Neutral Citation Number: [2012] EWCA Civ 12

Case No: C1/2011/1253

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Sir Anthony May PQBD and Sweeney J
CO/6790/2009

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/01/2012

Before:

THE MASTER OF THE ROLLS
LORD JUSTICE HUGHES
and
LORD JUSTICE SULLIVAN

- -

Between:

The Queen (on the application of Hannah McClure and Joshua Moos)	**Respondent**
- and -	
The Commissioner of Police of the Metropolis	**Appellant**

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- -

Monica Carss-Frisk QC and **David Pievsky** (instructed by **the Metropolitan Police)** for **the Appellant**
Michael Fordham QC and **Iain Steele** (instructed by **Bindmans**) for **the Respondent**

Hearing dates: 13 and 14 December 2011

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Judgment

The Master of the Rolls:

Introductory

1. This is the judgment of the court (to which all members have made substantial contributions) on an appeal brought by the Commissioner of Police of the Metropolis ('the Commissioner') against a decision of the Divisional Court (Sir Anthony May PQBD and Sweeney J). By that decision, the Divisional Court decided that, in certain respects, the crowd control carried out by the Metropolitan Police in connection with two demonstrations (known, at least in these proceedings, as the Royal Exchange demonstration and the Climate Camp), which took place in the City of London on Wednesday, 1 April 2009, did not constitute 'lawful police operations' – [2011] EWHC 957 (Admin), [2011] HRLR 24, para 64.

2. The decision was made in the context of judicial review proceedings brought by the claimants, who were both involved in the Climate Camp, to challenge a number of the policing decisions made in connection with the handling of the crowd which attended the two demonstrations. From an early stage it has rightly been accepted that judicial review proceedings in this case are appropriate only to the consideration of the strategic decisions. If there are allegations of excessive force or other tortious behaviour against individual, or groups of, police officers, in the course of the operations consequent on those decisions, those allegations must be made in ordinary Queen's Bench Division actions and their rights or wrongs are not the concern of this case.

3. The Divisional Court, which heard the evidence of Chief Superintendent Johnson, the officer in overall charge of the policing operation, rejected a number of complaints about his strategic decisions but, as mentioned, it upheld two. The Commissioner appeals in respect of the two complaints which were upheld. The claimants do not pursue those which were rejected. In the result, the principal outstanding issue has been whether, on the facts of this case, a decision to deploy the tactic of containment (or 'kettling' as it is sometimes, somewhat derogatorily known) was or was not lawful when applied to one part of the day's demonstrations.

4. Like several other protests which took place on 1 or 2 April 2009, the two demonstrations were held against the background of a G20 summit held in London on 2 April. There was a degree of co-ordination between some of those who were involved with those demonstrations and protests, via websites and no doubt in other ways. The Royal Exchange demonstration was targeted on an area outside the Royal Exchange and the Bank of England, and had been styled the 'Financial Fools' protest. The Climate Camp was established outside the Climate Exchange Building in Bishopsgate, about a quarter of a mile away, and had been styled the 'Fossil Fools' protest.

5. The 'Fossil Fools' protest had its origins in earlier environmental protest camps under the same title; police intelligence suggested that those had involved small numbers and had not become violent. The two demonstrations had each been advertised in various places including a website styled 'G20 Meltdown'. Neither demonstration had any identifiable leader with whom the police could have had discussions. The police

had asked in advance where in Bishopsgate the Climate Camp would be set up but had been given no answer.

6. By the afternoon of 1 April, Mr Johnson estimated that there were between 4000 and 5000 people attending each of the two demonstrations. Those numbers were significantly higher than police intelligence had anticipated, and reserves had to be called up. It was an ordinary working day for those employed in London or visiting on business; there were also tourists to consider.

7. The Royal Exchange demonstration was disorderly to the point of serious violence. The Climate Camp was markedly less disorderly; violence was only intermittent and significantly less serious than at the Royal Exchange. Some of those who took part in the Climate Camp brought tents and cooking equipment and were intent on staying the night. The Camp completely blocked Bishopsgate, a four lane highway running roughly north-south and constituting a major thoroughfare into and out of the City. The Camp's southern edge was a barricade erected by the protesters and formed of bicycles and other metallic objects.

8. Shortly after midday, Mr Johnson decided that it had become necessary for the crowd at the Royal Exchange to be managed by containing it – i.e. by stationing a police cordon at each of the several possible points of egress. There has never been any suggestion in these proceedings that this decision was unlawful; there is no challenge to the police's perception that it was necessary and proportionate in order to prevent the spread of breaches of the peace. The containment was followed in the evening by a progressive dispersal of the Royal Exchange demonstration, which was accomplished whilst public transport was still running. That again is not alleged in these proceedings to have been an unlawful or improper procedure.

9. Mr Johnson believed that the dispersal would give rise to the real likelihood of an imminent breach of the peace if, as he judged likely, the two crowds then mingled, particularly if some of the violent elements from the Royal Exchange demonstration made their way to the Climate Camp or were joined by people from it. Accordingly, he decided that the crowd at the Climate Camp should be contained at the time of the dispersal of the Royal Exchange demonstration. As part of the execution of the Climate Camp containment, the local sub-commander deployed a line of policemen physically to move the crowd's southern edge and barricade some 25 metres up Bishopsgate so as to remove the possibility of ingress to or egress from the Climate Camp via two alleyways, one on either side of Bishopsgate and running east and west from it; this has been labelled 'the push north'.

10. It is these two linked actions, the Climate Camp containment and the push north, which the Divisional Court held were unlawful, and which are now the subject of this appeal. It is appropriate to describe the evidence relating to the decision to contain the Climate Camp and the decision to push north in more detail, as it is crucial to the outcome of this appeal.

The relevant facts in more detail

11. We gratefully take the detailed relevant history from the full and careful judgment of the Divisional Court.

12. Mr Johnson, who was, as mentioned, responsible for the policing of the two demonstrations, travelled between them, and also to and from a command headquarters. Just after midday, he decided to contain the Royal Exchange demonstration, which had, according to his contemporaneous log, become 'highly excitable' and threatened to cause 'serious injury', and appeared to be likely to result in 'groups running amok in the City of London, damage to property + people attacked'. Containment did, to a substantial extent, if not completely, achieve its end in the sense of containing the crowd, but it did not prevent further violence from the Royal Exchange demonstration during the course of the day. That violence included an attack on a branch of the Royal Bank of Scotland in Threadneedle Street (which was looted and set on fire), setting off of smoke bombs, throwing of missiles, and the occupation and damaging of an unoccupied building.

13. As at 12.35, around the time it became necessary to contain the Royal Exchange crowd, the Climate Camp was reported to Mr Johnson as constituting a large, but not hostile, crowd blocking Bishopsgate. In contradistinction to the position outside the Royal Exchange, he decided not to contain the Climate Camp at that stage, but rather to put in place loose 'filter cordons' at either end of the crowd, to prevent it from spreading further. Such filter cordons allowed people to pass through in small numbers. Later in the day one officer, apparently at the centre of the crowd, noted that there was a 'party atmosphere' at the Climate Camp, although that was not reported to Mr Johnson. The Climate Camp was not, however, entirely free from violence. At 13.30 it was reported that the crowd had greatly increased in size, that bottles and coins were thrown at the police officers, and that three police carrier vehicles had been damaged ('wrecked' was the description subsequently used by Mr Johnson in his evidence). Some eighteen minutes later, it was reported that sections of the crowd were putting on masks, a sign that disorder was possibly being contemplated. Mr Johnson had relayed to him the opinion of his local sub-commander, Chief Inspector Dale, that the loose cordons would not be likely to maintain complete control, at least if the situation were to worsen.

14. Mr Johnson decided, however, that containment ought not, at that stage, to be ordered, on the basis that that decision would be reconsidered if necessary. His contemporaneous log recorded: 'Decided no at this time – no real disorder'. In his oral evidence Mr Johnson explained that by this he meant that, in contrast with what was happening at the Royal Exchange, there was no concerted attack on the police and the crowd was not breaking into buildings, smashing windows, or behaving in equivalent fashion.

