IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Case No. QB-2022-001420

The Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday, 26th April 2023

before

THE HONOURABLE MRS JUSTICE HILL

SHELL

- v -

PERSONS UNKNOWN

MS M STACEY KC and MR J SEMAKULA appeared on behalf of the CLAIMANT
NO APPEARANCE by or on behalf of the DEFENDANTS
MR S SIMBLET KC appeared on behalf of the INTERESTED PARTY

WHOLE HEARING

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Case called on.

MRS JUSTICE HILL: Good morning.

MS STACEY: Good morning, My Lady. So a tiny bit of housekeeping. You will have been handed I think a further supplemental bundle from our side which includes eight items.

MRS JUSTICE HILL: Yes. And I have received I think essentially within that bundle, further skeleton arguments that were placed before the previous Judges.

MS STACEY: Yes.

MRS JUSTICE HILL: And then a comparison of some of the orders.

MS STACEY: Indeed.

MRS JUSTICE HILL: So I have read those, I have had a chance to scan those.

MS STACEY: There's also a letter explaining why there was no additional [inaudible].

MRS JUSTICE HILL: Yes.

MS STACEY: Thank you. You've also got statements from [Ms Branch?] and [Ms Freeall?] and a note from Mr Simblet?

MRS JUSTICE HILL: Correct.

MS STACEY: And I've just recently handed up some documents which I will explain the relevance of in a moment.

MRS JUSTICE HILL: I have taken the chance overnight to read what I will call the initial evidence.

MS STACEY: Thank you.

MRS JUSTICE HILL: And I have read the attendance notes that were already available, primarily of the substantive hearing, if I can call them that way. So as far as the hearing before Bennathan J is concerned, there is in fact what seems to be a note of the judgment at page 2335. So that is what I have read as well as the Johnson judgment.

MS STACEY: I'm grateful for that.

MRS JUSTICE HILL: And plainly, I do not know Mr Simblet, there was a comment I think made about there not being a judgment of Sweetings J available. Was that in relation to these proceedings or the other injunction?

MR SIMBLET: That's in relation to the other injunction, the Kingsbury one.

MRS JUSTICE HILL: The Kingsbury one.

MR SIMBLET: Which was mentioned in Ms Stacey's submissions yesterday.

MRS JUSTICE HILL: Yes.

MR SIMBLET: And being one of the reason that Shell, having initially sought injunctive relief for themselves at Kingsbury.

MRS JUSTICE HILL: Yes.

MR SIMBLET: Decided not to because the Local Authority had obtained an injunction. And it was that injunction under which people have been sent to prison and committal proceedings brought, that one year later nobody knows what the Judge's reasons for that are. So I only mention it for My Lady because it has been part of Ms Stacey's explanation as to why she – why injunctions have or have not been sought in different contexts.

MRS JUSTICE HILL: But it is not in relation to-

MR SIMBLET: It's not in relation to-

MRS JUSTICE HILL: Mr Wheating[?] in this case, if I can call it that?

MR SIMBLET: No. No.

MRS JUSTICE HILL: No, I understand.

MR SIMBLET: But on the point that My Lady mentions about the judgment of Bennathan J, of course that is a solicitor's note of the judgment.

MRS JUSTICE HILL: Yes.

MR SIMBLET: It is not the judgment itself.

MRS JUSTICE HILL: Or a transcript.

MR SIMBLET: Or a transcript, or a – and we – and also, I mean this is – there has been a change of legal representation since those proceedings were put. So in a sense, the Court does not even have the security of knowing that the solicitors currently instructed in this matter are the people who produced that note.

MRS JUSTICE HILL: Yes, and it is perhaps surprising that there is not a transcript available of it, but we are where we are.

MR SIMBLET: We are where we are, but when I come to address you as to the role we can or should be allowed in these proceedings, those are part of the relevant context.

MRS JUSTICE HILL: I understand.

MR SIMBLET: That you are very dependent, respectively, on the submissions being made by the people who want the injunction and who have it. And one of the safeguards that the Court expects is that there are notes of judgment, or information about the judgment, so that the Court can be fully apprised as to what's happened and why. And that is one of the limitations on your ability to engage fully with the material.

MRS JUSTICE HILL: Thank you.

MR SIMBLET: That's my submission.

MRS JUSTICE HILL: Thank you. And Ms Stacey, you were just directing me to the other documents that had been placed on my desk.

MS STACEY: Yes.

MRS JUSTICE HILL: So there is a service chronology?

MS STACEY: Indeed, so if I could just ask you to – can we just take stock and I'll tell Your Ladyship what I propose to do hopefully very briefly this morning in order to assist Your Ladyship in deciding on the proper approach to the review, and for the 40.9 application.

I propose to address Your Ladyship on a few points that were left hanging over night. So taking stock of where we are, I will review where we've got to, and then I'm going to clarify our position following consideration overnight as to the approach on review. I've done some further research and I'll explain to Your Ladyship what our position now is in relation to that which I hope will help.

And thirdly I'll then go onto our position in relation to 40.9 which I hope will also help. And then come back to the review evidence and continue that process that we were concluding yesterday afternoon.

So far as where we are, My Lady, yesterday we proceeded on the basis that the review and our application for a continuation of the existing injunctions which are about to but have not yet expired, was made on the basis that there would be – they would be treated as having been made with no opposition, in the sense that you haven't yet decided the 40.9 application and Ms Branch's standing to oppose. So you will recall, Your Ladyship, you said let's proceed on that basis for now.

Our position is obviously that there is a continued threat which justifies the continuation. Nothing has changed and the harm that would eventuate if the protections were lifted would be severe. If we're right and it proceeds on a non-opposed basis, then we say the question for Your Ladyship is whether or not there's any reason to decline the extensions that we're seeking per *TFL v Lee*. And our position is that the answer to that question posed rhetorically is no. And I'll come back to that in due course. But before I do so, My Lady, as I say we've marshalled our thoughts overnight on the issue of the test which was vexing a number of us yesterday, and our position on 40.9 which I propose to run through.

So far as the test of review is concerned, we accept there's a starting point that this is different to the situation of *TfL -v- Lee* in the sense that there were named defendants and there was no representation on the other side. That second part is caveated, because at the moment we're proceeding on the basis of no opposition. But certainly no named defendants.

MRS JUSTICE HILL: I think in *TfL*, was the position not only there were no – there was no representation was there from any 40.9 point either?

MS STACEY: Quite.

MRS JUSTICE HILL: So just let me clear.

MS STACEY: Yes, that's right.

MRS JUSTICE HILL: Looking at the Freedman injunction judgment at 165, the original injunction judgment, that makes clear that there were 62 individuals as well as Ms Lee, is that right?

MS STACEY: Yes.

MRS JUSTICE HILL: Looking at 191 65. And then looking at 192, one can see that when it came back before Kavanaugh J, there were no defendants represented.

MS STACEY: Yes, there were no representations.

MRS JUSTICE HILL: I think one attended it looks like.

MS STACEY: Yes, but no 40.9 application being made. So we accept that that-

MRS JUSTICE HILL: So just pause there, the distinction is that there were named defendants who chose or did not attend?

MS STACEY: Yes.

MRS JUSTICE HILL: Apart from one. So to that extent there is a distinction because the Court can say that that is an *inter partes* decision albeit it that was *parte* has chosen not to be there or elected not to make representations.

MS STACEY: Indeed, or an unopposed if you like, *inter partes*-

MRS JUSTICE HILL: *Inter partes* but unopposed. And there were no, one might call them 40.9 group?

MS STACEY: Yes.

MRS JUSTICE HILL: Whoever – whatever the basis for that, whether it is [inaudible] or 40.9, there was nobody in that category either. I accept that, yes.

MS STACEY: Yes, so that's certainly the starting point, and as I say, having done some research

and given it further thought, this is our position: We accept and recognise that the general approach on the review may very well be different if – depending on whether-

MRS JUSTICE HILL: I am sorry to interrupt. You call it a review but your injunction expires next week. You call this a review hearing, but your injunction expires on Tuesday.

MS STACEY: It does.

MRS JUSTICE HILL: In two cases.

MS STACEY: It does.

MRS JUSTICE HILL: So you are describing it as a review, but I am sorry to say it might be more helpful to call it your application, because-

MS STACEY: Well an application for a variation of the existing orders, that they be continued. Because that's essentially what we're doing here. We've got some-

MRS JUSTICE HILL: Well that is how you would frame it.

MS STACEY: That's how we frame it.

MRS JUSTICE HILL: That is how you want to frame it.

MS STACEY: Yes.

MRS JUSTICE HILL: But the reality is legally, is it not, that if I do not grant this injunction in the form you seek, it will expire on Tuesday in two cases.

MS STACEY: They will lapse.

MRS JUSTICE HILL: Yes. So although you frame it as a review, that is no doubt how you wish to frame it legally for your reasons, but I think one needs to be a little bit careful with the language. I am not sure that necessarily that is the correct label for it.

MS STACEY: Well certainly in relation to the stations order, that is that there specifically provision for a-

MRS JUSTICE HILL: That is how it has been labelled and how it has been described.

MS STACEY: It may not matter what the label is, I mean ultimately it may not matter, but-

MRS JUSTICE HILL: But I do not read in Johnson J's judgment, or indeed in the transcript of those hearings, any discussion about what this hearing really is. Apart from the fact that there will be some kind of time limit on the injunction.

MS STACEY: Yes, and that's per *Barking & Dagenham*, whereby interim injunctions have to be kept – have a temporal limit, and the Court has a supervisory role to determine from time to time what they deem it should be. So there's a supervisory role to determine – what *Barking* doesn't say is that the claimant should allow the injunctions to lapse and then start

fresh. It's entirely consistent we say with the Master of the Rolls analysis in *Barking* that the review process should be put in place as long as the injunction – as the proceedings are on foot, because these applications arise out of the same set of proceedings. And here we say we are seeking an order in materially identical terms, but for the description of the persons unknown which is sought to made in a discrete way. So that is part of the context. But whether one calls it an application for a continuation of the existing injunctions, whether one says this is a review hearing, might not matter. The bottom line My Lady is that these injunctions have not yet [break in audio] they are on foot.

MRS JUSTICE HILL: Yes.

MS STACEY: And the question is how one approaches the hearing which we now have and what is the test for Your Ladyship.

MRS JUSTICE HILL: I am just not sure I am – all I am saying is I am not sure I have seen developed thinking around exactly what the test is and any of the other authorities.

MS STACEY: Well this is what I'm proposing-

MRS JUSTICE HILL: Yes, so although we are calling it a review, you are calling it that, I am not sure it is legally established that that is in fact the status of it albeit some shorthand is used to call it that.

MS STACEY: Yes, there had been reference to review. In one of the – the order which provided for the – all three to be heard together, used the language of continuation. So-

MRS JUSTICE HILL: Yes, but no doubt that is because they are application notices.

MS STACEY: Indeed. So both of those recognise as to the context within which the application is made, namely that it's under the umbrella of the same set of proceedings, in relation to any [inaudible] an order. As opposed to us having gone off in another set of proceedings seeking an entirely fresh order *de novo*. So I'm going to call it review, My Lady, with My Ladyship's leave, simply for shorthand purposes.

So, where I was at was that we recognise that the general approach on what I call a review may be different depending on whether that hearing is opposed or unopposed, okay? So scenario one, My Lady. If the hearing is unopposed, *inter partes* unopposed, as per *TfL -v- Lee*, there is no clear guidance. We've done some research, other than *TfL -v- Lee*, in relation to what the appropriate test should be.

MRS JUSTICE HILL: So just pause there. If *inter partes* but unopposed, as per *TfL*?

MS STACEY: Yes.

MRS JUSTICE HILL: You say?

MS STACEY: We say that you have regard to the test set out by Kavanaugh J which are not controversial I also say, because they reflect the various legal layers, I think they were described by Mr Watkin has, that the Court must have regard to when considering whether to grant injunctions. And it's fair to say that in such cases Judges have adopted, My Lady, a relatively light-touch approach. Albeit considering what has gone before, because it's contextual, and the nature of the order granted and sought to be continued.

MRS JUSTICE HILL: Pause there. Taken a relatively light-touch approach because of the context, you said?

MS STACEY: Yes.

MRS JUSTICE HILL: And?

MS STACEY: The nature. So they will look at what's being asked for. So for example if the order sought is identical then that would be part of the context. If amendments are sought well they would be looked at afresh and sought to be justified. And they will have regard to the relevant principles which are identified in Kavanaugh J's judgment. And that, My Lady, includes considering *Canada Goose*, if there are person unknown. And whether the procedural guidance has been complied with.

MRS JUSTICE HILL: And when you say the relatively light-touch approach has been adopted, is that because of a concern about developing inconsistent decisions on the same facts at the same High Court level?

MS STACEY: Yes.

MRS JUSTICE HILL: And it is not a precedent scenario, but a-

MS STACEY: It's a deference to-

MRS JUSTICE HILL: Deference to consistency.

MS STACEY: Brethren. That have gone before.

MRS JUSTICE HILL: Yes.

MS STACEY: So it's part of the context.

MRS JUSTICE HILL: Or whatever the equivalent of the sisters are.

MS STACEY: And proportionality. In – back to my point about the umbrella – arising out of the same set of proceedings. So here we have the scenario where the practical reality is it's not *de novo* because it arises out of the same set of proceedings, we say. The application is for an order on the same terms as that which has been granted before, subject to the minor

amendments. Considered by two Judges of the same court. I suppose it would be relevant factor to consider how much detailed consideration has been given which is a debate you are having with my learned friend. But also-

MRS JUSTICE HILL: Two Judges being the interim and then the final order.

MS STACEY: It is, yes.

MRS JUSTICE HILL: Or the-

MS STACEY: Yes.

MRS JUSTICE HILL: Court 37 and then the interim.

MS STACEY: First and the review. And the – first hearing and then the review date. And the – return date, rather. Keep saying review in my mind clearly. And the fact of – that the orders which are in place have not yet expired because these applications are brought before, pursuant to *Barking and Dagenham*, but no one lets them lapse, so the applications are pre-emptive if you like. And that approach My Lady, is consistent with the desire not to create inconsistent judgments.

It's also consistent with the overriding objective which is to ensure that these hearings are – that a Judge maybe three years down the line doesn't have to start from scratch and read back as though it were a *de novo* hearing. And it also My Lady reflects the wordings of the orders which I've taken Your Ladyship to. And as I said, the Master of the Rolls judgment in *Barking* who specifically refers to the duty to keep orders under review. That language doesn't suggest that orders originally granted would lapse and the claimants would need to start again.

But, and this is the caveat, plainly My Lady that does not mean that the Court has to blindly follow what has gone before. I don't read myself Kavanaugh J in *TFL v Lee* as having been of that view. If there was an error in law, if there's been a change of circumstance or a change of law, then the Court would be entitled and – to [inaudible], to take all that into consideration.

MRS JUSTICE HILL: Sorry, pause there. If a change of circumstances, that I understand. If a chance of law, that I understand. If an error of law-

MS STACEY: Based on evidence or something. There would need to be a justification to – I think that the Judge has to look at the matter in the round and has to identify a justifiable basis to depart from the order previously made. And there may be a number of circumstances in which that could arise, say for example the evidence has changed. Or consideration wasn't

properly given to an aspect or a principle. Or the evidence affects the way in which the principle was previously considered which would change the determination that is now to be made.

MRS JUSTICE HILL: But that contains two quite different scenarios, if I may say. One is where the evidence has changed. That is clear because that is even consistent with your lightest touch analysis on the review, that if the evidence has changed of course that would fit within the review as you frame it. But if you are also including within your submissions there the proposition that a Judge may take a different consideration of the relevant factors, I think I heard you say that?

MS STACEY: A different consideration. No, no I don't sorry, that goes to that-

MRS JUSTICE HILL: I need to be clear.

MS STACEY: Yes.

MRS JUSTICE HILL: About whether you are saying that a Judge at the review hearing who takes a different view, for example of the Article 11 balance or Article 10 balance.

MS STACEY: Yes.

MRS JUSTICE HILL: Is entitled to take a different view to his or her brethren Judge?

MS STACEY: If it's unopposed – if it's unopposed and there is no change of circumstances or change of law then we so no.

MRS JUSTICE HILL: That is what I thought.

MS STACEY: And that is consistent with the desire for there not to be inconsistent decision making.

MRS JUSTICE HILL: I understand. So when you are submitting different consideration, you mean on the basis of some new material.

MS STACEY: Indeed.

MRS JUSTICE HILL: I understand, thank you.

MS STACEY: That's scenario one, unopposed *inter partes*.

MRS JUSTICE HILL: Just pause there. So your proposition, just to be very clear about this, is that on exactly the same evidence, on exactly the same law, a Judge a year later is pretty much bound by what the Judge before has done? So on the evidence that is the same, on the law that is the same, the Judge a year later has got very limited room for manoeuvre?

MS STACEY: Yes.

MRS JUSTICE HILL: Because provided he or she is satisfied that there is – there has to be some

new evidence of continuing harm and risk.

MS STACEY: Of course, because it's looking forward.

MRS JUSTICE HILL: Because it is looking forward. But assuming that that pot of evidence stands good, your position is that on the law and on the historic evidence, the analysis that Judge reaches first time around, pretty much stands?

MS STACEY: Indeed.

MRS JUSTICE HILL: On an unopposed application.

MS STACEY: Indeed, and that is entirely consistent, and I am not here to give evidence, with the manner in which the Judges have dealt with these unopposed renewals since – I call them renewals, since January of this year.

MRS JUSTICE HILL: Just pause there. And just so I have a sense of it, I have plainly pieced together other elements of similar sorts of litigation on behalf of companies similar to Shell, but when you say that is the position that has been adopted, give me a rough sense of how many other streams of litigation there are? I think I have seen Valero[?], have I seen Esso?

MS STACEY: You have got the chronology I think, My Lady, in our progress chronology if I can call it that.

MRS JUSTICE HILL: Is this in the one from yesterday?

MS STACEY: Yes.

MRS JUSTICE HILL: Just bear with me a second.

MS STACEY: I believe, although I don't have it immediately to hand. I had it yesterday and there are references to when renewals, and they are called on renewals on the chronology, were obtained in relation to Valero, Esso, [inaudible].

MRS JUSTICE HILL: So this is in your process chronology?

MS STACEY: Yes.

MRS JUSTICE HILL: That was handed up yesterday.

MS STACEY: So on page two I think, no it's on the last page.

MRS JUSTICE HILL: So I can see reference on-

MS STACEY: Oh here we go. First page, so on the first page if you track down to 29 April 2022. This doesn't actually contain all of them but there was an interim injunction granted to Exolon[?]. Sorry, My Lady can I have just a look at this? Oh here we go, yes. So on the second page in January for example, 20 January.

MRS JUSTICE HILL: Yes.

MS STACEY: Valero. Saul[?] J.

MRS JUSTICE HILL: But they are the interim injunctions are they not? They are not reviews? Because it says, does it not, interim injunction to be reviewed in February 2024. So that principle of granting for a year seems to be-

[Crosstalk]

MS STACEY: There was a Valero renewal. It was a renewal. This is wrong. [Inaudible]. There was a renewal of the existing Valero injunction which was granted around the same time as the Shell injunction last year. We can provide those orders if – we've got a pack of them, of continuation orders if you like, on the back of original injunctions.

MRS JUSTICE HILL: And it looks from the previous page on one, the Exolon one, granted by Bennathan J in April.

MS STACEY: Yes.

MRS JUSTICE HILL: Is that the original interim?

MS STACEY: That's the original.

MRS JUSTICE HILL: And then you say that the Saul variation in January was on review?

MS STACEY: Yes.

MRS JUSTICE HILL: And what about the Valero one? Is that?

MS STACEY: Again that was – that was I think mislabelled on 20 January 2023 as an interim. That was a review.

MRS JUSTICE HILL: Because did all – I am sorry to be [inaudible] but did all three oil companies take action after the April incidents?

MS STACEY: So what happened was, yes, a series of companies did exactly the same thing. As did West Warwickshire in relation to the Kingsbury site. North Warwickshire filed-

MRS JUSTICE HILL: In or around April 2022?

MS STACEY: In or around – exactly, all around the same time which is why you will recall My Lady at the beginning I said this is the last I think of a series of what I call renewals, by oil companies in respect of the injunctions that they obtained to protect their oil terminals and refineries.

MRS JUSTICE HILL: But the series is?

MS STACEY: The series is Esso, Valero, Exolon, Shell. The renewals. And there are a few more. Oil [inaudible], one oil and gas, hydrogen gas. I don't have them but we can obtain them if that would be helpful. And for whatever reason, we are last in the queue.

MRS JUSTICE HILL: And is it your submission that in each of those review hearings in those four cases, that have taken place in 2023, in the Spring of 2023, that in each of those cases the Judges have accepted your submissions on jurisdiction in an unopposed scenario?

MS STACEY: In an unopposed scenario. In fact Judges – Saul J said well I don't need to trouble myself at the moment [inaudible] that ship has sailed. The real issue is the continued threat.

MRS JUSTICE HILL: But all of those were unopposed?

MS STACEY: Yes. If we – if you would like the orders just so you can see what has gone before, but they are in different proceedings, then we can provide them to Your Ladyship.

MRS JUSTICE HILL: But they were all unopposed?

MS STACEY: Yes, they were all unopposed. So about to move onto the opposed scenario.

MRS JUSTICE HILL: So all, I am sorry to press you, but these are I have to say more helpful to me than you might imagine because I am very keen to make sure I have understood this.

MS STACEY: Yes.

MRS JUSTICE HILL: So all of those Judges adopted the Kavanaugh J approach?

MS STACEY: Yes. But I don't believe that there are detailed judgments. They're not every – unfortunately not all of those hearings resulted in-

MRS JUSTICE HILL: Well if they were unopposed and they were taking it to a review jurisdiction then it is perhaps understandable.

MS STACEY: Exactly. But even if the Kavanaugh J judgment is, to my knowledge at least, and I think it's right to say the only reasoned judgment in respect of a, what I call the renewal.

MRS JUSTICE HILL: And on the basis that that one was in – it was also in February.

MS STACEY: It's in February.

MRS JUSTICE HILL: It is part of the group then is it?

MS STACEY: It's part of the group; it's in the middle of the group.

MRS JUSTICE HILL: Although that is TfL and not an oil company.

MS STACEY: Indeed. And National Highways. Oh, National Highways I should also say on Monday of this week. Slightly different because it was a final injunction following Bennathan J's – the appeal against Bennathan J's decision. Cotter J also extended the final injunction in relation to the M25, the London feeder roads and the strategic road network on the same basis. His view, again we need to get-

MRS JUSTICE HILL: Yes-

[Crosstalk]

MS STACEY: In fact My Lady-

MRS JUSTICE HILL: It is a final injunction.

MS STACEY: It's a final injunction but the same principle whether there's a continued threat. So slightly different because it's a final, but Cotter J is going to be giving judgment, and it may well, and I just lay this down as a marker, contain some helpful to Her Ladyship, indications as to the test in relation to the final at least. Because his view was very much you couldn't go back and redetermine points that had been determined by his brethren Judges. And he made that point several times through the course of the proceedings.

MRS JUSTICE HILL: In an unopposed scenario?

MS STACEY: In an unopposed – well no it wasn't – there was no 40.9 application but there were named defendants and they were in court and they made speeches.

MRS JUSTICE HILL: But had they been before, had they been named at the earlier stage when the-

MS STACEY: They had been named and the summary judgment – so the final injunction was obtained against them on a summary judgment basis. And they didn't file defences. And the Court found that the absence of the defences was a material consideration and on the evidence it was justified to grant a final injunction on that basis. So they had the opportunity to engage, they did turn up at various hearings, but what they were saying wasn't really an order shouldn't have been granted but more they would continue to do what they did because it was so important to their protests.

MRS JUSTICE HILL: But was there any fundamental difference between the two stages at which Cotter J was looking at the case? So firstly when the final injunction was made, and then secondly when he reviewed it, whoever made the first injunction?

MS STACEY: That was Bennathan J, yes.

MRS JUSTICE HILL: Was the position of the defendants any different?

MS STACEY: No.

MRS JUSTICE HILL: So in a sense there is consistency then. There is no material change in terms of somebody becoming involved between the two stages?

MS STACEY: No, there was no material change. Because they had been named defendants.

MRS JUSTICE HILL: Yes, so in that sense, although it is not unopposed, it is still different to this scenario?

MS STACEY: I agree.

MRS JUSTICE HILL: Thank you. And do you expect a judgment from Cotter J soon?

MS STACEY: I expect a judgment probably towards the beginning of next week. But I wouldn't necessarily bind myself to that. But he said days rather than weeks, and it was on Monday. For completeness My Lady, in relation to where a Judge can depart from what's happened before, there was some debate with Cotter J as to whether alternative service provisions could be amended on the basis of new evidence. And he was satisfied that given the new evidence that was provided to him which concerns difficulties in observing and statistics he was provided with, he was able to amend the pre-existing service provision. But his starting point was very much this has all been decided, a Judge has made this order.

MRS JUSTICE HILL: Yes, well that is understandable if there is new evidence, and I think there was some was there not here about difficulties with some of the petrol stations?

MS STACEY: Indeed. So that's the – our encapsulation of what we say the position appears to be in relation to unopposed. Does Your Ladyship have any more questions in relation to that?

MRS JUSTICE HILL: No.

MS STACEY: So far as scenario two is concerned.

Background discussion.

MS STACEY: There's a reference in the bundle to the other inunctions that were renewed, I am told. In Mr Pritchard-Gamble's[?] witness statement at page 971 of the bundle. It's a table. It's an exhibit of Mr Pritchard-Gamble at page 971. Although it would be in F. 971, yes. It's in bundle F4, behind tab F.

MRS JUSTICE HILL: I am not sure 971 is correct.

MS STACEY: That's the PDF number, I think it's probably 961, it's 10 pages less. Yes.

MRS JUSTICE HILL: Yes.

MS STACEY: This is what I have in mine, thank you.

MRS JUSTICE HILL: Is it in his witness statement?

