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ATTENDANCE NOTE

High Court of Justice
Queen's Bench Division
Claim No. QB – 2022 – 001420
Shell U.K. Oil Products Limited ("Shell"/ the "Claimant") v Persons Unknown ("Respondent")
Hearing (in person) before Mr Justice Johnson on 13 May 2022

ATTENDEES

1) Mr Justice Johnson (the "**Judge**").
2) Amy O'Connor – Court Clerk.
3) Toby Watkin QC for the Claimant – Landmark Chambers ("**TWQC**").
4) Emma Pinkerton, Emily Newey, Ellen Bandarian and Rebecca Phipps of CMS Cameron McKenna Nabarro Olswang LLP, the Claimant Solicitors.
5) Lara Nicholls, Poppy Watson and Natasha McCarthy of the Claimants.
6) Mrs Nancy Friel ("**Mrs Friel**").

AUTHORITIES REFERED TO

1) *Human Rights Act 1998*

2) *American Cyanamid Co (No 1) v Ethicon Ltd* [1975] UKHL 1 (05 February 1975) ("**American Cyanamid**")

3) *Canada Goose UK Retail Ltd v. Persons Unknown* [2020] 1 WLR 2802 ("**Canada Goose**")

4) *DPP v. Cuciurean* [2022] EWHC 736 (Admin) ("**Cuciurean**")

5) *DPP v. Ziegler and others* [2021] UKSC 23 ("**Ziegler**")

6) *National Highways Ltd v. PU* [2021] EWHC 3081 (QB) ("**National Highways**")

7) *Revenue & Customs Commissioners v Total Network SL [2008] 1 AC 1174* ("**Revenue**")

8) *JST BTA Bank v Ablyaszov (No.14) [2020] AC 727* ("**JST**")

9) *Cuadrilla Bowland Ltd v Persons Unknown [2020] 4 WLR 29* ("**Cuadrilla**")

10) *The Racing Partnership Ltd v Done Bros (Cash Betting) Ltd [2021] Ch 233* ("**The Racing Partnership**")

11) *National Highways Ltd v. PU [2021] EWHC 3081 (QB) ("**National Highways**")*

12) *Barking & Dagenham LBC v Otrs v Persons Unknown [2022] EWCA Civ 13 ("**Barking**")*

1. INTRODUCTION AND APPLICATION FOR ADJOURNMENT

1.1 TWQC explained that he was appearing on behalf of Shell, the Claimant. TWQC also acknowledged that there was individual also attending court who may wish to introduce themselves separately.

1.2 The individual confirmed that her name was Mrs Nancy Friel, an environmental activist connected with Extinction Rebellion but not Just Stop Oil or Youth Climate Swarm (or the action which JSO or YCS had recently been involved with). Mrs Friel explained that she was attending Court today because she was very concerned about the effect of the injunction / the principle upon which it was being sought. Mrs Friel asked the Court to adjourn the hearing.

1.3 The Judge asked Mrs Friel how long she was seeking an adjournment for, who her legal representatives were and on what dates her barrister was available.

1.4 Mrs Friel confirmed that her barrister was Owen Greenhall of Garden Court, and that he would be available on 17th May, 20th May, 31st May and for a large number of dates in June 2022. Similarly, Mrs Friel confirmed that she was represented by solicitors - Hodge Jones and Allen.

1.5 The Judge asked TWQC for a response to Mrs Friel's request for an adjournment.

1.6 TWQC explained that:

1.6.1 As far as he was aware, Mrs Friel was not a party to the proceedings but that she was entitled to be joined to them if she made an application; and

1.6.2 The terms of the Order are such that, someone who is affected by its terms is entitled to be joined on notice.

1.7 The Judge queried why an application would have to be made.

1.8 TWQC clarified that:

1.8.1 If someone, i.e., persons unknown, actually breached the terms of the Order, then they would become a defendant, but otherwise a person would have to apply; and

1.8.2 With reference to the White Book - page 1398, paragraph 40.9, TWQC stated that "*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".* TWQC further stated that it was not correct that anyone who was affected by proceedings would be entitled to make a submission - they would first have to ask to be joined to the proceedings.

1.9 The Judge noted that this was a technical point which would have to be worked through. However, and notwithstanding this, the Judge acknowledged that in principle, Mrs Friel would be entitled to have any order made by the court set aside if she was affected by it, but that she would first have to be a party to the proceedings. The Judge summarised TWQC submissions as being that the continuation of the order, if granted at this hearing, would not prejudice Mrs Friel's right to set aside the order at a later date in May or June.

1.10 TWQC confirmed this and explained that he had not been aware the Hodge Jones and Allen were acting in these proceedings, but they had been involved in other similar proceedings.

1.11 The Judge explained to Mrs Friel that what TWQC was saying was that it would not be necessary to adjourn the hearing now, because at any point, she could apply to have the order set aside or varied, particularly if she thought that it was wrongly given, no longer appropriate or unnecessarily and disproportionally impacted her right to protest. The Judge asked Mrs Friel if she had any other submission which she would like to make.

Mrs Friel explained that the Court was awaiting judgment on another matter, known as 'Thurrock and Adams v Persons Unknown' which also concerned petrol stations. Mrs Friel said that the judgment would be available within the next week or so and would be important and relevant to have that judgment to hand when making a decision on this matter.

Judgment on Application for Adjournment

1.12 The Judge then gave a short ruling on Mrs Friel's request for an adjournment as follows:

1.12.1 This is the return date of the interim injunction granted by Justice McGowan to restrain activity that the Claimant says unlawfully interferes with its rights. The order was made without hearing from any party other than Claimant.

1.12.2 This is the return date, the order having been published, and allows anyone coming within the ambit of a Defendant to seek to persuade the Court that it should not be continued, varied, or put aside. It is for the Court in any event to review whether should continue in its current form or be varied.

1.12.3 Mrs Friel, an Extinction Rebellion protestor has indicated that she wants to persuade the Court to consider setting aside the order. She has solicitors and counsel who can act for her, but that are not in a position to do so today, and, in those circumstances, she seeks the adjournment of this hearing.

1.12.4 Mr Watkin, Counsel for the Claimant, resists this. He has made it clear that anyone affected by order can seek to have it set aside at any time and it is the appropriate course to continue with the hearing today, recognising that it doesn't prejudice the rights of Mrs Friel or others to set aside the order at a later date.

1.12.5 Mrs Friel's reply tells me that there are parallel proceedings in another case where judgment is likely to be handed down in next week or so. Mrs Friel says that this is another reason why the Court may wish to wait.

1.12.6 In my view it is appropriate to continue today. The original application was made in somewhat emergency circumstances and so it is appropriate that it is brought into open court at the earliest practical time, so that the Claimant's arguments can be heard.

1.12.7 This does not prejudice the rights or arguments of Mrs Friel or anyone else. That is because they can hear the arguments in open court and at any point in the future, they can make an application to vary the order or have it set aside if they wish.