15. There had by then been a serious breakout from the contained Royal Exchange demonstration. A large group of the crowd had charged through the cordon at around 13.00, and had thrown missiles and smoke bombs. A similar breakout occurred at about 14.50, when extra police units had to be rushed to the scene to prevent the crowd attacking the nearby Stock Exchange. That attack was forestalled, but some violent sections of the Royal Exchange crowd remained outside the cordon. Some of them got into a disused building and threw missiles from the roof. At about 16.30, around 1,000 people, many of whom appeared to have been part of the break-out groups, were running along Cannon Street breaking windows. At 16.40 a group of some 200, described as 'hardcore' protesters, reached the Climate Camp and joined it. Subsequently, it was reported to Mr Johnson from the Climate Camp that missiles had

been thrown at police officers, that there had been an attack on a police van, that the crowd was 'volatile', and that the tyres of police vehicles had been slashed. Mr Johnson referred to the police trying to make arrests for disorder, criminal damage and assault, but that was not specifically at the Climate Camp.

16. It was at around this time that Mr Johnson made the decision, which is not challenged as having been unlawful, to disperse the still-contained Royal Exchange crowd after the rush hour, but whilst public transport was running and before night fell. He reached that decision at about 16.50, with a view to beginning the dispersal process at about 19.00. In the event, it started half an hour later. The dispersal was effected by allowing groups to leave by exits to the west of the Royal Exchange crowd (i.e. furthest from Bishopsgate), via two streets running away from Bank underground station (to the immediate west of the Royal Exchange), namely Princes Street (north-west) and Queen Victoria Street (south-west). The eastern end of the Royal Exchange crowd remained sealed, in particular by a cordon across Threadneedle Street. The plan was to try to release the crowd in pockets of between ten and twenty at a time, dependent on the mood and hostility of those involved, as well as on the police manpower available. There was estimated to be between 4,000 and 5,000 people to disperse, and the dispersal was complete by about 20.30. So the outflow must have been considerable.

17. At 18.17, in anticipation of this dispersal operation, Mr Johnson decided that it would be necessary to contain the Climate Camp crowd, and that this should be done at 19.00, to coincide with the projected start of Royal Exchange crowd dispersal. As already mentioned, his sub-commander, Mr Dale, directed the push north at around that time, in aid of the containment of the crowd.

18. Mr Johnson's reasons for the decision to contain the Climate Camp were logged in brief at the time, and were given in a little more detail in his evidence to the court. The Divisional Court expressly found that his decisions were taken in good faith, and it accepted his factual evidence (although, as explained below, it did not fully accept, or at least questioned, his assessment of the level of violence in the Climate Camp). The summary logged at the time read:

> 'Decision to put in containment of Carbon Exchange [i.e. Climate Camp] when the dispersal of Royal Exchange begins. Rationale: there are 4-5000 at Royal Exchange. There are 4-5000 at Carbon Exchange. Although Carbon Exchange relatively peaceful, the groups at [Royal Exchange] are not. I do not want them hi-jacking the Carbon Exchange or those groups outside the Carbon Exchange who are intent on disorder doing so. I will endeavour to clear Royal Exchange and then clear Carbon Exchange. If groups are allowed to mix, real danger of B[reach] of P[eace].'

19. In his witness statement Mr Johnson expanded on, but did not alter, this basis for his decision. In particular, he explained the third sentence of this entry in his log. As it records, he had two concerns. The first was that the violent elements of the Royal Exchange crowd, when dispersed, might join (and 'hi-jack') the Climate Camp. The second was that there had been disorder, albeit of a lesser degree, within the Climate

Camp already. The two demonstrations were not wholly separate, but had been advertised together.

20. Mr Johnson considered, as the transcript of the Divisional Court hearing reveals, that:

> 'there was a real danger of a breach of the peace if the groups were allowed to mix, and I believed that this would happen imminently, (i.e. within a few minutes, allowing for the short distance between the two locations) in the absence of containment.'

He added that it was not possible to identify, still less to isolate, those in the Climate Camp crowd who were violent or disorderly. Accordingly, he said:

> 'I therefore had to use a tactic that would prevent those groups from getting out and mixing with the disorderly and violent elements from the Royal Exchange. Similarly, it would not have been possible or practical to try and target only troublemakers from the Royal Exchange and prevent them from entering the Climate Camp. That would not have dealt with the problem I was facing, which was the need to keep the two volatile groups separate.'

21. Mr Johnson also explained in his statement that the dispersal at the Royal Exchange required extra deployment of police officers there, which limited those available to be at or near the Climate Camp. In his oral evidence, he said that the bulk of his resources were tied up in the dispersal operation at the Royal Exchange. He also explained that only some of his officers were 'protected', that is to say equipped with riot kit and protective clothing, and that it was not practicable to deploy unprotected officers in confrontation with a violent crowd. He exhibited a spreadsheet showing the numbers of officers available to him overall that day, including those borrowed from the City of London and Sussex forces, together with their operational units. It demonstrated that sizeable numbers were on duty for between 11 and 16 hours that day, and that many were also required for the expected demonstrations on the following day, when the G20 summit began.

22. The careful cross examination of Mr Johnson by Mr Fordham QC (who appeared for the Claimants with Mr Steele, as he does in this court) was directed, *inter alia*, to two issues concerned with the decision to contain the Climate Camp crowd. The first was what, if any, risk of disorder there was from within the Climate Camp crowd; the second issue was the time-scale within which any of the dispersed Royal Exchange protesters might arrive at the Climate Camp.

23. As to the first proposition, Mr Johnson made it clear that he had been anxious not to order containment at the Climate Camp unless it was 'absolutely necessary'. He had not done so even when the group of 200 'hardcore' protesters from the Royal Exchange had got into the Climate Camp at or about 16.40. It was the prospect of the dispersal at the Royal Exchange which was the tipping point in deciding to contain the Climate Camp. He agreed that he would not have ordered such containment if the crowd on Bishopsgate had been wholly peaceful and was never going to engage in

violence. If that had been his assessment, he would not have ordered containment even with the risk of contamination by Royal Exchange demonstrators.

24. However, Mr Johnson did not agree that there was no danger of violence from the Climate Camp. The crowd there was not by any means all disorderly, but his evidence was there were elements in it which were, and the reports which he received suggested to him, he said, that its volatility was escalating during the afternoon. He reiterated that it was the risk of mixing of the two crowds, and especially of the disorderly elements in each, which presented the risk of such a breach of the peace as to require, in his view, containment of the Climate Camp. Previous experience of dispersals had suggested, he said, that disorder often attended them, as it in fact did on this occasion. He also explained that his concern was not limited to the risk of people from the Royal Exchange going to Bishopsgate: he was also worried that violent or disorderly elements from the Climate Camp would get out and join the dispersing violent crowd from the Royal Exchange and that he would be left with a large crowd which he could not control 'running amok' in the City.

25. As to the second proposition, Mr Johnson accepted that there were police cordons to the east of the Royal Exchange crowd, and across Bishopsgate at or near its junction with Threadneedle Street. Those prevented dispersed protesters from going to the Climate Camp by the most direct routes, easterly along Threadneedle Street or Cornhill and turning north into Bishopsgate. The Royal Exchange dispersal was being conducted to the west, furthest from the direct route towards Bishopsgate. However, he explained that the City is full of alleyways, mews and side streets, and there appeared to be many routes by which people from the Royal Exchange could reach Bishopsgate, even though they were initially dispersed westwards. He said that, with the resources available, he could not work out a strategy for preventing the two crowds from joining up, and that he believed that the two crowds had ample means of communication between them.

26. Both parties relied to some extent on events which occurred after the decision to contain the Climate Camp had been made. At about 20.00, that is to say within half an hour of the dispersal at the Royal Exchange beginning and half an hour before it was completed, a crowd of between 200 and 300 from there arrived behind the police on Bishopsgate, south of those who were policing the Climate Camp. This group threw missiles at the police, lit fires and damaged property. It had clearly looped south and east after dispersal. A unit of police officers was despatched to try to deal with it. Its members were induced to run away to the south, over Southwark Bridge.

