealing with the new matters. I do not underestimate those burdens. However, they appear to me not to be of such an extreme kind as should lead to refusal of the application to amend. They can, in my view, be adequately compensated for by an order for costs.
- (6) Contentions were made as to differences between the original [PHA 1997](#) claim and the tort claims which it is now sought to add. I recognise that there is, at least, a “criminal flavour” to aspects of the [PHA 1997](#) claims. That, and other differences, do not in my view constitute good reasons to refuse permission to amend. A statement of case will often have to deal with differing legal bases for particular claims. I have not been able to identify any such confusion in draft 4 as would make it unfair for the new claims to be added. I accept that the essential facts relied upon were all pleaded in the original particulars of claim, the only additional matter being proof of damage. The issues raised in that regard are not, in my view, so complex as to put in doubt the ability to try such issues at a hearing in the summer term. I should comment in this regard on a suggestion by the 5th defendant that his lack of resources means that the claims in damages will be practically worthless. In that regard I record that the 5th defendant made it clear that he did not say that he would take steps to frustrate any court order. In general, whether a claim in damages will be of practical value is a matter which the claimants themselves are likely to be best placed to decide. In this particular case consideration of the merits of claims in tort may well assist the court in striking a balance between competing interests.
- (7) It was asserted that Mr Englehart's answer to my question admitted that the claim under the [PHA 1997](#) was weak. That being so, it was said to be inappropriate to allow the claimants to bolster a weak claim by introducing new claims in tort. In my view these contentions misunderstand Mr Englehart's answer. Recognition that it may not be possible to prove a course of conduct within the statute does not involve any concession that the claim is weak. Even if the claim were weak, that would not militate against allowing a claimant to put forward a different legal characterisation of the same facts which had stronger legal merit.
- (8) Another weakness was suggested to arise from alleged recent admissions by Mr Jones. It will, however, be for the judge at trial to assess the impact of any admissions. The admissions alleged are not so obviously destructive of the claimants' case as to warrant refusal of permission to amend.
- (9) Complaint is made about those parts of draft 4 which assert that the defendants are liable for the acts of others under [PHA 1997](#). Those assertions are not, however, formulated as mere “guilt by association.” Care has been taken by the pleader to identify the basis for asserting in each case that particular actions were aided, abetted counselled or procured by particular defendants. It is inevitable in cases of this kind that inferences may have to be relied upon. While some of the inferences — particularly in relation to websites — may not be particularly strong, it would be wrong in my view to rule them out at the present stage. It may be noted that the original particulars of claim contained extensive assertions as to the conduct of others, and associated such conduct with that of the defendants without identifying the legal basis for making such an association. In that regard Draft 4 constitutes a definite improvement.
- (10) In relation to criminal charges, developments since the original particulars of claim mean that the claimants are no longer able to rely upon criminal convictions. In those cases where draft 4 nevertheless advances the same factual case as had previously been advanced in reliance upon the convictions, I do not see any prejudice to the defendants. The same questions will arise — all that is changed is that the burden of proof will be on the

claimant rather than upon the defendant. There is, however, one respect where criminal proceedings may have an impact on the ground of permission to amend. This concerns the criminal charges against the 5th defendant in relation to events on 31 May 2005. If, as had appeared to be the case in February, there was likely to be a criminal trial of those charges in July, I would have been unwilling for that matter to be raised by amendment. The danger that the civil trial might prejudice the fairness of the criminal trial would, in my view, have been too great. However, the 5th defendant has now advised that all charges have been withdrawn, and accordingly that difficulty no longer arises.

- (11) It is objected that draft 4 seeks a final order against the remaining defendants which is more onerous than the undertakings which had been accepted from the Defendants Who Settled. However, the extent of any appropriate final order will be a matter for the trial judge. It does not necessarily follow from the acceptance of the undertakings that the court at trial will not impose anything more onerous. A separate question as to whether it is right to continue the interim injunctions arises in this regard, and I deal with it under the heading "Abuse of process" below. I also deal under that heading with the 10th defendant's assertion that she is in the same position as the 16th defendant against whom no interim injunction was made.
- (12) Assertions are made about Mr Lawson-Cruttenden's conduct in other cases. As observed at the outset of this judgment, however, each case turns on its own facts. I do not think that it is an efficient use of court time to embark upon examination of the individual facts of other cases: the question which arises in the present case can and should be determined by reference to the facts of the present case.