MS STACEY: It's in the exhibit to his witness statement, so it's behind -it's F, tab four, page 961.

MR SIMBLET: What page of the exhibit is it?

MS STACEY: Of the internal. 28.

MR SIMBLET: Thank you, I've got it.

MRS JUSTICE HILL: Mine seems to jump entirely from 933 through to 966, there is just nothing there.

MS STACEY: I was taking Your Ladyship to this table yesterday, do you recall? We were having a debate and you were asking me why I was pulling certain bits out and not others?

MRS JUSTICE HILL: Oh, it is the chronology.

MS STACEY: It's the chronology.

MRS JUSTICE HILL: Okay, then I have taken it out. So it is the-

MS STACEY: Yes, it's the composite chronology as I call it, and page 961 of that chronology.

MRS JUSTICE HILL: I see.

MS STACEY: That's why, I've-

MRS JUSTICE HILL: No, do not worry. Yes, okay. So 961, I have got January 23.

MS STACEY: Yes. January 23, you see reference there to renewals. Well renewals are in relation to Valero and Exolon so they were two separate hearings.

MRS JUSTICE HILL: They are the Saul hearings I believe are they not?

MS STACEY: They are the Saul hearings. And then the – I don't think all of them are in this table. No. And the copy of the Valero order is at 434 of the bundle, My Lady. And Exolon is at 474. Yes, so 434 is Valero, Saul J. And 474 I've got Exolon. You've got 474 Exolon. In the Valero, if I could ask you just to look at, just asking the review provision, they use the language of review in any event. Oh, paragraph 22 on page 442.

MRS JUSTICE HILL: These are the original orders made in 2022, they are not the reviews are they? So 474 is the-

MS STACEY: No-

MRS JUSTICE HILL: -Bennathan one.

MS STACEY: No, 434 is the Saul J renewal.

MRS JUSTICE HILL: Well 474 you gave me as well. 434?

MS STACEY: 434. If we look at that first, that is Saul J. 20 January 2022.

MRS JUSTICE HILL: That's the Valero renewal?

MS STACEY: Valero renewal. And if I – if Your Ladyship would look at 442, paragraph 22, there's provision for reconsideration. But at further hearings. And then 474 is not correct. It's not the renewal.

MRS JUSTICE HILL: 442, sorry, you were showing me the renewal provision?

MS STACEY: Yes. 442. Paragraph 22. There's just provision in there for reconsideration at a further hearing to be listed a year down the line. To determine, you'll see there, whether there's a continued threat which justifies is continuation which again is consistent with the

approach that I suggest has been adopted.

MRS JUSTICE HILL: Just while we are looking at this, 19 on this page?

MS STACEY: Yes.

MRS JUSTICE HILL: 'Any person applying to vary or discharge the order must provide their full name and address'. Pausing there?

MS STACEY: Yes.

MRS JUSTICE HILL: That does not seem to be the 24-hour timescale.

MS STACEY: No. I – no.

MRS JUSTICE HILL: Which I think is what, if I may say, has caused some of the practical difficulties-

MS STACEY: Indeed, well I'll address Your Ladyship on that because we've had some further thoughts about that in due – if I may, in due course.

MRS JUSTICE HILL: Well indeed, but also-

[Crosstalk]

MRS JUSTICE HILL: But also I am going to need some help with, when you come to your 40.9 submissions, the standard wording seems to be, 'Any person wishing to apply to vary or discharge must also apply to be named as a defendant'. And that is not what Mr Simblet's client wants to do for her own reasons. So I am going to need some help I think around this standard sort of wording. Because if in fact there is a proper route to representations, submissions, under 40.9 that is distinct from joinder-

MS STACEY: Yes.

MRS JUSTICE HILL: -And my reading of the discussion of this interrelationship at the previous hearings did not seem to – it seemed, if I may say, quite a few observations made about this difficult interrelationship or potential interrelationship, but no resolution of the matter.

MS STACEY: No.

MRS JUSTICE HILL: So for example, it looked to me as if at the hearing before Bennathan J for example. There was some discussion about 40.9 and joinder. And similarly I think when your colleague was representing your client, there was similar discussion I think, I cannot remember quite which one it was, I think it was before Johnson J?

MS STACEY: Yes, it was.

MRS JUSTICE HILL: And I think, and I just want to flag this for you to come back to, looking at if you can just pull up – sorry to jump around but the note of the hearing in front of

Johnson J that I read overnight, 224111?

MS STACEY: 22, sorry?

MRS JUSTICE HILL: Tab 22, sorry. Tab 22G, and then it is 2411 is the-

MS STACEY: 2411?

MRS JUSTICE HILL: Yes.

MS STACEY: 2411. Johnson J, yes. Got that.

MRS JUSTICE HILL: Yes, and your colleague I think Mr, is it Watkins?

MS STACEY: Watkin.

MRS JUSTICE HILL: Watkin was representing your clients?

MS STACEY: Yes.

MRS JUSTICE HILL: Your colleague's position was looking at 1.8 of the note, someone directly affected may apply to have a judgment or order set aside.

MS STACEY: Yes.

MRS JUSTICE HILL: It was not correct that anyone who is affected by proceedings would be entitled to make a submission. They would first have to be joined. Now I do not know whether he meant joined under 40.9 or joined as a defendant.

MS STACEY: Yes.

MRS JUSTICE HILL: And there seems to be elsewhere in, forgive me, I cannot quite remember where this point came up, but it might have been in the discussion before Bennathan J. There was some suggestion that somebody made, and I think it might have been in the context of Ms Freeall[?], that even if she did not fall within person unknown, she could be joined as a defendant. So she could – there could be a persons unknown and then her as a named defendant. So I do not have an answer to this-

MS STACEY: As an interested person?

MRS JUSTICE HILL: I do not understand. I do not know exactly what the submission that was being made was. The point I am making is I do not think there has been a clear determination of the interrelationship between 40.9 and joinder as a defendant. You all appear to agree that Ms Branch should not and does not want to be a defendant.

MS STACEY: Well, unless she is – she cannot be a defendant, we say, because – she would be a defendant – if she had committed an act, a breach, then she would be a known person unknown, if you like. A person who is known, and we would be – it would be duty bound on us to identify the circumstances and apply to join her. But as we understand it she is,

and in fact she is saying in terms that she was not planning on doing any of that. So in those circumstances we don't think she should be joined.

MRS JUSTICE HILL: So as far as you are both concerned, there is no question of her being joined.

MS STACEY: No. And there's no threat because, for the purposes of our application, we have-

MRS JUSTICE HILL: On her-

MS STACEY: -We have to establish that there is a threat, and we would not be able to – on her, exactly. In relation to her. We would not be able to satisfy Your Ladyship that in relation to her, she represents a threat on the face of her evidence. We don't dispute what she says there. So it would be improper for us to seek to join her because there would be no evidential basis upon which we could do so.

MRS JUSTICE HILL: And I took you entirely off your thread, and I am sorry for that. But you can see why I was looking at these similar provisions.

MS STACEY: Absolutely. So My Lady, this is why – this is all complicated and because it's all new and evolving, we thought it would help Your Ladyship to understand what we say about approach. So I-

MRS JUSTICE HILL: So I had the Valero renewal at 434.

MS STACEY: You've got the Valero renewal, that's the only one I think in fact is in the bundle in terms of the renewals. But as I say, I can provide the others if Your Ladyship wishes me to.

MRS JUSTICE HILL: I am not sure it is going to be helpful if they are just simply orders rather than judgments.

MS STACEY: Yes.

MRS JUSTICE HILL: But thank you.

MS STACEY: So if I can move then onto what we say the scenario is on an opposed?

MRS JUSTICE HILL: So just before you get there, if I take the view that I should not take into account in any way what Ms Branch has said and decide that that has to go on another day, for example.

MS STACEY: Yes.

MRS JUSTICE HILL: There is not any, what Mr Simblet describes as sort of interim blue touchpaper position where I can be aware of the submissions but not formally take them into account. If I decide there is not that, then you say that this is the approach I take?

MS STACEY: Yes.

MRS JUSTICE HILL: So we are back to where we were on Friday?

MS STACEY: Which is why I started with you – I started on page-

MRS JUSTICE HILL: Right.

MS STACEY: Exactly. I say there is no middle ground. And where I get to, I will explain my scenario two, but I'll say that means it's necessary, My Lady, for you to determine the 40.9 because you have to determine whether Ms Branch has standing before deciding which route, if you like, to go down. Now, and I'll come to this, but – when making submissions about 40.9 where we may get to is essentially a case management determination in relation to that determination.

MRS JUSTICE HILL: All right, so tell me your other scenario then?

MS STACEY: Tell you what the other scenario would be. So if an order which we're seeking the continuation of had been obtained without notice, if you like, and was opposed by someone with standing, and that's the emphasis we place on it. So that's why we need to determine the 40.9. With standing to oppose it, then we accept My Lady, contrary to, to some extent our previous position, the position may be different. We've looked overnight to see whether there's any authority. Certainly there's none in relation to protest injunctions, but we have gained some assistance from a very different context, the [Inaudible], that's the *Gee*[?] extract which I've handed up Your Ladyship, and I've given a copy to my learned friend.

The first part is to do with [inaudible] injunctions, you can skip over that. That's just been included for interest purposes, but I have tabbed the relevant page.

MRS JUSTICE HILL: So just pausing there, this scenario is the order had been obtained without notice and was then later opposed?

MS STACEY: Later opposed by someone with standing.

MRS JUSTICE HILL: Standing in a 40.9 sense?

MS STACEY: Well any – well it could be a defendant. Because 40.9 doesn't simply envisage persons unknown. It envisages a person-

MRS JUSTICE HILL: When you are talking about standing you mean?

MS STACEY: Somebody who the Court is satisfied is entitled to make submissions. Whether that's under 40.9 or any other basis. And I – as an aside, Mr Simblet was saying that Ms Branch could make submissions in the absence of 40.9. So you have to be satisfied that she has standing. So in that scenario, as I say there's no authority in this context, but we

have got some assistance from this extract. So 24.20 says that, 'If the defendant', it's talking about defendants here, but-

MRS JUSTICE HILL: I am looking in *Gee* am I?

MS STACEY: Yes, you're looking in *Gee* in the tabbed page.

MRS JUSTICE HILL: Yes.

MS STACEY: 24.20. Paragraph. And it's headed, 'Discharge or variation of an injunction', so that's in a scenario where the injunction has been granted by the Court. 'If the defendant wishes to set aside an injunction [of claim?] without notice by claimant, he must provide to the Judge, he should not try to appeal', that's the Court of Appeal, 'Without having first been before the Court at first instance for reconsideration'. So to that extent, My Lady, we accept that that's what it says there. So there's a reconsideration scope.

It then goes on to say, 'If the defendant wishes to apply, he should make his application promptly'. And pausing there, I fully accept we're not dealing here with a 40.9, but 40.9 is the route that's been identified by Ms Branch as enabling her to come before the Court and make submissions. So we say it might operate by analogy. But we emphasise the bit about promptness which I'll come back to.

MRS JUSTICE HILL: Yes.

MS STACEY: And then I think you can skip over the next bit and take it back up at the bottom in the sentence starting, 'Where the defendant'?

MRS JUSTICE HILL: Yes.

MS STACEY: 'Or a non-party is seeking to vary the injunction, and there are a number of interested parties, it is sensible to proceed by application notice'. For entirely practical reasons I suggest, which I've explained over the page. 'The terms of the variation can then be set out in the application notice, and this may facilitate reaching an agreement'.

Then it goes on to say this, which Your Ladyship might find helpful, 'The application to discharge the injunction takes the form of a complete re-hearing of the matter with each party being at liberty to put in evidence thus e.g. the defendant may seek to persuade the Court that all the evidence has insufficient risk of a judgment', that's the [inaudible] point, 'And the court decides the application on all the evidence before the Court. This includes evidence of matters which have occurred since the without notice application' etc.

Now My Lady, so this suggests that one looks at the matter afresh, but one doesn't ignore everything that's gone before. But it does take the form of a re-hearing. So the first

scenario, we say the light-touch approach applies. So a lower level of-

MRS JUSTICE HILL: I am sorry, forgive me. So the proposition here, and I have not got the authority cited, but the proposition here is in the context of another type of injunction?

MS STACEY: Yes.

MRS JUSTICE HILL: But a similar set of facts where it is granted on an effectively *ex parte* basis. There is then a party that comes forward.

MS STACEY: Or a non-party I think, to be fair. At the bottom of page, the tabbed page-

MRS JUSTICE HILL: Yes, I was parting the small p. Somebody comes forward.

MS STACEY: Yes. A person, yes.

MRS JUSTICE HILL: The application to discharge the injunction takes the form of a complete re-hearing of the matter.

MS STACEY: Of the matter.

MRS JUSTICE HILL: Yes, from where do you get the proposition that that is not *de novo*? Sorry, I do not quite follow. Because it does not say review, it says re-hearing.

MS STACEY: Sure, but-

MRS JUSTICE HILL: I think your submission was-

MS STACEY: The matter in the context when you've got – well this operates by analogy, but here we can't disregard the fact that this order is sought to be continued in the context that it arises, in the same set of proceedings. There have – you can't put out of your mind the fact that Judges have considered it. So if the matter would include a complete reconsideration of everything that's gone before, scrutiny of what's happened before albeit the Court deciding on upon the – what I call the renewal, which was opposed, would, having looked at all of that, decide whether it was appropriate to grant the order or continue the order. Based on all the evidence that-

MRS JUSTICE HILL: I am sorry Ms Stacey; it must be me. A complete re-hearing means you have got an *ex parte* order where no one was there. Someone is now there; you have a re-hearing. Does that not mean a *de novo* hearing? I am sorry if I do not follow why-

MS STACEY: Well that's what it says here.

MRS JUSTICE HILL: Yes.

MS STACEY: But as I say, this doesn't apply to protest injunctions. I'm making a concession that there may be scope for – well there is scopes it seems for greater scrutiny in circumstances where a party is opposing the injunction being continued. I don't necessarily accept that the

complete re-hearing which is referred to in this passage would require you to ignore everything that's gone before. And not look at for example the attendance notes, the evidence that the Judge had regard to. You'd have to look at all the evidence that's been filed in respect of the original application.

MRS JUSTICE HILL: But does it not mean though-

[Crosstalk]

MS STACEY: -Relevant to the application that's being made.

MRS JUSTICE HILL: Yes, on a sensible basis, of course one is going to look at the way in which arguments were developed before and the views that were reached before. But if the position has then been reached that there is now a new person saying, 'Hang on a minute, if I had been here before I would have said lots of different things'.

MS STACEY: They would be entitled to – yes, it's a matter of principle, they would be entitled to do so.

MRS JUSTICE HILL: Yes.

MS STACEY: But by re-hearing I meant you don't rip everything up and start again.

MRS JUSTICE HILL: No.

MS STACEY: And require the evidence to be re-served. You look at everything – similarly to, you will recall McGowan, J, Johnson, J, the skeletons were similar. And it looks as though the arguments were run essentially twice. Before both Judges. So presumably, and I wasn't there, but it looks as though, when one looks at the attendance notes, there was detailed consideration by McGowan, J. It came back from Johnson, J, and in fact he looked at a new skeleton but which re-ran the arguments would have been taken to the evidence, and submissions would have been made afresh. Before him. That's what happened in this case, it needed necessarily a-

MRS JUSTICE HILL: So you say that, and this is more perhaps a pragmatic way of looking at it, that it is not entirely *de novo* because you look back and say well look, I can see for example Article 10 arguments were ventilated even in the absence of Ms Branch or other 40.9 person, and I can see the way in which it was run in her absence. And I can now see what she says about it.

MS STACEY: Indeed.

MRS JUSTICE HILL: So-

MS STACEY: So have regard to all of that; that forms part of the picture. The Court doesn't need

to take that out of its mind, that is something the Court should probably have regard to.

MRS JUSTICE HILL: So that I understand.

MS STACEY: Yes.

MRS JUSTICE HILL: But beyond that, if in fact the Judge there hearing the 40.9 person says, 'Well actually, having now heard this new submission, the position is, in my view, different'?

MS STACEY: There's greater scope-

MRS JUSTICE HILL: That Judge in that-

MS STACEY: -In those circumstances, yes.

MRS JUSTICE HILL: I understand. Thank you. And forgive me then, if the route that the person has got to be a party with a small p is 40.9?

MS STACEY: Yes.

MRS JUSTICE HILL: Is it your position that while there is a discretion as to whether to recognise somebody under 40.9 and while the Judge has to be satisfied before that exercise of the discretion takes place that they are directly affected.

MS STACEY: And there's a good – the two gateways.

MRS JUSTICE HILL: Yes, however you frame it. If there had been, by Rule 40.9, they are entitled to a set aside. That is what 40.9 says on its face. Vary or discharge an order.

MS STACEY: I mean the slight procedural difficulty is that 40.9 – I'll come to 40.9. It seems to envisage the setting aside of an order that has been made.

MRS JUSTICE HILL: Yes, whereas here you are applying for a new order.

MS STACEY: So there's a procedural wrinkle there.

MRS JUSTICE HILL: Yes.

MS STACEY: So I will come – can I come to 40.9, but just to follow through the analysis on scenario two where it's opposed, if Your Ladyship accepted that there was a 40.9 application properly made which was to be heard in relation to an order of the court to set aside or vary. And then there's greater scrutiny as we've discussed. What that means, My Lady, is that the test in *TfL* are not – don't come out of the consideration. They are still the relevant test because they are the identified tests which reflect the authority in relation to interim injunctions. But you also look at the submissions which the Court has allowed that party to make, pursuant to the 40.9 application. And the reason I say it in that way is that when I come to 40.9 it's relevant to consider the merits of the submissions because that's

part of the threshold.

MRS JUSTICE HILL: Well that was the basis was it not, of as he then was His Honour Judge Cotter refusing the 40.9 admission in [Inaudible]. Was that you may be in as a directly affected party but ultimately the merits are not with you.

MS STACEY: And that's what – that's the reasons I'll come onto we say the gateways. We are prepared to concede that she is a person directly affected when one applies a generous interpretation of the words of 40.9 as per Bennathan J, and Ritchie J, but we say there are not good points. And the reason we say, and we'll come – it's slightly circular, My Lady, but the reason we say they are not good points which I'll expand upon, is that detailed consideration was given, the claimant's counsel went to great lengths to make sure that the points were properly ventilated.

They were properly considered, the known error, the evidence more than satisfied the risk tests and the harm tests. There's evidence of continued threat which I don't believe is something that's been taken issue with. Bennathan J's order was, as I say, stripped down to its bare bones and is plainly, we say, appropriate balanced. There's no issue with the stations order. And because of all of that, we say there's no good point and the test that Cotter J identified in the *Gees* case is whether there's a reasonable prospect of the non-party being able to secure a different order. That's the test, that's the gateway test of merit.

MRS JUSTICE HILL: It becomes a little circular though does it not?

MS STACEY: It does become circular, yes. And as we keep saying, we are where we are, but perhaps it's been helpful Your Ladyship, I have taken you through a large chunk of the evidence. Not all of it, but in the way it was approached. So that's – those are the two scenarios, but where we get to My Lady, in relation to all of that, is that you have to deal – it is necessary to deal with 40.9, and Ms Branch's standing first.

And perhaps then I can tell you where – I can give some indications, but where we are on that is as follows: We say there's no right for – she has no right to make an application as a non-party otherwise in 40.9, in the absence of Mr Simblet having identified any other basis. It's not right that any person can come to court and make any submissions in the absence of a procedural book.

And so far as the 40.9 application is concerned, we oppose it on the basis that we say firstly the gateway isn't met. And the gateway I take from *Breen*[?] at paragraph 43.

MRS JUSTICE HILL: Is that the factor that Ritchie J listed?

MS STACEY: Yes. Well no. That's discretion. So gateway is dealt with at 43. Factors come after gateway.

MRS JUSTICE HILL: Forgive me, it has been over 24 hours since I look at this, so lots has happened since then. So 43.

MS STACEY: And we have to take it in two stages.

MRS JUSTICE HILL: You do.

MS STACEY: Firstly the gateway. And the gateway, according to Ritchie J, and this is an expansion on what Bennathan J says but deals with two things. First, directly affected. And we can skip over that because we're prepared to concede that that box is ticked. Although the fact that it seems slightly tenuous, certainly in relation to [Tower and Haven?]. Because we'd say that Ms Branch has no right to protest in a way that involves trespass. And as I said yesterday was a slow march past the Tower involving 250 people which wouldn't engage the provisions of the injunction. There's no reason why Ms Branch couldn't do that without-

MRS JUSTICE HILL: But for present purposes you concede directly affected across all three?

MS STACEY: Let's assume. We accept directly affected in relation to – in relation to stations. Not in relation to Tower. And not in relation to Haven on the basis that those are purely trespass injunctions, if I can call it that.

MRS JUSTICE HILL: I see.

MS STACEY: But so far as good point is concerned, we don't accept the points that challenge our good points in terms of there being a reasonable prospect of her being able to secure a different order, and My Lady you get that test if you go back in the judgment to paragraph 23. Not 23, I'm so sorry, 38.

MRS JUSTICE HILL: Yes.

MS STACEY: So forward in the judgment, exactly. Cotter J. And what essentially this requires the Court to do is form a – it's almost – it's basically this is not an appeal obviously, and I don't want to use that language because I've accepted that there can be a re-hearing, but it's akin to admission for appeal application when one considers the merits of the points that have been raised before allowing that person through the gateway. And in relation to that… Yes, not [inaudible]. So when I said we accepted the re-hearing, as my junior points out, I haven't entirely accepted that, that it's entirely *de novo.* I told Your Ladyship that one

doesn't disregard everything that's gone before. We've had that. The *Gee* test, let's call it that.

MRS JUSTICE HILL: Yes.

MS STACEY: So far as the merits of the point are concerned, My Lady you have our note.

MRS JUSTICE HILL: Just pausing there. Before we leave *Breen*, the factors he sets out-

MS STACEY: The factors come on discretion. I think I need to complete good reason first. You can keep *Breen* open.

MRS JUSTICE HILL: Well let us perhaps do it in another way if you do not mind?

MS STACEY: Yes.

MRS JUSTICE HILL: Because obviously your submissions on the merits are directly relevant to whether she has a good point or not.

MS STACEY: Yes.

MRS JUSTICE HILL: But what do you say about the *Breen* factors?

MS STACEY: So, so far as the *Breen* factors are concerned, the first point we make is the list isn't definitive. And he doesn't seem to suggest that it is. Nor should it be because the Court has a general discretion. 40.9 expressly provides that a non-party may, without – there's an overarching discretion, one has to consider all the circumstances.

MRS JUSTICE HILL: Yes.

MS STACEY: So other than looking at specific [inaudible] factors, we rely on three main points.

MRS JUSTICE HILL: And you have had sight of her most recent statement addressing the factors?

MS STACEY: I have. Yes. Let me address those then before I refer Your Ladyship to the ones that we place reliance on in addition. It's page five of her statement. So factor one, we don't dispute her position in relation to. Factor two, well we say that she does, because given the range of her submissions or the extensive nature of the submissions which are sought to be advanced, which mount a wholesale attack on the very basis on which the injunction was granted. From the Human Rights points to the *Canada Goose* requirement, to the underlying cause of action across the board to the terms of the order.

And My Lady to a point specifically made in the statement relating to the environmental description whereby Ms Branch is – she's a member of Extinction Rebellion, it seems to us that she has no standing to make arguments on behalf of non-environmental protestors in circumstances where she herself is a member of Extinction Rebellion only. But that's an

indication of the range of submissions that she wishes to make which is tantamount to her seeking to control the litigation on behalf of all persons unknown, so we don't agree with what's said about factor two.

MRS JUSTICE HILL: Yes.

MS STACEY: Factor three, would it affect her. Well we dispute this too because given the narrow confines of the Tower and Haven injunctions which only prevent activity which is plainly trespass or nuisance, private law where a claimant has Article 1, Protocol 1, rights, we don't accept that she has any entitlement to protest in that way. And thus her rights wouldn't be affected. There's no freedom of forum. That's [Inaudible] which I've taken Your Ladyship to before.

And so far as the stations are concerned, well she has no right to protest in the manner described with the description of persons unknown, with the intention of disrupting and causing economic harm to the claimant. Again, no freedom of forum. So given the way in which the – we say the relatively narrow confines of the [inaudible] which are plainly unlawful, we don't accept that the existing injunctions does affect her property rights. And there's a recital My Lady you will recall, on the base of the orders, which makes it clear that they are not intended to catch lawful protest.

Factor four we don't dispute. Factor five, we don't dispute. Factor six, well this does involve persons unknown and so we don't dispute. Factor seven, we don't dispute. Factor eight, we do dispute, but I'll come back to this because the factors we specifically rely by way of discretion on, delay, prejudice resulting from the way in which this application has been brought, and merit. Those are the three additional discretionary factors which I'd ask for Her Ladyship to have regard to.

MRS JUSTICE HILL: Delay, prejudice and?

MS STACEY: Delay, prejudice and merit. If merit – it not with me on merit in terms of excluding her because she doesn't get through the gateway, I say merit in the – the merits of the points comes back into-

MRS JUSTICE HILL: Come back in a discretion.

MS STACEY: Come back in a discretion. Yes. So delay. I've handed up, My Lady, a chronology?

MRS JUSTICE HILL: Yes.

MS STACEY: The first two entries, just so I can explain this document. It's a chronology of

service on HJA who are Ms Branch's solicitors and were Ms Branch's solicitors last year when she put in the skeleton argument for the Tower proceedings. The first two entries relate to service on HJA on behalf of Ms Freeall so that – you can probably skip over those two which is why they're not highlighted.

But 14 February 2023 is where documents were specifically sent to HJA for Ms Branch. And pausing there I should say that there was no obligation on my client to do so because she's not a person who is named, and the alternative service provisions only require service in the way set out in the order. But they took a view and they decided out of an abundance of caution, belt and braces, to serve documents on people they knew about. Which is why these documents were sent to HJA for the attention of Ms Branch.

MRS JUSTICE HILL: 14 February is a reference here to the change of solicitors on the petrol stations claim.

