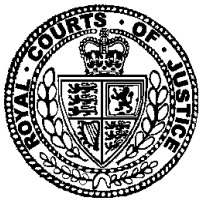

Neutral Citation Number: [2022] EWHC 3302 (Admin)

Case No: CO/1923/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2022

Before :

PRESIDENT OF THE KING'S BENCH DIVISION
-and-
MR JUSTICE CAVANAGH

- -

Between :

Director of Public Prosecutions	**Appellant**
- and -	
Peter Bailey, Benjamin Buse, Robert Gordon, Rachel Graham, Jaclin Kotzen, James Skeet	**Respondents**

- -
- -

James Boyd (instructed by the **Director of Public Prosecutions**) for the **Appellant**
Owen Greenhall (instructed by **Hodge, Jones & Allen**) for the **Respondents**

Hearing date: 6 October 2022

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

PRESIDENT OF THE KING'S BENCH DIVISION

Dame Victoria Sharp, P:

Introduction

1. The Director of Public Prosecutions (the DPP) appeals by way of case stated against the decision of District Judge Sharma sitting at High Wycombe Magistrates' Court on 4 April 2022, to acquit the respondents of aggravated trespass, contrary to section 68 of the Criminal Justice and Public Order Act 1994 (the 1994 Act) on the basis that the prosecution had not proved that the respondents had knowingly or recklessly trespassed on land belonging to Arla Foods Ltd.

2. The judge set out the following question for the opinion of the High Court:

> "Was I correct to conclude that in relation to an offence contrary to section 68 of the Criminal Justice and Public Order Act 1994, the Crown must prove that a defendant either knew or was reckless as to whether he or she is a trespasser?"

3. Our answer to that question is "no".

The background facts

4. The prosecution in this case arose out of the respondents' involvement in a protest at the site of a dairy owned by Arla Foods Ltd in Samian Way, Aylesbury. The protest was organised by Animal Rebellion. This is a protest group which is affiliated with Extinction Rebellion. The dairy is located on Aesop Business Park. The Aylesbury site of Arla Foods Ltd is the largest dairy in the United Kingdom. Raw milk is received from suppliers which is then pasteurised and cleaned before it is bottled for distribution and then transported from the site for supply to customers.

5. Shortly before 5.30 a.m. on 31 August 2021, sixteen protesters, including the six respondents, attended at the site and locked themselves onto two bamboo structures and a van thereby blocking entry into the dairy. The final protester was removed at 10.10 p.m. The protest lasted for nearly 17 hours and caused considerable disruption to deliveries and to vehicles leaving the site.

6. On 1 September 2021, the respondents were each charged with one offence of aggravated trespass, contrary to section 68 of the 1994 Act, and one offence of obstruction of a highway, contrary to section 137 of the Highways Act 1980. The wording of the charge under section 68 of the 1994 Act for each respondent was that:

> "On 31/08/2021 at AYLESBURY in the county of Buckinghamshire, having trespassed on land belonging to ARLA FOODS LTD, and in relation to a lawful activity, namely the production and distribution of dairy products by, from and to ARLA FOODS LTD, which persons were engaged in on that land, did an act, namely attaching yourself to a stationary object, thereby blocking the road and entrance to ARLA FOODS, which

> you intended to have the effect of obstructing or disrupting that activity."

7. The charges of aggravated trespass and obstruction of the highway were alternative charges. On 1 and 8 October 2021 the charges of obstructing the highway were withdrawn at the first hearings at High Wycombe Magistrates' Court.

8. The trial of the respondents before the judge took place on the 31 March, 1 April, and 4 April 2022. Much of the evidence was not in dispute. The judge found the following facts:

   i) The location of the bamboo structures and the van to which the respondents had locked themselves was in an area of the business park that belongs to Arla Foods Ltd. It is a private road and is not a highway.

   ii) None of the respondents had known that the above location was on private land. Nor had any of them been reckless as to that fact. The structure and van had been placed before the gate that appeared to delineate the boundary of the private area. That gate had been open when the respondents arrived and a deliberate decision had been made to place the van and structure before, and not beyond, that gate.

   iii) At no time before their arrest had any of the respondents become aware that they were on private land.

9. The judge went on to find that the offence of aggravated trespass requires knowledge or recklessness in respect of the trespass, and having regard to the facts found, therefore acquitted the respondents. The case stated says this:

> "On behalf of the applicant it was contended that it is no defence to the tort of trespass that the trespass is due to a mistake of law or fact and consequently there is no requirement of either knowledge or recklessness as to trespass. The decision in *R v Collins* [1972] 56 Cr.App.R 554 can be distinguished for the reasons that follow below.
>
> a. The offence of aggravated trespass is designed to build upon the civil tort of trespass. Paragraph 13 of *Richardson v DPP* [2014] UKSC 8; [2014] 2 W.L.R. 288 sets this out where it is stated that:
>
> "The intention of the section is plainly to add the sanction of the criminal law to a trespass where, in addition to the defendant invading the property of someone else where he is not entitled to be, he disrupts an activity which the occupant is entitled to pursue."
>
> b. There is already an actus reus and mens rea requirement within the offence. There is no need to read in an additional mens rea

