

IN THE HIGH COURT OF JUSTICE COMMERCIAL COURT (KBD)

BETWEEN

SHELL U.K. OIL PRODUCTS LIMITED

Claimant/ Applicant

- and -

THE CHIEF CONSTABLE OF SURREY POLICE

Respondent

SKELETON ARGUMENT

References to pages of the bundle are in the form [B/x/yy] are to the Bundle, page yy behind tab x.

Time Estimate, including reading: 1 hour

Suggested Pre-Reading

1. Application Notice dated 7/10/22 [B/1/3-7]
2. Particulars of Claim dated 3/5/22 [B/6/94-100]
3. Third Witness Statement of Emma Pinkerton dated 6/10/2022 and exhibits [B/3/10-63]
4. Draft Order [B/2/8-9]
5. Return Date Order [B/15/307-315]
6. (If time permits – for background) Witness Statement of Benjamin Austin dated 3/5/22 [B/9/116-155]

Introduction

1. The Claimant (“C”) seeks a third-party disclosure order against the Respondent pursuant to CPR 31.17, of documents in the categories of documents identified in the Draft Order at pages 1-3 of EP3 (“Emma Pinkerton’s Third Witness Statement”) on the terms and conditions identified in the Draft Order.

2. The application is made to facilitate the service and enforcement of an injunction order (the “**Order**”) which was obtained by C against ‘persons unknown’ in May 2022 to restrain actual and threatened acts of civil disobedience as part of targeted, organised disruptive protest activities which raised significant health and safety concerns. C sells fuel through a network of petrol stations displaying ‘Shell’ branding on sites across England and Wales and the Order was obtained following a series of protests involving the obstruction of and damage to and interference with C’s business activities undertaken at its petrol stations in England and Wales (the “**Shell Petrol Stations**”). An interim order was granted on 5 May 2022 by McGowan J to restrain various acts on or within the Shell Petrol Stations [B/11/161-169] and the injunction was continued by Johnson J for a period of one year on the return date of 13 May 2022 [B/15/307-315].
3. The proceedings were issued following protest activity on 28 April 2022 at the Cobham motorway services (the “**Cobham Petrol Station**”), and Clacket Lane motorway services (the “**Clacket Lane Petrol Station**”) in Surrey (together the “**Sites**”). The April 2022 protests resulted in the arrest of 4 individuals by Surrey Police [B/3/10, w/s Emma Pinkerton para 2.5]. A number of other protests took place at the Sites in breach of the Order in August 2022, resulting in 20 further arrests by Surrey Police [B/3/10, w/s Emma Pinkerton para 2.7].

Application for third party disclosure – to identify and name all Persons Unknown

4. As a matter of principle, if any of the persons unknown are known and have been identified, they must be joined as individual defendants to the proceedings: *Canada Goose UK Ltd v Persons Unknown* [2020] EWCA Civ 303 at [82(1)] and [82(4)]. In principle, such persons include both anonymous defendants who were identifiable at the time the proceedings commenced and ‘Newcomers’, that is to say people who will join the protest in breach of the Order in the future and thereby bring themselves within the description of the “persons unknown”.
5. The defendants have not yet been identified but are, in principle, capable of being identified and served with the order. However, having obtained the Order, C is unable to

name individuals as defendants to the proceedings without obtaining the information from the police which enables them to be identified.

6. The third-party disclosure order is accordingly sought to ensure the effectiveness of the Order the court has made. The basis upon which the order is sought is set out in the w/s of Emma Pinkerton [**B/3/10**].

Scope of the disclosure order

7. The Respondent's solicitors (Weightmans LLP) have confirmed [**B/3/61-62**] that it will consent to the application and that it is accordingly willing (if the Court so orders and if a request is made by C) to provide documents, following a request by C and on the terms of the Draft Order, identifying the names and addresses of any person who:
 - a. has been arrested by officers of Surrey Police or officers on behalf of Surrey Police in relation to the protests on 28 April 2022 and 24 August 2022 at the Sites (**para 1(a)** of the Draft Order); and
 - b. who may be arrested by or on behalf of Surrey Police officers in relation to activity which may constitute a breach of the Orders at or within the vicinity of one of the Shell Petrol Stations (**para 1(b)** of the Draft Order).
8. Similar orders have been sought and granted by the Court in a number of other recent protests cases (including in relation to the Insulate Britain protests as against the Metropolitan Police and Valero injunction in respect of the Kingsbury site).
9. The source of the power to make such an Order for the purposes of identifying and thereafter prosecuting a civil claim against an unknown defendant is CPR 31.17, which provides:

“Orders for disclosure against a person not a party”

31.17 (1) This rule applies where an application is made to the court under any Act for disclosure by a person who is not a party to the proceedings.

(2) The application must be supported by evidence.

(3) The court may make an order under this rule only where—

(a) the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; and

(b) disclosure is necessary in order to dispose fairly of the claim or to save costs.”

10. The threshold requirements for the exercise of the Court’s discretion to make a non-party disclosure order pursuant to CPR 31.17 are therefore:

- (i) that the documents sought are likely to support the case of the applicant (or adversely affect the case of one of the other parties); and
- (ii) that disclosure is necessary to dispose fairly of the claim or to save costs.

11. In *Kerner v WX* [2015] EWHC 1247 it was accepted that the wording of CPR 31.17 extended to disclosure regarding the identity of so-far unidentified defendants as their identity was an ‘issue arising out of the claim’ and the provision of that information by the third party (the DVLA) was likely to support the applicant’s case. He also held that “*it would be inappropriate to construe [CPR 31.17] in a narrow and literal way ... that approach would tend to obstruct or hinder the fair disposal of litigation*”.

