**IN THE HIGH COURT OF JUSTICE** **CLAIM NO:**

**QUEEN'S BENCH DIVISION**

**BETWEEN:**

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

**Claimant**

**and**

**PERSONS UNKNOWN DAMAGING, AND/OR BLOCKING THE USE OF OR ACCESS TO ANY SHELL PETROL STATION IN ENGLAND AND WALES, OR TO ANY EQUIPMENT OR INFRASTRUCTURE UPON IT, BY EXPRESS OR IMPLIED AGREEMENT WITH OTHERS, WITH THE INTENTION OF DISRUPTING THE SALE OR SUPPLY OF FUEL TO OR FROM THE SAID STATION**

**Defendants**

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**Claimant's Skeleton Argument**
**(Interim Injunction)**

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**Time Estimate (including pre-reading):** 2 hours

**Suggested Pre-Reading**

1. Application Notice dated 3 May 2022 [**3/12**]
2. Draft Order [**4/17**]
3. Draft Claim Form and Particulars of Claim [**1/3-2/11**]
4. Witness Statement of Benjamin Austin (C's Health, Safety and Security Manager), dated 3 May 2022 [**7/37**]
5. Witness Statement of Emma Pinkerton (of C's Solicitors) dated 3 May 2022 [**5/26**]

## Introduction

1. C seeks an urgent interim injunction against "persons unknown" to prevent persons unknown from conspiring to injure C's business by unlawful means. The relevant

unlawful means with which the injunction is concerned are the sabotage and blocking of its petrol stations around England and Wales.

2. C's business is the supply of fuel via a network of Shell-branded petrol filling stations. C's business, including via the network of petrol filling stations, is among the targets of the current wave of disruptive protest which began on 1st April under the banners of Just Stop Oil, Extinction Rebellion, and Youth Climate Swarm.

3. The current application is urgent because:

   (1) the actions of protesters have demonstrated, and persuaded C, that those involved are willing to trespass on petrol forecourts and damage them, as demonstrated by the vandalism of the Shell-branded petrol forecourt at Cobham Services and the BP-branded petrol forecourt at Clacket Lane Services, both on the M25.

   (2) these locations involve the storage of hazardous fuels, the use and storage of which is controlled because of the risks that they ordinarily pose.

   (3) the activities carried out by some protesters go far beyond lawful and peaceful protest and give rise to serious health and safety concerns.

   (4) the risk of repetition is obvious and 'imminent', in that it will occur without warning.

   (5) the activities are aimed at harming or disrupting C's business and are being coordinated, so that, even though the immediate subject of the unlawful acts is, in some cases and to some degree, the property of third parties (those persons or companies who operate the forecourt businesses), the threatened activities also constitute a threatened tort against C.

4. Details of the recent activities at Clacket Lane and Cobham (and of other attacks upon Shell Group's sites) are set out in the statement of Mr Austin, C's Health, Safety and Security Manger, (3.5.22) at paras 5.1 [**7/41**] to 6.4 [**7/44**].

5. The form of order sought is set out in the draft order served with the application notice ("the Order").

**Relevant legal tests to be applied**

6. Five layers of control are relevant, although to some degree they overlap.

   (1) First, because the application is for interim relief, there is the *American Cyanamid* test:

      (a) (subject to what is said below about s12(3) of the Human Rights Act 1998) is there a serious question to be tried?

(b) (if so) would damages be an adequate remedy for a party injured by the grant of, or failure to grant, an injunction?

(c) (if not) where does the balance of convenience lie?

(2) Secondly, because the application is, in part, brought against persons unknown, C must satisfy the guidance in *Canada Goose* para 82.

(3) Thirdly, because the application affects the Article 10 and 11 rights of the protesters, C must show that any interference with those rights is justified;

(4) Fourthly, for the same reason, C must satisfy section 12(2) of the Human Rights Act 1998 as to service;

(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 of "likelihood" of success at trial. C's position is that in fact s12(3) does not apply, but if it does apply, then nevertheless the evidence shows that C is "likely" (in the relevant sense) to obtain their desired relief at trial.

