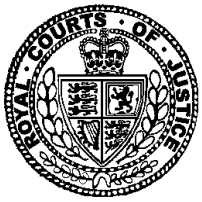

Neutral Citation Number: [2022] EWHC 3207 (Admin)

Case No: CO/117/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 December 2022

Before:

PRESIDENT OF THE KING'S BENCH DIVISION
and
MR JUSTICE JOHNSON

- -

Between:

DIRECTOR OF PUBLIC PROSECUTIONS	**Claimant**
- and -	
HIGHBURY CORNER MAGISTRATES' COURT	**Defendant**
-and-	
(1) JULIET STEPHENSON-CLARKE **(2) DANIEL HOOPER** **(3) LARCH MAXEY** **(4) ISLA SANDFORD** **(5) LACHLAN SANDFORD** **(6) SCOTT BREEN**	**Interested Parties**

- -
- -

Louis Mably KC and James Boyd (instructed by Crown Prosecution Service) for the Claimant
Clare Montgomery KC and Tim James-Matthews (instructed by ITN Solicitors) for the Sixth Interested Party

Hearing date: 30 November 2022

- -

Approved Judgment

This judgment was handed down by release to The National Archives
on 16 December 2022 at 10.30am

1. The Interested Parties were charged with offences of aggravated trespass arising out of their protest against construction of the HS2 railway. The charges alleged that they had disrupted or obstructed "HS2 construction". District Judge Williams acceded to a submission of no case to answer. She did so because the construction contractor was not on site, the only lawful activity that was taking place on the site was the eviction of the protestors, but the charge of disrupting or obstructing "HS2 construction" did not, in her judgment, encompass the eviction operation. She refused to state a case in respect of her decision because she considered that the application to state a case was frivolous or vexatious.

2. The Director of Public Prosecutions (the DPP) seeks judicial review of the decision to uphold the submission that there was no case to answer, and the refusal to state a case for the opinion of the High Court. His case is that:

   (1) the decision of the District Judge was irrational, because in the context of the case "HS2 construction" encompassed the clearance of the site, including the eviction of the Interested Parties, and

   (2) the decision of the District Judge was procedurally flawed because the defect she identified could have been cured by an amendment to the charge.

3. Interested Party 6 resists the claim. He says that the Crown's case had been that the Interested Parties had obstructed construction works, there was no evidence to support that case, and the Judge was therefore right to dismiss the charges.

4. The remaining Interested Parties have not taken any part in the proceedings. Their interests align with Interested Party 6.

The background

5. The HS2 project involves the construction of high speed rail lines between London Euston railway station and the North of England. It is, in part, governed by the High Speed Rail (London – West Midlands) Act 2017.

The prosecution case

6. Andrew Lythgoe is a surveyor and the property acquisition lead for HS2 Limited (HS2). He was a witness for the Crown. The summary of the prosecution case that follows is largely taken from Mr Lythgoe's statements.

7. The land at Euston Square Gardens is owned by Network Rail and leased to the London Borough of Camden (Camden). The area is covered by compulsory acquisition provisions in the 2017 Act. HS2 intended to construct a taxi rank on the land as part of the HS2 project. In November 2020, protestors occupied the land. On 18 December 2020 HS2 notified Network Rail and Camden that it would take possession of the land, for the purpose of the HS2 project, pursuant to schedule 16 of the 2017 Act. In accordance with the provisions of the 2017 Act, HS2 took possession of the land from 18 January 2021. Some protestors indicated that they would not leave the land voluntarily. Ordinarily, HS2 would have handed the land over to its building contractor, MDjv, straight away. It could not do this because of the protest.

8. On 25 January 2021, HS2 issued a warrant under section 13 of the Compulsory Purchase Act 1965 for an enforcement officer to deliver possession of the land. On 27 January 2021, a team of enforcement officers, together with employees of HS2, attended to take possession of the land and to evict the protestors.