MS STACEY: Yes. So on 14 February, that was sent. 16 February, application notice to petrol stations. That was the application to extend, and that contained the documents. Simply the application. That contained simply the application. And then on 28 February there's the application for joinder. And then you'll see on 6 April they were sent all the documents in relation to the petrol station proceedings, and they are listed out there at 6 April. So this is the recent knowledge.

MRS JUSTICE HILL: And so where sorry the entries on here after 14 February all relate to the petrol stations claim?

MS STACEY: Yes.

MRS JUSTICE HILL: Is that because there is a focus on that perhaps in Ms Branch's evidence? Or is there not evidence of service of the parallel documentation in relation to Haven and Tower on her?

MS STACEY: I'm told it was – yes. First entry, right at the top of the page, My Lady. Letter from HJA to CMS requesting certain petrol station documents. So those were requested at least on behalf of Ms Freeall.

MRS JUSTICE HILL: I see.

MS STACEY: And a decision was taken out of an abundance of caution because they knew about Ms Branch and her involvement previously. And the interest that she had expressed in the context of other proceedings that she had also been a client of HJA so they'd send documents-

MRS JUSTICE HILL: But her skeleton argument was lodged in relation to either Haven or Tower was it not?

MS STACEY: I know. But that's a Shell – that was a Shell injunction. Can I just get some clarity?

Background discussion.

MS STACEY: So I'm told Tower, Ms Branch extracted herself, I don't think she – this is disputed in fact, it reflects the statement because Mr Smith decided to make the submissions. So as far as Tower is concerned-

MRS JUSTICE HILL: I understand that.

MS STACEY: -She stepped back. But because she had been instructed – she had instructed HJA at that time, that's the link. And HJA had specifically requested documents on behalf of Ms Freeall in relation to the petrol stations. A view was taken by my solicitors that it would be sensible to ensure that Ms Branch has the relevant documents in relation to petrol stations.

MRS JUSTICE HILL: And presumably the application for joinder on 28 February that was served, and the sealed order reflecting joinder of the applications if not the cases, indicated that the other two were looking to be extended, is that right?

MS STACEY: Yes. So you've got the joinder for all three proceedings. The application, I can take you to that. It's-

MRS JUSTICE HILL: It seems clear that the Haven and Tower were up for renewal as well?

MS STACEY: Yes, it's the first bundle. I'll just get that for Your Ladyship.

MRS JUSTICE HILL: I am not sure 49-53, that is the certificate of service.

MS STACEY: No. That's in terms of – that's the evidence of service, My Lady, but that's not supposed to be the page reference for the application itself which I'm trying to find for you. 34 I think.

MRS JUSTICE HILL: Yes, 34 is the-

MS STACEY: I'm grateful. Yes, 34 will decide whether or not to continue the injunctive relief granted. That's the order I took Your Ladyship to yesterday. And you see on page 35-

MRS JUSTICE HILL: This is the narrative around all-

MS STACEY: Just the narrative. So I was dealing with delay. I've handed up that chronology to explain what Ms Branch knew about when – more recently, but of course she also, you have the skeleton argument that she filed in relation to Tower, so she had previous knowledge.

A

And as explained yesterday, the documents were put up on the website in relation to all three proceedings, as per the orders. And therefore we say that she could well have, and should have, brought an application under 40.9 to challenge the order that had been made 12 months ago. Well before now. And we also say My Lady that it's an inappropriate use of the 40.9 procedure to bring an application so late just before expiry of the order which she is seeking to have set aside.

B

And if I can expand on that? I made the point to Your Ladyship, I called it a wrinkle that needed to potentially ironed out, that the purpose of 40.9 appears to be designed to capture a non-party which may include a person unknown who is directly affected and discovers an order has been made, who wishes to challenge it, to challenge that order as made. That seems to be the purpose on the face of the language of 40.9.

C

And as I said, Ms Branch has been aware of this order for over a year. She could have challenged the order but did not do so. Her evidence I think is that she decided to-

MRS JUSTICE HILL: So over a year, where do I get that from?

D

MS STACEY: Well she knew that Tower – she put in the skeleton for Tower, so she knew of the Tower proceedings.

MRS JUSTICE HILL: Oh from the – the date of Bennathan J order/

MS STACEY: Exactly. Sorry, the date of Bennathan J order, exactly. Which is give or take a year from now.

E

MRS JUSTICE HILL: Yes.

MS STACEY: And the reason I say it's inappropriate is the affect of leaving it so late is essentially the claimant has been essentially ambushed just before expiry with wide-ranging submissions which risks derailing the time estimate and puts the existing orders at risk of expiry. Now you will recall that Johnson J, My Lady, declined to deal with Ms Freeall's submissions in relation to stations because of the urgency, and said it would be appropriate for them to come back. That's analogous to where we are here because-

F

MRS JUSTICE HILL: Well, and she was unrepresented.

G

MS STACEY: She was unrepresented. But there was an urgency factor. And the prejudice, he said, well there would have been prejudice because she could always come back. In the event she didn't. But here we're in a similar type of situation where we applied to extend on the basis of our case that there continues to be a real and present threat which justifies the protection remaining in place, and the harm which would be eventuated if it wasn't, if

H

the protection was lifted. And it's inappropriate, we say, to derail that application in the manner that's occurred, by extensive submissions having been brought in so late in the day. Now reliance, My Lady, is placed on the 24-hour provision. But the first point I'd make is that 40.9 contains no such time provision. It's a normal procedural rule, and we say it envisages promptness as part of the discretionary element. And I referred Your Ladyship to *Gee* text as a matter of essential procedural fairness, one would expect such applications to be made promptly. So it's open to Your Ladyship to have regard to that, and you should have regard to that because it's a very relevant factor in deciding whether or not to exercise your discretion in favour of the application.

MRS JUSTICE HILL: But is there not an argument that there is a general principle and there is a specific order in this case? So there may well be a general principle that requires fairness etc. but when there is a specific order that says anybody who wants to set this aside must give 24-hours' notice?

MS STACEY: Yes, but that specific order, I was about to come onto that. The 24-hour provision is intended to catch people who would be suitable for joinder. It specifically says so. It says, 'Any person applying to vary or set aside but give their name and address and be joined'. Let me just look at the petrol stations example.

MRS JUSTICE HILL: Yes.

MS STACEY: So I've got that in the new bundle in fairness as well. The older order. Page 2493. Actually no, that's not the case. No, that's wrong My Lady, that's paragraph six. Paragraph five is in more general terms.

MRS JUSTICE HILL: Yes.

MS STACEY: But then paragraph six goes on to say, do you have that?

MRS JUSTICE HILL: Yes.

MS STACEY: So they're to be read together. Paragraph six goes on to say that, 'Any such person must provide their full name and also apply to be joined as a named defendant'. So they envisage, My Lady, a situation where a person is at risk of being joined on the basis that they are identifiable – or as a person who should be joined because they are falling within the description of person unknown.

MRS JUSTICE HILL: But is that right-

MS STACEY: For joinder.

MRS JUSTICE HILL: Or is it – in light of what appears to be a lack of judicial resolution of the

tension between 40.9 and joinder?

MS STACEY: Yes.

MRS JUSTICE HILL: Is that right?

MS STACEY: Well that's what – certainly on the face of the two paragraphs.

MRS JUSTICE HILL: No, forgive me. I can read them. I can see what they say. But is the wording of six a considered position? So is the wording of six based on the proposition that if you are applying to vary you should become a defendant? Because is there not a recognition, as there is evidenced by Ms Branch's position that someone can be in the first part of six but not the second?

MS STACEY: Yes, My Lady, I'm not saying that five and six to be read as to preclude a 40.9 application.

MRS JUSTICE HILL: Okay?

MS STACEY: All I'm saying is the 24 hours provision applies in the context of person who are risk of being joined as named parties because they would be falling within the description of persons unknown.

MRS JUSTICE HILL: Is that not more procedurally problematic? That someone who is actually become a defendant only has to give 24 hours' notice?

MS STACEY: But she has to give 24 hours' notice-

MRS JUSTICE HILL: Because that brings with it all the bells and whistles of joinder does it not?

MS STACEY: But she wouldn't be joined unless and until the application was heard.

MRS JUSTICE HILL: No, but if the standard order is saying you can apply to become a defendant on 24 hours' notice, that brings with it greater procedural consequence than someone who applies under 40.9. It must do, because as Mr Simblet submits, 40.9 is a temporally limited provision, I want to make submissions but I am not going to be joined.

MS STACEY: Yes.

MRS JUSTICE HILL: But someone who is saying I want to be a defendant, that brings with it the obligation to place in a defence and all sorts of other bells and whistles and costs risks and all sort of other things. So I am just not sure your submission is helping me because…

MS STACEY: All paragraph five is saying is you have to make the application; you have to give notice that's not less than 24 hours in that particular context.

MRS JUSTICE HILL: Yes, but if someone can do that as a defendant, as a prospective defendant, to argue that therefore some more rigorous test should apply to somebody who is not even,

in inverted commas, applying for that.

MS STACEY: Yes. But then I suppose-

MRS JUSTICE HILL: It seems a little counterintuitive.

MS STACEY: Perhaps, but if such an application were made, then as a matter of case management discretion, one would consider the application and consider when it was to be heard and so forth. Just because you've made it within 48 hours, or at the 24-hour deadline, doesn't mean the application would be heard immediately thereafter. So-

MRS JUSTICE HILL: No, and I suppose, just to try and think about this sensibly.

MS STACEY: You have notify properly, and then-

MRS JUSTICE HILL: But also it is not within 24 hours of the hearing.

MS STACEY: No. It's not within 24 hours of the hearing. Quite. So you'd made the application and then you consider the application and you list it appropriately. Whereas here we say the first point is that this deals with a different situation, and I take Your Ladyship's point that it would be case managed appropriately. But the 40.9 situation doesn't contain-

MRS JUSTICE HILL: Is that right? What does it mean? I am sorry to go back to this. I mean I suspect what was – what happened is that – well I hope that the consideration that is now given to these issues might look – might lead to the wording of these provisions being thought about a bit more. But under five, 'Any defendant, or any person affected, may apply to discharge upon giving not less than 24 hours' notice'. So that means there must be a 24 hour gap between them saying I want to discharge, and them going to Court and saying please discharge. So it is 24 hours before a discharge hearing.

MS STACEY: Well not necessarily because they can – or what they-

MRS JUSTICE HILL: Where is the 24 hours attached to? Because it is not linked with the review hearing?

MS STACEY: It's notice of the hearing.

MRS JUSTICE HILL: Yes, but notice of the – 24 hours until what? It must be until they go to court to actually get the discharge.

MS STACEY: Of their application. Well that's the way I read it. 'May apply to vary at any time upon giving not less than 24 hours' notice of the application'. So you make the application to the Court, you notify within 24 hours that such application is to be made, and then comes before the Court and the Court decides when that application is to be listed for hearing. So it's not without – it's not-

MRS JUSTICE HILL: Well it may be, or the Court may say I am willing to discharge here and now.

MS STACEY: Well that would depend on the circumstance, yes.

MRS JUSTICE HILL: But there have been 24 hours-

[Crosstalk]

MS STACEY: -Case management situation-

MRS JUSTICE HILL: I agree.

MS STACEY: Just because you make the application doesn't mean – yes.

MRS JUSTICE HILL: Does your order not, as written at five, irrespective of the complexity of joinder at six, say someone can apply to discharge this order and go to Court to do that as long as we are told 24 hours before they do that.

MS STACEY: Come before the Court.

MRS JUSTICE HILL: Yes.

MS STACEY: For that purpose. But having given notice to the claimant.

MRS JUSTICE HILL: 24 hours.

MS STACEY: Yes. But a claimant can pitch up and say well it's too complex, we can't deal with it here and now.

MRS JUSTICE HILL: Of course, but conceptually.

MS STACEY: Absolutely.

MRS JUSTICE HILL: There is nothing in five to preclude-

MS STACEY: No. But that's a person – then six provides that that person should also be obliged to be joined at the same time.

MRS JUSTICE HILL: Yes, but I think we now agree that someone can be a 40.9 candidate without joinder?

MS STACEY: Yes. But five and six deal specifically with people who should be joined. So if one looks at-

MRS JUSTICE HILL: I am not troubled by joinder because Ms Branch is not being joined, you all agree that.

MS STACEY: No, exactly.

MRS JUSTICE HILL: So looking solely at five, irrespective of the review hearing listed today.

MS STACEY: Yes. Yesterday and today.

MR JUSTICE HILL: Ms Branch could have given no more than 24 hours' notice at any point in

the last year, and secured a hearing the following day at which she could invite the Judge to discharge the order. That would be consisted with this.

MS STACEY: But only if she applied to be joined. According to this. Because that's what the order says. Bennathan J decided that he could vary this provision because, if you like-

MRS JUSTICE HILL: Of the Chamberlain requirement to a similar effect?

MS STACEY: Yes. Exactly. But so the point I would simply make is 24 is dealing with this – the scenario where specifically there is to be a joinder, and Ms Branch has indicated she doesn't want to be joined. And she can't be joined.

MRS JUSTICE HILL: It is an indication though is it not? It is an indication of the way in which the order was anticipated to work?

MS STACEY: Yes.

MRS JUSTICE HILL: That if there was somebody who wanted to become a defendant-

MS STACEY: Yes.

MRS JUSTICE HILL: They could still get a hearing within 24 hours of giving you notice?

MS STACEY: They could, but My Lady I say – I've made my first point which is a different context. Albeit – so joinder, but the second point is yes it says 24 hours, but in this case Ms Branch is applying under 40.9 not wishing to be joined, having had knowledge. So the person that is envisaged by five and six isn't, I suggest, necessarily somebody who has had knowledge of the order being on foot for the length of time that Ms Branch has, making the application on essentially the eleventh hour, just before enquiry.

And back to 40.9 being a general procedural rule which would envisage promptness as a matter of discretion, the mere fact that the order provides for 24 hours' notice doesn't dispense, we say, with the need for you to consider whether or not the way in which she made the application against the backdrop of her knowledge, is appropriate.

And what's happened here, and I'll come to this if you're with Ms Branch on this 40.9 and dealing with it on a case management basis, we would say that it can't possibly be dealt with at the review hearing because we're on day two at 10 past 12. Had she made an application on 28 February when she was served the documents, and notified us of such application, we would have applied for more time. We would have framed our submissions differently. We would have carried out the research that we've been scrambling around to carry out in the course of last night-

MRS JUSTICE HILL: But are not – I am sorry to interject, I mean we are where we are in terms of

the difficulties. But by setting up an order that gives people 24 hours, you are – are you not inviting this risk if I may say?

MS STACEY: But only for those who are about to be – it talks about joinder-

MRS JUSTICE HILL: [Inaudible] the defendants it is more problematic, but by setting up an order that has a 24-hour provision and then timetabling these very complex hearings based on the assumption-

MS STACEY: Yes.

MRS JUSTICE HILL: Because you make the time estimate on the assumption that no one is going to turn up, no one is going to object, this is just going to be – so you say I need a day and a half just for me.

MS STACEY: My Lady-

MRS JUSTICE HILL: If you list it on that basis, that you know there is in place an order that would permit someone to give you notice, as they did here, one day before, that will then stymie that time estimate. The structure of these orders seems to me inviting this problem. Forgive me, that is a separate point. But I think there is a responsibility and there certainly would be, if I am looking at this order in future, to case manage this, if I may say, more proactively, or rigorously or better, whichever word you want to use. Because if you have that 24 hour provision you are inviting this problem.

MS STACEY: Well I see that, but perhaps there's a duty to join people who are about to fall into the category of the persons unknown. So that's – the fact that we accept that risk, if you like, in relation to such persons, is in recognition of the fact that-

[Crosstalk]

MRS JUSTICE HILL: But the order [inaudible] not only be joined, but to be joined, for the purposes of trying to set it aside.

MS STACEY: Yes. So to hear from that person, who is at risk of being joined, but Ms Branch we say isn't at risk of being joined.

MRS JUSTICE HILL: It is the same – it comes back directly to that point. Because the point is that the order permits somebody who wants to set aside this injunction to give you nothing more than 24 hours' notice. So by assuming when you list these that no one is going to attend, knowing there is that 24 hour permission which makes it permissible, you may say wrongly because she has had notice. If she only found out about the injunctions last Wednesday or Thursday, if she was not aware, she would still be within that 24-hour rule.

MS STACEY: She would, but I wouldn't be able to argue, as a matter of discretion, and you maybe wish to take the fact of her knowledge as a-

MRS JUSTICE HILL: I agree, but by your client selecting a time estimate that assumed no contest, I think there is a risk.

MS STACEY: Well I see that, and I – the privilege [inaudible]. And I can't avoid the fact that they're there. Yes, well. We're back to the fact that this is not an application under paragraph six or five, it is an application under 40.9, and it is an application under 40.9 as I say to challenge, and this is the line – the first line of Ms Branch's witness statement, to challenge an order that hasn't yet been continued. So pre-emptive if you like. Back to the wrinkle which I say 40.9 – 40.9 seems to assume that a non-party is seeking to challenge an order that's already been made. Set aside an order that's-

MRS JUSTICE HILL: But is the thrust of what is said in *Barking* not that that is the only way in for someone like her? I mean I agree that conceptually a point taken took an entirely narrow reading of 40.9, all Ms Branch can do is invite me to set aside the orders already made.

MS STACEY: Yes.

MRS JUSTICE HILL: But the clear thrust is it not of the reference to 40.9 in *Barking* is that as you have conceptualised these injunctions, they are to be reviewed and continued, and her role in that 40.9 process is therefore inevitably looking forward.

MS STACEY: It may be a question of when the application was made. And the manner in which it's made. So can you make a 40.9 application seeking to discharge an order pre-emptively? Just before a continuation? And thereby – it's the urgency point really in Johnson J; can you entertain such an application or do you require it to be dealt with on a different occasion?

MRS JUSTICE HILL: But do you say as a matter of construction of 40.9 that she has no *locus* in a future-facing argument? She has no *locus* on what happens beyond 2 May?

MS STACEY: I say as a matter of your discretion dealing with – if she's got through the gateway, if you accept she's got the good point, she gets past the good point argument. I say that as a matter – you're being asked to entertain the application here and now, as I understand it, at this hearing.

MRS JUSTICE HILL: I think so.

MS STACEY: You are, yes. It's said in terms. So as a matter of your discretion, the delay point is

a factor which we say should weigh heavily in the balance in the objective-

MRS JUSTICE HILL: No forgive me, it is more a drafting point or a construction point. 40.9 provides that someone can apply for an order that has been made to be set aside.

MS STACEY: Yes.

MRS JUSTICE HILL: Does that mean that she does not have standing to object to the application of a future order?

MS STACEY: Well conceptually-

MRS JUSTICE HILL: But that is what I am saying.

MS STACEY: The variation. We're asking for a variation. So we're saying you don't need – necessarily wrong to new order, so it can be a continuation of the existing order if you're with us on variation. But that variation hasn't yet been made. And on the face of the application, I mean it won't be done the head of opinion that – it's important because it comes back to the timing. She's asking to – she's seeking to challenge pre-emptively the continuation that we're seeking that the Court hasn't yet made.

MRS JUSTICE HILL: So you are saying effectively that that is another legal-

MS STACEY: It's another factor.

MRS JUSTICE HILL: -Linguistic reason for shutting her out?

MS STACEY: I am. And it's connected if you like with the timing point, the delay. And the prejudice because all of that amounts really to the same thing. She could have done it before; she's done it at this very late stage in circumstances where she could have done it before. Thereby bounced us into a situation which we were ill-equipped to deal with. And that doesn't seem to fit very neatly with 40.9 which seems to envisage, My Lady, somebody finding out about an order that has been made.

MRS JUSTICE HILL: Like an insurance company or a-

MS STACEY: Like an insurance company, exactly. And coming to Court and therefore explaining their position and seeking to set it aside. But we've had 12 months here. Not somebody, knowing about the order, deciding not to do anything about it, which is essentially because I'll see whether it's going to be continued or not. Not doing anything once they were served with the documents. And on the Friday before the Tuesday serving a 35-page skeleton argument making a number of points which attack the whole basis of the injunction having been granted in the first place. All of that, My Lady, is-

MRS JUSTICE HILL: It is almost then effectively, if one were to take 40.9 on its face, that I have

got two entirely separate applications before me. I have got 40.9 saying set aside everything that went before. And then I have got you saying oh contraire, continue it with a minor variation.

MS STACEY: Well that's – yes. Because the 40.9 – yes, the only order that's currently in place is the order of Johnson J-

MRS JUSTICE HILL: So then are we not faced with a scenario where we have got this procedurally challenging world, if I can put it as neutrally as possible, of persons unknown injunctions, and then we have got this rather square position of 40.9 and the round hole of the persons unknown. And we are trying to marry them up?

MS STACEY: Yes.

MRS JUSTICE HILL: And the senior Courts so far have identified 40.9 as the way in for someone like Ms Branch. In the context of the review jurisdiction.

MS STACEY: Understood. But in an – yes. In the context of the review – Well let's look at *Barking* and just see what they say.

MRS JUSTICE HILL: Yes. It is in our bundle I think.

UNKNOWN COUNSEL: It's in our bundle and it begins at 41.

MS STACEY: Tab three, thank you.

UNKNOWN COUNSEL: And there's several references to it.

MRS JUSTICE HILL: Yes, I have got here Master of the Rolls at paragraph 89. Yes.

UNKNOWN COUNSEL: There are other references, My Lady, to 40.9 as well as that one.

MRS JUSTICE HILL: Are there?

UNKNOWN COUNSEL: Yes. I can find them.

MRS JUSTICE HILL: Right. Person who is not a party directly may apply, so that is general – does not say when.

MS STACEY: 83 is another reference, My Lady, going back. Page 63. And 62 is the other reference.

MRS JUSTICE HILL: Sorry, so 83?

MS STACEY: So 62, 83 and the paragraph 89. Those are the three.

MRS JUSTICE HILL: 63 did you say, no?

MS STACEY: 62.

MRS JUSTICE HILL: But all-

MS STACEY: So none of those-

MRS JUSTICE HILL: With the greatest of respect to those who use these words, all they do is recount the wording of 40.9.

MS STACEY: Exactly, they. What they don't do, My Lady, which is why I wanted to look at them, is they don't suggest that in the context of a review, a time limit review, 40.9-

MRS JUSTICE HILL: No, I mean I think the-

MS STACEY: So it comes back to the wording, the language of 40.9. The application needs to be made once an order has been made, that person can apply and have it set aside. Which is back to the submission I was making to Your Ladyship previously. Which is why started by saying this is an improper use of the 40.9 procedure.

MRS JUSTICE HILL: So presumably what it boils down to is this? If I believe that Ms Branch is in under 40.9, on your submission the limits of her involvement are in relation to the past order?

MS STACEY: Yes.

MRS JUSTICE HILL: And you say for all the good reasons you have taken me to in the skeleton, said that those orders were properly made. Number one.

MS STACEY: Exactly.

MRS JUSTICE HILL: Number two, if she is under the 40.9, because of the linguistic construction of the rule, quite aside from the case management issues around delay, on a proper construction of the rules, she needs to wait until the injunction is made afresh, reviewed or renewed or whatever we say, and then come back. Is that where we have got to?

MS STACEY: That's where we've got to. And I accept [inaudible] on the basis of the language, yes. It's not appropriate to deal with it here and now because it prejudices the expiry and I don't – my client's are keen to ensure the continuation of-

MRS JUSTICE HILL: Unless the other intellectual way through it is that you go back to your very first position which is that this is one order that was made, and I am applying for it to be extended.

MS STACEY: Yes.

MRS JUSTICE HILL: And therefore there is a distinction because she is trying to set it aside in the extension process, does that make sense?

MS STACEY: It does. It does.

MRS JUSTICE HILL: And that is the – because to be fair, there is a bit of a cake and eat it position is there not? Because you are saying this is an extending process, for general

purposes. You are saying this is a review.

MS STACEY: My Lady I accept that, but that's why I said the variation has not yet been made. Which is true, I think technically speaking. We are saying it's a continuation of the positional basis, but I don't want to pre-empt anything, I don't want Your Ladyship to [inaudible] so unless I'm told the variation is gone to, the only order we have is the order that we're seeking which one is the subject of the applications. So yes, there is temporal difficulty.

So I just remind Your Ladyship that we're dealing with this in the basket of discretion at present. Having made the point on good reason for the gateway. So discretion we rely on firstly delay, secondly prejudice. If the matter were dealt with in the manner that's been suggested in terms of any risk of the extension that we're seeking being derailed. The fact that had the application been made soon we would have reframed submissions and we would have dealt with the issues rather differently and asked for more time.

And then finally merits. We're back to merits on – under discretion. Because we say that even if, My Lady, you were of the view that there are good points, Your Ladyship has to consider which of the points are good. And if you were to allow the application, consideration must be given as to which points can form the subject of submissions. As a matter of your discretion. And refer back to our note in relation to that.

And I think you have our position. If you're with us, and you are of the view that there was no – it was all given proper consideration to all the points properly raised and all the rest of it, then the points which are sought to be raised by Ms Branch we say go nowhere. And back to the test of is there a real prospect of her being able to obtain the [inaudible] is different.

My Lady then I say, if you are minded to allow the 40.9 application regardless of all of that, then it should be siphoned off on a case management basis. And the reason for that is well given the extensive nature of the submissions and the skeleton, we're going to need much more than this afternoon. Can't affect expiry, I've made the points on prejudice, and would ask the matter to be reserve to Your Ladyship because otherwise there's going to be duplication and wasting of court time. And it ought to be possible, and I would have thought My Lady, to include in the order so as to not prejudice Ms Branch if you're with her on the 40.9 application, provision for her to make that application. It is just simply an order in there and identifying the points which she – considering the [inaudible] for good

ones. And appropriate, for submission to be made-

MRS JUSTICE HILL: Sorry, could include provision for her to make the application.

MS STACEY: To make the application. But if you're-

MRS JUSTICE HILL: Are you saying she has not actually made it?