> requirement. It there was, then mistake in law as to the element of trespass could operate as a defence and that cannot be right.
>
> On behalf of the respondent it was contended that *Collins* is equally as applicable to the offence of aggravated trespass as it is to burglary.
>
> I was of the opinion that *Collins* applied to the offence of aggravated trespass. The offence of burglary also required (at that time in relation to an intention to rape) an additional mens rea requirement. That is not a reason therefore to distinguish Collins. Furthermore, a mistake in a civil law concept such as the ownership of property can operate as a defence where that equates to a lack of mens rea (see Blackstone's Criminal Practice 2022 at A3.9 with particular reference to *Smith (David Raymond)* [1974] QB 354). Trespass is similarly a civil law concept and there seems to be nothing to differentiate it in this respect.
>
> I did not find any assistance from the excerpt from Richardson that is relied upon. It appears to me to simply set out the intention behind the legislation to criminalise trespass in the specified circumstances and not to indicate in any way as to whether knowledge (or recklessness) as to the trespass itself is required.
>
> Accordingly, the offence of aggravated trespass requires knowledge or recklessness as to the trespass. I therefore acquitted the respondents."

The legislative framework

10. Sections 68 and 69 of the 1994 Act are contained in Part V of the 1994 Act, which is headed "Public Order: Unauthorised Encampments and Collective Trespass or Nuisance on Land". This Part of the Act created a number of new offences and police powers, including those in sections 68 and 69, aimed at trespassers who are misbehaving on private land.

11. One example is section 61 of the 1994 Act. This gives a senior police officer on the scene the power to direct trespassers to leave land if the officer reasonably believes that reasonable steps have been taken by the occupier to ask them to leave, and that the trespassers have caused damage, disruption or distress, or have more than six vehicles on the land. If a person, knowing that such a direction has been given to him, fails to leave the land as soon as reasonably practicable, or re-enters the land, he commits an offence. Another example, is section 62A and B of the 1994 Act (inserted in 2003) which provides that if more than one trespasser is on land with a caravan or caravans, with the purpose of residing there for any period, and it appears to the senior police officer on the scene that there is a suitable alternative pitch on a relevant caravan site for the caravan or caravans, the officer can direct the trespassers to leave.

12. As originally enacted, section 68(1) applied only to trespass "in the open air" and to the disruption of lawful activities "in the open air". These words were deleted by the Anti-Social Behaviour Act 2003, section 59(2). Further "trespass" offences were added by the Anti-Social Behaviour Act 2003 and the Police, Crime, Sentencing and Courts Act 2022.

13. The statutory definition of aggravated trespass is to be found in that part of the 1994 Act headed "Disruptive trespasses." Section 68 defines the offence of aggravated trespass. Section 69 confers powers on the police to direct persons committing or participating in aggravated trespass to leave the land, and creates a separate offence of failing to comply with such a direction; and another offence if such persons, having left, again enter the land as a trespasser within the period of three months.

14. Section 68 as amended provides in part as follows:

> "68**. 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—
>
> (a) of intimidating those persons or any of them so as to deter them or any of them from engaging in that activity,
>
> (b) of obstructing that activity, or
>
> (c) of disrupting that activity.
>
> (1A) The reference in subsection (1) above to trespassing includes, in Scotland, the exercise of access rights (within the meaning of the Land Reform (Scotland) Act 2003 (asp 2)) up to the point when they cease to be exercisable by virtue of the commission of the offence under that subsection;
>
> (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.
>
> (4) A constable in uniform who reasonably suspects that a person is committing an offence under this section may arrest him without a warrant.
>
> (5) In this section "land" does not include—

> (a) a highway unless it is a footpath, bridleway or byway open to all traffic within the meaning of Part 3 of the Wildlife and Countryside Act 1981, is a restricted byway within the meaning of Part 2 of the Countryside and Rights of Way Act 2000 or is a cycle track under the Highways Act 1980 or the Cycle Tracks Act 1984; [1]
>
> …."

15. Section 69 provides in part:

> "69. **Powers to remove persons committing or participating in aggravated trespass**.
>
> (1) If the senior police officer present at the scene reasonably believes—
>
> (a) that a person is committing, has committed or intends to commit the offence of aggravated trespass on land; or
>
> (b) that two or more persons are trespassing on land and are present there with the common purpose of intimidating persons so as to deter them from engaging in a lawful activity or of obstructing or disrupting a lawful activity,
>
> he may direct that person or (as the case may be) those persons (or any of them) to leave the land.
>
> (2) A direction under subsection (1) above, if not communicated to the persons referred to in subsection (1) by the police officer giving the direction, may be communicated to them by any constable at the scene.
>
> (3) If a person knowing that a direction under subsection (1) above has been given which applies to him—
>
> (a) fails to leave the land as soon as practicable, or
>
> (b) having left again enters the land as a trespasser within the period of three months beginning with the day on which the direction was given,
>
> he commits an offence and 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.

[1] The offence of aggravated trespass cannot be committed on land forming part of a highway, including a footpath or pavement running alongside the road, but can be committed on footpaths that do not run alongside a road, or on bridleways or on other rights of way. See section 68(5)(a) as substituted by section 68(5)(a) of the Police, Crime and Sentencing Act 2022 with effect from 28 June 2022 (a "tidying up" provision) and section 66 of the Wildlife and Countryside Act 1981 which defines "footpath", "bridleway", and "byway open to all traffic" for these purposes.