**Submissions**

7. Taking these 5 matters in turn:

***(1) The American Cyanamid test.***

8. The test for the grant of an interim injunction is familiar[1].

***(a) Serious question to be tried.***

9. The cause of action relied upon in this claim is conspiracy to injure by unlawful means. The elements of that tort were summarised in *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29 at [18]. They are:

(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.

*(i) Unlawful act*

10. The injunctions sought in the proceedings only restrain acts of a nature which are, by their nature, themselves unlawful, although they would only give C a direct cause of action where C is the entity in immediate possession of the land or equipment affected.

[1] *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (Not included in C's bundle of authorities)

All of the acts restrained constitute one or more unlawful acts, namely: trespass to land, trespass to goods, or private nuisance.

11. Many of the acts would also constitute criminal offences (such as criminal damage under s. 1(1) of the Criminal Damage Act 1971). However, for the purposes of this application C relies upon the fact that all of the acts relied upon would be actionable in tort[2] by the person in possession of the particular Shell Petrol Station, or the owner of the relevant equipment. However, C is not in legal possession of all of the Shell Petrol Stations, and does not own all of the equipment upon them. The factual position is explained in the statement of Mr Austin at paras 3.2-3.3 [**7/39**]. Accordingly, although the unlawful acts relied upon would clearly be actionable in tort, depending upon their precise location they may only be directly actionable in their own right by third parties.

12. In a claim for unlawful means conspiracy, where the 'unlawful means' employed are criminal but not themselves separately actionable by the claimant the House of Lords has held that the conspiracy is still actionable by that claimant (assuming the other elements of the tort are satisfied) where the means used were *"directed at the claimant"*: *Revenue & Customs Commissioners v. Total Network SL* [2008] 1 AC 1174, per Lord Walker at [94] and Lord Hope at [44].

13. In *JST BTA Bank v. Ablyaszov (No. 14)* [2020] AC 727 the Supreme Court consciously left open the issue of how far the same reasoning should apply to permit reliance by a claimant upon civil wrongs which were only actionable at the behest of third parties in contract and tort; an issue which the Supreme Court described as "complex" (at [15]). However, this issue was resolved in *The Racing Partnership Ltd* v. *Done Bros (Cash Betting) Ltd* [2021] Ch. 233, in which a majority of the Court of Appeal held that civil wrongs against third parties could also constitute the necessary 'unlawful means' for the tort of unlawful means conspiracy, subject to the important qualification that the *"unlawful means must have caused loss to the claimant, rather than merely being the occasions for such loss being sustained"* (per Arnold LJ at 155). This appears to be essentially a restatement of the principle expressed by Lord Walker in slightly different language in the *Total* case: that the relevant unlawful act, if not directly and separately actionable itself by the claimant, must have been *"indeed the means .. of intentionally inflicting harm"* on the claimant, rather than *"merely incidental*" to the intended harm (at [93]).

14. It is proper to draw the Court's attention to the fact that the unlawful act under consideration in *The Racing Partnership Ltd,* and which was not directly actionable by the claimant but only by a third party, was a breach of contract and not (as here) a tort. As far as counsel has been able to identify, there is no subsequent decision

[2] In the case of nuisance, upon proof of damage.

considering an unlawful means conspiracy where the 'unlawful means' relied upon have been a tort which was only actionable by a third party (i.e. not by the claimant in the conspiracy claim). However, C submits that there is no principled basis, or basis in authority, for confining the reasoning in *The Racing Partnership Ltd* only to breaches of contract, and excluding civil wrongs consisting of a tort.

15. Accordingly, C submits that the present state of the law is that the tort of unlawful means conspiracy can be based upon unlawful means consisting upon tortious acts by the defendants which are themselves only actionable by a third party, not the claimant, if those acts were the means of intentionally inflicting harm upon the claimant, and not merely incidental to that harm. In any event, there is clearly a 'serious question to be tried' as to whether this is the state of the law.

*(ii) Done with the intention of injuring C*

16. For the purposes of the relevant conspiracy tort, it is not necessary that the intention of injuring the claimant was the predominant purpose of the defendant. In the present case the Order is framed so as only to apply to acts done *"with the intention of disrupting the sale or supply of fuel to or from a Shell Petrol Station"*. The expressed intention which qualifies the scope of the order – an intention to interfere with C's business of supplying fuels via the petrol stations – is clearly a sufficient intention for these purposes (see the discussion of this point in *Cuadrilla* at [30]).

