

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

BETWEEN:

SHELL UK OIL PRODUCTS LIMITED

Claimant/Applicant

-and-

CHIEF CONSTABLE OF SURREY POLICE

Respondent

-and-

EQUALITY AND HUMAN RIGHTS COMMISSION

Interested Party

SUBMISSIONS BY THE EQUALITY AND HUMAN RIGHTS COMMISSION ON
THE CLAIMANT'S APPLICATION UNDER CPR 31.17

I. INTRODUCTION¹

1. The Claimant applies for an order that the Respondent, the Chief Constable of Surrey Police, shall give disclosure pursuant to CPR 31.17 of documents in the categories identified in the draft order [B/2/8-9], and subject to the conditions identified therein. The Respondent does not oppose that application.
2. The draft order [B/2/16-18] contains three broad categories of information.

¹ References to [B/x/y] are to tab x, page y in the hearing bundle.

- (i) The first, in paragraph 1(a) of the draft order, seeks the names and addresses of persons arrested during protests at the specified Shell petrol stations on 28 April 2022 and/or 24 August 2022.
 - (ii) The second, in paragraph 1(b), seeks the names and addresses of persons arrested in relation to conduct and/or activity which may constitute a breach of the orders granted on 5 May 2022 [**B/2/19-27**] and on 13 May 2022 [**B/2/28-36**] (referred to below as “**the Injunction**”) after they come into effect.
 - (iii) The third category of information sought, in paragraph 3 of the draft order, seeks (in relation to conduct or activity in relation to which documents have been disclosed under paragraph 1) the following insofar as that discloses any conduct and/or activity which may constitute a breach of the Injunction and/or may assist in identifying any person who might have undertaken such conduct and/or activity: arrest notes, incident logs or similar written records relating to the activity and/or conduct in question, other still photographic material, and/or the body or vehicle camera footage.
3. By an order dated 14 October 2022, Kerr J ordered that the Claimant’s application be adjourned, for the application to be served on (amongst others) the Equality and Human Rights Commission (“**the Commission**”) and for the Commission, if so advised, to make written submissions.
4. The Commission is grateful for the Court’s invitation to make submissions on the Claimant’s application. The Commission confines its submissions to matters that arise under the Human Rights Act 1998 (“**the HRA 1998**”) and the European Convention on Human Rights (“**the Convention**”). The Commission’s submissions are intended to assist the Court as to the relevant principles to apply and to identify matters relevant to the application that have not been raised by either party.
5. In summary, the Commission contends:
 - (i) Paragraph 1 of the draft order (if made) would interfere with the rights of individuals in relation to whom information/documents are disclosed (referred to

below as “**the protesters**”) under Article 8 of the Convention insofar as those protesters have been arrested but not charged with a criminal offence. It would also interfere with the rights of protesters under Articles 10 and 11 of the Convention.

(ii) Paragraph 3 of the draft order would (if made) interfere with the rights of protesters under Articles 8, 10 and 11 of the Convention.

(iii) As such, the Claimant must justify the interference with the protesters’ rights.

(iv) The Commission invites the Court to consider whether the Claimant has demonstrated that the draft order has a rational basis/is the least intrusive means of reaching its aim in the following respects:

(a) Paragraph 1 would appear to include the names and addresses of protesters who have been or will be charged; that information is in the public domain and therefore the disclosure of those details by the Respondent is not necessary for the Claimant to know their identities: see paragraph 20 below.

(b) Paragraph 1 permits the disclosure of the names and addresses of protesters who have been arrested but not charged and who have not committed any act in breach of the Injunction: see paragraph 21 below.

(c) Paragraph 3 appears to be too wide in scope for the reasons set out at paragraph 22 below.

(v) The Commission also invites the Court to consider whether the draft order strikes a fair balance between the rights of the Claimant and the rights of the protesters (see paragraphs 24-26 below).

6. Finally, the Commission respectfully requests that the Court directs that the application is made on the basis that the Commission neither seeks its costs from, nor will it be ordered to pay the costs of, any other party.

II. THE LEGAL FRAMEWORK

7. Section 34 of the Senior Courts Act 1981 provides in relevant part:²

“(2) On the application, in accordance with rules of court, of a party to any proceedings, the High Court shall, in such circumstances as may be specified in the rules, have power to order a person who is not a party to the proceedings and who appears to the court to be likely to have in his possession, custody or power any documents which are relevant to an issue arising out of the said claim—

- (a) to disclose whether those documents are in his possession, custody or power; and
- (b) to produce such of those documents, as are in his possession, custody or power to the applicant or, on such conditions as may be specified in the order—
 - (i) to the applicant’s legal advisers...

8. CPR 31.17 contains the relevant rules applicable to orders for disclosure against a person not a party. It provides in relevant part:

“(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.”