9. By 29 January 2021, many protestors had been removed. But a tunnel had been built underneath the surface of the land. Above and around the tunnel was a structure built out of plywood and palettes. It was known as Buckingham Pallets. It was being used as living quarters by the protestors. There were also 15 to 20 tents in the vicinity. Three platform shelters had been built in surrounding trees. Some protestors, including the Interested Parties, remained in the tunnel.

10. This meant that the operation to remove the remaining protestors was complex, dangerous, and required substantial resources. There were different specialist teams, supervised by High Court Enforcement Officers. These included a Confined Spaces Team who were trained in operations underground, and who were responsible for bringing protestors safely out of the tunnels. Emergency services were in attendance and on standby.

11. The protestors were "actively uncooperative and refused to leave the land." Some verbally abused the enforcement officers. Some took steps to avoid being apprehended, by running away and refusing to come down from the treehouses they had constructed. Mr Lythgoe believes they did this to harass HS2 employees and to disrupt the construction of the taxi rank. By late February 2021, all of the protestors, including the Interested Parties, were removed from the land. The costs caused by the delay occasioned by the protestors amount to almost £3.8 million (excluding VAT).

The proceedings in the Magistrates' Court

12. Between 23 February and 22 March 2021 each Interested Party was charged with an offence of aggravated trespass contrary to section 68 of the Criminal Justice and Public Order Act 1994. The charges related to the Interested Parties' protest activity at Euston Square Gardens. The charges specified the date(s) of the alleged offences, what it was alleged that the Interested Parties did, and the lawful activity that it was said that the Interested Parties had obstructed or disrupted:

Interested Party	Date(s) of offence	What the Interested Party did	Activity obstructed/disrupted
[redacted]			
Interested Party 1	25.2.21	Protest	Working
Interested Party 2	25.2.21	Protest	Working
Interested Party 3	27.1.21-22.2.21	Refused to leave the tunnel	Construction of HS2 train link
Interested Party 4	25.2.21	Protest	Working
Interested Party 5	26.1.21-6.2.21	Occupied a tunnel	The construction of HS2
Interested Party 6	26.1.21-13.2.21	Occupied a tunnel	The construction of HS2

13. Following the first hearings before the Magistrates' Court, all Interested Parties entered not guilty pleas. Directions were made for trial. Skeleton arguments were exchanged. The Interested Parties indicated that the issues were:

    (1) No intention to disrupt activity which persons were engaged in on the land in question;

    (2) No such obstruction/disruption caused;

    (3) Crown put to proof on the ownership of the land in question and whether the Interested Parties were trespassing.

14. In the Crown's skeleton argument it was said that the Interested Parties had "blocked HS2 employees from beginning clearance work at the site, a lawful activity…" and that they had:

> "trespassed on the land at ESG, which belonged to HS2 with the intention of obstructing HS2 from taking possession of the land and beginning clearance work. [They had] obstructed those aims by entering a tunnel which started in ESG and was dug by protesters. [They] remained underground for [a] prolonged period preventing work from commencing."

15. On 29 September 2021, Simon Natas, the solicitor-advocate acting for the Interested Parties, pointed out to the Crown Prosecution Service (CPS) that the wording of the charges was different as between the various Interested Parties. Mr Natas suggested that it was insufficient to define the activity that was being obstructed or disrupted as simply "working." He suggested that the wording should be the same for all the Interested Parties.

16. On 30 September 2021, the CPS amended the charges for each Interested Party so that, in each case, the allegation was that:

> "Between 26/01/2021 and [date of arrest respectively] at Euston Square Gardens, London NW1, having trespassed on land, and in relation to a lawful activity, namely [the] HS2 construction, which persons were engaged in or about to engage in on that land, you did an act, namely you occupied a tunnel on that land, which you intended to have the effect of obstructing or disrupting that activity."

17. Mr Natas said he was content with this wording. The word "the" appeared before "HS2 construction" for the amended charges in respect of Interested Party 5 and Interested Party 6 (it is said that this was a copying error), but not for Interested Parties 1 to 4. It is not suggested by anyone that this makes any material difference. The amended charges were provided to the court on 30 September 2021.

