

IN THE HIGH COURT OF JUSTICE

CLAIM NO. QB-2022-002577

QUEEN'S BENCH DIVISION

B E T W E E N :

ESSO PETROLEUM COMPANY LIMITED Claimant

and

(1) SCOTT BREEN

(2) THE PERSONS UNKNOWN WHO
ARE DESCRIBED IN ANNEX 1 TO
THE CLAIM FORM DATED 10

AUGUST 2022

Defendants

CLAIMANT'S SKELETON ARGUMENT

Application without notice for interim injunctive relief

Time Estimate (including pre-reading): 2 hours

Suggested Pre-Reading

1. Application Notice dated 10 August 2022[13]
2. Draft Order [18]
3. Claim Form and Particulars of Claim dated 10 August 2022 [1-12]
4. Witness Statement of Mr Anstee de Mas dated 10 August 2022 [27-53]

Introduction

5. C is in the course of undertaking works to replace the majority of a fuel pipeline. So far as immediately relevant, the pipeline is about 105km long. The pipeline and its replacement are acknowledged to possess strategic national importance.
6. The project has become the target of environmental protests.
7. D1 is a named defendant, a known tunneller who has dug himself in at Runnymede.

His case will be considered separately in what follows.

8. D2 are “Persons Unknown”. C now seeks an urgent interim injunction to prevent the person who match the various descriptions in the heading to this claim, from conspiring to injure C’s business by unlawful means. The unlawful means in question consist of the actual and threatened trespasses to goods and also to land which C has experienced – and which continues to be threatened against the pipeline project.
9. The current application is urgent because the actions of protesters have demonstrated, and persuaded C, that their actions have the capacity to disturb the works in a way which might have serious implications.
10. Details of the recent activities which C has experienced are set out in the statement of Mr Anstee de Mas dated 10 August 2022 at paras 6.2 to 6.72 [32-43].
11. The activities carried out by some protesters go far beyond lawful and peaceful protest and give rise to serious health and safety concerns.
12. The risk of repetition is obvious and ‘imminent’, in that it will occur without warning.
13. The immediate subject of the unlawful acts is substantially the property of third parties (those persons who for the time being have legal ownership of the pipe segments and other Items mentioned in the Particulars of Claim; and those persons who have ownership of the land where the works are taking place). But the protest activities are aimed at harming or disrupting C’s business and they are being coordinated. In the result, the activities / threatened activities also constitute a tort / threat of tort against C: the tort of conspiracy to injure by unlawful means.
14. The form of order sought is set out in the draft order served with the application notice (“the Order”).

Relevant legal tests.

15. Five layers of control are relevant, although to some degree they overlap.
 - (1) First, because the application is for interim relief, there is the *American Cyanamid* test:
 - (a) (subject to what is said below about s12(3) of the Human Rights Act 1998) is there a serious question to be tried?
 - (b) (if so) would damages be an adequate remedy for a party injured by the grant of, or failure to grant, an injunction?
 - (c) (if not) where does the balance of convenience lie?
 - (2) Secondly, because the application is, in part, brought against persons

unknown, C must satisfy the guidance in *Canada Goose* para 82.

- (3) Thirdly, because the application affects the Article 10 and 11 rights of the protesters, C must show that any interference with those rights is justified;
- (4) Fourthly, for the same reason, C must satisfy section 12(2) of the Human Rights Act 1998 as to service;
- (5) The fifth matter relates to s12(3) of the 1998 Act. Where it applies, it displaces the “serious question to be tried” test with a higher threshold of “likelihood” of success at trial. C’s position is that in fact s12(3) does not apply, but if it does apply, then nevertheless the evidence shows that C is “likely” (in the relevant sense) to obtain its desired relief at trial.

Submissions

16. Taking those 5 matters in turn:

(1) *The American Cyanamid test.*

Serious question to be tried: the tort of conspiracy to injure by unlawful means.

17. C’s cause of action is the tort of conspiracy to injure by unlawful means. The elements of that tort are (*Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29 at [18]):

- (1) an unlawful act by the defendant;
- (2) done with the intention of injuring the claimant;
- (3) pursuant to an agreement (whether express or tacit) with one or more other persons;
- (4) which actually injures the claimant.