> (4) In proceedings for an offence under subsection (3) it is a defence for the accused to show—
>
> (a) that he was not trespassing on the land, or
>
> (b) that he had a reasonable excuse for failing to leave the land as soon as practicable or, as the case may be, for again entering the land as a trespasser.
>
> (5) constable in uniform who reasonably suspects that a person is committing an offence under this section may arrest him without a warrant.
>
> (6) In this section "lawful activity" and "land" have the same meaning as in section 68."

The parties' submissions

16. Mr Greenhall for the respondents submitted that it was possible to read section 68 as requiring that a defendant must intend to trespass to be guilty of an offence of aggravated trespass. This was not a submission pursued with any enthusiasm however, whether on paper, or orally. No doubt this was because section 68 is obviously silent as to whether there is a mens rea for the trespass element of the offence. The words of the statute plainly do not impose such an express requirement and we need say no more about this line of argument.

17. The real issue between the parties centres on whether the presumption (the presumption) that Parliament does not intend to create offences of strict liability, even if there is silence as to the mental element, applies or is displaced in relation to the trespass element of the section 68 offence. As to that, it was common ground that the presumption can be displaced by necessary implication, i.e., an implication that is compellingly clear from the language used, the nature of the offence, the mischief sought to be prevented, and any other circumstances which may assist in determining Parliament's intention.

18. For the DPP it was submitted that there are a number of features such as the statutory language used, the nature of the offence and the mischief at which it was aimed which make it compellingly clear that the presumption of mens rea is displaced. Firstly, the criminal offence of aggravated trespass was intended to build upon the civil law concept of trespass, which has no mental element requirement; and in the absence of an express requirement of mens rea, Parliament could not have intended to dilute it by imposing a more stringent requirement than applies in the law of tort. Secondly, the fact that mens rea is expressly required for the "aggravated" element of the offence (by virtue of section 68(1)) strongly indicates that Parliament did not intend there to be a mens rea requirement for trespass (and the court cannot displace the plain words of the statute simply because the court thinks that the offence should not be one of strict liability). Thirdly, part of the purpose of section 68 is the urgent protection of property rights by the criminal law and the protection of public order from the consequences which may result from aggravated trespass (such as self-help on the part of the landowner). A mens

rea requirement for trespass would be inconsistent with those purposes, enabling an accused to avoid conviction for example, by claiming they did not know that they were protesting on private land, rather than on the public highway; indeed such a mens rea requirement would emasculate the provision, given the complexity of issues that can arise in relation to the division between the highway and private property. This interpretation does not lead to absurdity or unfairness since a defendant can only be convicted if they intend to disrupt or prevent the landowner from carrying out their lawful business, and thus act in a blameworthy manner. Any genuine mistake about the status of land could be reflected in sentence.

19. The argument for the respondents, in summary, is that the presumption applies, and all of the factors that are relevant to its applicability, point in favour of it not being displaced. There can be no assumption that the word trespass has the same meaning in a criminal statute as in the law of tort; the offence of aggravated trespass is a truly criminal offence, so the presumption is particularly strong; the penalty for the offence is not trivial and strict liability is not required in order to promote the purposes of the provision. Mr Greenhall relied in particular on two cases where the presumption was held to apply: *R v Collins* [1973] QB 100, and *R v Smith (David)* [1974] QB 354. Neither case concerned aggravated trespass: *Collins* concerned section 9 of the Theft Act 1968, and *Smith (David)* concerned section 1(1) of the Criminal Damage Act 1971. But it is submitted that the reasoning (and similar statutory language) in both cases strongly supported the existence of a presumption in this case.

20. Mr Greenhall also raised various arguments by reference to the rights protected under articles 10 and 11 of the European Convention on Human Rights (the Convention). These included that a conviction involving an offence for which there is strict liability for trespass, for a protest on private land is, *ex hypothesi*, disproportionate; it also infringes the Convention requirement that there shall be no punishment unless the offence is clearly defined in law and is foreseeable in its effects. In addition, strict liability for trespass in this offence would breach the Convention rights of those who wish to carry out lawful protest on the highway, as it would have a chilling effect on such activity, deterring those who might fear that they stray accidentally onto private land.

21. We permitted the parties to file further brief written submissions following the recent judgment of the Supreme Court in *Reference by the Attorney General for Northern Ireland – Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32 (the *Northern Ireland* case), which was handed down on 7 December 2022.

Discussion: some authorities

22. We start by noting two things. First, that the elements of the section 68 offence have been identified and considered in a number of cases, but it has never been suggested hitherto that the prosecution is required to prove an intention to trespass on the part of the defendant in order to found a conviction for aggravated trespass. On the contrary. The analysis of the offence is consistent with the plain meaning of the statutory words, namely that the (civil) wrong of trespass, is criminalised by the aggravated element of the offence.

