Claim No. QB-2022-BHM-000044

IN THE HIGH COURT OF JUSTICE
KINGS BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY

Between:

(1) HIGH SPEED TWO (HS2) LIMITED
(2) THE SECRETARY OF STATE FOR TRANSPORT

Applicants / Claimants

-and-

(1) PERSONS UNKNOWN ENTERING OR REMAINING WITHOUT THE CONSENT OF THE CLAIMANTS ON, IN OR UNDER LAND KNOWN AS LAND AT CASH'S PIT, STAFFORDSHIRE SHOWN COLOURED ORANGE ON PLAN A ANNEXED TO THE ORDER DATED 11 APRIL 2022 ("THE CASH'S PIT LAND")
(2) PERSONS UNKNOWN ENTERING OR REMAINING WITHOUT THE CONSENT OF THE CLAIMANTS ON, IN OR UNDER LAND ACQUIRED OR HELD BY THE CLAIMANTS IN CONNECTION WITH THE HIGH SPEED TWO RAILWAY SCHEME SHOWN COLOURED PINK, AND GREEN ON THE HS2 LAND PLANS AT https://www.gov.uk/government/publications/hs2-route-wide-injunction-proceedings ("THE HS2 LAND") WITH THE EFFECT OF DAMAGING AND/OR DELAYING AND/OR HINDERING THE CLAIMANTS, THEIR AGENTS, SERVANTS, CONTRACTORS, SUB-CONTRACTORS, GROUP COMPANIES, LICENSEES, INVITEES AND/OR EMPLOYEES
(3) PERSONS UNKNOWN OBSTRUCTING AND/OR INTERFERING WITH ACCESS TO AND/OR EGRESS FROM THE HS2 LAND IN CONNECTION WITH THE HS2 SCHEME WITH OR WITHOUT VEHICLES, MATERIALS AND EQUIPMENT, WITH THE EFFECT OF DAMAGING AND/OR DELAYING AND/OR HINDERING THE CLAIMANTS, THEIR AGENTS, SERVANTS, CONTRACTORS, SUB-CONTRACTORS, GROUP COMPANIES, LICENSEES, INVITEES AND/OR EMPLOYEES WITHOUT THE CONSENT OF THE CLAIMANTS
(4) PERSONS UNKNOWN CUTTING, DAMAGING, MOVING, CLIMBING ON OR OVER, DIGGING BENEATH OR REMOVING ANY ITEMS AFFIXED TO ANY TEMPORARY OR PERMANENT FENCING OR GATES ON OR AT THE PERIMETER OF THE HS2 LAND, OR DAMAGING, APPLYING ANY SUBSTANCE TO OR INTERFERING WITH ANY LOCK OR ANY GATE AT THE PERIMETER OF THE HS2 LAND WITHOUT THE CONSENT OF THE CLAIMANTS
(5) MR ROSS MONAGHAN (AKA SQUIRREL / ASH TREE)

AND 58 OTHER NAMED DEFENDANTS AS SET OUT IN THE SCHEDULE TO THE PARTICULARS OF CLAIM

Defendants

SUPPLEMENTARY SKELETON ARGUMENT OF THE CLAIMANTS

RESPONDING TO D6

For Review Hearing Tuesday 16 May 2023

[A] OTHER PROCEEDINGS

1. D6's skeleton argument raises issues which are common to proceedings before Mrs Justice Hill called *Shell v Persons Unknown* (QB-2022-001240; QB-2022-001259; QB-2022-001241). The matters in common are: the legal issues raised, defence counsel, the skeleton argument. As to the skeleton argument in *Shell*, it is attached here so that the court may see the nature and extent of the overlap.

2. The clerk to Hill J has indicated that the learned judge intends to circulate a draft judgment by Thursday 18th May. The court may wish to consider how the judgments in the two cases should most conveniently relate to each other. For the Claimants' part, they would wish to both maintain an injunction in place and have an opportunity to make written submissions on the *Shell* judgment. In other words, the Claimants submit that the *Shell* judgment should be considered in this Court's judgment. The possible approaches can be canvassed at the hearing.

[B] ISSUES

3. The Claimants do not accept D6's position (§§6-7) on his late service of his skeleton argument. It is plain on the face of the Injunction Order that there will be a review hearing in May. It is not a surprise. Further, the arguments now advanced were pre-prepared and ready in *Shell*.

4. But the Claimants are in a position to deal with those arguments and have done so in this supplementary skeleton argument, in the event that the court is .

5. D6 refers to *ex parte* applications (§7 (vi)). This is not an *ex parte* application. It is an application on notice which has been foreshadowed for a year.

6. D6 raises five issues (references to paragraphs in D6's skeleton):
   - No reasonable cause of action (§§26-39)
   - Highway and publicly accessible land (§§40-49)
   - Unlawful means conspiracy discouraged (§§53-68)
   - Test for precautionary injunction not met (§§69-81)
   - Terms of the injunction (§§82-100)

7. We address each in turn.

[C] NO REASONABLE CAUSE OF ACTION (§§26-39)

8. D6 complains:
   a) That the re-amended particulars are not sufficiently specific;
   b) The unlawful means conspiracy is a serious allegation which imports obligations similar to those in *Marsh v Chief Constable of Lancashire* [2003] EWCA Civ 284 and in CPR PD 16.7.5 in respect of allegations of fraud against public officials, and these amount to mandatory rules which apply to this case; and
   c) The claim does not identify 'by whom' and there are problems with the cause of action against persons unknown.

9. As to the first point, at (a), D6 may be submitting either that the court cannot permit the amendment or that it should not permit the amendment. The first possibility is plainly unarguable, so it is assumed that D6 is saying that the court should not permit the amendment.

10. The context here is an amendment to an existing claim which has been:

    i. fully pleaded without objection to those pleadings nor criticism at any previous hearing;
    ii. supported by very extensive witness statements, documentary and video evidence;
    iii. accepted in the terms of a detailed reserved judgment; and
    iv. undisturbed, and indeed endorsed, on appeal.

11. The amendment arises from exactly the same intention, types of conduct and many of the same actors as the original claim in circumstances where the Court has found relief to be justified. It is sophistry to address the amendment in isolation.

12. The amendment is perfectly clear. It is perfectly clear that the order prohibits people from getting together or organising themselves to cause mayhem to HS2 works. It may require cogent evidence to show it to the required standard, but that is a different point.

13. For similar reasons to those just stated, the *Marsh* and CPR points are bad points. No fraud is alleged. The unlawful means conspiracy is no more and no less serious than the Claimants' claim in general.

14. As to the third point, at (c), there is no requirement, need nor benefit in naming defendants specifically. It has been established that it is appropriate to bring this claim against person unknown in the judgment of Julian Knowles J at [184-187; CB/A/79]. The activists involved are a rolling group; there are calls to arms to invite those not yet involved; it is not effective to simply include named defendants; it is necessary to define persons unknown.

15. It is also not clear on what proper basis D6, who is a named defendant, seeks to take points in respect of D68, a person unknown.

16. D6 has identified no legal principle nor any authority for the proposition that a persons unknown defendant should not be framed in terms of unlawful means conspiracy. For the reasons set out in the Claimants' main skeleton argument, the authorities demonstrate quite the opposite. What is sought is not novel.

17. Further, D6 omits to draw attention to the relevant adverse findings in the judgment of Julian Knowles J (who sets out D6's case at Judgment [57]), or that permission to appeal on substantively the same basis was refused by the Court of Appeal in the Ruling [CB/A/108].

[D] HIGHWAY AND PUBLICLY ACCESSIBLE LAND (§§40-49)

18. D6 rehearses some of the well-known authorities on the lawful use of the highway. The submission which flows from these authorities is: "*it is far from clear that protests which disrupt minor roads or pavements/footpaths passing near HS2 Land will lead to a viable civil claim.*" (§49). It is said that the unlawful means conspiracy relies on unreasonable use of the highway for protest. D6 attacks a strawman, as if a final injunction were sought against trespass on public highway land. It is not.

19. This is an application for a precautionary interim injunction. The Claimants do not need to prove that past conduct or current conduct is or was unlawful. The test is *American Cyanamid* – it is implicit in that there would be a serious issue to be tried, and the Courts, including in the judgment of Julian Knowles J have consistently found that balance of convenience favours the Claimants. Plainly, any delay imposed by a defendant upon the HS2 Scheme cannot be reversed, nor can it be adequately compensated in damages, and hence the precautionary element of the proposed prohibition is satisfied.

20. D6's argument is not sustainable for these five reasons.

21. First, the terms of the Injunction Order specifically address the rights of users of the highway, including for lawful protest by:

    a) The fifth recital which confirms that the Order is not intended to prohibit lawful protest;
    b) At paragraph 4 by providing that nothing in paragraph 3 shall prevent any person from exercising their lawful rights over any public highway.

22. It follows that only unlawful protest on the highway is prohibited, as was also made expressly clear by Julian Knowles J at [15] – *"It should also be understood that the injunction that is sought will not prohibit lawful protest."*, and as re-emphasised at [195] and [216].

23. Secondly, it is no part of D6's case that he should be permitted to protest unlawfully. So much is clear from paragraph 6 of D6's own witness statement. The Claimants and D6 are in agreement that he should be entitled to lawfully protest against HS2, to explain to others why he considers that HS2 is wrong and his opinion about the merits of the HS2 Scheme. This has always been the Claimants' position, and was cited by Julian Knowles J in his judgment at [150].

24. Thirdly, the issues raised by D6 via his counsel as to slow walking and protest have been fully argued in writing and orally before Julian Knowles J. Those issues have been carefully considered in the learned judge's judgment, particularly at: [189-191].

25. Fourthly, D6 applied to the Court of Appeal for permission to appeal the Order of Julian Knowles J. Five grounds were advanced on behalf of D6. Ground 3(c)(ii) was that the learned judge erred in law by defining the prohibited conduct by reference to "vague terms" such as slow walking. In a detailed set of reasons for refusing permission to appeal on all five grounds, Coulson LJ rejected D6's arguments. He found [CB/A/107; paras 31-35] that the prohibition on slow-walking was a well-recognised phenomenon and its inclusion is an important part of any effective injunction. The topic of reasonable use of the highway in the context of protest and in the context of actively seeking to disrupt, delay and increase the cost of public infrastructure works has therefore had careful and reasoned consideration by a judge of the Court of Appeal who found the point to be lacking any reasonable prospects.

26. Fifthly, Schedule A to the Injunction Order provides that any person who seeks to contest the Claimants' entitlement to interim relief shall file written grounds which explain clearly the differences between their grounds and the issues which the Court has already adjudicated upon in the judgment of Julian Knowles J [CB/A/18]. The question of lawful vs unlawful use of the highway was: (a) raised before the learned judge; (b) fully argued; (c) determined against D6; (d) the subject of leading and junior counsel's advice on appeal and appealed accordingly; (e) such appeal was did not overcome the permission threshold. It follows that these issues should not be re-argued.