18. The trial commenced on 5 October 2021. According to Mr Natas, in the course of opening the case counsel for the Crown said that the Interested Parties had "acted to frustrate and disrupt construction planned on [Euston Square Gardens]" and that "the

disruption and delay to lawful construction had caused an estimated financial loss of £3.5 million."

19. The Crown's case was based on oral evidence from four witnesses, exhibits relating to HS2's possession of the land, and a compilation of video footage that showed the Interested Parties inside the tunnels. The Crown's case finished on 6 October 2021. The Interested Parties made a submission that there was no case to answer because there was no evidence that anyone was engaged in HS2 construction (which was said, in the amended charges, to be the lawful activity that the Interested Parties had obstructed or disrupted). In particular, the Interested Parties contended that the eviction of the protestors was separate from HS2 construction, and so disruption or obstruction of the eviction operation did not amount to disruption or obstruction of HS2 construction. The prosecution response was that the lawful activity of HS2 construction included, in the context of the case, the clearance of protestors from the land to enable building work to go ahead, and was not simply the building work itself. In the course of the submission of no case to answer, it became apparent that the judge had the original charges, and did not have the charges as amended on 30 September 2021. This was addressed: the judge was provided with the amended charges.

20. The judge held that there was no case for the Interested Parties to answer. That was because the wording of the charges referred to HS2 construction, and this process had not yet started. There was no evidence that any building contractor was physically on the land at the time of the alleged offences. While there were persons present on the land, the activity in which they were engaged was effecting an eviction and securing the site so it could be handed over for construction to begin, but this had not yet taken place because the site had not yet been cleared of trespassers. She said, "in effect what we are dealing with here is frustration of an eviction made in civil proceedings which is a very far cry from the criminal elements of this offence."

21. The legal advisor's note of the judge's reasoning states:

> "There were excavations. …Aim was to construct a taxi rank. The construction had not started. …Mr [Lythgoe] - trying to empty the site so the next stage of the procedure was construction.
>
> 1- Notice – [December]
>
> 2- Warrant of possession 27.1.21
>
> 3- Application made for an order of possession 22.2.21
>
> 4- Handover to the contractor
>
> 5- Contractors to take possession – this is the stage I need to consider.
>
> …The amended charges, state HS2 CONSTRUCTION - there was no evidence before me to show the protestors had done so when the constructors were present or about to start the construction. …Mr Easter- effecting an eviction and Mr

> [Lythgoe], securing the handover for the work to begin. The clearing was to secure the land and not construction. …A vehicle did arrive, the evidence is clear and no construction taking place on the contrary the 5-stage process had not gone beyond stage 3. It is imp to make clear Mr L aim was to clear handover the site. Largest segment had not been made clear and stage 4 had not been [reached]. The authorities have made it very clear what statute intended. There is no evidence that HS2 were ready to carry out the construction. HS2 were proceeding with due care and diligence. It is a narrow point but a very important point. There was no physical presence or activity taking place. The legal requirement of the person carrying out the construction NO EVIDENCE TO SUPPORT THIS AND CHARGES DISMISSED."

22. The DPP subsequently applied for the judge to state a case. The judge refused to do so because she considered the application was frivolous.

Statutory framework

Aggravated trespass

23. Section 68 of the Criminal Justice and Public Order Act 1994 states:

> "**Offence of aggravated trespass**
>
> (1) A person commits the offence of aggravated trespass if he trespasses on land and, in relation to any lawful activity which persons are engaging in or are about to engage in on that or adjoining land, does there anything which is intended by him to have the effect—
> …
> (b) of obstructing that activity, or
> (c) of disrupting that activity.
>
> …
>
> (2) Activity on any occasion on the part of a person or persons on land is "lawful" for the purposes of this section if he or they may engage in the activity on the land on that occasion without committing an offence or trespassing on the land.
>
> (3) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding level 4 on the standard scale, or both.
>
> …"

24. In *Richardson v DPP* [2014] UKSC 8; [2014] AC 635, Lord Hughes, at [4], said there were four elements to the offence:

> "i) the defendant must be a trespasser on the land;

> ii) there must be a person or persons lawfully on the land (that is to say not themselves trespassing), who are either engaged in or about to engage in some lawful activity;
>
> iii) the defendant must do an act on the land;
>
> iv) which is intended by him to intimidate all or some of the persons on the land out of that activity, or to obstruct or disrupt it."

