IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Neutral Citation Number: [2023] EWHC 2166 (Admin) Case No: QB-2022-001241

Courtroom No. 12

The Royal Courts of Justice
Strand
London
WC2A 2LL

3.26pm – 4pm
Thursday, 28th April 2022

Before:
THE HONOURABLE MR JUSTICE BENNATHAN

B E T W E E N:

SHELL UK LIMITED

and

ANDREW SMITH
& PERSONS UNKNOWN

MS STACEY QC appeared on behalf of the Applicant
MR R STERN (instructed by Hodge Jones & Allen) appeared on behalf of the Respondents

JUDGMENT
(Approved)

MR JUSTICE BENNATHAN:

1. These proceedings are applications for two injunctions. The claimants are two linked companies. As nothing turns, it seems to me, on their differing corporate identities, I will refer to them as either "the claimants" or "Shell". The orders sought are for two very different sites; one is the Shell Haven Oil Refinery which I may refer to as Shell Haven, a substantial fuel storage and distribution installation in Essex, and the other is the Shell Centre Tower, which I may call just The Tower, an office building in London.
2. The substance of the orders sought are: one, interim orders banning certain conduct at Shell Haven and The Tower to continue in slightly modified form for a period of one year or until trial, or until further order, whichever is sooner, to continue that as interim orders previously granted; two, alternative service provisions for the unknown defendants; three, an order for third party disclosure pursuant to Civil Procedure Rule 31, sub rule 17, that the chief constable of Essex and the Commissioner of the Metropolitan Police Service disclose documents recording the names and addresses of any individual who has been arrested by one of their officers in the context of breaches of this order – I will come back to the terms later on – and arrest notes, body camera footage, and other photographic material relating to any other such breaches.
3. There was some discussion whether I should consolidate the two separate applications formally under CPR 3.1, but for reasons discussed in the course of the hearing before me today, I think everyone agrees that I should not, but I do direct that these applications and cases should be listed together unless a time comes that either party applies them to be listed separately
4. It may well be if, for example there were enforcement proceedings about conduct at The Haven which did not involve The Tower, there would be no sensible purpose served then by listing them both together, but for the time being the default position as it were, should be that if one case was listed, the other should at least be considered to be listed at the same time, to be heard by the same judge in the same Court. To make any orders manageable and comprehensible, the two injunctions that are made should obviously be promulgated separately.
5. The defendants are, in the main, persons unknown though it is anticipated, reasonably in my judgment, they would carry out protests against Shell. Although the unknown defendants are identified by actions they might carry out, the background to these applications are protests associated with groups that include Just Stop Oil, Extinction Rebellion, Insulate Britain, and no doubt others. There is now one named defendant, Mr Andrew Smith, who I join on his unopposed application about part of these proceedings that relate to The Tower.
6. Mr Smith has served a witness statement and was represented at the hearing by Mr Stern of counsel. I pause to express my thanks to Miss Stacey of Queen's Counsel, and Mr Stern, and their respective legal teams for help I have been given in reaching my conclusions in this case.
7. Before Mr Smith joined in, there had been a skeleton argument served on behalf of a Jessica Branch. Ms Branch is someone who has been involved in protest by, I think, the group Extinction Rebellion in the past. She received an e-mail at, or at least via, one of the email addresses that Shell used to notify potential defendants of these proceedings.
8. In a similar but different injunction application earlier this week, counsel attended for Ms Branch. On a pragmatic basis and with the agreement of counsel for that oil company, I heard submissions from counsel for Ms Branch. In advance of this hearing, I asked the parties for their views on whether I should receive her submissions in this case. Shell, if I may call them that, Shell replied firstly that, before doing so there should be an application

made under CPR 40.9, and probably if such an application were made it should not be allowed on the basis, she is not to use the words of that part of the Civil Procedure rules "directly affected" by the order sought.

9. The solicitor's firm, Hodge Jones & Allen who instruct Mr Stern today, replied to my query by letter, saying firstly, they didn't pursue the point given that Mr Smith was becoming a defendant, but secondly, they suggested Ms Branch could fit within CPR 40.9 given her legitimate interest in protest not being stifled by what she fears would be characterised as "overly oppressive injunctions".

10. I do not have to decide this now, but my very tentative view is that normally a person who has no prospect of being caught by an injunction would not be "directly affected". However, in a protest case engaging Article 10 and Article 11 rights, and where all, or as here the vast majority of defendants are unknown, my tentative view is I would have decided I should hear representations on behalf of Ms Branch. It seems to me that in this context the words "directly affected" are perhaps just wide enough to encompass someone in her position.

