

ATTENDANCE NOTE

13 February 2023

High Court of Justice

Claim No QB-2022-002577

Esso Petroleum Company, Limited

and

(1) Scott Breen

(2) Persons Unknown

Hearing Before Mr Justice Knowles starting at 10:30am

Tim Morshead KC (TMKC) and Yaaser Vanderman represented the Claimant, instructed by Eversheds Sutherland (International) LLP

TMKC introduced the case and the importance of the Pipeline.

TMKC stresses the importance of the timetable relating to the works to the Pipeline, including environmental sensitivity of the areas it passes as certain works can only be carried out at certain time of the year.

Housekeeping

TMKC referred to two matters of housekeeping.

First, in relation to the Second Defendant, TMKC referred the Judge to the Sixth Witness Statement of Mr Allybokus which records the proper service of Court Documents leading up to the Trial.

Secondly, he introduced C's application for Substituted Service on the First Defendant. The application was made as a precaution because the methods of service set out in para 14 of HHJ Lickley KC's order probably apply to Mr Breen. But there is scope for argument that para 10 of that order envisages personal service on Mr Breen. Therefore, substituted service is sought on a precautionary basis.

As a result, C is asking Judge to give permission for substituted service on the First Defendant; pursuant to C's application dated 30 January 2022 and the Fifth Witness Statement of Mr Allybokus. Thus endorsing the measures C has taken to effect service on the First Defendant.

A separate Order has not been drafted for the Judge's permission for substituted service; this has been covered in the draft Order (for injunction) instead [TB1/5].

Scope of the Injunction

TMKC explained that the particular shape of the Order being sought by C interferes so little with what anyone is not allowed to do in the DCO Order limit, that the balance must be struck in C's favour on the facts of this case, regardless of which test is used.

Example: a mock funeral carried out by XR [TB1/272]. Protestors penetrated the fencing of the works and put their coffin into a trench which has been dug. It was peaceful. But that had put the work to a halt. If only they stayed on the other side of the fence, the protest could have continued as well as the works.

So the Order has been drafted in a way so that it does not prevent people to enter the DCO Order limits; all C is seeking is to regulate the conduct of the people who enters the DCO Order limits, and if they are asked to leave they do so.

This is probably not the right case to have a debate on how far the Ziegler test has survived in this context. In the draft Order C is seeking, the extent of anyone rights have been interfered is so minimal.

There is no longer anybody saying that the balance has been struck in the wrong way. There were IPs; it was open to them or others to intervene and put forward their argument of the interference with their rights but this has not happened.

TMKC also drew the Court's attention to the fact that the claim was not one for trespass. Rather, C relied on an economic tort. He referred to authorities bundle page 111. (JSC BTA Bank v Ablyazov and Anor)

What makes the Tort actionable is not the narrow question of whether the use of those means would give rise to a different cause of action independent of conspiracy but what makes the facts actionable is if the conspirator does something which he is not allowed to do.

The Supreme Court held that a person who commits a contempt of court has done enough to come within the tort whether or not it is a tort to commit contempt of court. TMKC referred to authorities bundle page 128.

TMKC referred to authorities bundle, Meier, pages 18-19 para 58.

Legal policy point, one should not be looking for reasons to make the conspiracy point to be unavailable. It should be the reverse, it should be on the look out for effective remedies where they are available within the law to prevent the mischief.

So far it has nevertheless been an effective remedy and protected the Pipeline.

Evidence

The evidence that started this case is that of the First Witness Statement of Mr Anstee de Mas [TB1/195].

The judgement of HHJ Lickley at para 9 provides a useful list of previous direct action.

It also describes the public importance of the Pipeline and that one would not have obtained an order to carry out the works without such public importance. It has been looked at by the body appointed by the estate by the Parliament. The evidence summarised by Judge Lickley in his judgement described the threats by reference to the campaigns conducted publicly by JSO, XR, Stop SLP etc. [TB1/297].

Continuing Threat

Evidence of threat at the time of the First Witness Statement of Mr Anstee de Mas has not gone away. Mr Anstee de Mas' fifth Witness Statement at paragraph 21 onwards, highlights ongoing threats. Including paragraph 34 [TB1/541].

XR quote "temporarily shift away" – the problem for C is that C does not know how long this "shift away" will be.

JSO quote at para 31 – generically the threat remains. C is concerned about what would happen if the pipelines would no longer be protected in the way it has been so far.

That is really the updating evidence if the lordship is prepared to accept matters by Judge Lickley; has anything changed since Oct 2022 to displace the need of an injunction?

Fifth Witness Statement of Mr Anstee de Mas records that nothing has happened which has changed the direction of the threat.

Order

Penal notice included.

Assumes that the Judge has heard the application for substituted service.

C is requesting for an injunction for a fixed moment in time.

The HS2 Order starts off very broad and then includes a carve out dealing with lawful protest. But that is because of the wide area covered by the HS2 injunction and the fact that HS2 dealt with highway rights. In this case we do not need the carve out [as it is very narrow].

The acts that are referred to in the Esso Order are very specific.

Mr Justice Knowles summarises: not necessary to have a lawful carve out for lawful protest (due to the specific nature of the acts C are requested to be covered by the Order) and no one could say they have a right to damage, for example.

TMKC continued... the acts contained in the Order being sought by C will only apply to people who will have the conspiracy element.

If you have the intention with someone else to do these things, it will be hard to argue that you have a lawful right to do those things.

The Order being sought by C says that it is not enough to do those things, you have to be asked to stop.

When looking at these points, it seems that there is no need for a "lawful protest" carve out as it is target specific.

TMKC continued to take the Mr Knowles J through the other provisions of the draft Order.

TMKC explained the key feature of the Order is how focused the drafting is and how moderately it affects what people can and cannot do within the DCO Order limits, unlike the HS2 example.

Mr Justice Knowles considered the date the current Order expires and whether there is a need to extend the current Order (presuming that judgment is going to be reserved).

TMKC confirmed the current Order expires on 21 February 2023; if Knowles J is not able to give judgment today, or soon, then yes it would be useful to extend the current Order.

Closure by Mr Justice Knowles

Knowles J confirmed that he will make an Order today to extend the HHJ Lickley KC order until further order.

Counsel to draw up an order to that effect, but Mr Knowles J clarifies that he will not use that as an excuse to delay the final decision.

However, it is noted that this is a very important decision and it will take his Lordship some time to reach a decision and give judgment.

Eversheds Sutherland (International) LLP

13.02.23