[E] UNLAWFUL MEANS CONSPIRACY DISCOURAGED (§§53-68)

27. D6 rehearses authorities on third-party and economic torts. D6 submits that Johnson J erred in *Shell Oil Products v Persons Unknown* [2022] EWHC 1215 in holding that third party torts could found a claim in unlawful means conspiracy. However, it seems that D6's point is actually that "instrumentality" is an element of the tort of unlawful means conspiracy and therefore such a claim cannot be founded in a third party tort.

28. It remains unclear what D6 is asking the court to do. Until that is clarified, the Claimants rely on its main skeleton argument and draw attention to the headnote in *JSC BTA Bank v Ablyazov (No14)* [2018] UKSC 19; [2020] AC 727, particularly *"that since the tort of conspiracy to injure by unlawful means was a tort of primary liability, the question of what constituted unlawful means could not depend on whether the use of those means would give rise to a different cause of action independent of conspiracy".*

29. There is no requirement to make out some underlying tort or criminal act. That is evident from the facts of *Ablyazov* where the unlawful means was a contempt of court. It did not matter what a contempt was a tort or not. Johnson J was, with respect, correct in *Shell Oil*, but it makes no difference if he was not – the leading case is *Ablyazov* as any reading of its treatise on economic torts at [6-24] shows.

30. At §52, in the context of his highways submissions, D6 misunderstands "statutory notices". Such notices are given by the nominated undertaker, in this case HS2 and provide certain rights to HS2, such as possession of land. A breach of such a statutory notice is unlawful. D6 does not explain why a conspiracy to breach an order of the court would not be sufficient to establish unlawful means. A contempt of court consisting of a breach of an injunction counts as "unlawful means" sufficient to support this cause of action, whether or not contempt of court is also an actionable tort in its own right. The rationale is that what makes conduct by a defendant actionable, is the absence of lawfulness in what the defendant has done, combined with the conspiracy element: as distinct from the question of whether or not the claimant would otherwise have had an independent cause of action against the defendant for the conduct in question: *Ablyazov* at [10–11]. Means are unlawful for the purposes of unlawful means conspiracy, if the defendant had no legal right to use them.

[F] TEST FOR PRECAUTIONARY INJUNCTION NOT MET (§§69-81)

31. D6's submissions are remarkable in their omissions. Not only is there years of primary evidence of a concerted campaign to delay, disrupt and prevent construction of HS2, there are the following express findings to that effect, including in respect of D6.

32. D6 has personally been involved in co-ordinated action against HS2 and D6's actions formed a large part of the evidence base upon which Julian Knowles J founded the Judgment. The extensive unlawful direct action protests against HS2 in the underlaying application are explained in the witness statement of Richard Jordan ("Jordan 1") [CB/ORIGA/1].

33. The Claimants emphasise that serious disruption, cost and safety risks have been caused by encampments of protestors, including in tunnels, on land for HS2 Works prior to HS2 taking possession [Groves 1, para 14/15; Core-A-251].

34. Key elements of Jordan 1, with underlining for emphasis, are:

    a. [15]: Up to December 2021, a total cost of £121.62 million was incurred in dealing with activists engaged in anti-HS2 direct action protest. These costs were borne entirely by the public purse.
    b. [14, 23]: More than 1,007 incidents having an impact on operational activity were recorded between Q4 of 2017 and December 2021, and 129 individuals were arrested 407 offences from November 2019 - October 2020 alone.
    c. [29.1.8]: Activists used lock-on devices to attach to tunnel shoring and to <u>other activists</u> to resist removal from within dangerous hand dug tunnels on trespassed land at Euston Square Gardens and [55.5] attacked with a wooden stick those attempting to remove a protestor from the tunnels.
    d. [29.2.1, 29.2.4.1, 29.2.4.3]: <u>Groups</u> of activists obstructed access to HS2 sites by lying down in front of compound gates, dumping a boat in front of a site entrance, and staging a <u>group</u> "die-in" by lying on the ground blocking both lanes of a public highways near to a site entrance.
    e. [29.6.3, 58]: A group of activists constructed a defensive tower on the HS2 Land at Small Dean to resist removal, protected with barbed wire and booby-trapped

with expanding foam and razor wire to create danger and delay for those seeking to evict the camp (that eviction cost £5m and took over a month).

f. [21.12]: D6 stated on 23 February 2022 stating that if an injunction was granted over one of the gates providing entrance to Balfour Beatty land, they "will just hit all the other gates" and "if they do get this injunction then we can carry on this game and we can hit every HS2, every Balfour Beatty gate… So, yep, please come – just come and help us. Come and help us build. Come and help us dig. Come just be part of us. Come for a cup of tea. Come for a meal. Come have a chat.".

g. [21.13]: D6 stated on 24 February 2022 stating if the Cash's Pit camp is evicted, "we'll just move on. And we'll just do it again and again and again… we can fight the injunction and we will resist and fight the eviction, we need all Hands to the pump but we're ready, we won't go down easy and this isn't the end of us, our camps or the protests".

35. In these proceedings, Mr Justice Cotter made an injunction order protecting HS2 Land known as Cash's Pit [CB/ORIGA/29] ("Cotter Order") on 11 April 2022. Despite the Cotter Order, 5 activists dug a tunnel under the Cash's Pit land, and refused to leave. The Claimants' brought committal proceedings (which included two further defendants who remained above ground), which were heard by Mr Justice Ritchie, who found each of the defendants to be in contempt of court. In his judgment, *HS2 & SoS Transport v Harewood* [2022] EWHC 2457 (KB), the learned judge held at:

a. [33]: "The opposers to the HS2 project consist of a broad range of groups including Extinction Rebellion, HS2 rebellion, Stop HS2 and others. The aims generally of these protesters were to obstruct and cause direct harm to the HS2 project, to increase the costs thereof and to delay it and to stop it."

b. [36]: "I find on the evidence that the security costs for the events at CPL alone amount to approximately £8,000,000. The Defendants before me at this hearing and the many other protesters who have attended at or lived at CPL are responsible for the vast majority of that £8 million and I so find as a fact."

c. [37]: "The direct action taken by protesters in relation to CPL, which is owned by HS2, included trespass, criminal damage, the construction of wooden living accommodation, the construction of tree houses, the digging of tunnels under

the earth and various ancillary acts of obstruction to the works carried out by HS2 and their subcontractors in areas nearby."

d. [43]: "The Claimants' evidence, which I find was proven, showed that as a generality the protesters used various methods to force HS2 to incur taxpayers expenses as a result of their direct action. Those included "lock on" devices, tunnels, theft, staff abuse, access obstruction, criminal damage, spiking trees, fly tipping, occupying sites, at height protests and the like."

e. [53]: "The second category of breach of the Cotter Injunction concerns the four men who descended into the tunnels under CPL and stayed there after the 10th of May 2022. This direct action was not only a deliberate flouting of the Cotter Injunction but also of the authority of the civil justice system and of Court orders generally. These Defendants knew that they had been ordered off the land and refused to go. These Defendants knew that they were putting the taxpayer through HS2 to very substantial expense. These Defendants also knew that they were potentially putting the security staff of HS2 and the underground emergency workers at risk if any part of the tunnel system collapsed."

36. Dobson 1 [CB/A/212] sets out at [111] onwards an incident on the A418. HS2 exercised statutory powers to temporarily stop up the highway for certain works under Schedule 4 of the Phase One Act. The A418 is not subject to the Injunction Order. At [117] onwards, Mr Dobson describes how D66 and D67 interfaced with the works on the A418. It is plain from the exchanges that D66 and D67 were acting in concert, and at [130], Mr Dobson describes how D66 and D67 repeatedly disrupted the works, acting together, and despite entry onto a stopped up highway being unlawful. Matters escalated, and in at [134 - 136], Mr Dobson evidences physical, unlawful, confrontations.

37. Given the evidence in these proceedings (both for this review and the original application), and from the findings on committal arising from the Cotter Order, it is not arguable that the test for a precautionary injunction is not made out. Although, as the Claimants accept, the number of incidents has decreased significantly, that is as a result of the protection of the Injunction Order and for no other reason. By this application, the Claimants seek simply to improve the protection which the Court has already accepted the HS2 Scheme requires in order to prevent further, unnecessary expenditure

of public funds, and to prevent activists from carrying out the activities and effects which have been deprecated by the Court but are not captured by the Injunction Order as drafted. As the recitals to the draft Order make clear, as was accepted by the learned judge in the Judgment: lawful protest and lawful use of public rights of way are not prohibited.

38. Notably, D66 and D67 (Thomson-Smith and Butcher) have offered undertakings in which they do not oppose the draft Order and appear to accept that they were working together to the detriment of HS2. It is fair to say, that although undertakings have been offered, D66 and D67 also seek to make clear that they do not agree that they were trespassers, they were not in breach of the Injunction Order, and dispute Dobson 1. Taking D66 and D67's commentary at its highest, given the harm caused to the HS2 Scheme by the actions of D66 and D67, it provides strong support for the case that further extension of the protection of the HS2 Scheme is warranted.

39. The Claimant's case passes the threshold for a precautionary injunction.

[G] TERMS OF THE INJUNCTION (§§82-100)

40. D6 contends:
    a. "unlawful means" has not been sufficiently particularised;
    b. The geographical scope is unlimited;
    c. There should be a requirement to show loss to the Claimants; and
    d. There should be an amendment to require that the unlawful act caused loss.

41. None of these points is correct.

42. As to the first point, (a), the term 'unlawful means' in the context of obstructing etc works for a huge infrastructure project does not give rise to any uncertainty whatsoever. However, if the term can be conveniently particularised, then there is no objection to doing so. To that end, the Claimants would be content to amend the draft order such that paragraph 5 reads:

"5. For the purposes of paragraph 3(b) prohibited acts of obstruction and interference shall include (but not be limited to) to the following, and for the purposes of paragraph 3(d) unlawful acts shall be include (but not be limited to) to the following as if 'the HS2 Land' were to read "works or activities authorised by the HS2 Acts":

….

…. etc"

43. This minor amendment would appear to address D6's concern.

44. As to the second point, (b), it is not correct to say that the injunction would have unlimited geographical scope. This is because the works authorised by the HS2 Acts are a known linear scheme, the extent of which is carefully prescribed by Parliament: see Dilcock 11 at paragraph 25-31 [CB/A/262-264].

45. This point raised by D6 on the prohibited conduct was comprehensively addressed by the Court of Appeal in the Ruling at [36] – [38] and rejected as "excessively legalistic".

