**Claim No: QB-2022-001241 (“Shell Haven Proceedings”)**

**Claim No: QB-2022-001259 (“Shell Centre Tower Proceedings”)**

**Claim No: QB-2022-001420 (“Shell Petrol Stations Proceedings”)**

**IN THE HIGH COURT OF JUSTICE**

**KINGS BENCH DIVISION**

**B E T W E E N :**

1. **Shell U.K. Limited**

**Claimant: (QB-2022-001241)**

1. **Shell International Petroleum Company Limited**

**Claimant** **(QB-2022-001259)**

1. **SHELL U.K. OIL PRODUCTS LIMITED**

**Claimant (QB-2022-001420)**

**- and –**

**PERSONS UNKNOWN**

**[more fully described in the Relevant Claim Form]**

**Defendants**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**CLAIMANTS’ FURTHER SUBMISSIONS**

**IN RELATION TO CPR RULE 40.9**

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1. These further written submissions are filed in response to the application by Jessica Branch pursuant to CPR rule 40.9 (“Ms Branch’s application”). Ms Branch’s Application is supported by her witness statement which is said to be filed “in support of my challenge to the Claimants’ applications to extend three injunctions” (para 1).
2. These submissions cover:
   1. The scope of the jurisdiction for a non-party to be heard. Cs contend that the jurisdiction allows a non-party to set aside or vary an order which has been made and is thus back-ward looking in its application and effect.
   2. Whether and the extent to which Ms Branch can establish the ‘gateway’ tests under rule 40.9. Cs contend that the gateway has not been met for the reasons set out below.
   3. Whether and the extent to which the Court should exercise its discretion under rule 40.9. – Cs contend that the Court should not do so for the reasons set out below.
   4. How the Court should determine Ms Branch’s Application, having heard the submissions made on behalf of Ms Branch *de bene esse*. Cs contend that the Court should determine the application as suggested at paragraph 31 below and give judgment, so as to avoid the need for a further hearing.

**The scope of the jurisdiction under 40.9**

1. As stated in oral submissions, Ms Branch has not pointed to any procedural basis which would entitle her to make submissions as a non-party, other than pursuant to CPR rule 40.9. If an alternative basis is identified and relied on by Ms Branch, Cs should be afforded an opportunity to respond.
2. The scope of a non-party’s entitlement to make submissions under rule 40.9 is circumscribed by the language of that procedural rule. The rule is not confined to injunction orders. The language of rule 40.9 encompasses judgments and orders of all kinds and envisages a challenge by the non-party to an order which has already been made.
3. As Cotter J put it in *Ageas Insurance Ltd v Stoodley* [2019] Lloyds Rep IR 1 at [30] (emphasis added):

*“In my view the starting point for analysis of CPR 40.9 is that a Judgment or order must have been obtained within the action in which the applicant is not a party.*

*Judgments or orders fall into two categories; those that can be the subject of an application to vary or set aside under the CPR and those which require to be appealed.”*

1. That reflects the language of 40.9 – a person cannot be said to be “*directly affected by a judgment or order*” unless and until the court has made the order which the non-party is seeking to have set aside.
2. As developed in oral submissions, Cs accept that the orders made in this case fall in the first category identified by Cotter J (para 2 of the quote above). Although there is no direct authority in the context of injunctions obtained against Persons Unknown, Cs accept that as a matter of principle, the court has jurisdiction to entertain an application by a defendant or person falling within rule 40.9 to discharge or vary such orders, in line with the approach set out in Gee QC in relation to Mareva injunctions in “Commercial Injunctions” at para 24-02:

*“If a defendant wishes to set aside an injunction obtained without notice by the claimant. He must apply to the judge; he should not appeal to the Court of Appeal without having first been before the court at first instance for reconsideration of the without notice order.*

*If the defendant wishes to apply to have the order set aside or varied, he should make his application promptly.*