18. C frames its cause of action in this way because it does not have a sufficient degree of possession or control of the whole of the land over which the pipeline works are taking place, to be entitled to plead trespass to land / nuisance directly against trespassers/ causers of nuisance. Neither does it have sufficient ownership of the various Items targeted by the persons unknown, to be entitled to plead trespass to goods. There are exceptions to this: for example, C is the freeholder of at least two of the parcels of land affected by the project; and on analysis it might turn out that the terms of some, at least, of its licences in relation to other areas are sufficient for those purposes. But the picture when viewing the pipeline route as a whole (some 90km long) is a complex tapestry and, further, one which changes over time (for example, as particular Items become integrated into the pipeline). It would be excessively granular and impractical (or, at all events, disproportionate), as well as

confusing to potential Defendants, to attempt to identify the multitude of different cases separately, let alone to customise separate forms of relief in relation to different parcels of land. The conspiracy cause of action overcomes this difficulty.

19. On the other hand, compared with a direct cause of action such as trespass, the conspiracy cause of action has the disadvantage (from the point of view of C) that there might in theory be individuals who commit unlawful acts as genuinely independent actors outside the conspiracy. C accepts that such persons would not be captured by the proposed definitions of “Persons Unknown”. But C expects that this disadvantage is likely to be more theoretical than real, because of the intrinsic improbability of such a factual scenario being found by the Court to subsist. Further and in any event, for reasons now stated, C has no real alternative that is practical or proportionate in relation to the route of the pipeline taken as a whole.
20. Taking the 4 elements of the tort in turn:
21. As to (1) in para 17 above: unlawful act: subject to a nuance mentioned below, C seeks to restrain only such acts as, by their nature, are themselves necessarily unlawful, whether or not the unlawfulness would be actionable by C directly (as distinct from the persons who own the Items and land in question) apart from the other elements of the tort of conspiracy.
22. It appears not yet to have been determined judicially that unlawful means conspiracy is available to a claimant who relies on torts committed against another person, as distinct from a breach of contract committed against another person or a crime. However, at this stage, the Court is not concerned to establish whether C’s claim for unlawful means conspiracy is bound to succeed. The question is whether there is a serious issue to be tried. As to that: C adopts the summary of the law including the reference to this aspect of the matter as stated by Johnson J in *Shell UK Oil Products Ltd v. Persons Unknown* [2022] EWHC 1215 at paras 25–32 (citing *Cuadrilla Bowland Ltd v. Persons Unknown* [2020] EWCA Civ 9; [2020] 4 WLR 29 per Leggatt LJ at [18], *Revenue and Customs Commissioners v. Total Network SL* [2008] UKHL 19; [2008] 1 AC 1174 per Lord Walker at [94] and Lord Hope at [44]; *The Racing Partnership Ltd v. Done Bros (Cash Betting) Ltd* [2020] EWCA Civ 1300 [2021] Ch 233 per Arnold LJ at [155]; *JST BTS Bank v. Ablyaszov (No 14)* [2018] UKSC 19 [2020] AC 727).
23. The unlawfulness consists of one or more of: trespass to land, trespass to goods, or private nuisance. C relies upon the fact that all of the acts in question would be actionable in tort by the person in possession of the particular land where the activity occurs, or by the owner of the relevant Item. (Certain of the restrained acts would also constitute criminal offences (such as criminal damage under s. 1(1) of the Criminal Damage Act 1971) – but C does not rely on this consideration).

