IN THE HIGH COURT OF JUSTICE **CLAIM NO:**

QUEEN'S BENCH DIVISION

BETWEEN:

(1) SHELL UK LIMITED

(2) ESSAR MIDLANDS LIMITED

Claimants

and

PERSONS UNKNOWN ENTERING OR REMAINING AT THE CLAIMANTS' SITES KNOWN AS SHELL HAVEN, STANFORD-LE-HOPE AND/OR KINGSBURY JOINT VENTURE TERMINAL, (AND AS FURTHER DEFINED IN THE PARTICULARS OF CLAIM) WITHOUT THE CONSENT OF THE CLAIMANTS, OR BLOCKING THE ENTRANCES TO THOSE SITES, IN CONNECTION WITH THE ENVIRONMENTAL PROTEST CAMPAIGNS OF JUST STOP OIL AND/OR EXTINCTION REBELLION AND/OR YOUTH CLIMATE SWARM

Defendants

CLAIMANTS' SKELETON ARGUMENT

(INTERIM INJUNCTION)

Time Estimate, including reading: 2 hours

Suggested Pre-Reading

1. Application Notice dated 14/4/2022
2. Claim Form and Particulars of Claim dated 14/4/2022
3. Witness Statement of Stephen Brown dated 14/4/2022
4. Witness Statement of Emma Pinkerton dated 14/4/2022
5. Draft Order

Introduction

1. Cs seek an urgent interim injunction against "persons unknown" to prevent trespass and various other unlawful interferences with two oil terminals which are owned and

operated by Cs:

(1) Shell Haven, in Stanford-le-Hope, Essex, owned and operated by C1;

(2) Kingsbury Joint Venture Terminal, Kingsbury, Warwickshire, owned by C1 and C2, and operated by C1.

2. Cs are among the targets of the current wave of disruptive protest which began on 1st April under the banners of Just Stop Oil, Extinction Rebellion, and Youth Climate Swarm.

3. The current application is urgent because:

(1) the actions of protesters have demonstrated, and persuaded Cs, that those involved are willing to trespass on oil installations;

(2) these locations are hazardous even under ordinary conditions. This should need little exposition but is covered by the evidence of Mr Brown;

(3) the activities carried out by some protesters go far beyond lawful protest and give rise to serious health and safety concerns;

(4) those activities are continuing in the immediate vicinity of the Kingsbury Site, on other oil installations within the group of installations known as the Kingsbury Complex;

(5) further, C1 has reason to believe that its Shell Haven site is being targeted, and the same concerns would constitute a serious health and safety risk to that site also.

4. Details of the relevant activity at Kingsbury and Shell Haven, and the perceived threat to those sites, is set out in the witness statement of Stephen Brown dated 14/4/2022.

5. The form of order sought is set out in the draft order served with the application notice.

Relevant legal tests to be applied.

6. Five layers of control are relevant, although to some degree they overlap.

(1) First, because the application is for interim relief, there is the *American Cyanamid* test:

(a) (subject to what is said below about s12(3) of the Human Rights Act 1998) is there a serious question to be tried?

(b) (if so) would damages be an adequate remedy for a party injured by the grant of, or failure to grant, an injunction?

(c) (if not) where does the balance of convenience lie?

(2) Secondly, because the application is against persons unknown, Cs must satisfy the guidance in *Canada Goose* para 82.

(3) Thirdly, because the application affects the Article 10 and 11 rights of the protesters, Cs must show that any interference with those rights is justified;

(4) Fourthly, for the same reason, Cs must satisfy section 12(2) of the Human Rights Act 1998 as to service;

(5) The fifth matter relates to s12(3) of the 1998 Act. Where it applies, this displaces the "serious question to be tried" test with a higher threshold based on "likelihood". Cs' position is that (1) s12(3) does not apply but (2) if s12(3) does apply, then nevertheless the evidence shows that Cs are "likely" in the relevant sense to obtain their desired relief at trial.

Submissions.

7. Taking those controls in turn:

(1) The American Cyanamid test.