*(iii) Pursuant to an agreement with one or more other persons.*

17. Again the Order is framed so as only to apply to acts done "in expressed or implied agreement with any other person".

*(iv) Which actually injures the claimant*

18. As C's evidence shows, the conscious aim of these protests is to disrupt the sale of C's fuel through the Shell Petrol Stations. It is self-evident that activity which interrupts the operation of those sales will injure C, since it prevents sales which generate revenue for C.

19. Accordingly, it is clear that, if the actions which the Order restricts were to eventuate, C would have a good cause of action against anyone breaching the terms of the Order.

20. Subject to C also satisfying the requirements for a precautionary injunction (formerly known as a *quia timet* injunction), it is clear that there is a 'serious question to be tried' in respect of C's claim for final relief in this case.

***(b) Adequacy of damages for a party injured by the grant of, or failure to grant, an injunction.***

21. The remedy which C seeks within the proceedings is an injunction.

22. C has no reason for confidence that any individual who commits the tort which the injunction seeks to prevent would have the means to provide any financial remedy to C for financial injury which C would suffer directly from disruption to the supply of fuel. Any such damage suffered by C would also be extremely difficult to quantify, since they rely upon determining the financial effects of the disruption.

23. In addition, many of the restrained protesters create a serious health & safety risk for those working or in the vicinity of the Shell Petrol Stations (including the protesters themselves). The consequences for C (and for those people) of a serious health & safety incident obviously could not be adequately compensated in damages.

24. C therefore submits that damages could not be an adequate remedy for any injury suffered by C from the conduct which the injunction seeks to prevent, either in principle or in practice.

25. Conversely, it is difficult to envisage how the making of the injunction could cause any injury to any person at all, given its terms — or, at least, any injury that could not be compensated by an award of money. C freely offers the usual cross-undertaking to this end. C's means to honour the cross-undertaking needs no exposition.

***(c) Balance of convenience.***

26. Apart from questions arising under the Convention, the balance of convenience obviously comes down in C's favour: apart from the Convention, there is really nothing in the scales the other way.

***(2) The Canada Goose guidance.***

27. In *Barking & Dagenham LBC & Otrs v. Persons Unknown* [2022] EWCA Civ 13, the Court of Appeal has clarified that there is no jurisdictional difference between an interim and a final injunction; that (at least in the context of injunctions to prohibit unauthorised encampments) interim or final injunctions should be time-limited, and that it is good practice to provide for their review; but subject to that, it has affirmed the continuing relevance of the procedural guidance in *Canada Goose UK Retail Ltd v. PU* [2020] 1 WLR 2802 in relation to interim relief.

28. Taking the *Canada Goose* requirements in turn (from para 82 of the judgment):

***"(1) 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."***

29. C has not identified any persons who can properly be named as defendants to the claim on the basis that there is a real risk of them carrying out any of the acts proscribed by the injunction.

30. C has managed to identify five people by name who have to some extent been involved in the past protests at Clacket Lane Services and Cobham Services, see w/s Pinkerton paras 2.1-2.6 [**5/27-28**]. However, in relation to four of the five, C is aware that they are already subject to bail conditions which include a requirement not to enter any petrol station in England and Wales. In relation to the fifth, although C has identified a name, that person's role is entirely unclear.

31. In the circumstances, C cannot properly assert that there is a 'real risk' or 'strong probability' that its rights will be infringed by those particular individuals in the future in a manner which the injunction seeks to protect. C therefore considers it inappropriate to name them as defendants on the current available information.

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

32. This has been achieved in the headers to the relevant court documents including the Claim Form and draft Order.

***"(3) 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."***

33. The risk of the tort is demonstrated by:

    (1) The explicit and continuing threats of disruption made by protest groups/organisers, as identified by Mr Austin at paragraph 7.2 [**7/45**].

    (2) The recent incidents at Clacket Lane Services and Cobham Services.