24. As to (2) in para 17 above: done with the intention of injuring C: in the case of an unlawful means conspiracy, the authorities do not suggest that it is necessary for the intention of injuring C to be the “predominant” purpose of a defendant. By contrast, a requirement of such “predominance” is the distinctive feature of a lawful means conspiracy (eg *per* Popplewell J in *FSDEA v. Dos Santos* [2018] EWHC 2199 at [31]) – which is not the tort on which C relies.
25. In our case, the proposed Order only applies to acts done “with the intention of preventing or impeding construction of the Southampton to London Pipeline Project”. This formulation is appropriate for present purposes (see eg *Cuadrilla* at [30]).
26. As to (3) in para 17 above: pursuant to an agreement with one or more other persons: the proposed Order applies only to acts done “by express or implied agreement with any other person”.
27. As to (4) in para 17 above: which actually injures the claimant: it appears from the evidence that the conscious aim of those engaging in these protests is to disrupt the construction of the pipeline. It really goes without saying that activity which succeeds in this objective will injure C, but nevertheless Mr Anstee de Mas confirms this in his statement of 10 August 2022 at paras 9.2 - 10.1.7 [48-50].
28. Accordingly, if the actions which the proposed Order restricts were to eventuate, C would have a good cause of action against anyone breaching the terms of the Order.
29. Overall, accordingly, there is a “serious question to be tried” in respect of C’s claim for final relief in this case based on the tort of unlawful means conspiracy.

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

30. The remedy which C seeks within the proceedings is an injunction.
31. It is improbable that any individual who commits the tort which the injunction seeks to prevent would have the means to provide any financial remedy to C for harm which C might suffer.
32. In addition, there is the potential for the restrained activities to include acts which might otherwise jeopardise the health & safety of the protesters themselves, the emergency services (police, fire brigade, ambulance), the general public (some of the works take place on land to which the public has access) as well as those working on the pipeline project, as explained in the statement of Mr Anstee de Mas dated 10 August 2022 at paras 10.1.1 to 10.1.2 [49-50].
33. Accordingly, damages would not be an adequate remedy for any injury suffered by C from the conduct which the injunction seeks to prevent, either in principle or in

practice.

34. Conversely, it is difficult to envisage how the making of the injunction could cause any injury to any person at all, given its terms — or, at least, any injury that could not be compensated by an award of money. C freely offers the usual cross-undertaking to this end. C’s means to honour the cross-undertaking is self-evident by their last filed company accounts for the year ended 2020.[Nawaaz: a balance sheet was not exhibited].

Balance of convenience.

35. The balance of convenience favours C: subject to the Convention (considered separately below) there is really nothing in the scales the other way.

(2) The Canada Goose guidance.

36. In *Barking & Dagenham LBC & Otrs v. Persons Unknown* [2022] EWCA Civ 13, the Court of Appeal clarified that there is no relevant jurisdictional difference between an interim and a final injunction; that (at least in the context of injunctions to prohibit unauthorised encampments) interim or final injunctions should be time-limited, and that it is good practice to provide for their review; but subject to that, it has affirmed the continuing relevance of the procedural guidance in *Canada Goose UK Retail Ltd v. PU* [2020] 1 WLR 2802 in relation to interim relief.

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

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

38. With the exception of D1, C has not identified any persons who can properly be named as defendants to the claim on the basis that there is a real risk of them carrying out any of the acts proscribed by the injunction.

39. As to D1: the facts are in the statement of Mr Anstee de Mas dated 10 August 2022 at paras 6.54.1 to 6.54.12 [39-40].

“(2) The “persons unknown” must be identified in the originating process by reference to

their conduct which is alleged to be unlawful.”

40. This has been achieved in the headers to the relevant court documents.

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

41. The risk of the tort is demonstrated by:

(1) The incidents of actual disruption which have already taken place and which Mr Anstee de Mas describes at paras 6.2]-6.72 [32-43].

(2) The explicit and continuing threats of disruption made by protest groups/organisers, as identified by Mr Anstee de Mas at paras 7.4-7.28 [43-47].

42. “Imminence” in this context means that, in the circumstances, the claim is not brought prematurely – as might be the case if C could obtain proper vindication of its rights if an injunction was brought (for example) once the threatened acts eventuated. The imminence requirement is met in this case.

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

43. The proposed Order sets out the proposed means of service of the Order and of the proceedings. Mr Anstee de Mas explains the rationale at para 14.4 [53]. The proposed method is reasonably likely to bring the proceedings and the Order to the notice of potential “Persons Unknown” defendants.