23. In *DPP v Barnard* [2000] Crim LR 271, the Divisional Court said:

> "It is entirely clear that the statute requires proof of three elements: (i) trespass on land [in the open air]; (ii) the doing of some act — that must be some distinct and overt act beyond the trespass itself; and (iii) the intention by this second act to intimidate, obstruct or disrupt as provided by (a) to (c) in section 68(1) …"

24. This formulation was approved by the Divisional Court (Moses LJ, Kenneth Parker J) in *Bauer and others v DPP (Liberty Intervening)* [2013] EWHC 634 (Admin); [2013] 1 WLR 3617, at para 12. The appellants in that case were part of a group protesting against tax avoidance who entered Fortnum and Mason and remained there for two and half hours. After setting out section 68(1), Lord Justice Moses said at paras 11 to 13:

> "11. The wording of that section shows that it is necessary to prove not merely an act of trespass but an act beyond that of mere trespass in relation to lawful activity. This requirement of an additional act beyond the act of trespass founded the essential argument in this appeal. It was argued that these appellants or, at the very least the four appellants who were not named as doing any specific act within the store, had done no more than trespass. The judge had found that the demonstration was an additional act. But, contended the appellants, continued presence as part of a demonstration was not an additional act. It was no more than the act of trespass. It was this point which, no doubt, led to the first question posed by the District Judge in his stated case:-
>
> "Was I right to conclude that the defendants committed the second act required by s.68(1) of the Criminal Justice and Public Order Act 1994 on a joint enterprise basis?"
>
> 12. This argument, advanced on behalf of the appellants with a beguiling sense of reality by Mr Thomas, was founded on the decision of this court in *DPP v Barnard* [CO/4814/98] 1999 WL 85279. The information in that case alleged no more than that the accused had "unlawfully occupied the site and that they had done so with the intention specified in s.68". The Divisional Court concluded that the information did not disclose any offence known to the law. Section 68 makes plain that to prove an offence of aggravated trespass not only must a trespass be proved but also a further act, accompanied by one or more of the intentions identified in the section. In his judgment Laws LJ tabulated the three elements which s.68(1) requires to be proved:-
>
> "(i) Trespass on land in the open air; (as the Act then provided)

> (ii) the doing of some act – that must be some distinct and overt act beyond the trespass itself; and
>
> (iii) the intention by this second act to intimidate, obstruct or disrupt."
>
> 13. The statutory question posed by s.68 is whether the prosecution can prove that the trespasser has done anything on the land ("there"), apart from trespassing, with the required statutory intent?"

25. In *Richardson and another v DPP* [2014] UKSC 8; [2014] AC 635 (Lord Hughes, Baroness Hale, Lord Kerr, Lord Toulson and Lord Hodge) the defendants were convicted of aggravated trespass in the Magistrates' Court. Their appeal against conviction by way of case stated was dismissed by the Divisional Court (Laws LJ and Owen J). The Supreme Court then dismissed their appeal. The defendants had contested the charge under section 68 on the basis that the occupants of the shop they had occupied were not engaging in lawful activity for the purposes of section 68, because, amongst other things, the company was guilty of aiding and abetting the transfer by Israel of Israeli citizens to a territory under belligerent occupation which was an act ancillary to a war crime and a criminal offence.

26. Lord Hughes JSC giving the judgment of the court, said this at para 3:

> "By definition, trespass is unlawful independently of the 1994 Act. It is a tort and committing it exposes the trespasser to a civil action for an injunction and/or damages. The trespasser has no right to be where he is. Section 68 is not concerned with the rights of the trespasser, whether protester or otherwise."

27. At para 4 Lord Hughes identified the four elements to the section 68 offence:

> "Under the section there are four elements to this 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."

28. Lord Hughes went on to say this about the intention of the section:

> "13. The intention of the section is plainly to add the sanction of the criminal law to a trespass where, in addition to the defendant invading the property of someone else where he is not entitled to

> be, he there disrupts an activity which the occupant is entitled to pursue."

29. Para 4 in *Richardson* was cited by Lord Burnett CJ in *DPP v Cuciurean* [2022] EWHC 736 (Admin); [2022] 2 Cr App R 8 with these introductory words at para 12: "The offence has four ingredients all of which the prosecution must prove."

30. Against that background, we consider briefly the well-travelled ground of the circumstances in the criminal law in which mens rea should be presumed. The seminal case is *Sweet v Parsley* [1970] AC 132. In that case a woman rented a house out to students, who, without her knowledge used the premises to smoke cannabis. Her conviction under section 5 of the Dangerous Drugs Act 1965, of managing premises used for the purpose of smoking cannabis was quashed. The statute was silent as to any mens rea requirement, but the House of Lords held the presumption should apply. Lord Reid said.

> "Our first duty is to consider the words of the Act: if they show a clear intention to create an absolute offence that is an end of the matter. But such cases are very rare. Sometimes the words of the section which creates a particular offence make it clear that mens rea is required in one form or another. Such cases are quite frequent. But in a very large number of cases there is no clear indication either way. In such cases there has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. That means that whenever a section is silent as to mens rea there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require mens rea."

31. In *B (A Minor) v Director of Public Prosecutions* [2000] 2 AC 428 the defendant, aged 15, had repeatedly requested a 13-year-old girl sitting next to him on the bus to perform oral sex on him. She had refused to do so. The defendant was convicted of an offence contrary to section 1(1) of the Indecency with Children Act 1960. That section makes it an offence to commit an act of gross indecency with or towards a child under the age of 14 or to incite a child under that age to such an act. It was held that although the statute was silent as to the mental element required for the offence, the defendant was not guilty of the offence if he honestly believed that the girl was over the age of 14.

32. Lord Nicholls (with whom Lord Irvine LC and Lord Mackay agreed) said at pp 463 to 464:

> "In section 1(1) of the Act of 1960 Parliament has not expressly negatived the need for a mental element in respect of the age element of the offence. The question, therefore, is whether, although not expressly negatived, the need for a mental element is negatived by necessary implication. 'Necessary implication'

> connotes an implication which is compellingly clear. Such an implication may be found in the language used, the nature of the offence, the mischief sought to be prevented and any other circumstances which may assist in determining what intention is properly to be attributed to Parliament when creating the offence."