11. Analogies are always perilous things in decisions that have to depend on the precise facts but I risk an analogy on this occasion: if one were to think of a football fan of a particular team who discovered there was an injunction banning other fans of that team visiting a certain venue, it seems to me the term "directly affected" would just be wide enough to encompass such a person, and if it would have encompassed them, then once one introduces Articles 10 and 11, I think the same term probably would have encompassed Ms Branch.

12. An argument raised in correspondence, but not relied on by Ms Stacey in our brief discussions of the subject today, an argument raised by Shell was the floodgates argument. If that is a concern, then I think the answer would be firstly, the Court can be flexible so as to permit sensibly limited numbers of parties joining in, and secondly, the Court can use its robust case management powers to avoid repetition or submissions that are simply political argument that did not engage with the issues that had to be resolved. I stress this is a tentative view, and it is fact-sensitive, so in other cases the facts might lead me to a different conclusion.

13. The evidence put before me by Shell in respect of events at Shell Haven comes from Steven Brown, the Distribution Operation Manager for Shell. Mr Brown has made two witness statements. Within them, he refers to a number of historic protests and protests at other linked or geographically proximate premises. On the subject of Shell Haven, he writes as follows:

> "On 3 April 2022, a large group of protesters blocked the main access to Shell Haven terminal, although police attended and ensured that a single lane of the carriage way remained opened. Eight protesters boarded two tankers parked outside the perimeter of the terminal and blocked the first tanker in. The police managed to remove them, however this took approximately six hours. Since then, the first claimant security team has spotted various people scoping and investigating the site and it is understood they have been attempting to locate the access point to the jetty".

14. The other examples he gives, I think, are of other similar activities nearby but nonetheless they are sufficiently proximate both geographically and in the activities being carried out by the other organisations he names to found, it seems to me, a sensible concern that Shell Haven could imminently be a target for serious protest activity.

15. Mr Brown served a second witness statement which in essence establishes that there have been no further protests specifically targeted at Shell Haven, but there have been other

protests and other proclamations, if that is the right word, by some of the groups involved in the protests that give him the liveliest fears that protests are very likely to take place in the near future and on a substantial basis.

16. The evidence I had before me in respect of the possible events at The Tower comes from Keith Garwood, the Asset Protection Manager for Shell. In his two witness statements he wrote of protests at The Tower, and more broadly, elsewhere in London. His concerns are about trespassing, which shuts down the offices and intimidate staff.

17. Mr Garwood also went so far as to suggest that protests that block roads nearby and pavements nearby pose a danger to other road users, might stop emergency vehicles, and might further intimidate staff. More specifically, and recently on 6 April of this year, some paint like substance was thrown at the tower building. On 13 April, about 500 protesters were near the building banging drums and unfurling banners in a manner which he, Mr Garwood, thought could be intimidating some staff.

18. Five protesters entered the building and glued themselves to various parts of the reception area. On 15 April, a group stood near police lines, near the tower building making noise and unfurling banners. They were there for about an hour and a half and lead those in charge of the building to order a lockdown. On 20 April, about 11 protesters were outside the building. They lit flares and unfurled banners. Once more, this lead to those in charge of security of the building calling a lockdown, and Mr Garwood expressed concerns again that staff could be intimidated by these protests and emergency access could be blocked.

19. It is worth stressing that of all the accounts of all the actions at both the claimant's sites, no suggestion has been made of violence being used against any person. These are protests that are disruptive, often seemingly well planned, frequently noisy, no doubt potentially upsetting to at least some Shell employees, but they are peaceful protests.

20. I have also read witness statements by solicitors for Shell, essentially dealing with methods of service on the unknown defendants and their contact with the relative two police forces who are either neutral or downright supportive of the application for disclosure.

21. Mr Smith has served a witness statement. I do it, I hope, no violence if I summarise, that he sets out in little detail his concerns about the importance of the climate emergency, the dangers to humanity, and the planet brought about by that. He cites the example of activists protesting against Shell elsewhere in the world who have actually paid with their lives. He is fiercely critical, as he is allowed to be, of the Shell Oil company in expressing his views. Obviously, I am articulating his views. It is not for the Court to express any view at all on what are contentious political issues.