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

44. The proposed Order tracks the threatened torts and subject to what is said in the next paragraph does not seek to prohibit lawful conduct.

45. The possible exception (which C assumes for present purposes, though it is not conceded) is that in theory there might be no actionable wrong done by a person who, on public land, merely climbs over a compound fence and does nothing more; or by a person whose mere presence on public land is enough to obstruct the construction works. I cannot immediately think of other examples, though there might be others.

46. In the case of private land, there is no relevant complication, because such persons

are trespassers whether or not the activities they undertake on the land are otherwise actionable. It is a problem specific to highways and other public land.

47. This complication arises because the DCO order limits include some highways as well as some other areas of land to which the public has access. For reasons stated by Mr Anstee de Mas at paras 5.12-5.15 [31] and which are really self-evident from the scale of the project, it would be wholly impractical to attempt to identify the different parcels of land and apply different controls to them. Instead, the relief proposed by the Order is in all cases the minimum means of protecting the Claimant's rights that is proportionate. So, in particular, the proposed Order does not seek to restrain protesters from entering the DCO order limits: this would be the simplest solution but C considers that it is too broad to adopt as a general measure. Instead, the proposed Order seeks to control what people do within those the DCO order limits; and the controls which it imposes on public land would not amount to any interference with any right exercised by any member of the public on such land who was not part of the alleged conspiracy.
48. So to return to my two examples in para 45 above: it is proportionate that fence-climbing and obstruction of the construction works on public land should be prohibited, even if those acts would not otherwise be unlawful in and of themselves. The particular activity of fence climbing on public land or merely being present on public land might not be unlawful in and of itself. But significant protection is built into the proposed Order because a person will only become a defendant (and breach the proposed Order) if the conspiracy elements are present in his or her case.
49. Further, the DCO process (in which none of the protest movements made any representation) was conclusive that the pipeline is in the public interest and indeed a matter of strategic national importance. In such circumstances, creating a bespoke "carve out" from the effect of the proposed Order in relation to private land, to deal with the peculiarities of public land, can hardly be said to be proportionate: it would be tantamount to an invitation to protesters to focus their activities in areas of land to which the public has access.
50. For reasons given, therefore, this is a proportionate intervention given the unusual facts of the case.
51. C considers that its form of proposed order strikes the right balance. Naturally, however, C will be responsive to the Court's views.

"(6) The terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do. The prohibited acts must not, therefore, be described in terms of a legal cause of action, such as trespass or harassment or nuisance. They may be defined by reference to the defendant's intention if that is strictly necessary to

correspond to the threatened tort and done in non-technical language which a defendant is capable of understanding and the intention is capable of proof without undue complexity. It is better practice, however, to formulate the injunction without reference to intention if the prohibited tortious act can be described in ordinary language without doing so.”

52. The proposed Order respects all of this guidance. As in *Cuadrilla*, the drafting refers to “intention”. But this is unavoidable in a conspiracy case. Non-technical language is used, as required.

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

53. So far as concerns temporal limits: the Order proposes a return date. C expects this to be 2 or 3 weeks from the date of the Order being made, subject to the preference of the Court. The temporal limits are therefore also clear.

54. So far as concerns geographical limits, the relevant circumstances are:

- (1) The scale of the project which requires the Court’s protection, is unusually large. The works are programmed to follow a careful programme which respects site-specific constraints (eg, optimum timeframe for working on environmentally-sensitive land, to minimise risk of harm to flora/fauna) (*per* Mr Anstee de Mas in paras 9.2.2-9.2.4 [48-49]).
- (2) The works involve C’s contractors in maintaining works compounds surrounded by fences at various locations. Segments of un-laid pipe as well as equipment and other items/material required for the project (what the Particulars of Claim call “the Items”) are often stored in such compounds.
- (3) Such Items are also situated within works sites at the locations where the pipe is actually to be laid. Works sites are fenced or otherwise physically demarcated from the surrounding land.
- (4) The fences/physical demarcation are not suitable to deter motivated persons from obtaining access.