Requirements of a charge

25. Rule 7.3 of the Criminal Procedure Rules requires that an allegation of an offence in a charge must contain "such particulars of the conduct constituting the commission of the offence as to make clear what the prosecutor alleges against the defendant…"

26. Section 123 of the Magistrates' Courts Act 1980 states:

> "**Defect in process**
>
> (1) No objection shall be allowed to any information or complaint, or to any summons or warrant to procure the presence of the defendant, for any defect in it in substance or in form, or for any variance between it and the evidence adduced on behalf of the prosecutor or complainant at the hearing of the information or complaint.
>
> (2) If it appears to a magistrates' court that any variance between a summons or warrant and the evidence adduced on behalf of the prosecutor or complainant is such that the defendant has been misled by the variance, the court shall, on the application of the defendant, adjourn the hearing.
>
> …"

Statement of case by magistrates' court for opinion of the High Court

27. Section 111 of the Magistrates' Courts Act 1980 states:

> "**Statement of case by magistrates' court**
>
> (1) Any person who was a party to any proceeding before a magistrates' court or is aggrieved by the… order… of the court may question the proceeding on the ground that it is wrong in law… by applying to the justices composing the court to state a case for the opinion of the High Court on the question of law… involved…
>
> …
>
> (5) If the justices are of opinion that an application under this section is frivolous, they may refuse to state a case, and, if the applicant so requires, shall give him a

> certificate stating that the application has been refused; but the justices shall not refuse to state a case if the application is made by or under the direction of the Attorney General.
>
> (6) Where justices refuse to state a case, the High Court may, on the application of the person who applied for the case to be stated, make an order of mandamus requiring the justices to state a case."

Grounds of challenge and response

Ground 1: Irrationality

28. The DPP contends that the term "HS2 construction" in the amended charge encompasses the clearance of a site (including the eviction of protestors) for the purpose of then carrying out building works as part of the HS2 project. He says that the decision of the judge that the eviction process was not part of HS2 construction was irrational, in that no reasonable tribunal could have arrived at that conclusion having proper regard to the context. In particular, the DPP's interpretation of "HS2 construction" is, he says, consistent with the evidence served in advance of trial, and the DPP's skeleton argument, and the way in which the case had been presented. The DPP's case was that what was being directly obstructed and disrupted by the protestors was the clearance of the site, and that the construction of the taxi rank itself had not yet commenced. The judge's interpretation of the phrase did not allow for the context in which the charges fell to be interpreted.

29. Interested Party 6 contends that the judge was right to conclude that "HS2 construction" did not encompass the eviction of protestors. He says that the common understanding was that the Crown alleged the Interested Parties had obstructed or disrupted "construction work", and it was clear that the Crown were alleging the Interested Parties had obstructed construction work on the proposed taxi rank. There was no evidence that such work was taking place, or was about to take place. On the contrary, the Crown's evidence was that no such work would or could take place until the protestors had been evicted.

Ground 2: Procedural impropriety

30. If, contrary to the DPP's primary case, there was some defect in the charge, then the DPP says that the judge ought either to have regarded the defect as immaterial, or, alternatively, ought to have permitted an amendment to the charge in accordance with section 123 of the 1980 Act.

31. Interested Party 6 responds that the issue before the judge concerned whether there was sufficient evidence to prove an element of the offence. Once it was recognised that there was no sufficient evidence, this was not a matter that could be cured by recourse to section 123 of the 1980 Act.

Ground 3: Refusal to state a case

32. The DPP contends that his application to state a case raised questions of law as to whether the decision to dismiss the charges was irrational and procedurally flawed. The judge was wrong to say that the application was frivolous. Interested Party 6 responds that the judge was right to refuse to state a case, but Clare Montgomery KC, for Interested Party 6, acknowledged that if there is merit in grounds 1 and 2, it would follow that the judge's refusal to state a case was wrong.

