

# ATTENDANCE NOTE

**High Court of Justice**

**Queens Bench Division**

**Claim No. QB – 2022 – 001241**

**Shell U.K. Limited and Essar Midlands Limited v Persons Unknown**

**Hearing (remote) before Mr Justice Sweeting, 14 April 2022, starting at 15:42**

## ATTENDEES

- 1) Mr Justice Sweeting (the “**Judge**”)
- 2) Phil Earley – Court Associate
- 3) Valentina Meo – Court Clerk
- 4) Tim Morshead QC of Landmark Chambers, representing the Claimant (“**TMQC**”)
- 5) Sarah Judd and Natasha McCarthy of the First Claimant
- 6) Emma Pinkerton, Anthea Adair, Ellen Bandarian and Sally Tang of CMS Cameron McKenna Nabarro Olswang, the First Claimant’s Solicitors
- 7) Tom Pilgram (stated to be Press Association)

## AUTHORITIES REFERED TO

- 1) *American Cyanamid Co (No 1) v Ethicon Ltd* [1975] UKHL 1 (05 February 1975) (“**American Cyanamid**”)
- 2) *Cream Holdings Ltd v. Banerjee* [2005] 1 AC 253 (“**Cream Holdings**”)
- 3) *Ineos Upstream v. Persons Unknown* [2017] EWHC 2945 (Ch) (“**Ineos**”)
- 4) *Ineos Upstream v. Persons Unknown* [2019] 4 WLR 100 (CA) (“**Ineos CA**”)
- 5) *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29 (“**Cuadrilla**”)
- 6) *Canada Goose UK Retail Ltd v. Persons Unknown* [2020] 1 WLR 2802 (“**Canada Goose**”)
- 7) *National Highways Ltd v. PU* [2021] EWHC 3081 (QB) (“**National Highways**”)
- 8) *Barking & Dagenham LBC & Otrs v. Persons Unknown* [2022] EWCA Civ 13 (“**Barking**”)
- 9) *DPP v. Cuciurean* [2022] EWHC 736 (Admin) (“**Cuciurean**”)
- 10) *Kudrevicius v. Lithuania* [2016] (“**Kudrevicius**”)
- 11) *Barraco v. France* No. 31684/05, 5 March 2009 (“**Barraco**”)
- 12) *Birmingham City Council v. Afsar* [2019] EWHC 1560

## 1. INTRODUCTION

- 1.1 TMQC appreciated that this matter was being dealt with urgently and asked what materials had reached the Judge.
- 1.2 The Judge indicated that he did not have in front of him all of the relevant documentation. The Judge had seen two witness statements, an application notice, draft order and a claim form but no particulars of claim. The Judge said that he had already adjourned a separate application for an injunction for Kingsbury (the wider Kingsbury complex of which the Claimants' property was part) which was sought by North Warwickshire Borough Council (the "**Local Authority**") and which included a power of arrest pursuant to statutory powers (not available to Shell). The reason for the adjournment was because he wanted the parties in that application to finalise the order sought by the Local Authority. The Local Authority's injunction included a buffer zone which the Judge required the Local Authority to reduce in scope from what had been proposed but which he was otherwise in principle content to order. The Judge considered the injunctive relief provided by the Local Authority's order would provide the Claimants with the relief they were seeking and more and that it might be sensible for the parties to liaise with one another.
- 1.3 The Judge indicated that he could see that some of the activities the protesters are carrying out run the risk of causing quite a lot of serious harm and not in the least because of the risk of either an explosion or the release of toxic chemicals. Having read the witness statement provided by Mr Stephen Brown of the First Claimant in this case, the Judge confirmed he was fortified in his view that there is a risk. He indicated that it would be helpful to have regard to Mr Brown's evidence, in the Local Authority's application.
- 1.4 The Judge also mentioned that Valero had obtained an order on 11 April 2022 in respect of part only of the Kingsbury complex. It was a more restrictive injunction but did not seem to have had much effect.
- 1.5 The Judge reiterated that it would be helpful for the parties to confer with one another with regard to the extent of the injunction sought for the wider Kingsbury complex and that, given his knowledge of the site, Mr Brown could feed into discussions about the boundary of the buffer zone.
- 1.6 TMQC asked how long the matter had been adjourned for.
- 1.7 The Judge said that he had asked the Local Authority to respond this afternoon but it can be picked up tomorrow morning if needs be.
- 1.8 TMQC said that he was in the process of taking instructions on the adjournment of the Claimants' application for Kingsbury and that he would move onto the First Claimant's application in respect of Shell Haven in the meantime.

## 2. SHELL HAVEN APPLICATION

- 2.1 TMQC said that evidence as to the nature of the risks had presumably already been heard in the previous application by the Local Authority, and he referred to the evidence of Mr Brown which was before the Court and which the Judge had had an opportunity to read, in view of which he said he would spend most of his time going through a handful of authorities.