27. At about 21.35 a further group of between 200 and 300 people appeared at the northern end of the Climate Camp, at the junction of Bishopsgate with Wormwood Street. Its members threw bottles, coins and other articles at the police and caused a significant amount of trouble. Four or five units of police officers (about 110 men) had to be deployed to deal with it. This group was, similarly, behind the lines of the police officers containing the Climate Camp crowd. The dispersal of the Climate Camp had to be delayed until this group could be removed. It refused to move for about an hour, despite the invocation of section 14 of the Public Order Act 1986 to impose conditions on the assembly, but eventually, at 22.30 when the decision was made to begin to arrest its members, it melted away. Neither group was thus able to join up with the Climate Camp, nor was any part of the Climate Camp able to leave to join up with either group.

28. The evidence relating to the push north came not from Mr Johnson but from his sub-commander, Mr Dale, who was not required by the claimants to be cross-examined. According to Mr Dale's witness statement, it was his decision to move the barrier which had been put up across Bishopsgate and to push the crowd north of the junctions with the two alleyways. This was to prevent frustration of Mr Johnson's order to contain the Climate Camp. The push north was attended by active resistance on the part of the crowd, including the throwing of missiles from a gantry, and by the use of some force by the police who were in protective kit with riot shields. There are arguments as to the manner in which this operation was conducted by the officers involved in it, but, as already explained, we are here concerned only with the decision to undertake it. Mr Johnson was asked some questions about the push north but apart from observing that it was a sensible part of a containment operation to stop up exits or entrances he said only that he would not second-guess the decision of the officer on the spot. He was also cross-examined about the state of instructions for the execution of such a manoeuvre, but that forms no part of the appeal before us.

29. In the course of its judgment the Divisional Court suggested that Mr Johnson had been cross-examined as to why the push north had been necessary at all and why it had not been possible to station lines of officers across the mouths of each of the alleyways. The court recollected that Mr Johnson had indicated that resources were insufficient – [2011] HRLR 24, para 34; however, now that a complete transcript is available, it is apparent that the suggestion of blocking the alleyways was not made to Mr Johnson. His answers about resources were directed to more general questions as to whether he could prevent all means of access from Royal Exchange to Bishopsgate, and questions about resources at the Climate Camp.

30. Lastly, Mr Johnson was cross-examined on the suggestion that the push north had been unnecessarily provocative because it had moved the crowd 30 metres beyond the alleyway junctions. The factual basis for that assertion seems at best uncertain. Mr Dale's statement referred only to moving the crowd to a point north of the alleyways. The suggestion made in cross examination was not adopted by the judgment. It seems that the move was between 20 and 30 metres to a point north of the alleyways.

The applicable law

31. In *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2006] UKHL 55, [2007] 2 AC 105, the police intercepted the claimants who were on their way to a protest, and escorted them whence they came, because it was believed that some of them were intent on causing a breach of the peace. This action would clearly have been an infringement of the claimants' rights unless it could be justified by the concern of the police about a breach of the peace. The House of Lords held that the common law entitled, indeed bound, police officers and citizens alike to seek to prevent, by arrest or action short of arrest, any breach of the peace occurring in their presence or which they reasonably believed was about to occur. If no breach of the peace had actually occurred, a reasonable apprehension of an imminent breach of the peace was required before any form of preventive action was permissible.

32. On the facts of *Laporte* [2007] 2 AC 105, the House of Lords held that not only had there been no indication of any imminent breach of the peace when the coaches were intercepted, but the police did not consider that a breach of the peace was imminent.

Accordingly, the police action was held to have constituted an unlawful interference with the claimants' right to demonstrate at a lawful assembly.

33. If police action is to be justified where no actual breach of the peace has occurred, it is therefore essential that the police reasonably apprehend an imminent breach of the peace. Imminence was described at [2007] 2 AC 105, para 141, by Lord Mance in these terms:

> 'The requirement of imminence is relatively clear-cut and appropriately identifies the common law power (or duty) of any citizen including the police to take preventive action as a power of last resort catering for situations about to descend into violence. That is not to suggest that imminence falls to be judged in absolute and purely temporal terms, according to some measure of minutes. What is imminent has to be judged in the context under consideration, and the absence of any further opportunity to take preventive action may thus have relevance.'

34. Lord Rodger of Earlsferry said at [2007] 2 AC 105, para 69, that there was no need for the police officer 'to wait until an opposing group hoves into sight before taking action', as that would 'turn every intervention into an exercise of crisis management'. Lord Carswell said this about imminence at [2007] 2 AC 105, para 102:

> '[I]t can properly be applied with a degree of flexibility which recognises the relevance of the circumstances of the case. In particular it seems to me rational and principled to accept that where events are building up inexorably to a breach of the peace it may be possible to regard it as imminent at an earlier stage temporarily than in the case of other more spontaneous breaches.'

35. Three other observations in that case are worth noting in the present context. First, at [2007] 2 AC 105, para 29, Lord Bingham of Cornhill made the point that a constable has a 'duty' as well as a 'power' to 'seek to prevent … any breach of the peace occurring in his presence …, or any breach of the peace which is about to occur.' Secondly, Lord Rodger said at [2007] 2 AC 105, para 84, that a police officer could stop potential protesters from proceeding further, 'even if they were entirely peaceful', provided 'there was no other way of preventing an imminent breach of the peace'. Thirdly, Lord Brown of Eaton-under-Heywood said at [2007] 2 AC 105, para 114, that, even when a breach of the peace is reasonably judged imminent, the police must still take no more intrusive action than appears necessary to prevent it.

36. The Divisional Court in this case said at [2011] HRLR 24, para 12, that it derived the following propositions from *Laporte* [2007] 2 AC 105, which we consider to be an accurate summary of the law, which was not challenged on this appeal:

> (1) For a police officer to take steps lawful at common law to prevent an apprehended breach of the peace, the apprehended breach must be imminent;
>
> (2) Imminence is not an inflexible concept but depends on the circumstances;

> (3) If steps are to be justified, they must be necessary, reasonable and proportionate;
>
> (4) Depending on the circumstances, steps which include keeping two or more different groups apart may be necessary, reasonable and proportionate, if a combination of groups is reasonably apprehended to be likely to lead to an imminent breach of the peace; and
>
> (5) Again depending on the circumstances, where it is necessary in order to prevent an imminent breach of the peace, action may lawfully be taken which affects people who are not themselves going to be actively involved in the breach.

37. Containment was specifically considered in a subsequent decision of the House of Lords, *Austin v Commissioner of Police of the Metropolis* [2009] UKHL 5, [2009] 1 AC 564, where the claimant, together with thousands of other demonstrators, had been required to remain inside a cordon for seven hours. The claimant, who had not been violent in any way, claimed damages for false imprisonment and breach of her right to liberty under Article 5 of the European Convention on Human Rights.

38. The claim failed. As the Divisional Court put it in this case at [2011] HRLR 24, para 13, the House of Lords in *Austin* [2009] 1 AC 564 concluded that:

> 'The police had been engaged in an unusually difficult exercise of crowd control which had as its aim the avoidance of personal injuries and damage to property and the dispersal as quickly as possible of a crowd bent on violence and impeding the police. The police had acted reasonably and properly to prevent serious disorder and violence. The restriction of the claimants' liberty had not been an arbitrary deprivation of liberty and Article 5 was not applicable.'

And, as the Divisional Court went on to say four paragraphs later, it is common ground 'that the circumstances in which police containment action would be lawful at common law are for practical purposes the same as the circumstances in which there would be no violation of Article 5'.

39. Consistent with the approach of Lord Rodger in *Laporte* [2007] 2 AC 105, para 84, the Court of Appeal (whose decision was affirmed by the House of Lords) had held in *Austin* [2007] EWCA Civ 989, [2008] QB 660, paras 68 and 119, that, where a breach of the peace was taking place or reasonably thought to be imminent, the police could interfere with or curtail the lawful exercise of rights of innocent third parties, but only if they had taken all other possible steps to prevent the breach or imminent breach of the peace and to protect the rights of third parties, and only where they reasonably believed that there was no other means to prevent a breach or imminent breach of the peace.