Discussion

33. Before coming to the grounds of claim, an issue raised by the parties was how the Crown put the case against the Interested Parties in the Magistrates' Court. Two other matters that were touched on were whether, for the purpose of section 68 of the 1994 Act, those who are about to undertake a "lawful activity" must be physically present on the land at the time of the offence, and whether a lawful eviction may suffice as "lawful activity" for the purpose of section 68. It is not necessary to resolve either of these latter issues for the purposes of this case. We nonetheless deal with them briefly below.

How the Crown put the case against the Interested Parties in the Magistrates' Court

34. The parties do not agree about how the Crown put the case against the Interested Parties in the proceedings before the Magistrates' Court. This is potentially relevant to both grounds advanced by the DPP. If the judge's interpretation of the words "HS2 construction" matched the way in which the Crown had put the case, then the DPP can hardly complain that her interpretation was unreasonable. Nor, in those circumstances, would there have been any purpose in amending the charge. Conversely, if it had always been clear that the Crown's case encompassed the clearance of the site (so not just limited to the final act of constructing a taxi rank) then that context would show that "HS2 construction" was intended to cover that activity.

35. Louis Mably KC for the DPP says that the Crown's case was always that the Interested Parties had disrupted the clearance of protestors from the site. He relies on a witness statement from Sarah Gabay, a senior crown prosecutor who presented the prosecution. In that statement, Ms Gabay says that the case advanced against each Interested Party was that "this was an organised occupation of the land with the intention of disrupting and obstructing its clearance with the ultimate aim of disrupting and obstructing the commencement of construction work." Mr Mably also relies on extracts from the Crown's skeleton argument for the trial itself which stated that the allegation related to the obstruction by the Interested Parties of attempts to clear the site. He points out that the Crown's evidence had always made it clear that the main construction contractor was not on site, and that the building of the taxi rank had not commenced.

36. Ms Montgomery says that the case that was advanced in the Magistrates' Court was that the Interested Parties had obstructed the construction of HS2. She relies on the wording of the charge and on the way in which the case was opened (see paragraph 18 above). She says that the charges were amended in the course of the no case to answer submission, to use the term "HS2 construction". If the Crown's case really had been limited to the obstruction of the eviction operation, then the charges would have been framed differently – the words "lawful eviction" would have been used in place of "HS2 construction." Ms Montgomery also relies on the reaction of the Crown when it was

said on behalf of the Interested Parties in the course of submissions that there were no construction workers on site - only those involved in the eviction. If the Crown's case really was limited to the eviction operation then, Ms Montgomery says, one might have expected the Crown readily to agree with the underlying basis for the submission, and to point out that that was the case being advanced. Instead, there was a debate about the meaning of "HS2 construction". Ms Montgomery also relies on the terms in which the District Judge resolved the application. The notes of the District Judge's decision (see paragraph 21 above) show, she says, that the case that was being advanced was that the Interested Parties had obstructed and disrupted the work of the building contractors, rather than those involved in the eviction of the Interested Parties.

37. We do not consider that there is any real conflict in the evidence as to how the case was put. The underlying evidence served by the Crown was to the effect that the Interested Parties had disrupted and obstructed the clearance of the land (including their own eviction) which was the essential precursor to the start of work building the taxi rank. The skeleton argument filed by the Crown was consistent with the underlying evidence, and alleged that the Interested Parties had obstructed clearance work. In her witness statement Ms Gabay makes it clear that the Crown's case encompassed the clearance of the land, whilst asserting that the Interested Parties' ultimate aim was to disrupt or obstruct the commencement of construction work. This is consistent with the skeleton argument and consistent in turn with the underlying evidence. In his witness statement filed after Ms Gabay's statement, Mr Natas does not dispute the account that Ms Gabay gives. He relies on one sentence from her opening in isolation; but that is not inconsistent with Ms Gabay's evidence. The Crown's case was put on the basis that the Interested Parties had disrupted and obstructed their eviction and this disrupted and obstructed the commencement of construction works.