8. The test for the grant of an interim injunction is familiar[1].

(a) Serious question to be tried.

9. Between them Cs have title to the land in relation to which injunctions are sought to restrain trespass in general, and various further specific forms of unlawful interference. The details of Cs' title are set out in the w/s of Emma Pinkerton at paras 3.1–3.5 (Shell Haven) and 3.6–3.9 (Kingsbury).

10. The injunctions sought in the proceedings only restrain acts which are, by their nature, tortious interferences with Cs' land:

(1) Trespass to Cs' land; and

(2) Private nuisance, in the form of unlawful interference with Cs' right of access to its land via the highway: *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29 at [13].

11. Accordingly, there is a serious question to be tried in this action.

(b) Adequacy of damages for a party injured by the grant of, or failure to grant, an injunction.

12. The remedy which Cs seek within the proceedings is an injunction.

[1] *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (Not included in Cs' bundle of authorities)

13. A person whose proprietary interests in land are being unlawfully interfered with is *prima facie* entitled to an injunction to restrain that continuing interference. In principle, therefore, damages are normally inadequate as a remedy in such a case.

14. Further, Cs have no reason for confidence that any individual who commits any tort would have the means to provide any financial remedy. Therefore, damages could not in practice be an adequate remedy for any injury suffered by Cs if there were no injunction.

15. Conversely, it is difficult to envisage how the making of the injunction could cause any injury to any person at all, given its terms – or, at least, any injury that could not be compensated by an award of money. Cs freely offer the usual cross-undertaking to this end. Cs' means to honour the cross-undertaking needs no exposition.

(c) Balance of convenience.

16. Apart from questions arising under the Convention, the balance of convenience comes down in Cs' favour: apart from the Convention, there is really nothing in the scales the other way.

(2) The Canada Goose *guidance.*

17. In *Barking & Dagenham LBC & Otrs v. Persons Unknown* [2022] EWCA Civ 13, the Court of Appeal has clarified that there is no jurisdictional difference between an interim and a final injunction; that (at least in the context of injunctions to prohibit unauthorised encampments) interim or final injunctions should be time-limited, and that it is good practice to provide for their review; but subject to that, it has affirmed the continuing relevance of the procedural guidance in *Canada Goose* in relation to interim relief.

18. Taking the *Canada Goose* requirements in turn (from para 82 of the judgment):

> "(1) The "persons unknown" defendants in the claim form are, by definition, people who have not been identified at the time of the commencement of the proceedings. If they are known and have been identified, they must be joined as individual defendants to the proceedings. The "persons unknown" defendants must be people who have not been identified but are capable of being identified and served with the proceedings, if necessary by alternative service such as can reasonably be expected to bring the proceedings to their attention. In principle, such persons include both anonymous defendants who are identifiable at the time the proceedings commence but whose names are unknown and also Newcomers, that is to say people who in the future will join the protest and fall within the description of the "persons unknown."

19. Cs have not identified any persons who can be named: Pinkerton WS para 4.1.

> "(2) The "persons unknown" must be identified in the originating process by reference to their conduct which is alleged to be unlawful."

20. This has been achieved in the headers to the relevant court documents including the Claim Form and draft Order.

"(3) Interim injunctive relief may only be granted if there is a sufficiently real and imminent risk of a tort being committed to justify quia timet relief."

21. The risk is demonstrated by:

(1) The sustained and explicit threats of disruption made by protest groups/organisers, including encouraging people to take part in activities intended to lead to arrest. Examples have been collected at Brown WS para 7.1–7.10.

(2) The security breaches actually experienced by Cs in the past days: Brown WS paras 8.1–8.2 (Kingsbury), para 8.3 (vicinity of Kingsbury) and para 8.9 (Shell Haven).

(3) The risk in the present case is amplified by the hazardous nature of the installations in question and their related traffic. The nature of the product being carried within the wagons (highly flammable gasoline) makes the wagons and the persons in them, and anywhere near them, highly vulnerable to events escalating in unforeseen ways and/or out of control, especially where there is any risk whatsoever of a source of ignition coming into contact with the fuel or the fuel vapour.