40. From this, it follows that the containment of the Climate Camp and the push north could only have been justified if each action was reasonably believed by the police to have been the only way of preventing an imminent breach of the peace. When considering reasonableness in this context, both sides were, correctly in our view,

happy to adopt the approach of Sedley LJ in *Redmond-Bate v Director of Public Prosecutions* (1999) 163 JP 789, 791, where he said:

> '[T]he test of the reasonableness of the constable's actions is objective in the sense that it is for the court to decide not whether the view taken by the constable fell within the broad band of rational decisions but whether in the light of what he knew and perceived at the time the court is satisfied that it was reasonable to fear an imminent breach of the peace. Thus, although reasonableness of belief, as elsewhere in the law of arrest, is a question for the court, it is to be evaluated without the qualifications of hindsight.'

The Divisional Court's reasoning

41. After an introductory section, the Divisional Court set out the law and the facts at [2011] HRLR 24, paras 7-17 and 18-29 respectively. We have already set out the relevant primary facts and the law, so there is no need to discuss the contents of these two sections of the judgment further, with the exception of four passages.

42. First, at [2011] HRLR 24, para 21, the Court recorded that between 13.00 and about 17.30, Mr Johnson was informed as to what was going on in the two crowds. He was told about escalating disorder at the Royal Exchange demonstration (including attacks on, looting in, and setting fires in, the Royal Bank of Scotland in Threadneedle Street, and entry onto, and throwing items from the roof of, an empty building). He was also told about increasing numbers of demonstrators at the Climate Camp, some of whom threw bottles and coins, and some of whom put on masks. He was also told that around 200 of the Royal Exchange demonstrators had joined the Climate Camp, and that a police van at the Climate Camp had been attacked, and that tyres on police vehicles had been slashed.

43. Secondly, at [2011] HRLR 24, para 23, the Court explained Mr Johnson's reasons for deciding at 19.00 to contain the Climate Camp, in these terms:

> 'Mr Johnson considered that, when the Royal Exchange dispersal took place, he did not want the two groups joining up under any circumstance, as he feared widespread violence and breach of the peace. He decided to disperse the Royal Exchange crowd from two exits in Princes Street and Queen Victoria Street, that is those away from Bishopsgate, to try to prevent those leaving from going towards the Climate Camp. At the time, he was told that the crowd at the Climate Camp was volatile and that tyres on police vehicles had been slashed. He had been at the Special Operations Room in Lambeth, but returned to the Climate Camp where, at 6.17pm, he decided to put in a containment there to start when the Royal Exchange dispersal began, i.e. at 7.00pm. His rationale was that there were about 4-5000 demonstrators at each of the demonstrations. The Climate Camp was relatively peaceful, but the Royal Exchange groups were not. There had been some disorder and violence at the Climate Camp and some of the protestors had put on masks. He considered that there was a real danger of a breach of the peace at the Climate Camp if the groups were allowed to mix, and he believed that this would happen imminently, which he explained in his witness statement as within a few minutes allowing for the short distance between the two demonstrations. He said that the major change which caused him to contain

> the Climate Camp was the dispersal of people from the Royal Exchange who had been acting in a disorderly and criminal manner. It was not practical to find out which individuals at the Climate Camp were intent on disorder or criminality. He had however to prevent those groups from getting out and mixing with the disorderly and violent elements from the Royal Exchange. The converse applied to the troublemakers from the Royal Exchange.'

44. Thirdly, at [2011] HRLR 24, para 24, the Court stated that 'Dispersal of the Royal Exchange crowd released some police resources to deploy to the Climate Camp. But as the groups were released from the Royal Exchange, Mr Johnson considered there was an imminent threat of disorder by those released from the Royal Exchange going to the Climate Camp.' Fourthly, at [2011] HRLR 24, para 27, the Court stated that

> 'Mr Johnson's fear that dispersed Royal Exchange protestors might try to join those at the Climate Camp was justified to the extent that 200-300 people from the Royal Exchange found their way into Gracechurch Street to the south of Bishopsgate, where they were throwing missiles at the police, lighting fires and damaging property. Somewhat later, at about 9.35pm, other Royal Exchange protestors found their way to Wormwood Street and tried to approach the Climate Camp from the north.'

The Court then discussed the dispersal of the crowd at the Royal Exchange a little further.

45. At [2011] HRLR 24, paras 30-37, the Divisional Court discussed the evidence given by Mr Johnson in relation to the various claims made by the claimants. In relation to the Climate Camp containment, the Divisional Court said at [2011] HRLR 24, para 31, that its justification:

> 'has to depend on the proposition that dispersal of violent protestors from the western end of the Royal Exchange demonstration created a reasonable apprehension of an imminent breach of the peace at the Climate Camp, or possibly elsewhere but including those at the Climate Camp. There were in reality two possibilities – one that dispersed Royal Exchange protestors would join the Climate Camp; the other that Climate Camp protestors would break out to join dispersed Royal Exchange protestors on the streets of the City. The first of these was perhaps more likely than the second, and it was to this which Mr Johnson's evidence was mainly directed.'

46. The Court then explained that there were certain roads which could have been taken to get from the Royal Exchange to the Climate Camp, and said that 'Mr Johnson's evidence was that he did not have the resources to seal off all roads and that this would have been physically impossible'. While accepting that evidence, the Court 'was not convinced that it would have been impossible to seal off Great St Helens Street and the unnamed alley way opposite' as 'the two side streets were not within the area occupied by the Climate Camp' – [2011] HRLR 24, para 34. In the same paragraph, the Divisional Court described the decision to push north as 'broadly sensible'. The Court went on to record that, on the grounds of 'police resources', Mr Johnson had, in his evidence, rejected the suggestion that, rather than containing the Climate Camp, he could have blocked the two side streets and provided 'loose cordons at the possible exits from the Climate Camp'.

47. At [2011] HRLR 24, para 36, the Court recorded Mr Johnson's evidence that his 'decision to contain predicates the possibility of force or violence, either by the police or by protestors reacting to the containment ... [and] that he would not have used force against a peaceful crowd. His officers must be aware that some in the crowd would be violent towards the police'. The Court then referred to the criticism by the House of Commons Home Affairs Select Committee of 'the use of shield strikes and in particular of lack of communication and training and the placing of untrained officers in the front line of public protests' (which are not matters for consideration in these proceedings as explained in para 2 above).

48. The Court at [2011] HRLR 24, paras 38-47 and paras 48-55 then summarised the claimants' and the Commissioner's respective cases. At [2011] HRLR 24, paras 40 and 41, the Court said this when setting out the claimants' case on the decision to contain the Climate Camp (which we quote fairly fully as it includes part of the reasoning of the court on this issue):

> '40. Mr Fordham submits that at 6.17pm, when the decision to contain the Climate Camp was taken, there was no sufficient apprehended imminent breach of the peace by any of those participating in the Climate Camp demonstration to justify containment. That in our judgment is correct. The Climate Camp was largely not hostile and such violence or disorder as there had been there during the afternoon was sporadic. … When [containment] was put in place, it was at most precautionary. Mr Fordham is also, we think, correct to submit that, apart from the possibility of dispersing Royal Exchange protestors mixing with those at the Climate Camp, there never was a reasonable apprehension of imminent breaches of the peace at the Climate Camp. Mr Fordham submits that the defendants' contention that there were groups within the Climate Camp who were intent on disorder or criminal damage is largely unsupported by the evidence. We think this is correct, although Mr Johnson did say as much in general terms. This was one part of Mr Johnson's otherwise truthful and straightforward evidence which we did not find convincing. Apart from the reported arrival of 200-300 hardcore protestors at around 4.40pm, the specific incidents of disorder relied on had occurred earlier in the afternoon. The real justification relied on for the Climate Camp containment was the dispersal of the Royal Exchange demonstration and the perceived need to prevent some of those dispersed from hijacking the relatively peaceful Climate Camp.
>
> 41. Mr Fordham submits that at 7.07pm and thereafter there was no sufficient apprehension of any breach of the peace at the Climate Camp to justify containment. Even if dispersed Royal Exchange protestors were intent on joining the Climate Camp and intent on violence there, there was no reasonable apprehension by those putting the containment in place that it was likely to occur. The two obvious routes to Bishopsgate were quite a distance on foot from the western end of the Royal Exchange demonstration at Bank where the dispersals were occurring. If Royal Exchange protestors did approach the Climate Camp, an appropriate cordon could be formed at short notice. In the event, it was not until around 9.30pm that some Royal Exchange protestors reached the northern end of the Bishopsgate demonstration via Wormwood Street. This is, of course, hindsight but the

> journey required made delay quite likely. … Mr Fordham submits that there was no reasonable apprehension of an imminent breach of the peace. No breach of the peace was about to be committed nor on the point of happening in the near future. This was not a case where there was no need to wait until an opposing group hove into sight, since there was no opposing group and no groups on the point of converging. It would not be crisis management to wait to see how things developed. ...'