46. D6's submissions at §93 – 96 are anticipated in the Claimants' Skeleton at [24] – [36]. D6's complaint about "legal terms" here, a specific economic tort, was rejected by the Court of Appeal in the Ruling at [30] [CB/A107].

[F] ARTICLES 10 AND 11 ECHR (§§11-22 AND 101-103)

47. These are 'catch-all' submissions which essentially repeat the other submissions. Julian Knowles J addressed the law and the balance in his judgment and the balance is no different in respect of the re-amended particulars.

48. In conclusion, the question remains, *"what unlawful activity is D6 concerned to ensure he and others may continue to pursue?"*.

RICHARD KIMBLIN KC

MICHAEL FRY

15th May 2023

APPENDIX

DEFENCE COUNSEL'S SKELETON ARGUMENT IN *SHELL -V PERSONS UNKNOWN*

IN THE HIGH COURT OF JUSTICE (QBD)

Claim No: QB-2022-001241 ("Shell Haven Proceedings")

Claim No: QB-2022-001259 ("Shell Centre Tower Proceedings")

Claim No: QB-2022-001420 ("Shell Petrol Stations Proceedings")

Between

(1) SHELL U.K. LIMITED

Claimant: (QB-2022-001241)

(2) SHELL INTERNATIONAL PETROLEUM COMPANY LIMITED

Claimant (QB-2022-001259)

(3) SHELL U.K. OIL PRODUCTS LIMITED

Claimant (QB-2022-001420)

-and-

PERSONS UNKNOWN **Defendant**

and

MS JESSICA BRANCH **INTERESTED PERSONS**

SKELETON ARGUMENT ON BEHALF OF

INTERESTED PERSON (MS JESSICA BRANCH)

Essential reading: Skeleton arguments, Witness statement of Interested Person

INTRODUCTION

1. The Claimants in their applications dated 30th March 2023 seek the extension of three injunctions, brought in three separate proceedings, each against no named Defendants. There are also applications to amend their pleadings, and a suggestion that the injunction proceedings be consolidated in some way. They

have listed these applications for 1.5 days. Since there are no named Defendants, it is likely that the court would want to consider carefully the basis of the claim and the terms of any injunctions to be regranted. To that end, Ms Jessica Branch, who has filed a statement dated 24th April 2023, wishes to be heard.

2. Ms Branch is a mother of two young children who attends demonstrations organised by Extinction Rebellion ("XR"), a global movement committed to combatting catastrophic climate change. The role of the fossil fuel industry in contributing to climate change is at the heart of XR's campaigning. She has not participated in any demonstration organised by Insulate Britain or Just Stop Oil.

3. No allegations of tortious conduct are made against Ms Branch. There is nothing in her statement that would suggest that she intends to behave unlawfully or tortiously such that the Claimants would wish to make her subject to an injunction. Nevertheless, as a person with a sincere and genuine concern that lawful protest against the Claimants' activities should be permitted and effective, Ms Branch wishes to be heard on the three injunctions. Ms Branch does not wish to become a named Defendant, but wishes to be heard. In one sense, she might already be a party, in the sense that the Claimants have made everyone in the world a potential party. She is, however, someone who is "directly affected" by this, so would be entitled to apply to be treated as an interested Person pursuant to CPR 40.9, or simply heard *de bene esse.* It is not known whether or not the Claimants would oppose this: submissions are made below about why it is appropriate for the court to permit such intervention, whether pursuant to CPR Part 40.9 or otherwise.

4. Ms Branch raises concerns over the following matters:

   i) The Claimant seeks injunctive relief on the basis of claims which do not establish such relief, and which, on the fuller analysis that can now be provided than was possible for the judges asked to grant these complex injunctions under emergency conditions, disclose no reasonable cause of action;

ii) The Claimant wrongly seeks to restrain lawful protest on the highway and other land to which the public have access;

iii) The test for a precautionary (*quia timet*) injunction is not met, and the Claimants have not apprised the court of the proper test;

iv) The terms are overly broad and vague, so objectionable due to uncertainty;

v) Discretionary relief should not be granted;

vi) The orders have a disproportionate chilling effect.

BACKGROUND

5. The Claimants are various corporate emanations of Shell. Shell is an oil and gas "supermajor" and by revenue and profits is one of the largest companies in the world. This is relevant:

   (i) when the court considers the resources available to the Claimants in this litigation and beyond, and the extent to which it is fair, one year into these injunctions, to consider the extent to which the Claimants have still not properly formulated their case;

   (ii) why, since it is one of the major global producers of greenhouse gas emissions, that environmental protestors may legitimately wish to protest against its activities.

6. The Claimants seek injunctions to restrain "persons unknown" from from various activities at various places. One relates to Shell Oil Refinery in Warwickshire. Another set of proceedings relate to petrol stations across England and Wales. The third relates to acts of protest at the Shell Headquarters ("Shell Centre Tower") in central London.

<u>STANDING, BENEFIT TO COURT OF MS BRANCH BEING HEARD</u>

7. These are injunctions which bind everybody but where nobody has been served or heard, it is hoped that the court would be assisted by arguments being put forward from persons other than the Claimants. It is of benefit to the court, and may allow the court to feel more confident in its conclusions, if it hears argument from persons other than the Claimants. In *Ineos v Persons Unknown* [2017] EWHC 3427 (Ch), Morgan J (in his judgment on costs following his earlier decision on the substance) and in a case in which the named defendants only became named defendants at the Claimant's insistence, found that:

> "the opposition presented by the Sixth and Seventh Defendants to the Claimants' application lengthened the hearing (as compared with a case where no one appeared on behalf of the Defendants) but the participation of the Sixth and Seventh Defendants was of assistance to the court in a case of public importance" (at [8(4)])

8. Ms Branch seeks to make representations on the draft order without being made a party to the claim. It is submitted that the court can just hear her. Alternatively, the court may consider that she is someone who is "directly affected" by any judgment or order or variation of the existing order that the court will be making, as to which CPR 40.9 states:

> <u>Who may apply to set aside or vary a judgment or order</u>
>
> 40.9 A person who is not a party but who is directly affected by a judgment or order may apply to have the judgment or order set aside or varied.

9. The application of this provision to protest injunctions sought against persons unknown was considered by Bennathan J in *National Highways Ltd v Persons Unknown* [2022] EWHC 1105 (QB). An application was made by a person who was not a named defendant who gave evidence that "the terms of the order sought are so wide as to prevent protests that are lawful and, more specifically, set out her concern that they might catch people such as her who, while not involved with [the named protest groups] might protest near some of [the sites specified in the draft order] and find herself inadvertently caught up in contempt

proceedings" (at [21]). Bennathan J permitted representations to be made under CPR 40.9 for the following reasons:

> "(1) The scenario suggested by [the applicant], in her specific concern, is not fanciful and would amount to a sensible basis to regard her as "*directly affected*".
>
> (2) Even absent that most direct connection, in a case where an order is sought for unnamed and unknown defendants, and where [as here] Convention rights are engaged, it is proper for the Court to adopt a flexible approach and a general concern by a person concerned with the political cause involved could, perhaps only just, fit within the term. To take an example far removed from the facts of this case, a member of a proselytising religious group who only attended their local place of worship *might* nonetheless be seen as directly affected by an order banning his co-religionists from travelling to seek converts.
>
> (3) In a case where the Court is being asked to make wide ranging orders and, but for a successful rule 40.9 application, would not hear any submissions in opposition it seemed to me desirable to take a generous view of such applications." (at [21])

10. The issue was also considered in *Esso Petroleum v Breen* [2022] EWHC 2600, which, like this case, concerned claims for injunctions restricting rights of protest. Ritchie J, at paragraphs 41 – 45 of his judgment, set out relevant factors. The interested person was permitted to make submissions on a proposed injunction under CPR 40.9 without being made a party to proceedings.

11. Accordingly, by whichever of these two routes is preferable, the court is invited to receive the submissions and arguments from Ms Branch.

<u>INJUNCTIVE RELIEF AND PROTESTS</u>

12. In *Canada Goose v Persons Unknown* [2020] EWCA Civ 303, [2020] 1 WLR 2802*,* the Court of Appeal, in a joint judgment from the then Master of the Rolls, David Richards LJ and Coulson LJ considered some of the issues arising in protest injunctions brought against "persons unknown". As will be discussed below, subsequent cases have revised some of the decision reached in that case. However, nothing has been said to undermine paragraph 93 of the judgment, where the court said:

> "As Nicklin J correctly identified, Canada Goose's problem is that it seeks to invoke the civil jurisdiction of the courts as a means of permanently controlling ongoing public demonstrations by a continually fluctuating body of protesters. It wishes to use remedies in private litigation in effect to prevent what is sees as public disorder. Private law remedies are not well suited to such a task. As the present case shows, what are appropriate permanent controls on such demonstrations involve complex considerations of private rights, civil liberties, public expectations and local authority policies. Those

affected are not confined to Canada Goose, its customers and suppliers and protesters. They include, most graphically in the case of an exclusion zone, the impact on neighbouring properties and businesses, local residents, workers and shoppers. It is notable that the powers conferred by Parliament on local authorities, for example to make a public spaces protection order under the Anti-social Behaviour, Crime and Policing Act 2014, require the local authority to take into account various matters, including rights of freedom of assembly and expression, and to carry out extensive consultation: see, for example*, Dulgheriu v Ealing London Borough Council* [2019] EWCA Civ 1490, [2020] 1 WLR 609. The civil justice process is a far blunter instrument intended to resolve disputes between parties to litigation, who have had a fair opportunity to participate in it."

13. The Claimants in this case are asking a judge of the King's Bench Division to maintain injunctions based on claimed private law rights. The circumstances in which those private law rights provide an entitlement to relief are highly controversial in any case, and in this case, do not justify the continuation of the injunctions granted.

14. It has been accepted by the Claimants, and was, for instance, mentioned in submissions made to Jeremy Johnson J in the "petrol stations" claim, that Article 10 and Article 11 ECHR apply to this claim.

15. Articles 10 and 11 of the European Convention on Human Rights state:

Article 10 – Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11 – Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

16. Articles 10 and 11 together supplement the common law and serve to protect the right to protest. Since the court is a public authority for the purposes of section 6 of the Human Rights Act 1998, it is unlawful for the court to act in a way which is incompatible with these rights. This must therefore, along with the other principles upon which discretionary remedies are either granted or with-held, have a bearing on whether the court maintains an injunction restricting protest.

17. Articles 10 and 11 together contain important protections on the right to protest. It is notable that, as might be thought is common sense, that it is not just the right to speak freely, but the right to demonstrate and associate with others. A protest involving one person standing with a placard, such as the man who used to walk along Oxford Street with a sign saying, in capitals, "LESS LUST FROM LESS PROTEIN. LESS FISH, BIRD, MEAT, CHEESE, EGG, BEANS, PEAS, NUTS AND SITTING" may be taken less seriously than a million people turning up to protest against the Iraq War. Numbers, locale and methods are all important.