55. It can thus be seen that there are four matters that need to be taken into account when applying the requirement of “clear geographical limits” to the particular facts of the present case:

- (1) areas where the Items are situated, are physically demarcated with a fence or otherwise;
- (2) in some cases, the demarcation will move as and when the works move elsewhere;

- (3) even where demarcation takes the form of a fence, this is not of a kind which can deter a determined protester from obtaining entry – as experience has shown; and
- (4) the route of the pipeline within which these areas are situated is unusually long and (so to speak) “unwieldy”. It is straightforward to give the Order clear geographical limits: the proposed Order refers to the DCO “order limits”. But it is impractical to identify the DCO “order limits” otherwise than by reference to the DCO itself¹; and equally impractical to identify the areas within the DCO order limits where Items are located from time to time.

56. The proposed Order reflects those considerations.

(3) Articles 10 and 11.

57. Both in relation to the issue of whether there is a serious issue to be tried, and in relation to the general exercise of the Court’s discretion, the Court must consider, in the round, whether appropriate weight has been given to Ds’ qualified rights under Article 10 (freedom of expression) and Article 11 (freedom of assembly) of the Convention. In protest cases, Articles 10 and 11 are linked. The right to freedom of assembly is recognised as a core tenet of a democracy.

58. There exist *Strasbourg* decisions where protest which disrupted the activity of another party has been held to fall within Articles 10 and 11. But “*deliberately obstructing traffic or seriously disrupting the activities of others is not at the core of these Convention Rights*”: *DPP v. Cuciurean* [2022] EWHC 736 per Lord Burnett of Maldon, CJ at [36].

59. C suggests that a key distinction is between protest and persuasion on the one hand, which engage Articles 10 and 11; and on the other hand, coercion and compulsion, which do not engage those Articles, or do not strongly engage them: see *Cuadrilla Bowland Ltd v. PU* [2020] 4 WLR 29 at [94].

60. Further, Articles 10 and 11 do not bestow any “*freedom of forum*”, and do not include any ancillary right to trespass on private property: *Ineos (CA)* per Longmore LJ at [36]. Neither could they reasonably be argued to include an ancillary right to damage private property or to injure others.

61. At least in theory it is possible to imagine a scenario in which the inability to enter unlawfully upon particular property had the effect of preventing any effective exercise of an individual’s freedoms of expression or assembly. In such a case, barring entry

¹ The plans involved are so extensive that an injunction which attempted to exhibit them would be cumbersome beyond utility and potentially confusing. (A copy of the DCO will appear in the authorities bundle in the usual way for completeness – but it is 289 pages long).

to that property could be said to have the effect of “*destroying the essence of those [Article 10 and 11] rights*”. If that were the case, then the State might well be obliged (in the form of the Court) to regulate (i.e., interfere with/ sanction interference with) another party’s rights in order to vindicate effective exercise of the protestor’s rights under Articles 10 and 11: see *Cuciurean* at [45]. But that would involve a very unusual situation, which cannot immediately be foreseen at least in this country, where there are plentiful outlets for lawful protest. And this is plainly not such a case. As Lord Burnett held in *Cuciurean* at [46]:

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

62. The main nuance in this connection has already been considered (paras 45–50 above). The only other acts within the terms of the Order which might at least potentially occur without a trespass to land or goods are the blocking or impeding of access by C’s contractors from the highway (or other land to which the public has a right of access) to the land within the DCO order limits. But such activity would still constitute a private nuisance (see *Cuadrilla* at [13]). Furthermore, even in relation to the highway, the right of protest does not extend to the right to conduct coercive activities.
63. C accepts that protest on the public highway and, accordingly, other public land, is not always unlawful, or constitutes either a trespass (actionable by the highway owner) or a nuisance, merely because it results in some disruption. The Supreme Court held in *DPP v. Ziegler* [2021] 3 WLR 179³ that the issues which arise under Articles 10 & 11 require consideration of five questions (at [16]):
- (1) Is what the defendant did in exercise of one of the rights in articles 10 or 11?
 - (2) If so, is there an interference by a public authority with that right?
 - (3) If there is an interference, is it “prescribed by law”?
 - (4) If so, is the interference in pursuit of a legitimate aim as set out in article 10 or article 11, for example the protection of the rights of others?
 - (5) If so, is the interference ‘necessary in a democratic society’ to achieve that legitimate aim?
64. Those restrained by the terms of an injunction from obstructing access to the land within the DCO “order limits” from the public highway (or other land to which the public has a right of access) would otherwise at least arguably be exercising their