9. Accordingly an application under CPR 31.17 requires an applicant to demonstrate that the two threshold conditions in sub-paragraph 3 are met. If the conditions are met, the Court retains a residual discretion to order non-party disclosure or not: see *Kerner v. WX and YZ* [2015] EWHC 1247 (QB) per Warby J at [25]. At this stage the Court must take any public interest considerations into account and, if necessary, balance those

² The relevant provision in the County Court is section 53 of the County Courts Act 1984.

considerations: *Frankson v. Home Office* [2003] EWCA Civ 655; [2003] 1 WLR 1952 at [13].

10. That balancing exercise must, pursuant to section 6 of the HRA 1998, be exercised compatibly with Convention rights. That necessarily entails the Court conducting a balancing exercise between the rights of the protesters and the rights of the Claimant. The Commission makes submissions on this point below.
11. Finally, the word “*only*” in CPR 31.17 emphasises that disclosure from non-parties is the exception rather than the rule: see *Frankson* at [10].³

III. THE BALANCING EXERCISE

(a) The Convention rights engaged

Paragraph 1 of the draft order: the disclosure of the names and addresses of protesters arrested

12. **Article 8 of the Convention:** disclosure by the Respondent of the fact of an investigation of an offence prior to charge interferes with a suspect’s rights under Article 8. After charge, the fact of an investigation having taken place will be in the public domain, and disclosure of that fact will not engage Article 8.
13. As to the position prior to charge, in *ZXC v. Bloomberg LP* [2022] UKSC 5; [2022] AC 1158 the Supreme Court held that as a general rule, or “*legitimate starting point*” certain types of private information will normally be regarded as giving rise to a reasonable expectation of privacy [52]-[53]. This includes information that a person who had not yet been charged was under criminal investigation [146]. The Supreme Court emphasised that this principle was subject to qualification, notably that the “*legitimate starting point*” was not a legal rule or presumption and that whether there is a reasonable expectation of privacy in the relevant information is a fact sensitive enquiry (see [67]-[68]).
14. A suspect in a criminal investigation does not have a reasonable expectation of privacy after the point of charge: *Bloomberg* at [77]. In *R (Rai) v. Crown Court at Winchester*

³ See, to similar effect, the statement that the power in CPR 31.17 should be exercised with “*some caution*”, *Re Howglen Ltd* [2001] 1 All ER 376 at 381, and further, that the grant of such applications should not be regarded as routine: *Henry v. News Group Newspapers Ltd* [2011] EWHC 1364 (QB) at [6].

[2021] EWHC 339 the Divisional Court conducted a review of the case law and concluded that there was “*authority for the proposition that, in general, a suspect in a criminal investigation has an expectation of privacy up to the point of charge; not thereafter. At the point of charge, or shortly thereafter, the suspect (now defendant) will appear in a criminal court and the open justice principle will lead to the public identification of the defendant as having been charged with a criminal offence*” [49].⁴

15. **Articles 10 and 11 of the Convention:** disclosure of a protester’s name or address, when he or she has been arrested but not charged, interferes with their rights under Articles 10 and 11. Most notably it has a chilling effect on legitimate future protest, in so far as conduct that does not constitute a criminal offence (and may not constitute one of the acts prohibited by the Injunction) may result in their name and address being passed to the Claimant, and being added as a party to the Claimant’s claim.

Paragraph 3 of the draft order

16. **Articles 8, 10 and 11 of the Convention:** the Commission maintains that it is likely that disclosure of the material sought in paragraph 3 of the draft order would engage Article 8 whether or not the person referred to had been charged with a criminal offence. Some of the material sought may be particularly sensitive (for example, witness statements provided to the Police). This is addressed in more detail below. Disclosure would engage Articles 10 and 11 for the same reasons set out in paragraph 15 above.

(b) Justification

17. The disclosure of the material sought interferes with the protester’s rights under Article 8, 10 and 11 of the Convention. That interference requires justification if the Court is to make the order sought by the Claimant. The test for justification is fourfold: (a) does the measure have a legitimate aim sufficient to justify the limitation of a fundamental right; (b) is the measure rationally connected to that aim; (c) could a less intrusive measure have been used; and (d) bearing in mind the severity of the consequences, the importance of the aim and the extent to which the measure will contribute to that aim, has a fair

⁴ Retention and disclosure of information that a person has been convicted of a criminal offence engages Article 8: see *R (L) v. Commissioner of Police of the Metropolis* [2010] 1 AC 410 at [27].

balance been struck between the rights of the individual and the interests of the community?