MS STACEY: For the hearing, sorry. For the hearing of the application. You could include, it's entirely a matter for Your Ladyship, but if an application is to be made, provision could be made for a hearing to be listed.

MRS JUSTICE HILL: I see.

MS STACEY: For that application.

MRS JUSTICE HILL: You are not taking a Rule 23 point against her?

MS STACEY: No, it's case management directions for the hearing of that application which would include identification of the points which you will exercise your discretion and consider to be good ones and proper for her to make. And we would say they would exclude necessarily any points in relation to the environmental word in the description of persons unknown because that is something she has no standing in relation to. In the same way as she had no standing to make submissions in relation to the third party disclosure application. Because she is not affected by that.

MRS JUSTICE HILL: And you draw distinction between petrol stations, Tower and Haven.

MS STACEY: And we draw a distinction between petrol stations, Tower-

MRS JUSTICE HILL: So you say conceptually, or evidentially justified for me to limit her 40.9 involvement to the petrol stations?

MS STACEY: Limit them to properties and limit them to issues. Because the issues – you're being asked at the moment, if I understand it, to allow submissions in relation all the points in Mr Simblet's skeleton. But there needs to be identification of what the proper scope of the submissions could be.

MRS JUSTICE HILL: But you have made the point have you not that she has an additional hurdle to get over in relation to petrol – forgive me, Haven and Tower?

MS STACEY: Yes.

MRS JUSTICE HILL: Because you do not even concede direct effect on that?

MS STACEY: No.

MRS JUSTICE HILL: Quite aside from the other building blocks of your argument?

MS STACEY: Exactly.

MRS JUSTICE HILL: Thank you very much.

MS STACEY: So having said all of that, My Lady, I was going to come back to, and complete my taking you through the review. We're nearly there. At last, when we rose yesterday I was asking you to read the past evidence and I was then going to take you to the current evidence, the skeleton, and wrap it up which shouldn't take very long.

MRS JUSTICE HILL: If it helps you, because we have done this a little bit back to front. No criticism of anybody. But yesterday, day before? Day before, whichever day that was, Monday. Let me just go in the fresh evidence here. So I have already read [Lashbrooke One?], [Garwood Three?], [Austin Three?], Pritchard-Gamble One, [Oldfield One?], Oldfield Two and Oldfield Three.

MS STACEY: That's very helpful.

MRS JUSTICE HILL: I have not gone through all the appendices, but I have read the statements.

MS STACEY: You've read the statements.

MRS JUSTICE HILL: Yes.

MS STACEY: And you will note – have noted therefore that there's reference to the background, the risk as asserted in the witness statements in relation to each of those properties, and the harm that would be caused if the protection afforded by the injunctions were not continued.

MRS JUSTICE HILL: And the very helpful, if I may, the [inaudible] anyway.

MS STACEY: I'm grateful because I was about to take you to the skeleton. So paragraphs – if I can just do it quickly in this way and ask you to pay particular reference to skeleton at 11-19.

MRS JUSTICE HILL: Bear with me a second.

MR SIMBLET: My Lady, while you are turning that up, in a sense you have commented on this already. We have dealt with matters to some extent procedurally in reverse. Technically of course, this is my application to be heard on behalf of Ms Branch. And you've heard the arguments as to why I shouldn't be. When would – and yesterday you said the case was listed for a day and half and you've got this afternoon to deliver your judgment. Is there a point at which you were proposing to invite me to make any oral submissions, and is that time after lunch?

MRS JUSTICE HILL: Yes, it is. It is. I should have made clear.

MR SIMBLET: I shall sit down.

MRS JUSTICE HILL: That I have had to make other arrangements. So you have this afternoon. I

should have made that clear, my apologies. Yes, so I have got your evidence and I have got your skeleton here.

MS STACEY: You've got all the evidence; you've got the chronology. The skeleton.

MRS JUSTICE HILL: And the particular paragraphs you have flagged in your skeleton?

MS STACEY: Yes. 11-13. Not all the references but the key references to the original threat. You've read the witness statements anyway as you have indicated. Fourteen, 15 refers to continued threat, and you'll see there are specific references under the heading of petrol station sites, corporate buildings and oil refinery sites. So we've pulled out the key, most recent incidents in relation to those. Paragraph 16, My Lady deals with broader incidents which equally dealt with in Mr Pritchard-Gambles' overarching witness statement, if I can put it that way. And if I can bring matters right up to date with the latest word on that, there's a clip that I wish to hand up to Your Ladyship, it's a news item of yesterday.

MRS JUSTICE HILL: Thank you.

MS STACEY: Which is a statement by Extinction Rebellion. It's to step up the campaign. I think this is dated one day ago, that was yesterday. We printed it off this morning. And I'm referring Your Ladyship to it specifically for the purposes of on page three you'll see a statement on behalf of Extinction Rebellion, top of the page. Refers to a demand for the halting of all new coal, gas and oil exploration.

And then you'll see the third paragraph down on the third page, 'Next we will reach out to supporter organisations to start creating a plan for setting up our campaign to force an ecosystem of tactics that includes everyone from first-time protestors to those willing to go to prison'. So it's an escalation, it follows on from the ultimatum letter. It just represents a – we understand, the latest-

MRS JUSTICE HILL: So paragraph 16 you would add a sub-paragraph. In light of the – what is the date on this? It is literally today?

MS STACEY: Yes. And that then makes good the point in paragraph 17, going back to the skeleton which is saying the protest campaign is far from over on the evidence. Protest groups continue to attempt to put pressure on the government to halt new investments in fossil fuels and Shell and its asses will, as before, continue to be a target.

And then at 18, we made some general points which are relevant to risk, My Lady. And they are organisation points which you'll see listed at paragraph 18. And I'd remind Your Ladyship that it's not just JSO, the – on the evidence it's – there's a significant degree

of overlap between the groups. You have – heard reference to Animal Rebellion and the austerity protest groups JSO, Extinction Rebellion, Insulate Britain and other groups.

And then finally My Lady at paragraph 19 on evidence you see the reference to harm? My Lady will recall the two-stage test in the *Bastin*[?] judgment of Smith J, where he essentially says, and I can take Your Ladyship to it if you wish, but essentially it's, 'Is there a real and imminent risk of the activities occurring?' And then secondly, 'Would the harm be so grave or serious as to cause irreparable loss?' That's essentially it. And the greater the harm, whilst there's no fixed or absolute standard for measuring the risk, the greater and the more serious the harm, the more likely it is the Court will be satisfied that the protection should remain in place.

MRS JUSTICE HILL: And you rely on the potential severity of the risk?

MS STACEY: And we rely on-

MRS JUSTICE HILL: So, forgive me, severity of the harm.

MS STACEY: In relation to harm we rely on what's set out in 19, in summary. Haven and petrol stations, storage of flammable petroleum products, and that gives rise to an extremely serious potential risk of harm. Asking rhetorically if this injunction wasn't in place and that were to happen, could that harm be capable of being compensated for in damages, or be undone? The answer to that is clearly no. And we have-

MRS JUSTICE HILL: Because it involves a risk to life and limb?

MS STACEY: Indeed. Health and safety risks. And we have set out in paragraph 19a a legitimate concern that if it weren't in place there is a real risk of potentially very serious incident which we cause real harm to the protestors, to the claimant's staff and/or to the general public. Which is incapable, simply, of retrospective remediation.

And so far as Tower is concerned, the harm is different, but you've seen the evidence of what has happened in the past, you've got the evidence for example of the protestors climbing up on the canopy of the tower. In one of the earlier witness's, I think it was Mr Brown's statement, Brown number one. And indeed in – that's summarised also in Ms Lashbrooke's statement.

And there's also a risk of trespassers who were, if they were to enter into the building as we are prohibiting them to do, would cause danger to the health and safety of staff and contractors, and the general public to whom my clients have a duty to protect. So harm is an important factor, but the two tests are both risk of the activities occurring and the harm

that would eventuate. So for all of those reasons, My Lady, we say that it's quite clear that the protection should be in place and that his Court, as other Judges have done in relation to similar injunction proceedings since January, should continue the protections which were obtained by my clients.

So far as the duration is concerned. Actually, before duration, 43 of the skeleton My Lady deals with persons unknown. And as you'll see at paragraph 45, 46 and 47 in relation to stations, we are asking for a variation of the order to remove the word environmental from environmental protest campaigns. Now My Lady, there's an argument to be made that the label or the name of the particular protest group is legally irrelevant. Because *Canada Goose* requires that the persons unknown be described by reference to the acts which are alleged to be unlawful.

MRS JUSTICE HILL: Not the rationale.

MS STACEY: It's entirely irrelevant who they are, what their motivations are, how -what they call themselves. So for that reason I say that it should be removed, as a matter of law. But in any event we've got the evidence, My Lady, that it's not simply environmental protestors, and therefore that no longer reflects the threat which we say is imposed.

MRS JUSTICE HILL: Because you say the *Bastin* test is now met by those who are so described?

MS STACEY: Exactly. And so far as duration is concerned, we deal with that My Lady at paragraph 50 of the skeleton argument. And at the outset you'll see what we say there. Essentially our position is we're seeking an order until trial or further order, but with the 12-month backstop. That doesn't prevent, My Lady, if you're with Mr Simblet and his client in relation to 40.9. It doesn't prejudice her ability to apply to the Court in that period. But the reason for the 12 months, and it's not the case that I'm seeking anything beyond the 12 months as suggested by this might. If I've said anything to the contrary, that's not my intention.

The 12 months is simply there to allow for the procedural steps that will need to be taken by my client and laypeople post-Barking and Dagenham, once they understand what the legal landscape is. And it is, I suggest, an entirely appropriate backstop period for my client. But it's not to be taken from that that they are simply seeking a continuation for 12 months so they can sit on their hands and do nothing between now and then.

And so far as terms are concerned, My Lady our headline position is that everything was considered by the Judges before and it's all appropriate. But I, if I may, reserve the right to

come back in relation to any terms depending on how things develop this afternoon.

MRS JUSTICE HILL: Certainly. Is there anything else you wish to say, Ms Stacey?

MS STACEY: Yes. I should also make a point that the duration was not simply to do with Barking and Dagenham, it was also consistent and enforced-

MRS JUSTICE HILL: HS2.

MS STACEY: Well HS2 but also the nature of the threat [inaudible]. So originally, in the evidence you will have seen references to the next two to – three to four years being critical. So there are long sustained periods of time over which these protestors have expressed the intention to continue their campaigns. So it's not a temporary thing, and that is also a factor which needs to be weighed in the balance when considering duration.

MRS JUSTICE HILL: Understood. Okay.

MS STACEY: [Inaudible] finally.

MRS JUSTICE HILL: Thank you.

MS STACEY: I should tell Your Ladyship what our position is on publication. Because I've said to Your Ladyship that everything was considered properly, but yesterday you'll recall that Mr Simblet made the point which I've described as a good one. Well I should caveat is potentially a good one in relation to the writing on the forecourt.

MRS JUSTICE HILL: Yes. Did I say that?

MS STACEY: I think that was my description.

MRS JUSTICE HILL: Yes. It may well be, but I am not sure I have given any view, that is all.

MS STACEY: On the face of it it seems – well certainly one that I hadn't considered, but I've considered it overnight and I just want to just finalise what our position is. So it's in fact not – it doesn't change anything is essentially what we say. So Johnson J in paragraphs 68-71?

MRS JUSTICE HILL: Yes.

MS STACEY: Sorry, I am fingers and thumbs. And it is the wrong authority, I'm sorry. Yes, refers to Cream[?]. And refers to the fact that Parliament, you'll see the sentence starting, 'Parliament enacted Section 12.3 to address that concern, going back was the concern being that Article 8 being incorporated into domestic law might result in the Courts readily granting interim applications to restrain publication by newspapers of material that interferes with privacy rights'. So that's the concern. 12.3 was enacted to address by setting a high threshold for the grant of an interim injunction for such cases. And it codified

the prior restraint principle.

And Johnson J said, 'That policy motivation has no application here'. We would adopt that. So the fact that people are writing on forecourts or spraying words on walls doesn't engage the policy consideration or motivation that gave rise to 12.3. Equally, he goes on to say My Lady, that, 'The word publication doesn't have an unduly narrow meaning so as to apply only to commercial publications'. Fine. But then to track down that sentence, 'It should be applied accordingly to cover any form of communication'. And then at 70, the meaning set out by Lord Sumption in *Latchow*[?] is sufficient to achieve the policy intention. He then says, 'There is no good reason therefore for giving the word publication an artificially broad meaning so as to cover for example demonstrative acts of trespass in the course of a protest. Such acts are intended to publicise the protestors' views, but they do not amount to publication'.

And equally, where a protestor, in the course of a protest and the context of a protest, is writing on a forecourt or on a wall, they are not publicising, they are expressing – they are intended to publicise the protestors' views, but they do not amount to publication.

And at 71, My Lady, the point is made that, 'The word publication has a narrower reach than the word freedom of expression, or the term freedom of expression. And it's not intended to apply to all forms of expression'. That's paragraph 71.

So for those reasons, My Lady, our position is that the writing to which Mr Simblet made reference, doesn't fall within publication under Section 12.3. So our original position still stands. But in any event, we come back – it's a non-point anyway because Johnson J proceeded on the basis that even if it did-

MRS JUSTICE HILL: The likely test is met.

MS STACEY: Exactly.

MRS JUSTICE HILL: Anything else you would like to say, Ms Stacey? Thank you.

MR SIMBLET: Well My Lady, before Ms Stacey sits down on that point, it was the – my submission in the written document and supported by the orders made in the *Ineos*[?] case that that might very well be Johnson J's opinion, but in fact he is bound by the decision in *Ineos*. The submissions we've heard at the moment have not addressed that point.

MS STACEY: My Lady, I think I addressed this yesterday when I said that Johnson J was right to say that there had been no argument and they proceeded on the assumption that Section 12.3 applied. That there had been no specific argument in relation to the point and there

Johnson J's judgment is the first, as I understand it, considered exposition of the circumstances in which the test applies and the question of whether it applies in the context of such protests.

MRS JUSTICE HILL: All right. Mr Simblet, we will just take a very short break and then we will discuss where we go from here. Five minutes.

Court adjourns.

Court resumes.

MRS JUSTICE HILL: Mr Simblet?

MR SIMBLET: Well let me just try to – you said you wanted to take stock. Can I begin by making some points about where we have got to on the *locus* of Ms Branch? And of course one point that has now been teased out essentially under scrutiny from Your Ladyship, is that since these injunctions are coming to an end anyway, the real value of Ms Branch's contribution is not in relation to past acts, but in relation to the continuation of the injunctions.

And to that extent, anybody could be sitting here at this *ex parte* hearing that these claimants have arranged on their timetable and for their convenience and seeking to object to the continuation of the order. So Ms Branch can hardly be in a worst position by-

MRS JUSTICE HILL: On what basis though, Mr Simblet? That is your general discretion point before 40.9 is it?

MR SIMBLET: Well let's leave aside for – yes, leave aside 40.9. Where we have got to is the claimants, and this is the fallacy with which Ms Stacey persisted under exchanges with the Court this morning. Where we have got to is if in fact, as My Lady puts it, the claimants have injunctions which are going to expire next week, what they are really seeking to do is have new injunctions granted. Or, and I might have said the same injunctions re-granted, though of course they do seek some differences. So what they are seeking is new injunctions to be granted. So what this is on that analysis, but not Ms Stacey's analysis where she uses review and so on, is a hearing at which the Court is being asked to grant relief against persons unknown. And which therefore anybody is entitled to make submissions and oppose.

MRS JUSTICE HILL: But is that right, Mr Simblet? I mean I have given no firm view about how the hearing should properly be characterised, but they are injunctions that are sought against a defined group of persons unknown, not persons unknown at large. So is it right that

simply anybody could make representations?

MR SIMBLET: Well yes. Because not only is that the point that's made in *Canada Goose* that anybody – I mean the dicta are pretty broad in *Canada Goose*. And it is essentially for the person themselves, to an extent, to define whether they consider that they might be affected by these orders. I mean this is the – this is one of the pernicious results of the claimants suing everybody, or suing nobody but seeking to bind potentially everybody, and say that you become in breach of the injunction by doing the act.

So the trouble with this persons unknown procedure, in a protest context, is that a person may want to put forward the position that particular things should not be subject to an injunction from the Court. Because they are, for instance, lawful protest or something like that. On Ms – on the way these proceedings have been brought, either they can say so before the orders are made, but in most cases they won't know because they've not been named and they've, in many cases, not even been served. Or notified. And sometimes you get orders withholding – withholding notification of the fact of the hearing until after the injunction has been granted. It's not what's happened here, but it can happen.

So the claimants say they should be able to get their injunctions without any opposition from anybody, or without naming a defendant. But the effect of the orders that are obtained, and it's very clear, is – and this is where the *Gammell*[?] decision which is referred to in *Barking* and so on becomes of importance. A person can end up in breach of the injunction, and at that time, by breaching the injunction, becomes a defendant.

So essentially, the – everybody is given the choice of either do completely what the claimants would say their order means, however broadly it's drawn or however they've gone about it. And you will see that in this case they sought orders that Judges refused to make, and we've had the example of Bennathan J. Or they can breach the order and find themselves facing the very serious consequences of contempt proceedings. Or they can turn up in front of Johnson J and be told, 'I don't want to hear you', and, 'You're not having an adjournment'.

Or they can do what Ms Branch has done, which is to show up to this hearing before My Lady and say these injunctions should not be re-granted, and there were – and the way that the Court has so far looked at them has some difficulties. And there are difficulties with the claimant's case going forward. And one irony of this case is that although it is on the petrol stations injunctions, is that although it is alleged that there is a conspiracy, and

that is the only basis upon which the injunctions are sought, a conspiracy between a whole range of unidentified people who, on the evidence and on the submissions Ms Stacey made yesterday, would appear not to be in agreement about major things.

It's hard to see how environmental protestors protesting about the use of petroleum products and the carbon emissions and so on, have anything in common with people turning up at a petrol station complaining about the cost of living whose contention is that fuel should be cheaper. It's hard to see, as a matter of common sense, how that can be any sort of common cause there. But that is the basis upon which the claimants now put their case and ask for you to extend the injunction that have already been granted. If – but at the same time, where there is an agreement is between the various fuel companies involved, who are coordinating, it would appear, although you have very imperfect information about that, a series of applications to Courts for injunctions to stop people doing things that they would rather didn't happen.

So if there is a conspiracy, it appears to be a conspiracy to seek remedies from the Court, rather than a conspiracy between completely unidentified people who appear to have very different purposes. Yet that is the central plan upon which the petrol stations injunction is to be pursued.

So we say – and the second point is, or not the second, the additional point on being heard, is that it is Ms Stacey's submission, and she was pressed about this but she maintains it, that Jessica Branch is not somebody who can become a defendant, and it would not be proper for her to be joined as a defendant. So her contention therefore is that it's only people who are tort [inaudible] who may find themselves subject to enforcement action, who can make representations against it, and effectively nobody else can because they don't have any *locus*. So that is how the Court-

MRS JUSTICE HILL: I am not sure that is quite how she put it. I understood her to be saying-

MR SIMBLET: But it's the consequence of what she says.

MRS JUSTICE HILL: I am not sure that is right though is it? Because she accepts that your client in principle could be within 40.9 but says there are reasons why she should not be so recognised.

MR SIMBLET: Well – but she – no, she says that. But she also says that there are difficulties with 40.9 in terms of going forward. I'm looking at the injunctions you're being asked to make going forward. Ms Branch isn't asking to set aside orders that haven't yet been made. How

could she? She is seeking to say you shouldn't make these – and that's what the – that's where the logic of the claimants-

MRS JUSTICE HILL: So you say the combination of Ms Stacey's position that Ms Branch cannot be a defendant, and one of the reasons she is not properly within 40.9 at all is because that would limit her to submissions about the past order?

MR SIMBLET: Yes.

MRS JUSTICE HILL: Which means that she has no – there is a gap?

MR SIMBLET: Yes. That's her submission. That's the consequence of where we are, isn't it?

MRS JUSTICE HILL: I think – I mean-

MR SIMBLET: I can't see how that isn't, on what we've heard.

MRS JUSTICE HILL: I think that was one permutation of the submissions. I think Ms Stacey, I understood you to also be saying that one way of characterising the 40.9 involvement is that it is an ongoing order that is reviewed, and therefore she would have *locus* in a future facing way.

MR SIMBLET: Yes.

MS STACEY: Exactly.

MR SIMBLET: Yes, but that isn't right.

MS STACEY: I said it was a time limit point. Yes. One way of characterising is was – not a new order, effectively, but it's saying it's a continuation.

MRS JUSTICE HILL: Yes.

MS STACEY: And that's because that was consistent with the way we put our case on review.

MR SIMBLET: But the trouble with that is that that is wrong. Because it is a new order. And the fact that it is new, required to be a new order, is the subject of binding authority from the Court of Appeal in *Ineos*. And if I can bore you with *Ineos*, which is the Court of Appeal's decision which is in our bundle of authorities. And again pausing there, if it comes to the issue of do we have a good point or things to raise.

A number of times we've had to look in our authorities to make out parts of Ms Stacey's case. Or to consider parts of Ms Stacey's case. We had to look at the conspiracy authorities there yesterday, we've now got to look at *Boyd v Ineos*, so if we weren't here with our authorities, what point would be made?

But turning to *Boyd -v- Ineos*, Lord – sorry, I've written on my notes what the actual reference is, but there are two references from Longmore LJ, as to what was wrong – one of

the things that was wrong with the injunctions made. Paragraph 4, page 247 of the authorities bundle, 'The injunctions granted by the Judge against the first and second defendants have acceptable geographical limited but there is no temporal limit. That is unsatisfactory'.

MRS JUSTICE HILL: Sorry, paragraph?

MR SIMBLET: 43. Page 247. And then over the page, paragraph 50 headed disposal, 'I would therefore discharge the injunctions made against the third and fifth defendants and dismiss the claims against those defendants. I would maintain the injunctions against the first and second defendants, pending remission to the Judge to reconsider or one, whether interim relief should be granted in the light of Section 12.3 (h) (r) (a)', and obviously I've got submissions about the implications of that. And, 'Two, if the injunctions are to be continued against the first and second defendants, what temporal limit is appropriate'.

So the Court of Appeal, leave aside all these anecdotes that you've been told about people wandering along in front of Judge at the Queen's Bench Division whose judgment nobody can see and we're dependent on the applicant's own note of the proceedings to work out what's going on. The Court of Appeal have determined in those – in that case and others, that there should be a temporal limit to the injunction.

So therefore what is being sought from My Lady is new injunctions. Because the old ones cannot go on indefinitely because if one of these Judges, whether it's Bennathan J or Johnson J, had made an order without a temporal limit, that would be unacceptable. And wrong. So her submission, and where she – this is why we got into this debate although the Court and she got into this debate about quite what the role – what your role is and whether you have to sit there, as it were, bound by what Bennathan J or Johnson J thought about a point, albeit the very limited assistance they've had from anybody not wanting an injunction to be granted.

Whether you were bound by that, it's quite plain, and I think you had got from my observation of those exchanges, is you had got to the position that plainly you're not confined in a case where there have been no named defendants, and the case is not properly *inter partes* in any sense, you are not bound by the fact that other Judges have taken a particular approach to the evidence when you come to look at whether injunctions in similar terms should be remade. And that being the position-

MRS JUSTICE HILL: Well I think that was close to Ms Stacey's concession in light of *Gee*-

MR SIMBLET: Yes, she got – essentially she eventually accepted that that must be the-

MRS JUSTICE HILL: Yes-

MR SIMBLET: But the logic of-

MRS JUSTICE HILL: Caveated slightly, but still the *Gee* rehearing point was made.

MR SIMBLET: Yes, absolutely. And the logic of that, and pausing there, that's again a good point that we have raised. You were being told yesterday that the law was totally different on that point, and it was only after attention had been drawn to what Kavanaugh J had done in *Lee* and the number of defendants and so on that that – those further researches are undertaken. But leaving all of that aside, the fact is that if you are not required slavishly to follow what Johnson J has decided, particularly knowing that people wanted to oppose it and weren't allowed to. Or what Bennathan J has decided, then it becomes therefore at this hearing a situation in which people who wish you not to do what Ms Stacey applies for, are entitled to raise objections and be heard.

Now one means by which the Court has suggested such intervention might in this case-

MRS JUSTICE HILL: What is the rationale for a category short of 40.9, Mr Simblet? I am sorry if I am not following it.

MR SIMBLET: No, on the face of it there may be people who say they don't want to be joined. I've explained why.

MRS JUSTICE HILL: Yes.

MR SIMBLET: Don't agree with the order, object to its chilling effect. And may – I mean we say you don't have to use 40.9, but-

MRS JUSTICE HILL: But why?

MR SIMBLET: Well because anybody is entitled to say, 'I wish to object to this order'.

MRS JUSTICE HILL: But is that right?

MR SIMBLET: Well it may be that it's not because the solution is, as *Canada Goose* talks about and 40.9 talks about. 40.9 – but then of course – but then the difficulty with simply jumping into the 40.9 hole is that Ms Stacey says, and still maintains the position that has difficulties about applications going forward as opposed to things that have happened in the past. So if she's right about that, if she's right about that and she's right that Ms Branch cannot properly be joined as a defendant-

MRS JUSTICE HILL: It is the-

MR SIMBLET: Then either Ms – nobody can ever hear from people like Ms Branch, or there is

some other means by which they can address the Court. And that's why I'm putting my submissions in the way that I did. She either has to, as it were, shut up and go home because you're not a defendant. Or the Court has to allow her to address it and if 40.9 is – has the construction that Ms Stacey raised, then that causes difficulty. That's how I put it.

Now you, My Lady, have suggested a means by which her opposition can be formalised, by using 40.9. But if you don't do that and you apply the logic of the position that was being discussed yesterday, which is that the Court may put out of its mind anything Ms Branch has had to say, then what you would have effectively done, is remade orders, knowing that there were opposed, and not allowed anybody to oppose them. And then some other Judge in six months to a year's time, would be given some note of whatever went on here. I mean if it were – we're waiting a year for a judgment from Sweeting J. But leaving that aside, if there were no formal judgment, then some note would be produced and we'd have some anecdotal evidence about what went on in some other proceedings before somebody else about which we know little. That cannot be the way.