22. Mr Smith goes on to talk about the importance of the Shell centre tower as a site of protest. He then details a little more about the protests and I quote this from paragraph 10 of his statement of 28 April:

> "The Shell centre tower protests extended to the street outside and were not confined to the building. Our methods are generally confined to gathering outside the building, holding banners and signs and chanting slogans to make the reasons for our protests clear. Our protests do cause some disruption, but we allow traffic to pass on the road and we do not prevent pedestrians from passing through the group. In fact, we welcome interaction with the public and make the most of outreach opportunities.
>
> At the recent protests we were keen to engage with Shell staff members and bring our protests directly to those who are part of the destructive business practise [sic]. We did not block entrances or exits and allowed space for staff members to pass. It was Shell's decision to lock down the building as a result of our protest. Our presence at shell is a tiny reality check on a

multi-million pound "Greenwash" campaign that the corporation uses to skew public opinion of its operations".

23. It is perhaps fair to insert an observation by me that the main thrust of Mr Smith's witness statement was to seek the prevention or limitation or negating of the sort of protests he describes that he has participated in. Looking forward to the terms of the order sought, in fact, the relatively restrained order sought by Shell would not constrain the sort of activity Mr Smith describes in that section of his statement.

24. Section 12.2 of the Human Rights Act 1998 limits the Court's ability to grant any relief such as an injunction in a case where freedom of expression is involved, and the defendant is neither present nor represented.

25. While Mr Smith is present, of course the great majority of the potentially affected defendants are not present. That limitation does not apply however, where the applicant has taken all practical steps to notify the defendant or punitive defendants. In this case, I have read evidence from solicitors acting for the claimants who make clear emails have been sent to various groups, copies of the interim injunction have been left at the edge of the various sites, thus alerting protestors to the existence of these proceedings. On that basis I am satisfied the claimants have taken all practical steps and I can make the order sought provided the other criteria are met.

26. Section 12.3 of the Human Rights Act also requires me not to issue an injunction unless I am persuaded that the claimants are likely to succeed in any eventual action to stop the "publication" that the order would forbid. On one view of the law that provision is not really aimed at protest cases such as this but there is Court of Appeal authority that it should be taken as applying, so of course I follow that authority. In fact, the "likely" test, is already required under other parts of the law that I have to consider, so I will deal with that compendiously in a few minutes time.

27. The power for the Court to grant injunctions is set out in very broad terms in section 37 of the Senior Courts Act 1981. A criminal offence that characterises the sort of conduct that the claimants fear is section 68 of the Criminal Justice and Public Order Act 1994, the offence of aggravated trespass, the trespass done to obstruct or disrupt a lawful activity. Another offence relevant to protest on the roads is wilful obstruction of a highway contrary to Section 137 of the Highways Act 1980 which carries the power of arrest.

28. The well-established test for the grant of an interim injunction was described *American Cyanamid v Ethicon* [1975] AC 396. The first two aspects, where there is a serious question to be tried and whether damages would be an adequate remedy were no injunction granted are easily met in this case. The actions planned, carried out, and publicised by the groups listed, clearly amount to the strong basis for an action for trespass as well as a nuisance. Given the sort of sums involved in the oil industry on the impracticality of obtaining damages on that scale from a diverse group of protesters, some of whom may have no assets, damages would obviously not be an adequate remedy.

29. The injunction sought is an anticipatory injunction in the sense firstly, that it is largely against persons unknown and secondly, its anticipation of further action that is feared as distinct from conduct that has already taken place or continuing conduct. In *Vastint Leeds BV v Persons Unknown* [2018] EWHC 2456 (Ch), Marcus Smith J summarised the effect of two decisions of the Court of Appeal on this topic and I adopt his summary with gratitude.

30. The questions I have to address are one, is there a strong possibility the defendants will imminently act to infringe the claimants' rights; two, if so, would the harm be so "grave and irreparable" that damages would be an inadequate remedy. I note that the use of those two words raises the bar higher than the similar sounding test found within *American Cyanamid*.

31. Injunctions against on identified defendants were considered by the Court of Appeal in the

case of *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100 and *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802. As both cases are recent decisions concerning unknown defendants, in protest cases, they are of particular significance to a case such as this. *Ineos* concerned protests against fracking. There was an argument before the Court to protect the protestors' Article 10 and 11 rights under the convention, of course the rights to freedom of expression and to freedom of association.