1.12.8 I note the suggestion that judgment is due to be handed down in another case. In my judgement, and not withstanding this, it remains appropriate that this matter be ventilated in open court now. If the judgment is made in terms that are too wide, an application can be made in light of any other judgment which is handed down.

1.12.9 Accordingly, I rule against the application to adjourn.

2. BACKGROUND TO RETURN HEARING

2.1 In relation to the timing of return hearing, TWQC explained to the Judge that the order of Mrs Justice McGowan had directed the return hearing for 10:30am, and further that: (i) the Claimant's application to renew the injunction records 10:30am as the relevant time; and (ii) that the time had been recorded on the documents which had been served and disseminated to the Defendants. TWQC confirmed that people had attended previous return dates and that although he was happy

to proceed at the current time and had no objection to doing so, perhaps it might be prudent to wait. TWQC said that he was simply noting the situation for his Lordship to consider.

2.2 The Judge said that TWQC was quite right to bring this up and was aware that the hearing was listed at 10:30am. However, the Judge noted that he had another commitment at 12:15 and so was keen to conclude this return hearing by 12. The Judge also confirmed the date and time of the return hearing had been published in the Court's lists which anyone would be able to see. The Judge further explained that he had anticipated some preliminary arguments (as in fact had occurred) and that he was happy to continue and proceed on the basis that if anyone did attend and were concerned that they had missed an important part of the proceedings, that TWQC could summarise what had been missed so no one would be disadvantaged.

3. NATURE OF THE ORDER SOUGHT AND FACTUAL BACKGROUND

3.1 The Judge explained that he had the draft order, the hearing bundle, the skeleton argument, and the authorities bundle. TWQC confirmed that these were the only materials that were required. The Judge then confirmed that he had read the skeleton argument.

3.2 TWQC explained that this was a return date for an injunction which was granted on a precautionary basis. TWQC clarified that the basis of this injunction was that there was a real risk of invasion of the Claimant's rights and the consequences were sufficiently grave to justify the injunction.

3.3 TWQC noted that there were no named Defendants, simply the injunction was sought against a class of persons unknown. TWQC emphasised that:

3.3.1 The injunction restrains, and only restrains, conspiracy by persons unknown to injure the Claimant by unlawful means; and

3.3.2 that the request for the injunction was an immediate response to the protests occurring at two petrol stations at the end of April 2022 on the M25. These petrol stations were (a) the Cobham Services (which is a Shell branded petrol station) and (b) the Clacket Lane Services (which is a BP branded petrol station). TWQC explained that the protest involved, to use the words of the protestors themselves, "sabotage" to petrol pumps. Hammers were taken to petrol pumps, spray paint was used on the petrol pumps (the relevance of which TWQC said he would return to), protestors glued themselves to each other, the road, and the petrol pumps and finally, the protestors blocked the petrol station forecourts by sticking themselves to the forecourts and lying across the entrances. It was not clear how long these individuals were protesting for, however, TWQC suggested that this in and of itself was a secondary point, as in light of the damage inflicted on the petrol pumps, they were rendered inoperable. Nevertheless, TWQC quoted a statement from the protestors which said they had been at the site(s) for at least 4 hours.

3.4 TWQC said that the actions by the protestors were unlawful and were not actionable by the Claimant other than on the grounds of conspiracy since the Claimant does not own all of the Shell branded petrol stations.

3.5 The Judge noted that the order included a wide range of acts and queried whether the acts in the order were actionable in themselves, quoting paragraph 3.5 of the order "*depositing any substance or erecting any structure in, on or against any part of a Shell Petrol Station*". The Judge queried whether parking a car would be actionable, and further queried circumstances where people were exercising their right to peaceful protest, i.e. by holding a sign.

3.6 In response to the Judge's question, TWQC said that the issue was addressed in the skeleton argument, but ultimately, the Judge's question goes to the issue of whether acts on the premises would be a lawful act or a trespass.

3.7 The Judge questioned: (i) whether any person would be a trespasser since the forecourts are open to the public; and (ii) whether it would be unlawful for someone to go into the premises to buy some items but to be holding a placard whilst doing so.

3.8 TWQC noted that there is not a right of forum in relation to protest and there is no right to trespass so as to protest. There is an implied licence to enter premises but only for limited reasons why a person is permitted to be there, i.e., you have a licence to enter a shop to look at and purchase goods, but not to do so in order to steal. TWQC acknowledged that there may be demarcation lines and took the Judge's point on the phraseology of paragraph 3 of the order – however, he emphasised that the order and actions described therein is directed only at unlawful behaviour, i.e. there is an implied licence given to members of the public to enter the forecourt of a petrol station to purchase fuel but not to smash up the premises.

3.9 The Judge identified that, in any event, paragraph 3 was subject to paragraph 2, i.e., which states that the acts in paragraph 3 were only prohibited if they were done "*with the intention of disrupting the sale or supply of fuel to or from a Shell Petrol Station"*.

3.10 TWQC said that lawful acts would themselves be prohibited by injunction where there was no other proportionate way of protecting the Claimant's rights, and that the Court had used its power several times to do so, and had referred to this in *Canada Goose*.

3.11 The Judge pointed out that this had always been subject to other control mechanisms such as geographical ambit and time. The Judge said that it appeared to him in this case, that the Claimant was seeking an order, not just in relation to the one or two petrol stations where protests had already taken place, but to petrol stations all across the country and for up to a year.

3.12 TWQC explained that within the evidence was a description of the events that precipitated the claim (and terms of the order sought), including the events of 28 April 2022 which had already been described. TWQC offered to take the Judge to the specific references within the evidence and explain the nature of the cause of action.

3.13 The Judge agreed that this would be helpful.

3.14 TWQC directed the Judge to the First Witness Statement of Mr Benjamin Austin ("**BA1**") which was exhibited [**Hearing Bundle, p38**]. TWQC explained that there were descriptions of the historical protests [**Hearing Bundle, p43**], including:

3.14.1 Reference to wider protests in April 2019 at paragraph 5.2;

3.14.2 violent action taken by protestors, including deliberately smashing a glass door pane at the Shell Centre at paragraph 5.3 (also in April 2019); and

3.14.3 In recent weeks (i.e. April 2022), protestors have been cutting air brake cables on lorries, tunnelling under roads, climbing on top of oil tankers, gluing themselves to roads and other objects, and tampering with safety equipment at the Kingsbury Terminal at paragraph 5.6.

3.15 This, TWQC said, was the wider context. Next TWQC turned to paragraph 6.1 of BA1, which provides the narrower context, and that paragraph 6.2 listed a summary of the various behaviours that could be seen within and quotations from videos available online. The reference to the protests lasting 4 hours is at paragraph 6.3.2.