MRS JUSTICE HILL: Yes, and-

MR SIMBLET: -In which litigation is conducted in these Courts.

MRS JUSTICE HILL: No. And it may be that -I am conscious of the time so I will take the lunchbreak shortly, Mr Simblet, but it may be that we are perhaps in this unusual procedural space because of the novelty of the persons unknown jurisdiction.

MR SIMBLET: Well yes.

MRS JUSTICE HILL: And the existence of 40.9.

MR SIMBLET: Yes, I keep having to say-

MRS JUSTICE HILL: But being the best we have got, but not being a perfect solution. Because 40.9 has plainly been there long before persons unknown.

MR SIMBLET: Absolutely – well not if – not according to the Master of the Rolls, the current Master of the Rolls in *Barking* where apparently – because there have in the past been persons unknown injunctions pursued in relation to coming on land. And that's why I accept and I-

MRS JUSTICE HILL: Yes, but-

MR SIMBLET: It's the use of persons unknown in cases that go outside simply turning a trespassers will be prosecuted notice into one with legal effect.

MRS JUSTICE HILL: Yes. I agree.

MR SIMBLET: And that – but that, we say, is their choice. They've chosen to bring their proceedings in this way. Normally the Courts expect people to say who is it you wish to proceed against and why? You say what you – people don't just bring proceedings randomly for orders, they name the defendants and they allow the defendants to have their position put before the Court. They have taken, deliberately and intentionally, a procedural shortcut which operates for the convenience of the claimant and cannot be allowed to act – to cause injustice.

And we say that if you follow through what Ms Stacey is saying, it causes obvious injustice and so cannot be right. And if in fact you – there – if in fact she were to stick as doggedly to those submissions as she appeared initially to, that would – may of itself be a reason to deprive the claimants of the injunctions because of course injunctions themselves are discretionary relief.

How can a party come to court and ask a Judge to exercise her discretion in circumstances where the Judge knows the proceedings are fundamentally unfair and expose people to the risk of fines and imprisonment? It's – it cannot be right and we don't – essentially, all of that is from first principles of what is a Judge, what is the rule of law, what are proceedings, who are claimants, who are defendants?

Defendants are defined in the CPR as the person against whom the claim is brought. What happens here is the claimant call the defendants – well they are basically theoretical defendants, they're conjured up defendants, who don't actually exist as people, but they exist as a threat. As a means by which the threat is to be visited upon the claimant.

And that's why I say there are conceptual problems with the under – particularly with the petrol stations case. There are very severe conceptual and practical problems with the underlying claim.

MRS JUSTICE HILL: No, and I understand-

MR SIMBLET: And when I come after lunch, I will try and take you through some of them.

MRS JUSTICE HILL: Just in terms of practicality, we have this afternoon but I will need to sit no longer than 4.30. So within that time, I think there are some – I am happy to hear from you, I have made arrangements to hear from you and in fairness, still on a [inaudible] basis, if you like, without commitments as to status here.

MR SIMBLET: Thank you. Well-

MRS JUSTICE HILL: Forgive me, I think Ms Stacey would wish to have some time to come back

on some of the points about the order that you might make, some of the points about terms.

MR SIMBLET: Yes.

MRS JUSTICE HILL: I know we have taken things slightly back to front and there might be arguments about who has the right to reply on what etc. But in the spirit of case management can you discuss amongst yourselves how to manage this afternoon?

MR SIMBLET: Well if it helps narrow the issues, now that we know that the point in Ms Stacey's skeleton argument, and the skeleton argument that was served in respect of these proceedings, late in the day. So if we're talking about who is complaining about late points and things, then in the light of the fact that 25b has been struck through-

MRS JUSTICE HILL: Is that the nuisance point? Remind me?

MR SIMBLET: Yes. The public nuisance point. I hope this is 25b, but in the light of that letter b going, I do not need to make my public highway submissions.

MRS JUSTICE HILL: Okay.

MR SIMBLET: Certainly with the same intensity.

MRS JUSTICE HILL: So the main areas of your submissions this afternoon will be?

MR SIMBLET: In – what I will be saying. Something about the underlying basis of the petrol stations claim.

MRS JUSTICE HILL: That is about the conspiracy point?

MR SIMBLET: Yes. Conspiracy and the Section 12. And the…

MRS JUSTICE HILL: Some detail on the terms.

MR SIMBLET: Some detail on the terms and the length.

MRS JUSTICE HILL: So they are the broad headings for you this afternoon?

MR SIMBLET: And – yes. I think that's likely to cover most of it, yes.

MRS JUSTICE HILL: So time – some timetabling.

MR SIMBLET: And I won't be long.

MRS JUSTICE HILL: On the basis that I have now freed up this afternoon and made other arrangements, Ms Stacey can then respond as she sees fit on the terms and the-

MR SIMBLET: Yes.

MRS JUSTICE HILL: I think that should be enough time.

MS STACEY: We will discuss – you would like a timetable from us, yes.

MRS JUSTICE HILL: Well I think we have perhaps just done it ourselves have we not?

MR SIMBLET: Yes. What time are we going to restart?

MRS JUSTICE HILL: We are going to start at 10 past two.

MR SIMBLET: Thank you. So at 10 past – I would expect to have finished around about 10 past three.

MRS JUSTICE HILL: So Ms Stacey has-

MR SIMBLET: I hope that, and that should give us a – and the points on the terms are pretty back and forth ones that either I'm right or I'm wrong and either she's right or she's wrong. It's not – there's no going to be lengthy further ability to support or attack the other person's position.

MRS JUSTICE HILL: In terms of practicality going forward, with no further commitment being given on my part at all, I would be giving a judgment of some sort before the end of this week, given the expiry of the injunctions on Tuesday. I will give some kind of judgment this week.

MR SIMBLET: Thank you.

MRS JUSTICE HILL: Because I am aware that I think two of them expire on Tuesday.

MS STACEY: The second, yes, which is Tuesday.

MRS JUSTICE HILL: Which is Tuesday and Monday is a non-working day. So I will give some kind of judgment this week. I have not yet been able to work out the logistics of how that will be. Whether it will be a written judgment with a very tight turnaround for amendments. So in the usual way, so a written judgment, then that is handed down in your absence. Or a short Teams hearing perhaps at which I gave a judgment to you on Teams where I read it out. Discuss amongst yourselves please over lunch what your logistics are over the next two days, what might be more amenable to you and I will take that into account. I cannot say I will – be guided by it.

MS STACEY: I take it from that that would be a judgment, and there wouldn't be a more detailed judgment later? That would be the judgment?

MRS JUSTICE HILL: It depends. It depends. There will be a decision this week. But I anticipate that it will-

MS STACEY: There are some important points that need to be thrashed out, so I just-

MRS JUSTICE HILL: Yes, I mean there is going to have to be a decision by me this week at least on the ones that expire on Tuesday.

MS STACEY: Indeed.

MRS JUSTICE HILL: And it is a question of how that is done. So discuss amongst yourselves

whether for you example you would want a further short Teams hearing at which I give you a decision. Or whether you would prefer to do it in writing, but you would have to be very aware of the need for a tight turnaround on giving any amendments to a draft judgment.

MS STACEY: Yes.

MRS JUSTICE HILL: Because normally you would have two days would you not between a draft, let us just say, and a hand down hearing.

MS STACEY: Indeed.

MRS JUSTICE HILL: And there is not that capacity.

MS STACEY: No.

MRS JUSTICE HILL: So for example, if a written judgment were to be circulated, with no commitment at all, but something like nine o'clock on Friday morning, amendments would have to be back by 12 or two, something like that.

MS STACEY: Yes, and the amendments would be limited to typographical errors.

MRS JUSTICE HILL: Of course. That is the – those are the only ways I can see. I do not particularly want to require you all to attend in person.

MS STACEY: No. But also we're mindful of Your Ladyship's time and if you need more time to give more detailed judgment, then-

MRS JUSTICE HILL: And I think that is what Johnson J did, did he not? He gave a decision and then gave-

MS STACEY: And then took the time to set it all out in detail. And I think given the climate we're in and the fact that these cases are rapidly evolving, there's a need for clarification. It seems to me without instructions it might be practical for a decision to be given so that an order can be prepared and then more detailed judgment to follow. That would be our [inaudible].

MRS JUSTICE HILL: Well discuss amongst yourselves what your movements are and what might work best.

MR SIMBLET: My Lady, just before you go. Ms Hardy reminds me that – and my shopping list of things I was going to address you on, I have not included 40.9. I've obviously put the note in and you've seen my submissions, but that's obviously – second – you've heard my primary submission which is that it's just a tool by which people can address you.

MRS JUSTICE HILL: Well perhaps let us do it in this order. I mean bearing in mind I have read your client's statement, I have read Ms Freeall's, I have read the submissions. I have got

the measure of 40.9. I have got very clearly the measure of what your learned friend says about it.

MR SIMBLET: Fine.

MRS JUSTICE HILL: If there is anything you can add on that, let us take that first.

MR SIMBLET: Thank you.

MRS JUSTICE HILL: All right. 10 past two.

Court adjourns.

Court resumes.

MRS JUSTICE HILL: Mr Simblet?

MR SIMBLET: My Lady, beginning with 40.9 because there a couple of additional points to me. I obviously rely on my note, and you obviously have my point that we are not necessarily just in 40.9 territory because this an application for [inaudible] for new injunctions. So you have got those points. But assuming we do have to say something about 40.9, a deal of complaint is made by the claimants about previous involvement of Ms Branch with these proceedings, and the lateness with which the notification of our intention to be at Court to resist the submissions as made.

Two points about that. The first is of course – the first is, as My Lady has observed, there is – if in fact the claimants ask for an order which can be set aside on 24 hours' notice, a person such as Ms Branch who is not seeking to set it aside, can hardly be in a worse procedural position than somebody who is seeking to set it aside. As a matter of common sense and common sensical case management.

Secondly, store was placed on the fact that various pieces of information had been sent to Hodge Jones and Allen, and specifically Ms Hardy. Well Ms Hardy is not, as it were, on permanent retained to Jess Branch. Mr Hardy is a solicitor who in certain cases is instructed, if the client so instructs them, and makes arrangements for remuneration and those sorts of things, able to take on a case and represent somebody.

Ms – neither Ms Hardy – well let's put it this way, Ms Hardy is not some sort of post box for the claimants to use when they send something. Particularly when what they sent suggested that it wasn't that important. Said it's, as it were, out of abundance of caution we're sending you this material. And if what – if at the end of that what the claimants then say is that somebody who was sent some stuff, or whose previous solicitor has been sent some stuff.

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And bear in mind Ms Hardy is not on the record in these proceedings, this is not like a situation where Cameron McKenna were on the record, and then the notice was sent saying that now it is Eversheds on the record. Ms Hardy had previously accepted instructions to do various things at an earlier stage of some of the injunction proceedings. She is not formally on the record, and merely sending her a document does not require either Ms Hardy to do anything or provide some sort of constructive notice to Ms Branch.

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I accept of course that now, looking back at what has subsequently happened, and if you piece it all together and you put together all the pieces of documentation, served as they were in a very different form from that which is before My Ladyship, that on reflection, Ms Branch decided that she wanted to appear at this hearing. But that doesn't, in my submission, affect the approach that the Court should take to somebody who becomes aware of an order that says you can set it aside on 24 hours' notice, and makes the application that she has on more than 24 hours' notice.

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And My Lady has the point that as it happens, the claimant's counsel were aware of mine and Mr Greenhall's involvement and I corresponded directly with them at the end of the last working week. So they technically they – the intention of Ms Branch to oppose, and the fact that she had counsel instructed, was known to the claimants for longer than the Court required parties to give, or people to give, if they wish to become involved.

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And My Lady has the point – well to take as an examples paragraphs five and six of Johnson J's order, those are terms that the claimants asked for.

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MRS JUSTICE HILL: Also, one thing I reflected on over the short adjournment a little bit was that the wording of 40.9 refers to somebody having the ability, if they're directly affected, to apply to have the order set aside.

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MR SIMBLET: Yes.

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MRS JUSTICE HILL: Or varied. And effectively it might be construed that the claimant's application is an application to vary the current order.

MR SIMBLET: Yes.

MRS JUSTICE HILL: And therefore there is congruency there.

MR SIMBLET: Yes.

MRS JUSTICE HILL: I had sort of understood you were applying for the initial order effectively to be set aside, but I do not know how we can set it aside. It is going to lapse on Tuesday.

MR SIMBLET: She has lived with it for 363 days, 358 days, I don't think Ms Branch is going to worry about the remaining seven.

MRS JUSTICE HILL: But I mean if one were to try and understand what the neatest procedural route is to your client having the right to make some submissions was, and if I was nervous about the proposition that there is a generic right-

MR SIMBLET: A free for all.

MRS JUSTICE HILL: Well a generic right to be heard in any event. A free for all if you like. But one way of trying to achieve some fair route through this might be to say that what Ms Stacey is really doing is applying to vary the current order because she is applying to renew it and vary its terms in some respects. And therefore we are within 40.9 that way?

MR SIMBLET: Yes. And of course-

MRS JUSTICE HILL: I do not know if that is right or not.

MR SIMBLET: And the other thing is the definition of protestors point, is a new one. That is not in a – the new definition of protestors is not something that was known about a year ago or months ago, it's relatively recent in the development of this application. So that has a bearing also on, as it were, what Ms Branch knew or did know and whether she'd want to be involved. I'm sorry, I think I interrupted My Lady when you about to say something more valuable than what I've just submitted.

MRS JUSTICE HILL: No, I am sure I was not. But I am certainly troubled at the proposition that there is no procedural space for your client at all. Because if Ms Stacey's submissions at their highest are correct, and I am not sure she puts it entirely in this high way, but at their highest, you have no *locus* at all until the order has been made.

MR SIMBLET: Yes.

MRS JUSTICE HILL: Until the new order has been made.

MR SIMBLET: Yes.

MRS JUSTICE HILL: Because I did understand part of your submissions were that 40.9 only takes effect when an order has been made.

MS STACEY: Perhaps I can clarify that we've reflected upon it overnight as well. So that I can clarify what-

MRS JUSTICE HILL: I mean in the context in particular of a persons unknown case. I mean it might be that there is an understanding about how a 40.9 operates when it is a conventional *inter partes* claim where there is a road traffic accident and then an insurer after the event comes to fray, if you like. But in the context of a persons unknown?

MS STACEY: Well My Lady, shall I just explain what we say about continuation versus new order, and then what we say about 40.9?

MRS JUSTICE HILL: I think this is helpful, Mr Simblet, so forgive me.

MS STACEY: Yes, I was going to come back on it in reply because I thought that it was more appropriate, but given that you're having the debate now, so that everyone knows what we say. So My Lady you accused me of-

MRS JUSTICE HILL: I hope not.

MS STACEY: Of trying to have my cake and eat it.

MRS JUSTICE HILL: I did not mean to accuse you of anything.

MS STACEY: No, but on the back of that, I think it was fair. And thought's been given as to – this is stuff – none of this is easy. So our position is, having though about it over lunch, that we referred to this application or this hearing as a review, and we think that's quite right. Because what you're doing is reviewing. What are you reviewing? You're reviewing the existing injunctions, yes, which we seek the continuation of on materially, or identical terms. Apart from the one tiny variation. Which Ms Branch has no *locus* to make representations in relation to.

So you are reviewing the existing injunctions. The injunctions are the same, but the mechanism by which you give us what we want, if you like, would be by way of an extension, and that is by virtue of a new order. So it seems to me that there has to be a new order, regardless of my point about it's a review therefore it continues. Technically speaking, we are reviewing what's gone before because we're reviewing existing injunctions. But by virtue of a new order. If the continuation is to be granted. And I think that's where Your Ladyship was, and I think technically Your Ladyship was right about that. But that doesn't mean I depart from my characterisation of it as a review, because you

A are still reviewing the existing injunction.

MRS JUSTICE HILL: But what I am trying to grapple with is how does that fit with 40.9?

MS STACEY: I know. Now, I – we say you can't get away from the fact that you need a new order to give us what we're asking for. And if you test that by looking at what would happen, it would be an order, if we're right, by a new Judge, albeit of an existing injunction on materially identical terms. There is one amendment, so Your Ladyship's point on variation is valid, but that variation only applies to one element of it in respect of which Ms Branch hasn't any standing.

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MRS JUSTICE HILL: Well does it not apply to the temporal limit? Even if I give you an entirely new order that is absolutely identical to the Johnson J or Bennathan J orders, they will be different in temporal scope will they not?

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MS STACEY: Yes.

MRS JUSTICE HILL: Because I am varying them to impose the 2024 deadline.

MS STACEY: You're varying the existing – that's right. You're varying the existing injunction.

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MRS JUSTICE HILL: Even if it was absolutely otherwise identical.

MS STACEY: For the purposes of granted that extended period. Yes, I accept that. But can I just say this? In terms of the queasiness perhaps that the Court has, the concept of the [inaudible] being there, the answer to that – I characterise that as a time limit point. We're not saying that Ms Branch couldn't come to Court. She could either have come earlier or she could come later. It's just simply the now, the here and now, the way in which it's been done at this point in time, that we are troubled with. So it's not a shutting out; it's a when-

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MRS JUSTICE HILL: So you say 40.9 would have bitten for anything in the last 300 and something days?

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MS STACEY: Yes. Exactly.

MRS JUSTICE HILL: And it bites now, but only really for the next three days or whatever it is.

MS STACEY: Exactly. And that's by virtue of – and there can be, you know, we say no particular sympathy in relation to that. Because she knew about it, she could have brought it earlier, but chose not to. But one has to proceed upon a principled basis. And the objection that we are raising in relation to this is look at 40.9, we see what it provides for. And it doesn't seem to have contemplated this kind of scenario, but My Lady you are left with the words of that provision which seem to us to be clear. It's a variation, or discharge, or an order. And the order, and it's the submission I made to Your Ladyship before lunch, that you

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currently have in place, or the orders, are Johnson J and Bennathan J.

MRS JUSTICE HILL: No, I see that. I understand. That is helpful, thank you.

MS STACEY: That's it. And its consequences are not so alarming, if you accept the proposition that she's not going to be shut out for all time, it's just timing. I hope that helps.

MRS JUSTICE HILL: It does.

MR SIMBLET: Well My Lady, the extent to which it doesn't help is this: The claimants are saying you should make new orders, well to use your words, My Lady, even if they are identical the timings are different, that they should make new orders and Ms Branch cannot be heard in opposition to those orders. What they say is that although there is a hearing today at which the Court is considering exactly whether to make new orders, there should be another hearing on any day that isn't today where Ms Branch comes along and tries to set that order aside. How can that be a more efficient or sensible way of proceeding?

MRS JUSTICE HILL: Is another way of conceptualising this, and I am afraid this is what is causing me some difficulty, that you have before me an application under 40.9 to vary the existing order or set it aside. Okay? Just hear me out. And in the course of that you are making principled submissions about why the last order should be varied or set aside. But in fact the substance of those submissions is exactly the same as what you would say in relation to the future order?

MR SIMBLET: Yes.

MRS JUSTICE HILL: And so therefore, if you are correct that there is a general discretion to hear a member of the public without meeting the 40.9 test, because it is an *ex parte* persons unknown injunction, that that is a sort of case management approach that could be taken?

MR SIMBLET: Yes. I – and although I said yes to My Lady's conceptualisation of you're making a 40.9 application. I'm only really making a 40.9 application because the Court has suggested that that might be the procedural route in that avoids the situation which is my primary position, which is that on an application for new orders to be made *ex parte*, which is what this is, that somebody is entitled to come along and say, 'I want to be heard'.

MRS JUSTICE HILL: But there is a dispute between you about that and Ms Stacey highlights that you provided no direct authority for that. She takes issue with your pre-40.9 position.

MR SIMBLET: Yes, I understand that. But – well let's – let's assume she's right. What her submission is then is that Courts can only allow injunctions that effect persons unknown that everybody says have very wide affects, in circumstances where only the claimant gets

to tell the Court what should happen. That's why I finished before lunch with that that goes against every notion of justice that we-

MRS JUSTICE HILL: Or any named defendant. She would say if there was a named defendant.

MR SIMBLET: Yes, well there isn't a named defendant. So in any case, in this injunction – let's - I'll meet the case that she's come to make. She's not saying this, there are no named defendants. Her case is that she is entitled to address you and nobody else is.

MRS JUSTICE HILL: And that you can only come back after the event?

MR SIMBLET: Yes. And that's – that is a, to paragraph Sedley LJ in a case, is a proposition that needs only to be stated to be rejected.

MRS JUSTICE HILL: Thank you.

MR SIMBLET: And if that is her case, then don't give her her injunction. Because it actually offends against the rule of law and the requirement that those affected by orders be entitled to say what they wish to have – wish to say to resist them. That is to say that we live in a situation where an oil company can go around and say what everyone else has got to do. And the only filter on that is a Judge who may have the time that you have given to this, and the ability to give it, or may, like Johnson J, be a Judge who's got an appointment to go to and has to leave and give it very short consideration. Which is the evidence, uncontested evidence, of Ms Freeall.

MRS JUSTICE HILL: Putting those points to one side though, the… I mean I will reflect further on what is being said, but on any view there is a question surely, Ms Stacey, about whether it is right that an *ex parte* persons unknown order can only be challenged after the event. I mean unless I am going unduly back to first principles, to submit that an *ex parte* persons unknown injunction that binds potentially thousands of people, can be only challenged after the event. I mean – and I appreciate we are doing this very discursively and forgive me if this feels like some Socratic discussion, but it is a bit because I do not believe anybody has really yet had to reflect on this particular – I mean unless I am right, I do not think this, the combination of a renewal or review, and 40.9 has been dealt with. Because nobody, I do not think you have told me yet, has had a renewal or review hearing at which a 40.9 person has arrived?

MS STACEY: No.

MRS JUSTICE HILL: So the only time 40.9 has come into play has been when-

MS STACEY: An order has been granted and somebody has come up after the order's been

originally granted and made an application.

MRS JUSTICE HILL: Is that the Ritchie scenario in *Esso*?

MR SIMBLET: That is Ritchie in *Esso*, the people turned up at the return date.

MRS JUSTICE HILL: Yes, so after the interim order.

MS STACEY: That's what I meant by originally. It's the original order.

MRS JUSTICE HILL: So the emergency order had been made and then they turned up at the return date. And the *National Highways*, Bennathan J example?

MS STACEY: Yes. My Lady, it's an unusual space, persons unknown. Challenge has been made as to the appropriate nature of it, but Cameron – this jurisdiction is recognised at the highest level, the Supreme Court has endorsed that in appropriate circumstances, which we say apply here, 'It is permissible and there is jurisdiction to bring a claim against persons who are identifiable but have not yet been identified. As long as they are appropriately defined, see the *Canada Goose* guidance', okay? So in that context, if this were a starting from scratch application for an injunction, it stands to reason that the persons unknown would be defined by reference to the offending conduct which falls the subject of the description. Noone would expect people to be there. Where we are now, we are essentially risking, and this is back to the new order continuation for a variation of the existing order, on the basis that there remains a continued threat. The effect of that is to grant an injunction going forward. We're in the same space as we would be back at the beginning, albeit the test of new and re-hearing we discussed. But there are no named persons that [inaudible] now. So we're in exactly the same position. Therefore it's not surprising, in my submission, to expect that any persons would come to court after such an order being granted.

MRS JUSTICE HILL: No, I see that.

MS STACEY: So there's no conceptual problem with that, My Lady, on a review. That's why I say it's timing, we're not precluding. If one accepts the proposition that you can grant an injunction on the back of proceedings initiated against persons unknown-

MRS JUSTICE HILL: *Ex parte.*

MS STACEY: *Ex parte.*

MRS JUSTICE HILL: Yes. No, I agree.

MS STACEY: Which Mr Simblet takes issue with, but frankly it's on the face on the authorities. I don't see that that can be made out.

MRS JUSTICE HILL: So you say broadly, in a case of this nature, there is normally an emergency

injunction.

MS STACEY: Yes.

MRS JUSTICE HILL: There is then an interim one.

MS STACEY: Yes.

MRS JUSTICE HILL: And then there is some kind of return date.

MS STACEY: Exactly.

MRS JUSTICE HILL: And there is some kind of review. And you say at each point where an order has been made, there is the 40.9 right.

MS STACEY: Exactly.

MRS JUSTICE HILL: But just on this case, the timing goes like this-

MS STACEY: Exactly.

MRS JUSTICE HILL: And the opportunity is property brought there, and we are now here.

MS STACEY: And he might say oh well this is all a bit unfair because we're here – we are where we are which is a phrase that's been repeated throughout the course of the last two days.

MRS JUSTICE HILL: Including by me.

MS STACEY: That this needs to be dealt with on a principled basis because of the wider application. One needs to understand what the true affect of 40.9 is. Because otherwise it's a danger of being unruly. And one needs to understand in what circumstance a party can pitch up and make submissions to the Court. So the concept I say is not problematic entirely and outwith the jurisdiction.

MRS JUSTICE HILL: No, I see that now. Forgive me, I see that. In a different way now. And you say it is just an unfortunate consequence of the timing in this case.

MS STACEY: Yes.

MRS JUSTICE HILL: But again, going round in circles, that probably comes back to the 24-hour provision. Does it not?

MR SIMBLET: They have got what they've asked for. And they now don't like it.

MRS JUSTICE HILL: It comes back to that does it not?

MS STACEY: It's not that we've got what we asked for.

MRS JUSTICE HILL: Because, forgive me. Have we not got here – we have got a marrying up here of the 24-hour provision that allows you to set it aside with the review hearing. You have got the alignment of those two things, and they may not be a round peg in a round hole.