49. The Court's description of the claimants' case on the push north is at [2011] HRLR 24, paras 46-47, and it is unnecessary to quote it in this judgment, as it does not contain any relevant expressions of opinion. Nor, for the same reason, is it necessary to quote any part of the judgment directed to the summary of the Commissioner's case.

50. At [2011] HRLR 24, paras 56-64, the Divisional Court expressed their conclusions. They began at [2011] HRLR 24, para 56, by identifying the 'principal issue' as being 'whether the containment at the Climate Camp between 7.07pm … and 11.15pm or so was necessary, proportionate and justified in law'. The Court then explained that:

> 'To be justified in law as being the lawful exercise of the common law power to take reasonable steps to prevent a breach of the peace …, the police had reasonably to apprehend an imminent breach of the peace at the Climate Camp or, if not at the Climate Camp, so associated with the Climate Camp that containing the Climate Camp itself was reasonably necessary.'

The Court then stated that a breach of the peace 'is imminent if it is likely to happen' and that the 'test of necessity is met only in extreme and exceptional circumstances'.

51. At [2011] HRLR 24, para 57, the Court stated that it 'accept[ed] the truthfulness of [Mr Johnson's] factual evidence' save to the extent that it 'question[ed] whether he did not overstate the extent to which there had been elements of disorder at the Climate Camp during the day and any basis for supposing that violence might break out as the evening approached'. They then went on to express 'considerable sympathy for Mr Johnson and his officers', who had 'over a long and gruelling day, to deal as best they might with two large and often disorderly demonstrations'.

52. At [2011] HRLR 24, para 58, the Court then said that, while they accepted that 'there had been serious and sustained violence at the Royal Exchange demonstration sufficient to justify its containment throughout the period it was in place', 'there had been no equivalent disorder or violence at the Climate Camp during the afternoon, not even when 200-300 so called hardcore protestors had joined the Climate Camp at around 4.40pm'. Paragraph 58 of the judgment then continued:

> 'Containment of the Climate Camp was not justified by the behaviour and conduct of those at the Climate Camp alone. When the Royal Exchange protestors were dispersing from 7.25pm there was clearly a risk that some of them might head for the Climate Camp and the police were right to anticipate the risk and take appropriate steps to deal with it, if it materialised. But it was, we think, no more than a risk, and the distances between Bank and the demonstration in Bishopsgate were significant for people travelling

> on foot and the available routes were circuitous. A Royal Exchange protestor bent on joining the Climate Camp who was reasonably familiar with the geography of the City might at a stretch and in theory reach the Climate Camp in 10 minutes or so, but those who did reach the northern end in fact took up to 2 hours to do so. As we have said, we are not clear on the evidence that those in Gracechurch Street ever really reached the outskirts of the Climate Camp.'

53. The Divisional Court then said this at [2011] HRLR 24, paras 59-60:

> '59. There was at 7.07pm no reasonably apprehended breach of the peace, imminent or otherwise, within the Climate Camp itself sufficient to justify containment. The Commissioner's main case depends entirely on the risk that there would be breaches of the peace at or associated with the Climate Camp resulting from the arrival of protestors from the Royal Exchange. There was such a risk, but it was at that stage only a risk; and it was not, in our judgment, a risk of *imminent* breaches of the peace sufficient to justify full containment at the Climate Camp. Such flexibility as the concept of imminence bears does not extend that far on the facts of this case.
>
> 60. Accepting, as we do, that the police were right to take steps to guard against the risk, we have to consider other possibilities. These, we think, included being prepared to implement some form of absolute cordon or cordons, if that became later necessary to deal with an imminent risk, and, it may be, sealing off some side roads. An absolute cordon at the north of the Climate Camp may well have become necessary and proportionate at or around 9.30pm when some Royal Exchange protestors did eventually arrive there. That may not have justified an absolute cordon at the south, since the need was, not so much to keep the Climate Camp protestors in, as to keep the Royal Exchange protestors out.'

54. The Court then turned to the push north. At [2011] HRLR 24, para 61, they said that 'the police were right to have an eye to infiltration from Great St Helens Street and the street or alleyway opposite', and that 'Mr Johnson had finite and limited resources'. However, they considered that:

> '[T]he officers who did the pushing and some others could have cordoned the relatively narrow side roads as an extension of the filter cordon at the southern end of Bishopsgate. We think that at 7.00pm filter cordons at each of the side roads would have sufficed. We accept that blocking all the more distant means of access to Bishopsgate would not have been feasible. It follows that, in our judgment, the pushing operation from the south was not necessary or proportionate. In the event, those side streets were not used by Royal Exchange protestors in any number to try to reach the Climate Camp.'

55. The only other aspect of the conclusions which should be referred to is in [2011] HRLR 24, para 62, where the Court referred to instances of 'unduly inflexible release' and of 'unnecessary, and, we think, unjustified force in the pushing operation'. They also concluded that there had been 'insufficient' 'training and on the spot instruction'.

The Commissioner's appeal: the issues

56. Having set out the facts and the applicable legal principles, it appears to us that, so far as the issues which are the subject of this appeal are concerned, there were three questions for the Divisional Court, two relating to the containment of the Climate Camp and one relating to the push north:

> (i) (a) Did Mr Johnson reasonably apprehend an imminent breach of the peace at the Climate Camp as at 19.00?
>
> (b) If so, was the decision to contain the Climate Camp a reasonable and proportionate response to that apprehension?
>
> (ii) Was the decision to push north, at the southern end of the Climate Camp, a reasonable and proportionate decision?

57. As explained more fully above, after correctly summarising the applicable law at [2011] HRLR 24, paras 7-17, expressing unexceptionable conclusions (subject to what we say in para 63 below) as to what one might call the objective primary facts at [2011] HRLR 24, paras 18-28, accurately summarising Mr Johnson's evidence (subject to the point made at para 29 above) at [2011] HRLR 24, paras 29-37, and fairly summarising the parties' respective contentions at [2011] HRLR 24, paras 38-55, the Divisional Court reached its conclusions at [2011] HRLR 24, paras 56-64. On this appeal, we must, of course, focus on those conclusions and the reasons given to support them.

58. When considering the Commissioner's appeal, the first step is to identify what those conclusions were. It appears from the above analysis of the judgment that the Court effectively concluded that the Commissioner failed on question (i)(a), on the ground that, although Mr Johnson honestly believed that a breach of the peace was imminent if the Climate Camp was not contained, that belief was not reasonable. The Court made it clear in more than one passage, most clearly at [2011] HRLR 24, para 59, that a breach of the peace was not imminent, but it also made it clear that Mr Johnson was, save perhaps on the point mentioned in the passage quoted at para 48 above, an accurate witness, and that he had made his decisions on 1 April 2009 in good faith - see [2011] HRLR 24, paras 23 and 57.

59. Turning to question (i)(b), there appears to be no finding by the Court that, if, contrary to its conclusion, Mr Johnson's apprehension of an imminent breach of the peace was justifiable, his decision to contain the Climate Camp was unreasonable or disproportionate. However, in his well-presented submissions on behalf of the claimants, Mr Fordham contended that, on Mr Johnson's own evidence, the Commissioner should fail on this question. That was, he said, because Mr Johnson had said in evidence that he would not have ordered containment of the Climate Camp unless there had been actual violence in the Climate Camp itself.