3.16 TWQC then took the Judge through a page by page turn of the photos exhibited to BA1 starting from page 205 showing a wide view of the forecourt with one of the protestors with his hand up to the petrol pump. Moving onto page 206 showing pump number 11: this pump has had its glass screen broken and spray paint applied. Turning to page 207 showing the protestors and a damaged pump with spray paint. Next, page 208 which showed a protestor spraying paint onto a petrol pump. TWQC made clear that these images were collected from the internet, i.e. they are publicly available rather than from Shell employees, highlighting that the protestors were using mobile electronic equipment which was prohibited due to the health and safety risks. TWQC explained that he would address the relevance of this point later.

3.17 The Judge queried whether the sign displayed on page 208 positively invited people at stations to use their phones. TWQC explained that this was only from inside their cars from the driving seat.

3.18 TWQC invited the Judge to turn to [**Hearing Bundle, p188**] – a HSE guidance document - and in particular, page 194 which in the penultimate point explains that "*portable electric equipment should not be used*". The Judge queried when this health and safety guidance was released. TWQC said that he was unsure but explained that the expert of the Highway Code [**Hearing Bundle, p201**] stated that it had been updated in 2022 and contained similar guidance.

3.19 The Judge explained that he had seen the same issue (i.e., re use of mobile phones) on an ex-parte application and the question was whether there was clear expert evidence on the danger of this. Although usually petrol stations contained small signs prohibiting phones, the Judge noted that he was also extremely familiar with seeing people walking across forecourts on their phone. TWQC stated that, although it was not for him to give evidence in fact, he had seen petrol pump personnel telling people to get off their phones.

3.20 TWQC then quoted paragraphs 4.3, 4.5 and 4.6 of BA1 [**Hearing Bundle, p41**] :

> "*The way in which fuel, and petrol filling stations, are managed and operated is tightly regulated. These matters are closely regulated in the UK. Petrol filling stations fall within the scope of (among others) the Dangerous Substances and Explosives Atmosphere Regulations 2002 ("DSEAR") which relates to the risks from fire, explosion and similar events arising from dangerous substances in the workplace and imposes various requirements to identify and take steps to mitigate those risks. The industry "Petrol Filling Stations – Guidance on Managing the Risks of Fire and Explosion" dated October 2018 (which is referred to as "The Red Guide"). This sets out industry best practice on the management of these risks at petrol filling stations. It includes a section regarding (at paragraph 7.2) the requirements of the Dangerous Substances and Explosive Atmosphere Regulations 2002 ("DSEAR") which apply to petrol filling stations, and the industry best practice as regards the controls that should be adopted to protect areas where explosive atmospheres may occur from sources of ignition. The pumps are in a zoned area that has the potential to have a level of fuel vapour in the air that could be ignited by uncontrolled activities when strict fire risk management controls are not in place and adhered to. It can be seen from this that very careful steps must be taken at petrol filling stations to ensure that areas of particular risk are identified and that significant steps are taken to ensure that those areas are isolated so far as possible from ignition risks.*
>
> *As is clear from this, any work or activity in the area of the pumps must be strictly controlled and managed. This is why even mobile phones should not be used at petrol filling stations, as they are an ignition source risk. I refer in this regard to the Highway Code (dated 25 March 2022) which states (at pages 220 and 221) that in respect of "Petrol stations/ fuel tank/ fuel leaks […] Never smoke, or use a mobile phone, on the forecourt of*

petrol stations as these are major fire risks and could cause an explosion". It appears to me that many, if not all, of the video clips and photographs that I refer to in section 6 of this witness statement have been filmed or taken on mobile phones on the forecourts despite the ban on the use of such equipment in that location. For example, in the clip I refer to at paragraph 6.3.3, a protestor wearing an orange high vis vest can be seen checking his phone; on the report I refer to at paragraph 6.3.7, a protestor can be seen recording another protestor using a phone.

The management of Shell are very concerned that acts of sabotage to equipment on the forecourt of a Shell Petrol Station are potentially extremely dangerous, possibly resulting in a fire or an explosion. Breaking the pump screens with any implement could cause a spark and in turn potentially harm anyone in the vicinity. The severity of any vapour cloud ignition could be catastrophic and cause multiple fatalities. Unfortunately, Shell Group has tragically lost several service station employees in Pakistan in the last year when vapour clouds have been ignited during routine operations. This reinforces our very real concerns regarding the extreme risks caused by protestor activity on 28 April 2022 and that I anticipate will continue."

3.21 TWQC concluded the Mr Austin was clearly of the opinion that it remains prohibited to use mobile phones at petrol stations.

3.22 The Judge apologised for pushing but said he wanted to test this a little bit and explained that as soon as the Court is told there is a risk of ignition of vapours and a risk of explosion, then that conjures up a huge risk and plays into issues of proportionality and balance. The Judge said that he didn't understand how the risk arises, and pointed to [**Hearing Bundle, p211**] where there was a picture of a police officer at the station with a phone on his shoulder, i.e. in an area where people have been told they cannot have their phones on them. The Judge queried what the specific issue with taking videos was.

3.23 TWQC explained he was not an expert on mobile phones and that with the greatest respect, the Court was speculating. TWQC continued that he assumed the greatest risk was when you press a button and that this no longer has to be done with touch screens. The Judge noted that he was confused because he could not see how the issues arising in connection with mobile phones related and also that since the guidance referred to portable phones, it must be antiquated language.

3.24 TWQC clarified that the fact of the protestors use of mobile phones is not a key basis for seeking injunction, and that they may have gone down a slight rabbit hole in relation to this issue. TWQC stated that the central relevance of the mobile phones point is twofold:

(i) it highlights the degree to which the protestors are thinking about health and safety – i.e., there are signs at petrol stations which prohibit the use of mobile phones, and yet the protestors did so anyway. This was a demonstrated the degree to which they were having careful regard for health and safety; and

(ii) it illustrates how the activities in normal life are controlled on sites such as the ones we are considering, to illustrate the level of risk on the site: i.e., the industry considers it to be a risky site, and therefore particular activities are controlled.

Whether and how far the phone use itself is actually a significant risk, is largely immaterial;

3.25 The Judge said that this discussion had been helpful.

3.26 TWQC brought the Judge back to [**Hearing Bundle, p209**] showing the police removing someone glued to the road, highlighting that the protestors' acts were not intended to be temporary

and transient but meant to last as long as possible. They protests are trying to be as disruptive as possible. [**Hearing Bundle, p210**] showed a person holding a petrol pump out of its holder and [**Hearing Bundle, p212**] showed someone applying superglue to their hand and a petrol pump (not clear if this is the same person as shown in [**Hearing Bundle, p210**]). TWQC said that that he had several points to make regarding risk from those photographs:

3.26.1 The first was that there is there is often fuel on the hand-held petrol pumps themselves – he, and no doubt the judge, had been dripped on by the hand-held fuel pumps on numerous occasions in the past and there is always a risk when doing things with fuel, that some may get onto you. There is an associated, heightened level of risk there by doing something with fuel in play; and

3.26.2 The second point was that there was clearly a level of permanence since the only reason someone would stick themselves to a pump would be to disable it in a way that would not be easy to relieve without having risk to those doing the relieving (i.e. emergency services workers). This amounts to a further increased risk in the form of protest undertaken and it has been performed in the most disruptive way possible.