MS STACEY: My Lady, yes. But the application I'd remind Your Ladyship, isn't being brought on the basis of clause five or six of the order that we are-

MRS JUSTICE HILL: No, but the logic of the evidence that has been provided is to that effect. Because the evidence provided by Ms Branch and Ms Freeall today, Ms Branch in particular, was that they deliberately waited until 24 – or they understood that the 24-hour provision before the hearing, was the most sensible time to make this application. That is the thrust of Ms Branch's evidence.

MS STACEY: I understand that, My Lady, but one – in this space where there's jurisdiction to bring proceedings against persons unknown when – one has to proceed on those – back to my principled basis.

MRS JUSTICE HILL: Well that is what I am trying to do.

MS STACEY: Yes. And it's not sufficient that Mr Simblet's client to say well you can hear anyone because, well in the absence of something to point to, in what circumstances can you simply pitch up and speak, in particular when they're not saying they're a person unknown who needs to be joined. There's 40.9. And 40.9 provides for the level of protection which there otherwise not be.

And it provides a degree of comfort to *Barking* that *Barking,* as we looked at before lunch, doesn't say one can employ that 40.9 process at any particular point in time. It simply says in the – it was in the context of an injunction being granted. And that was entirely consistent with what I was telling Your Ladyship about if we were at a standing start, you'd get your injunction of the Court satisfied. That person could come to Court and challenge it. We are in that same situation now where we're asking you to review. That would lead to a new order [inaudible] albeit one that reviews what's gone before. And once that's granted, then Ms Branch will have her right.

And you might consider that's all very unfortunate because it's a waste of everyone's time, but if that's what the law provides for, and is deficient, then it's not for us to make the law; it's for the legislators to amend or the rules to be changed.

MR SIMBLET: Well I have [inaudible] that. We are half an hour – we are halfway into the time I said I would be, so I – and Ms Stacey has used quite a lot of that.

MRS JUSTICE HILL: Well at my invitation.

[Crosstalk]

MR SIMBLET: Yes, the Court's invitation, but – so therefore I may want to go on a bit longer is

what I am going to say. And not… But-

MRS JUSTICE HILL: I am not going to hold you to it, Mr Simblet.

MR SIMBLET: In relation to the fact – the fact is that that – those submissions confuse jurisdiction and technical ability of the Court to proceed in that way, or a party to proceed in that way, with the practicalities that follow from where somebody chooses to use that jurisdiction in that way. An illustration of the point. If Shell had named some defendants like Transport for London did, Ms Stacey would be able to say, there being no opposition to her order, 'Well these people were given the chance to come to Court. The injunction was made, they didn't say anything in opposition', or anything sensible in opposition I think was her submission. And, 'Therefore, the order as made is now one that can properly be looked by the Court as *inter partes* and that's why the review exercise is one of review as per Kavanaugh J'. She could have done that.

They chose not to do that. *Canada Goose* makes clear that there are – where parties choose not to do that, there are enhanced procedural responsibilities, and that is what paragraph I think 82 in *Canada Goose* is all about. One – essentially, a party who proceeds with an application for a persons unknown injunction, accepts a number of either expressly and impliedly accepts a number of – they may need to make a number of concessions procedurally as the price for being permitted to proceed in that way.

And that's what *Canada Goose* in the Court of Appeal and Nicklin[?] J's first instance decision were all about. It's about the problems that are caused in injunctions where people are not properly before the Court. Now, the law has moved slightly from that, in that in the *Barking* case the Master of the Rolls departed from a judgment of the previous Master of the Rolls, because it was the Master of the Rolls also in – a different Master of the Rolls in *Canada Goose*, but nevertheless two very authoritative senior Judges in the chair in each of those cases. And said that there is jurisdiction to grant an injunctions against persons unknown because the statutory power to grant an injunction under, I think it's Section 37 of the Supreme Courts Act, is so wide.

So there's jurisdiction. I don't dispute with Ms Stacey there's jurisdiction. Where we part company is that as a consequence of choosing to proceed in that way, her clients may well have to accept interventions that may in other circumstances be less tolerated by the Courts. So for instance, a party that is – or a person that is made a party to proceedings, and judgment is reached in those proceedings, cannot seek to go behind the factual basis of

those proceedings.

And that's what I alluded to yesterday to, to the *Hunter -v- Chief Constable of West Midlands*, and all of those cases that talked about it being an abuse of process to attempt to bring a collateral challenge or to relitigate matters. There may also be, as I'm put in my notes, some form of issue estoppel. But that doesn't apply here because nobody was before the Court apart from the claimants. So since nobody is before the Court and *Canada Goose* and *Barking* make plain that anybody who is affected should be given the opportunity to come before the Court, we're here now. We're coming before the Court when the Court is looking at this matter. When better to come?

Well Ms Stacey's analysis, you come after the Court's done it. Well that flies in the face, in my submission, of any engagement with CPR Part 1, let alone any succeeding provisions of the procedural rules about how cases can be effectively case managed. And it comes back to – or if I can give you an example of this, what I have said in my note about the continuing availability of representative proceedings.

It is perfectly open to a claimant, and you might have thought that these claimants who allege a conspiracy would have thought that if they could make out their conspiracy they would think that Rule 19.6 was one of the things that addressed this position. It is open to a claimant to say these people have a common interest in the proceedings, and to sue somebody in a representative capacity. They have chosen – they could have done that. And if they had done that, the submissions you'd be hearing would be different. But they haven't.

And they come – I'm meeting, and you're dealing with My Lady, the case that they have put before the Court in the way they have put it before the Court. And if in fact Ms Stacey realises, as these two days evolve that actually it might have been better to do something different, that isn't a reason, in my submission, to, as it were, depart from what the Court ought otherwise to do in ensuring the overall fairness of coercive orders that the Court is being invited to make. So CPR 19.6 was available.

But even in proceedings that begin against persons unknown, I did draw the Court's attention yesterday in – and supplied the authority of the *Ucock*[?] case and what Faulk J had done in that case. Where the proceedings had begun as a persons – have you got that in your authorities?

MRS JUSTICE HILL: I have got that, yes.

MR SIMBLET: Yes. The proceedings have begun as persons unknown injunctions, including with claims of conspiracy. And as the case unfolded and in that period between *Canada Goose* being decided and Barking and Dagenham going to the Court of Appeal, it emerged that there were particular problems with simply proceeding in the way that they were with persons unknown. So what they chose to do was to add- apply to add a number of people who they said should be defendants. And you can see, My Lady, I think I referred to this in the email that I sent to Court about it, and to Ms Stacey about it, they applied to join a number of people, and their names are set out at paragraph 14.

They tried to join them on the basis of things that they said had happened there, and unlike this case where these highly resources claimants, probably one of the richest companies in Britain, seem unable to do the basic detective work to tell the Court who it is they wish to litigate against, and is somehow sitting and waiting for some sort of court orders to require the police to do their job for them.

These – the claimants in *Ucock* had made their own researches, looked at videos things happening at the site and so on, and they – on the basis of what they said, that material on the internet or footage that they seen and so on, disclosed, they applied to add people whom they identified. Some by name, some in fact by – I mean I can't turn the particular page up now, but as an example, it's not the – I don't say it's expressed, the person wearing the blue coat who did this on this date, which is – which *Cameron* accepts as a way that somebody may be identified and brought before the Court.

So what they did was they moved from a persons unknown, an injunction that brought claims only against persons unknown plus those who had applied to be joined who the defendants seven to I think 12, or seven to 13 who were then deleted. And they applied to join specifically the other people. So they then had some people.

These claimants can't be bothered with that. What these claimants are doing is saying that rather than the – rather than do what the Courts generally expect to happen in a case, where the parties say who the other parties are, they are saying that it's all right to sit on this order for about a year while they seek additional orders from the police to identify those whom they say they will want to proceed against by trial. We've used the metaphor in these proceedings about how we're doing things somewhat back to front. That is a very good metaphor for how the claimants are proceedings. Normally you say who it is you want to sue, what remedy you want and why you want it.

Here the claimants say we just want some sort of remedy against people generally. We can't tell you exactly what the people generally have in common, and I'm going to move to that point in a moment, but until the police help us we can't do it. And for that – and notwithstanding that, you the Court should indulge us and stop other people opposing the orders that we seek. It's not how litigation should be conducted and if in fact it is being submitted as it is, that when they apply for orders from the Court the Court should refuse to hear those that are not brought before the Court by the claimants, the inevitable injustice that that approach would create is clear and obvious and I propose to say no more about it.

So that is why we are here and that is, if you consider 40.9 is the tidy procedural route to give us some *locus* in the proceedings, we're prepared to use it. But we say that we are not – that there's – we cannot fail for reasons either of lateness, because you can't be late to something that hasn't happened. Or because there is some sort of magical period either side of a court hearing that the claimants want within which somebody who wants to use the 40.9 jurisdiction has to apply. That's verging, in my submission, on the absurd.

I'm going to move then to the problems with the – I've got some points on the terms of the injunctions themselves.

MRS JUSTICE HILL: Just before you leave that, Mr Simblet, just – can I ask you both to reflect on this: In *Breen* the decision that was reached by Ritchie J was, if I have understood the judgment correctly, between the making of the *ex parte* and the making of the return date injunction.

MR SIMBLET: As I understood it, the people pitched up to the return date injunction.

MRS JUSTICE HILL: Which he adjourned off because there was, funnily enough, insufficient court time.

MR SIMBLET: Yes. He did what you suggested you might do yesterday. I noticed that when I was re-reading it overnight.

MRS JUSTICE HILL: Well I had not realised he had done that but I am glad to see it. But on a serious note, if one looks at the way his judgment is written, and it is at page 460 of the authorities, he deals with that fact at paragraph 10, that the interested persons had turned up at the hearing, did not want to be joined, but did want to make representations.

MR SIMBLET: Yes.

MRS JUSTICE HILL: And it was, if I have understood it correctly, as he says at paragraph 11, insufficient time to deal with these matters. It is not quite clear, but there was a full return

A date he describes on 5 October.

MR SIMBLET: Yes.

MRS JUSTICE HILL: So what-

MR SIMBLET: He adjourned the *ex parte* injunction and had the return date on 5 October with them intervening on the 40.9 is my understanding of what the judgment says.

B MRS JUSTICE HILL: Yes. And then towards the end, if one sees the ruling at 67, the decision he gave was to allow them to make representations, paragraph 67, at the return date on the injunction.

MR SIMBLET: Yes.

C MRS JUSTICE HILL: So he clearly seems to have been of the view that although the *ex parte* order had been made, 40.9 permitted them to make representations at the return date. Is that not a similar procedural space to where I am, albeit I am between a return date and a review.

MR SIMBLET: Well-

D MRS JUSTICE HILL: So, forgive me, does he use of 40.9 here not illustrate that he at least was prepared to accept that it is not entirely backward facing?

MR SIMBLET: Yes.

MRS JUSTICE HILL: And does not entirely relate back to an existing order? Because he was plainly, as far as I can see, allowing the interested person to make a representation at the

E return date. So the interested person was clearly then making submissions about whether at the return date the *ex parte* injunction should be continued or not.

MR SIMBLET: Yes. I'm nodding, I haven't thought of that point myself, but as it does provide support for the fact that 40.9 does not confine you to an order that's already been made.

MRS JUSTICE HILL: Despite on the face of it, the wording suggesting it might do.

F MR SIMBLET: Yes.

MRS JUSTICE HILL: Or should do.

MR SIMBLET: So it's a – if I may say so, My Lady, it's a cleverer point than one I had identified, but it appears to be right. And it appears to reflect what the Court did.

G MRS JUSTICE HILL: I need to look in just in his judgment more carefully but his is the closest to our detailed consideration of 40.9 in this framework?

MR SIMBLET: Yes, I agree. And it reinforces, in my submission, the proposition, and he identifies it himself, that Courts should want to hear from people where there is a substantial public interest point or a civil liberties point being raised by the interested person.

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MRS JUSTICE HILL: In the search for principle in this, the distinction between an *ex parte* and a return date, and a return and a review, where the only changing factor is where the interested person comes in, it seems hard to discern.

MR SIMBLET: Yes. Ms Stacey keeps asking the Court to approach this on a principled basis.

MRS JUSTICE HILL: Well I am trying to.

MR SIMBLET: But is unable – but actually is unable to formulate exactly what that principle should be, other than to say it should be any day except when the Court's dealing with her application.

MRS JUSTICE HILL: No, she says the strict wording of 40.9 is-

MR SIMBLET: Yes. No, for the – that's what she says. For those reasons.

MRS JUSTICE HILL: Too late for last year and too early for this year.

MR SIMBLET: Exactly. So I say that's the only time that it can be done is when the Court's not dealing with it. That's the logic. That's where it leads to.

MRS JUSTICE HILL: Well I am not sure it does-

MR SIMBLET: Well I may be bounderalising[?] her submissions for dramatic effect, but that is – it's not wrong. You couldn't do it – we're too late for yesterday and we're too early for tomorrow. That's how you-

MRS JUSTICE HILL: No, you are too late for last April.

MR SIMBLET: Yes, well…

MRS JUSTICE HILL: Is what she says.

MR SIMBLET: Yes.

MRS JUSTICE HILL: And May are you not? I mean that is the serious point.

MS STACEY: Well there's a sliding scale isn't there.

MRS JUSTICE HILL: It is a timing point.

MS STACEY: I haven't identified any particular point in time where they're too late. But yes.

MRS JUSTICE HILL: But it is today.

MS STACEY: But it is today. You have my submissions.

MRS JUSTICE HILL: No I do. And I think we are all searching for a principled basis in an area that is not very clear.

MS STACEY: When I'm talking about principle, I'm talking one has to construe the rule, and that's what you're required to do. And we wanted – that's why we – because the wider implications, not just the least [inaudible]. There are numerous [inaudible] the Rule one

must grapple with.

MRS JUSTICE HILL: Well I hope you understand that that is why I am trying to do that.

MS STACEY: I fully understand that, My Lady.

MRS JUSTICE HILL: My invitation to you perhaps is to look again at *Breen* because it does look as if-

MS STACEY: I am looking at it now.

MRS JUSTICE HILL: -A similar point was taken. You have still got your time, Mr Simblet, I am not knocking any-

MR SIMBLET: No, I know.

MRS JUSTICE HILL: My interventions. Carry on.

MR SIMBLET: Thank you. My Lady, I'll move then to – well they're related points.

MRS JUSTICE HILL: Yes.

MR SIMBLET: But in terms of the claimants' lack of a case in relation to their conspiracy claim.

MRS JUSTICE HILL: Thank you.

MR SIMBLET: And they're related – it's related in this way to the Section 12 issue because of course the Section 12 issue informs what threshold must be surmounted by the claimants to show their case or their entitlement to the injunction.

MRS JUSTICE HILL: Well it is a difference between serious issue to be tried.

MR SIMBLET: Yes.

MRS JUSTICE HILL: And likely to succeed.

MR SIMBLET: Absolutely. Yes. You've got the point.

MRS JUSTICE HILL: Yes.

MR SIMBLET: In a sense both Ms Stacey and myself elide this issue and want you to do different things. Ms Stacey says it's sufficient to show American [inaudible], I mean serious issue to be tried. That test is surmounted. I say they haven't got a – they haven't got – there isn't a serious issue to be tried, and in fact in any event the threshold is likely to succeed under the Section 12 (3) test. So – but whichever test it is, in my submission there are some very serious, and I use the phrase conceptual, and practical difficulties with the underlying basis of the petrol stations injunctions. If I can park – I will explain what I mean but I will also narrow the issues on the Haven and the Tower injunction that where those – those injunctions – I mean subject to certain arguments about the terms and whether the underlying case justifies all of the terms, I've got a couple of submissions on that, but the –

it is not difficult to see how somebody who produces evidence that satisfies the Court of imminent trespass can obtain an injunction in the tort of trespass that restrains people from coming onto its land.

MRS JUSTICE HILL: And nuisance I think. Was it not both?

MR SIMBLET: Yes. But unreasonable use of land. But the prohibitions are more likely to – more – there's a closer nexus between the prohibitions and the tort of trespass in actual fact. But let's – and in a sense nuisance was originally sought as also in the act on the highway and this is where they got into looking into the stuff about the gateways and so on. But you've got the map and so on. Those sorts of map issues, it's – I don't say that they cannot show any sort of case in trespass. But I do say that their claim on the petrol stations has very very serious problems. The petrol stations injunction is not based on trespass or nuisance, and Ms Stacey clarified her position on that yesterday. It is based on what is said to be a claim in conspiracy.

MRS JUSTICE HILL: Can I just double-check, Ms Stacey forgive me, I will have to check back on my notes. The Tower and Haven injunctions, do they solely relate to the owned land?

MS STACEY: As the terms of the orders granted.

MRS JUSTICE HILL: Yes.

MS STACEY: Yes. Because it's the entrances, your-

MR SIMBLET: Yes.

MRS JUSTICE HILL: That was the debate with Bennathan J was it, about the map?

MS STACEY: Indeed. The broader proceedings refer to public nuisance. They haven't amended, but all of it's been granted on a-

MRS JUSTICE HILL: But for my purposes?

MS STACEY: For your purposes, My Lady, yes.

MRS JUSTICE HILL: There is – so there is no public highway issue at all?

MS STACEY: No. You'll recall the map, the plan with the markings that you were shown electronically. And there's no part of the public highway.

MRS JUSTICE HILL: I had a helpful copy from you.

MS STACEY: Exactly.

MRS JUSTICE HILL: Yes.

MS STACEY: Yes, there's no public highway. Public highway is actually covered by the [inaudible] that's referenced, so the road leading up to the Haven is covered by that. So far

as Tower is concerned, it's just the entrances.

MRS JUSTICE HILL: I understand, thank you. And so Mr Simblet, as far as your initial skeleton is concerned, having had that point clarified?

MR SIMBLET: Yes.

MRS JUSTICE HILL: Paragraph 49 up to 59, that deal with public highway.

MR SIMBLET: Yes. If what Ms Stacey has made clear is right, and I can't say – well I accept what she says about the effects of the injunction. If we are only talking about-

MRS JUSTICE HILL: For interim purposes I think.

MR SIMBLET: Yes. And for interim purposes that'll be sufficient, then that follows, My Lady, of course.

MRS JUSTICE HILL: And as far as land which is not part of the public highways, so your submissions at 60 and 61, this does feature in the petrol stations claim. But your main point about the petrol stations one is the conspiracy point, is that right?

MR SIMBLET: Yes. I mean the – we – I will look at, I will take you to the terms of the injunction and perhaps deal with the non-public highway points there, but it's the – the underlying basis upon-

MRS JUSTICE HILL: No forgive me, Ms Stacey clarified yesterday in relation to petrol stations, your only tort is unlawful [inaudible] conspiracy.

MR SIMBLET: Yes.

MRS JUSTICE HILL: And so where you have made submissions in your written argument, Mr Simblet, at 60 and 61 about trespass and private nuisance, they do not bite on the petrol stations.

MR SIMBLET: I was worrying about a danger I don't face.

MRS JUSTICE HILL: Happy to focus these-

MR SIMBLET: Happy to narrow the issues on that basis.

MRS JUSTICE HILL: But that is correct, Ms Stacey, in terms of the petrol station tort, is it not? It is only unlawful because-

MS STACEY: The only tort. The cause of action is conspiracy.

MRS JUSTICE HILL: At all, let alone for interim purposes.

MS STACEY: No.

MRS JUSTICE HILL: Yes, thank you.

MR SIMBLET: And thank you to Ms Stacey. With that clarification, when you come to approach

A what is the serious issue to be tried, the starting point is that claimants must be able to show the Court some sort of case. The case that they rely on is in the tort of conspiracy. We looked by recourse to some of the authorities that I'd produced, or identified, to – at some of the ingredients of conspiracy and there are particular problems with those and I'll elide them. Refer to those briefly in a moment. But the more fundamental point is that conspiracy to cause loss by unlawful means is an intention tort. In this it is a tort of some seriousness. It is a tort in which the claimants contend-

B MRS JUSTICE HILL: It is an intentional tort. I cannot quite-

MR SIMBLET: Sorry, it's a tort of – involving serious allegations. And in this case, the serious allegations relied upon by the claimants are said to be criminal acts. Or to include criminal acts.

C MRS JUSTICE HILL: But did the submission yesterday not focus solely on civil acts?

MS STACEY: Yes.

MR SIMBLET: But there were things – but they are civil – they are civil wrongs, but they also are criminal. So smashing up a petrol pump, it's said.

D MRS JUSTICE HILL: But forgive me, in the skeleton argument advanced to Johnson J, my recollection is that the focus of the submissions by, Ms Stacey was it you or your colleague? I cannot remember.

E MS STACEY: Mr Watkin.

MRS JUSTICE HILL: Was solely on civil.

MS STACEY: Indeed. He made the point that these would also be, but for the present purposes he specifically said we do not rely on the fact that they are criminal. We rely on the torts.

F MR SIMBLET: Yes, I understand – we're not at any cross purposes, My Lady. And what I am trying to say is that what is alleged is serious allegations. And that means such as the obligation to plead fraud, where that's relied on. Or, as My Lady will know, in relation to the tort of misfeasance in public office.

MS STACEY: My Lady, sorry, we're not relying on fraud or misuse of-

G MR SIMBLET: I know you're not. I'm sorry, yesterday wasn't entirely clear what the submissions were as to what the case was on this, but I – what I am trying to make the point is that when people make serious allegations which they are required to back up by a statement of truth on a claim form. I'm waiting for objection to be made to that. The Courts expect the party making the allegations to set them out clearly and squarely. And I

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shouldn't need to cite case law to make that point. I can use the example of misfeasance in public office because My Lady may be familiar with the case of *Watkins* where that is said, and there are other similar cases that say that where allegations of serious conduct are alleged, there needs to be proper particularity.

Added to that, My Lady, and this is the point that I put in my skeleton submissions, where a case is based on an agreement by conduct, the CPR requires that the details of who the parties to that agreement are, are specifically pleaded. I am trying now to find if I put it in the – it's [Inaudible] 16, point-

MRS JUSTICE HILL: Is this in your skeleton?

MR SIMBLET: It is in my skeleton but now I can't find it. I've set it out in the skeleton. I'm sorry, My Lady, I don't want to be grinding to a half.

MRS JUSTICE HILL: It is 16.7.5, paragraph 88.

MR SIMBLET: 88, thank you. Yes. 16.7.5 and I have set out the material – the parts of that. 'The particulars of claim must specify the conduct relied on and state by whom, when and where the acts constituting the conduct were done'. And also – and it's the by whom that has a bearing here. Because what you have in the particulars of claim, and indeed what you have in the new particulars of claim because my learned friend has applied to amend their particulars of claim, is no detail of what the conspiracy is, who it involves, what its objects are, how they agreed, how this all came about. It's completely unpleaded.

We were told yesterday that it is the claimants' intention to proceed to trial and seek a final injunction. And irrespective of my *locus* in these proceedings, or Ms Branch's *locus* in this proceedings, the current particulars of claim are non-compliant and should not be allowed to proceed much further in their current form. And one of the submissions I'm going to make, I'll say it now and then come back to it, is that if you overlook for present purposes, the lack of any details of who these conspirators are and what it is all about and so on, you – and you're being asked to produce some directions for trial.

One of the directions that you should require is that full details are pleaded as to the nature of the conspiracy alleged. And if the claimants can't do that, then the Court by the trial will know exactly what the – the extent to which they have or don't have a case. But for now I make the point that conduct of this sort is required to be specifically pleaded, and a conspiracy, very serious allegation, is specifically required to be pleaded at least to the extent of those mandatory terms in the CPR, and the claimants have nothing of the sort.

They cannot tell you the name of one conspirator.

Indeed their case is worse than that. Because what we are – what they seek to do by removing the definition of environmental from protestor is essentially to say that anybody who wants to demonstrate against Shell is part of a conspiracy, whatever their motives. And I touched on it this morning, it's an absurd position to contend that people that are protesting against the price of fuel at a petrol station are in any sort of agreement with environmental people, whether they are using the banner of Just Stop Oil or Extinction Rebellion, or just turning up themselves because they're concerned about the impending doom that we face as a species.

To say that those people are conspiring with the cost of fuel people is absurd. It's just – it cannot satisfy the do they have a case point. It's ridiculous. And since it is ridiculous, then in my submission My Lady needs to reflect very carefully as to whether in fact the claimants have shown that there is a serious issue to be tried. They don't – no counsel feels able to put his or her name to pleadings alleging what the conspiracy is or who the conspirators are. And I think My Lady picked upon the point yesterday that the claim form itself doesn't make clear what the cause of action is.

So the Court is not told on the claim form that there's a conspiracy, and in the particulars of claim, including in their draft amended form, what the conspiracy is. That's very difficult, in my – it's very difficult in that situation, in my submission, to draw the conclusion that there is a serious issue to be tried on a claim of conspiracy.

But in fact the threshold they need to surmount is the likely to succeed test, the Section 12 (3) test, so I'll move to my submissions on that.

MRS JUSTICE HILL: Just before you do, just so that I have got the clarity of it. Section 12 (3), does that only bite on the petrol stations?

MR SIMBLET: I would say it bites on all of them.

MRS JUSTICE HILL: Yes.

MR SIMBLET: But as you've heard, I'm not – for current purposes, I'm addressing the lack of a case point on the petrol stations. So the – you will have to draw your own conclusion as to whether the claimants can show they're likely to proceed in Haven and Tower, but I haven't made any submissions about their lack of a case in that.

MRS JUSTICE HILL: Ms Stacey, remind me, did 12 (3) even come up in the Bennathan J hearing?

MS STACEY: Yes.

MRS JUSTICE HILL: It was addressed in the skeleton was it not?

MS STACEY: Yes, it was.

MRS JUSTICE HILL: But it did not seem to be the subject of as much discussion as in the Johnson J hearing?

MS STACEY: Forgive me, I just want to check before I say yes or no to that.

MR SIMBLET: I think My Lady's right, and while Ms Stacey checks, I think My Lady is right and I understand also that Bennathan J professed to apply the Section 12 (3) test rather than simply serious issue to be tried. But I'll be corrected on that if I'm wrong.

MS STACEY: My Lady, 2338.