32. In the course of the judgment, it was said at paragraph 30 that "A court should be inherently cautious about granting injunctions against unknown persons since the reach of such an injunction is necessarily difficult to assess in advance". In its conclusions, Longmore LJ tentatively framed the requirements of an injunction so as to include, one, "The terms must not be so wide that they prohibit lawful conduct", two, "The terms must be sufficiently clear and precise to enable persons potentially affected to know what they must not do".

33. *Canada Goose* was concerned with protests against clothing containing animal products. The Court of Appeal's judgment revisited *Ineos* and another decision a fracking protest appeal, that is to say *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29 and described, at paragraph 82 of *Canada Goose*, a modified version of Longmore LJ's requirements once more. I only produce only those that are pertinent to this case.

> "(1), the prohibited acts must correspond to the threatened tort. They may include lawful conduct if, and only if the extent that, there is no other proportionate means of protecting the claimants' rights.
> (2), the terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do".

34. An issue in any case like this is how I should approach limitations on the Article 10 and Article 11 rights of the defendants. In the Supreme Court case of the *Director of Public Prosecutions v Ziegle*r [2022] AC 408, protesters had blocked a road leading to a venue where an arms fair was being held, by sitting in the road and attaching themselves to heavy objects. The Supreme Court concluded that the District Judge who had acquitted them on the basis that protest was a lawful excuse was entitled to arrive at that decision.

35. *Ziegler* was an important case, perhaps a landmark case, but its effects should not be misunderstood. The Court did not declare that blocking roads was henceforth a legitimate and lawful form of political action, but that on occasions it might not be a crime under that section of that Act.

36. The limits to *Ziegler*, and important limits in the context of this case were made clear in the case of *Director of Public Prosecutions v Elliot Cuciurean* [2022] EWHC 736 (Admin) in which Lord Burnett, Chief Justice, held that *Ziegler* did not impose an extra test in a case of aggravated trespass under Section 68 of the Criminal Justice and Public Order Act 1994 on the basis that Article 10 and Article 11 rights do not generally include the right to trespass and therefore Parliament had set the balance between those rights and the lawful occupier's rights and Article 1 of Protocol 1 by the terms set out in that offence.

37. The right to peaceful enjoyment of one's property has been honoured by the Courts for centuries albeit not described as a human right nor still less as A1P1. Article 10 and Article 11 rights have been described in numerous cases from which I select only two examples. In *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23, Laws LJ said at paragraph 43

> "Rights worth having are unruly things. Demonstrations and protests are liable to be a nuisance. They are liable to be inconvenient and tiresome, or at least perceived as such by others who are out of sympathy with them".

38. In the European Court of Human Rights case of *Kudrevičius and Lithuania* [2015] 62 EHR 34, at paragraph 91, the Court said

"The right to freedom of assembly is a fundamental right in a democratic society and like the right to freedom of expression is one of the foundations of such a society, thus it should not be interpreted as restrictively".

39. It is clear that once breach proceedings are underway it is no defence for the alleged contender to argue that the injunction should not have been granted in the first place or that its terms are too broad. The balance between property rights and the rights of protesters is one that has to be struck now at the stage when the injunction is being granted. That point was made in the *National Highways Limited v Ana Heyatawin and Others* [2021] EWHC 3078 (QB) at paragraphs 44 and 45.

40. The great majority of potential defendants were not represented before me. As I am being asked to impose an injunction that could expose those who breach it to imprisonment, I need to justify why I make any order. The orders I am prepared to make forbid various acts of trespass including the blocking of gates on Shell's premises. I will make those orders, having been satisfied that:

41. One, were the underlying claims ever to reach trial, the claimants have a strong basis for an action for trespass, and private and public nuisance on the basis of the protests that have already occurred and the protests that are further threatened.

42. Two, given the sort of sums involved in the oil industry and the impracticality of obtaining damages on that scale from the diverse group of protesters, damages would obviously not be an adequate remedy

43. Three, there is a strong possibility that defendants will imminently act to infringe the claimant's rights. Given that they have already done so and have promised, if that is the right word, that similar actions will continue in the future.

44. Four, the harm caused by the activities I will seek to prevent by the terms of the injunctions would amount to "grave and irreparable harm" in that, in respect of the Haven Site, trespassing on the site could lead to highly dangerous outcomes given the highly flammable or even explosive nature of the materials being handled. In respect of both sites, prolonged obstruction of entrances could lead to a very different type of very serious damage, namely very large-scale costs to the business conducted in those respective premises.