3.27 TWQC explained that BA1 says that the effect of the protests was that 55 petrol pumps had been damaged/ sabotaged. TWQC clarified that there had been no further attacks since the grant of injunctions, but that BA1 refers to recent statements (i.e. on 4 May) from various protestor groups that the protests would continue until the government made a statement that it would end new oil and gas projects in the UK.

3.28 TWQC explained that for completeness, BA1 refers to: (i) recent attacks on Barclays and Standard Chartered by Extinction Rebellion and Money Rebellion; and (ii) the disruption at the Clydebank Nustar Terminal, to show that: (i) the attacks were continuing; (ii) the risk as arising on 28 April 2022 had not diminished; and (iii) that there was a real risk of a further invasion of the Claimant's rights.

3.29 The Judge asked whether there had been any evidence of protests occurring not at Shell sites, i.e. at refineries. TWQC directed the Judge to [**Hearing Bundle, p30**], explaining that on 3 May at the Nustar Clydebank Oil Deport, protestors had climbed on top of structures and that there were photographs of this at [**Hearing Bundle, page 65**].

3.30 The Judge noted that this had occurred on 3 May 2022 and so only 10 days prior to this hearing.

3.31 TWQC continued that there were quotations from those participating talking about how scary it was to be at such a height which again clearly demonstrated the degree to which the protestors are disregarding issues of health and safety.

3.32 Having been through many incidents which demonstrated the risks, TWQC concluded with two final points. First, the potential risk relating to use of spray paint. BA1 refers to evidence which shows that spray paint was used by the protestors at the petrol station "sabotage". TWQC acknowledged that neither he nor the Claimant was aware of what type of paint was used, but spray paint itself can also be highly flammable. So the protestors were using a flammable substance which presents yet another ignition risk on site. Secondly, TWQC noted that the evidence referred to another uncontrolled risk, that in in relation to other road users who were frustrated motorists.

3.33 The Judge asked whether the glue used was flammable. In response, TWQC said this was not known, but also noted that there was nothing to suggest that the Claimant had not carried out an assessment confirming that the glue was safe. TWQC further explained that the acetone or similar

products used to remove the glue itself would also likely be flammable. The Judge noted that he could see all sorts of risks arising from this.

4. THE AMERICAN CYANAMID TEST

4.1 TWQC directed the Judge to paragraph 7 of his skeleton which set out the five layers of protection to be considered when the court is considering the grant of an injunction.

4.2 The first of these layers was the *American Cyanamid* test:

> *"1. Is there a serious question to be tried?*
>
> *2. Would damages be an adequate remedy for a party injured by the grant of, or failure to grant, an injunction?*
>
> *3. If not, where does the balance of convenience lie?"*

4.3 TWQC stated that because of the Human Rights Act, which he would explain shortly, although the *American Cyanamid* test framed the relevant test in terms of 'serious question to be tried', he invited the Court to proceed on the basis that it was 'likely', on the balance of probabilities, that a final injunction would be granted at trial.

Limb 1 American Cyanamid

4.4 TWQC turned to the first question (i.e. serious question to be tried) and explained that in this case the cause of action to be relied upon was conspiracy to injure by unlawful means and that this tort was summarised in *Cuadrilla*, as being:

> *"(i) an unlawful act by the defendant;*
>
> *(ii) done with the intention of injuring the claimant;*
>
> *(iii) pursuant to an agreement (whether express or tacit) with one or more other persons;*
>
> *(iv) which actually injures the claimant."*

Unlawful Act by the Defendant

4.5 TWQC explained that to establish the first element, i.e., unlawful act by the defendant, many of the acts would also constitute criminal offences, but that for the purposes of this application the Claimant relied upon the fact that all of the acts relied upon would be actionable in tort. TWQC continued that nature of what could constitute 'unlawful means' was subject to legal debate and that his submission were set out in paragraphs 13 to 15 of this skeleton argument and that he was happy to summarise these points to the Judge.

4.6 TWQC stated that the legal controversy arises in relation to whether the relevant unlawful means, if they are torts, have to be separately actionable by the Claimant. TWQC submitted that this controversy had been resolved in stages:

4.6.1 In *Revenue*, the Lordships ruled that a criminal act, which was not separately actionable by the claimant, was sufficient to constitute the unlawful means if directed at the Claimant (in this case the avoidance of income tax was a criminal act but not separately actionable by the Revenue) and that it would be sufficient if it was the means of inflicting the harm to the Claimant.

4.6.2 In *JST*, the Supreme Court considered whether a contempt of court (by reason of a failure to disclose) was also unlawful and ruled that it was. There the focus of the

discussion in the judgment was about the question not being one of unlawfulness and actionability, but more about whether or not the acts were the relevant instrument of the intention. However, the Court left open whether acts which were merely torts actionable by third parties, but not the claimant, could form the unlawful means in the claimant's cause of action, and described the issue as "complex".

4.6.3 TWQC submitted that issue was resolved in *The Racing Partnership*. In that case, the Defendant (i.e., the conspirator), was in a contractual relationship with a third party and breaching terms of that contract by using information supplied to it for the purposes of providing betting information, i.e., the conspirator was making unlawful use of third-party information in breach of a contract. The purpose of doing so was to injure the Claimant and it was said that the tort of conspiracy was made out. At first instance it was held that the contractual breaches (actionable by third parties) were not a relevant 'unlawful means', however, on appeal the Court of Appeal reversed the decision and said it was an unlawful means for the purposes of the tort of conspiracy.

4.6.4 TWQC directed the Judge to the judgment of Arnold LJ, specifically issue 7 of that case which was the issue of whether breaches of terms and conditions constituted unlawful means [**Authorities Bundle, p332**]. TWQC explained that there were two issues: firstly, how connected did they have to be to the damage incurred, and whether the acts had to be actionable by the claimant or only at the suit of a third party. This was dealt with at paragraph 155:

> "*The judge's reasoning raises a third question, which is whether or not the unlawfulness must be unlawful as against the claimant (or at least against a class of persons of which the claimant is a member, which may include the general public in the case of criminal offences). As to this, the House of Lords held in Commissioners v Total that (unlike in the tort of causing loss by unlawful means) it is not a requirement of unlawful means conspiracy that the unlawful acts should be actionable at the suit of a third party. In those circumstances, I cannot see that it can be necessary that they be independently actionable at the suit of the claimant. Accordingly, I cannot agree with the judge's reason for holding that SIS's breaches of the Exchanges' terms and conditions were not relevant unlawful means.*"

4.6.5 TWQC explained *Racing Partnership* was a contract case – the unlawful means were a breach of contract actionable by a third party - not a case, where the unlawful means were actionable in tort by a third party. But, as set out in his skeleton, the argument for third party tortious acts being sufficient was, if anything, stronger than for breaches of third-party contracts. Torts are the infringement of civil rights arising automatically from common law, in contrast to a breach of a contractual promise which has simply been made between two other parties.