18. It is also the essence of protest that many, including those in power, will regard it as unwelcome. As Laws LJ stated in *R(Tabernacle) v Secretary of State for Defence* [2009] EWCA Civ 23:

> "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." (at [43])

19. In *R (Laporte) v Chief Constable of Gloucestershire* [2007] 2 AC 105, the House of Lords unanimously determined that the police had acted unlawfully when they had intercepted coaches conveying protestors from London to a demonstration at a military base at Fairford, then required the coaches to turn around from a motorway services and take all passengers back to London. These events were taking place at the time of tensions around the Iraq War and in connection with an airbase from which American planes were likely to fly. Lord Bingham gave the principal speech. His summary of the context is at paragraphs 3-7. The situation was quite extreme: see Lord Carswell (in his concurring speech) at paragraphs 103. He referred to the situation faced as "quite possibly

extending to acts of serious sabotage" (at a military base) and where in that same paragraph he found a risk of "very serious consequences".

20. Nevertheless, the police actions were unlawful. Lord Bingham set out the common law powers relating to detention to prevent a breach of the peace (paragraph 29- 33), and the necessity test applying before detention is permitted, and set out how the ECHR rights to freedom of expression and freedom of association fit into English law (paragraphs 34- 37). He concluded (paragraphs 39, 43, 45, 56) that the Chief Constable had acted unlawfully.

21. At paragraph 52, Lord Bingham stated that "article 10 and 11 rights are fundamental rights, to be protected as such. Any prior restraint on their exercise must be scrutinised with particular care." Or, as Lord Carswell said at paragraph 115, "prior restraint (pre- emptive action) needs the fullest justification". The police, and courts below, had gone wrong and the claimant protestor succeeded in her claim. The court will note that the restrictions had been unlawful even though Lord Bingham was prepared to accept (paragraph 55) that some on the coaches "might wish to cause damage and injury", or as Lord Carswell , the fact was that the location of any potential disorder was known and could and should be left to the control of police officers in attendance at the scene. This meant that it had been "wholly disproportionate" to restrict the claimant's rights under Article 10/11 merely because she was in the company of others who might breach the peace: see paragraph 55.

22. *Laporte* represents a decision, at the highest level, supportive of the principle that protest, even disruptive protest is lawful, and the courts cannot prevent it unless there is a clear necessity to do so, and even more importantly, that rights under Article 10 and Article 11 are statutory rights.

23. The Supreme Court considered the application of Articles 10 and 11 ECHR in relation to obstructive protests on the highway in the case of DPP v *Ziegler* [2021] UKSC 23. Of particular note are the Supreme Court's findings that:

    i) "intentional action by protesters to disrupt by obstructing others enjoys the guarantees of articles 10 and 11" [70];

ii) no restrictions may be placed on the enjoyment of Articles 10 and 11 rights "except "such as are prescribed by law and are necessary in a democratic society"" [57];

iii) "[a]rrest, prosecution, conviction, and sentence are all "restrictions" within both articles" (ibid.) and there is "a separate evaluation of proportionality in respect of each restriction" (para 67);

iv) each of those restrictions will only be "necessary in a democratic society" if it is proportionate ([57]);

v) the "determination of the proportionality of an interference with ECHR rights is a fact-specific enquiry which requires the evaluation of the circumstances in the individual case" [59];

vi) "deliberate obstructive conduct which has a more than de minimis impact on others still requires careful evaluation in determining proportionality" [67];

vii) "both disruption and whether it is intentional are relevant factors in relation to an evaluation of proportionality" [70];

viii) however, "there should be a certain degree of tolerance to disruption to ordinary life, including disruption of traffic, caused by the exercise of the right to freedom of expression or freedom of peaceful assembly" [68];

24. The Supreme Court in *Ziegler* set out *"various factors applicable to the evaluation of proportionality"* at [72-78]. However, the Court underscored that *"it is important to recognise that not all of them will be relevant to every conceivable situation"* and that, moreover, *"the examination of the factors must be open textured without being given any pre-ordained weight"* [71].

25. The non-exhaustive list of factors *"normally to be taken into account in an evaluation of proportionality"* [72], include:

i) the extent to which the continuation of the protest would breach domestic law [72] and [77];

ii) the importance of the precise location to the protesters [72], it being recognised that *"the right to freedom of assembly includes the right to choose the time, place and modalities of the assembly, within the limits established in paragraph 2 of article 11"* (*Sáska v Hungary* (Application No 58050/08) at [21], as cited in *Ziegler* at [76];

iii) the duration of the protest [72];

iv) the degree to which the protesters occupy the land [72];

v) the *"extent of the actual interference the protest causes to the rights of others, including the property rights of the owners of the land, and the rights of any members of the public"* (*ibid.*);

vi) whether the views giving rise to the protest relate to *"very important issues"* and whether they are *"views which many would see as being of considerable breadth, depth and relevance"* (*ibid.*);

vii) whether the protesters *"believed in the views they were expressing"* (*ibid.*);

viii) the availability of alternative routes to that obstructed [74];

ix) whether the obstruction was targeted at the object of the protest [75];

26. There will be further submissions in relation to *Ziegler* on the topic of protest on the public highway, but for the moment, there are two points to be made. One is a point which ought to be obvious, which is that the engagement of Article 10 and 11 means that any decision by the court to restrict protest must be sufficiently principled and predictable to satisfy the Strasbourg court. The second, from the fact that Article 10 is engaged, is the extent to which section 12 Human Rights Act 1998 elevates the proper threshold for the grant of an injunction to that where the Claimants must establish that they are likely to succeed at trial. Ms Branch submits that these injunctions can only be granted if the test under section 12 (3) is satisfied.

SUBMISSIONS ON THE APPROPRIATE TEST TO BE MET, AND THAT SECTION 12(3) REQUIRES THE CLAIMANT TO PROVE THEY ARE LIKELY TO SUCCEED)

27. Section 12 of the Human rights Act 1998 states:

> 12 Freedom of expression.
>
> (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.
>
> (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.

28. The Claimants submit that section 12(3) does not apply in the present case. They rely on what they submitted, and which Johnson J accepted, in one of the cases under consideration here. In *Shell Oil v Persons Unknown* [2022] EWHC 1215 (QB).

29. The Claimants are wrong about that. Not only have a number of High Court judges decided that the section 12(3) test does apply generally in cases concerning protest (as did, in fact, the judgments underpinning the Haven and Shell Centre Tower injunctions in this case), but the decision of the Court of Appeal in *Boyd v Ineos* holds that, was binding on Johnson J and is binding on the court now considering the renewals.

30. In *Shell Oil*, Johnson J stated:

> 67. Nothing in the injunction explicitly restrains publication of anything. Nor does it have that effect. The defendants can publish anything they wish without breaching the injunction. The activities that the injunction restrains do not include publication. It does not, for example, restrain the publication of photographs and videos of the protests that have already taken place. Nor does it prevent anyone from, for example, chanting anything, or from displaying any message on any placard or from placing any material on any website or social media site.
>
> …

69. The word "publication" does not have an unduly narrow meaning so as to apply only to commercial publications: "publication does not mean commercial publication, but communication to a reader or hearer other than the claimant" – *Lachaux v Independent Print Limited* [2019] UKSC 27 [2020] AC 612 *per* Lord Sumption at [18]. Lord Sumption's observation was made in the context of defamation, but Parliament legislated against this well-established backdrop. Section 12(3) should be applied accordingly so that "publication" covers "any form of communication": *Birmingham City Council v Asfar* [2019] EWHC 1560 (QB) *per* Warby J at [60].

70. The meaning set out by Lord Sumption in *Lachaux* is sufficient to achieve the underlying policy intention. There is therefore no good reason 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 protestor's views, but they do not amount to a publication.

71. Further, the wording of section 12 itself indicates that the word "publication" has a narrower reach than the term "freedom of expression". That is because the term "freedom of expression" is expressly used in the side-heading to section 12, and in section 12(1), and is used (by reference ("no such relief")) in section 12(2) and section 12(3). The term "publication" is then used in section 12(3) to signify one form of expression. If Parliament had intended section 12(3) to apply to all forms of expression, then there would have been no need to introduce the word "publication".

72. I therefore respectfully agree with the observation of Lavender J in *National Highways Limited v Persons Unknown* [2021] EWHC 3081 (QB) at [41] that section 12(3) is "not applicable" in this context.

73. It is, though, necessary to address the decisions in *Ineos Upstream v Persons Unknown* [2017] EWHC 2945. That case concerned an injunction that appears to have been similar in scope to the injunction in the present case. At first instance, Morgan J held (a) that section 12(3) applied (at [86]) and (b) the statutory test was satisfied because if the court accepted the evidence put forward by the claimants, then it would be likely, at trial, to grant a final injunction (at [98] and [105]). As to the applicability of section 12(3), Morgan J found the injunction that he was considering might affect the exercise of the right to freedom of expression. That was plainly correct, because the injunction restrained activities that were intended to express support for a particular cause. It does not, however, necessarily follow that section 12(3) is engaged (because, as above, "publication" is not the same as "expression"). There does not appear to have been any argument on that point – rather the focus was on the question of whether there was an interference with the right to freedom of expression. To the extent that Morgan J in *Ineos* and Lavender J in *National Highways* reached different conclusions about the applicability of section 12(3) in this context, I respectfully adopt the latter's approach for the reasons I have given."

31. Contrary to what Johnson J said, the Court of Appeal decision in *Boyd v Ineos* [2019] 4 WLR 100 <u>is</u> clear authority that section 12(3) does apply to cases such as the present. Permission to appeal was explicitly granted in relation to whether the trial judge 'failed adequately or at all to apply section 12(3) of the Human Rights Act 1998' (see [17]). In *Ineos*, the Court of Appeal stated:

"47. …The only injunctions left are those restraining trespass and interfering with the claimants' rights of way and it will be rather easier therefore for the claimants to establish

that at trial publication of views by trespassers on the claimants' property should not be allowed.

48. Nevertheless, I consider that there is force in Ms Williams's [counsel for Appellant's] submission. It is not just the trespass that has to be shown to be likely to be established; by way of example, it is also the nature of the threat. For the purposes of interim relief, the judge has held that the threat of trespass is imminent and real but he has given little or no consideration (at any rate expressly) to the question whether that is likely to be established at trial. This is particularly striking in relation to site 7 where it is said that planning permission for fracking has twice been refused and sites 3 and 4 where planning permission has not yet been sought. " (emphasis added)

32. There is no suggestion in this passage that demonstrations consisting of acts of trespass or similar should not fall within the scope of 'publication' for the purposes of s12(3).

