Neutral Citation Number: [2020] EWHC 2489 (QB)

Case No: QB-2020-002916

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 September 2020

**Before** :

**THE HON. MR JUSTICE MURRAY**

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**Between :**

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| **THE MAYOR AND BURGESSES OF THE LONDON BOROUGH OF HACKNEY** | **Claimant** |
| **- and -** | |
| **(1) SHIVA LIMITED**<br>**(2) ANTEPAVILION LIMITED**<br>**(3) THE ARCHITECTURE FOUNDATION LIMITED**<br>**(4) BARKER SHORTEN ARCHITECTS LLP**<br>**(5) PERSONS UNKNOWN EFFECTING THE MATERIAL CHANGE OF USE OF THE REGENTS CANAL FOR THE DISPLAY OF ART INSTALLATIONS WITHOUT THE BENEFIT OF PLANNING PERMISSION**<br>**(6) PERSONS UNKNOWN CAUSING OR PERMITTING THE UNAUTHORISED MATERIAL CHANGE OF USE OF THE LAND TO A MIXED USE INCLUDING FOR THE DISPLAY OF ART INSTALLATIONS WITHOUT THE BENEFIT OF PLANNING PERMISSION** | **Defendants** |

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**Mr Wayne Beglan** (instructed by **London Borough of Hackney Legal Services**) for the **Claimant**
**Mr Russell Gray**, a director of the First Defendant, representing the First Defendant and Second Defendant in person
**Mr Jaimie Shorten**, a partner of the Fourth Defendant, representing the Fourth Defendant in person

The Third Defendant did not attend and was not represented.

Hearing date: 28 August 2020

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# Approved Judgment

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

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THE HON. MR JUSTICE MURRAY

**Covid-19 Protocol:** This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down are deemed to be 10:30 am on 18 September 2020.

## Mr Justice Murray :

1. This is the return date for an interim injunction granted by Johnson J on 20 August 2020 (order sealed on 21 August 2020) ("the Interim Order") to the claimant, the London Borough of Hackney, in relation to land known as the Regent's Canal and adjacent land at Brunswick and Columbia Wharf, 53-55 Laburnum Street, Hackney, London E9 7HA ("the Site").

2. The Interim Order was granted under section 187B of the Town and Country Planning Act 1990 ("the 1990 Act"). The claimant is the local planning authority for the administrative area in which the Site lies.

3. The claimant seeks to continue the prohibitory provisions of the Interim Order as against the first defendant, Shiva Limited, the second defendant, Antepavilion Limited, and the fourth defendant, Barker Shorten Architects LLP, as well as seeking mandatory relief against the first defendant, as discussed below in this judgment.

4. In relation to the third defendant, The Architecture Foundation Limited ("the AF"), after it was served with the Interim Order, the third defendant offered an undertaking to the court in terms set out in a letter from its solicitors, Herbert Smith Freehills LLP, dated 27 August 2020. It also confirmed that it would make a public statement, as set out in the letter, to the effect that the AF has been notified of the claimant's position that the installation of *Sharks!* amounts to a breach of planning control and that the AF does not endorse any action involving a breach of planning control. On that basis, the claimant seeks no further relief against the third defendant.

*The Site*

5. The Site is comprised of:

    i) several parcels of adjacent land, all owned by the first defendant, Shiva Limited (one parcel being registered to the first defendant in 1991 under its corporate name at that time, Shiva Fabrications Limited); and

    ii) a stretch of the Regent's Canal immediately to the north of that land, which is controlled by the River & Canal Trust.

6. A number of buildings are situated on the Site, collectively known as "Hoxton Docks". They are composed of Columbia Wharf on the western part of the Site and Brunswick Wharf immediately adjacent on the eastern part. The buildings overlook Laburnum Street to the south and Regent's Canal to the north.

7. Columbia Wharf, with a street address of 53 Laburnum Street, is a two storey commercial building, built between 1951 and 1963, at the junction of Laburnum Street and Haggerston Road. The property has a series of flat roofs. It was acquired by the first defendant in 1991.

8. Brunswick Wharf, with a street address of 55 Laburnum Street, is comprised of one and two storey warehouses built between 1895 and 1916. It has a yard at the front of the property to the south and abuts the Regent's Canal at the rear of the property to the north. It was acquired by the first defendant in 1995.

9. The Site is in a conservation area. Two grade II listed designated heritage assets are nearby, namely, Haggerston Bridge, over the Regent's Canal just by the northwest corner of the Site, and Haggerston Baths on Laburnum Street, facing north towards the Site.

10. The planning use classes of the buildings on the Site are a mix of B1 (office/studio) and C3 residential use. Two permitted residential flats are located at 53 Laburnum Street at first floor level. The use class of the remainder of the buildings is B1 (office/studio).

*The Interim Order*

11. Paragraph 1 of the Interim Order prohibits the defendants from:

> "(a) using the Land or facilitating the use of the Land for the display of art installations or similar installations;
>
> (b) placing or otherwise installing any pontoons in the area of Regent's Canal edged black and hatched on the Plan attached to this Order;
>
> (c) from carrying out any works including but not limited to development to the rooftops of buildings on the Land marked blue on the plan attached to this Order."

12. "The Land", as defined in the Interim Order, is the Site, including the relevant stretch of the Regent's Canal.

13. In relation to paragraph 1(c) of the Interim Order, I note that no part of the plan attached to the Interim Order in the hearing bundle prepared by the claimant is, in fact, marked blue. Mr Russell Gray, a director and principal shareholder of the first defendant, representing the first and second defendants in person, said that the same was true of the copy of the Interim Order served on the first defendant. Nothing material for present purposes, however, turns on that defect in the Interim Order.

14. Paragraph 2 of the Interim Order makes it clear that it does not prevent the defendants from using the Site for a purpose for which they have *express* planning permission or from causing any operational development to take place for which there is *express* planning permission. The Interim Order does not, however, include an exception to the general prohibitions in paragraph 1 for any use of the Site that does not require planning permission.

15. The claimant applied for the Interim Order specifically to prevent the erection of an installation entitled "*Sharks!*", which was the winning entry of the 2020 Antepavilion Competition, an annual architecture competition sponsored by the second defendant, Antepavilion Limited, and the third defendant, The Architecture Foundation Limited, and which was described as follows in the shortlist for the 2020 competition prepared by the competition sponsors:

> "**Sharks! by Jaimie Shorten**

> 'The Headington Shark (proper name Untitled 1986) made a famous case in planning decisions and precedent. The Appeal decision that allowed it to be (eventually) retained included this:
>
> > "the shark is not in harmony with its surroundings, but then it is not intended to be in harmony with them"
>
> This proposal has several sharks on a raft.
>
> The compositional arrangement of the sharks follows that of The Raft of the Medusa by Théodore Géricault (1791-1824).
>
> They will sing Charles Trenet's La Mer, in harmony and in French, as a poignant reflection on the UK leaving the EU
>
> > La mer,
> > Au ciel d'été,
> > Confond, ses blancs moutons
> > Avec les anges si purs.
> > La mer,
> > Bergère d'azur
> > Infinie…
>
> Additionally, each of the six sharks will give a lecture on important themes in contemporary architecture and urbanism."