34. 'Imminence' in this context means that, in the circumstances, the claim is not brought prematurely, in the sense that C could obtain proper vindication of its rights if an injunction was brought (for example) once the threatened acts eventuated. That is plainly the situation in this case.

***"(4) 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."***

35. The Order sets out the proposed means of service of the Order and of the proceedings. It Order provides for service of proceedings by:

    (1) Posting of notices at the entrances, and other strategic points, on the Shell

Service Stations. The notices explain the nature and effect of the injunctions, and direct the reader to a URL and solicitor contact details at which copies of the Order and proceedings can be obtained

(2) Placing notice of the existence of the injunction on Shell's website.

36. Although it may be difficult to ensure that warning notices are correctly posted on absolutely every one of the 1,062 Shell Petrol Stations, it is submitted that these steps as could be expected to bring the proceedings to the attention of anyone who might be in danger of breaching the Order. It should be emphasised (and is recited in the Order) that, although these steps will constitute formal service, it remains the case that no individual can be in breach of the Order without knowing of its existence.

37. Shell also proposes to email the injunction to a list of email addresses which have already been identified in connection with the current wave of protests, albeit not as an element of the formal acts of service. Since in *Canda Goose* the Court of Appeal was critical of reliance upon the emailing of individuals or organisations as a means of service on the public in general, the Order directs that this step be taken but does not constitute it to be good service.

38. In the current context, given the current urgency, and given that there are no named defendants, it is submitted that there are no other reasonably practical steps which could be taken to notify

***"(5) 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."***

39. The Order tracks the threatened torts and does not seek to prohibit lawful conduct.

***"(6) 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."***

40. The Order respects all of this guidance. Like the injunction in *Cuadrilla Bowland* the injunction and description of the defendants use the language of intention. That is necessitated by the nature of C's cause of action, for which intention is a necessary element.

41. It would obviously be possible to frame an injunction which simply forbids most of the acts, which are themselves unlawful. However, such acts are not themselves

separately actionable by C, so that the relief granted would exceed C's cause of action. Whilst the 5th principle identified in *Canada Goose* (quoted above) permits an injunction to be framed so as to potentially also to capture lawful behaviour, that is only permissible where there is no other proportionate means of protecting C's rights. C therefore submits that the appropriate course in this case is to frame the injunction in the language of intention, in order to seek to ensure that the acts prescribed correspond to the tort on which this claim is founded.

42. Moreover, there are real practical difficulties in framing all of the relevant acts in this case so as to exclude unobjectionable activities without referring to the intention of the actors. For example, it would be difficult to frame an injunction which prevented the causing of damage to equipment at the Shell Petrol Stations so as to avoid capturing accidental damage, without referring to the intention of the party causing the damage.

43. Accordingly, C submits that the references to intention are "strictly necessary to correspond to the threatened tort". They also adopt non-technical language, as required.

***"(7) 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. …"***

44. The Order identifies the protected premises by reference to their physical nature as petrol filling stations and their Shell branding. It is submitted that by these means, and given the nature of the prescribed acts (which do not, for example, include mere trespass), the geographical limits of the Order are appropriately clear for the purposes of this order. No person could reasonably be in doubt about whether they were breaching such an order.

45. The Order proposes a return date. C expects this to be 2 or 3 weeks from the date of the Order being made, subject to the preference of the Court. The temporal limits are therefore also clear.

***(3) <u>Articles 10 and 11.</u>***

46. Both in relation to the issue of whether there is a serious issue to be tried, and in relation to the general exercise of the Court's discretion, the Court must consider, in the round, whether appropriate weight has been given to Ds' qualified rights under Article 10 (freedom of expression) and Article 11 (freedom of assembly) of the Convention. In protest cases, Articles 10 and 11 are linked. The right to freedom of assembly is recognised as a core tenet of a democracy. There exist *Strasbourg* decisions where protest which disrupted the activity of another party has been held to fall within Articles 10 and 11. But *"deliberately obstructing traffic or seriously disrupting the activities of others is not at the core of these Convention Rights": DPP v. Cuciurean*

[2022] EWHC 736 per Lord Burnet of Maldon, CJ at [36].