"(4) As in the case of the originating process itself, the defendants subject to the interim injunction must be individually named if known and identified or, if not and described as "persons unknown", must be capable of being identified and served with the order, if necessary by alternative service, the method of which must be set out in the order."

22. The draft order provides for service of proceedings by:

(1) Posting of notices on the Access Roads warning of the existence of the order;

(2) Emailing the injunction to a list of email addresses which have been identified in connection with the current waive of protests.

23. In the current context, given the current urgency, and given that there are no named defendants, it is submitted that there are no practical steps which could be taken to notify, and that there are also compelling reasons why the respondents should not be notified.

24. The draft Order sets out the proposed means of service. There is every reason to expect that the means there specified will be effective to bring the Order to the notice of anyone affected.

"(5) The prohibited acts must correspond to the threatened tort. They may include lawful conduct if, and only to the extent that, there is no other proportionate means of protecting the claimant's rights."

25. The draft Order tracks the threatened torts and does not seek to prohibit lawful conduct.

"(6) The terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do. The prohibited acts must not, therefore, be described in terms of a legal cause of action, such as trespass or harassment or nuisance. They may be defined by reference to the defendant's intention if that is strictly necessary to correspond to the threatened tort and done in non-technical language which a defendant is capable of understanding and the intention is capable of proof without undue complexity. It is better practice, however, to formulate the injunction without reference to intention if the prohibited tortious act can be described in ordinary language without doing so."

26. The draft Order respects all of this guidance.

"(7) The interim injunction should have clear geographical and temporal limits. It must be time limited because it is an interim and not a final injunction. ..."

27. The land holdings of Cs at Kingsbury and Shell Haven extent well beyond the scope of the injunctions sought. In framing the terms of the injunction, in order to make their geographical limits clear to anyone on the ground, the sites which are protected by the injunctions have been defined by reference to boundary features the location of which are shown by the red line on the plan. These are, essentially: gates or gateways, fences, the flank walls of one building (in the case of part of the boundary at Kingsbury Joint Venture Terminal) and the River Thames (in the case of part of the boundary at Shell Haven).

28. The draft Order proposes a return date. Cs expect this to be 2 or 3 weeks from the date of the Order, subject to the preference of the Court. The temporal limits are therefore clear.

(3) Articles 10 and 11.

29. Both in relation to the issue of whether there is a serious issue to be tried and in relation to the general exercise of the Court's discretion, the Court must consider, in the round whether appropriate weight has been given to Ds' qualified rights under Article 10 (freedom of expression) and Article 11 (freedom of assembly) of the Convention. In protest cases, Articles 10 and 11 are linked. The right to freedom of assembly is recognised as a core tenet of a democracy. There exist *Strasbourg* decisions where protest which disrupted the activity of another party has been held to fall within Articles 10 and 11. But *"deliberately obstructing traffic or seriously disrupting the activities of others is not at the core of these Convention Rights"*: ***DPP v. Cuciurean*** [2022] EWHC 736 per Lord Burnet of Maldon, CJ at [36].

30. Further, Articles 10 and 11 do not bestow any *"freedom of forum",* and do not include any ancillary right to trespass on private property: *Ineos* (CA) per Longmore LJ at [36]. It is of course possible to imagine at least in theory a scenario in which barring access to particular property had the effect of preventing <u>any</u> effective exercise of an individual's freedoms of expression or assembly. In such a case, barring entry to that property could be said to have the effect of *"destroying the essence of those [Article 10 and 11] rights"*. If that were the case, then the State might well be obliged

(in the form of the Court) to regulate (i.e., interfere with/ sanction interference with) another party's property rights, in order to vindicate effective exercise of the rights under Articles 10 and 11: see *Cuciurean* at [45]. But that would be an extreme situation. And this is plainly not such a case. As Lord Burnett held in *Cuciurean* at [46]:

> "[i]t would be fallacious to suggest that, unless a person is free to enter upon private land to stop or impede the carrying on of a lawful activity on that land by the landowner or occupier, the essence of the freedoms of expression and assembly would be destroyed. Legitimate protest can take many other forms."