16. The winner of the 2020 Antepavilion Limited, Mr Jaimie Shorten, is a partner of the fourth defendant, Barker Shorten Architects LLP, a firm of architects.

17. At the time the claimant was preparing for and making its application for the Interim Order, it apprehended that installation of *Sharks!* was imminent or perhaps already under way. The relief sought, and given by the Interim Order, was prohibitory only. The claimant is now also seeking mandatory relief against the first defendant to remove the partial installation of *Sharks!*, as described in more detail below.

*Service of the Interim Order and the partial installation of* Sharks!

18. After the Interim Order was made on 20 August 2020, but before a sealed copy was available, Mr Patrick O'Connor, the Planning Enforcement Team Leader of the claimant, attended at Hoxton Docks at approximately 20:30 on the evening of 20 August 2020 in order to serve unsealed copies of the Interim Order at the site. In his witness statement of service made on 21 August 2020 (the witness statement is dated "Friday 20th August, 2020", but that appears to be a typographical error, as 20 August 2020 was a Thursday, and paragraph 9 of the witness statement refers to events occurring on 21 August 2020), Mr O'Connor notes that, in addition to affixing copies of the Interim Order to each entrance of the premises, he encountered Mr Gray at the Site and brought the Interim Order to his attention.

19. While at the Site, Mr O'Connor noted that there were three model sharks each positioned on a pontoon in the canal. He took some photographs, two of which were

exhibited to his witness statement, and which showed three sharks, apparently constructed of fibreglass, of similar size and colouring, showing the shark's head and mid-body, in "breaching" position. Mr O'Connor understood that the final installation was intended to include five such sharks.

20. On the following day, 21 August 2020, Mr Nick Kirk, a Senior Planning Enforcement Officer of the claimant, attended at the Site at approximately 12:20 to served sealed copies of the Interim Order. He noted that there were then four model sharks on pontoons positioned in the canal. Two of the photographs attached to his witness statement showed the four sharks, one of which was considerably bigger than the other three and was also constructed from mid-body to head in "breaching" position

21. The claimant contends that the fourth shark, bigger than the other three, was installed after copies of the unsealed Interim Order were served at the Site and on Mr Gray personally and that, therefore, the installation of the fourth shark was likely to be a deliberate breach of the Interim Order.

22. In his evidence to me, Mr Gray maintained that the fourth shark had been installed by the time he had had the opportunity to read and get advice on the Interim Order, which he maintained was difficult to interpret. As soon as he understood the effect of the Interim Order, he stopped the installation of the fifth shark (also constructed in a similar mid-body to head "breaching" position and also to be fixed to a pontoon), which at the time of the hearing before me therefore remained in the warehouse. I found no reason to disbelieve that evidence.

23. For purposes of this application to continue the order of Johnson J and for mandatory relief, on the evidence before me, I conclude on a balance of probabilities that Mr Gray's account is truthful that the fourth shark was installed while he was getting to grips with the unsealed Interim Order and that he did not direct it to be installed in deliberate breach of the Interim Order. I also note that, had Mr Gray been minded deliberately to ignore the Interim Order, it seems likely that he would have completed the *Sharks!* installation with the fifth shark.

*The legal framework*

24. The legal framework that governs this application is well-established. The claimant relies on section 222 of the Local Government Act 1972 for the power to institute these civil proceedings in its own name, which it considers to be expedient for the promotion or protection of the interests of the inhabitants of its area.

25. The claimant relies on section 187B of the Town and Country Planning Act 1990, which confers on a planning authority the power to apply for an injunction to restrain any actual or apprehended breach of planning control where it considers it necessary or expedient to do so. That power is available regardless of whether the planning authority has exercised or is proposing to exercise any of its other planning enforcement powers.

26. The claimant has set out its reasons for considering that it is necessary and expedient to apply for injunctive relief against the first, second and fourth defendants for the reasons set out in the supporting witness statements, which are summarised in the Brief Details of Claim.

27. I bear in mind the guidance contained in *South Bucks District Council v Porter* [2003] UKHL 26; [2003] 2 AC 558, in particular, at [27]-[37] (per Lord Bingham of Cornhill).

28. The principles applying to the grant of interim relief set out in *American Cyanamid v Ethicon* [1975] AC 396 (HL) apply, bearing in mind the planning context and that the claimant is the local planning authority. As always, the analysis is necessarily fact-specific.

29. The claimant relies on *Thames Heliports Plc v London Borough of Tower Hamlets* (1996) 74 P&CR 164 (CA) for the proposition that the installation of *Sharks!* on pontoons in the Regent's Canal is capable of constituting a change of use of land for the purposes of section 55 of the 1990 Act, which defines what constitutes a "development" requiring permission under section 57 of the 1990 Act. In that case, the Court of Appeal held that a proposal to establish a heliport facility on a vessel navigating up and down the tidal section of the River Thames, the vessel stopping from time to time at one of 22 possible sites to enable helicopters to land and to take off, *could* constitute a change of use of land for the purposes of section 55 of the 1990 Act. The Court of Appeal also held that it was not right for the court to hold as a matter of law that a material change of use *would* occur, as that was a value judgment to be made by the planning authority and not by the court.

*The evidence reviewed*

30. This application is principally supported by three witness statements made by Mr O'Connor dated 19 August 2020, 27 August 2020 and 28 August 2020, the first two of which include a number of exhibits. In addition, there are three witness statements dealing principally with service of the Interim Order, the witness statements of Mr O'Connor dated 20 August 2020 and of Mr Kirk dated 21 August 2020, to which I have already referred, and a witness statement made by Ms Louise McCarthy dated 24 August 2020.

31. The principal evidence filed in opposition to the claimant's application is that of Mr Gray who filed a document dated 27 August 2020 that stands as his witness statement and as the skeleton argument on behalf of the first defendant. For convenience, I will simply refer to it as his witness statement. Mr Gray also filed a set of exhibits to accompany his witness statement. At the hearing, Mr Gray indicated that he was also representing the second defendant. Mr Gray has a considerable experience of planning matters, and his submissions were clear, well-organised and detailed, despite the short amount of time he had to prepare and file them.

*Additional background*

32. The first defendant maintains that there has been a long history of art display and installation at the Site. Since at least 1995 the Site has been used for the production and display of art (painting, sculpture, installations, experimental architecture and occasional performance art), including gallery and exhibition spaces. During this time the complex has provided studios to numerous well-known artists of international stature, including two Turner Prize winners.

33. The claimant does not appear to dispute this. The claimant notes in its skeleton argument that it is trite planning law that a level of activity of a different use class, so long as it is ancillary, can be accommodated without constituting a material change of use. It appears, therefore, that the claimant's view has been that the artistic activity at the Site has, for the most part, been ancillary to the permitted B1 use of the majority of the Site.

34. Some installations at the Site have, however, in the claimant's view, gone beyond permitted use and resulted in planning enforcement activity. For example, the claimant issued an Enforcement Notice against the first defendant on 17 March 2016 ("the 2016 Enforcement Notice") in relation to the erection of an unauthorised structure at roof level and the erection of fencing around the roof edge. The first defendant's appeal against that Enforcement Notice was dismissed on 7 April 2017. The claimant maintains, and the first defendant does not deny, that the 2016 Enforcement Notice has not yet been complied with, despite over three years having elapsed since the appeal was dismissed.