*…*

*Whether defendant, or a non party, is seeking to vary the injunction and there are a number of interested parties, it is sensible to proceed by application notice. The terms of the variation can then be set out in the application notice and this may facilitate reaching an agreement.*

*The application to discharge the injunction takes the form of a complete rehearing of the matter, with each party being at liberty to put in evidence.”*

1. Nevertheless the process and procedural sequence provided for in rule 40.9 is a challenge to an order which has been made, not a pre-emptive application in respect of an order which has not yet been made. Thus, a newcomer (or non-party who is “directly affected” by the order) discovering the existence of an order can apply to have the order set aside, once made.
2. As developed in oral submissions, a successful application for the continuation of the injunctions would result in a new order: although existing injunctions are the subject of the review, if the court accepts that the injunctions should be continued, the injunctions would be continued by means of a new order made by the judge hearing the continuation application for an extended period of time and subject to any variations which may be considered appropriate.
3. It follows that a non-party who discovers that an interim injunction has been made has the following options:
   1. They can make an application under rule 40.9 after the first order is made, at the return date, and thereby challenge the *ex parte* order made at the first hearing (in this case, the orders of Sweeting J and McGowan J).
   2. They can make an application under rule 40.9 after the first order has been confirmed at the return date (in this case, the orders of Bennathan J and Johnson J);
   3. They can make an application under rule 40.9 after an order has been made continuing the injunction following a review hearing.
4. There seems no procedural impediment to a non-party making such an application in relation to each order as set out above. On each occasion they would need to satisfy the ‘gateway’ under rule 40.9 and the court has a residual discretion to consider all the circumstances including having regard to the timing of the application and the merits of the points sought to be raised.
5. However, it is Cs’ case that it is procedurally improper for a non-party to make a prospective application under rule 40.9 as a means of challenging an order *before* it has been made. The language of rule 40.9 (which refers to the setting aside or variation of “the order” as opposed to a challenge being raised in respect of an application for an order) does not allow for that. The scope of the rule is confined by its language and is clearly backward looking in its application and effect.
6. The notion that an order must be made before rule 40.9 is employed even in a protest context is not inconsistent with anything in *Barking* *and Dagenham v Persons Unknown* [2022] EWCA Civ 13: see e.g. at [83] (which quotes from Marcus Smith J’s judgment in *Vastint*):

*““[u]ntil an act infringing the order is committed, no one is party to the proceedings. It is the act of infringing the order that makes the infringer a party”. Any person affected by the order could apply to set aside under CPR 40.9.”*