33. In *Birmingham City Council v Afsar* [2019] EWHC 1560 (QB) Warby J stated:

> "But I would go further. I am satisfied that it would be quite wrong to treat the word "publication" in s 12(3) as having a limited meaning, restricted for example (as Mr Manning's submission seemed to imply) to commercial publication. It is hard to see how that such an approach could be rationally defended. It would give commercial publishers preferential treatment compared to other defendants, such as individuals communicating for private purposes, on social media. As everybody knows, some social media accounts have larger readerships than some paid-for newspapers. But there is a more fundamental point. In the law of defamation, "publication does not mean commercial publication, but communication to a reader or hearer other than the claimant": *Lachaux v Independent Print Ltd [2019] UKSC 27* [18] (Lord Sumption). This is generally true of the torts associated with the communication of information, sometimes known as "publication torts", and the related law (see the discussion in *Aitken v DPP [2015] EWHC 1079 (Admin) [2016] 1 WLR 297* [41-62]). Parliament must be taken to have legislated against this well-established background. Section 12(3) applies to any application for prior restraint of any form of communication that falls within Article 10 of the Convention. This is appropriately reflected in the language of the Practice Guidance, quoted above." (at [60], emphasis added)

34. The proper test for the application of s12(3) HRA 1998 is therefore whether an order restrains: "*any form of communication that falls within Article 10 of the Convention*". Whilst Johnson J is correct that this is narrower than simply acts which fall within the scope of Article 10 ECHR, this is is only to the extent that the act must additionally be a "form of communication". Therefore, whilst an act of expression that was not intended to be communicated to any audience would not be included, the application of s12(3) is not otherwise restricted.

35. It is quite clear that the acts restrained by the proposed orders include conduct which falls within Article 10 of the European Convention. The scope of Article 10 includes all forms of peaceful protest. As the European Court stated in *Murat*

Vural v Turkey (App. No. 9540/07), pouring paint on a statute may be seen, from an objective point of view, as an expressive act. This is the correct test:

> "an assessment must be made of the nature of the act or conduct in question, in particular of its expressive character seen from an objective point of view, as well as of the purpose or the intention of the person performing the act or carrying out the conduct in question." (at [54])

36. Once an act is categorised as "*expressive*", it is only if it is violent, incites violence or has violent intentions that the conduct will be considered to fall outside the protection of Article 10. This has recently been confirmed in *AG Reference on a Point of Law (No 1 of 2022)* [2022] EWCA Crim 1259 (at [96]).

37. It is important to note that the manner and form of a protest may be an integral part of the message that is sought to be communicated. As Laws LJ stated in *Tabernacle*:

> "… this "manner and form" may constitute the actual nature and quality of the protest; it may have acquired a symbolic force inseparable from the protesters' message; it may be the very witness of their beliefs. " (at [37)

38. The above are all general points to be made from the protest context. The court may or not agree with those observations. There are interesting points to be made about whether any form of visible, or performative protest (e.g. a "die in") amounts to "publication". Ms Branch would submit that it does, and submissions will be made on that. However, what is obviously very clear in this case is that the order sought, obtained from Johnson J and currently under consideration in these applications contains a prohibition on: "writing in any substance on any part of a Shell Petrol station" (para 3.4).

39. It is simply absurd to contend that "writing" something on a publicly visible structure such as a petrol station does not amount to publication. It certainly would amount to publication sufficient to make out one of the components for a claim in libel: see Clerk and Lindsell, Chapter 21, section 5, where there is a discussion of cases that establish that proof of posting a postcard will amount to "publication" for the purposes of a libel claim.

40. Moreover, there is no reason why a protest on the highway outside a Shell petrol station which symbolically blocks access for a limited duration where this is done

with the intention and knowledge that it is witnessed by others cannot be a form of communication. The demonstrators acts are as much a communication of a message to their audience as it would be if they were to use a megaphone of loud hailer. Indeed, the absence of words in a silent "die-in" protest is an integral part of the message conveyed.

41. It is respectfully submitted that Johnson J fell into error when he stated: "The activities that the injunction restrains do not include publication. It does not, for example, restrain the publication of photographs and videos of the protests that have already taken place.". First, it is artificial to draw a distinction between the occurance of a performative demonstration and transmission of videos and images of the event to others. This is analogous to stating that a prohibition on actors speaking dialogue which is intended to be filmed for tv is not a restriction on publication because it is not a restriction on the capture and transmission of images. Second, the fact that images of previous protests may be published is irrelevant. Allowing repeats of series one of a tv show to continue to be broadcast does not mean that a prohibition on filming series 2 is not a restraint on publication.

42. Contrary to the decision of Johnson J, the approach in *Ineos* and *Birmingham CC v Afsar* has recently been followed in the majority of recent decisions relating to injunctions restraining disruptive protest against oil companies (see the ruling of Mr Justice Bennathan in *Esso Petroleum v Persons Unknown* [2022] EWHC 1477 (QB) at [7]). Unfortunately, there are some cases in which these *djcta* from Johnson J have been followed, and this is why, since it is submitted that the Johnson J approach is not correct, some time has been spent on this issue.

43. The Court is respectfully invited to follow the binding authority of *Ineos* and the consistent line of High Court decisions to the same effect and to apply Section 12(3) HRA in the present case. The Claimants are required to show that they are "likely" to succeed at trial.

44. Ms Branch submits that the Claimants are not "likely" to succeed at trial. She also submits that they do not have even a *prima facie* case of the sort sufficient

to make out the first component of the *Anisminic* test. This important point, which goes to the root of the proceedings is now addressed.

THE CLAIMANTS' LACK OF A CASE

45. The Claimants rely on a claim in conspiracy to injure by unlawful means. The Amended Particulars of Claim do not specify the legal nature of the underlying unlawful means on which the Claimants rely. They are similarly not specified in the Claimants Skeleton Argument for the renewal hearing dated 20.04.23. The Skeleton Argument for the initial hearing before Johnson J identified them as: Trespass to Land, Trespass to Goods and Private Nuisance[1]. Those torts do not, however, feature in the Particulars of Claim or the proposed Amended Particulars of Claim.

46. The Claimants accept that in relation to much of the land covered by the injunction the torts are not actionable at the suit of the Claimant. The Claimants skeleton argument for the hearing before Johnson J stated:

> "for the purpose of this application C relies on the fact that all of the acts relied upon would be actionable in tort by the person in possession of the particular Shell Petrol Station, or the owner of the relevant equipment. However, C is not in legal possessionof all of the Shell Petrol Stations, and does not own all of the equipment upon them" (at [11])

47. The basis for the claim in unlawful means conspiracy are therefore torts actionable only by third-parties (for convenience "third-party torts").

48. It is important to make some general points on the underlying torst before returning to the claim in unlawful means conspiracy.

Public highway

49. The Claimants also allege that the Tower injunction and Haven injunctions are supportable by reference to claims in public nuisance. At paragraph 25 of their skeleton argument, they submit that the claim for an injunction in public nuisance is justified on the basis granted by Morgan J in the *Ineos* case. It is

[1] Claimant's skeleton argument for hearing before Johnson J dated 03.05.22 at [10].

regrettable to say the least that this submission was made, particularly in a case where there are no named defendants before the court. The Claimants must know that that injunction was discharged by the Court of Appeal in *Boyd v Ineos*, and that Morgan J's decision on that could not stand.

50. There are similar significant problems in this injunction remaining in force on this basis. Insofar as the injunction covers land which is a public highway, it should be noted that <u>all</u> of the underlying torts require the defendants' use of the highway to be unreasonable.

51. The public have a right of reasonable use of the highway which may include protest (*DPP v Jones* [1999] 2 AC 240). This is so even when protests deliberately obstruct other road users. Ultimately, the issue is one of the proportionality of interference with rights protected under ECHR 10 and 11 when prohibiting such protest (see the High Court decision in *DPP v Ziegler* [2019] EWHC 71 (Admin)). The Supreme Court in *DPP v Ziegler* [2021] UKSC 23 emphasised the fact specific nature of the assessment of proportionality. Similarly, the Court of Appeal in *INEOS* stated:

> "the concept of 'unreasonably' obstructing the highway is not susceptible of advance definition… that is a question of fact and degree that can only be assessed in an actual situation and not in advance" (at 40]).

52. It is wrong to view the right of the public to pass and repass as having primacy over the right to protest on the highway. Instead, there is a need to "balance the different rights and interests at stake" (see the High Court ruling in *DPP v Ziegler* [2019] EWHC 71 (Admin) at [108]).

53. Clearly it cannot be asserted <u>any</u> form of obstructive protest on the highway will constitute a trespass without regard to the degree and impact of the obstruction.

54. Similarly protests which do not cause undue interference with the rights of others do not fall within the definition of either public or private nuisance.

55. Whilst the owner of a property may enjoy a common law right of access to the highway (now to a large extent qualified by statute), it is not the case that *every*

interference with such access will constitute an actionable private nuisance. As Lord Adkin stated in in *Marshall v Blackpool Corp* [1935] A.C. 16:

> "The owner of land adjoining a highway has a right of access to the highway from any part of his premises. …The rights of the public to pass along the highway are subject to this right of access: just as the right of access is subject to the rights of the public and must be exercised subject to the general obligations as to nuisance and the like imposed upon a person using the highway." (at [22], emphasis added)

56. Insofar as the general obligations as to nuisance on the highway are referred to, in *Harper v G N Haden & Sons* [1933] Ch 298, Romer LJ said:

> "The law relating to the user of highways is in truth the law of give and take. Those who use them must in doing so have reasonable regard to the convenience and comfort of others, and must not themselves expect a degree of convenience and comfort only obtainable by disregarding that of other people. They must expect to be obstructed occasionally. It is the price they pay for the privilege of obstructing others." (at 320, emphasis added)

57. This reflects the general features of the tort of private nuisance, it was described by the House of Lords in *R v Rimmington* [2005] UKHL 63 as:

> "Thus the action for private nuisance was developed to protect the right of an occupier of land to enjoy it without substantial and unreasonable interference." (at [5], emphasis added)

58. It is therefore not the case that every interference with access to, or passage along, the highway, for whatever duration and extent, will be tortious. Similarly, not every such obstruction will be lawful. It is all a matter of fact and degree

59. The important point is that the underlying claims relied on by the Claimant to establish the unlawful means conspiracy rest on an assessment of disruptive protest on the highway as unreasonable. It is far from clear that protests which disrupt minor roads or pavements/footpaths passing near Shell Petrol Stations will lead to a viable civil claim. Similarly, where the extent of the interference with more major roads is not a total and extended halting of traffic the outcome of balancing the extent of disruption against the defendants rights under Article 10/11 ECHR cannot be determined in advance.

Non-public highway land

60. Insofar as the injunction covers land which is not part of the public highway, the Claimant asserts (though does not plead) claims in trespass and private

nuisance, albeit that the Claimants seem to accept that they do not have sufficient rights of possession to bring a claim in its own name for trespass or private nuisance.