35. On 18 October 2019 the claimant issued an Enforcement Notice against the first defendant ("the 2019 Enforcement Notice") in relation to four rooftop structures, which were erected following the Antepavilion competitions in 2017 and 2019, along with the installation of a platform and decking at roof level and the installation of fencing around the roof edge at 53 Laburnum Street. The 2019 Enforcement Notice is currently being appealed by the first defendant.

36. I do not attempt to summarise the full planning and enforcement history of the site. Mr Gray attached to his witness statement tables setting out the planning and enforcement history, and Mr O'Connor's witness statements, in particular, his witness statement of 28 August 2020, set out the claimant's evidence in relation to the planning and enforcement history.

*Article in* The Guardian *of 18 August 2020*

37. Attached to Mr O'Connor's witness statement dated 19 August 2020 made in support of the application for the Interim Order was an article by Oliver Wainwright published in *The Guardian* on 18 August 2020 regarding the *Sharks!* installation. The article, entitled "Sharks! Why are five man-eaters being unleashed into a popular canal?", reads in part as follows:

> " 'We don't do planning,' says Russell Gray, 'or regulations, or any of that bollocks.' The property developer is standing in his canal-side warehouse in Hackney, London, next to a gigantic model of a prehistoric shark with blood stains smeared around its gaping mouth. 'We're about liberating the arts and architecture from institutional control.'
>
> This week, Gray is launching a shiver of sharks into Regent's Canal: five polystyrene and fibreglass beasts equipped with smoke machines, laser beams and speakers. Some will even blow bubbles out of their mouths. Over the coming weeks, the sharks will sing songs and give lectures to each other on the subject of architecture and urbanism. This is the latest iteration

> of the Antepavilion, an annual commission organised by Gray's company, Shiva, in collaboration with the Architecture Foundation. That's if the council doesn't confiscate the fearsome creatures first.
>
> Gray has a long record of baiting the authorities. He once parked a tank on a site in Southwark over a feud with the council. Its gun is still pointing at the planners' offices. More recently, he has locked horns with Hackney council over structures erected on the roof of Hoxton Docks, a complex of artists' studios and spaces in a jumble of old wharf buildings that he bought in the late 1980s. 'The planners say it's all "incongruous",' he tells me, referring to the menagerie of structures his rooftop has acquired over the years. 'Who are they to depreciate our interventions with that term?'
>
> …
>
> 'There is a bipolar culture in planning,' Gray says, 'which is that you bully the little man and lick the arse of the big developer because he pays out big sums in cash. Look at how the canal has been destroyed around here with luxury towers. Planning is a profit centre for local authorities.' Reflecting his frustrations, this year's Antepavilion brief called on entrants to 'respond to the tension between authoritarian governance of the built environment and aesthetic libertarianism'."

38. Mr Gray says that *The Guardian* article misquoted and misrepresented him, distorting what he had said to fit the journalist's agenda of opposition to the government's latest proposed planning reforms. Mr Gray says that he told the journalist that his position on planning controls was:

> "far more complex and that, particularly in relation to historic buildings, I was very often to be found challenging a local authority for failing to properly protect them, including the Claimant."

39. Mr Gray says that the article is now "the subject of a defamation dispute with the Guardian" and that the court should entirely ignore it.

40. Mr Wayne Beglan, counsel for the claimant, submitted that the claimant was entitled to rely upon *The Guardian* article as some support for its position. He noted that the first defendant has not provided any detail in relation to its proposed defamation claim against *The Guardian*, and he submitted that the article was consistent with the recent planning history at the Site and that it purported to contain direct quotations from Mr Gray.

*The claimant's determination that this application is necessary and expedient*

41. By reference to the guidance in *South Bucks DC v Porter*, the claimant says that it is necessary and expedient to apply for injunctive relief against the defendants under section 187B of the 1990 Act for the following reasons:

    i) the apprehended breach of planning control would be flagrant;

    ii) the extent of the proposed breach is substantial;

    iii) the operational development constituting the breach is taking place within a conservation area and near to a Grade II listed structure, namely, Haggerston Bridge, both of which enjoy high levels of statutory and national planning policy protection;

    iv) the planning history of the Site and the contents of *The Guardian* article, consistent with that planning history, demonstrate a contempt or lack of care for the claimant's role as the local planning authority charged with proper enforcement of breaches of planning control;

    v) the claimant has used conventional enforcement measures before in relation to the Site, including issuing the 2016 Enforcement Notice, with which the first defendant has still not yet complied, despite its appeal having been rejected by the planning inspector on 7 April 2017 (which continuing failure is a criminal offence under section 179(2) of the 1990 Act) as well as the 2019 Enforcement Notice, which remains subject to appeal;

    vi) the claimant has now had the opportunity to assess the partial installation of *Sharks!* and has concluded that planning harm does arise for reasons set out in Mr O'Connor's witness statement dated 27 August 2020; and

    vii) the defendants have not provided any good reasons to the claimant why they consider, in terms of the operation of the planning scheme, they are entitled to act as they propose to do in installing *Sharks!*

42. Mr Beglan reminded the court that it is not for the court to examine matters of planning policy and judgment, which are matters for the local planning authority. In this case, the breach involves a Site given a high degree of protection in national policy, which is substantially replicated in local policy.

*The claimant's reasons for seeking injunctive relief*

43. In his witness statement dated 19 August 2020 given in support of the application for the Interim Order, Mr O'Connor stated that the apprehended breach of planning control that the Interim Order was intended to address was the anticipated installation of *Sharks!*, which was a material change of use of the area of the Regent' Canal adjacent to the Columbia and Brunswick Wharves.

44. In his witness statement dated 27 August 2020, Mr O'Connor set out the policy considerations that are relevant to the Site, given its location in a conservation area and the proximity of a designated heritage asset in the form of the grade II listed Haggerston Bridge, making reference to the development plan for Hackney,

comprised of the London Plan (2016) and Hackney Local Plan (2020), the National Planning Policy Framework, the Regent's Canal Conservation Area Appraisal and the Blue Ribbon Network (Policy 7.24 of the London Plan), which is relevant in light of the stretch of the Regent's Canal that forms part of the Site. Against that background, the claimant considers that the installation of *Sharks!* represents an intensification of the breach of planning control at the Site and that action is necessary to protect the amenities of nearby occupiers, in light of the aims and objectives of Policy LP2 (Development & Amenity) of the Hackney Local Plan 2020.