38. It is wrong to suggest, as Ms Montgomery does, that the charges were amended by the Crown during the submission of no case to answer, and in response to that submission. In truth, the amendment had been made prior to the trial albeit for some reason unknown the matter had not been recorded by the court and the judge was unaware of this until the submission of no case. The term "HS2 construction" was used from the outset by the Crown as a portmanteau term to encompass the activities which were, on the Crown's case, being obstructed. The Interested Parties did not object to this formulation of the charges; but if they considered that this formulation was defective, this issue could and should have been raised at an early stage rather than in a submission of no case: *Dacre Son & Hartley Limited v North Yorkshire Trading Standards* [2004] EWHC 2783 (Admin); (2005) 169 JP 59 *per* Fulford J at [38].

Is there a requirement that those about to undertake the lawful activity are physically present on the land?

39. This question does not arise or require resolution before us because, on the facts of this case, those carrying out the eviction operation were physically present on the land. Nonetheless we mention it because it may be that this issue influenced the way the Crown chose to advance the case on clearance and eviction.

40. There is no requirement for physical presence (as opposed to being "on" the land in the sense of having a right to possess, occupy or use the land) in the words of the statute. The statute criminalises a trespass on land with an intent to intimidate or disrupt or obstruct a lawful activity which persons are about to engage in on that or adjoining land.

Someone who is about to carry out a lawful activity on land may be intimidated, or disrupted, or obstructed, even if they are not yet physically present on the land. Indeed, the fact that they are not physically present on the land may be due to intimidation, disruption or obstruction.

41. *Tilly v Director of Public Prosecutions* [2001] EWHC 821 (Admin) to which the judge referred was a very different case on its facts to this one. The defendant protestors in that case were charged with offences of aggravated trespass on the ground that they had trespassed on fields and disrupted or obstructed the lawful activity of growing crops. The trespasses took place at night when the farmers were not physically present on the land. The question for the High Court concerned whether, for the purposes of the offence, those carrying out the lawful activity must be physically present on the land. The Court answered the question in the affirmative. At [26] Rafferty J said:

> "[Section 68] contemplates and is designed penally to mark a situation in which people are meant to be intimidated, or cannot get on with what they are entitled to do. Thus, to suffer inconvenience or anxiety they must be present."

42. Neither side addressed us on *Tilly*, the correctness of which was simply assumed. We consider however that it is open to argument that the section 68 offence may be committed where the person undertaking a lawful activity is not physically present on the land – particularly where for example the offence is based on an anticipated lawful activity ("about to take place") rather than a lawful activity that is already taking place.

Can a lawful eviction suffice for the purpose of section 68?

43. Ms Montgomery accepted that the deliberate obstruction of enforcement officers who were seeking to evict the Interested Parties so that construction work could commence could in certain cases amount to the offence of aggravated trespass. We agree. It follows that Ms Montgomery would have to accept that if the words "HS2 construction (lawful eviction)" had been used in place of "HS2 construction" then there would not have been any basis for the submission of no case to answer. Ms Montgomery made a broader submission that trespass is not in itself a criminal offence; and section 68 is not intended to turn what is a trespass without more into an offence of aggravated trespass. Again, we agree, but this submission is beside the point. On the prosecution case, this was plainly not a case of simple trespass.

Ground 1: Irrationality

44. The judge appears to have considered that the offence of aggravated trespass may not be committed by disrupting or obstructing a lawful eviction: "in effect what we are dealing with here is frustration of an eviction made in civil proceedings which is a very far cry from the criminal elements of this offence." This is not however a correct statement of the law. The ingredients of the offence of aggravated trespass under section 68(1)(b) or 68(1)(c) require that a lawful activity is disrupted or obstructed. The lawful enforcement "of an eviction made in civil proceedings" is a lawful activity. The frustration of such an activity is tantamount to its disruption or obstruction. Thus, the "frustration of an eviction made in civil proceedings" is not "a very far cry from the criminal elements" of aggravated trespass as the judge appears to have thought. On the

contrary, it is capable of amounting to one element of the offence. As we have already said, during the course of her submissions, Ms Montgomery accepted as much.