60. As to question (ii), we consider that the Court's conclusion that the push north was unreasonable stands or falls with its conclusion on question (i). If the containment of the Climate Camp was, as the Court concluded, unjustifiable, then, as it also concluded, the push north was similarly unjustifiable. On the other hand, if, contrary to the Court's view, the containment was reasonable, then there is no basis for impeaching the push north. This conclusion rests on a passage in the evidence of Mr Dale and a few findings in the judgment below.

61. Mr Dale, who was not called for cross-examination, said in his witness statement that the push north was 'necessary to prevent frustration of the containment'. The Court concluded that the decision to push north 'so that the two side streets were not within the area occupied by the Climate Camp…. was a broadly sensible decision subject to the details of the pushing operation to which we will come' - [2011] HRLR 24, para 34. Those 'details' were, as Mr Fordham realistically accepted, the instances of unjustified and unnecessary force allegedly used in the operation, referred to at [2011] HRLR 24, para 62, which cannot themselves impinge on the reasonableness or otherwise of the actual decision to push north. A conclusion that, even if containment of the Climate Camp was justified, the decision to push north was not reasonable or proportionate, would therefore have been inconsistent with the Court's conclusion in [2011] HRLR 24, para 34.

62. The Court's conclusion that the pushing operation was not reasonably necessary also appears to be dependent upon its opinion at [2011] HRLR 24, para 60 that 'some form of absolute cordon or cordons' at the southern end of the Climate Camp (i.e. containment) was not necessary, because there was no imminent risk of breaches of the peace (as mentioned in the previous paragraph of the judgment), and that blocking the side streets as an extension of 'filter cordons' at the southern end of Bishopsgate would have sufficed - [2011] HRLR 24, para 61.

63. Furthermore, in the same paragraph of the judgment, the Court accepted that Mr Johnson had finite and limited resources and that the pushing decision was Mr Dale's not his. There was no evidence that the resources available to Mr Johnson were sufficient to extend the filter cordon. Indeed, in his witness statement and in his cross-examination, Mr Johnson said that the manpower needed to ensure an orderly dispersal of the Royal Exchange demonstration further limited the police resources available to be deployed at the Climate Camp. In this connection it is also relevant to note that, at [2011] HRLR 24, para 34, the Court accepted his evidence that he did not have the resources to 'seal off all the roads' and that 'this would have been physically impossible' in any event. It is true that there is an earlier observation in the judgment that '[d]ispersal of the Royal Exchange crowd released some police resources to deploy at the Climate Camp' at [2011] HRLR 24, para 24, but we have some difficulty with that statement, as there was no evidence to support it, and it seems inconsistent with the evidence of Mr Johnson, which the Court accepted.

64. Finally, on question (ii), it appears to us very difficult to see how it could have been fairly open to the Court to conclude that the decision to push north was not a reasonable and proportionate way of implementing a lawful containment decision (as opposed to the proposition that it was not reasonably necessary because containment was not justified). That is because the decision was made by Mr Dale and not by Mr Johnson, and Mr Dale had provided a witness statement explaining his reasons for making the decision, and the claimants had elected not to cross-examine him.

65. Accordingly, in order to determine this appeal, we have to focus on two issues. The first is whether Mr Johnson's genuinely held apprehension that there was a breach of the peace at the Climate Camp imminent was a reasonable view, and the second issue is whether his decision to contain the Climate Camp was unjustifiable on his own evidence.

66. So far as the first of those issues is concerned, there are no fewer than ten different grounds raised in the Commissioner's notice of appeal and written argument prepared on his behalf by Ms Carss-Frisk QC, who appeared in this court with Mr Pievsky, for the Commissioner, as she did below. However, as she realistically accepted in the course of her well-presented oral submissions, she really had two criticisms of the Divisional Court's reasoning as to why the Commissioner had failed to establish that Mr Johnson's apprehension of an imminent breach of the peace was reasonable. The first was that, rather than considering whether Mr Johnson's apprehension was reasonable, the Court formed its own view on the matter. The second criticism was that, in so far as the Court did decide that the apprehension was unreasonable, there was no evidence upon which it could fairly have done so.

67. Accordingly, there are two questions to be considered on the first issue, and one on the second issue. Those questions are (i) whether the Divisional Court adopted the wrong approach to the question whether a breach of the peace was imminent, (ii) whether Mr Johnson's apprehension that there was an imminent breach of the peace was reasonable, and (iii) whether, on Mr Johnson's own evidence, he should not have ordered containment of the Climate Camp. We turn to consider those questions, which overlap to an extent.

The imminence of a breach of the peace: was the Court's approach wrong?

68. The role of the Divisional Court was, as both sides accepted, accurately described by Sedley LJ in *Redmond-Bate* (1999) 163 JP 789, 791, namely 'to decide not whether the view taken by [Mr Johnson] fell within the broad band of rational decisions but whether in the light of what he knew and perceived at the time the court is satisfied that it was reasonable to fear an imminent breach of the peace'. The Court's function was not, therefore, to form its own view as to imminence.

69. It can be said with some force that it would be surprising if the Divisional Court had made the mistake of forming its own view as to the imminence of a breach of the peace at the Climate Camp, rather than assessing the reasonableness of Mr Johnson's apprehension of such imminence. Not only did the Court give a careful and accurate summary of the applicable law at [2011] HRLR 24, paras 7-17, but it also referred to the decision in *Redmond-Bate* (1999) 163 JP 789 at [2011] HRLR 24, para 39. However, those two points are mitigated by the fact that, in its analysis of the law, while concentrating on the need for imminence, the Court did not in terms focus on the nature of its role or the nature of the question it had to answer, and by the fact that the Court referred to *Redmond-Bate* (1999) 163 JP 789 not in that connection, but in context of Mr Fordham's point that 'if the police reasonably apprehended breaches of the peace by dispersing Royal Exchange protestors, the police preventive action should have been directed against them and did not justify containment of the Climate Camp protestors who were in the main peaceful'.

70. Ms Carss-Frisk relies on the way the Court expressed itself in four crucial paragraphs of the judgment, [2011] HRLR 24, paras 58-61. Thus, the Court said (with underlined emphasis supplied):

> a) '58. … [T]he risk that there would be breaches of the peace at the Climate Camp ... was, <u>we think</u> no more than a risk", an observation which was followed by the Court's own assessment of the time it would have taken

for someone at the Royal Exchange demonstration to reach the Climate Camp;

b) '59 … [T]he risk that there would be breaches of the peace … was not, in our judgment, a risk of *imminent* breaches of the peace …';

c) '60 … [O]ther possibilities, we think, included' measures including cordons and blocking off roads, which was followed by the Court's own assessment of what 'may well have become necessary and proportionate at or around 9.30 pm …';

d) '61 … [Dealing with the push north] 'We think that at 7.00 pm filter cordons on each side of the road would have sufficed. … [I]n our judgment, the pushing operation … was not necessary …".

71. Any appellate court should be slow to latch onto what may be no more than linguistic imperfection or infelicity of expression in order to undermine an otherwise impeccable judgment. To borrow an expression of Lord Diplock (in *The Antaios* [1985] AC 191, 203) detailed semantic and syntactical analysis of first instance judgments by appellate courts is generally to be deprecated. However, one cannot simply ignore the way in which a judge expresses himself in a judgment: after all, the purpose of a reasoned judgment is to explain why the judge arrived at his decision. In the end, as with any question involving the interpretation of a document, one has to construe a judgment as a whole, but, at least in the absence of good reason to the contrary in a particular case, one should, in our view, approach any issue with a predisposition in favour of the judge having got the law right rather than wrong.

72. In this case, each of the four paragraphs which encapsulate the Court's reasoning contain at least one sentence suggesting that the Court applied the wrong test, namely proceeding on the basis of its own view of imminence rather that on its assessment of the reasonableness of Mr Johnson's view of imminence. On the other hand, there is not a single sentence in those four paragraphs which expressly indicates that the Court considered the reasonableness of Mr Johnson's apprehension.