31. So far as concerns the highway: Cs are not in fact seeking to restrict the Defendants' use of the highway for the purposes of protest. However, for completeness, it is helpful to have in mind that even in relation to the highway, the right of protest does not extend to a right to conduct coercive activities. Cs accept that not all protest on the public highway is unlawful, or constitutes either a trespass (actionable by the highway owner) or a nuisance, even if it results in some disruption. The Supreme Court held in *DPP v. Ziegler* [2021] 3 WLR 179[2] that the issues which arise under Articles 10 & 11 require consideration of five questions (at [16]):

    (1) Is what the defendant did in exercise of one of the rights in articles 10 or 11?

    (2) If so, is there an interference by a public authority with that right?

    (3) If there is an interference, is it "prescribed by law"?

    (4) If so, is the interference in pursuit of a legitimate aim as set out in paragraph (2) of article 10 or article 11, for example the protection of the rights of others?

    (5) If so, is the interference 'necessary in a democratic society' to achieve that legitimate aim?

32. Those restrained by the terms of an injunction from obstructing the public highway would otherwise be exercising their Article 10 and 11 rights, and the grant of an injunction will constitute some interference with those rights – even if not within "the core" of those rights. That interference is prescribed by the law concerning the vindication of Cs' rights (both private law rights, and its A1P1[3] rights), and Cs' consequent entitlement to an injunction. The vindication of Cs' rights is itself a legitimate aim. The protection of the wider public from interference with its access to fuels is another. Accordingly, the issue of the Court in such a case is whether such interference as the injunction might comprise is "necessary in a democratic society"

[2] This case is not within C's bundle of authorities. C relies upon the summary and explanation of it by Lavender J in *National Highways v. PU* [2021] EWHC 3081, discussed further below.
[3] Article 1 of Protocol 1 "1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions...."

to achieve that aim.

33. That issue can also be properly expressed as the question of whether the potential inference with Ds' rights is "proportionate" which, in turn, requires consideration of four sub-questions:

(1) Is the aim sufficiently important to justify interference with a fundamental right?

(2) Is there a rational connection between the means chosen and the aim in view?

(3) Are there less restrictive alternative means available to achieve that aim?

(4) Is there a fair balance between the rights of the individuals and the general interest of the community, including the rights of others?

34. In the similar context of the Insulate Britain protests, in *National Highways Ltd v. PU* [2021] EWHC 3081, Lavender J (at [38]-[40]) summarised and considered the factors which Lords Hamblen and Stephens JSC had identified in *City of London Corpn v. Samede* [2012] PTSR 1624[4] as being potentially relevant to the issue of proportionality, and consequently how the four proportionality sub-questions might be answered.

35. On this application Cs must show only a serious question to be tried (subject to what is said below about section 12(3) of the HRA 1998). For similar reasons to those expressed by Lavender J in *National Highways* Cs submit that the four sub-questions relevant to the "proportionality" test can be answered as follows – thus satisfying the (stricter) requirements for obtaining relief in relation to a highway, even though no highway is here involved:

(1) The aims of restraining Ds' activities are the vindication of Cs' own private law and A1P1 rights, and the avoidance of disruption to the UK's fuel supplies at an unusually sensitive and critical time.

(2) There is an obviously rational connection between the means chosen in this case and the aim in view: the means narrowly focus on the prevention of interference with Cs' rights and with the distribution of its fuel.

(3) There is no less restrictive alternative means available to achieve the aim. An action in damages would not prevent the disruption which Ds see to cause. Harm to Ds would be hard to quantify, but there is little reason to suspect that any identifiable defendant would be capable of satisfying any claim

[4] This case is not within Cs' bundle of authorities. Cs rely on the summary and explanation of it by Lavender J in *National Highways v. PU* [2021] EWHC 3081, discussed further below.

anyway. Although the police are carrying out their functions, this has not stopped the disruption and it is clear that those participating in the protests are willing to bear the consequences of prosecution.