45. Be that as it may, this was not the primary basis for the judge's decision. The submission of no case was upheld because the charge referred to "HS2 construction" and the judge did not consider this phrase encompassed the eviction of protestors so as to enable the main contractor to move onto the site.

46. We disagree. The words "HS2 construction" in their natural meaning are sufficiently broad to encompass works that are part of the overall construction project. They are apt to encompass activity undertaken in the course of the development of the new railway, including preliminary clearance work such as the eviction of the protestors to enable the contractor to enter the land - a necessary first step in the course of HS2 construction at Euston Square Gardens. We would add that Ms Montgomery accepted that the words were capable of covering the clearance of the protestors' tents, but not the clearance of protestors. In our view however no sensible distinction can be drawn in this context between the clearance of property and the clearance of people (in a wholly different context, we wish to emphasise, to evictions which take place for example in the ordinary housing context). Such works may include, therefore, safely securing the land, clearing it, preparing it, transporting materials onto it and building the railway (and associated structures). The demolition of Buckingham Pallets, the filling in of the tunnel and indeed the removal of the Interested Parties who were unlawfully on the land were all therefore part and parcel of "HS2 construction". Further, whatever the views the judge may have had about the meaning of "HS2 construction" as a matter of generality, it is quite clear in the particular context of this case that the Crown's case encompassed clearance works. The wording of the charge therefore fell to be interpreted in that context.

47. The judge's conclusion that the words "HS2 construction" were not capable of covering clearance works was therefore wrong. It follows that we consider that the judge was wrong to hold that the charge as worded was not capable of covering the facts alleged by the prosecution.

Ground 2: Procedural impropriety

48. It follows from our analysis above that there was no need to amend the charge. But even if there was scope for ambiguity or a need for further particulars it does not follow that the judge was justified in dismissing the charges at the close of the prosecution case.

49. The overriding objective is that criminal cases should be dealt with justly which means acquitting the innocent, and convicting the guilty and dealing with the prosecution and the defence fairly. Dismissing a charge because of a technical defect in the particulars of the offence which has no impact on the substance of the case and which can be amended without causing any delay or injustice to the parties, is unlikely to be compatible with the overriding objective.

50. In *R v Graham and others* [1997] 1 CrAppR 302 Lord Bingham CJ said, at 309D:

> "Our sole obligation is to consider whether a conviction is unsafe. We would deprecate resort to undue technicality. A conviction will not be regarded as unsafe because it is possible

> to point to some drafting or clerical error, or omission, or discrepancy, or departure from good or prescribed practice. … But if it is clear as a matter of law that the particulars of offence specified in the indictment cannot, even if established, support a conviction of the offence of which the defendant is accused, a conviction of such an offence must in our opinion be considered unsafe. If a defendant could not in law be guilty of the offence charged on the facts relied on no conviction of that offence could be other than unsafe."

51. Those observations were addressed to the jurisdiction of the Court of Appeal (Criminal Division) under the Criminal Appeal Act 1968. But the same general approach must be applied to a case such as the present. If the evidence called by the prosecution is not capable of establishing the commission of an offence, then the Magistrates' Court would be bound to accede to a submission of no case to answer. The position is different where such a submission is based on some technical or drafting error in the written particulars of charge which has no bearing on the substance of the case and which can be cured by an amendment without causing unfairness. The application of the overriding objective, though sensitive to the particular circumstances of any given case, is much more likely to require that the defect is cured by an amendment (with an adjournment if that is necessary to ensure fairness to the defence) rather than the dismissal of the charge.