4.6.6 TWQC submitted that it is 'likely' that a court at a final hearing would hold that there was a threat of relevant acts which were 'unlawful means'.

Intention of Injuring the Claimant

4.7 TWQC moved onto the second element, i.e. that the act is carried out with the intention of injuring the Claimant. TWQC explained that in relation to the tort of conspiracy, the intention does not have to be the predominant purpose, only one of the purposes. In some cases, like in *The Racing Partnership*, this could be controversial, however, not here as it was a vowed intention of the protestors that they wanted to disrupt the supply of fuel.

Agreement with One or More Persons

4.8 TWQC continued with the third element which is "*Pursuant to an agreement with one or more other persons*". He explained that this element was made out because the threat here arises from co-ordinated protests, with people acting in concert. The injunction is only directed at circumstances when this is the case.

4.9 The Judge stopped TWQC on that point and confirmed this point with reference to paragraph 2 of the order which refers to acts being done in agreement with others.

Actually Injures the Claimant

4.10 TWQC moved onto the final element of the *Cuadrilla* test, which was that the act actually injured the Claimant which, in the context of a precautionary injunction, means that there was a sufficient risk of such an injury. TWQC explained that the activities which had been carried out and which were to be restrained actually prevented the sale of fuel and so injured the Claimant's business.

4.11 The Judge queried whether the Claimant actually made any loss if fuel was not sold, since some of the petrol stations were not owned by Shell.

4.12 In response, TWQC explained that yes, if fuel cannot be sold the Claimant directly loses out. There are various contractual structures by which the fuel is sold but if you shut a petrol station for a day, Shell loses out on that revenue. Clearly harms the Claimant – various ownership models, but ultimately, the fuel is the Claimant's fuel. In some circumstances, when it is sold, the revenue is collected for Shell. However, in other circumstances the fuel is sold to the petrol stations and so further fuel is only bought from Shell when that fuel been sold.

4.13 The judge queried whether Shell would just sell more fuel the next day as a consequence of the petrol station being shut on that day. TWQC submitted that this was unlikely, since those who wanted fuel would have just moved onto the next petrol station and bought what they wanted somewhere else.

4.14 TWQC raised a secondary point that these torts have potential wider consequences that are harmful to the Claimant. The Claimant's branding is all over these stations. The Claimant is very concerned of the risk generated to those associated to its brand and the public. Accordingly, the Claimant is at risk as a brand because it is associated with these fuel stations – i.e. an event at the station is immediately linked to the Claimant.

4.15 The Judge queried whether this line of argument was included in the Court documents. TWQC stated that it went to an issue of proportionality and effect on the Claimant as a result of the protests.

4.16 The Judge asked whether what was being suggested was that the Claimant was worried about the harm being done to the brand due to the attention being brought to it by the protestors. TWQC clarified that this was not at all what he was submitting. Shell was not seeking to prevent reputational damage arising from protests against it. In so far as it was relevant, TWQC was referring to harm arising because of an adverse event at a petrol station. The acts being carried out were dangerous acts – first and foremost this is the Claimant's concern. TWQC directed the Judge to the fact that one of the Claimant's sites in Pakistan exploded and that he was not talking about the risk to the brand from people protesting since the order clearly states the Claimant was not trying to stop lawful protest. TWQC confirmed that the Claimant had not sought to stop other peaceful protests occurring through the terms of other injunctions which it had at its other sites, only acts of protest involving (for example) damage to property or trespass.

4.17 The Judge sought confirmation that the injunction did not, for example, stop protests outside the curtilage that were noisy as long as they were not blocking people. TWQC confirmed that this was the case.

Limb 2 American Cyanamid

4.18 TWQC then moved onto the second limb of *American Cyanamid* which was the adequacy of damages. TWQC submitted that:

4.18.1 the ability to quantify damage would be extremely difficult since the amount of disruption would be hard to assess especially since the damage that could be caused by health and safety risks to their employees would be too broad; and

4.18.2 the Court could not have confidence that any individual who commits the tort would have the financial means to pay any damages.

4.19 The Judge raised a further third point which was that since the activities conducted could give rise to ignition, there was a real risk of injury to others. TWQC confirmed that this was a significant concern and that this was massively relevant to proportionally, but that he was seeking to focus narrowly on the elements of the tort, and thus the risk of harm to the Claimant.

Limb 3 American Cyanamid

4.20 TWQC moved onto the third element of *American Cyanamid*, i.e. the balance of convenience. It was submitted that this too was in the Claimant's favour since the protestors were acting in unpredictable and dangerous ways.

4.21 The Judge asked TWQC to pause and consider the fact that it is often said in applications such as these that the criminal law provides an adequate remedy, and these acts should be left to the criminal law to restrain, rather than imposing a civil injunction which doesn't have protections in quite the same way criminal law does. The Judge queried whether, if one company gets an injunction, would that not push the protests to petrol stations of other companies. The Judge contemplated that in seeking the injunction for all of the Claimant's petrol stations rather than one or two, they were creating their own quasi criminal system, and would it not be better to leave this to the criminal system?

4.22 TWQC explained that the point is regularly made in applications like this, but that the law provides us with both civil and criminal protections. The criminal law system operates everywhere, at all times and in all circumstances. But in addition the law recognised that it was also necessary to provide further specific protection, in particular circumstances, to the specific civil rights of individuals, and that is what is sought here.

4.23 The Judge queried why the criminal law was not enough since the police attended the site and took people away. TWQC responded that the Claimant's petrol station was shut for a day, maybe more, and that that the police subsequently arresting people didn't protect the functioning of the site in that time or mitigate the risks which the Claimant was concerned about. The police presence and powers had not stopped the action and disruption from occurring. TWQC also noted that if the Courts adopted this position, the Court would effectively never grant an injunction in relation to an activity which was potentially criminal, because the position would always be taken that the criminal system is adequate.

4.24 TWQC submitted that the balance of convenience pointed clearly in favour of the Claimant's injunction.

5. THE CANADA GOOSE GUIDANCE

5.1 TWQC explained that the next stage was the *Canada Goose* guidance and that this was set out in his skeleton which explained how each question had been answered in each case.

5.2 TWQC explained that the first stage of the guidance was:

> "*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*"

5.3 TWQC stated that this concerned the point he had just made regarding identifying individuals who are a future threat, which is very difficult to do.

5.4 TWQC specifically mentioned "*bring the proceedings to their attention*" which related to the adequacy of service. TWQC noted that if people could be identified, they would be joined to the proceedings, and in any event newcomers to the protests will fall within the definition of Defendant. TWQC directed the judge to paragraph 31 of his skeleton which dealt with the bail conditions of four individuals who had been identified and why it was thought inappropriate, given those conditions, to join them as defendants to a claim for a protective injunction.

5.5 TWQC moved onto stage two of the guidance:

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

5.6 TWQC explained that this point had been dealt with in the description and class of the defendants which has been adopted in the Claim Form.