33. In *R v Lane* [2018] UKSC 36; [2018] 1 WLR 3647, the statute under consideration was section 17 of the Terrorism Act 2000. The question in that case was whether, when the defendants sent money abroad, they had "reasonable cause to suspect" that it would or might be used for the purposes of terrorism. It was held these statutory words clearly imposed an objective and not a subjective requirement. It was not open to the courts to interpret the provision as requiring that the defendants actually suspected that the money would be used for terrorism. The Supreme Court therefore held that a defendant could be liable for entering into a funding arrangement for the purposes of terrorism, even if the defendant did not actually suspect that the money they donated would be used for terrorism.

34. Lord Hughes (with whom Lady Hale, Lord Burnett, Lord Hodge and Lord Mance agreed) said the following at para 9:

> "Whilst the principle is not in doubt, and is of great importance in the approach to the construction of criminal statutes, it remains a principle of statutory construction. Its importance lies in ensuring that a need for mens rea is not inadvertently, silently, or ambiguously removed from the ingredients of a statutory offence. But it is not a power in the court to substitute for the plain words used by Parliament a different provision, on the grounds that it would, if itself drafting the definition of the offence, have done so differently by providing for an element, or a greater element, of mens rea. The principle of parliamentary sovereignty demands no less. Lord Reid [in *Sweet v Parsley*] was at pains to observe that the presumption applies where the statute is silent as to mens rea, and that the first duty of the court is to consider the words of the statute."

35. *Pwr v DPP* [2022] UKSC 2; [2022] 1 WLR 789 concerned a conviction for carrying an article in such a way or in such circumstances as to arouse suspicions that the defendants were members or supporters of a proscribed organisation, contrary to section 13(1) of the Terrorism Act 2000. Each of the defendants had carried the flag of a proscribed organisation, the Kurdish Workers' Party, at a demonstration in Central London. The defendants admitted that they had acted deliberately in the sense that they knew that they were carrying the flags, but they said that they could not be guilty of the offence because they did not have any knowledge of the import of the flag they were carrying or displaying, or of its capacity to arouse reasonable suspicion that the defendants were members or supporters of a proscribed organisation. The Supreme Court held that the

presumption of mens rea was rebutted and that the offence was one of strict liability (see paras 27 to 34 and 36 to 58).

The core question

36. As identified above, the offence of aggravated trespass was introduced as part of a suite of offences in Part V of the Act which might be described as "trespassing plus"; they criminalised what would otherwise be a civil trespass where the trespass was accompanied by what Parliament decided was blameworthy conduct on the part of the defendant, that is, conduct that was particularly antisocial or harmful to the owner or occupier of the land.

37. Trespass is a legal concept from the law of tort, the meaning of which is well-settled; and as is common ground, proof of the civil wrong requires no mental element. Parliament's decision to use the word trespass when describing the offence of aggravated trespass and indeed when naming the offence is not conclusive, but there is no indication in the statutory language or from the context of the provision, that trespass should be given a different and novel meaning from the meaning it has had at common law for many centuries. As Mr Boyd put it, and as is clear from the discussion of the elements of the offence of aggravated trespass in cases such as *Richardson* and *Cuciurean*, the offence was clearly intended to build on the civil law of trespass.

38. In *Sweet v Parsley*, Lord Reid explained that the underlying rationale for the presumption of mens rea is that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. However, this is not a rationale that finds purchase in the offence of aggravated trespass in circumstances where liability can only arise where the relevant conduct (the trespass) is done with a blameworthy intention viz. intimidating, disrupting or obstructing lawful activities. We would add that whilst it is true in general terms that the presumption can apply to an element of an offence even where Parliament has specified the mens rea for a different element of the same offence, the fact that Parliament chose to specify the relevant mens rea for aggravated element of the offence and in such detail, does strongly indicate that Parliament did not intend there to be a mens rea requirement for trespass.

39. One further feature of the statutory provision provides support for the above analysis. It is to be noted that where Parliament wished to refine the accepted legal meaning of trespass for the purposes of section 68 offence, this was done expressly: see section 68(1A) which applies to Scotland.

40. In short, had Parliament intended trespass to mean something different in section 68 from its meaning in the law of tort, it would have said so. It is true as Mr Greenhall points out that words or phrases do not invariably have the same meaning in the civil law as in the criminal law. The example he relied on was self-defence. In criminal proceedings, the question is whether the defendant had a genuine belief as to the existence of circumstances rendering it necessary to take action and it does not matter whether his belief was reasonable, whereas in civil proceedings the defendant's belief must be both genuine and reasonable: see *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25; [2008] AC 96 and *Sheffield City Council v Brooke* [2018] EWHC 1540 (QB) [2019] QB 48 at paras 52 to 62. However, there were strong policy reasons for that difference. In *Ashley* at para 3 Lord Bingham of Cornhill PSC said, "the ends of justice

to which the two rules respectively exist to serve are different". See also Lord Scott of Foscote at paras 17 and 18, and Lord Carswell at para 76.