52. Such an approach is also mandated by section 123 of the 1980 Act. The correct approach to the predecessor provision of section 123 (which was in identical terms) was explained by Lord Widgery CJ in *Garfield v Maddocks* [1974] QB 7 at 12:

> "Those extremely wide words, which on their face seem to legalise almost any discrepancy between the evidence and the information, have in fact always been given a more restricted meaning, and in modern times the section is construed in this way, that if the variance between the evidence and the information is slight and does no injustice to the defence, the information may be allowed to stand notwithstanding the variance which occurred. On the other hand, if the variance is so substantial that it is unjust to the defendant to allow it to be adopted without a proper amendment of the information, then the practice is for the court to require the prosecution to amend in order to bring their information into line. Once they do that, of course, there is provision in [subsection (2)] whereby an adjournment can be ordered in the interest of the defence if the amendment requires him to seek an adjournment."

53. This was the approach the judge should have adopted. She was required to decide if the variance between the evidence and the summons was slight, causing no injustice to the Interested Parties. If that was the case, the charge should have been allowed to stand. If however the judge considered that the variance was so substantial that it was unjust to the Interested Parties to allow it to be adopted without a proper amendment, then she should have required the prosecution to amend the charges; and if it was in the interests of justice to do so she could have granted an adjournment to the Interested Parties. It follows that the procedure she adopted (considering the defence application relating to

the defect in the charge in a submission of no case to answer and then dismissing the charges on that basis) was fundamentally flawed.

Ground 3: Refusal to state a case

54. Under section 111(5) of the 1980 Act a judge may refuse to state a case if she is of the opinion that the application is frivolous. The DPP's substantive challenge to the judge's conclusion that there was no case to answer is well founded. It follows that the application to state a case was not frivolous. It raised a contestable legal issue underling the decision to uphold the submission of no case to answer. The judge was not entitled to refuse to state a case. As we have now separately determined the challenge by the DPP to the judge's substantive decision, there would be no purpose in remitting the matter to the judge in order for her to state a case.

Remedy

55. Ms Montgomery submits that the case should not be remitted to the Magistrates' Court. By the time of any retrial more than two years will have elapsed since the date of the alleged offences. Such delay has an impact on witness' memory and diminishes the public interest in the prosecution continuing. Further, these are summary only offences, punishable upon conviction by a maximum sentence of three months' imprisonment: section 68(3). She submits that the sentences in this case are likely to be relatively short, particularly given the passage of time since the relevant conduct. Further, since the trial before the Magistrates' Court a number of the Interested Parties have now been punished for contempt of court arising from the conduct to which these criminal charges relate: *High Speed Two Limited v Maxey* [2022] EWHC 1010 (QB).

56. We accept that we have a discretion as to whether the case should be remitted: *R (Director of Public Prosecutions) v Stratford Magistrates' Court* [2017] EWHC 1794 (Admin) *per* Simon LJ at [52] - [55]. We are in no doubt that in the circumstances of the present case that discretion should be exercised so as to order the remittal of the case for retrial. There is delay, but it is not at the level where there is likely to be any significant impact on the cogency of the evidence. Much of the evidence comprises video footage, documentary exhibits (relating to the transfer of land from HS2 to its sub-contractor), and admissions made by the Interested Parties pursuant to section 10 of the Criminal Justice Act 1967. Further, the reason for the delay is the unmeritorious argument raised by the Interested Parties before the judge.

57. We take the view that there remains a strong public interest in the trial running its proper course. Although the Interested Parties have been held to be in contempt of court in civil proceedings, no sanction was imposed. The court instead approved a consent order which did not contain any sanction "with considerable reluctance" (*Maxey* at [23]) and only after observing that it would be for the police to deal with "the wider picture" (*Maxey* at [22(i)]) and that were it not for the attitude of the claimant in those proceedings, the contemnors "would be facing custodial sentences." We recognise this means the Interested Parties will continue to face the criminal proceedings, with all that encompasses. We do not underestimate the effect of this and have weighed it in the balance; but that balance, in our judgment falls firmly in favour of remitting the case.

Outcome

58. For the reasons given above, the DPP's claim for judicial review on each of the three grounds of challenge succeeds. There remain extant issues to be determined at trial, including whether the Interested Parties (or any of them) had the requisite *mens rea* for the offence. Accordingly, we direct that the case should be remitted to Highbury Corner Magistrates' Court for a retrial before a different judge.