61. Given the complexities of land ownership in multi-retailer commercial environments, it cannot confidentially be asserted that the landowner will not tolerate the presence of those protesting against the Claimant in each and every case where this might occur. It is therefore unclera that claims in trespass and private nuisance will be made out.

Unlawful Means Conspiracy and Third Party Torts

62. As a general point, the reliance on wide-ranging economic torts such as conspiracy to injure through unlawful means was discouraged by the Court of Appeal in *Boyd v Ineos* [2019] 4 WLR 100. The trial judge granted an injunction based on torts of trespass, private nuisance, public nuisance and conspiracy to injure by unlawful means (at [11]). The Court of appeal stated:

> "39. Those important points about the width and the clarity of the injunctions are critical when it comes to considering the injunctions relating to public rights of way and the supply chain in connection with conspiracy to cause damage by unlawful means. They are perhaps most clearly seen in relation to the supply chain. The judge has made an immensely detailed order (in no doubt a highly laudable attempt to ensure that the terms of the injunction correspond to the threatened tort) but has produced an order that is, in my view, both too wide and insufficiently clear. In short, he has attempted to do the impossible. He has, for example, restrained the fifth defendants from combining together to commit the act or offence of obstructing free passage along a public highway (or to access to or from a public highway) by (c(ii)) slow walking in front of the vehicles with the object of slowing them down and with the intention of causing inconvenience and delay or (c(iv)) otherwise unreasonably and/or without lawful authority or excuse obstructing the highway with the intention of causing inconvenience and delay, all with the intention of damaging the claimants.
>
> …
>
> 42. Mr Alan Maclean QC for the claimants submitted that the court should grant advance relief of this kind in appropriate cases in order to save time and much energy later devoted to legal proceedings after the events have happened. But it is only when events have happened which can in retrospect be seen to have been illegal that, in my view, wide ranging injunctions of the kind granted against the third and fifth defendants [those based on unlawful means conspiracy] should be granted. The citizen's right of protest is not to be diminished by advance fear of committal except in the clearest of cases, of which trespass is perhaps the best example." (emphasis added)

63. The Court of Appeal discharged those parts of the order based on public nuisance and unlawful means conspiracy leaving only those based on trespass

and private nuisance. The clear concern raised was over the use of wide-ranging economic torts to restrain protest rather than the detailed application of torts such as trespass and the like.

64. In *Cuadrilla*, the Court of Appeal accepted that reference to intention *might* in some circumstances be permitted in an injunction and that it would be possible to incorporate prohibitions in an injunction corresponding to the tort of unlawful means conspiracy using reference to intention and effect (at [69]). However, the Court did not endorse the use of the tort of unlawful means conspiracy as a basis for founding injunctive relief in protest cases. In *Cuadrilla*, the Court the prohibitions were made out on the facts from claims in private nuisance. The court in fact described the prohibition corresponding to unlawful means conspiracy as "a different matter" (at [81]). The Court noted that in relation to the particular conduct that formed the basis of the committal hearing: "Cuadrilla had no need to rely on the tort of unlawful means conspiracy in seeking to restrain such conduct." (at [81]).

65. In the initial ruling in the present case Johnson J stated:

> "It is only necessary to decide whether the claimant has established a serious issue to be tried as to whether the tort that are herein play may suffice as the unlawful act necessary to found a claim for conspiracy to injure. Those torts involve interference with rights in land and goods where those rights are being exercised for the benefit of the claimant (where the petrol station is being operated under the claimant's brand, selling the claimant's fuel). Recognising the torts as capable of supporting a claim in conspiracy to injure does not undermine or undercut the rationale for those torts." (at [29])

66. Notwithstanding the limited threshold imposed by the judge relating to a serious issue to be tried (rather than that under s12(3) HRA 1998 as addressed above) thre are a number of flaws with his reasoning.

67. In *OBG Ltd v Allan* [2008] 1 AC 1, Lord Nicholls stated the following (in the context of a claim for causing loss through unlawful means):

> "159. The difficulties here are more apparent than real. The answer lies in keeping firmly in mind that, in these three-party situations, the function of the tort is to provide a remedy where the claimant is harmed through the instrumentality of a third party. That would not be so in the patent example.
>
> 160. Similarly with the oft-quoted instance of a courier service gaining an unfair and illicit advantage over its rival by offering a speedier service because its motorcyclists frequently exceed speed limits and ignore traffic lights. The unlawful interference tort would not

> apply in such a case. The couriers' criminal conduct is not an offence committed against the rival company in any realistic sense of that expression."

68. Whilst "instrumentality" is a "function of the tort" and is therefore a necessary condition for tortious liability via an unlawful means conspiracy, it is not a sufficient condition on which it should be determined whether particular types of unlawful conduct fall within the scope of the tort.

69. In *Customs Comrs v Total Network SL*[2008] AC 1174 the House of Lords considered the elements of the tort of conspiracy to injure through unlawful means. The case concerned a carousel fraud allege to have been committed by the defendant. The Court of Appeal held that this criminal conduct was insufficient to found a claim in unlawful means conspiracy. Reversing the decision on this point, the House of Lords held that in certain circumstances a criminal offence could provide a basis for an unlawful means conspiracy claim. However, there was also a requirement for 'instrumentality': the criminal conduct must be the means by which the claimaint has suffered loss. As Lord Mance stated:

> "119. Caution is nonetheless necessary about the scope of the tort of conspiracy by unlawful means. Not every criminal act committed in order to injure can or should give rise to tortious liability to the person injured, even where the element of conspiracy is present. The pizza delivery business which obtains more custom, to the detriment of its competitors, because it instructs its drivers to ignore speed limits and jump red lights (Lord Walker in *OBG Ltd v Allan [2008] 1 AC 1* , para 266) should not be liable, even if the claim be put as a claim in conspiracy involving its drivers and directors. And—as in relation to the tort of causing loss by unlawful means inflicted on a third party—there is a legitimate objection to making liability "depend upon whether the defendant has done something which is wrongful for reasons which have nothing to do with the damage inflicted on the claimant": per Lord Hoffmann in OBG Ltd v Allan , at para 59."

70. Lord Walker stated:

> "94. From these and other authorities I derive a general assumption, too obvious to need discussion, that criminal conduct engaged in by conspirators as a means of inflicting harm on the claimant is actionable as the tort of conspiracy, whether or not that conduct, on the part of a single individual, would be actionable as some other tort …
>
> "95. In my opinion your Lordships should clarify the law by holding that criminal conduct (at common law or by statute) can constitute unlawful means, provided that it is indeed the means (what Lord Nicholls of Birkenhead in *OBG Ltd v Allen [2008] AC 1* , para 159 called 'instrumentality') of intentionally inflicting harm."

71. It is therefore clear that "instrumentality" is considered as an additional element of the tort of unlawful means conspiracy and not a test as to whether unlawful

acts of a particular character (tortious/criminal etc) can form the basis of the unlawful means tort.

72. The comments of Lord Walker were directly addressed by Lord Sumption in the UKSC case of *JSC BTA Bank v Ablyazov and another (No 14)* [2018] UKSC 19 where he said:

> "15 The reasoning in *Total Network* leaves open the question how far the same considerations apply to non-criminal acts, such as breaches of civil statutory duties, or torts actionable at the suit of third parties, or breaches of contract or fiduciary duty. These are liable to raise more complex problems. Compliance with the criminal law is a universal obligation. By comparison, legal duties in tort or equity will commonly and contractual duties will always be specific to particular relationships. The character of these relationships may vary widely from case to case. They do not lend themselves so readily to the formulation of a general rule. Breaches of civil statutory duties give rise to yet other difficulties. Their relevance may depend on the purpose of the relevant statutory provision, which may or may not be consistent with its deployment as an element in the tort of conspiracy. For present purposes it is unnecessary to say anything more about unlawful means of these kinds. "

73. It is therefore explicitly left open whether, and in what circumstances, a claim in unlawful means conspiracy may be founded on a third-party tort. If Lord Sumption had considered that satisfaction of the test of instrumentality would be sufficient to extend unlawful means conspiracy to a third party tort he would have said so (as he did with criminal offences). He explicitly did not.

74. In *Racing Partnerships Ltd v Done Bros Ltd* [2020] EWCA Civ 1300 it appears to have been assumed that the sole requirement of whether an unlawful means conspiracy may be based on a third-party breach of contract/breach of confidence claim is the requirement to fulfil the test of imnstrumentality. The court did not address the antecedent question, explicitly left open in *Ablyazov*, as to whether an unlawful means conspiracy can in principle be based on a breach of contract/breach of confidence claim. *Racing Partnerships* therefore does not address the concerns addressed by Lord Sumption regarding the extension of unlawful means conspiracy to third-party torts.

75. It is therefore submitted that Johnson J fell into error in the present case when he stated that:

> "For the purposes of the present case, it is not necessary to decide whether a breach of statutory duty can found a claim for conspiracy to injure, or whether every (other) tort can do so. It is only necessary to decide whether the claimant has established a serious

> issue to be tried as to whether the torts that are here in play may suffice as the unlawful act necessary to found a claim for conspiracy to injure. Those torts involve interference with rights in land and goods where those rights are being exercised for the benefit of the claimant (where the petrol station is being operated under the claimant's brand, selling the claimant's fuel). Recognising the torts as capable of supporting a claim in conspiracy to injure does not undermine or undercut the rationale for those torts. It would be anomalous if a breach of contract (where the existence of the cause of action is dependent on the choice of the contracting parties) could support a claim for conspiracy to injure, but a claim for trespass could not do so. Likewise, it would be anomalous if trespass to goods did not suffice given that criminal damage does. I am therefore satisfied that the claimant has established a serious issue to be tried in respect of a relevant unlawful act." (at [29])

76. First, the test of instrumentality is not addressed in this passage. Second, the test adopted for the extension of the tort of unlawful means to third-party torts is that this "does not undermine or undercut the rationale for those torts". It is unclear precisely what is meant by this passage. It appears to suggest that the extension of unlawful means does not undermine the rationale for the torts of trespass to land and private nuisance, and it is unclear why this would be any basis on which to extent unlawful means conspirtacy in this way. In any event, there is no authority that this is a proper and lawful basis on which to apply the tort of unlawful means conspiracy to the third-party torts mentioned.

77. In any event, the Claimants have provided scant detals of the specific basis of the tortious claims on which unlawful means conspiracy is said to arise in the present case. It is therefore impossible to assess whether the test of instrumentality is met. Finally, in many instances of the prohibited conduct in the present order there is no requirement that the Claimant suffer actual harm (which is an element of unlawful means conspiracy) the prohibited conduct therefore goes well beyond that which woud fall within the tort of unlawful means conspiracy.