73. However, there is one sentence in those four paragraphs which may be said to indicate that the Court adopted the right approach. At the beginning of [2011] HRLR 24, para 59, the Court said that '[t]here was at 7.07pm no reasonably apprehended breach of the peace, imminent or otherwise, within the Climate Camp itself sufficient to justify containment' (emphasis supplied). However, as is clear from the word 'itself' and from what follows in the paragraph, that sentence is not concerned with the source of the breach of the peace which triggered Mr Johnson's apprehension, Royal Exchange demonstrators from outside the Camp joining the Climate Camp. It is also true that, in earlier parts of the judgment the Court had accurately set out its function. Thus, at [2011] HRLR 14, para 31, it said that 'the justification for the Climate Camp containment has to depend on [the creation of] a reasonable apprehension of an imminent breach of the peace at the Climate Camp' (emphasis supplied). Also, when setting out Mr Fordham's submissions, the Court accurately identified the right approach – at [2011] HRLR 24, paras 40-41, the claimants' case is described as being that 'there never was a reasonable apprehension of breaches of the peace at the

Climate Camp' and that 'there was no reasonable apprehension by those putting the containment in place that [a breach of the peace] was likely to occur' (emphasis supplied).

74. We accept that it can be said that these passages at the beginning of [2011] HRLR 24, para 59 and in the course of [2011] HRLR 24, paras 31 and 40-41 show that the Court had the correct approach well in mind. However, it can equally be said that the contrast in language between those earlier paragraphs and what was said by the Court in the passages cited in para 70 above, when explaining its conclusions on the very issue on which it was being called on to decide, supports the Commissioner's case, as it shows that the Court can state the precisely correct approach when it wishes to do so.

75. The notion that the Divisional Court wrongly formed its own assessment, rather than considering the reasonableness of Mr Johnson's assessment, of imminence is supported by another feature of the judgment below. That feature is that the Court did not examine Mr Johnson's own reasons, as contained in his log, his witness statement and his cross-examination, for concluding that the acknowledged risk, which he rightly anticipated and took appropriate steps to deal with, was not merely a risk of a breach of the peace, but a risk of an imminent breach of the peace. If the Court was fairly to find that Mr Johnson's assessment at 19.00 that a breach of the peace was imminent was not reasonable, one would expected it to have given an explanation as to why this was so, in the light of what Mr Johnson knew and honestly perceived at the time, and his rationale as to imminence, which was accurately summarised at [2011] HRLR 24, para 23 (and set out at para 43 above). When giving their reasons for allowing the claimants' case at [2011] HRLR 24, paras 57-61, the Court expressed its view, as highlighted in the passages cited in para 70 above. But nowhere did it expressly address Mr Johnson's reasons for reaching a different view (other than dealing somewhat delphically, at [2011] HRLR 24, para 58, with his view that it would have been easy for Royal Exchange demonstrators to get access to the Climate Camp, and accepting his statement that he had limited resources at [2011] HRLR 24, para 61).

76. In all these circumstances, we have reached the conclusion that the Commissioner has made out his case that the Divisional Court applied the wrong test when assessing whether there was an imminent risk of breach of the peace in the Climate Camp.

The imminence of a breach of the peace: was Mr Johnson's view reasonable?

77. If we are wrong in that conclusion, it would be necessary to consider the question whether the Divisional Court was entitled to conclude that Mr Johnson's apprehension that there was an imminent breach of the peace in the climate Camp was a reasonable one. If we are right in that conclusion, it may well still be necessary to consider that question, because, otherwise, it may be necessary to order a retrial. Accordingly, we turn to consider the second point made by Ms Carss-Frisk.

78. It appears to us difficult to contend that Mr Johnson's apprehension that there was an imminent breach of the peace in the Climate Camp as at 19.00 was unreasonable, in the light of the fact that the Divisional Court accepted that his apprehension was honest, and that the evidence he gave was accurate (save to the limited extent of 'question[ing]' his assessment of the extent of the violence within the Climate Camp).

Further, as we have just mentioned, the Court does not appear to have analysed his evidence with a view to explaining why his apprehension was unreasonable: indeed, it does not appear to have rejected that evidence, at any rate expressly.

79. Mr Fordham, however, submitted that the Court had in fact rejected Mr Johnson's reasons for apprehending that there was an imminent breach of the peace in the Climate Camp, and had done so on two grounds. Those grounds were that the Court held to have been wrong or unreasonable, (i) Mr Johnson's assessment of the extent of disorder in the Climate Camp as at 19.00, and (ii) his assessment as to the time that it would take for the dispersed Royal Exchange demonstrators to reach the Climate Camp.

80. As to the first ground, it seems to us that the Court did not conclude that the Climate Camp had been entirely peaceful: they merely 'question[ed]', at [2011] HRLR 24, para 57, whether Mr Johnson had not overstated the extent to which there had been disorder at the Climate Camp during the day, and his basis for supposing that violence might break out as the evening approached – see also at [2011] HRLR 24, para 40. That is very different from rejecting his evidence that the Climate Camp was not entirely peaceful. Indeed, it is hard to see how that evidence could have been rejected. As the Court noted at [2011] HRLR 24, paras 21 and 23 (and repeated at para 30 when discussing his cross-examination), Mr Johnson had been told during the afternoon that the crowd at the Climate Camp was volatile, that there had been throwing of coins and bottles, that some demonstrators were putting on masks, that tyres on police vehicles had been slashed, that there had been an attack on a police van, and that 200 hardcore protesters had already joined the Camp.

81. This level of disorder at the Climate Camp may well have been 'more of the same', as Mr Fordham put it, but that is no basis for a conclusion that Mr Johnson's perception of either the extent of the disorder at the Climate Camp, or the potential for violence to break out if the crowds at the Royal Exchange demonstration and at the Climate Camp were allowed to mix, was unreasonable.

82. It is also true that the Court, at [2011] HRLR 24, para 41, thought that what it described Mr Johnson as 'sa[ying] in general terms' in his evidence, namely that 'there were groups within the Climate Camp who were intent on disorder or criminal damage' was 'largely unsupported by the evidence' and was 'unconvincing'. However, that merely serves to underline the fact that the Court accepted that there was a degree of disorder and violence in the Climate Camp: the only question is how much. That might be important if Mr Johnson's primary reason for containing the Camp had been the level of violence and disorder threatened within the Camp shorn of any incursion. However, as the Court accepted and emphasised more than once, the factor which precipitated Mr Johnson's apprehension of imminent breaches of the peace in the Camp was a result of combination of the two groups, either by incursion into the Climate Camp by some of the Royal Exchange demonstrators or by mixing of violent elements from the Climate Camp with those demonstrators.

83. Indeed, it seems to us that this ground, and indeed, much of the basis of Mr Fordham's cross-examination of Mr Johnson in the Divisional Court, proceeded on the false basis that containment of the Climate Camp could only be justified by a risk emanating solely from the demonstrators within the Camp, rather than from a

combination of some or all of those demonstrators with elements from the Royal Exchange demonstration.

84. As for Mr Fordham's second ground, namely the contention that the Court rejected Mr Johnson's assessment of the time that it would take for the dispersed Royal Exchange demonstrators to reach the Climate Camp, the position appears to be as follows. Mr Johnson's perception was that those people who were dispersed from the Royal Exchange demonstration could get to the Climate Camp 'within a few minutes allowing for the short distance between the two demonstrations' - [2011] HRLR 24, para 23. The Court's own assessment, as expressed at [2011] HRLR 24, para 58, was that 'a Royal Exchange protestor who was bent on joining the Climate Camp who was reasonably familiar with the geography of the City might at a stretch and in theory reach the Climate Camp in 10 minutes or so'. Even if that assessment was correct (and taking the same questionable course as the Divisional Court, we think the journey could easily have been achieved in ten minutes normal walking), it would not mean that Mr Johnson's perception that the Royal Exchange demonstrators could join the Climate Camp in 'a few minutes' was not reasonable in the light of what he knew and perceived at the time.

85. It is also in point that the Court (when summarising Mr Fordham's argument, apparently with approval) said that the distance between the two demonstrations would mean that it was 'quite likely' that there would be 'delay' between the demonstrators leaving the Royal Exchange and finding their way to the Climate Camp, such that 'an appropriate cordon could be formed at short notice' – [2011] HRLR 24, para 41. That assessment, bearing in mind the tense position on the ground, renders it very difficult to characterise as unreasonable a decision on the ground that there might be insufficient delay to form an effective cordon.