41. Such policy considerations have no application to the case before us. Instead, it is clear from the statutory context and purpose of the legislation that the ends of justice which the tort of trespass and the criminal offence of aggravated trespass exist to serve are, in all essentials, the same. Both exist to protect property rights and to maintain public order, the particular purpose of section 68 being to enhance the legal protection of property rights afforded by the law of trespass in circumstances in which the trespass is accompanied by other blameworthy behaviour.

42. As Lord Hughes said in *Richardson* at para 13, cited at para 28 above, the intention of the section is plainly to add the sanction of the criminal law to a trespass where, in addition to the defendant invading the property of someone else where he is not entitled to be, he there disrupts an activity which the occupant is entitled to pursue. In *Cuciurean* Lord Burnett CJ described section 68 as having the legitimate aim of protecting property rights in accordance with article 1 of the first Protocol to the Convention and going beyond a landowner's right to possession of the land. It applies where a defendant carries out an additional act with the intention of intimidating someone performing, or about to perform, a lawful activity, from carrying on with it. Articles 10 and 11 did not bestow any freedom of forum to justify trespass in those circumstances. The section was to help preserve public order and prevent breaches of the peace where those objectives were put at risk by trespass: see paras 45, 67 to 71, 73 to 78, 89 and 90.

43. In most cases, as Mr Greenhall accepted, it will be plain that the protest is taking place on private land. It will be equally plain that the protestors do not have the permission of the occupiers to go onto the land. If there is any room for doubt, then in our judgment it is consistent with both the spirit and purpose of the legislation that the responsibility for this, lies with the trespasser. What matters in the context of this offence, is whether the person is a trespasser, not whether they intended to trespass. It is to be noted that the encouragement of vigilance on the part of the potential defendant has been held to support the conclusion there was no mens rea requirement for a particular ingredient of an offence in relation to other criminal offences. See for example, *Gammon (Hong Kong) Ltd v Attorney General of Hong Kong* [1985] AC 1, at 14d, per Lord Scarman and *R v Brown (Richard)* [2013] UKSC 43 at para 39. In *Brown* it was held that it was not necessary for the accused to know or be reckless as to whether a girl was under 14 for the purposes of the offence of unlawful carnal knowledge of a girl under the age of 14, contrary to section 4 of the Criminal Law Amendment Act (Northern Ireland) 1923.

44. There is a further difficulty that must be confronted on the respondents' case, which is how the court should identify the mental element that the prosecution would be required to prove, without falling into the trap referred to in *Lane*, of the court arrogating to itself the role of Parliament by drafting the definition of the offence itself. The judge took the view that the mens rea requirement encompassed both an intention to trespass and recklessness. But it is not at all clear why that should be so; nor were we offered any principled or reasoned argument for that particular formulation. We note that the difficulty in formulating precisely what the mens rea should be in the face of silence in the statute itself, was one of the reasons the Supreme Court held in *Pwr* that there was no requirement of mens rea in that case: see paras 37, 38 and 40. Likewise, we would regard it as falling outside of the judicial role to embark on a speculative exercise to

divine what Parliament may have intended the mens rea for the trespass element of the offence of aggravated trespass to be.

45. The respondent's case before us, as it was before the District Judge, is founded on the case of *Collins* where the Court of Appeal held that the prosecution were required to prove that a defendant intended to trespass or was reckless as to whether or not he entered as a trespasser for the purposes of the offence of burglary contrary to section 9(1) of the Theft Act 1968. Burglary was and is a serious offence.

46. Sections 9(1) and 9(2) of the Theft Act provided, at the relevant time:

> "(1) A person is guilty of burglary if - (a) he enters any building or part of a building as a trespasser and with intent to commit any such offence as is mentioned in subsection (2) ... (2) The offences referred to in subsection (1) (a) ... are offences of ... raping any woman therein, ..."

The maximum sentence then provided for burglary, following a conviction on indictment, was fourteen years' imprisonment.

47. The facts of the case are familiar to generations of law students. The defendant was crouching, undressed apart from his socks, on the windowsill of a woman's bedroom; she mistook him for her boyfriend, invited him in and they had sexual intercourse. The defendant claimed that at the time he entered the building, he believed, on reasonable grounds, that he had been invited into the house. The defendant was a trespasser under the civil law because the woman had not given informed consent for him to enter the property. He contended that he would only be a trespasser for the purposes of section 9(1), and so guilty of burglary with intent to rape, if he had intended to trespass or had been reckless as to whether or not he was trespassing. The Court of Appeal agreed with this submission: see p105E.

48. We do not accept that the reasoning in *Collins* binds, or should be followed by this court. Firstly, the meaning of a word in a statute, and the applicability of the presumption of mens rea depends on the circumstances of the particular case, including the statutory language, the context, the statutory purpose and other matters. Burglary and aggravated trespass are, self-evidently, different offences enacted to deal with different legal wrongs. Certainly, there is no rule of legal interpretation that trespass must have the same meaning in relation to all criminal offences of which it forms an ingredient.[2]

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[2] Further examples include: Trespass in a building with a firearm or an imitation firearm, contrary to Section 20(1) of the Firearms Act 1968 ("FAA"; Trespass on land with a firearm, again without reasonable excuse, contrary to section 20(2) of the FAA; Entering and being on any premises as a trespasser, whilst having any weapon of offence, without reasonable excuse, contrary to section 8 of the CLA 1977; Entering or being on the premises of foreign missions (including the premises of diplomatic missions and consular premises) as a trespasser, contrary to section 9 of the CLA 1977; and Being in a residential building which the person entered as a trespasser, if the person knew or ought to know that he or she was a trespasser, and the person intends to live in the building or intends to live there for any period, contrary to section 144 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