47. However, Articles 10 and 11 do not bestow any *"freedom of forum",* and do not include any ancillary right to trespass on private property: *Ineos* (CA) per Longmore LJ at [36]. Neither could they reasonably be argued to include an ancillary right to damage private property or to injure others.

48. It is of course possible to imagine at least in theory a scenario in which the inability to trespass upon particular property had the effect of preventing any effective exercise of an individual's freedoms of expression or assembly. In such a case, barring entry to that property could be said to have the effect of *"destroying the essence of those [Article 10 and 11] rights"*. If that were the case, then the State might well be obliged (in the form of the Court) to regulate (i.e., interfere with/ sanction interference with) another party's rights in order to vindicate effective exercise of the protestor's rights under Articles 10 and 11: see *Cuciurean* at [45]. But that would require the most extreme hypothetical situation. And this is plainly not such a case. As Lord Burnett held in *Cuciurean* at [46]:

> *"[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."*

49. The only acts within the terms of the Order which might at least potentially occur without a trespass to land or goods are the blocking or impeding of access to the Shell Petrol Station. Such activity could theoretically fall within the Act even if it was carried out from the public highway. Such activity would still constitute a private nuisance (see *Cuadrilla* at [13]). So far as that is concerned, even in relation to the highway, the right of protest does not extend to the right to conduct coercive activities.

50. C accepts that protest on the public highway is not always unlawful, or constitutes either a trespass (actionable by the highway owner) or a nuisance, merely because it results in some disruption. The Supreme Court held in *DPP v. Ziegler* [2021] 3 WLR 179[3] that the issues which arise under Articles 10 & 11 require consideration of five questions (at [16]):

    (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"?

[3] This case is not within C's bundle of authorities. C relies upon the summary and explanation of it by Lavender J in *National Highways v. PU* [2021] EWHC 3081, discussed further below.

(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?

51. Those restrained by the terms of an injunction from obstructing access to the service station from the public highway would otherwise be exercising their Article 10 and 11 rights, and the grant of an injunction would constitute some interference with those rights – even if not within "the core" of those rights. That interference is prescribed by the law concerning the vindication of C's rights (and indeed the private law rights and A1P1[4] rights of others), and C's consequent entitlement to an injunction. The vindication of C's rights is itself a legitimate aim. The vindication of third party rights, and the protection of the wider public from interference with its access to fuels are two more. Accordingly, the issue of the Court in such a case is whether such interference as the injunction might comprise is "necessary in a democratic society" to achieve that aim.

52. That issue can also be properly expressed as whether the potential inference with Ds' rights is "proportionate" which, in turn, requires consideration of 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?

53. In the similar context of the Insulate Britain protests, in *National Highways Ltd v. PU* [2021] EWHC 3081, Lavender J (at [38]-[40]) summarised and considered the factors which Lords Hamblen and Stephens JSC had identified in *City of London Corpn v. Samede* [2012] PTSR 1624[5] as being potentially relevant to the issue of proportionality, and consequently how the four proportionality sub-questions might be answered.

54. On this application C must show only a serious question to be tried (subject to what is said below about section 12(3) of the HRA 1998). For similar reasons to those

[4] Article 1 of Protocol 1 "1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions…."
[5] This case is not within C's bundle of authorities. C relies on the summary and explanation of it by Lavender J in *National Highways v. PU* [2021] EWHC 3081, discussed further below.

expressed by Lavender J in *National Highways* C submits that the four sub-questions relevant to the "proportionality" test can be answered as follows — thus satisfying the requirements for obtaining that part of the relief which might potentially affect the rights of those on the highway:

(1) The aims of restraining Ds' activities are the vindication of C's own private law rights, the avoidance of harm to staff and the public (both of which also have consequent harmful effects upon C), and the avoidance of disruption to the provision of fuel to the public.

(2) There is an obviously rational connection between the means chosen in this case and the aim in view: the means narrowly focus on the prevention of interference with C's rights and with the distribution of its fuel.

(3) There is no less restrictive alternative means available to achieve the aim. An action in damages would not prevent the disruption which Ds seeks to cause. Harm to C would be hard to quantify and, in so far as it is harm to C arising from potentially serious injury to others, it is impossible to quantify. But there is little reason to suspect that any identifiable defendant would be capable of satisfying any claim anyway. Although the police are carrying out their functions, this has not stopped disruption and it also seems clear that those participating in the protests are willing to bear the consequences of prosecution.