45. Mr O'Connor set out the following justification in the witness statement dated 27 August 2020 for seeking to continue the prohibitory effect of the Interim Order and for mandatory relief:

i) The display of an art installation, currently comprised of four fibreglass sharks on pontoons in the Regent's Canal at the Site, is a material change of use of the Site, which does not fall within the scope of any existing permission or permitted development rights. Planning permission is therefore required. No application for relevant planning permission has, however, been made by any of the defendants, nor has there been any approach by any defendants to the claimant to engage in pre-application consultation or discussion about the installation of *Sharks!*

ii) The installation of *Sharks!* is an alien feature in this location that affects the setting of Haggerston Bridge, which is "significantly harmful to the overall experience of the surroundings in which the heritage asset is experienced", although it is conceded that in planning terms the "cumulative harm to the designated heritage asset is considered less than substantial". The harm, however, is not offset by much in the way of public benefit ("if any at all") from the installation of *Sharks!* Accordingly, the material change of use of the Site for the display of an art installation is unacceptable. The addition of a fifth "shark" to the installation would only increase the level of visual harm. The apprehended intensification of the unauthorised use is therefore also considered unacceptable.

iii) Section 72(1) of the Planning (Listed Buildings and Conservations Areas) Act 1990 places a general duty upon a planning authority in relation to buildings or other land in a conservation area to pay special attention to the desirability of preserving or enhancing the character or appearance of that area. The Regent's Canal Conservation Area is a well-used public space with an important environmental landscape and a unique industrial heritage, both along the canal (including the locks, bridges and moorings) and in the industrial buildings beside the canal. The *Sharks!* installation in its current state is a "completely alien feature within the overall context of the Regents Canal conservation area". It is completely out of character with the surrounding buildings and the canal itself and "cannot by any metric be judged to contribute in a positive way to the character and appearance of the conservation area". Its appearance is visually dominant. By virtue of its size, design and nature it is a harmful addition to the visual appearance of the conservation area, detracting from its character.

46. Mr O'Connor considered that *Sharks!* gave rise to the following potential harms:

i) the development occupying up to 61m$^2$ of the waterway would be capable of hindering navigation depending on its location and layout;

ii) the development could have the effect of impeding public access along the towpath on the northern side of the canal, which is 2.8 metres in width with no safety railings in place along the canal-edge and is subject to heavy foot and cycle traffic, which could be unviable, particularly in juxtaposition with Haggerston Bridge, under which the towpath is further reduced to about 2 metres in width;

iii) the completed development is likely to impact adversely on the residential amenity of nearby occupiers, including possibly in relation to amplified noise levels of the music and lectures associated with the proposed installation in its completed form;

iv) the development is expected to include "laser beams", which could result in harm to the amenities of nearby residential occupiers should there be light "overspill" and any laser beams or laser shows, which by implication would occur from dusk onwards, could result in harm to the setting of Haggerston Bridge, the character and appearance of the Regent's Canal Conservation Area and to public amenity and safety in the vicinity.

47. Mr O'Connor considered that the proposed installation would conflict with the aims and objectives of policies LP1 (Design Quality and Local Character), LP2 (Development and Amenity) and LP52 (Water Spaces, Canals and Residential Moorings) of the Hackney Local Plan 2020.

48. Mr O'Connor admitted that there was some uncertainty in the assessment of these potential harms as the developer had not approached the claimant proactively to seek either pre-application advice or by submitting a planning application, which would have then resulted in the usual consultative process with relevant statutory bodies and neighbouring residential occupiers.

49. Mr O'Connor acknowledged in his witness statement of 27 August 2020 that the use of section 187B of the 1990 Act is not a commonplace step, however in the judgment of the claimant it was necessary and expedient in this case. There have previously been significant breaches of planning control at the Site while under the control of the first defendant. Furthermore, the Antepavilion competition appears to encourage entrants to effect a breach of planning control, which appears to be in conflict with Parts 9 and 10 of Principle 2 (Competence) of the Code of Conduct of the Royal Institute of British Architects (RIBA). Traditional means of enforcement, short of injunctive relief, have not been successful to date in dealing with unlawful development arising from the Antepavilion competition. The claimant has therefore concluded that it is necessary and expedient to seek injunctive relief to prevent this latest unlawful development in the form of the *Sharks!* installation.

50. On the basis of Mr O'Connor's evidence, Mr Beglan made the following submissions in relation to the application of the *American Cyanamid* principles to this case:

i) In relation to the prohibitory relief sought, there is clearly a serious issue to be tried, as there has been a specific breach of planning control by virtue of the

partial installation of *Sharks!* and a justified apprehension of a further breach of planning control by the completion of the installation. The *Heliports* case supports the proposition that the installation of *Sharks!* on pontoons on the Regent's Canal is capable of constituting a change of use of land for the purposes of section 55 of the 1990 Act. In relation to the mandatory relief sought, there is a strong *prima facie* case that the partial installation of *Sharks!* is a material change of use of the Site requiring planning permission, which has not been sought, much less granted.

ii) As to balance of convenience in relation to the prohibitory relief sought, that lies in favour of granting the injunction. The planning harms caused by the installation of *Sharks!* cannot be adequately compensated in damages. In seeking to prevent those harms, the claimant is acting in the public interest. The first defendant has provided no compelling evidence as to why prohibitory relief should not be granted. It has provided scant details of the "opening event", which could not take place. If planning permission is, in due course, granted, an opening event can be arranged then.

iii) As to balance of convenience in relation to the mandatory relief sought, that lies in favour of granting the injunction as the removal of the four sharks currently installed appears to be an operation capable of being undertaken in a very short period of time without substantial resource.

iv) The order sought, continuing the prohibitions in the Interim Order and granting mandatory relief, would "hold the ring" pending the outcome of the planning process.

*Views of the first and second defendants in opposition to this application*

51. Mr Gray, on behalf of the first and second defendants, raised several arguments against the claimant's application for continuing prohibitory relief and for mandatory relief and in favour of discharging the Interim Order.

52. First, Mr Gray submitted that the Interim Order is an "extreme measure" for which there is no proper justification. It is well-known to the claimant, in the community and more broadly in the London art world that the Site has been used for the production and display of art and related artistic activities for the past twenty-five years, as studios and galleries, save for a small amount of residential floorspace approved in 1998. It has not previously been suggested that this is inconsistent with the current B1 classification of most of the Site, and this use has not previously been challenged. To the contrary, the claimant has acknowledged this use by applying charitable occupation business rates relief based on exactly such use.

53. Accordingly, Mr Gray submitted, the central premise of the claimant's application for the Interim Order and for its current application to extend that interim relief, namely, that the installation of *Sharks!* is a material change of use, is false. By making that assertion to Johnson J in support of its application for the Interim Order, the claimant was acting disingenuously. It was also guilty of material non-disclosure to the court, in failing accurately to describe the history of the Site as a centre for the creation and display of art, as well as the full planning history. That material non-disclosure should draw the censure of the court and result in the discharge of the Interim Order.

54. In support of the foregoing point regarding material non-disclosure, Mr Gray noted that the 2019 Enforcement Notice makes no allegation of "material change of use", as it would have done if the claimant believed that such a breach of planning control could be made out in the course of an ordinary planning appeal process in relation to the rooftop structures that were the subject of the 2019 Enforcement Notice.

55. Mr Gray asserted that the claimant has been aware of the plan to install *Sharks!* since at least March of this year. If it had any concerns about the planning impact of the installation, the claimant has had plenty of opportunity to raise these with the first defendant. There is no justification for having waited until the eve of the installation and opening event of *Sharks!* to take the draconian step of obtaining a without notice injunction, which has already imposed a significant financial loss on the first and second defendants.