18. The Commission further submits that the Court should examine the three broad classes of disclosure sought by the Claimant (see paragraph 2 above) separately as the balance to be struck differs for each category.
19. **Legitimate aim:** the Claimant contends that the order is necessary to protect its right to carry on its business, and in particular, to allow the Claimant to join individual protesters to the claim. The Commission accepts that in principle this is a legitimate aim.
20. **Rational connection/less intrusive means:** the Commission notes that the wording of paragraph 1 of the draft order is wide enough to include protesters who have been or will be charged. The Court may wish to consider why the Claimant needs to obtain the names and addresses of protesters who were charged following the protests on 28 April 2022 from the Respondent, as that information is in the public domain and known to the Claimant: see the third witness statement of Emma Pinkerton at §2.5 [B/3/11].⁵ Similarly, insofar as any protesters are charged following the protests on 24 August 2022 (or any subsequent protest), their names will enter the public domain.
21. Further, the Commission invites the Court to consider whether there is a rational connection between the disclosure of the names and addresses of protesters who have been arrested but not charged and the aims pursued by the Claimant. In circumstances in which no charges have been pursued, it is not apparent that the protester's actions constitute conduct prohibited by the Injunction (not least as almost all of the acts prohibited by paragraphs 2 and 3 of the Injunction constitute criminal offences) [B/3/21]. Further or alternatively, this is a matter that falls to be considered when determining whether the draft order strikes a fair balance between the rights of the protesters and the rights of the Claimant: see paragraph 25 below.

⁵ The judgment of Johnson J on the Injunction application explains that the Claimant decided not to add the names of these individuals as defendants as (in the case of four of those charged) it considers that the bail conditions imposed mean that there is not a significant risk that they will carry out further similar activities, and (in the case of a fifth) it is not sufficiently clear that the conduct of that individual comes within the scope of the Injunction, at §13 [2022] EWHC 1215 (QB) [B/16/319].

22. Further still, the Commission considers that paragraph 3 of the draft order either may not be sufficiently rationally connected to the Claimant's aim and/or has concerns about the width of paragraph 3 of the draft order, i.e. that part of the order that makes provision for the Respondent to disclose arrest notes, incident logs or similar written records and photographs and/or body or vehicle camera footage relating to the activity in question. Specifically:

- (i) This information is not necessary for the Claimant to join a protester to the claim.
- (ii) It is unclear at this stage whether such material exists; it may not. The Court should be cautious about making such a wide order: see, by analogy, *Vardy v. Rooney* [2022] EWHC 946 at [49]-[50].
- (iii) The width of the request for disclosure means that the Court cannot carry out a proper balancing exercise in respect of each part of the material sought. For example, witness statements are likely to fall within "*written records*". There is a public interest in maintaining the confidentiality of those who make statements to the police in the course of a criminal investigation. There is also a public interest in ensuring that as far as possible the courts try civil claims on the basis of all of the relevant material and thus have the best prospect of reaching a fair and just result: *Frankson* at [13]. That is a fact sensitive balance which cannot be conducted in the abstract.
- (iv) The draft order provides the Respondent may refuse disclosure for the reasons set out in paragraph 6 (the material may prejudice any ongoing criminal investigation or public interest immunity ("PII")). It does not, however, require the Respondent to consider or assess the Convention rights of those whose information is disclosed under paragraph 3 of the draft order. Neither does the draft order provide a basis on which the Respondent could decline to disclose material where the Respondent considered that such disclosure would constitute a breach of the Convention.
- (v) In the absence of knowing what other evidence is available to the Claimant in any particular claim against an individual protester (i.e. evidence that it or its agents may already hold, or evidence that may become available in the course of

disclosure in the claim) the Court cannot be satisfied that the disclosure sought by paragraph 3 of the draft order is necessary for the Claimant to pursue that claim.

(vi) Paragraph 3 of the draft order may involve the disclosure of material identifying individuals other than those who have been arrested and whose names have been provided under paragraph 1 of the draft order. Paragraph 6 permits the Respondents to redact (at least temporarily) material that may prejudice ongoing criminal investigations or fall within the category of PII. The draft order does not contain provision for the Respondent to redact or obscure the identities of protesters who were not arrested and whose names and addresses have not been provided to the Claimant pursuant to paragraph 1 of the draft order.

23. For these reasons, the Commission suggests that the Court consider whether it is lawful:
 - (i) for the draft order to require the Respondent to disclose the names and addresses of those individuals who have been, or will be, arrested and/or charged, and
 - (ii) for the draft order to include paragraph 3.

24. **Fair balance:** the Claimant has set out those matters that it suggests weigh in favour of the order being granted (Skeleton Argument at [16]-[18]). The Commission suggests that the following factors may point the other way in respect of disclosure pursuant to paragraph 1 of the draft order.

25. First, the names and addresses to be disclosed include individuals who have not been charged with a criminal offence. As explained above at paragraph 27, some of the names and addresses of those arrested but not charged are likely to include those who have not acted in breach of the Injunction.

26. Second, the chilling effect on rights under Articles 10 and 11 if arrest at a protest may lead to a protester's name and address being disclosed to the private company against which the protest was aimed is significant. The Commission maintains that this is a weighty matter that the Court should keep firmly in mind in striking the balance.

Sarah Hannett KC

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1 November 2022