53 Thus the outcome of my analysis is that, subject to the "Fruits of the Poisoned Tree" argument which I shall consider in the context of abuse of process below, there is only one matter which could give rise to concern. This is the part of draft 4 which refers to events on 31 May 2005. If the 5th defendant is still the subject of criminal charges in that regard, then I will not allow that matter to be introduced by amendment. If, however, the charges have been withdrawn then there is no cause for concern.

54 There are, however, a number of aspects of draft 4 which call for tidying up. These have been identified during the course of argument, and — again subject to the "Fruits of the Poisoned Tree" argument — I would therefore propose that the claimants lodge a revised version of Draft 4, limited to tidying up amendments, prior to any order being drawn up. The defendants will, of course, have an opportunity to comment on that draft.

The abuse of process complaint

55 The D5 Abuse of Process Application notice identifies a number of failings. For the purposes of this judgment I shall confine consideration to matters identified in paragraphs 2 to 5 of the application notice. I take them in turn.

56 Paragraph 2.1 of the Application Notice complained of the introduction into chronologies of incidents, witness statements and exhibits of matters which were not the subject of any pleading against any named individuals or indeed generally. The claimants' skeleton said that the complaint appeared to stem from the contention that the claim pleaded against the defendants was limited to their own conduct. In fact the Particulars of Claim not only pleaded the "three occasions" but also harassment by the other protestors and alleged that the conduct of all of them together constituted a course of conduct. Mr Englehart added orally that it was a misconception to say that you cannot have evidence which is not a pleading against a named individual. These comments in my view miss the point. At the time the Application Notice was issued the defendants had been served with a welter of material which bore no obvious relationship to the claimants' particulars of claim. It was later to emerge that Mr Lawson-Cruttenden would assert that because issues could be discerned from this welter of material the claimants would be entitled to amend their particulars of claim. In the event, his first attempt at an amendment on 9.11.05 and his revisions to it later that month had to be abandoned. In those circumstances it can hardly be said that the issues arising from this material were obvious. It is now accepted that the assertions as to responsibility for actions of others needed complete recasting. In these circumstances I regard the complaint made in paragraph 2.1 as well founded, and as particularly serious in the context of a claim that was due to come on for trial on 21 November 2005. The claimants ought to have identified the need to amend their

particulars of claim long before that date in such a way as would enable the defendants to understand the relevance of the material sought to be relied on by the claimants.

57 Paragraphs 2.2 and 2.3 complained that the claimants relied on material for which the court refused to grant an order for third party disclosure on 12 July 2005. Material obtained from Sussex police in breach of that order related to:

- (1) the roof top protest on the 2 September 2004;
- (2) the arrests made under [section 14 of the Public Order Act 1986](#) on 21 March 2004;
- (3) arrests made on 31 May 2005;
- (4) the arrest made of Paul Lesniowski on 15 June 2005;
- (5) arrests on the 13 July 2005.

58 The claimants' skeleton argument observed among other things that the Judge made clear that although he only allowed the application in part, it did not preclude a renewal with proper evidence. This appears to have been construed by the defendants as being an order that the claimants were not entitled to any of the disclosure that he would not grant that day. This is not so. There was nothing in this judgment to prevent subsequent, further voluntary disclosure. Accordingly it was said that the allegation of breach of a Court Order should not have been made. Mr Englehart added that the police thought that everything they disclosed was pursuant to that order.

59 I consider that the key point here is that Sussex Police had from the outset plainly been concerned to have express approval from the Court for disclosure made to Mr Lawson-Cruttenden. This is abundantly clear from the passages in the statement of Detective Constable Bialoszewski described at paragraph 29 above. It must have been plain to Mr Lawson-Cruttenden that the material which in due course was disclosed went well beyond Simon J's order, in particular in the respects identified in paragraph 2.2 of the Application Notice. Mr Lawson-Cruttenden said he was not going to "argue the toss." This was not an acceptable approach. At the very least there was doubt as to whether Sussex Police had correctly followed the court's order. As an officer of the court it was his duty to raise the matter. I regard this as a serious failing for which the claimants must bear responsibility.

60 Paragraph 2.4 of the Application Notice complained about material relevant to current criminal proceedings. Here I agree in principle with the contention by the claimants that a concern of prejudice to a criminal trial is a matter for an application for a stay. Moreover it seems to me plain that the civil court would be highly likely to grant a stay of any part of its proceedings which could prejudice a criminal trial. The difficulty facing the defendants, however, was that until the position was properly set out in a draft amendment there was no means of knowing that the claimants intended to rely upon matters which were to be the subject of a criminal trial. In those circumstances the defendants can hardly be criticised for not having made an application to stay. In the event, prior to receipt of the claimants' draft amendment, the defendants had issued application notices complaining about the disclosure of this material. That was all that could properly have been expected of them at that stage.