56. Mr Gray submitted that the terms of the Interim Order are confused and inconsistent because of the false premises upon which those terms are founded. Consequently, the unintelligibility, ambiguity and/or oppressiveness of the terms of the Interim Order provides another basis on which the Interim Order should be discharged. Paragraph 1(a) prohibits the use of the Site for the display of art installations "or similar installations", yet that is what has occurred at the Site for the past twenty-five years. Paragraph 1(b) prohibits the placing or installing of "any pontoons" in the area of the Regent's Canal immediately in front of Columbia and Brunswick wharves, yet there are currently pontoons there in relation to which it has never previously been suggested that their presence is unlawful. Paragraph 1(c) prohibits the carrying out of "any works" on the Site "including but not limited to development to the rooftops of buildings on the Land marked blue on the plan attached to this Order". Quite apart from there being no land marked blue on the plan attached to the Interim Order, the reference to "any works" is far too broad. It would appear, for example, to prevent the first defendant from repairing the roof.

57. Mr Gray submitted that, to obtain the Interim Order, the claimant relied on a false and defamatory newspaper article in *The Guardian* that misquoted and misrepresented Mr Gray, without having made any attempt to verify the accuracy of the article. The court should give no credence to this sensationalised newspaper report and should discharge the Interim Order, which was obtained on a materially false basis.

58. Mr Gray submitted that the claimant has asked the court to pre-judge in its favour the issue of whether the installation of *Sharks!* would constitute a material change of use and require consent and, on that basis, seek an injunction.

59. Mr Gray further submitted that the *Heliports* case does not support the proposition that the positioning of the sharks on pontoons on the canal *would* constitute a material change of use, but merely that it *might*. In any event, the *Heliports* case can be distinguished. The environmental impact of five life-sized model sharks floating on small pontoons in a sheltered location on the Regent's Canal cannot be sensibly compared with a floating heliport on the tidal section of the Thames in central London.

60. According to Mr Gray, the following three propositions would have to be true in order for the claimant to be justified in obtaining an injunction to restrain the installation of *Sharks!*, namely, that:

i) planning consent is required for the installation;

ii) such consent is not inherent in any of the first defendant's and/or second defendant's multiple existing consents and licences; and

iii) if any additional consent is required, the claimant would have valid grounds for refusing that consent.

61. Mr Gray submitted that, the foregoing three propositions not being self-evident, if the claimant chooses to pursue them, they fall to be resolved in the ordinary planning process, including by issue of an Enforcement Notice if the claimant sees fit to do so.

62. Turning, therefore, to the *American Cyanamid* principles, Mr Gray made the following submissions:

i) In relation to question of whether there is a serious issue to be tried, given the authorised planning use of land at the Site for the erection of art installations, which has occurred at the Site for at least 20 years with the claimant's full knowledge, the case is unarguable. There is no serious issue to be tried. In relation to the installation of the model sharks on pontoons in the Regent's Canal, the case is scarcely arguable and, in any event, so weak that the court should hesitate to grant an injunction where there are well-established procedures, short of injunctive relief, available to the claimant to exercise its planning enforcement powers.

ii) In relation to the balance of convenience, in support of its argument that the installation of *Sharks!* will cause damage or harm to the public interest, the claimant has taken an "elephant gun approach" to specifying the harm, without putting forward any genuine or serious examples of such harm. Even Mr O'Connor in his witness statement dated 27 August 2020 has characterised the "potential" harms as subject to a "level of uncertainty". Dealing with each in turn:

a) Obstruction of canal navigation. It is clear from the video exhibit, accessible via a link in the exhibit to Mr Gray's witness statement (which I viewed during the course of the hearing), that there is no risk to navigation from the *Sharks!* installation given that the part of the Regent's Canal where the sharks are located is approximately three times the width of the adjacent Haggerston and Queen's Bridges. The Canal & River Trust, having been sent photographs of the sharks in the water, has not raised an objection to the installation, but instead has indicated that "we want to work with you".

b) Obstruction of the towpath's public thoroughfare and congregation of people. The video exhibit makes it clear that pedestrians and cyclists are not obstructed by the crowds that gather to watch the weekly dance performances on pontoons at the site by a newly formed dancing company, Distdancing, formed mostly of dancers from the Royal Ballet who cannot perform indoors due to the current Covid-19 social distancing requirements. Far more people attend these than would ever congregate on the canal-side to view the *Sharks!* installation. In any

event, the causing of congestion is not a valid ground of refusal of planning consent.

c) Attracting public attention and noise nuisance. Harm from noise nuisance is purely speculative, as the fourth defendant has not yet settled on content, volume or frequency for any soundtrack for the sharks. Should a problem arise, it can be dealt with by well-established means of controlling noise nuisance. Any genuine concern regarding this aspect could have been raised directly with the first and second defendants.

d) Adverse impact on grade II listed Haggerston Bridge and on conservation area, "incongruity" and public benefits. It is a matter for the planning inspector appointed to hear the appeal against the 2019 Enforcement Notice to make the decisive judgment on the adverse impact on its setting, including Haggerston Bridge and the adjacent conservation area, of any allegedly incongruous structures on the Site, which he or she will have to do by reference to the surroundings and the premises themselves. The immediately neighbouring Bridge Academy is "a stark example of incongruity by design writ large", and Columbia and Brunswick Wharves are themselves an undeniable hotch-potch of different styles of industrial buildings of the twentieth century. The Regent's Canal Conservation Area should never have been extended to cover these buildings of no arguable conservation value, that extension having occurred in 2007 without notice to the first defendant. Meanwhile, the outstanding listed Haggerston Baths, immediately outside the conservation area, is owned by the claimant and is derelict. "Incongruity" or "disharmony" with its surroundings is a matter of judgment for the planning inspector, as shown by the example of the Headington Shark (see [15] above). That judgment will need to weigh in the balance the public benefits arising from the cultural activities of Antepavilion at the Site.

iii) The instances of "potential harm" relied on by the claimant are contrived and disingenuous. The real motivation of the claimant is simply its demand for control for the sake of control itself. (See [90] below.)

iv) As to the potential damage or loss to the defendants, in particular, the first and second defendants, if the existing injunction is maintained and/or extended, the claimant is wrong to say that the Interim Order has caused no loss to the defendants and that, if maintained, it will continue to cause no loss. The second defendant has invested at least £25,000 in the 2020 Antepavilion commission for construction costs and prize money combined, along with at least £10,000 of support and organisational costs that will have to be written off if the installation cannot proceed as planned in the summer season in accordance with the objectives of the second defendant, as a charity, and its obligations to the winner of the 2020 competition. Apart from these monetary losses, there are intangible losses that cannot be compensated in damages: (a) to the winner of the competition whose winning entry will never be fully realised during the current summer season; and (b) to the reputation and future of the competition, which may not be able to continue for a fifth year, even if

the defendant succeeds ultimately in lifting the injunction. By contrast, there is no credible evidence that the claimant will suffer any harm or loss if the Interim Order is not maintained.

v) The balance of convenience therefore lies in favour of refusing the application for mandatory relief, discharging the Interim Order, leaving the claimant to prove its case through the ordinary planning process.