5.7 TWQC proceeded to stage three of the guidance:

> "*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.*"

5.8 TWQC noted that the Courts have indicated that quia timet relief should more usefully be referred to as a "precautionary injunction" and that the relevant test is whether there is a real risk or strong probability of an invasion of rights, and whether the consequences of an invasion are sufficient grave to justify an injunction.

5.9 The Judge queried whether this was not just supporting *American Cyanamid*. TWQC explained that this was a higher threshold since it required a real risk is in relation to ex-parte interim injunctions to restrain anticipated future breaches the consequences of which would have to be sufficiently grave.

5.10 The Judge stated that in this case TWQC had already conceded a higher threshold because of the Human Rights Act. TWQC explained that this point hadn't been conceded. The Claimant's submission was that Morgan J had adopted the wrong tests, but that he would show that those wrong tests were met anyway in this case. Since there was no named defendant present at the hearing, he would satisfy the court that those higher tests were in fact met.

5.11 TWQC stated that the other qualification mentioned in relation to the necessary risk was that it was "*imminent*". He explained that this meant that the claim was not brought prematurely, in the sense that the Claimant could obtain proper vindication of its rights if an injunction was brought (for example) once the threatened acts eventuated.

5.12 TWQC then quoted stage 4 of the guidance:

> "*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*"

5.13 TWQC stated that this was the appropriate moment to discuss service and directed the Judge to paragraph 9 of the original order [**Hearing Bundle, pg16**]:

> *"9. Pursuant to CPR 6.15 and 6.27 service of this Order and of the Claim Documents shall be effected upon the Defendants as follows:*
>
> *9.1. The Claimant shall use all reasonable endeavours to arrange to affix:*
>
> *9.1.1. at each entrance of each Shell Petrol Station;*
>
> *9.1.2. on every upright steel structure forming part of the canopy infrastructure under which the fuel pumps are located within each Shell Petrol Station forecourt;*
>
> *9.1.3. and at the entry door to every retail establishment within any Shell Petrol Station warning notices, no smaller than A4 in size.*
>
> *9.2. The said warning notices shall:*
>
> *(i) warn of the existence and general nature of this Order, and of the consequences of breaching it;*
>
> *(ii) identify a point of contact and contact details from which copies of the Order and Claim Documents may be requested.*
>
> *(iii) identify a website address (the "Claim Documents URL") at which copies of the Order and the Claim Documents may be viewed and downloaded.*
>
> *9.3. The Claimant will ensure that notification of the existence of the Order and the Claim Documents is made available on its website address at www.shell.co.uk, along with a link to the Claim Documents URL.*
>
> *9.4. The Claimant shall upload to the Claim Documents URL copies of the Order and the Claim Documents and a note of the hearing at which this Order was granted.*
>
> *9.5. The Claimant shall send by email a copy of the Order and a link to the Claim Documents URL to each of the email addresses listed in the Third Schedule to this Order."*

5.14 TWQC explained that attached to the order was also a list of email addresses which had been emailed the relevant document but that this wasn't a form of deemed service because the Court of Appeal said in *Canada Goose* that serving on people where there was no obligation to pass the information onto wider people is not a sufficient way of causing service to be effected.

5.15 The Judge queried whether signs had been put up at all stations. TWQC quoted paragraph 10:

> "*10. Pursuant to CPR 6.12(3) and 6.27, the Claim Documents and Order shall be deemed to be served on the latest date on which compliance with the provisions of paragraph 9.1 shall have occurred at not less than half of the Shell Petrol Stations and paragraphs 9.2-9.4 shall also have occurred, such date to be verified by the completion of a certificate of service or witness statement.*"

5.16 TWQC explained that because not all of the service stations were directly owned by the Claimant, they were not able to ensure the signs were put up at all of them. However, more than half had put up the signs by 10th May 2022 as evidenced by the second witness statement of Emma Pinkerton ("**EP2**"). TWQC explained that there was a schedule recording compliance and that the number must be much higher than 50% at this time. TWQC explained that the logic was that once over half of the petrol stations had the signs warning of the injunction applying to all stations, those who would commit the tort of conspiracy could be expected to know about the proceedings.

5.17 TWQC clarified that no individual would be deemed to be capable of breaching the order until they were personally aware of its terms, and so the provisions was not making someone potentially subject to an order which they knew nothing about.

5.18 The Judge queried what publicity there had been surrounding the notices. TWQC confirmed that Reuters had picked it up. The Judge asked whether Just Stop Oil or other protest groups had been talking about the injunction (i.e. on social media) and TWQC explained that he was not aware of any press release. TWQC confirmed that Just Stop Oil had been emailed about it and that Mrs Friel was in attendance so must have heard about it somewhere. TWQC also mentioned that at least one person had contacted CMS (the Claimant's solicitors) on the basis of having seen a sign and wanting to know more about the injunction.

5.19 The Judge then queried whether environmental protestors would even go onto petrol station forecourts, to which TWQC stated that it would be optimistic to say that out of the 1,000 protestors arrested, that none of them buys petrol from the Claimant. The Judge stated the TWQC may be right but that in terms of a general profile, the protestors may be less likely to frequent petrol stations.

5.20 TWQC explained that other methods of service had been considered including newspaper adverts which used to be favoured by the Court but that nowadays it seemed unlikely that many would become aware of it through that route, and that Mrs Justice McGowan had agreed that this would not be beneficial. The Judge asked for clarification that Mrs Justice McGowan didn't require a newspaper advert and TWQC confirmed this.

5.21 TWQC explained that posting on social media sites had also been considered, and that this was sometimes used in relation to claims against named individuals, but that this was difficult when the seeking to serve a class of unknown persons, since there would be no control over how long the post would remain up, or what would be put onto the platform with the injunction, and so this would not be a safe means of seeking to effect service.

5.22 TWQC confirmed that the proceedings were now deemed served since the relevant steps in the order had already been undertaken. TWQC then moved on to future service and directed the Judge to the draft order [**Hearing Bundle, p11**]. TWQC explained that posting the notice on the stanchions had been quite an exercise and had not gone smoothly and so alternatives were proposed for the future. TWQC confirmed that 'Method A' had originally been selected since all the stations had printers on site and so were able themselves to print and put up notices quickly. TWQC explained that 'Method B' was an alternative owing to the undesirability of having the

notice all over the stations and the effect on the sites and reflecting the long-term nature of the injunction.

5.23 The Judge queried what the suggested adverse effect of the injunctions was. TWQC explained that the signs had to go up on boards, which interfered with advertising opportunities around the sites. TWQC noted that since the existing injunction had already been widely posted and read, there was less need for quite so many notices for the future.

5.24 TWQC handed the judge the new form A4 notice that was proposed to be placed at the stations in a more permanent form, which included the same wording but included Shell branding. TWQC explained that it was proposed that they would be at the entrance of each station and also on a prominent place on the stanchions for each row of pumps.