1. Nothing in *Barking* supports the prospective use of rule 40.9 and there is nothing to suggest that the Master of the Rolls was contemplating the inter-relation of that rule with the review process[[1]](#footnote-2).
2. Moreover, as developed in oral submissions, the concept of limiting applications under rule 40.9 to the period after an order has been made, poses no conceptual difficulty in practice and causes no injustice to the relevant non-party:
   1. The courts have accepted that there is jurisdiction to grant an interim order against Persons Unknown in appropriate cases: see e.g. *Cameron, Bromley, Canada Goose,* cited in *Barking*. Such orders would, by definition, be obtained in the absence of the affected persons.
   2. The procedural checks and balances which have been imposed by the courts are intended to temper that jurisdiction and ensure that it is employed in appropriate cases only. The court must proceed with caution before granting such orders and ensure that the procedural guidelines in *Canada Goose* [2020] EWCA Civ 303, [82] are adhered to. That includes the requirement for a clear definition of the relevant category of persons unknown so as to enable such persons to know who they are and service provisions which the court is satisfied can reasonably be expected to bring the proceedings to the attention of that appropriately defined category.
   3. Rule 40.9 allows any person directly affected by the order who receives notice of it after it has been made, to apply to the court. That covers both any ‘newcomer’ who has fallen within the category of persons unknown (*Barking* [62], [83], [89]) or a potential newcomer who might fall within that category if they were to carry out the prohibited acts. Given that such an application can be made each time an order has been made and given that such orders are to be kept under review, the construction contended for by Cs (that rule 40.9 applies in respect of an order after it has been made), increases the opportunity for scrutiny. As the Master of the Rolls put it in *Barking* at [89] “*Orders need to be kept under review. For as long as the court is concerned with the enforcement of an order, the action is not at an end*.” Where a series of orders are made in a protest case following reviews, the non-party would be entitled to apply to vary or set aside each order on each occasion that a new order was made.
   4. The ‘lacuna’ which has arisen in this case arises on its particular facts where Ms Branch has chosen to bring the application a few days before the orders expire and on the assumption that rule 40.9 is not merely back-ward looking, but/ this does not create a procedural black-hole in practice. Ms Branch’s evidence (2nd w/s, para 21) was that she had been “*similarly concerned by the Order Johnson made a year ago and the restrictions it represented*” but “*was content to wait until the Order expired, to see whether Shell proposed to extend it, in the knowledge that if they did there would be another return hearing which would be the best and most efficient way to bring a challenge…”.* If the Court accepts Cs’ submissions as to the scope of rule 40.9, non-parties retain the ability to set aside or discharge orders at the various stages set out above; however, such applications would need to be brought in line with the usual process, as per guidance set out by Gee QC above (“*If the defendant wishes to apply to have the order set aside or varied, he should make his application promptly. … Whether defendant, or a non party, is seeking to vary the injunction and there are a number of interested parties, it is sensible to proceed by application notice. The terms of the variation can then be set out in the application notice and this may facilitate reaching an agreement.”*)
3. Conversely, the use of rule 40.9 to insert an application pre-emptively within the review process without considering the case management implications risks procedural unfairness and imbalance between litigants. There are good reasons why a non-party should wait until an order is made and apply in the usual way, rather than seeking to challenge a prospective order on a review without any application notice as Ms Branch has done. First, until then the application is premature (a person cannot be said to be “directly affected” by an order unless and until it is made). Second, as a matter of case management and procedural fairness, the process must be principled and procedurally consistent regardless of the respective resources of the litigants (it is perfectly conceivable, for example, that an injunction is obtained by a crowd funded environmental protest group and that the 40.9 challenge was brought by a well-resourced corporation or wealthy individual with broader commercial interests). Review hearings are listed in advance on the basis of time estimates which are reasonably anticipated and neither the Court nor claimants can be expected to factor in applications of which they have no notice.
4. It is accordingly Cs’ position that Ms Branch’s Application cannot relate to the prospective orders sought on the review and can only be treated as being applicable to the – now expired - orders of Johnson J and Bennathan J.

**Requirement for clarity**

1. The decisions of Ritchie J in *Esso Petroleum Co Ltd v Breen* [2022] EWHC 2600 and Bennathan J in *NHL v Persons Unknown* [2022] EWHC 1105 are relied on by Ms Branch. However, those decisions must be treated with a measure of caution:
   1. Ritchie J in *Breen* relied on Bennathan J in *NHL*, but the question of whether Ms Branch was “directly affected” in the latter case was determined in NHL on the basis of an informal application which was made at short-notice without any opportunity to consider the proper ambit of the rule and without any detailed argument or consideration of the scope of 40.9 or the underlying authorities as to the meaning of “directly affected”[[2]](#footnote-3).
   2. Neither judge considered the scope of rule 40.9 as set out above, or the approach to “*directly affected*” as applied by the Court of Appeal in *Mohammed v Abdelmamoud* (below). As Ritchie J in Breen at [40] acknowledged “*Other than these cases there appears to be no authority on the point or at least none was put before me and none is set out in the Supreme Court Practice*.”
2. The scope of rule 40.9 in the context of protest injunctions raises a point of general importance with implications which go beyond the particular circumstances of this case. The law in this area of the past two years has evolved rapidly and there has not, as yet, been sufficiently detailed consideration given to the important issues raised in the course of the present hearing as to the scope and applicability of rule 40.9 in the context of non-parties who seek to challenge an order which has not been made, or as to the extent to which non-parties who have expressly asserted that they do not intend to breach an order can nevertheless be said to be ‘directly affected’ on the basis that they consider their lawful activities might conceivably put them at risk (see below).
3. It is therefore hoped that the Court will take this opportunity to provide the greater clarity and guidance required.