63. Mr Gray submitted that the planning and enforcement history at the Site over 20 years shows the amount of time and effort that the first defendant has expended in attempting to meet the demands of the claimant. There has only been one appeal determined against the first and second defendants, and there has been one determined in its favour. Apart from that one unsuccessful appeal, there has only been one single trivial noise notice in relation to the premises, which was quickly unwound. The first defendant's appeal against the 2019 Enforcement Notice, which deals with the two rooftop structures arising out of prior Antepavilion competitions, remains outstanding. It is therefore wrong and deliberately misleading for the claimant to submit that traditional means of planning enforcement have been unsuccessful in dealing with development issues at the Site.

64. As far as the first defendant's appeal against the 2019 Enforcement Notice is concerned, Mr Gray submitted that there was a strong case on appeal, namely, that the uninhabitable temporary rooftop structures that are the subject of the 2019 Enforcement Notice do not require planning consent any more than sculptures in a sculpture park do.

65. Mr Gray noted that the claimant relies on alleged harm to the visual amenity of the Regent's Canal Conservation Area that would be caused by the *Sharks!* installation, but no objection has been made to Air-Draft, which is a large temporary structure on the historic 1934 motorised barge "Ouse", for which the first and second defendants hold licences from the Canal & River Trust and mooring rights alongside the premises. Air-Draft was the winning entry from the 2018 Antepavilion competition. There are also a number of existing pontoons for which the first and second defendants have consents and licences, three "swimming pontoons" that have been in place dockside since July 2018 and a further four "non-swimming" rectangular pontoons that have been in place dockside since December 2019. Although these placements are highly visible, no objection has been made to any of these in relation to the visual amenity of the conservation area. Mr Gray also made a number of criticisms of the decision to extend the Regent's Canal Conservation Area in 2007 to cover the area on which the claimant now relies.

66. Finally, Mr Gray submitted that this whole costly exercise could have been avoided had the claimant taken up his repeated offers to engage with the claimant at a senior level (above the level of Mr O'Connor) to discuss the artistic activities at the Site, the Antepavilion competition and how these sit with the claimant's planning enforcement activities in respect of the Site, given claimant's boasted support for arts, culture and the creative industries. To that end, Mr Gray appended correspondence with the claimant during 2019 and 2020 in which he attempted to get Councillor Guy Nicholson, who is the Hackney Cabinet Member for Planning, Culture and Inclusive Economy to meet with or telephone him. Mr Nicholson did respond to Mr Gray by e-mail on 14 November and 18 December 2019 and 19 February and 27 March 2020,

addressing comments raised by Mr Gray by e-mail, but Mr Nicholson declined Mr Gray's repeated invitations to meet or to speak by telephone.

*The position of the fourth defendant*

67. On 26 August 2020 Mr Shorten wrote to the court asking that his firm, the fourth defendant, be discharged as a respondent to the Interim Order. His principal arguments were that he had complied with the Interim Order as soon as he was aware of it, he had no interest or control over the Site, and he did not own the model sharks or the pontoons on which they rest. He also noted that his only relationship with the 2020 Antepavilion competition was that he was the winner, having provided design and construction ideas. He had no involvement in planning matters, and there was no written contract between the competition organisers and him. He was not required to do more as a result of winning the competition, and he could not procure that anyone else complied with the injunction. He therefore considered that it would be disproportionate and ineffective for his firm to remain a party, and it was unfair that the fourth defendant should be at risk of costs being imposed in relation to someone else's breach.

68. Mr Shorten repeated some of those submissions at the hearing but provided no evidence in support of them in the form of a witness statement containing a statement of truth. Mr Shorten also emphasised that he won the competition as an individual and that his partner, and the partnership, namely, the fourth defendant, had no involvement, so it was not fair that the injunction should apply in relation to the partnership.

*Is there a serious issue to be tried?*

69. Regarding whether there is a serious issue to be tried that the installation of *Sharks!* is a material change of use of the land at the Site and therefore a "development" for purposes of section 55 of the 1990 Act, the claimant's position is that, to the extent that art installations have been permitted at the Site over the past 20 years, it has been as an ancillary use to the principal B1 use of the Site. The installation of *Sharks!*, however, goes beyond ancillary use. I agree that there is a serious issue to be tried in this respect. Given the size, scope and location on the canal of the installation, there is a *prima facie* case that it goes beyond use that ancillary to permitted B1 use at the Site.

70. I also agree with the claimant that the *Heliports* case, albeit concerned with quite different facts, supports the claimant's proposition that the installation of *Sharks!* on pontoons in the Regent's Canal is *capable* of constituting a change of use of land for the purposes of section 55 of the 1990 Act. It is not for this court to determine whether it *would* constitute a change of use for that purpose.

71. My conclusion that there is a serious issue to be tried is not affected by Mr Gray's submission that the 2019 Enforcement Notice does not, on its face, allege a material change of use by the erection of the rooftop structures that are the subject of the 2019 Enforcement Notice nor his submission that no planning enforcement action has apparently been taken in relation to Air-Draft, the winning entry of the 2018 Antepavilion Competition. Those are interesting points and may suggest some inconsistency in the claimant's approach to planning enforcement at the site, but those

points do not forestall the claimant from relying on the argument that the installation of *Sharks!* involves a material change of use.

72. The claimant has given its view as to why the planning history of the site does not establish that the display of art installations, other than incidental to the lawful B1 use of the building as artists' workshops and studios, is a lawful use. The claimant has done enough, therefore, to establish that there is a serious issue to be tried.

73. It is not for me to resolve that issue on this occasion. Accordingly, I reject Mr Gray's submission that the claimant is asking the court to pre-judge in its favour the question of whether the installation of *Sharks!* would constitute a material change of use and therefore require planning consent.

*Where does the balance of convenience lie?*

74. As to the balance of convenience, I turn to consider (i) whether the claimant acted expeditiously and justifiably in seeking and obtaining the Interim Order on an urgent without notice basis, (ii) whether damages would be an adequate remedy for either party, (iii) whether the continuation of the prohibitory relief granted by the Interim Order and the giving of the mandatory relief sought by the claimant would be just and proportionate measures in the circumstances of this case and (iv) other factors relevant to the balance of convenience. I also briefly consider Mr Gray's submission that the rights of the defendants under Article 10 of the ECHR are adversely affected by the Interim Order and the proposed injunctive relief.

75. As to whether the claimant acted with appropriate expedition in seeking the Interim Order and was justified in doing so on an urgent without notice basis, the claimant explained that although it was aware of the outcome of the 2020 Antepavilion Competition in late March 2020, it did not consider that action was necessary until an apprehended breach of planning control was likely to occur. That point was reached in late July, when the claimant's planning enforcement team learned that the 2020 competition winning entry was likely to be installed. The competition sponsors had brought the matter to the claimant's attention by inviting the claimant to comment on the merit of the overall Antepavilion competition as well as the *Sharks!* proposal.