(4) The grant of an injunction clearly strikes a fair balance between Ds' rights, C's rights, and the general interests of the community. The observations of Leggatt LJ in *Cuadrilla Bowland Ltd v. PU* [2020] 4 WLR 29 at [94]-[95] are apt:

> "... the disruption caused was not a side-effect of protest held in a public place but was an intended aim of the protest.. this is an important distinction. ... intentional disruption of activities of others is not "at the core" of the freedom protected by article 11 of the Convention .... One reason for this is [is] that the essence of the rights of peaceful assembly and freedom of expression is the opportunity to persuade others.... persuasion is very different from attempting (through physical obstruction or similar conduct) to compel others to act in a way you desire" [emphasis added]

36. Any interference with anyone's Article 10 and 11 rights caused by a Court Order preventing that person's deliberate disruption of Cs' business, and not mere protest, is outweighed by

(1) Ds' interference with Cs' abilities to carry out their lawful business,

(2) Cs' A1P1 rights to enjoy their own property, and

(3) the interest of the public in continuing access to the fruits of Cs' undertaking.

37. Consequently, to the degree to which the injunctions sought might interfere at all with any individual's Article 10 & 11 rights, any such interference is proportionate, and does not require the Court to modify its approach (apart from the Convention) to the threatened interference with Cs' rights.

(4) Section 12(2) of the Human Rights Act 1998 as to service.

38. S12 is quoted by Morgan J in *Ineos* at para 84. S12(1) and (2) provide:

> "12(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
>
> (2) If the person against whom the application for relief is made ('the respondent') is neither present nor represented, no such relief is to be granted unless the court is satisfied — (a) that the applicant has taken all practicable steps to notify the respondent; or (b) that there are compelling reasons why the respondent should not be notified."

39. I will return to (3) separately, below.

40. Cs have not identified any persons who can be named: Pinkerton WS para 4.1.

41. Further, there is the danger (recognised by Morgan J in *Ineos* at para 96) that advance publicity of the present application might accelerate attempts to penetrate the

terminal perimeters etc, ahead of any order made by the Court.

42. Clearly the issue of how service might alternatively have been affected, or notice of this return date been given, is one upon which there can be different approaches. If present or represented, Ds could have made submissions to the effect that further and additional measures could have been taken to publicise the hearing. It might be said on behalf of Ds (for example) that the existence of the proposed application could have been emailed to the addresses or advertised in local or national press. Whilst it is right to draw these potential arguments to the attention of the Court in the absence of any representation for Ds, Cs submit that it remains the case that s12(2) is satisfied.

(5) S12(3) of the Human Rights Act 1998 as to "publication".

43. S12(3) provides:

> "(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed."

44. There is High Court authority that this applies to protests. Morgan J said so in *Ineos* paras 84–86. The Court of Appeal has also proceeded on the same basis although seemingly without argument (eg in *Ineos* 17(2), 33–34, 37, *Cuadrilla* 51 and *Canada Goose* 78). On the other hand, in the *National Highways* case, Lavender J said at para 41 that section 12(3) "is not applicable" – but without giving reasons.

45. In the present case, it is submitted on the evidence that Cs are "likely" to establish what section 12(3) would require, assuming it to be applicable (contrary to Lavender J's view) and assuming "likely" to have the meaning attributed to it by Morgan J in *Ineos*.

46. But so far as necessary, we respectfully suggest that both assumptions are wrong.

47. As to the first: although his reasons do not appear from his judgment, Lavender J was correct to hold that section 12(3) is inapplicable in this context. Lord Nicholls explained the provenance of s12(3) in *Cream Holdings v. Banerjee* [2005] 1 AC 253 at para 15. The statutory purpose so described has the specific function of enhancing the protection afforded to "publications" as ordinarily understood — a free press being the lifeblood of democracy.