**(2)** **Submissions as to the application of 40.9**

(a) ***The Gateway Test***

*Directly affected:*

1. The 2 gateway tests are set out in *Breen* at [43].
2. As to the requirement that the non-party be “directly affected”, the Court of Appeal in *Mohamed & Others v Abdelmamoud* [2018] EWCA Civ 879, Newey LJ said this at [27] (underlining added):

*"It is clear from its terms, … that CPR 40.9 does not empower the court to set aside a judgment or order wherever it might think that appropriate. It is a precondition that the applicant is 'directly affected' by the judgment or order. That the power should not be untrammelled makes obvious sense. In general, a defendant to a claim should be left to decide for himself whether to defend it. Further, it could hardly be appropriate to allow a third party to apply to have a judgment set aside unless he would then be in a position either to defend the claim on the defendant's behalf or to put forward a defence of his own*."

1. In the underlying judgment (which was upheld by the Court of Appeal) [2015] EWHC 1013 (Ch) at [58] when, after referring to a number of previous cases, the court stated:

*"These cases support the proposition that in order for a non-party to be 'directly affected' by a judgment or order for the purposes of CPR 40.9, it is necessary that some interest capable of recognition by the law is materially and adversely affected by the judgment or order, or would be materially and adversely affected by the enforcement of the judgment or order."*

1. As set out above, neither Ritchie J nor Bennathan J considered that test.
2. Applying the reasoning of Newey LJ to a protest context, a person who wished to carry out the activities which form the subject of a pre-existing order and who would (if they did so) fall within the category of persons unknown and become a defendant, should be left for themselves to decide whether to apply to set the order aside. Such a person can do so prior to becoming a defendant, by making an application under rule 40.9 before carrying out any prohibited act. However, Ms Branch is not a potential newcomer. She has stated that she does not want to risk participating in protests at Shell Petrol Stations, the Shell Centre Tower or Shell Haven, but the relevant orders only prohibit certain specific conduct. The passage underlined above calls into question the suggestion that a person such as Ms Branch who has expressly stated that they have no intention of breaching the prohibitions (and thus would not fall within the definition of persons unknown) can nevertheless claim to be “directly affected” – they are not a party, have no prospect of being a defendant and it is difficult to see on what basis they are entitled to seek to defend the claim on a potential defendant’s behalf – and to do so without being exposed to any of the costs risks associated with joinder. It is difficult to see how Ms Branch’s approach is consistent with a power that is “*not…untrammelled*” (see paragraph 22 above). The fact that the claim has been brought against Persons Unknown – in line with the jurisdiction set out above – does not widen the ‘gateway’ and enable any person to come to court to make submissions and challenge an order. The approach of Bennathan J and Ritchie J renders the qualifier ‘directly’ in the phrase ‘directly affected’ otiose and is contrary to the approach of the Court of Appeal in *Abdelmamoud.*
3. Moreover, given that the orders only prohibit specific acts which are by their nature unlawful, it is difficult to see how Ms Branch can assert that her interests are “materially” affected, per the test at paragraph 23 above.
4. On that basis, Cs position is that Ms Branch is not a person directly affected by any of the orders – on the evidence before the Court (including Ms Branch’s own evidence) - and Cs’ concession to the contrary in relation to Shell Petrol Stations (which was made without consideration of the test) is withdrawn.