76. According to Mr O'Connor's evidence, work commenced on preparing a case, but was significantly delayed between 30 July and 10 August by "catastrophic ICT failures disabling all IT applications at the Council". The claimant then became aware of the article in *The Guardian* of 18 August 2020, to which I have already referred, which confirmed that installation of *Sharks!* was imminent, but without specifying a definitive date for its likely occurrence. The claimant made its without notice application to Johnson J on 20 August 2020. The claimant said that it was necessary to make the application without notice, because it was likely that if notice were given, the defendants would accelerate installation of *Sharks!* so that the claimant would be presented with a *fait accompli*.

77. In the event, as we have seen, *Sharks!* was partially installed by the time the Interim Order was made and initially served unsealed. The *status quo* for present purposes is that there is a partial installation of four of the five contemplated model sharks, without the contemplated lighting and auditory effects.

78. Johnson J clearly accepted that it was appropriate to make the Interim Order on an urgent without notice basis, and nothing that emerged during the hearing before me has caused me to take a different view.

79. As to the adequacy of damages, the claimant is seeking to protect the public interest in the effective enforcement of the planning laws. It is clear that damages are not an adequate remedy for the claimant.

80. As to whether damages would adequately protect the interests of the defendants should it ultimately prove to be the case that injunctive relief should not have been granted to the claimant, it appears that damages could adequately compensate the first and second defendants for the costs associated with the partial installation of *Sharks!*, but would be inadequate to address the intangible aspects of the delay to the installation and damage to the reputation and sustainability of the Antepavilion competition highlighted by Mr Gray.

81. While I agree with the claimant that the removal of the four model sharks currently installed in the Regent's Canal is not likely to be a difficult or costly exercise, I am satisfied on Mr Gray's evidence that significant costs have been incurred by the first and second defendants in relation to the partial installation of *Sharks!* Those costs must be weighed in the balance; however, I note that, in any event, they have already been incurred. There is no evidence that extending the prohibitory relief would entail significant additional cost for any defendant.

82. The first and second defendants have not acted secretively in relation to the 2020 Antepavilion competition, although they did not inform the claimant of the precise timing of the installation of the 2020 winning entry. On the claimant's own evidence, the claimant has been aware of the nature of the 2020 winning entry since late March, because it was drawn to the claimant's attention by the first and second defendants.

83. Mr Gray heavily criticised Mr O'Connor's evidence as to the planning harms that would potentially be caused by the installation of *Sharks!* Mr O'Connor's assessment in relation to possible obstruction of navigation on the relevant stretch of the Regent's Canal and possible obstruction of the towpath do not appear to be particularly strong points. Mr O'Connor's assessments in relation to (i) the potential adverse impact on residential amenity of nearby occupiers, (ii) the impact on the character and appearance of the Regent's Canal Conservation Area and (iii) the conflicts between the installation and the aims and objectives of specific policies of the Hackney Local Plan 2020 lie clearly within the exclusive purview of the claimant as the local planning authority.

84. In relation to the proportionality of the injunctive relief sought, as I have already summarised, the claimant relies on the recent planning history of the Site to argue that traditional means of enforcement have not been effective, whereas Mr Gray says that the claimant presented a partial and misleading summary of the planning history to Johnson J and is guilty of material non-disclosure, on which basis the Interim Order should be discharged and any further relief refused.

85. In support of these points, Mr Gray asserted that the evidence in Mr O'Connor's witness statement of 28 August 2020 (apparently originally dated 25 August 2020, according to paragraph 11 of the claimant's skeleton argument for this hearing,

supplied by way of reply on matters of planning history) had been deliberately and wrongly withheld from Johnson J.

86. In reply to that allegation, Mr Beglan said that the witness statement had been prepared in anticipation of a possible argument by Mr Gray based on the longer planning history, which the claimant considered of little merit. When that argument was, indeed, made in Mr Gray's witness statement/skeleton argument delivered late on the evening before the hearing, the claimant considered that Mr O'Connor's additional witness statement on the planning history should be submitted by way of reply. There was no material non-disclosure.

87. In my view, if Johnson J had had the detailed planning history that was available to me for this hearing, it is unlikely that he would, on that basis, have refused to make the Interim Order. In my view there was no material non-disclosure. The fact that the 2016 Enforcement Notice has still not been complied with, despite the appeal having been lost by the first defendant, together with the issuance of the 2019 Enforcement Notice (notwithstanding that it remains subject to appeal), is sufficient, in my view, to justify the claimant's submission that traditional planning enforcement measures have been ineffective in relation to breaches of planning control arising out of recent Antepavilion competitions.

88. As for the article in *The Guardian*, Mr Gray says that it is defamatory. It is not for me, of course, to say whether it is or not, but I note that Mr Gray denies that he was accurately quoted. He criticised the claimant for failing to make any attempt to verify the accuracy of the article, but, as submitted by Mr Beglan, the article was, in the claimant's view, consistent with the recent planning history of the Site and purported to contain direct quotations from Mr Gray.

89. There was nothing improper in the claimant's presenting *The Guardian* article to Johnson J as part of its case for injunctive relief. It is not clear how the claimant could have verified the accuracy of the article or that it was subject to a duty to do so. Johnson J would have been capable of assessing the weight of that evidence, taking judicial notice of the fact that newspaper reports are not always accurate. The article was, in any event, also evidence that installation of *Sharks!* was imminent, justifying, on the claimant's case, the urgency of the claimant's application. As it happens, *Sharks!* was in the course of being installed at that time, so the article was accurate to that extent.

90. The article in *The Guardian* was also accurate in referring to the Antepavilion competition's brief to entrants to "respond to the tension between authoritarian governance of the built environment and aesthetic libertarianism". At para 57 of his witness statement/skeleton argument, Mr Gray said the following:

> "In reality the injunction is an affirmation by the Claimant of its demand for control for the sake of control itself and for the intrinsic satisfaction it brings to those who aspire to exercise it through public office. It is exactly what the brief for the 2020 Antepavilion invited entrants to engage with: the tension between creative free expression and planners exercising their essential powers for the public good – or self-indulgently and

> oppressively overreaching them. The defendants invoke their Art. 10 rights."

91. Mr Gray raises points here that are legitimate matters for public debate, and I intend no criticism of Mr Gray or the Antepavilion competition in highlighting them. They help, in my view, to explain the first defendant's approach to the claimant's application.

92. I note that the article in *The Guardian* highlights comments allegedly made by Mr Shorten to the author, which Mr Shorten has not sought to distance himself from (nor, in my view, is there any obvious reason why he should). Mr Shorten acknowledged in the article that *Sharks!* was inspired by the Headington Shark in Oxford, which was a sculpture erected in 1986 of an eight-metre-long shark crashing into the roof of a terraced house and which, after a six-year legal battle, was approved by the planning inspector on the basis that "[i]n this case it is not in dispute that the shark is not in harmony with its surroundings, but then it is not intended to be in harmony with them". The article refers to the outcome of this legal battle as "a symbol to many of the triumph of eccentricity over bureaucracy".

93. It is not the court's role in relation to this application to attempt to resolve this tension between the perceived public goods produced by planning law, its implementation and enforcement, on the one hand, and aesthetic freedom and aesthetic diversity, on the other hand. But it is relevant background that the *Sharks!* installation is intended to test and challenge the planning process, responding to the 2020 Antepavilion competition brief.