48. Further, "publication" is an ordinary English word. A "publication" is something which is "published" — and while a person who undertakes protests may well by doing so "publicise" his or her views, he or she does not thereby "publish" them. Like many English words, "publication" has a certain protean quality and must in any event be read purposively. So, of course, it embraces "publication" not only by books and newspapers but also by broadcasting and social media and so on. But that is not the

point. On no view as a matter of ordinary English does "publication" cover every activity merely it is publicity-seeking and undertaken in the furtherance of an expression of views. As a matter of ordinary English, not every act of "publicity" is a "publication". Yet "publicity", at the most benign, is how the impugned activities in the present case, fall to be characterised. One might readily accept that the protesters are seeking to "publicise" their views by undertaking their activities – but a terrorist might seek to "publicise" his views by exploding bombs. You do not "publish" when you detonate a bomb and you do not "publish" when you break into private property or impede traffic - even if by doing so you "publicise". Neither of those activities, merely because it "publicises" a viewpoint, is what in ordinary English anyone would call a "publication".

49. Further, Warby J made a similar point in *Birmingham City Council v. Afsar* [2019] EWHC 1560, where an *ex parte* injunction had been obtained without reference to s12(3), which among other things prevented "the printing or distribution of leaflets" (Appendix B of the judgment). Warby J was critical of the applicant's failure to refer to s12(3) (and also for its failure to refer to the practice direction on Interim Non-Disclosure Orders at [2012] 1 WLR 1003) and discharged the *ex parte* injunction on the basis of material non-disclosure (though he made a new injunction). At paras 60–61, Warby J draw attention to the fact that: "There are no doubt many ways of behaving anti-socially that do not involve speech, or writing, or other forms of expression" — his point being that these, unlike printing/distributing leaflets, would not amount to "publication", and so would not engage s12(3).

50. Having regard to the authority cited above, including the Strasburg jurisprudence mentioned in the English cases, there is no reason to give "publication" a strained meaning so as to cover the kinds of activity in question in the present case. Such activities simply are not "at the core" of the Convention rights of freedom of expression/ assembly. "Publication", by contrast, in the ordinary sense of "something that is published", is clearly at the very core of those rights. It is intelligible that it should receive special protection through s12(3).

51. It is unclear from his reasons why Morgan J thought otherwise in *Ineos*: he appears to have noted the breadth of s12(1) (and, hence, s12(2)), without his attention being drawn to the distinct (and narrower) legislative history of s12(3).

52. Finally, Johnson J accepted the foregoing analysis at an *ex parte* application in a like matter on 8/4/2022 (*Exolum v. PU*).

53. As to the second assumption: Lord Nicholls explained in *Cream Holdings* that "likely" does not mean "more likely than not" in the context of an interim application: para 16–22. It is unclear from his reasoning why Morgan J, in *Ineos*, thought that Lord Nicholls's guidance did not apply. But at all events, it clearly applies in the

present circumstances.

54. However, as indicated, Cs' position is that the evidence it has lodged is (more than) sufficient to satisfy s12(3), even if s12(3) applies and even if "likely" means "more likely than not".

Full and frank disclosure – Proportionality issue

55. In light of Cs' duty of full and frank disclosure, it is appropriate to draw the following points to the Court's attention, being points which might be raised by Ds against the grant of the application:

(1) Those taking part in the protests perceive there to be serious environmental and economic disadvantages to the exploration, development and production of fossil fuels in the UK and are committed to ameliorating climate change and changing government policy. The sincerity of the protesters' views, and the fact that many agree with their aims (if not necessarily their means) were recognised in both *Zeigler* and *Samede* as potentially relevant factors in the assessment of the proportionality of the interference with their Article 10 and 11 rights.

(2) It may be said that there are alternative methods available to protect the Sites other than the grant of an injunction, and that the police themselves are intervening. However, although Cs (and the police) have taken, and continue to take, other steps to protect the Sites, the continued existence of the protest at Kingsbury, their powers are limited. The nature of the risk to Cs' sites and the additional potential deterrence of an injunction clearly mean that assistance of the Court is still justified in order to ensure that the interests of both Cs and the wider public are properly protected.

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