86. Indeed, it is hard to see how a perception that there was an imminent risk of the Royal Exchange demonstrators joining the Climate Camp and importing their violence could be characterised as unreasonable on the undisputed facts of this case. There were two very large crowds in close proximity to each other, with a number of possible routes between them, in circumstances where, as the Court accepted, Mr Johnson 'did not have the resources to seal off all roads and this would have been physically impossible' - [2011] HRLR 24, para 34, and where one of the crowds, which was being dispersed, included many demonstrators who had committed serious breaches of the peace.

87. The Court's conclusion (if such it was: again, it may have simply been a record of Mr Fordham's submissions) at [2011] HRLR 24, para 41, that the police did not have to take 'expansive measures' to deal with these dispersing demonstrators, and that they may simply have made their way to Fenchurch Street Station, was contrary to the evidence of Mr Johnson that those demonstrators were causing problems such as throwing missiles and lighting fires and had to be dispersed – evidence which there was no reason to doubt, and no evidence to contradict.

88. This was not a case where the Court concluded that no containment was justified. The Court accepted at [2011] HRLR 24, para 60, that an absolute cordon at the north of the Climate Camp may well have become necessary and proportionate at or around 21.30 when some of the Royal Exchange demonstrators eventually arrived there. Even if one puts to one side the Commissioner's argument that this analysis amounted

to an erroneous 'crisis management' approach to imminence, this acceptance demonstrates that the difference between the assessment of the Court and that of the person on the ground, Mr Johnson, was one of timing and/or degree. On that basis, if the Court was fairly to hold that the latter assessment was not a reasonable one, there should have been a careful explanation in the judgment as to why, and there is no such explanation.

89. Indeed, while hindsight is normally better avoided when considering whether a particular assessment was reasonable or not, there is a slightly different, if connected, point. It is a fact that, after dispersal began at the Royal Exchange at 19.25 ([2011] HRLR 24, para 27), over 200 people from the Royal Exchange demonstration had found their way to the cordon to the south of the Climate Camp by 20.00 and had to be dispersed (according to the contemporary log and Mr Johnson's evidence). This makes it hard to suggest that Mr Johnson's apprehension at the time that the dispersion of the Royal Exchange demonstration was about to start, that those being dispersed would seek to join the Climate Camp and cause a breach of the peace, was an unreasonable one. The mere fact that an anticipated or feared happening did not, in fact, occur, rarely can safely provide any support for the contention that it was not reasonable to anticipate or fear that the happening would occur; however, as we see it, the fact that the happening did, in fact, occur can properly be cited in support of the contention that it was reasonable so to anticipate or fear.

90. Accordingly, whether or not the Divisional Court adopted the right approach on the question of the imminence of a breach of the peace in the Climate Camp as a result of it being joined by demonstrators from the Royal Exchange, we agree with the Commissioner's case on this appeal that, on the facts as found by the Court, there was no justifiable basis for concluding that Mr Johnson's apprehension that such a breach was imminent was unreasonable.

Was the decision to contain the Climate Camp unjustified on Mr Johnson's evidence?

91. Mr Fordham's argument on this point involves three propositions, namely (a) whatever threat the infiltration by Royal Exchange demonstrators may have posed to a breach of the peace in the Climate Camp, Mr Johnson accepted that, unless there had been violence in the Climate Camp, its containment would not have been justified, but (b) there had, as a matter of fact, been no violence in the Climate Camp, and so (c) it follows that the containment cannot be justified as a matter of law.

92. This argument can be disposed of shortly in the light of what we have already said. We are prepared to assume that proposition (a) is correct, although we are not convinced that it is a fair reflection of Mr Johnson's evidence, which is summarised at para 23 above. However, we do not consider that proposition (b) can be supported, and so proposition (c) fails. Our reasons for rejecting proposition (b) can be found in the summary of the evidence summarised at paras 13-15 and 19-20 above, the findings of the Divisional Court set out in paras 42-43 above, and our conclusions in paras 80-82 above.

Concluding remarks

93. For these reasons, we would allow the Commissioner's appeal, on the basis that there was no valid basis for concluding that Mr Johnson's decision to contain the Climate

Camp at 19.00 on 1 April 2009 was unlawful, as his apprehension that a breach of the peace was imminent was a reasonable view for him to have formed in the light of the information available to him at the time. The Divisional Court appears to have formed its own view on the imminence of a breach of the peace rather that assessing the reasonableness of Mr Johnson's view, and, even if they decided that his view was unreasonable, there was no valid basis for reaching such a decision.

94. We have concluded that a decision to contain a substantial crowd of demonstrators, whose behaviour, though at times unruly and somewhat violent, did not of itself justify containment, was justifiable on the ground that containment was the least drastic way of preventing what the police officer responsible for the decision reasonably apprehended would otherwise be imminent and serious breaches of the peace, as a result of what he reasonably regarded as the immediate risk of the crowd being joined by dispersing demonstrators from another substantial crowd, which had itself been contained, as its behaviour had been seriously violent and disorderly. A few further words about our conclusion may therefore be appropriate.

95. At [2011] HRLR 24, para 56, the Divisional Court said that '[i]t is only when the police reasonably believe that there is no other means whatsoever to prevent an imminent breach of the peace that they can as a matter of necessity curtail the lawful exercise of their rights by third parties'. It is right to emphasise that we agree with this, and that nothing in our decision is intended to detract from it. Indeed, the observation accords with the evidence of Mr Johnson in his cross-examination. He said that the decision to contain the Climate Camp should not have been made 'unless it was absolutely necessary'. That is right, for reasons of principle and practice. Containment of a crowd involves a serious intrusion into the freedom of movement of the crowd members, so it should only be adopted where it is reasonably believed that a breach of the peace is imminent and that no less intrusive crowd control operation will prevent the breach, and where containment is otherwise reasonable and proportionate. Further, as Mr Johnson said in evidence, 'containment … can actually escalate what is already going on, in terms of disorder, to make it even worse'.

96. Any member of the police considering whether to contain a crowd, and any court considering whether a decision to contain a crowd was justified, should bear in mind these important factors. At [2011] HRLR 24, para 56, the Divisional Court also said that '[t]he test of necessity is met only in truly extreme and exceptional circumstances'. This is no doubt true, but we doubt whether it gives any assistance over and above the requirements discussed in *Laporte* [2007] 2 AC 105 and summarised so clearly by the Divisional Court at [2011] HRLR 24, para 12 (and set out at para 36 above). Almost by definition, a decision to contain will only be made, or even considered, in extreme and exceptional circumstances: the Divisional Court made it clear that they thought the circumstances appertaining in the City of London on 1 April 2009 were extreme and exceptional (see for instance what they said at [2011] HRLR 24, para 57, cited at para 51 above). But an argument as to whether, in a particular case, the circumstances were extreme or exceptional enough, or 'truly' extreme and exceptional, is scarcely likely to assist those deciding at the time whether to contain, or those subsequently deciding whether the containment was justified.

97. In view of the fact that we are allowing the Commissioner's appeal, it is not necessary to deal with his further argument that, even if the containment and push north were not lawful operations, the Court should not have declared that, as a result, the

claimants' Article 5 rights were infringed. Ms Carss-Frisk's contention, which must await other proceedings for its resolution, is that, unless the claimants had wanted to leave the Climate Camp during the period of containment, their Article 5 rights would not have been infringed, and that that issue must be determined on a claimant-by-claimant basis, and not in judicial review proceedings, whose function is as described in para 2 above.

98. The only other point that we should mention is that the observations of the Divisional Court about the way in which the containment and the push north were conducted at [2011] HRLR 24, para 62 (to which some reference has been made at para 55 above) cannot properly be treated as part of their decision. While the Court's criticisms of the conduct of the containment and push north may very well turn out to be entirely correct if the Queen's Bench actions referred to in para 2 above eventuate, these proceedings are only concerned with the lawfulness of strategic decisions.

99. In the event, we allow this appeal.