MRS JUSTICE HILL: All we have at-

[Crosstalk]

MRS JUSTICE HILL: Is on one view this section is not – I mean this is a solicitor's note of what he said.

MS STACEY: Exactly.

MRS JUSTICE HILL: On one view, this section is not really intended for cases like this, but on the basis of the Court of Appeal authority, means the Judge must follow.

MR SIMBLET: Yes.

MS STACEY: So there was a – it was flagged. The fact that the law is in a slight state of flux in relation to it was flagged, but he proceeded on the basis that it applied. Without deciding the point.

MR SIMBLET: If it helps Ms Stacey, one of the things she's not facing here is an application that the order should be discharged for non-disclosure or anything like that. We're – you are – this comes back to which approach you should take, as a Judge being asked to re – to make fresh orders. I say you should apply the Section 12 (3) threshold and that the claimants cannot surmount it.

And I say that, and Ms Stacey's touched on the reason that impressed Bennathan J. I say that first because you are bound and you are bound by *Boyd -v- Ineos* where Section 12 (3) was stated in terms to be what the Court below had been grappling with. And where you can see from what was said by Longmore J in *Boyd*, that one of the reasons for the appeal succeeding was that the Judge had not properly applied, or not properly applied the Section 12 (3) test.

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And I took My Lady this morning to paragraph 50 when we were talking about the temporal element. The other thing that is said in paragraph 50 was whether interim relief should be continued in the light of Section 12 (3) HRA. It's not just something that was assumed to apply, it's something that the Court itself looked at and reached a decision on. And I am supported in that being the proper reading of *Boyd -v- Ineos* by the grounds of appeal document-

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MRS JUSTICE HILL: Permission to appeal.

MR SIMBLET: Yes, those documents, which show that the Court itself decided that an aspect of Section 12 (3) was something that should, on reflection, be looked at and be part of the appeal.

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MRS JUSTICE HILL: So within the bundle, Mr Simblet, you've given me already I think A307. No, you have given me-

MR SIMBLET: Those are just – those are not the page numbers for this case.

MRS JUSTICE HILL: No, they are not. So – but they are unhelpfully close to the actual page numbers. But you have given me, I think you gave me some in the bundle, did you give all four yesterday?

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MR SIMBLET: Yes.

MRS JUSTICE HILL: Let me look. These show, do they, and Ms Stacey has these documents has she?

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MR SIMBLET: She has these documents. And what I say they say in short form is there were two appellants, Mr Boyd and Mr Corré. Mr Corré was initially refused permission to appeal on one of his points, the sections which engage Section 12. The Judge granted Mr Boyd permission to appeal on an aspect involving Section 12, and then she then revisited and corrected – sorry, not corrected, revised, her permission order to allow Mr Corré to argue the Section 12 – the consequences of the Section 12 point in his case. And we see that then happening in *Boyd -v- Ineos*.

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MRS JUSTICE HILL: So looking at what was numbered at 317, that is an order from Asplin LJ.

MR SIMBLET: Asplin LJ, yes.

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MRS JUSTICE HILL: It was held that there was a reasonable prospect of success in relation to whether the Judge has directed himself properly on Section 12 (3).

MR SIMBLET: Yes. And my points is well if Section 12 (3) doesn't apply, why would the – why would a Court of Appeal Judge need to concern herself with whether that had been correctly

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applied. It's no more or no less than that, but it supports what is decided in *Ineos*.

I've taken you to paragraph 50, also for My Lady's note paragraph 49, and the discussion by the Court between paragraphs 44 and 49, on the application of Section 12 (3). In particular the fact that one of the reasons the conspiracy to injure injunction was discharged in *Boyd -v- Ineos* was at 48. 'It is not just the trespass that is shown to be likely to be established, it is also the nature of the threat'. And how all of this evidence related to Section 12 (3) considerations at paragraph 49.

So *Boyd -v- Ineos* was a case in which one of the reasons the grounds of appeal succeeded was because the evidence didn't meet the test required by Section 12 of the claimants being able to show they were likely to succeed in their claims. I think that's as much as I can say about that for the moment.

I will also take My Lady to Warby J's decision which is in the same bundle of authorities at tab 10, page 315 it begins. My Lady can see at paragraphs four and five what the concern was on the part of the applicants for the injunction. Much of the discussion was about whether the claimants should in that case have been drawing the Court's attention to Section 12, which they hadn't. And Warby J said more about that at paragraphs 57-63.

MRS JUSTICE HILL: Sorry, which page am I on now, Mr Simblet?

MR SIMBLET: Page 333.

MRS JUSTICE HILL: This is in *Asfaw*.

MR SIMBLET: *Asfaw*, sorry. Have I skipped too far quickly? We're in Warby J, so Warby J in *Asfaw*. I've taken My Lady to page 316, paragraphs four and five just to show what the case was about.

MRS JUSTICE HILL: Yes.

MR SIMBLET: It's to show it's a protest case and that people doing things people didn't like outside a school. And then the Section 12 point is discussed on page 333 in the context of a complaint of material non-disclosure.

MRS JUSTICE HILL: Yes.

MR SIMBLET: And I rely not so much on Warby J's consternation at this not being brought to the Court's attention, which isn't a complaint we make here, but on what he says about it at paragraphs 59 to 60 and 61. I've set out paragraph 60 in the skeleton, but also what Warby J had to say at 61 is of importance. 'Section 12 (3) may not be relevant to every antisocial behaviour injunction, there are no doubt many ways of behaving antisocially that

do not involve speech or writing or other forms of expression. But there can be no doubt as to the materiality of Section 12 (3) in this case. It contains a statutory prohibition on the grant of a pretrial injunction which interferes with freedom of expression unless the Court is satisfied the claimant is likely to obtain a final injunction'.

So an example there of a case involving freedom of expression, and I say to My Lady that the examples given in our skeleton argument of ways in which people are demonstrating, necessarily involve them publicising or doing something that amounts to a publication within Section 12 (3). Standing there holding up a placard. Or, to use the example that I raised yesterday, writing – one of the prohibitions in the injunction is writing on the – would be writing on a petrol station in a public place. I've put in the skeleton is it – what publication means for the tort of libel.

MRS JUSTICE HILL: That is the [Inaudible] point, yes?

MR SIMBLET: Yes. And it would be surprising if somebody were to write, 'The Judge who dealt with my injunction proceedings is corrupt and I have evidence to show that, and his name is X', and for the Judge to be unable to bring libel proceedings because that didn't amount to a publication. It's – it can hardly be not a publication – it can hardly be publication in the very generous way in which it is interpreted in the tort of libel, but not publication within the term properly understood under Section 12 (3).

So the threshold is one of likely to succeed, and the claimants aren't likely to succeed because they don't – cannot show any conspiracy. And their actual submissions on what the nature of the threat, to use their words, but the nature of the people turning up to demonstrate is, is completely contradictory and counter – well contrary to any idea of what a conspiracy properly can be. It has to be an agreement to do things for a common purpose. And it's not good enough simply to say these people are alleged to have damaged petrol pumps at Cobham Services and hammer the petrol pumps, and to say from that there must be some conspiracy of a widespread nature to involve every petrol station, over 1,000 of them, based on that conduct or the evidence that they've put in support.

It just isn't the – there isn't the pleading to support it, and there must be the pleading to support it. So you can't, in my submission, grant an injunction affecting the petrol stations. If, and I was going to move to my – some of the objections to some of the terms of the injunctions, but I'll perhaps park – since I've come back to this point once already, I will say that what my submission is if you do grant some procedural indulgence to the claimants

in this wholly unparticularised and wholly improperly pleaded case, you must bring that unacceptable state of affairs to an end fairly promptly and one of the terms upon which you could grant an injunction but prevent, as it were, unacceptable litigation conduct progressing much longer would be require the claimants to amend their particulars so that the Court can assess for itself exactly what the nature of the conspiracy is.

And so you might for instance want to grant their injunction temporarily while they have time to do that, and then revisit the position once you've seen their amended particulars of claim. And if their particulars of claim are still in the state that they are today, because actually responsible counsel cannot put their names to allegations of a serious nature against any identified people, then you may at that point think well actually this injunction shouldn't continue any longer and should be discharged. And I do – that's one step that you might want to take. You might also require – give – because you're asked to give directions for the progress of the claim, you can't have a claim that just goes on forever and ever. And this claim will need to be brought to an end with a trial, or the claimants withdrawing, and no trial Judge should be confronted with pleadings in this state. So again it may be something for you to take into account on the directions, My Lady.

So those are the submissions on conspiracy and Section 12.

MRS JUSTICE HILL: Just before you leave that topic, does *Cuadrilla* give us any insight into the way in which that conspiracy was pleaded?

MR SIMBLET: I'm not aware that it does. I haven't got the – I haven't interrogated *Cuadrilla*.

MRS JUSTICE HILL: We only looked at it really for the purpose of the definition.

MR SIMBLET: Of what a conspiracy is.

MRS JUSTICE HILL: Yes.

MR SIMBLET: And I don't know whether that point was taken or properly taken, if at all, in *Cuadrilla*, and we don't have I don't think have the pleadings there.

MRS JUSTICE HILL: And I think *Cuadrilla* is really about the contempt aspect of this-

MR SIMBLET: Yes. And it's a contempt point and also bear in mind My Lady, I keep saying we are where we are, but where we also are is a year into these proceedings. There's nothing unreasonable in expecting a party that seeks discretionary remedies from the Court to have the basic components of the tort upon which it relies, before the Court in the conventional way. So unless there's anything I can help with and My Lady with at that point, then I will move onto temporal elements.

Well we've seen this morning in the discussions between the Court and Ms Stacey, that there has to be a temporal element. If you impose injunctions, you will need to be very alert to the possibility, and I fear may become the probability, that the claimants have no interest in forcing this to a final resolution. And instead come back again for further extensions. Because things – they say things happen. So for instance they ask for up to a year because they say that might be the time that it takes to cover the judgment in *Barking* and its implications. Well let's assume its implications remain the same. Let's assume the decision in *Barking* isn't fundamentally changed. What should then happen, in – is – or what the claimants say would then happen is they would just carry on with this claim. I've made my points that the claim in conspiracy cannot just carry on, it needs to be properly pleaded. But-

MRS JUSTICE HILL: I am not sure in fairness that Ms Stacey has said that. But I mean-

MR SIMBLET: Well she's – I'm not sure she has said – sorry, I misheard what you said?

MRS JUSTICE HILL: I am not sure she has really given any indication that these would be unlimited. I mean-

MS STACEY: No.

MRS JUSTICE HILL: You have got a backstop of a year; you have made your position.

MS STACEY: I specifically told you about the directions that we had in mind. I made submissions quite to contrary.

MR SIMBLET: If in fact the law is tweaked in some way, then the claimants will be wanting to do something different, and as Ms Stacey said in, and this is why I say what I say, as Ms Stacey said in the submissions she made on directions, she anticipates that say named people might be added and come forward and want to say, want to file, defences or want to put in evidence and so on. If that happens, then as I understood Ms Stacey to be submitting yesterday, and with respect to her she's right on this, it's quite easy to see how these proceedings would not be reaching a final determination within the period of a year.

But – so when we look at what are you being asked to do, you're being asked to kick the can down the road for about a year, but you're really being asked to – it will be – the claimants may come knocking on the door of the court for some other reason at some later stage. I don't think I need to persist with this any further, but it's when you are – if you are going to impose directions or to, not impose directions, to make directions, I would invite you to be particularly specific about the circumstances in which further orders and so on

may properly be applied for, if we're going beyond the one year that's been said already. Can I move then to some of the terms of the injunctions?

MRS JUSTICE HILL: Please do. I have got Ms Stacey's latest draft here and I have got your submissions.

MR SIMBLET: Yes. Well, one of the first observations to make in relation to the petrol stations injunctions is there seems to be a pretty limited nexus between the conduct that is said to be the basis of the need to seek injunctive relief and to come to Court, and what actually was drawn up as being the terms of the injunction. And by that, I'm afraid I'm working from old drafts here, but I'm sure My Lady – if My Lady turns up the petrol station injunction?

MRS JUSTICE HILL: Yes, I have that.

MR SIMBLET: Things like blocking or impeding access to any pedestrian or vehicular access, or to a building within the Shell petrol station. In there we may be moving – there we are dealing with premises in which a. there is an implied expectation that people will be coming and going into the petrol station. And in my submission if – it's over-restrictive to say that – to use blocking or impeding. I know that they would be interpreted in a way that does not mean *de minimis* but it is, in my submission, perfectly legitimate and lawful protest for people to seek to speak to people going to buy fuel, to hand them a leaflet, to do that sort of thing, and nothing that is in the particulars of claim or the evidence produced about people damaging petrol pumps and so on should cause the Court to determine that a provision such as that is proportionate and a necessary response on the evidence that it has before it.

MRS JUSTICE HILL: Just before you get to that part of your submissions in further, looking at the way you have dealt with this in writing, the – are you going to come back to the other points you have made about the terms? You have gone to 3.1 blocking or impeding access, but in your written submissions you have got your submissions about the environment point, I think you have made that. That that should not be removed.

MR SIMBLET: Yes. Well one additional – yes, thank you My Lady.

MRS JUSTICE HILL: It just helps me to follow what you have said in writing. Is there anything else you want to say about the definition of persons unknown?

MR SIMBLET: Yes. The – it's an unsatisfactory definition. Well, yes there is in the sense that it is drawn from – I was just getting to it from a different route. The definition is drawn from the things that are prohibited. You've got my point about how they can't drop the word environmental because if it's said to be a conspiracy, who are the conspirators? The

absence of the case, the absence of detail in the case, militates very strongly against that being permitted. But in terms of the – if it's persons unknown damaging and/or blocking the use of and/or access to any Shell petrol station, it's the blocking, the use of or access to, because

MRS JUSTICE HILL: Well, before you get there, I am sorry to take you – I want to try and pin this down to the structure in your skeleton.

MR SIMBLET: All right, sorry My Lady.

MRS JUSTICE HILL: So you have dealt with 101 through to three, which is the definition of persons unknown.

MR SIMBLET: Yes, well – I've – did you receive my qualification about that?

MRS JUSTICE HILL: And I have struck through 102-

MR SIMBLET: Yes, thank you.

MRS JUSTICE HILL: Little three, is that the correct-

MR SIMBLET: Yes, that was the, I suppose, that was the – it was partly a practicality point and also a sort of presentational point, the Judean People's Front sort of idea that we don't want to be seen as not-

MRS JUSTICE HILL: But your points around the definition of persons unknown, are 101, environmental should remain in?

MR SIMBLET: Yes.

MRS JUSTICE HILL: 101 (i), there needs to be some kind of effect clause, and there needs to be some kind of cause clause, is that right?

MR SIMBLET: Yes. What is the – simply blocking or impeding access to a pedestrian access does not cause damage to the claimants. It does not cause damage that is only compensatable – sorry, that is not compensatable by an award of damages which is of course one of the criteria for the grounds of an injunction. It's the – essentially their case is that people demonstrate against Shell, we don't like it, and we should get an injunction in these terms. That's the – that won't do. We're coming back I suppose to the discussions that we had yesterday about [Inaudible] and the history of the tort of conspiracy by unlawful means. It needs to say, if there is to be this provision, it needs to reflect the fact that the people that the claimants say that it will cause them – it will cause them loss.

MRS JUSTICE HILL: So your solution is the wording you offer at footnote – at 110?

MR SIMBLET: Well.

MRS JUSTICE HILL: Is that right? So, just trying to look out for-

MR SIMBLET: I know what My Lady is trying to – I'm not being very helpful to My Lady here, and I'm not trying to be unhelpful. Partly my answer to this is there isn't a solution. Because you can't actually – that's another reason for not granting the injunctions in the form that they seek, because they cannot come up with a form of words which reflects the underlying basis of the tort.

MRS JUSTICE HILL: So just so I have got your objections clear, if I distil it in this way: Your objection to the persons unknown definition at 101 of your submission is that one, environmental should remain?

MR SIMBLET: Well I suppose my objection is one, the fact that they want to move environmental shows what's wrong with the claim, yes.

MRS JUSTICE HILL: But in terms of drafting points. Two, the definition of persons unknown that you put at 101 should somehow reflect an affect-

MR SIMBLET: That's it's the causing of loss.

MRS JUSTICE HILL: And loss.

MR SIMBLET: Yes.

MRS JUSTICE HILL: So you would submit that 101 does not end with what the intention is.

MR SIMBLET: Yes.

MRS JUSTICE HILL: And has some wording in it to reflect.

MR SIMBLET: Yes.

MRS JUSTICE HILL: What you then say, I think you add affect in to the prohibited conduct at 110?

MR SIMBLET: Yes.

MRS JUSTICE HILL: So it would have to be with the intention, you would say, and effect of disrupting the sale, is that right?

MR SIMBLET: Yes, and by means of the acts in paragraph three over the page. So yes, I suppose the short answer to My Lady's question is I don't really have anything orally to add to what's been put in writing there, but those submissions are maintained.

MRS JUSTICE HILL: I am sorry, it is my eyes going squiffy. On 103 you have added in intention and effect of-

MR SIMBLET: Yes.

MRS JUSTICE HILL: Thereby disrupting the sale. Yes.

MR SIMBLET: Yes.

MRS JUSTICE HILL: I see, so that is your one, your two amendments on the persons unknown definitions.

MR SIMBLET: Yes.

MRS JUSTICE HILL: Then do you maintain the points at 106 and seven about the geographical issue?

MR SIMBLET: There's – yes. I mean this is the difficulty with service and eliding service with the – or the responsibilities to serve with the terms of the injunction. That it's not clear what a Shell petrol station is. You would think it would be clear because you would think it would be one with a big sign outside saying Shell. But that's not what the claimants say. The claimants say it's-

MRS JUSTICE HILL: No, because of the shared ownership.

MR SIMBLET: They say it's any Shell petrol station with any Shell branding. So if you went into a garage shop and they were selling a Ferrari branded model which has Shell sponsorship on it, you could technically be in breach of this injunction.

MRS JUSTICE HILL: So you say, I know I have got your higher level submissions about why this injunction should not be granted at all, but you say in relation to the location point, there needs to be some other guidance as to a. which stations are included, and b. the geographical limits of the land? Because you talk about the four – the-

MR SIMBLET: Yes. And some of these – and some of these are places that the public have implied rights of access to.

MRS JUSTICE HILL: So you need to be clear, rather like the map that I was shown yesterday.

MR SIMBLET: Yes.

MRS JUSTICE HILL: Of the perimeter fence if you can call it that.

MR SIMBLET: There may need to be a – I mean at the moment the claimants say it's sufficient to put a little A4 notice up in half the petrol stations, but it may be that something more detailed than that needs to be included in the – what the area is so that anybody knows where they can and cannot stand.

MRS JUSTICE HILL: Well that is the point about service. I mean I am-

MR SIMBLET: But it's also a point about what the injunction – about what the prohibition is. Because-

MRS JUSTICE HILL: Ms Stacey?

MS STACEY: Sorry, just to be clear, we're not talking about where people can and can't stand. This is not a trespass injunction.

MR SIMBLET: Well it is.

MS STACEY: It's not simply where, it's what they're doing.

MR SIMBLET: Well blocking or impeding access to any pedestrian or vehicular entrance. So if you stand outside a vehicular entrance.

MRS JUSTICE HILL: Sorry, Ms Stacey?

MS STACEY: It's blocking – am I looking at the right one? Yes. By express or an implied route with others in connection with a protest with the intention of disrupting the sale or supply to the station. It's – all the elements string together; you can't take one off and say that's a trespass one. If somebody was simply standing it wouldn't be sufficient, we'd have to prove all the elements of the tort. So it's more – it's not so simple – it's not simply a case of saying where you are, it's what you're doing there that this claimant is concerned with.

MR SIMBLET: That's exactly-

MRS JUSTICE HILL: I see.

MR SIMBLET: That's exactly what I thought.

MRS JUSTICE HILL: Okay, what I want to do, I am conscious of time, Mr Simblet. What I want to do is just get your shopping list of issues that you say are wrong with the drafting, if in fact the petrol stations order survives.

MR SIMBLET: Yes, well that's exactly what I – that's what's wrong with it. Because if in fact you are protesting at a petrol station, are you at risk of somebody coming along and saying you're doing what Ms Stacey just read out. When in fact where you may be may be not even anything to do with the petrol station. In fact on the face of it, you would be outside the petrol station if you were impeding access to a pedestrian or vehicular entrance.

MRS JUSTICE HILL: Because you say, do you, that the extent of where access begins and ends is unclear? Is that what you say?

MR SIMBLET: Well where access begins and ends is always going to be unclear. And also they don't rely on trespass, so it's not just what their land is. They would say that if protestors stood on a piece of pavement outside a petrol station through which people can drive onto the petrol station, and protested there, in the way that Ms Stacey just read out, I won't repeat the words, that that was – could be a breach of this injunction. That is prohibited conduct.

MRS JUSTICE HILL: So you say, and I am obviously going to hear from Ms Stacey on these

points, but you say there needs to be some greater geographical limit, albeit this petrol station claim has not put in trespass, so the people understand where-

MR SIMBLET: At each and every petrol station.

MRS JUSTICE HILL: Where the limits of access are thought to be.

MR SIMBLET: At each and every petrol station. And that's why in some of these cases there are exclusion zones and so on. They draw it in a map.

MRS JUSTICE HILL: So it is not to do with the genesis of the underlying tort not being trespass, it's to do with clarity for the people who are-

MR SIMBLET: Here we're on clarify points, yes. It's – and the underlying tort isn't in trespass so that's why I don't limit it, as it were, to their – to Shell's land. Ms Stacey's intervention wasn't an intervention with which I disagreed.

MRS JUSTICE HILL: All right so-

MR SIMBLET: It's about – so we're on with blocking or impeding are too uncertain. And also is not – there's no proper nexus with their pleaded case or the basis upon which they came before Johnson J or indeed any other Judge.

MRS JUSTICE HILL: Yes.

MR SIMBLET: I don't say that people can't be stopped from causing damage.

MRS JUSTICE HILL: Yes. So just trying to then – the third scene you elicit, 108 in your submissions, there needs to be some addition again around effect, is that right? That is the third point?

MR SIMBLET: Yes. And if there can't be, then that's a reason not to grant the injunction. That's what – this is where some of this goes.

MRS JUSTICE HILL: Yes, so that is to the conduct elements.

MR SIMBLET: Yes.

MRS JUSTICE HILL: The defendant must not do any of these acts with the intention, you say, and effect.

MR SIMBLET: Yes.

MRS JUSTICE HILL: So that is the third on your shopping list. And then your fourth? I think we then get-

MR SIMBLET: Then we are getting onto blocking and impeding, yes.

MRS JUSTICE HILL: I just wanted to make sure I understood so for Ms Stacey to have a fair chance to-

MR SIMBLET: No, thank you My Lady, and I appreciate that this not straightforward and it's not been necessarily made any more straightforward by what I'm submitted about that.

MRS JUSTICE HILL: No, we are all doing the best we can. So under 3.1 you reiterate the geographical point.

MR SIMBLET: Yes.

MRS JUSTICE HILL: And you?

MR SIMBLET: And draw attention to the fact that it's not necessarily unlawful.

MRS JUSTICE HILL: Because that is another point about geography and [inaudible]?

MR SIMBLET: Yes. And that any protest is likely – any protest outside a petrol station may well lead somebody to claim that their access was impeded. I mean if you try and hand somebody a leaflet and they slow down to take it, you've impeded their access. But that lawful protest cannot be prohibited by the Court.

MRS JUSTICE HILL: Just so that I am clear, sorry to row back on this, all of your submissions on the detail of the terms are on petrol stations?

MR SIMBLET: Yes.

MRS JUSTICE HILL: Understood. Okay. So in some way your arguments of principle around Haven and Tower are much more limited?

MR SIMBLET: Yes.

MRS JUSTICE HILL: Because-

MR SIMBLET: There are – there's one point I think I want to make about Tower.

MRS JUSTICE HILL: Okay, let us come back to that.

MR SIMBLET: We'll come back to that. Can we go through petrol stations?

MRS JUSTICE HILL: The reason I am flagging it is because I am conscious of time, but b. the position is, is is not Ms Stacey, that the petrol stations has slightly longer to run? That runs until the 13th I think.

MS STACEY: The caveat to that, My Lady, is something I was going to raise in reply is that these service provisions are complex and it will require time to comply with them. Because there are, as I understand it, 1,127 service stations, all of which all need to [inaudible].

MRS JUSTICE HILL: All right. At the moment?

MS STACEY: But it has got – we've got to 12 May.

MRS JUSTICE HILL: Which in the context of this claim is quite a bit of time compared to Tuesday.

MS STACEY: But as I understand it, looking at what happened before, we'd need an order by Wednesday in order to have the 10 days to do the stuff that we need to do to comply with the [inaudible] provision.

MRS JUSTICE HILL: Okay, I did not realise that.

MS STACEY: You've given the indication before lunch that I asked, and that's what [inaudible]

MRS JUSTICE HILL: I understand. So carry on, so Mr Simblet?

MR SIMBLET: Yes. Blocking or impeding. I don't say there's anything about the – can't stop people from being prevented from causing damage. Same with messing about with switches and so on, nobody is going to try and say that that's conduct that somehow is lawful. I mean this is all subject of course to the point that they haven't got a case at all, but let's assume they have and we're dealing with the implications of any case that they have.

The next concern we'd have is affixing or locking themselves or any object or person or any part of a Shell petrol station or any other person or object on the Shell petrol station. On the face of it, that prohibits someone from putting a leaflet on a car.

MRS JUSTICE HILL: Yes.

MR SIMBLET: Spraying, painting, pouring, depositing or writing any substance or any part of a Shell petrol station. Chalking on the ground, prohibited by that. And those things are things that Shell have no right to require the Court to do. Those prohibitions.

MRS JUSTICE HILL: Well unless they succeed on their arguability of a conspiracy on a third party basis.

MR SIMBLET: No, but even if they do. Even if they do, paint - drawing with chalk outside a petrol station.

MRS JUSTICE HILL: Your point is no necessarily unlawful?