49. It is true, of course, that the court in *Collins,* like this court, was concerned with the meaning of trespass in the context of a criminal offence. As the court in *Collins* made clear however, it was only dealing with the meaning of trespass for the purposes of section 9(1) of the Theft Act. The court did not purport to find that there is a mental element to trespass wherever that word appears in a criminal statute. Secondly, the position in respect of the offence of aggravated trespass is not analogous to that which the court was addressing in *Collins.* The court in *Collins* took account of the history of the offence of burglary, an offence that is very different in kind to aggravated trespass (in burglary, trespass is essentially an aggravating feature of the offence which the defendant already intends to commit at the point where he enters any building or part of a building as a trespasser). Burglary did not therefore "build" on or "grow out of" the tort of trespass in the way that aggravated trespass did and was designed to do. As the court in *Collins* explained, the purpose of the reference to "trespasser" in section 9(1) of the Theft Act was to remove some of the (frequently absurd) technical rules that had developed in relation to the requirement of "breaking and entering" in burglary prior to the enactment of the Theft Act. Such matters have no application or relevance to the offence with we are concerned.

50. We gain no assistance either from the case of *Smith (David*) on which the respondents also relied, where the Court of Appeal held that a defendant was not guilty of criminal damage if he genuinely, though mistakenly, believed that the property that he had damaged belonged to him. In brief, the case is not, as Mr Greenhall submitted, authority for the general proposition that a mistake regarding the civil law concept of ownership of property can operate as a general defence in criminal law. Rather, the case was decided on the statutory language of section 1(1) of the 1971 Act and by reference to the history of the offence. This section provides that the defendant must intend "to destroy or damage such property or being reckless as to whether any such property would be destroyed or damaged." The phrase "such property" relates back to the words "property belonging to another". It follows that the offence is committed only if the defendant intended to damage property belonging to another or was reckless whether he did so. The court in *Smith (David)* pointed out that under the law in force before the passing of the 1971 Act, it was clear that no offence was committed by a person who destroyed property belonging to another in the honest but mistaken belief that the property was his (359H to 360A). There was no reason to think that Parliament intended to change this by enacting section 1 of the 1971 Act.

51. Nor do we accept the respondents' submission that the absence of a requirement for intention or recklessness in relation to trespass would lead to harsh and unfair consequences. Mr Greenhall's point was that protests on the highway, rather than on private land, may not be unlawful even if they cause disruption to ordinary life, including disruption of traffic; and he relied on the risk that someone who thought they were lawfully protesting on public land could inadvertently trespass and thereby be liable for aggravated trespass (and the knock-on chilling effect on those who might otherwise wish to protest on the highway for example).

52. However, in this context it is relevant to note that aggravated trespass is not an offence of strict liability. The presence of an intention requirement for the aggravated element of the offence mitigates any potential unfairness. Further, we refer to the points already made at para 43 above. In cases in which there might be some doubt, section 69 also provides the opportunity for a direction be given by a police officer. As for the chilling

effect on lawful protests, we think that the risk of this is somewhat remote. Anyone who protests on the highway and engages in conduct which would render them guilty of the offence of aggravated trespass on private land, would necessarily be engaging in conduct which is intended by them to have the effect of intimidating persons so as to deter them from engaging in lawful activity, or of obstructing that activity, or of disrupting that activity; and would likewise be at risk of offending by committing the offence of obstructing the highway.[3]

53. Before considering the Convention arguments that have been raised we should mention, briefly, two other potentially relevant considerations to the presumption, albeit they are of limited significance in our view. These are firstly, whether the offence is "truly criminal" or not, and secondly, the seriousness of the offence and the extent to which any conviction is likely to stigmatise the offender. The offence of aggravated trespass is one of general application and it is not a regulatory offence, but this does not persuade us the presumption must apply in the face of the countervailing considerations to which we have referred. As to the seriousness of the offence, aggravated trespass is a summary only offence, with a maximum sentence of three months' imprisonment. It is an offence therefore, towards the lowest end of the spectrum of seriousness; and given the circumstances in which such offending is likely to take place, we think it is unrealistic to suppose that the social stigma that attaches to a conviction is a weighty matter in relation to the presumption.

Convention arguments

54. In our judgment it is clear from what was said in *Richardson*, *Cuciurean* and most recently in the *Northern Ireland* case, that the respondents' Convention arguments are ill-founded. We do not consider either that the respondents can achieve their desired result in relation to their Convention arguments by the back door; that is, by framing the suggested infringement as a chilling effect on those who wish to protest on the highway.

55. The respondents' submissions in a nutshell are that the right to protest engaged by article 10 (freedom of expression) and article 11 (freedom of assembly and association) would be infringed by a conviction for aggravated trespass in the absence of a mens rea requirement for the trespass element of the offence. It would not be in accordance with the law, as articles 10 and 11, and article 7 (no punishment without law) require an individual to be able to know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable (see *Cantoni v France* (Application No 17862/91).

56. We can dispose of the article 7 argument briefly. As set out above, the meaning of trespass is well-established. There is no lack of certainty about it.