5.25 The Judge asked whether the notices would remain the same. TWQC confirmed that that the wording was the same but that the notices would no longer be on every station supporting the roof, nor on the door into the commercial unit.

5.26 The Judge also asked whether the signs that had been put up had been maintained. TWQC explained that the process of verifying the putting up of the signs had been slow, and that he was not aware of any process being undertaken so far regarding the verification of the maintenance of the signs other than the fact that the instructions had been to put the signs up and keep them up.

5.27 The Judge understood that when the order was made, the primary focus would have been the period between the hearing and the return date which was only a week. The Judge explained that since a further year was being requested, additional wording should be added at 9.1 to state "*shall be affixed and maintained*". TWQC took instructions and this was agreed.

5.28 TWQC concluded on stage 4 that since Mrs Friel was in attendance, it appeared that the service of the notices had worked and that reasonable steps had been taken to bring the proceedings to the attention to the class of defendants.

5.29 TWQC continued with stage 5 of *Canada Goose*:

> "*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*"

5.30 TWQC explained that this point had already been discussed and that the order prevented the threatened torts but did not prohibit lawful conduct.

5.31 TWQC then quoted stage 6 of *Canada Goose*:

> "*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*"

5.32 TWQC explained that in this case, the nature of the tort was such that reference to intention was necessary to ensure that the injunction was limited to the cause of action. He said that the

alternative would have been limit the 'unlawful means' but that, as the judge had pointed out, that might encompass some lawful behaviour.

5.33 TWQC moved onto the 7 stage and final requirement of *Canada Goose*:

> "*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. …*"

5.34 TWQC explained that in relation to geographical limits, if the injunction being granted was (for example) in relation to trespass where the unlawfulness was governed by a specific boundary line, then it would be necessary to be clear about physical demarcations. However, that was not the nature of in this case. In the circumstances of this case and the terms of this injunction, the geographical limit was sufficiently clear: all Shell branded petrol stations in England and Wales.

5.35 The Judge reiterated that the injunction shouldn't have a wider geographical reach than was proportionate and necessary and asked for the evidence relating to the geographical reach of the protests taking place thus far. TWQC explained that for Claimant, the protests were in London (Shell Centre), Surrey (Shell petrol station), the Midlands (Kingsbury Terminal), Essex (Shell Haven) and Scotland.

5.36 The Judge asked whether there had been any protests in Wales. TWQC explained (on instructions) that threats had been made in Wales to Welsh installations, but nothing had occurred in the current wave of protests. TWQC noted that the key point was not to identify specific areas and whether there had already been a protest there, but whether there was a real risk to Shell petrol stations, and whether there was a subset that wasn't at risk. TWQC continued that there was no way to definitively say that a petrol station in Cumbria wouldn't be the next target, or one in Manchester. TWQC explained that Shell does not know where the protestors will go next and that even though we might assume Cobham (i.e. in Surrey) is at a lower risk because it has already been attacked, this is still not a safe assumption.

5.37 The Judge explained that the risk might be greater to more prominent stations since the aim of the protest is to disrupt fuel supply, but also with a much broader aim to achieve publicity and send a message, which would be much more likely to be achieved at a busy station on the M25.

5.38 TWQC agreed that this was true in the sense that the flashiest form of publicity to be achieved would be to find the busiest petrol station in the country and attack that one. However, if they couldn't attack those ones then they might be expected to move on to other ones.

5.39 The Judge explained that there had to be a threshold level on risk such as there was *in National Highways* where at least one of the injunctions was limited to only to the M25. The Judge explained that there was an incremental approach and that the Court didn't start by injuncting everywhere, only where there was a real, immediate risk.

5.40 TWQC explained that he was not sure why the injunctions were first limited to the M25. TWQC suggested that one of the reasons might have been that what was required there was the fastest injunction they could achieve. The more complicated the injunction is, the more difficult it is to get injunctions in place. TWQC clarified that he was not aware of any judgment stating that the injunction must start where the current attack is and move outwards. TWQC explained that it is a balancing exercise and comes back to the scope of the order and that these are protests to cause harm to the Claimant. The order was not stopping protesting outside with banners and so this was an appropriate geographical limitation. TWQC continued that if, for example, there was evidence that Just Stop Oil had said it would be inappropriate to protest at petrol stations in an area of

depravation, there could be a basis for excluding those areas. However, Shell is not confident in pointing to any petrol station and saying that there is no risk to that station.

5.41 TWQC then moved onto temporal limits and explained that what was sought was an interim injunction for a further year. TWQC referred to Barking which related to an unlawful trespasser and stated, in that context, that the interim injunction should not go on for more than a year without review. TWQC invited the Court to take that approach since there was no indication that the protests would stop. TWQC explained that this injunction was a burden to the Claimant since they don't want signs on their forecourt and there is currently disquiet within the business about the signs and so it was only seeking what was appropriate.

5.42 The Judge queried whether *Barking* had anything to say about getting on with litigation as this is one theme that has started to emerge a year ago. TWQC explained that Mr Justice Nicklin's approach in a number of cases was that an interim injunction should be granted only to get on with seeking a final order, but that this view seemed to have subsided since Barking, and that the key point was that there should be regular review.

5.43 The Judge again queried whether an injunction can be granted and then the claimant can sit on their hands until the review date. TWQC stated that Justice Nicklin's analysis of the law in relation to interim injunctions had been rejected in Barking, and that such injunctions were not merely emergency measures which could only exist for the narrow purposes of identifying named defendants and bringing an action against them. This analysis was rejected in *Barking*.

5.44 The Judge asked whether he was wrong in his assumption that there must still be an obligation to get on with the case. TWQC asked what case the Judge was referring to, since the only thing that could be done was to seek a final injunction, also against persons unknown.

5.45 The Judge made clear that this was what he was referring to and that he had seen orders in the past that created an obligation on the claimant to progress litigation, meaning that they either make an application for a final injunction and if no steps are taken then the injunction lapses.

5.46 TWQC explained that this was a form of order being made and that it was for the Court to decide, however the authority that suggested this analysis of the nature of an interim injunction had been rejected. *Barking* was implicit in saying that this was not required. TWQC continued that continuing an interim injunction was more flexible. The principle is that these injunctions affect newcomers and so once a defendant is identified to be named you would have to amend the proceedings to name a defendant, which would be much more difficult once there was a final injunction had been granted.

5.47 The Judge asked whether *Barking* imposed the injunction for a year.

5.48 TWQC and the Judge looked through the *Barking* judgment at paragraphs 49, 77, 89 and 107 and TWQC concluded that there was a requirement for a review but no limit of one year and that this was set in the context of injunctions against persons unknown for traveller communities. TWQC explained that this was a fact specific consideration.

5.49 The Judge asked what the duration of other injunctions TWQC was aware of in relation to the recent protests. TWQC explained that some were for a year whereas some were for review in January 2023, but that in this case, no end point could be seen for the protests since the remarks by protestors suggest they will continue until policy changes, so it would be appropriate to set a date in the future and to see if the landscape changes.