³ This case is not within C’s bundle of authorities. C relies upon the summary and explanation of it by Lavender J in *National Highways v. PU* [2021] EWHC 3081, discussed further below.

Article 10 and 11 rights, and the grant of an injunction would constitute some interference with those rights – even if not within “the core” of those rights. However, such interference is prescribed by the law because it is a vindication of C’s rights (and indeed the private law rights and A1P1⁴ rights of others). The vindication of those rights of C is itself a legitimate aim. The vindication of third party rights, and the protection of the wider public from interference with access to fuels are two more.

65. Accordingly, the issue in such a case is whether such interference as the injunction might comprise is “necessary in a democratic society” to achieve that aim.

66. That issue can also be expressed as whether the potential interference with Ds’ rights is “proportionate” which, in turn, requires consideration of four sub-questions:

- (1) Is the aim sufficiently important to justify interference with a fundamental right?
- (2) Is there a rational connection between the means chosen and the aim in view?
- (3) Are there less restrictive alternative means available to achieve that aim?
- (4) Is there a fair balance between the rights of the individuals and the general interest of the community, including the rights of others?

67. In the similar context of the Insulate Britain protests, in *National Highways Ltd v. PU* [2021] EWHC 3081, Lavender J (at [38]-[40]) summarised and considered the factors which Lords Hamblen and Stephens JSC had identified in *City of London Corpn v. Samede* [2012] PTSR 1624⁵ as being potentially relevant to the issue of proportionality, and consequently how the four proportionality sub-questions might be answered.

68. On this application C must show only a serious question to be tried (subject to what is said below about section 12(3) of the HRA 1998). For similar reasons to those expressed by Lavender J in *National Highways* C submits that the four sub-questions relevant to the “proportionality” test can be answered as follows – thus satisfying the requirements for obtaining that part of the relief which might potentially affect the rights of those on the highway (and other land to which the public has a right of access):

- (1) the aims of restraining Ds’ activities are the vindication of C’s own private law rights, the avoidance of harm to others including its own contractors/staff, the

⁴ Article 1 of Protocol 1 “1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions...”

⁵ This case is not within C’s bundle of authorities. C relies on the summary and explanation of it by Lavender J in *National Highways v. PU* [2021] EWHC 3081, discussed further below.

emergency services and the general public (both of which also have consequent harmful effects upon C), as well as the avoidance of harm to the protesters themselves – and the avoidance of disruption to the provision of fuel to the public.

- (2) There is an obviously rational connection between the means chosen in this case and the aim in view: the means narrowly focus on the prevention of interference with C’s rights and with the construction of its pipeline.
- (3) There is no less restrictive alternative means available to achieve the aim. An action in damages would not prevent the disruption which Ds seek to cause. There is little reason to suspect that any identifiable defendant would be capable of satisfying any claim anyway. Further, the harms in question are (so to speak) larger than money can compensate for.
- (4) The grant of an injunction strikes a fair balance between Ds’ rights, C’s rights, and the general interests of the community. The observations of Leggatt LJ in *Cuadrilla Bowland Ltd v. PU* [2020] 4 WLR 29 at [94]–[95] are apt.

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

- (1) Ds’ interference with the ability of C (and third parties) to carry out their lawful business;
- (2) the wider interests in protecting Ds, and those in the vicinity of the pipeline works, from injury, and the potential harm to C which would eventuate if such an injury were to eventuate;
- (3) the interest of the public in continuing access to the fruits of C’s undertaking.