94. The current *status quo* is unsatisfactory for both parties. *Sharks!* is partially installed, failing to realise the full concept, but, according to the claimant, in its current state leading to some, if not all, of the potential planning harms highlighted by Mr O'Connor in his evidence.

95. Having regard to all of the foregoing factors and weighing them all carefully in the balance, which I have not found to be an easy exercise, I conclude that the balance of convenience falls on the side of granting the injunctive relief sought, both as to continuation of the prohibitions in the Interim Order (subject to some clarification of the language) and granting the mandatory relief sought by the claimant. I am satisfied that it would be just and proportionate to do so.

96. Although Mr Gray referred to Article 10 of the ECHR in paragraph 57 of his witness statement/skeleton argument, which I have quoted above, he did not pursue this point in his further written and oral submissions. The defendants are not prevented from exercising their freedom of expression by the order I am proposing to make but are simply required to comply with the order pending resolution of the planning control issues raised by the *Sharks!* installation.

97. In relation to the three point summary of the first defendant's case, which I have set out at [60] above, the first two points are addressed by my conclusion that the claimant has established that there is a serious issue to be tried that planning consent is required for the installation of *Sharks!* As to the third proposition, the claimant has given the reasons for its assessment as to potential planning harms, which are not for this court to resolve.

*Position of the fourth defendant*

98. The claimant opposes the fourth defendant's application to be released from the effect of any injunctive relief that might be made in response to its application on the basis that the fourth defendant has not submitted any evidence to support its application to be released, nor is there any evidence about the fourth defendant's continuing ownership of *Sharks!* Mr Beglan submitted that, it appears from the evidence of the first and second defendants that Mr Shorten will retain input in relation to *Sharks!* At present, therefore, he submitted there remains a serious issue to be tried between the claimant and the fourth defendant and the prohibitory relief should therefore be continued as against the fourth defendant.

99. Mr Shorten is an architect, practising through his firm, the fourth defendant. His winning entry in the 2020 Antepavilion Competition clearly arises out of and is closely connected to his professional activities as an architect. The claimant also appears to be correct that there is no evidence before the court on which I can safely conclude that there is no serious issue to be tried in relation to the fourth defendant and Mr Shorten as a partner of the fourth defendant, in relation to the ownership and control of *Sharks!* Accordingly, I conclude that it is just and proportionate that the prohibitory injunctive relief sought by the claimant should be continued in relation to the fourth defendant.

*The scope of injunctive relief to be given*

100. The artistic merits of *Sharks!* are not a matter for this court, nor are the merits of the planning issues raised by the claimant or the merits of the first and second defendants' counter-arguments on the planning issues, the threshold of there being a serious issue to be tried having been crossed.

101. It is an important part of the background to the application that artistic and cultural activities have taken place at the Site over the course of more than twenty years, and that this fact is well-known to the claimant. Those activities must, however, be conducted in compliance with applicable law and regulation, including relevant planning law.

102. I have concluded, for the reasons given in this judgment, that it is just and proportionate to give some form of injunctive relief to the claimant. However, as we went nearly an hour beyond the originally estimated and allocated time of two hours for the hearing (which, bearing in mind that the court was sitting as the Interim Applications Court, is, in any event, normally the maximum time that can be allotted given the pressure of other work in that court), we did not have time to consider the proper scope of the injunctive relief to be given.

103. Accordingly, I propose to set out my current views on that question, having heard the evidence supporting the application, and to invite written submissions from the claimant and from the first, second and fourth defendants. I will then consider whether I can make an order on the basis of those submissions or whether it is necessary to have a further short hearing to deal with this question of scope.

104. As to the proper and proportionate scope of the injunctive relief to be given, the only anticipated breach of planning control for which the claimant has provided sufficient

evidence is the installation of *Sharks!* Although there have been clear differences of opinion between the claimant and, in particular, the first defendant as to the need for planning consent for specific installations, the 2016 Enforcement Notice, which has not yet been complied with by the first defendant, and the 2019 Enforcement Notice, which remains subject to appeal, deal with the other outstanding planning matters. Furthermore, there is no reason, in my view, to apprehend any other imminent breach of planning control by the first, second and/or fourth defendants on the basis of the evidence presented by the claimant.

105. In my view, therefore, there is no proper basis for continuing the wide prohibition in the Interim Order, nor is there a need for the injunctive relief to extend to Unknown Persons.

106. Accordingly, I propose to limit the prohibition to the installation of *Sharks!*, with the prohibition to continue until a planning application for the installation of *Sharks!* is made and planning consent is granted or, if refused, an appeal against the refusal is granted in favour of the first and second defendants, or until further order of the court.

107. In the meantime, the current position, with *Sharks!* only partially installed and not fully realised is unsatisfactory for all parties. In my view, the balance of convenience lies in favour of granting the limited mandatory relief sought by the claimant against the first defendant, namely, that the four model sharks currently installed on pontoons in the Regent's Canal be removed, pending resolution of the planning position.

108. I set out in the Annex to this judgment the principal provisions of the form of order that I propose to make to give effect to this judgment, subject to consideration of any submissions on the question of the scope of the order from the claimant and the first, second and fourth defendants. When I circulated this judgment to the parties in draft in accordance with the normal arrangements under Practice Direction 40E, I suggested that this could be done by written submissions within a relatively short timeframe. The first, second and fourth defendants have requested additional time to prepare their written submissions and for those to be considered at an oral hearing. In view of the fact that they were acting in person, I have agreed to this request.

109. This matter has been listed for hearing on 14 October 2020 at 10:30 am with a time estimate of one hour, with written submissions to be provided, if so advised, by each of the claimant and the first, second and fourth defendants by 4:00 pm on 12 October 2020. At the hearing, once the question of the scope of the order has been resolved, I will also consider written and oral submissions from the claimant, first, second and fourth defendants on other consequential issues such as costs and permission to appeal.

## Annex

### *Principal provisions of proposed form of Order*

1. The order of Johnson J dated 20 August 2020 is discharged.

2. The First, Second and Fourth Defendants are prohibited (whether by themselves, their servants or their agents) from using the Land [*defined as in the Interim Order*] or facilitating the use of the Land for the display of the *Sharks!* installation that was the winning entry of the 2020 Antepavilion competition on the rooftop or any other external surface at the Land, including on any one or more pontoons in the area of the Regent's Canal edged black and hatched on the Plan attached to this Order. This prohibition will apply (1) until planning consent is granted for the installation of *Sharks!* or, if an application is made and refused, an appeal against the refusal is granted in favour of the first defendant or (2) until further order of the court.

3. The First Defendant is required to remove the four model sharks currently located on pontoons in the Regent's Canal within the area edged black and hatched on the Plan attached to this Order.

4. Without prejudice to the prohibition in paragraph 2 of this Order, nothing in this Order shall prevent the Defendants from using the Land for a purpose (1) for which the relevant Defendant has express planning permission, (2) that falls within permitted development rights or (3) that otherwise does not require planning permission.