MR SIMBLET: Yes. These are not necessarily unlawful, and also bearing in mind of course that the offence of criminal damage has a defence of lawful excuse or it didn't cause damage, these are not things that necessarily cause damage. I know we're not trying to – I know we're trying to look at this in terms of the torts of trespass to good and so on rather than crimes, but it's worth bearing in mind that even the criminal law allows people to do some of these things.

MRS JUSTICE HILL: So you point about 3.4, five and six, is really that these are not necessarily unlawful acts?

MR SIMBLET: Yes. And therefore if they're not necessarily unlawful acts, the Court can't-

MRS JUSTICE HILL: I am putting them all together as one.

MR SIMBLET: -Very easily prohibit them. Yes, that's – My Lady said, these are not – my submission is these are not necessarily unlawful acts. The Court therefore cannot or should not prohibit them.

MRS JUSTICE HILL: That is your fifth point overall on [inaudible].

MR SIMBLET: Yes.

MRS JUSTICE HILL: So your sixth point is the encouragement point which you just say is too broad and vague?

MR SIMBLET: Yes, it's too vague and that's why somebody like Ms Branch experiences this, and the chilling effect of this injunction. You don't even need to go there. You can be – you can post something on the internet or, you know, it's good that people are standing – are turning up at petrol stations giving out leaflets. And that you'd be-

MRS JUSTICE HILL: Or retweet a picture that says, 'Well done you', or something.

MR SIMBLET: Yes.

MRS JUSTICE HILL: You say that it's outwith the geographical framework.

MR SIMBLET: Yes. It's just – basically, I'm sure My Lady has this point, Courts cannot grant injunctions that they are not prepared to enforce. And which are not sufficiently clear to be properly enforced. And the trouble with this order as drafted is some of the prohibitions are too vague and uncertain to be enforced, and some of them are in breach of the statutory right that these persons unknown have, protected by Article 10 and Article 11, to protest. And the Court can only restrain unlawful protest.

And if I can just cloak, because I know Ms Stacey needs her time to come back, that this is a difficulty for the claimants is made clear, you may think My Lady, from the way Ms Stacey outlined her case and the evidence yesterday, where she placed reliance on the fact that there was lawful protest taking place at some of these places. The fact that the claimants have to in part ask for the Court's intervention to restrain things against the background of there being lawful protest, is a matter that should cause My Lady some considerable hesitation before granting them either the injunctions that they seek or the injunction – sorry, either the injunctions as worded, or injunctions at all.

And finally for completeness, My Lady said did I have any submissions on Tower and Haven. I have submissions on the restrictions on Tower and Haven that – insofar as they are the same restrictions that have been placed on petrol stations. So things like the fact that

you can't – that you might block or impede access to Tower. Or you can't stick a sticker on a – well perhaps sticking a sticker is a bad example, but you can't pin a notice up on parts of the Tower or Haven or whatever, those are all unreasonable and illegitimate restrictions on protest. But My Lady has the submissions on the limited basis upon which Ms Branch is concerned about Tower or Haven.

MRS JUSTICE HILL: So I just need to marry up where the wording is the same.

MR SIMBLET: Yes. Or similar. Just – you have the underlying substantive point.

MRS JUSTICE HILL: But there is at least the geographical clarity around those?

MR SIMBLET: Yes. There's a greater geographical clarity, and as Ms Stacey explained yesterday, the claim as – and has clarified before My Lady this afternoon, that claim is all in trespass and there – and it's their land, so it's much clearer. And they've got the plans. And I suppose to test this proposition, one of the difficulties with the petrol stations case is that you don't have a plan. You should have 1,000 plans of petrol stations and where it is the claimants seek to restrain protest, but you haven't got any.

MRS JUSTICE HILL: But you would accept on those claims that the Section 12 (3) threshold, if it applies, is easier for the claimants to meet.

MR SIMBLET: In Haven and Tower?

MRS JUSTICE HILL: Yes.

MR SIMBLET: Yes.

MRS JUSTICE HILL: So if the test is likely to succeed, you would accept because of the genesis of the underlying tort, that it's an easier task than on the petrol stations claim where the main focus of the submissions seems to be.

MR SIMBLET: Yes.

MRS JUSTICE HILL: You may not go as far as conceding it is met.

MR SIMBLET: Yes, I'm not conceding it's met, but My Lady has the point.

MRS JUSTICE HILL: Got it. Thank you so much.

MR SIMBLET: There's nothing further to add. Thank you.

MRS JUSTICE HILL: Ms Stacey, I have grouped together the points around terms under six headings. Do you – feel free though to make whatever submissions you wish.

MS STACEY: My Lady, in relation to the last point, the petrol stations, their need to keep protection in place, I just ask for your note to have regard to Johnson J in paragraph 18-19 which refer to some of the risks to the petrol station which would eventuate if the

protections was not in place. So that's just the point that I think you were just discussing with my learned friend, so-

MRS JUSTICE HILL: I am not sure I was, was I?

MR SIMBLET: No.

MRS JUSTICE HILL: I wrongly assumed that we had a little bit more time on the petrol stations claim. I have wrongly assumed, but you are telling me that in fact-

MS STACEY: It's a general point as to the importance of maintaining cover at the petrol stations and the reference point for that is Johnson J, at 18-19. But I think I took Your Ladyship to that before lunch. So-

MRS JUSTICE HILL: But just so that we are clear in terms of timing, on the petrol stations you are saying that although it does not run out until the week after next, you need the order by next Wednesday?

MS STACEY: So I can give you the detail as to why that's the case. So last time around, if that's the probably the best reference point as to what the timeline should be, it's Emma Pinkerton Two, her witness statement of 10 May. I don't have the page reference immediately to hand, but I can get it. She says that on 10 May of last year, an instruction was given to put up warning notices. Sorry her witness statement is dated 10 May. She says the instruction was given on 6 May and that by 10 May they managed to get warning notices up at 58% of stations.

The difference now is that there are multiple bank holidays between now and 12 May. If we have longer, it's page 2586, if we have longer we can obviously get more notices up. And in some – since then we've found that it's more effective to send a printed pack to the stations which means it may take longer than in 2022. So on that basis we've calculated that we need really from next Wednesday through to 12 May in order to enable us to effectively serve in relation to the stations.

MRS JUSTICE HILL: But the same is not true of Tower and Haven?

MS STACEY: No. Tower and Haven is much more straightforward.

MRS JUSTICE HILL: I had not appreciated that from your skeleton but thank you.

MS STACEY: No.

MRS JUSTICE HILL: Carry on?

MS STACEY: Thank you. Just before I go to terms I just want to see if there's anything I need to pick up on. Just one point about, it may be a point in passing, but Your Ladyship thinks I

don't need to address, but it was suggested that we had chosen not to name anyone etc. and that it was inappropriate for us in a sense not to go to third party disclosure [inaudible], I just ask Your Ladyship to bear in mind what Freedman J said in *TfL -v- Lee*: 'Which is endorsed by other Judges including Bennathan J that it is much preferable for the information to be gathered through the police resources, and is likely to be more reliable and accurate'. And it's that – that's the process that we followed, and it's the process that's been followed in other protest cases throughout the history of these protests.

So far as the complaints, if you like, or objections are made in relation to conspiracy, I think that's the next heading, are concerned. My Lady, we don't accept that there is any conceptual difficulty with the way in which the conspiracy claim is particularised. Plainly in due course if any person was to be committed, or in due course if the [inaudible] injunction is to be – well in due course if any person is to be committed, it would be for the claimant to prove the intention to cause damage. We – this has all been gone through in some detail by the Judges before, and I took Your Ladyship to the attendance note. So I'm not going to-

MRS JUSTICE HILL: The held skeletons I know deal with this.

MS STACEY: Exactly. But the particulars of claim, the short point is that the particulars then correspond with *Cuadrilla*, paragraph 18 which sets out the various components of the conspiracy cause of action. And it's important to bear in mind, and sorry before I leave that, we don't accept there's a lack of clarity or details in the particulars. Persons unknown is the defendant, precisely on the basis that we know that some people have been smashing up pumps but we don't know who they are, and that's the process that needs to be gone through. But as discussed with Your Ladyship before lunch, there is jurisdiction for the Court to grant interim injunctions in relation to persons unknown.

The – it just so happens that on this occasion the cause of action on which the injunction is founded is conspiracy. That might make it more problematic. It might be said, in due course my client, because of the subjective element of intention, but that's a question of evidence. It doesn't – it's not fatal to the claim that's been brought. And doesn't create certainly a conceptual problem for my clients. So that's the first point. The second point, My Lady, is to remind ourselves of the test. What we need to establish is serious-

[Crosstalk]

MRS JUSTICE HILL: -To be tried.

MS STACEY: Quite. Not that these people have in fact caused the damage, but there's the serious issue because it's a cautionary injunction we're dealing with here. Now that's subject to the caveat of Section 12 because that raises the threshold. I accept that. And I therefore will deal with that now. The documents that you were taken to, so the appeal documents, orders of Asplin LJ, we say don't take anything any further. At best, they suggest that there was a question mark over the approach of the Court of Appeal in relation to 12 (3).

We don't, My Lady, have any underlying grounds of appeal to see how it was put and what led to the grant of those orders. But what we do have – and we don't have any appeal judgments bottoming out the point to assist us. But what we do have are two things. Firstly is that when one reads the Court of Appeal judgment in *Ineos* , there is no argument on the face of that judgment as to whether or not Section 12 (3) did apply. There was no analysis. It's quite clear from a reading of the judgment that parties proceeded on the assumption that 12 (3) applied. The issue is not ventilated in that judgment.

Whereas, and this is the second point, it was ventilated and considered in great detail by Johnson J. Including, My Lady, reference to Warby J's judgment in *Asfaw* which Mr Simblet referred to in his submissions. And Johnson J deals with paragraph 60 of *Asfaw*, we can go back to it if Your Ladyship wishes. Where effectively it's said, and I'm paraphrasing, publication has a wide meaning. Probably the best reference is going to Johnson J to see what he said about that.

MRS JUSTICE HILL: Just before you leave the *Ineos* point, I am not – so all of those grants of appeal, permission to appeal, forgive me, are to the Court of Appeal which led to the judgments on 3 April 2019? That must be right. So all of those documents that Mr Simblet [inaudible] arrived and dated at some point in 2018, and they are what led to the substantive judgment of 2019? And your point is-

MS STACEY: No argument.

MRS JUSTICE HILL: So whatever happened between the grant of permission to appeal, ultimately the appeal judgment is what helps me.

MS STACEY: Indeed.

MRS JUSTICE HILL: Thank you.

MS STACEY: Sorry, I-

MRS JUSTICE HILL: No, I was trying to think-

MS STACEY: No, I was-

MRS JUSTICE HILL: Sorry if it was a basic point.

MS STACEY: No.

MRS JUSTICE HILL: Johnson J, got it.

MS STACEY: Johnson J at 69. You'll see in the last line where he says Section 12 (3) should be applied accordingly so that publication covers any form of communication. That's a reference to *Afsaw* which is the paragraph – one of the paragraphs that Mr Simblet refers to. So that's fine, so it was considered by Johnson J. And then he goes on to consider in paragraph 70 and 71, why Section 12 (3) nevertheless doesn't apply to protest cases. And My Lady it's important to bear in mind that on the facts of *Afsaw*, people were distributing leaflets, and that's apparent from paragraph 31.

No evidence here of any equivalent type of activity, and if you look at the order, My Lady, which is the hook if you like for the submission that publication might apply, the words are spraying, painting, pouring, depositing or writing in any substance on any part of the Shell petrol stations. That is not, in my submission, anywhere near close to the facts of *Afsaw*, so these cases are all fact specific on the particular facts before Johnson J who was perfectly right to find that Section 12 (3) had no application.

MRS JUSTICE HILL: Thank you.

MS STACEY: So far as duration is concerned, My Lady as I think I've said a number of times-

MRS JUSTICE HILL: I have your points about the timing if it helps you. I do not need you to trouble me further about that.

MS STACEY: I'm grateful. As far as the definition of persons unknown is concerned, I think you also have our points in relation to that, but please let me know if you need particular assistance.

MRS JUSTICE HILL: Well I understand why the environmental part wants to be removed. What do you say about the proposal to add affect?

MS STACEY: Yes, well we say that it's not appropriate in circumstances where we're seeking an anticipatory injunction against persons unknown. And one needs to bear in mind what's the purpose of the description of persons unknown? You see that from *Canada Goose* in 80.2.2. The requirements, just pull that up… the small bundle, 82.2, page 37 of the authorities bundle.

MRS JUSTICE HILL: What does that say?

MS STACEY: It says the persons unknown must be defined in the originating process by reference

to their conduct which is alleged to be unlawful. So that's just what needs to be done. And the purpose of that is so that you can identify the persons who in due course might be joined. Now the element of actual damage is something that – it's loss essentially. So it would have to be proven by my client in due course if we were to enforce. Because a person could turn around and say well actually you've suffered no actual damage and therefore there's no complete cause of action against me. But it's not an element that would be necessary or appropriate to include in the description. Because it introduces unnecessary complexity.

MRS JUSTICE HILL: Is that not one of the *Cuadrilla* elements? Have I misremembered that?

MS STACEY: It's one of the *Cuadrilla* elements of the cause of action.

MRS JUSTICE HILL: Yes.

MS STACEY: But it doesn't say – the point here is by reference to their conduct. The conduct is what needs to be identified. So the acts, the unlawful acts, not the effect. So if you look at *Canada Goose*, paragraph 82.2, they must be defined by reference to the actions which are unlawful, the offending acts. Now what the effect of those acts are - is arising at a different stage. And you might get assistance by two further cases. *Breen*. Actually before we do that, let's turn up *Bastin* which is earlier on in the authorities bundle. Behind tab eight. Sorry, of the small authorities bundle. *Bastin* is at page three. Paragraph 22 which is at page eight.

MRS JUSTICE HILL: You can just tell me what it says.

MS STACEY: It says, so I'm looking actually at paragraph 22.2.1, where reference is made to Bloomsbury and the Vice Chancellor in Bloomsbury states as follows: 'The crucial point as it seems to me, is that the description used must be sufficiently certain as to identify both those who are included and those who are not. If that test is satisfied, it does not seem to me to matter that the description may apply to no one or to more than one person, nor that there is no further element of subsequence identification, whether by service or otherwise'.

So My Lady, the call from Cameron which was the Supreme Court Judge and [inaudible] heading up this jurisdiction if I can put it that way. The purpose of the description needing to be so specific was for the purposes of identification. So as to allow service. And I suggest that the description that we have is perfectly proper and appropriate in light of that underlying policy.

MRS JUSTICE HILL: Thank you.

MS STACEY: I'm just going to have a quick look at *Breen* to see if that's helpful, takes the point any further. Yes, and that also reflects paragraph 31 of *Breen*, page 463. It's slightly off the point but I'll ask Your Ladyship to look at it anyway.

MRS JUSTICE HILL: Yes.

MS STACEY: 463, paragraph 31, you'll see there there's reference to the injunction. So this wasn't so much the description but it's said that the injunction was expressly made subject to the condition, those actions had to be carried out in agreement with the intention of preventing or impeding. There's no reference there to actual harm. But that's the reference to the injunction, but nevertheless, even less requirement in relation to the description which is all to do with description which is all to do with identification and service. And how can you prove actual harm in the context of an anticipatory injunction against persons unknown? It introduces an investigative process that is simply outwith the requirement. So that's the effect point.

MRS JUSTICE HILL: The next one was geography around the petrol stations.

MS STACEY: Yes. Geography around petrol stations. Well My Lady one has to look at this in context. Dealt with by Johnson J is the starting point and you will recall from the attendance note that there's a long and detailed exchange between him and Mr Watkin as to what the appropriate geographical limits of this injunction should be. The target, the overall target, is Shell. The petrol stations change. And that's a point that was recognised by Johnson J; it's not set in stone because it's a branded station and that changes from time to time. So that's the starting point.

The second point is contextually what is sought to be prohibited in relation to Shell petrol stations. Not simply walking on them. So in that scenario it's not as important, one might say, to define the geographical limits by reference to boundaries. Because crossing a boundary isn't enough. You are prohibited from doing the activities which offend the various component parts in paragraph 18 of *Cuadrilla*. You don't get to the range of breach unless all those component parts have been satisfied, if you like.

And in that context, Johnson J was satisfied that Shell petrol station branded, you know it when you see it. You have to take a step back and apply the man on the Clapham omnibus test, if I can put it that way. What would a reasonable bystander understand? And is it sufficiently clear in all the circumstances? And the answer to that question My Lady, is yes. The other point My Lady that I would throw into the mix is there was no freedom of forum.

Whilst Ms Branch might want to stand on the forecourt handing out leaflets, or stand at the entrance and be concerned, she has no – there is, as *Cuadrilla* makes clear, no rights – there no – act of protest for the purposes of disturbing or disrupting, or which would cause blockages is not at the core of Articles 10 and 11. She can protest elsewhere which doesn't carry the risk that she is so concerned about.

And I'm told, given that there are currently as I stand her, 1,127 stations which all change from time to time, it's simply not possible for maps to be produced, or plans in the usual way. But there is no geographical lack of clarity because the location which forms the subject of the overarching cause of action in respect of which the unlawful activities would need to be proved, is clear enough by reference to its definition. And that's the approach adopted ultimately by Johnson J. And I turn up the paragraph and show you what he says.

MRS JUSTICE HILL: I can read that in my own time.

MS STACEY: Yes. Defined by reference to the class, the thing, as opposed to a plan.

MRS JUSTICE HILL: Both the activities and the fact that it is Shell-related.

MS STACEY: Exactly.

MRS JUSTICE HILL: Yes.

MS STACEY: And so-

MRS JUSTICE HILL: The third point that Mr Simblet made was around effect, I think you have dealt with that.

MS STACEY: I have dealt with that. I think then I'm at 3.4 and 3.6 of his skeleton.

MRS JUSTICE HILL: Then you are on blocking and impeding access I think.

MS STACEY: That's geographical scope.

MRS JUSTICE HILL: Which you have dealt with.

MS STACEY: Which I've dealt with, and no freedom of forum again.

MRS JUSTICE HILL: So then the affixing, erecting, painting. All unlawful.

MS STACEY: Yes, well My Lady.

MRS JUSTICE HILL: All not necessarily unlawful.

MS STACEY: Back to two points in relation to that. Back to no freedom of forum. You don't have to do it there. You don't have to affix anything on land that's not yours. It's private property. That's the first point. The second point My Lady, is *Cuadrilla* makes clear that an injunction or prohibition can include conduct that would not otherwise be unlawful. Can include, in other words, lawful activity if it's necessary. For the purposes of the cause of

action. So it's not in itself necessarily objectionable that an injunction order is framed in terms that might conceivably catch activity that would be lawful. And you have the recital here.

MRS JUSTICE HILL: I am sorry?

MS STACEY: And you have the recital that the intention isn't – so if somebody does something, hands out a leaflet, you know in practical – the practical reality is they aren't going to be enforced against, they're not a person unknown. We'd look at the evidence, back to Freedman J's approach to consideration before you join. You have to look at whether the evidence justifies it. I'm taking this at quite a lick.

MRS JUSTICE HILL: No, I am also conscious of time. Have you dealt with the persons unknown and paragraphs one and three. You have dealt with geography, that's two and four and you have dealt with not necessarily unlawful, that is five. And then six was encouragement.

MS STACEY: And the point on encouragement that it was subjective?

MRS JUSTICE HILL: No. That again too vague, uncertain. You would say I assume in response to that is it the same point around not necessarily unlawful?

MS STACEY: Exactly. Not necessarily unlawful. And also again back to *Cuadrilla* which talks about the types of lack of clarity. And there can be – well it's not necessarily unlawful and one can form a view about it. It's not unclear, one knows, in the context of these types of protests, what we're trying to get at. That if you're acting in combination with others then encouragement – yes, and we're dealing with coordinated, well-organised groups, working together. So you know it again when you see it.

MRS JUSTICE HILL: That is very helpful, Ms Stacey. Is there anything else you want to say?

MS STACEY: Can I just turn my back?

MRS JUSTICE HILL: Please do.

MS STACEY: My Lady, you haven't forgotten about the third party disclosure have you? Because I dealt with that on day one.

MRS JUSTICE HILL: Absolutely not.

MS STACEY: It feels like a long time ago.

MRS JUSTICE HILL: I have today. We have not had any submissions; I do not think we need to revisit it. I absolutely have not.

MS STACEY: And so far as process is concerned, it may be the appropriate time to – I had a very brief chat with Mr Simblet and I don't think Mr Simblet's in disagreement, he'll pop up if

he is, but our preference would be for an indication to be given, a decision to be made rather, on – as soon as possible. Or an order to be and therefore we'd need Your Ladyship's assistance in terms of seeing an order. Which would be produced on the back of that decision ideally by Friday. But obviously I'm in Your Ladyship's hands. Thereafter, we do wish to have a more detailed judgment because we think it would assist both us and other parties, given the-

MRS JUSTICE HILL: No, that is certainly my intention. It is just the logistics of doing so.

MS STACEY: Well, that can follow. But priority here would be to get the decision once Your Ladyship's considered everything And we can make ourselves available on Friday to make sure that's turned around.

MRS JUSTICE HILL: I think that would be helpful. All right, well-

MR SIMBLET: Can I pop up in relation to Friday? I actually have a conference with a retained client on Friday so it's quite – Friday morning would be difficult for me to be – but Ms Hardy is able to deal with any corrections and so on if it's simply a question of – it sounds like it's not going to be a judgment, it's looking at the order. I won't be able to look at it myself on Friday morning. If it was another time, then-

MRS JUSTICE HILL: I think in terms of absolute priority, I have to get something to you that decides the Tower and Haven issues by the end of Friday. At the latest.

MS STACEY: Yes.

MRS JUSTICE HILL: Not – petrol stations I know we might have until next week. That is quite a long time in the scope of this case. But what you need from me is a decision about whether to grant or renew the injunction on Tower and Haven. And in order to achieve that, we need a recital that reflects how I have dealt with Mr Simblet's client.

MS STACEY: Indeed.

MRS JUSTICE HILL: I think. Because it needs to reflect-

MS STACEY: It's the 40.9 point that needs to be referenced.

MRS JUSTICE HILL: It needs to reflect the extent to which I have allowed him in or now allowed him in or listened to or taken into account of all his submissions. So those issues, it seems to me, are the priority.

MS STACEY: I agree.

MR SIMBLET: I rise I hope to be helpful. On the if it is – now that we're aware of these difficulties in relation to the petrol stations and so on, if My Lady finds herself in a position

that you haven't reached all of your decisions and you'd like to and you're conscious of the fact that there is a practical problem for the claimants that would – that could be solved by extending the injunction for a couple of days, or whatever, if that's what you need to do, then – well obviously I don't speak for everyone in the world, I only speak for Ms Branch, and everyone in the world is affected, but we can understand how the Court might want to case manage that and wouldn't seek to make-

MRS JUSTICE HILL: I think that is sensible.

MR SIMBLET: We wouldn't seek to make your life more difficult.

MRS JUSTICE HILL: Well I would quite like to be able to assist your client as much as I can. But I think that is a helpful-

MRS JUSTICE HILL: That's happened before, a short continuation. For a matter of days or a short period of time, a week.

MS STACEY: Oh yes. Sorry, I need to work out how that interrelates with our service obligations. Because we have to serve any order, so any short continuation has to be served against – there's two rounds.

MR SIMBLET: That's not helpful.

MS STACEY: No. It's fine for Tower and Haven but that's not the problem. Or it might be. Tower and Haven it wouldn't be so-

MRS JUSTICE HILL: Well it might – yes. Let me reflect. I mean there is more between you on the petrol stations as far as I can see.

MS STACEY: Yes, a short continuation in relation to that would involve another round of quite extensive service, activity on our part. Because we have to serve that – the risk being, My Ladyship to put it in practical terms, if we didn't serve that short continuation order, however long it lasts for, effectively there – people could have a free pass in the period between – because they wouldn't have been served with that order.

MR SIMBLET: Well again to help, of course you could dispense with the reservice requirements for that part of it. I see the point that Ms Stacey raises, she doesn't want to do it twice.

MRS JUSTICE HILL: Well is the position then in reality are you saying that you – well it might have to be what we can do.

MS STACEY: Well quite, but I just want to flag it's not as straightforward.

MRS JUSTICE HILL: Because there are so many petrol stations.

MS STACEY: So many petrol stations, dispensing of service in the context of persons unknown.

MRS JUSTICE HILL: Not attractive.

MS STACEY: Not necessarily something we can do without thinking about it quite carefully.

MRS JUSTICE HILL: Yes.

MS STACEY: So I don't want to create roadblocks in my – because I would like a short continuation to give Your Ladyship as much time as possible, but that's something that I thought it proper to bring to your attention.

MRS JUSTICE HILL: All right. Leave it with me and I will do the best I can and you will hear from my clerk in some form. You will hear something by noon on Friday. I cannot promise what it will be but I am very conscious of the timing. But across all of the injunctions. And if I can make an in principle decision even around the petrol stations, even for a short period of time, I might be able to wrap that up by Friday morning as well. – Friday lunchtime as well.

MS STACEY: I'm grateful.

MRS JUSTICE HILL: So I will do the best I can.

MS STACEY: Thank you.

MRS JUSTICE HILL: You will hear from my clerk in some form. So please, I am assuming Mr Simblet then my clerk has Ms Hardy's email address. And we will – yes, she has been party to some of these round [inaudible], so yes.

MRS JUSTICE HILL: So even though perhaps she is not formally on the record, she is content to hold the brief while you are in prison for saying-

MR SIMBLET: She will be.

MRS JUSTICE HILL: On a serious – I mean I want to make sure that things are properly covered and I think your junior is-

MR SIMBLET: Yes, Mr Greenhall may be available by then. I am not sure. He is doing a trial somewhere.

MRS JUSTICE HILL: Does my clerk have his details? Can you make sure she does. And I think certainly on your team's side we have plenty of contact details and you are aware of my clerk's information. All right, thank you very much both of you.

Court rises.

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