2.2 The Judge confirmed that he was persuaded that the potential harm re Shell Haven is the same as Kingsbury as it relates to the storage of hazardous material which is principally aviation fuel. The same groups appear to be involved and the activity is likely to be the same as the activity at Kingsbury – the plan is to obstruct the importing and distribution of fossil fuels so there is the risk of significant harm if injunctive relief is not granted.

2.3 There was then a discussion re the paginated electronic hearing bundle and skeleton argument which the Judge did not yet have - these were provided before the hearing proceeded.

### **3. TESTS TO BE SATISFIED - PARAGRAPH 5 OF THE CLAIMANT'S SKELETON ARGUMENT**

3.1 TMQC explained that there are 5 tests to be satisfied:

3.1.1 First, because the application is for interim relief, there is the “*American Cyanamid*” test.

3.1.2 Secondly, because the application is against persons unknown, the First Claimant must satisfy the guidance in *Canada Goose* (para 82 of the judgment).

3.1.3 Thirdly, because the application affects the Article 10 and 11 rights of the protesters, the First Claimant must show that any interference with those rights is justified.

3.1.4 Fourthly, for the same reason, the First Claimant must satisfy section 12(2) of the Human Rights Act 1998 as to service.

3.1.5 The fifth matter relates to s12(3) of the 1998 Act. Where it applies, this displaces the “serious question to be tried” test with a higher threshold based on “likelihood”.

3.2 TMQC then went through those tests with reference to his skeleton argument and the authorities mentioned in the skeleton argument.

### **4. NUISANCE/INTERFERENCE WITH LAND - PARAGRAPH 10 OF CLAIMANT'S SKELETON ARGUMENT**

4.1 On Shell's causes of action, TMQC said that trespass needed no elaboration and cited *Cuadrilla* as authority for the proposition that a person suffers a private nuisance if its right of access to the highway is interfered with.

### **5. IDENTIFICATION OF DEFENDANTS/PERSONS UNKNOWN - PARAGRAPHS 17 - 28 OF CLAIMANT'S SKELETON ARGUMENT**

5.1 TMQC referred to *Canada Goose* and said that although the *Barking & Dagenham* case means that *Canada Goose* is no longer good law in relation to final injunctions, nevertheless the guidance which it contains in relation to interim injunctions remains the law and was specifically endorsed in *Barking*.

5.2 TMQC referred to the obligation for a claimant to name any defendant that it is aware of and that in this instance, the First Claimant had not identified anyone who could be named and so this had been satisfied.

5.3 TMQC pointed to the claim form and the definition of the Defendants as “*Persons unknown entering or remaining at the claimant's sites known as Shell Haven, Stanford-Le-Hope and/or*

*Kingsbury Terminal, (and as further defined in the particulars of claim) without the consent of the claimants, or blocking the entrances to those sites, in connection with the environmental protest campaigns of Just Stop Oil and/or Extinction Rebellion and/or Youth Climate Swarm”* and in fact worked in favour of potential defendants by excluding those whose presence was not referable to those campaign movements.

5.4 The Judge explained that the previous application for Kingsbury had a much narrower definition and that it would be preferable to have some commonality between the two applications.

5.5 TMQC then said that it would be preferable for some of the wording from the above extract not to form part of the final order as it was too imprecise and would create difficulties of proof against persons whose presence was not referable to any particular campaign but nevertheless which amounted to a breach of the injunction, so that the new definition should not include the words “*in connection with the environmental protest campaigns of Just Stop Oil and/or Extinction Rebellion and/or Youth Climate Swarm*”. The Judge agreed.

5.6 TMQC said that although it would make sense for the Kingsbury applications to be aligned, the Shell Haven application should remain as a stand-alone application.

5.7 TMQC went through further points and requirements from the skeleton argument relating to requirements in respect of identification and service on unknown persons. The Judge said that the inclusion of emailing certain addresses was a good idea and that between the First Claimant and the Local Authority, they had managed to identify the majority of the protest groups.

## **6. RIGHT TO PEACEFUL PROTEST - PARAGRAPHS 29-37 OF THE CLAIMANT’S SKELETON ARGUMENT**

6.1 TMQC moved onto consider Article 10 (freedom of expression) and Article 11 (freedom of assembly).

6.2 TMQC said that the relevant cases were *DPP v. Cuciurean* and *Ineos CA* case but that *Cuciurean* was the more up to date authority.

6.3 TMQC said that the court has to balance the First Claimant’s rights and the Defendants’ article 10 and 11 rights.

6.4 TMQC mentioned *Kudrevicius* and *Barraco*.

6.5 TMQC said that the authorities recognise the principle that members of the public do not have the right to demonstrate over private land other than in extreme circumstances such as where there would otherwise be nowhere to protest peaceably, which was not this case. He said that under the circumstances of the present case, there would be no interference with article 10 and 11 rights as the convention does not entitle the Defendants to enter the First Claimant’s land in order to exercise those rights.