70. Consequently, to the degree to which the injunctions sought might interfere at all with any individual’s Article 10 & 11 rights, any such interference is proportionate, and does not require the Court to modify the approach which it would take (i.e. before consideration of the Convention) to the threatened interference with C’s rights.

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

71. Section 12 is quoted by Morgan J in *Ineos Upstream v. PU* [2017] EWHC 2945 at [84]:

“12(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.

(2) If the person against whom the application for relief is made (‘the respondent’) is neither present nor represented, no such relief is to be granted unless the court is satisfied – (a) that the applicant has taken all practicable steps to notify the respondent;

or (b) that there are compelling reasons why the respondent should not be notified.”

72. There is also a subsection (3), but this is addressed separately, below.
73. Apart from D1, C has not identified any persons who can be named (as addressed above). No person becomes a defendant to this action unless they breach the terms of the Order sought. So there is no ‘respondent’. Further, there is the danger (recognised by Morgan J in *Ineos Upstream v. PU* [2017] EWHC 2945 at [96]) that advance publicity of the present application might accelerate attempts to disrupt and cause damage ahead of any order made by the Court.
74. Clearly the issue of how alternative service might be effected, or notice of the return date given, is one upon which there can be different approaches. If present or represented at the return date, Ds could make submissions to the effect that further and additional measures could have been taken to publicise the hearing. It might be said on behalf of Ds (for example) that the existence of the proposed application could have been emailed to more addresses (though email to known addresses is proposed as part of the Order) or advertised in local or national press. Whilst it is right to draw these potential arguments to the attention of the Court in the absence of any representation for Ds, C submits that it remains the case that s12(2) is satisfied.

(5) ***Section 12(3) of the Human Rights Act 1998 as to “publication”.***

75. Section 12(3) provides that:

“(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.”

76. *Dicta* can be found from which it might be thought that this constraint applies even though the proposed injunction does not seek to restrain any “publication” as that word might ordinarily be understood. However, this matter was considered at length by Johnson J in *Shell v. Persons Unknown* [2022] EWHC 1215 (QB) at [66]–[76]. He concluded

“Ineos does not therefore determine that section 12(3) applies to a case such as the present where there is no question of restraining the defendants from publishing anything. Ineos does not mandate a finding in this case that section 12(3) applies. I have concluded that section 12(3) does not apply. If I am wrong, then I have, anyway, found that the claimant is likely to succeed at a final trial (see paragraph 32 above).”

77. C adopts his reasoning and invites the Court to adopt the like approach.

Full and frank disclosure – Proportionality issue

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

- (1) Those taking part in the protests perceive there to be serious environmental and economic disadvantages to the exploration, development and production of fossil fuels in the UK and are committed to ameliorating climate change and changing government policy. The sincerity of the protesters' views, and the fact that many agree with their aims (if not necessarily their means) were recognised in both *Zeigler* and *Samede* as potentially relevant factors in the assessment of the proportionality of the interference with their Article 10 and 11 rights.
- (2) It may be said that there are alternative methods available to protect C's pipeline other than the grant of an injunction and that local authorities have potentially wider and better powers to seek to restrain unlawfully disruptive protests. However, the nature of the risk to C and the additional potential deterrent effect of an injunction, amply justify the Court granting the Order to ensure that the interests of both C and the wider public are properly protected. Furthermore, even apart from the potential expense and delay, reliance on local authorities would involve an unusually demanding (and therefore risk-laden) measure of co-ordination, bearing in mind the size of this project and the number of authorities potentially involved.
- (3) Public land: this has already been addressed above.

Considerations specific to D1.

79. D1 is a known "tunneller". This time, he has dug himself in on land belonging to Runcyede Borough Council, at a location situated within the DCO order limits, at a sensitive position near the M25 needed by C's contractors for access. He has been boasting about it on social media. The evidence is in Mr Anstee de Mas' statement at paras 6.56-6.61 [40-41].
80. The proposed Order contains provisions which are customised to his particular case as to service (personal service is envisaged) and as to the steps he must take and which, obviously, do not apply generally to the "Persons Unknown" (remove himself from his pit).

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