57. There was some discussion during oral argument as to whether the correct analysis is that articles 10 and 11 have no application to aggravated trespass, or, rather, that they are engaged but that the inevitable and unchallengeable conclusion is that the

[3]Amendments have been made to the law relating to criminal liability for protesting on the highway by section 73 to 80 of the Police, Crime and Sentencing Act 2022, including the replacement, by section 78, of the common law offence of public nuisance, with a new statutory offence of intentionally or recklessly causing public nuisance. These amendments came into effect from 26 June 2022, and are not therefore relevant to this appeal.

prosecution for aggravated trespass is proportionate. This is an arid debate in the context of this case, as the end result on either analysis is the same.

58. Turning first to *Richardson*, an argument based on Convention rights was rejected by the Supreme Court. At para 3 Lord Hughes said:

> "References in the course of argument to the rights of free expression conferred by article 10 of the European Convention on Human Rights were misplaced. Of course a person minded to protest about something has such rights. But the ordinary civil law of trespass constitutes a limitation on the exercise of this right which is according to law and unchallengeably proportionate. Put shortly, article 10 does not confer a licence to trespass on other people's property in order to give voice to one's views. Like adjoining sections in Part V of the 1994 Act, section 68 is concerned with a limited class of trespass where the additional sanction of the criminal law has been held by Parliament to be justified. The issue in this case concerns its reach. It must be construed in accordance with normal rules relating to statutes creating criminal offences."

59. This passage was approved and applied by the Divisional Court in *Cuciurean* (at para 48).

60. The issue for the Divisional Court in *Cuciurean* was whether the prosecution must satisfy the Court so that it is sure that a conviction for aggravated trespass is a proportionate interference with the rights of the defendant under articles 10 and 11. The Divisional Court held that there is no such requirement. This was because there is no general principle that where a person is being tried for an offence which engaged those articles, the Crown must prove that a conviction would be a proportionate interference with those rights. "The necessary balance for proportionality is struck by the terms of the offence-creating provision, without more ado": see para 58, quoting *Bauer*. The court in *Cuciurean* at paras 63 and 66 to 67 distinguished the decision of the Supreme Court in *DPP v Zeigler* [2021] UKSC 23 as *Ziegler* was concerned with the offence of obstruction of the highway, where there is a statutory defence of "lawful excuse"; and because the commission of that offence did not involve the infringement of private property rights.

61. *Cuciurean* held therefore that it was unnecessary to read a proportionality test into section 68 to render it compatible with articles 10 and 11. Section 68 had the legitimate aim of protecting property rights in accordance with article 1 of Protocol 1 to the Convention. It did not apply to mere trespass. It applied (and only applied) where a defendant trespassed, and carried out an additional act with the intention prescribed in section 68(1). A protest carried out for the purpose of disrupting lawful activities did not lie at the core of article 10 and 11. At paras 45 and 46 Lord Burnett said:

> "45. We conclude that there is no basis in the Strasbourg jurisprudence to support the respondent's proposition that the freedom of expression linked to the freedom of assembly and

> association includes a right to protest on privately owned land or upon publicly owned land from which the public are generally excluded. The Strasbourg Court has not made any statement to that effect. Instead, it has consistently said that articles 10 and 11 do not "bestow any freedom of forum" in the specific context of interference with property rights (see *Appleby* [2003] 37 EHHR 38 at [47] and [52]). There is no right of entry to private property or to any publicly owned property. The furthest that the Strasbourg Court has been prepared to go is that where a bar on access to property has the effect of preventing any effective exercise of rights under articles 10 and 11, or of destroying the essence of those rights, then it would not exclude the possibility of a State being obliged to protect them by regulating property rights.
>
> 46. The approach taken by the Strasbourg Court should not come as any surprise. articles 10, 11 and A1P1 are all qualified rights. The Convention does not give priority to any one of those provisions. We would expect the Convention to be read as a whole and harmoniously. Articles 10 and 11 are subject to limitations or restrictions which are prescribed by law and necessary in a democratic society. Those limitations and restrictions include the law of trespass, the object of which is to protect property rights in accordance with A1P1. On the other hand, property rights might have to yield to articles 10 and 11 if, for example, a law governing the exercise of those rights and use of land were to destroy the essence of the freedom to protest. That would be an extreme situation. It has never been suggested that it arises in the circumstances of the present case, nor more generally in relation to section 68 of the 1994 Act. It would be fallacious to suggest that, unless a person is free to enter upon private land to stop or impede the carrying on of a lawful activity on that land by the landowner or occupier, the essence of the freedoms of expression and assembly would be destroyed. Legitimate protest can take many other forms."

62. Finally we note that the reasoning in *Cuciurean* was approved by the Court of Appeal in *Attorney General's Reference (No 1 of 2022)* [2022] EWCA Crim 1259, where the court took a similar approach to the issue of proportionality for the offence of criminal damage as had been taken in *Cuciurean* to aggravated trespass; and by the Supreme Court in the *Northern Ireland* case at para 55 by Lord Reed PSC, giving the judgment of the court (Lord Reed, Lord Kitchin, Lord Burrows, Lady Rose, Lord Lloyd-Jones, Lord Carloway, Dame Siobhan Keegan).

Conclusion

63. For the reasons given, the appeal must be allowed. The case will be remitted to the High Wycombe Magistrates' Court for a retrial.