(4) The grant of an injunction clearly strikes a fair balance between Ds' rights, C's rights, and the general interests of the community. The observations of Leggatt LJ in *Cuadrilla Bowland Ltd v. PU* [2020] 4 WLR 29 at [94]-[95] are apt:

> *"… 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 <u>compel</u> others to act in a way you desire"* [emphasis added]

55. Any interference with anyone's Article 10 and 11 rights caused by a Court Order preventing that person's deliberate disruption of C's business, and not mere protest, is outweighed by:

(1) Ds' interference with the ability of C (and third parties) to carry out their lawful business;

(2) the wider interests in protecting Ds, and those in the vicinity of the Shell Petrol Stations, from injury, and the potential harm to C which would eventuate if such an injury were to eventuate;

(3) the interest of the public in continuing access to the fruits of C's undertaking.

56. Consequently, to the degree to which the injunctions sought might interfere at all with any individual's Article 10 & 11 rights, any such interference is proportionate, and does not require the Court to modify the approach which it would take (i.e. before consideration of the Convention) to the threatened interference with C's rights.

***(4) Section 12(2) of the Human Rights Act 1998 as to service.***

57. S12 is quoted by Morgan J in *Ineos Upstream v. PU* [2017] EWHC 2945 at [84]. S12(1) and (2) provide:

> "*12(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.*
>
> *(2) If the person against whom the application for relief is made ('the respondent') is neither present nor represented, no such relief is to be granted unless the court is satisfied — (a) that the applicant has taken all practicable steps to notify the respondent; or (b) that there are compelling reasons why the respondent should not be notified."*

58. Subsection (3) is addressed separately, below.

59. C has not identified any persons who can be named (as addressed above). No person becomes a defendant to this action unless they breach the terms of the Order sought. So there is no 'respondent'. Further, there is the danger (recognised by Morgan J in *Ineos Upstream v. PU* [2017] EWHC 2945 at [96]) that advance publicity of the present application might accelerate attempts to disrupt and cause damage at Cs Petrol Stations etc, ahead of any order made by the Court.

60. Clearly the issue of how service might alternatively have been affected, or notice of this return date been given, is one upon which there can be different approaches. If present or represented, Ds could have made submissions to the effect that further and additional measures could have been taken to publicise the hearing. It might be said on behalf of Ds (for example) that the existence of the proposed application could have been emailed to the addresses or advertised in local or national press. Whilst it is right to draw these potential arguments to the attention of the Court in the absence of any representation for Ds, C submits that it remains the case that s12(2) is satisfied.

***(5) S12(3) of the Human Rights Act 1998 as to "publication".***

61. S12(3) provides:

> *"(3) 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."*

62. In *Ineos* Morgan J said (at [84]-[86]) that s. 12(3) applies to protests. The Court of Appeal has also proceeded on the same basis, although seemingly without argument (eg in *Ineos* [2019] 4 WLR 100 at 17(2), 33–34, 37, *Cuadrilla* 51 and *Canada Goose* 78). On the other hand, in the *National Highways* case, Lavender J said at para 41 that section 12(3) "is not applicable", but without giving reasons.

63. In *Ineos* Morgan J also proceeded on the basis that "likely" meant "more likely than not" in the context of the case before him.

64. It is submitted on the evidence that C meets the test on the basis of Morgan J's expression of the threshold. However, so far as is necessary, C submits that this is not the threshold, at least in the present case.