6.6 TMQC and the Judge discussed the order and the list of activities that had been identified by the Local Authority in their application and which included obstructing the highway which was a concern due to the fact that it would be difficult to identify which protestors were obstructing and those who might choose to move out of the way – but such difficulties did not

arise directly in the present application because the First Claimant does not in this application seek relief in relation to the highway.

## **7. HUMAN RIGHTS ACT - PARAGRAPHS 38 - 42 OF CLAIMANT'S SKELETON ARGUMENT**

7.1 TMQC referred to section 12(2) of the Human Rights Act 1998 (which is quoted so far as relevant by Morgan J in *Ineos* at paragraph 84) and said that sub-section (1) explains when the whole section applies when rights of expression might be affected and sub-section (2) therefore clearly applies. In the present case, there were no practical steps for the First Claimant to take besides potentially alerting the press that this application would be made, which would be disproportionate and potentially self-defeating as it might alert people to act before the injunction was in place.

7.2 TMQC also submitted that advance notice of the injunction could accelerate any protests and that at paragraph 96 of the judgment at *Ineos*, the Judge was alive to this point.

## **8. HUMAN RIGHTS ACT - PARAGRAPHS 43 - 54 OF CLAIMANT'S SKELETON ARGUMENT**

8.1 TMQC moved onto section 12(3) of the Human Rights Act 1988 and the definition of "publication".

8.2 TMQC again referred to *Ineos* and specifically paragraphs 85 and 86 where Morgan J held that s12(3) applied even in a protest context, but TMQC noted that Morgan J's reasoning did not in fact refer to the word "publication" in s12(3) but instead focused on the wider language in s12(1).

8.3 TMQC referred to *National Highways* in which at para 41 Lavender J said that section 12(3) was not applicable but without giving any reasoning.

8.4 TMQC made further submissions following his skeleton argument as to the legislative origin of s12(3) explained in *Cream* but which was perhaps not drawn to Morgan J's attention, the definition of publication and the meaning of that word in ordinary English and the judgment of Warby J in *Birmingham CC v. Asfar*.

8.5 TMQC submitted that s12(3) does not apply in the present context but that, if it does apply, the evidence satisfies the test of "likely" in s12(3) in any event, even on the basis of "more probable than not" which is how Morgan J applied it.

8.6 Further, TMQC said that in fact "likely" has been glossed heavily and does not mean "more likely than not". He referred again to *Cream* and read from paragraph 22 of the judgment, where Lord Nicholls said that the court should not make an order "*unless satisfied that the applicant's prospects of success at the trial are sufficiently favourable to justify such an order being made in the particular circumstances of the case*". TMQC said it was not clear why Morgan J thought that this reasoning did not apply in *Ineos*.

## **9. REFERENCE TO EVIDENCE**

9.1 Time 17:01 - TMQC had concluded the submissions on the law and turned to evidence.

9.2 TMQC said that he would not take the Judge separately through the evidence in detail as he had already had the opportunity to read and that as he had walked the Judge through the tests, he could apply the evidence to them himself.

9.3 TMQC submitted that the products stored at Shell Haven are of an explosive character, there was still a very volatile situation and that things could get out of hand very quickly in an unforeseeable way.

## **10. TERMS OF THE ORDER**

10.1 TMQC and the Judge went through the draft order itself, TMQC flagging the changes that had already been suggested and that it would be limited to Shell Haven only.

10.2 The Judge explained that he was content with paragraph 2 of the injunction.

10.3 TMQC queried why the order included reference to CPR 81.4 within paragraph 8 as it appeared premature and confusing. The Judge agreed that this should be removed.

10.4 TMQC and the Judge discussed formalities and the sealing of the order and agreed that this could be done either tonight or tomorrow morning.

10.5 Service of an unsealed order after 5pm would be good service.

## **11. PHYSICAL PROTECTION OF THE SITES - PARAGRAPH 55 OF CLAIMANT'S SKELETON ARGUMENT**

11.1 TMQC raised one final matter relating to paragraph 55 of the skeleton argument and the fact that there may be other methods apart from an injunction that could help to protect the sites, however, the Judge confirmed that the deterrent effect of having an injunction insures that even if some individuals persist, the injunction is having a positive effect.

## **12. CLOSING**

12.1 The Judge and TMQC finalised the Kingsbury matter and TMQC confirmed that the two parties would be corresponding with one another to try to get the order dealt with as soon as possible.

12.2 TMQC confirmed he had instructions that the Kingsbury application could be adjourned.

12.3 TMQC raised one final matter of the possibility of the Judge listening to the evidence on a separate injunction application (for Shell) which had been issued earlier for the Shell Centre Tower, where there have been some protests at the site within the past few days. TMQC stated that the Judge clearly would not have time to hear the matter today but asked if the Judge would be able to hear it tomorrow, explaining that the majority of the issues would be the same.

12.4 The Judge explained that this could be dealt with tomorrow morning and made a final reference to contacting the Local Authority to ensure that there was some correspondence between the two parties.

### **Hearing ends 17:18**