78. Finally, there has been no consideration of the concerns expressed in *Ineos* over founding in junctive relief in the context of protest on extensive and nebulous claims in unlawful means conspiracy.

79. It is therefore submitted that a claim in unlawful means conspiracy is an improper and inappropriate means to base injnctive relief in the present case.

80. The weakness of the Claimants' position rests not just in the problems with their formulation of the underlying torts, but also due to this being to restrain conduct by persons unknown who have not to date committed tortious acts.

81. Snell's Equity , 30th ed (2000), p 719, para. 45–13 (approved by the Court of Appeal in *Secretary of State for Environment v Meier* [2008] EWCA Civ 903 at [16]) says:

> "Although the claimant must establish his right, he may be entitled to an injunction even though an infringement has not taken place but is merely feared or threatened; for "preventing justice excelleth punishing justice". This class of action, known as quia timet , has long been established, but the claimant must establish a strong case; "no one can obtain a quia timet order by merely saying ' timeo .' He must prove that there is an imminent danger of very substantial damage …" (emphasis added)

82. In *Elliot v Islington LBC* [2012] 7 EG 90 (Ch) the requirements were expressed as:

> "the practice of the court has necessarily been to proceed with caution and to require to be satisfied that the risk of actual damage occurring is both imminent and real. That is particularly so when, as in this case, the injunction sought is a permanent injunction at trial rather than an interlocutory order granted on American Cyanamid principles having regard to the balance of convenience. A permanent injunction can only be granted if the claimant has proved at the trial that there will be an actual infringement of his rights unless the injunction is granted." (at [29], emphasis added).

83. In any event, there is no evidence at all of non-environmental protest groups seeking to carry out activity of the sort prohibited under the order there is hence no basis to broaden the definition of "Persons Unknown" in the manner sought.

84. The common features of all of these claims is that:

    i) They are brought against "persons unknown";

    ii) One year into these injunctions, and with all the resources available to the Claimants, they do not feel able to allege a claim in tort against any named individual. This is despite the court having given the Claimants the benefit of third party disclosure orders that ought to have helped them to do what any claimant is normally expected to do, and identify against whom they wish to proceed;

    iii) The underlying legal basis of their claims (reflected in the Particulars of Claim and in the proposed Amended Particulars of Claim) appears to be

some sort of claim based on conspiracy to injure. They invite the court to infer that this is a serious matter;

iv) Despite the seriousness of this matter, the Claimants' Particulars of Claim do not identify any particular conspiracy, nor any actual conspirators, and make no allegations as to the way in which the conspiracy is said to have arisen, or what its objects are.

85. Each of these, both individually and in combination, ought to cause the court to be seriously concerned as to the validity of the claims before the court. The gravemen of the case upon which the Claimants seek relief is to be found in paragraph 3.1 of the Particulars of Claim, where it is alleged that "persons unknown will in the future combine to engage in ….unlawful acts with the intention of disrupting the sale of fuel…" with allegations that this would cause "harm" in paragraph 3.2.

86. There are no individuals identified in this conspiracy.

87. The Particulars are based on something that the publishers of the Just Stop Oil website have posted there, along with what various "protesters" have done.

88. This all discloses a serious conceptual difficulty with the claim. The refusal, or inability, to identify alleged conspirators is something that discloses that there is no legitimate case in conspiracy to injure. The Claimants have not complied with the clear, mandatory obligation in PD16.7.5 applying to a claim based upon agreement by conduct, where, "the particulars of claim must specify the conduct relied on and state by whom, when and where the acts constituting the conduct were done".

89. While the courts will allow in certain circumstances claims to be brought against unidentified people, or "persons unknown", this does not mean that claims can be brought against a purely hypothetical defendant. Claims can only be brought for or against someone with legal personality: see *Moosun v HSBC* [2015] EWHC 3308, especially at paragraphs 8-10 (where claims on behalf of children without litigation friends and on behalf of a dog were struck out). At least in *Moosun* the other claimant knew the dog and the children on whose behalves she intended

to make the claim. The Claimants in this case are in a worse position even than that: one year into this claim, the Claimants are not able to sign a statement of truth alleging a case against any named person, or to provide sufficient particulars of the alleged conspiracy in order to comply with the obligation in PD16.7.5.

90. Similarly, the courts cannot allow persons without legal personality to be parties to claims, and will strike out claims brought against persons without legal personality. An important example of that, and in a case seeking injunctive relief against protestors, was seen in in *EDO v Campaign to Smash EDO and others* [2005] EWHC 837. The claims brought against an organisation without legal personality were struck out: see paragraphs 43- 45 of Gross J's judgment.

91. Accordingly, the Claimants here cannot create a claim against "Just Stop Oil" or "Extinction Rebellion" or whatever label certain people choose to protest under merely by referring to "Just Stop Oil" in their particulars. They cannot confect a claim in conspiracy by imagining or conjuring up the alleged conspirators, and breach the obligation to identify the conspiracy and case against those conspirators by conjuring up the alleged miscreants. There either is a case, or there is not, and one year into this claim, the Claimants ought to be able to say what it is.

92. It may be that this aspect of the concern is a consequence of the Claimants' decisions in each case to proceed against "Persons Unknown" without regard to the circumstances in which such a method of proceeding might properly be brought. Essentially, there are serious conceptual and practical problems in using "Persons Unknown" in protestor cases, particularly where the tortious conduct alleged or apprehended would be committed away from a defined area or piece of land. Some of these problems were discussed by Nicklin J in *Canada Goose v Persons Unknown* [2019] EWHC 2459 (QB) at paragraphs 149- 150. On appeal, the Court of Appeal ([2020] EWCA Civ 303, [2020] 1 WLR 2802) went on to state that final orders should not be made "in a protestor case" against "persons unknown": see 89- 93. The generality of that proposition cannot be seen, at least at present, as longer completely correct following following the

decision in *London Borough of Barking v Persons Unknown* [2022] EWCA Civ 13, [2023] QB 295_. That case has itself been appealed to the Supreme Court, with arguments heard and judgment awaited.

93. The Court of Appeal in *Barking* decided:

    i) there is *jurisdiction* to make final orders against "persons unknown": see 119- 121,

    ii) that the court can grant final injunctions that prevent persons who are unknown and unidentified from trespassing on local authority land (as formulated in the heading between paragraphs 70-71 and precisely set out at paragraph 101).

94. Sir Geoffrey Vos MR also cast some doubt, and indeed, over- ruled, paragraphs 89-92 of the *Canada Goose* case. Those paragraphs from *Canada Goose* form separate sub- headings above paragraphs 79, 83, 84 and 91 of the *Barking* decision.

95. The court will note that paragraph 93 of the *Canada Goose*_ case was NOT discussed, still less over- ruled, in this way. The court in *Barking* was concerned with whether people who set up a camp on a local authority camp can, depending on the evidence, be said to have been provided with proper notification of the terms of an injunction. This case cannot help with the more complex problems of actual notice and how that can be given, in cases involving protest, where some of the acts restrained will be taking place far away from the particular venue.

96. That is particularly with the injunctions here, which are underpinned by the alleged CONSPIRACY (i.e. a state of mind and agreement) with completely unrestricted geographical ambit.

97. Thus the Claimants here face the same hurdle as defeated the claimants in *Boyd v Ineos*. The absence of a proper formulation of their case, and the absence of evidence to support a conspiracy to injure means that they cannot make their case.

TERMS OF INJUNCTION

Legal Framework

98. General principles of proportionality require that an injunction is targeted as closely as practicable on the conduct which constitutes the tortious behaviour. The terms of an order may only prohibit otherwise lawful conduct beyond the scope of the strict tort where it is necessary "in order to provide effective protection of the rights of the claimant in the particular case" (*Cuadrilla Bowland v Lawrie* [2020] EWCA Civ 9 at [50]) and "there is no other proportionate means of protecting the claimants' rights" (see *Canada Goose* at 78 and 82(5)). Clearly the extent to which an order prohibits lawful conduct must be kept to a minimum.

99. The terms of an injunction muse not be unduly vague. In *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29 the Court of Appeal stated:

> **"**57. There are at least three different ways in which the terms of an injunction may be unclear. One is that a term may be ambiguous, in that the words used have more than one meaning. Another is that a term may be vague in so far as there are borderline cases to which it is inherently uncertain whether the term applies. Except where quantitative measurements can be used, some degree of imprecision is inevitable. But the wording of an injunction is unacceptably vague to the extent that there is no way of telling with confidence what will count as falling within its scope and what will not. Evaluative language is often open to this objection. For example, a prohibition against "unreasonably" obstructing the highway is vague because there is room for differences of opinion about what is an unreasonable obstruction and no determinate or incontestable standard by which to decide whether particular conduct constitutes a breach. Language which does not involve a value judgment may also be unduly vague. An example would be an injunction which prohibited particular conduct within a "short" distance of a location (such as the Site Entrance in this case). Without a more precise definition, there is no way of ascertaining what distance does or does not count as "short".
>
> 58. A third way in which the terms of an injunction may lack clarity is that the language used may be too convoluted, technical or otherwise opaque to be readily understandable by the person(s) to whom the injunction is addressed. <u>Where legal knowledge is needed to understand the effect of a term, its clarity will depend on whether the addressee of the injunction can be expected to obtain legal advice.</u> Such an expectation may be reasonable where an injunction is granted in the course of litigation in which each party is legally represented. By contrast, in a case of the present kind where an injunction is granted against "persons unknown", it is unreasonable to impose on members of the public the cost of consulting a lawyer in order to find out what the injunction does and does not prohibit them from doing." (emphasis added)

100. Even where the strict terms of an order are limited, consideration must be given to any 'chilling effect' that the injunction has beyond conduct falling directly

within its terms. This is particularly so for injunctions that are vague or broadly drawn (see *INEOS v Boyd* [2020] EWCA Civ 515 at [40]). The temporary nature of an order may still be disproportionate when the chilling effect is considered (see *Christian Democratic People's Party v Moldova* (2007) 45 EHRR 13).

<u>Terms of Order: Definition of Persons Unknown</u>

101. The proposed definition of persons unknown reads:

> PERSONS UNKNOWN DAMAGING, AND/OR BLOCKING THE USE OF OR ACCESS TO ANY SHELL PETROL STATION IN ENGLAND AND WALES, OR TO ANY EQUIPMENT OR INFRASTRUCTURE UPON IT, BY EXPRESS OR IMPLIED AGREEMENT WITH OTHERS, IN CONNECTION WITH ~~ENVIRONMENTAL~~ PROTEST CAMPAIGNS WITH THE INTENTION OF DISRUPTING THE SALE OR SUPPLY OF FUEL TO OR FROM THE SAID STATION

102. Two points are made on the definition of persons unknown:

    i) The tort of unlawful means conspiracy requires both an intention to cause harm and actual harm to arise. Therefore, in order that the order captures only those who have committed tortious acts there should be an effect clause in the definition of the conduct prohibited.

    ii) The tort of unlawful means conspiracy requires instrumentality: the unlawful act must be the direct cause of loss to the claimant rather then merely the occasion of such loss. This should be specified in the definition of persons unknown.

    iii) The evidential basis for the claim is focussed on the grops Insulate Britain and Just Stop Oil and should not be extended beyond these organisations.

    iv) There is no basis whatsoever, to extend the definition beyone environmental protest.