12. The threshold requirements of CPR 31.17 are met here:

- a. The information/documents sought are clearly relevant to the issues in the proceedings, being the enforcement of the Orders and the efficacy of the Orders.
- b. The disclosure is necessary in order to dispose fairly of the claim, as there is no realistic alternative method by which Cs could obtain the information in question and, without it, Cs would find it difficult to enforce the Orders. The information/documents sought are clearly defined and limited to that which is required to enforce the Orders. It is relevant (albeit not decisive) that such orders have proven to be effective in other cases.

13. Paragraph 1(b) of the Order is forward looking and is designed to ensure that all defendants falling within the category of persons unknown, including Newcomers, are identified and that all identifiable defendants can be joined to the proceedings and that the Order can be served and enforced so as to be effective against them. The C's desire to identify and join such persons is consistent with the directive in *Canada Goose* that all identifiable defendants should be named and joined and the order sought is one which the Court can and should make:
- a. The threshold tests in CPR 31.17 do not impose any limitation on the categories of documents which may form the subject of third party disclosure order and do not specify when disclosure is to be provided and do not stipulate that the documents must exist at the date of the Order. The only limitation in the provision is that the documents sought must be relevant to the issues and that disclosure is necessary in order to dispose fairly of the claim.
 - b. The documents in para 1 (b) of the Draft Order will become 'documents' for the purposes of the order, and thus subject to the obligations under the order, if and when they are created. The obligation to produce such documents will therefore only arise if such documents do come into existence and a request is made by C.
 - c. In practice, para 1(b) simply ensures that there is an ongoing duty to disclose those documents which are said to be relevant and necessary to be disclosed whilst the Order remains in place, without the need to make further applications to this Court each time. If the court is satisfied that it is appropriate to order disclosure of the para 1(a) documents which reveal the identity of those protestors already arrested, it is difficult to see why the threshold test would not also be satisfied in respect of future documents within the same category.
 - d. The rule confers a discretionary power and there is ample scope for deciding in an individual case what the appropriate scope of the disclosure should be, having regard to the nature of the proceedings and the nature of the documents sought. Here, the Order was granted for a period of one year and is intended to be effective against 'persons unknown' which include not only those anonymous defendants who were identifiable and fell within the description at the time the proceedings commenced but also 'Newcomers' who may fall within the description and become

identifiable in the protest in the future. Given that and the nature of the proceedings involving a fluctuating body of protestors, there is obviously a need for the disclosure to extend to documents which will enable all potential defendants to be identified, to ensure that they can all be named and served.

- e. A narrower construction would place a significant fetter on the power to order disclosure (see *Kerner*, above ““it would be inappropriate to construe [CPR 31.17] in a narrow and literal way ... that approach would tend to obstruct or hinder the fair disposal of litigation”). The policy rationale of CPR 31.17 is aimed at ensuring that a party can have access to documents which are not in the possession of the parties themselves but will assist the other’s case and the fair disposal of litigation.
- f. Any narrower construction would also invariably lead to multiple third-party disclosure applications having to be brought by a party in the course of proceedings such as this and would impose place significant practical constraints on that party’s ability to do so given that they would not necessarily being in a position to know when the documents might come into existence. A narrow construction of CPR 31.17 which requires successive applications to be brought in respect of the same categories of document as and when they are created would be disproportionate, unnecessarily costly and wasteful of court resources. It would also impose an additional burden on the third party who would presumably need to be contacted in advance of each such application to consider its position. It is relevant (although not determinative) that the Respondent is content to be subject to an ongoing obligation to disclose documents revealing the identity of future defendants.

Human Rights considerations

- 14. As to the question of whether any Article 8 ECHR rights of individuals in relation to whom information/documents are disclosed affect the analysis, for the Defendants it may be said that the disclosure is directed at obtaining from the police information which has been provided to them effectively under compulsion, and which is personal information they would ordinarily be entitled to protect, to some degree.
- 15. As Warby J identified in *Kerner* at [25], the discretionary nature of CPR 31.17 gives “*ample scope for deciding, in an appropriate case, that disclosure would represent an*

unnecessary and disproportionate intrusion into personal privacy or should not be ordered for some other reason”.

16. However, that is not a countervailing public interest consideration which weighs against disclosure for the following reasons:
 - a. The information and documents disclosed are for the internal use of C and its legal advisers only. Whilst the disclosure would involve the revealing to C of information which might be personal, the collateral use of any documents thus disclosed is automatically restricted by CPR 31.22¹. The Draft Order also expressly specifies (paragraph 10) that C may not make use of any document disclosed other than for purposes connected with these proceedings.
 - b. The Draft Order also incorporates a direction for the redaction of the names and addresses of the named defendants (paragraph 11 of the Draft Order)
17. On that basis, the only real impact upon any particular person is that they will be prevented from escaping the consequences of their unlawful acts and the ability of the Court to vindicate C’s rights will not, therefore, be frustrated.
18. Conversely, it is hard to see how the claim could be disposed of fairly against any individual perpetrator of any of the unlawful acts which are the subject of the Orders, without the disclosure of the information sought. In so far as the Defendants’ privacy is invaded, any such interference is clearly proportionate in order to allow the Orders which are justified by the, it is submitted, weighty factors set out above, to operate effectively and ensure that Cs are not prevented from being unable properly to vindicate their own rights in the face of tortious, and consciously disruptive, behaviour by the Defendants in breach of a court order.
19. In those circumstances it is submitted that the balance clearly favours the making of the disclosure order in the terms sought.

MYRIAM STACEY KC 12 October 2022

¹ Unless the Court otherwise orders.