61 Turning to examine the position from the point of view of the claimants, they knew that the parties were working towards a speedy trial to commence on 21 November 2005. As part of the disclosure of documents and witness statements the claimants produced material which could only be relevant if the claimants were to introduce at that trial new issues concerning matters which were to be the subject of criminal trials. It seems to me that there are only two logical possibilities. The first is that the claimants simply did not consider the possibility that the defendants would object to the introduction of such issues. The second is that the claimants gave consideration to that possibility, but decided to wait and see what happened. On any view the claimants were seriously at fault, for they either failed to consider an obvious problem, or if they did consider it they should have raised it with the defendants before reaching the stage of disclosure as it plainly had the potential to prejudice the trial date.

62 Paragraph 3 complained more generally that police material had been obtained without a court order or in breach of the [Data Protection Act](#). Mr Englehart has persuaded me that it is at least arguable that where a police force has not sought a court order then such an order may not

have been needed, and that the [Data Protection Act](#) may not have been infringed. In the absence of a legal representative to put the contrary view I do not propose to decide the point.

63 Paragraph 4 concerned reliance by the claimants on incidents concerning Caterpillar and Agrexco. In answer the claimants refer to the way in which the case is now put in Draft 4. However in assessing the merits of this complaint it is appropriate to consider the position at the time that it was made. At that time the trial was scheduled to take place starting on 21 November 2005. The claimants disclosed documents and witness statements relating to events concerning Caterpillar and Agrexco, none of which had been pleaded. There was no indication as to how they were said to be relevant. It would have been absurd to think that this disclosure alone could enable the defendants to prepare to deal with new issues in this regard at a trial scheduled to start on 21 November 2005. In the event a draft amendment referring to Caterpillar and Agrexco was put forward on 9 November 2005. This was far too late to enable the defendants properly to deal at a trial on 21 November 2005 with the issues sought to be raised. Moreover the draft proved to be seriously deficient, among other things by casting the net too widely, and had to be substantially recast in Draft 4. Added to all this, there had been very clear indications from the decisions and observations of Gross J on 14.4.05, Simon J on 12.7.05 and 9.9.05, and Royce J on 23.9.05 that in a context where a speedy resolution was important the court was anxious that the claimants should focus on the key questions as to what had happened in relation to them, as opposed to what had happened to others, and to avoid side-issues. In those circumstances the persistence by the claimants, during the period up to the loss of the 21 November 2005 trial date, in seeking to introduce these matters showed a wilful disregard of the importance of maintaining an early trial date.

64 Paragraph 5 of the Application Notice concerned failures on the part of the claimants to give proper disclosure of material relevant to the pleaded case. Here it seems to me that, putting other complaints on one side, there are grave concerns as to the way in which the claimants' solicitors dealt with video material. On 21 September 2004 EDO had written to Mr Lawson-Cruttenden enclosing photographs from CCTV footage and a CD of CCTV footage. The letter asked him among other things to review this material, to indicate whether it was of interest, and whether he would like more such material. Mr Lawson-Cruttenden appears to have done none of these things. Instead, his firm prepared a list of documents dated 23 September 2005 which disclosed the existence of video evidence but stated that it was "voluminous but of little evidential value". It could only have been proper to make this assertion if someone on the claimants' side had some good reason to hold the view that the CCTV material was of little evidential value. So far as I can tell, the claimants' solicitors had not viewed the material and had no basis on which to hold that view themselves, nor were they aware of anyone on the claimants' side who held that view. Thereafter attempts by the defendants to view the CCTV material became bogged down in a dispute about proposed undertakings as to confidentiality. More importantly, nothing was done to safeguard or seek to identify the relevance of the complete CCTV material until my order of 16.11.05. This latter failing, and the inexplicable assertion that the video material was of little evidential value, reveal a worrying lack of focus on proper preparation for trial and proper disclosure in that regard.