*Merits:*

1. The Court is referred to Cs’ note and its oral submissions. The test, as set out in Breen at [38] (per Cotter J in *Ageas*) is whether there is any “*real prospect of success in changing the order that had been made*”. It stands to reason that when considering whether to allow a non-party to make submissions, the court must consider whether that person is raising any arguments with a realistic prospect of success in terms of amounting to a defence to the claim. For the reasons which have been set out in oral submissions, Cs contend that there is no such prospect.

***(b)*** ***Discretion***

1. The Breen factors (at [44]) are not definitive.
2. Cs contend:
   1. If (as Cs assert) the rule 40.9 application could only be made in respect of the orders of Johnson J and Bennathan J, Ms Branch waited too long. The bringing of the application to coincide with the review hearing prejudices Cs’ application and is an improper use of the rule 40.9 procedure (see above).
   2. Even if (contrary to Cs’ primary position) the rule 40.9 application could be brought in relation to an order sought on review, the failure to bring a formal application and/or give adequate notice to Cs that Ms Branch intended a 40.9 application to be dealt with at the same time as the review hearing is a factor which should weigh against the application being heard at the same time as the review, particularly in circumstances where Ms Branch has had ample notice of the review hearing and the pre-existing orders (see chronology of knowledge which was handed up in the course of oral submission). Further, as per the guidance by Gee QC (above), applications should be made promptly and Ms Branch should have proceeded by application notice. As Counsel for Cs indicated at the outset, it is accepted that the court has jurisdiction to entertain applications in the absence of an application notice. However, the absence of a formal application notice summarising Ms Branch’s application is a factor which can be taken into account by the court when considering the question of procedural fairness (see above).
   3. The Court is required to consider the merits of the points sought to be raised by Ms Branch (and the prospects of her securing a different result) when considering whether and to what extent to exercise its discretion in favour of allowing the application.

**(3)Determination of the rule 40.9 application**

1. As repeatedly stated in the course of the hearing, “*we are where we are”.* Given the way in which the hearing developed and the fact that submissions have already been advanced on behalf of Ms Branch which the Court has considered *de bene esse*, Cs invite the Court to address Ms Branch’s application in its judgment, for the sake of completeness:

If Cs are wrong about the scope of rule 40.9 (and it is not simply backwards looking), the Court has heard the arguments and can in principle deal with Ms Branch’s application. The Court is accordingly invited to determine the application in order to avoid a further hearing in relation to the point and duplication, on the basis that the arguments have been fully ventilated.

1. Alternatively, if Cs are right in relation to the scope of rule 40.9, it would be open to the Court to treat the application as having been made immediately after the review and consider it on that basis. Given that the arguments have now all been made, it is submitted that it would also be preferable for the Court to determine the Application in that way, rather than syphoning it off and dealing with it on another occasion (contrary to the submission made by Cs Counsel orally).
2. **Orders sought**
3. For the reasons set out above, the Court is asked to:
4. Determine the scope of 40.9 and whether it is capable of being relied on in respect of prospective orders.
5. Determine the question of ‘directly affected’ and whether it applies to Ms Branch in respect of the various orders.
6. Consider the merits of the submission raised by Ms Branch and identify the arguments (if any) which the Court considers can be made, on the basis that they satisfy the ‘gateway’ test and should be permitted in the exercise of the Court’s discretion.
7. Determine Ms Branch’s application as suggested at paragraph 31 above and give judgment, so as to avoid the need for a further hearing.

**MYRIAM STACEY KC**

**JOEL SEMAKULA**

**Landmark Chambers**

**2 May 2023**

1. For the reasons set out by Cs’ Counsel in her follow-up email to the court on 26.4.23 at 20:16, it is Cs’ position that the court can also derive no assistance from the fact that Ritchie J considered a rule 40.9 application on the return date in *Breen*, in the absence of any consideration of the point in that case. [↑](#footnote-ref-2)
2. Consistently with her position on this review, Ms Branch attended the hearing of the summary judgment application and made submissions to set aside *a future* order which the court was being asked to make. [↑](#footnote-ref-3)