45. The claimants have rights under A1P1 and must be entitled, as are all companies and individuals, to seek the protection of the Courts. The fact that others have strongly held views about fossil fuels and the environment cannot be a basis in my refusing protection to a law-abiding business once the relevant legal criteria are met.

46. I do have the greatest concerns in some cases like this where I am asked to impose an injunction banning the blocking of a road, and even more so were I being asked, but I am not being asked in this case, to ban protests near The Tower, and that those concerns flow both from the common law, from Article 10 and 11 rights, and more specifically from the Supreme Court case of *Ziegler*.

47. The effect of *Ziegler*, it seems to me with great respect, is the Parliament and Supreme Court have combined to bring about a situation where the rights of protesters and those against whom they protest can be assessed and weighed carefully with knowledge of all the facts. An injunction that banned blocking roads, and even more so on injunction that tried to ban protests, would have had the effect of demolishing that delicate balance as there would be no lawful defence to a breach of such an order.

48. All that said, that is not a consideration that bites in this case, because Shell have been, to my view, appropriately restrained in the orders they have sought from the Courts. I mention again the case of *DPP v Cuciurean* which makes clear that *Ziegler* balance does not apply once one is concerned with trespass.

49. I have suggested changes, modifications to the terms of the draught order in respect of both

the Haven premises and The Tower premises. The changes I have suggested and have been accepted on behalf of Shell by Ms Stacey QC is to make clear, if there were any doubt before, that the only activities that are banned are activities that include trespass on property of which Shell is the occupier. It follows that the orders I make do not, in my view, infringe the *Ziegler* case. They do not damage the delicate balance between the rights of property owners and the rights of protesters that were engaged by *Ziegler* and in the cases that led to it.

50. There are applications for alternative service set out in the draft order. In any case where there are unknown defendants whose conduct in the future may make them defendants, it is obviously sensible to have a variety of methods of service. The methods set out in the draft order are sensible and broad and I approve them. Traditional methods of service will be used against Mr Smith now he has joined in as a defendant in respect of one of the injunctions, that in respect of The Tower.

51. The claimants also seek an order for both the relevant police forces to disclose material that could be evidence of breaches of the injunctions. Both those forces have been notified of this application and both were content for the application to be made and did not require to be represented at this hearing. It seems to me the disclosure sought is the most sensible and efficient way to identify any breaches of the injunctions, and it seems to me that Shell are entitled, once they have obtained the injunctions, to have practical means at their disposal to enforce it against those who breach them. I was anxious to ensure that there were suitable confidentiality clauses in respect of the material obtained by way of that disclosure, and they are indeed written into the draft order.

52. There was some argument before me as to how one should delineate the material that the two respective police forces, the Metropolitan Police and the Essex Police, should make available to Shell. The draft proposed by the time of this hearing was material that "may constitute a possible breach". Mr Stern on behalf of Mr Smith suggest that is too wide and suggest that instead a formulation along the lines of "conduct or activity which is reasonably believed to be a breach of the injunction".

53. I am not sure with respect to the arguments of both sides that there is a huge difference in practical terms between those two formulations. In the end, I think the happiest formulation that both allows Shell to obtain material which on the face of it they are entitled to but does not mean that they get material they are not entitled to, is to take the formulation proposed by Shell quote "may constitute a possible breach" and remove the word "possible" to tighten up that phrase slightly and identify more closely what material should be disclosed.

54. On that basis, I am also prepared to make that part of the order. I have suggested to Ms Stacey QC that she and her team redraft the draft orders in the terms both as she has agreed to do in discussion, and in the terms, I hope described slightly more fully in this *ex tempore* judgment.

55. On the day immediately after the hearing, I would ask that Mr Stern is provided with the draft and if Mr Stern has amendments to suggest, the first port of call is to see if the claimants are prepared to agree any such amendments. If not, I am happy to receive by e-mail, through my ever-capable associate who sits before me, the alternative drafts, and then I will decide on the final detail.

56. I make plain, though I do not suppose I need to for Ms Stacey or Mr Stern, that this is an opportunity to tighten up and be more precise with wording, not to relitigate that which has gone before.

End of Judgment

Transcript from a recording by Ubiqus
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Ubiqus hereby certify that the above is an accurate and complete record of the proceedings or part thereof

This judgment has been approved by the judge.