5.50 TWQC explained that the test is: that the Court make a decision based on the evidence before it and unless circumstances change, an appropriate period is adopted.

5.51 The Judge explained that it was also undesirable to have inconsistencies between the different injunctions, firstly in what was actually being prohibited but also with regards to the geographical and temporal limits. He also suggested that there might be merit in having the review hearings heard together. TWQC explained that each injunction is case-specific and that the nature of each of the sites and the threats is different in each case. TWQC further noted that in terms of timing, if there are differing dates for review there would be a spread of review hearings, and that the first few of those would start giving an indication of what the lay of the land might be, which would allow other applicants to take a view about what they should do.

6. ARTICLES 10 AND 11

6.1 TWQC then moved on to Articles 10 and 11 of the Human Rights Act and that since the Judge had been down a similar route before, he would only be brief in his submissions. TWQC explained that every protest apart from violent ones, but including disruptive ones as was the case in *Ziegler*, is an exercise of Article 10 and 11 rights, and that in considering the grant of an injunctions the Court must consider whether appropriate respect has been given to those Article 10 and 11 rights.

6.2 TWQC pointed out that deliberately obstructing traffic is not "at the core" of Articles 10 and 11 and further, as recognised in Strasbourg and by this Court, and that Articles 10 and 11 don't give rise to a "freedom of forum" as to the location of protests. As such the protestors do not have a right to trespass on property to protest, and he submitted that equally they could have no right to commit trespass to goods, or to damage property or injure people. TWQC explained that in this context, blocking of access from the highway did not necessarily involve a trespass, was one of the actions that had been the subject of consideration by the Court on a number of occasions in relation to Article 10 and 11 rights.

6.3 TWQC said in the scenario of restraining blocking of a highway, the Court is squarely in the territory of balancing one set of rights against another set of rights, including the immediate rights of the Claimant. TWQC directed the Judge to paragraph 54 of his skeleton argument and a quote from Lord Burnett in *Cuciurean*:

> "*[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*"

6.4 TWQC explained that in the context of protests on the highway, the Supreme Court in *Ziegler* had identified 5 questions to consider:

> *"(1) Is what the defendant did in exercise of one of the rights in articles 10 or 11?*
>
> *(2) If so, is there an interference by a public authority with that right?*
>
> *(3) If there is an interference, is it "prescribed by law"?*
>
> *(4) If so, is the interference in pursuit of a legitimate aim as set out in paragraph (2) of article 10 or article 11, for example the protection of the rights of others?*
>
> *(5) If so, is the interference 'necessary in a democratic society' to achieve that legitimate aim?""*

6.5 TWQC explained that "*necessary in a democratic society*" is another way of saying that any interference must be proportionate and, in relation to the issue of proportionality, there are 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?"

6.6 TWQC explained that he had placed in the authorities bundle Lavender J's consideration in *National Highways* which included a good collection of points from *City of London Corpn v. Samede [2012] PTSR 1624*. In terms of proportionality tests, the aims of the injunction are the vindication of Claimant's rights, although the injunction also has the effect of avoiding harm to staff and others.

6.7 TWQC then went through paragraph 60 of his skeleton argument, specifically a quote from Leggatt LJ in *Cuadrilla*:

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

6.8 TWQC submitted that any interference with Article 10 and 11 by the continuation of the proposed injunction is outweighed by interference with the Claimants rights, specifically:

6.8.1 The Defendant's interference with the rights of the Claimant (and third parties) to carry out their lawful business and enjoy their property;

6.8.2 the wider interests in protecting the Defendant, and those in the vicinity of the Shell Petrol Stations, from injury, and the potential harm to the Claimant which would arise if such an injury were to eventuate;

6.8.3 the interest of the public in continuing access to the fruits of the Claimant's undertaking.

6.9 TWQC stated that the Claimant would succeed at trial in showing that to be the case.

7. SECTION 12(2) OF THE HUMAN RIGHTS ACT 1998

7.1 TWQC moved on to s.12(2), which required that all steps to notify the respondent of the hearing must have been taken. TWQC confirmed that this had been satisfied in the context of what had already been done and the Defendant being a class of persons unknown.

8. SECTION 12(3) OF THE HUMAN RIGHTS ACT 1998

8.1 TWQC quoted the relevant section:

> "*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*"

8.2 TWQC explained that the Claimant's case was that the restrained actions were not a "publication" and "likely" doesn't mean more likely than not and as such Morgan J was wrong on both points in *Ineos*. However, TWQC submitted that, even s. 12(3) applied and if "likely" did mean more likely than not, that was satisfied in the present.

8.3 The Judge agreed that it was not a publication.

8.4 TWQC flagged that it was nearing 12pm. The Judge asked TWQC to continue.

8.5 TWQC raised a number of points which he said might have been put on behalf of the respondents in relation to proportionality if they had been represented. He said that the protestors motives were clearly sincere, and their wish to de-carbonise is something that large numbers of the general public and the Government is in favour of, but that nevertheless the risk to the Claimant from the restrained acts justifies the granting of the order.

8.6 TWQC asked if there was anything further he could do to assist and the Judge stated there was not.

8.7 The Judge asked Mrs Friel if there was anything she wanted to say.

8.8 Mr Friel stated that she was not sure about how she would go about challenging the order as it states that she would have to be joined but she doesn't meet definition of the Defendant and if hypothetical activists protest in order to be joined as a Defendant, they would implicate themselves.

8.9 TWQC clarified that not only those who come within the definition of the Defendant can apply to set aside the order, just that the only people who can participate in court proceedings are the Defendant and parties to the proceedings.

8.10 TWQC reiterated that the only people who have standing to address the Court are parties to the proceedings.

8.11 The Judge stated that he didn't think this was correct as the media regularly make representations in his courtroom without being joined as parties.

8.12 TWQC explained that the matter needs to be looked at as it can't be right that people can make submissions in relation to actions unless they are part of the actions on some level. The Court would have to consider the means by which they participate.

8.13 TWQC further clarified that if Mrs Friel did become a party she wouldn't have to come within the scope of the existing Defendant. If she were joined to the proceedings the Defendants would be: (1) the defined class of Defendants and (2) Mrs Friel.

8.14 The Judge stated that this was a valid point. He expressed the view that the status of Mrs Friel if she does apply raised difficult issues.

9. JUDGMENT

9.1 Subject to one amendment I have made which relates to retaining the notices at the sites, I will grant the order, but this is subject to final checking of the terms of the order.

9.2 My reasons for doing so align with the reasons of Mrs Justice McGowan but I will give a reserved written judgment as soon as I can and attendance will not be required for the handing down, I will distribute it in writing in the ordinary way.

9.3 It will come to the Claimant and will be subject to the normal embargo between the draft and formal hand-down and there will be an opportunity to correct typos and consequential matters in writing.

9.4 The order needs to be made today and the provisions in the order for way in which it is then advertised need to be complied with.

Hearing concluded at 12:06