65. As to the first point: Lavender J was correct to state that section 12(3) is inapplicable in this context. Lord Nicholls explained the provenance of s12(3) in *Cream Holdings v. Banerjee* [2005] 1 AC 253 at para 15. The statutory purpose so described has the specific function of enhancing the protection afforded to "publications" as ordinarily understood — a free press being the lifeblood of democracy. "Publication" is an ordinary English word. A "publication" is something which is "published" — and while a person who undertakes protests may well by doing so "publicise" his or her views, he or she does not thereby "publish" them. Like many English words, "publication" has a certain protean quality and can embrace "publication" not only by books and newspapers but also by broadcasting and social media and so on. However, on no view does the ordinary meaning of "publication" cover any activity at all, merely because it is publicity-seeking and undertaken in the furtherance of an expression of views. As a matter of ordinary English, not every act of "publicity" is a "publication". One might readily accept that the protesters are seeking to "publicise" their views by undertaking their activities – but a terrorist might seek to "publicise" his views by exploding bombs. You do not "publish" when you detonate a bomb and you do not "publish" when you damage private property or impede access to it, even if by doing so you "publicise" your cause.

66. Warby J made a similar point in *Birmingham City Council v. Afsar* [2019] EWHC 1560 in which an ex parte injunction had been obtained, without reference to s12(3), which among other things prevented "the printing or distribution of leaflets" (Appendix B of the judgment). Warby J was critical of the applicant's failure to refer to s12(3) (and also for its failure to refer to the practice direction on Interim Non-Disclosure Orders at [2012] 1 WLR 1003) and discharged the ex parte injunction on the basis of material non-disclosure (though he made a new injunction). At paras 60–61, Warby J drew attention to the fact that: "*There are no doubt many ways of behaving anti-socially that do not involve speech, or writing, or other forms of expression*". Implicit in Warby J's comment is the premise that these behaviours, unlike printing/distributing leaflets,

would not amount to "publication", and so would not engage s12(3).

67. Having regard to the authority cited above, including the Strasburg jurisprudence mentioned in the English cases, there is no reason to give "publication" a strained meaning so as to cover the kinds of activity in question in the present case. Such activities simply are not "at the core" of the Convention rights of freedom of expression/ assembly. "Publication", by contrast, in the ordinary sense of "something that is published", is clearly at the very core of those rights. It is intelligible that it should receive special protection through s12(3).

68. It is unclear from his reasons why Morgan J thought s. 12(3) applied in *Ineos*. From his analysis it appears he may mistakenly have assumed that the requirement of s. 12(3) applied in any case which might affect the exercise of the Convention right to freedom of expression. However, that analysis does not give effect to the distinction between the scope of s. 12(1) and the narrower scope of 12(3).

69. As to the meaning of the word "likely" within s. 12(3), Lord Nicholls explained in *Cream Holdings* that "likely" does not mean "more likely than not" in the context of an interim application: para 16–22. Morgan J in *Ineos* appears to have taken Lord Nicholls to have asserted that this was the default position, save where other circumstances call for a different threshold. However, that is inconsistent with Lord Nicholl's ultimate conclusion (at [22), which was that the word "likely" in s. 12(3) required a somewhat higher test than the usual *American Cyanamid* threshold, but one which was tailored to the circumstances of the particular case:

> *"the effect of section 12(3) is that the court is not to make an interim restraint order unless satisfied 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"*

70. However, as indicated, C's position is that the evidence it has lodged is (more than) sufficient to satisfy s12(3), even if s12(3) applies, and even if "likely" means "more likely than not".

**Full and frank disclosure – Proportionality issue**

71. In light of C's duty of full and frank disclosure, it is appropriate to draw the following points to the Court's attention, being points which might be raised by Ds against the grant of the application:

    (1) Those taking part in the protests perceive there to be serious environmental and economic disadvantages to the exploration, development and production of fossil fuels in the UK and are committed to ameliorating climate change and changing government policy. The sincerity of the protesters' views, and the fact that many

agree with their aims (if not necessarily their means) were recognised in both *Zeigler* and *Samede* as potentially relevant factors in the assessment of the proportionality of the interference with their Article 10 and 11 rights.

(2) It may be said that there are alternative methods available to protect the Shell Petrol Stations other than the grant of an injunction, that the police themselves have intervened in relation to the previous examples of the same behaviour, and that local authorities have potentially wider and better powers to seek to restrain unlawfully disruptive protests. However, the nature of the risk to C (and the serious underlying health & safety risk to the public and to those working at Shell Petrol Stations), and the additional potential deterrent effect of an injunction, clearly amply justify the Court granting the Order to ensure that the interests of both C and the wider public are properly protected.

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