65 At the hearing I drew particular attention to Simon J's trenchant observations on 9.9.05. Mr Englehart's response was that there were faults on both sides, and that if the proposed amendments had been disallowed the claimants were ready to proceed with the trial on 21.11.05 on the basis of the unamended particulars of claim. As to faults on the part of the defendants, he had earlier particularly identified the failure by the Moss Defendants to serve witness evidence in support of their application prior to 15.11.05. It is right to say that my decision to adjourn on 16.11.05 was strongly influenced by a desire to ensure that the claimants should have a proper chance to consider and reply to the very serious allegations made by the Moss Defendants in the witness statement served on 15.11.05. As against that however, in the period between issue of the application notice on 1.11.05 and service of the witness statement on 15.11.05 the defendants' legal team had been involved in the argument on the preliminary issues, had then had to consider my judgment, and most importantly had received on 9.11.05 the Amendment Application enclosing a complicated proposed new pleading which they had to try to take on board in order to finalise the witness statement. If the claimants had not been guilty of the serious faults identified above I consider it highly unlikely that the defendants would have been in a position where they felt compelled to make an application to strike out, and if they had made such an application they would not have been held up in preparing their witness statement in support.

66 There is another respect where I consider that there is an element of fault on both sides. This lies in the failure to identify the real issues prior to my order of 1.12.05. In the absence, however, of the serious faults on the part of the claimant identified above, I do not think that this failure would have prevented a speedy trial starting on 21.11.05.

67 My overall conclusion from the above is that there was, to say the least, a woeful neglect on the part of the claimants to focus on the need to prepare for a speedy trial, and that at least in one respect there was a wilful disregard of the importance of maintaining an early trial date. Actions were taken to introduce new issues which, if they had been introduced, would have inevitably led to loss of the trial date of 21.11.05. Obvious steps that ought to have been taken to ensure proper preparation for trial on that date were not taken. The blame for loss of the trial date in my view undoubtedly lies with the claimants. It should not necessarily be assumed that fault in this regard is attributable only to the claimants' then legal team. I note that Mr Jones was present at the hearings before Gross J on 14.4.05, Simon J on 12.7.05 and 9.9.05 and Royce J on 23.9.05. He must have been aware that the court was anxious that the claimants should concentrate on the real issues and not allow the case to become mired in side issues.

68 What should be the consequence of these failings? I consider that it is just and proportionate that the claimants be deprived of the benefit of the interim injunction as against the remaining defendants. The claimants secured that injunction on the footing that they would proceed to a speedy trial. The failings I have identified show that the claimants did not adhere to their obligations. It would be wrong to allow them to continue to have the benefits which were dependent upon compliance with those obligations. As regards the 5th and 10th defendants, I am bolstered in that view by the consideration that circumstances have changed so that they are now in a position similar to that of the 16th defendant, against whom Gross J thought it inappropriate to grant an interim injunction. That consideration is not, however, crucial to my decision, which I believe is compelled by the need to insist that claimants who secure interim injunctions pending speedy trial must carry out their obligation to work diligently towards achieving that speedy trial.

69 The claimants must of course pay the costs of and occasioned by the Amendment Application, and in my view their failings make it appropriate that these costs should be on an indemnity basis. It also seems to me that the claimants' failures should be marked more generally by an order for indemnity costs to be paid to the 5th and 10th defendants. I consider that real damage was done by the claimants' conduct at latest from the time when disclosure was made on 23.9.05, but this damage did not include the costs of the preliminary issues. I shall therefore order that the costs of these proceedings, other than those of the preliminary issues, from 23.9.05 to today shall be paid by the claimants to the defendants on an indemnity basis.

70 I do not think it right to go beyond this and deprive the claimants of amendments which can be dealt with in time for a trial in the summer term. It is true that the ability to put forward these amendments can be said to be the fruit of a tree which the claimants have metaphorically poisoned. If, however, they had not sought and obtained an interim injunction then on balance I consider that there would not have been good reason to prevent the amendments in Draft 4 from being made. Now that the interim injunction is to be discharged, I regard this as sufficient penalty for the claimants' failures, and I do not think that justice requires a more severe course.

71 I add that the discharge of the interim injunction does not mean that the remaining defendants can with impunity resume trespass or other tortious activities against the claimants. The question whether such activities should be restrained by order of the court is a matter to be determined at a trial in the summer term. A defendant whose actions prejudice that determination may well find that the court's powers to act on an interim basis are exercised afresh.

Conclusion

72 For the reasons given above my broad conclusions are as follows. First, I conclude that the claimants should have permission, on appropriate terms, to amend the Claim Form and the Particulars of Claim substantially in the form now proposed, but revised to reflect what is said earlier in this judgment. Second, the 5th Defendant's complaints of abuse of process are in large measure sound and should lead, among other things, to the claimants being deprived of the benefit of the interim injunction initially granted by Gross J in April 2005 and replaced by me in February 2006. The parties are asked to seek to agree consequential orders which flow from this judgment.

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