103. To establish any proper basis of claim, the definition of persons unknown should therefore read:

PERSONS UNKNOWN DAMAGING, AND/OR BLOCKING THE USE OF OR ACCESS TO ANY SHELL PETROL STATION IN ENGLAND AND WALES, OR TO ANY EQUIPMENT OR INFRASTRUCTURE UPON IT, BY EXPRESS OR IMPLIED AGREEMENT WITH OTHERS, IN CONNECTION WITH ENVIRONMENTAL *PROTEST CAMPAIGNS ASSOCIATED WITH INSULATE BRITAIN AND JUST STOP OIL WITH THE INTENTION* AND EFFECT *OF* THEREBY *DISRUPTING THE SALE OR SUPPLY OF FUEL TO OR FROM THE SAID STATION.*

Terms of Order: prohibitions

104. The Order states:

> *Definitions*
>
> 1. In this Order:
>
>   1.1. *"Shell Petrol Station"* means all Petrol Stations in England and Wales displaying Shell branding (including any retail unit forming a part of such a petrol station, whatever the branding of the retail unit).
>
> …
>
> *Injunction*
>
> 2. For the period until 4pm on [DATE], and subject to any further order of the Court, the Defendants must not do any of the acts listed in paragraph 3 of this Order in express or implied agreement with any other person, and with the intention of disrupting the sale or supply of fuel to or from a Shell Petrol Station.
>
> 3. The acts referred to in paragraph 2 of this Order are:
>
>   3.1. blocking or impeding access to any pedestrian or vehicular entrance to a Shell Petrol Station or to a building within the Shell Petrol Station.
>
>   3.2. causing damage to any part of a Shell Petrol Station or to any equipment or infrastructure (including but not limited to fuel pumps) upon it;
>
>   3.3. operating or disabling any switch or other device in or on a Shell Petrol Station so as to interrupt the supply of fuel from that Shell Petrol Station, or from one of its fuel pumps, or so as to prevent the emergency interruption of the supply of fuel at the Shell Petrol Station.
>
>   3.4. affixing or locking themselves, or any object or person, to any part of a Shell Petrol Station, or to any other person or object on or in a Shell Petrol Station.
>
>   3.5. erecting any structure in, on or against any part of a Shell Petrol Station.
>
>   3.6. spraying, painting, pouring, depositing or writing in any substance on to any part of a Shell Petrol Station.
>
>   3.7. encouraging or assisting any other person do any of the acts referred to in sub- paragraphs 3.1 to 3.7.
>
> 4. A Defendant who is ordered not to do something must not:
>
>   (A) do it himself/herself/themselves or in any other way.

(B) do it by means of another person acting on his/her/their behalf, or acting on his/her/their instructions, or by another person acting with his/her/their encouragement.

105. These are addressed in turn.

Shell Petrol Station

106. The term "Shell Petrol Station" is defined as any petrol station displaying Shell branding. There is no further guidance provided as to the scope of the land covered. It is not specified whether forecourts are included, or access roads or acilliary building within a larger retail space (which will often be shared by several other diverse retail outlets). It is notable that no maps or other guidance have ben provided setting out the georgraphical limits of the land affected by the order. This is significant since a number of terms prohit actions "in", "on" or "within" a Shell Petrol Station. Of particular concern is the potential for areas of public highway (whether access roads or footpaths) to be included within the land covered by any individual Shell Petrol Station.

107. The lack of clarity in the defintion of the land covered by "Shell Petrol Stations" means the injunction lacks the requisite clarity for an order which imposes severe penal santions for breach.

Intention of disrupting the sale or supply of fuel to or from a Shell Petrol Station.

108. The order states:

> For the period until 4pm on [DATE], and subject to any further order of the Court, the Defendants must not do any of the acts listed in paragraph 3 of this Order in express or implied agreement with any other person, and with the intention of disrupting the sale or supply of fuel to or from a Shell Petrol Station.

109. For the same reasons set out above in relation to the definition of persons unknown, the prohibited conduct should include both an effect clause and instrumentality in order that the prohibited conduct corresponds as closely as possible to the tortiosu basis for the order.

110. The prohibition should therefore read:

> For the period until 4pm on [DATE], and subject to any further order of the Court, the Defendants must not do any of the acts listed in paragraph 3 of this Order in express or implied agreement with any other person, and with the intention and effect of disrupting

> the sale or supply of fuel to or from a Shell Petrol Station by means of the acts in paragraph 3.

(3.1) Blocking or impeding access

111. This term imposes a blanket prohibition on protests which interfere with access to Shell Petrol Stations in any way. The prohibition is not limited to actions which take place on the land of the petrol station itself (such land is in any event is not defined). The prohibition therefore applies to protests on the public highway, which impact on access to a Shell Petrol Station. There is no geographical limit to the scope of action caught save that it must have an impact on a Shell Petrol Station.

112. As the UKSC confirmed in *Ziegler*, protests which intentionally disrupt the flow of traffic, even beyond a *de minimis* impact, nonetheless fall within the scope of Articles 10 and 11. A fact specific inquiry must be made in each case regarding the proportionality of restrictions on such protests. It is therefore impossible to state in advance whether such an obstructive protest will be unlawful. All will turn on fact-specific factors, including importantly: the importance of the issue, whether the protest targets the location affects, the degree of actual disruption caused, the availability of alternative routes and whether any public disorder arises.

113. The impact of protests which affect access to Shell Petorl Stations will vary widely depending on the circumstances and the duration of the protest. It cannot be said in advance that any demonstration that slows the flow of traffic onto a Shell Petrol Station will be unlawful.

114. As the above examples demonstrate, the Order appears to prohibit conduct which is not unlawful and is a clear exercise of Article 10 and 11 rights. There is no basis under which the order permits protests which have only a small impact on the flow of traffic. The Order prohibits all protests that interfere with the flow of traffic in any way. The effect of the order extends considerably beyond tortious conduct and the impact on Article 10 and 11 rights is therefore disproportionate.

(3.4) affixing any object or person

115. This would prohibit placing leaflets or signs on any objects on or in a Shell Petrol Station. Given the lack of clarity over the geographical scope of the land covered by any Shell Patrol Station this may include areas of the public highway. Affixing a sign to a public highway cannot be said in advance to be necessarily tortious even if it has the effect of impeding the sale of fuel at a Shell Petrol Station for a short period.

(3.5) erecting any structure in, on or against any part of a Shell Petrol Station

116. Similar concerns arise in relation to this term as with (3.4) above, particularly given the potential for the definition of SHJell Petrol Station to include areas of the public highway.

(3.6) Painting or depositing or writing any substance on to any part of a Shell Petrol Station

117. This term would appear prohibit writing in chalk on the forecourt of a Shell Petrol Station. Whilst there is a reuiqrement that this is done with an intention to disrupt the sale of fuel it is difficult to see how this coud in fact arise. The net effect of the prohibition is therefore a chilling effect on anyone seeking to protest by writing on or near a Shell Petrol Station: acts which are not actionable by the Claimants and which it is inappropriate to threaten with the potential sanction of imprisonment for contempt.

(3.7)/(4) encouraging any other person to do any act prohibited

118. The term 'encouragement' is clearly vague. A person who displayed a banner in support of those protesting against Shell Oil would risk breaching the order. There is also a risk of a chilling effect on the expression of support for the aims of XR and those opposed to the fossil fuel use.

119. This term is a direct infringement of free speech and should therefore be viewed with particular scrutiny.

PROPORTIONALITY AND EXERCISE OF COURT'S DISCRETION

120. The Court is required to consider the effect of the injunction order as a whole. Taken cumulatively the scope of the order and range of conduct restrained renders the order wholly disproportionate. The Order clears lacks "clear geographical and temporal limits" and fails to meet the *Canada Goose* requirements.

121. There are also concerns about the clarity of the proposed order. Such a lack of clarity brings with it a 'chilling effect' which may found a separate ground of challenge to the order.

122. Overall it is submitted that the terms of the order, and the related definitions of persons unknown are overly broad, too complex and unclear. The definition of persons unknown in the present injunction is so wide that is covers persons entirely unrelated to the previous protests against Shell Oil who have not previously protested in an unlawful manner and who do not threaten to do so. Nevertheless the present injunction prevents such persons from what would otherwise be entirely lawful conduct. The present injunction is therefore flawed in its approach to persons unknown.

123. The definitions of persons unknown and the prohibited conduct make reference to multiple cross-referring clauses, requirements for 'express or implied agreement with others' and disjunctive intention and effect clauses. The Order is simply too difficult to be reliably interpreted by a lay-person.

CONCLUSION

124. It is submitted that the present orders display many of the flaws identified in *Canada Goose*, as the Court of Appeal stated:

> "…Canada Goose's problem is that it seeks to invoke the civil jurisdiction f the courts as a means of permanently controlling ongoing public demonstrations by a continually fluctuating body of protestors. It wishes to use remedies in private litigation in effect to prevent what it sees as public disorder. Private law remedies are not well suited to such a task. As the present case shows, what are appropriate permanent controls on such demonstrations involve complex considerations of private rights, civil liberties, public expectations and local authority policies. Those affected are not confined to Canada Goose, its customers and suppliers and protestors…." [at 93]

125. In seeking the to extend the Order the Claimant overlooks the role of the police in managing public order situations and protests. There are already ample police powers (including arrest for Aggravated Trespass and Public Nuisance) to address the limited number of more serious types of activity such as tunnelling which the Claimant has raised concerns over. There are also police powers to regulate unreasonable obstructions on the highway (including arrest for the offence of Obstruction of the Highway which now carries a potential prison sentence). The advantage of allowing such issues to be addressed by the police is that a factual assessment can be made on the ground as to the extent of disruption and the relevant competing rights and interests can be balanced, if necessary, on a minute-by-minute basis. Such an approach will inevitably produce a more tailored and proportionate balancing of rights than a court order which seeks to strike a balance in advance and in general terms across a wide range of factual circumstances. The limited instances of disruptive protest relied on by the Claimants therefore do not warrant the granting of an extensive and complicated order in the form sought.

126. The Interested Persons respectfully ask that the court discharge/vary the interim injunction in accordance with the submissions above.

Stephen Simblet KC
Owen Greenhall
Garden Court Chambers
23.04.23