IN THE HIGH COURT OF JUSTICE Claim No QB-2022-001098

KING'S BENCH DIVISION

B E T W E E N:

(1) ESSO PETROLEUM COMPANY, LIMITED
(2) EXXONMOBIL CHEMICAL LIMITED

Claimants

-and-

PERSONS UNKNOWN AS FURTHER DESCRIBED IN THE RE-AMENDED CLAIM FORM

Defendants

CLAIMANTS' SKELETON ARGUMENT

Hearing date, 27 March 2023

Time Estimate: assuming the matter remains unopposed, 2.5hrs of judicial time, and 2.5 hours of pre-reading.

***Suggested Pre-Reading, in suggested order*:**

1. Judgment of Bennathan J, dated 27 April 2022 **[AB/225]**
2. Judgment of Ellenbogen J, dated 6 April 2022 **[AB/247]**
3. Anthony Milne WS, dated 3 April 2022 **[HB1/310]**
4. Stuart Sherbrooke Wortley WS, dated 4 April 2022 **[HB1/42]**
5. Nawaaz Allybokus WS3, dated 22 April 2022 **[HB2/78]**
6. Martin Pullman WS, dated 27 February 2023 **[HB2/270]**
7. Nawaaz Allybokus WS5, dated 20 March 2023 **[HB2/370]**
8. Draft Order **[HB2/3]**

Introduction

1. Cs obtained an interim injunction *ex parte* before Ellenbogen J on 6 April 2022 ("the 6 April Order") **[HB2/14].** At the return date on 29 April 2022, Bennathan J extended the order ("the 29 April Order") **[HB2/254],** with the usual requirement of a review.

2. Cs now seek a continuation of the 29 April Order for a further year. This is the same

approach as was adopted in *Valero Energy Ltd v Persons Unknown* (QB-2022-000904): another case of an injunction being used to protect oil terminals, granted by Soole J on 20 January 2023.

The Sites

3. The sites which are the subject of the claim (the "Sites"), the titles to the Sites and the Claimants' interests in those Sites are set out in the Witness Statement of Stuart Wortley dated 4 April 2022 **[HB1/42]**. The Sites are shown in the Plans attached to the 6 April Order **[HB2/26ff]**.

4. So far as concerns tenure: a mixture of freehold and leasehold interests is involved. This was considered in extensive detail before Ellenbogen J, who was satisfied as to Cs' title. Since then, no person has come forward to suggest that there is any lack of title on Cs' part, such as to deprive them of proper standing in relation to the torts on which they rely in these proceedings. For present purposes, therefore, we simply list the relevant sites, with cross-references to where the identifying photographs and land registry entries (though some of the land is unregistered) can be found should the need arise:

   (1) Fawley Petrochemical Complex: Marsh Lane, Southampton SO45 1TH: **[HB1/74]; [HB1/107]; [HB1/103]**.

   (2) Hythe Terminal: New Road, Hardley S045 3NR: **[HB1/120]**; **[HB1/74]**.

   (3) Avonmouth Terminal: St Andrew's Road, Bristol BS11 9BN: **[HB1/179]; [HB1/122]**.

   (4) Birmingham Terminal: Tyburn Road, Birmingham B24 8HJ: **[HB1/193]; [HB1/185]; [HB1/188]**.

   (5) Purfleet Terminal: London Road, Purfleet, RM19 1RS: **[HB1/228]; [HB1/202]; [HB1/206].**

   (6) West London Terminal: Bedfont Road, Stanwell, Middlesex TW19 7LZ: **[HB1/250]; [HB1/239]**; **[HB1/242]; [HB1/245]; [HB1/232]; [HB1/235]**.

   (7) Hartland Park Logistics Hub: this site is at Ively Road, Farnborough: **[HB1/298]; [HB1/252]**.

   (8) Alton Compound: this is located at the A31, Hollybourne: **[HB1/304]; [HB1/300]**.

5. So far as concerns use: the Sites are a mixture of oil refineries/terminals/logistics hubs/compounds. Their substance and importance not only to Cs but to the nation, are really self-explanatory: but, by way of example only, the Fawley site (number 1 above) is the largest oil refinery in the UK and provides 20% of UK refinery capacity.

Background.

6. The general background is common knowledge but in outline: in early 2022, there had been indications of potential threats of trespass and acts of nuisance in relation to the Just Stop Oil and Extinction Rebellion campaigns: see Milne WS ¶¶7.1–7.5, 9.1–9.30 **[HB1/313, 316-322]** . This resulted in an extensive and co-ordinated campaign of direct action against oil terminals and refineries, which commenced on 1 April 2022: see Milne WS ¶¶8.1–8.8; Wortley WS ¶¶40–41; and Allybokus WS#3.

7. Matters of immediate concern to Cs are recorded in Allybokus WS#3 ¶22:

   (1) On 4 April 2022, 15 individuals attended the West London Terminal and 2 of them climbed on top of tensegrity structures in order to block the entrance to the Terminal.

   (2) On 6 April 2022, a group of individuals blocked a roundabout on the main route from the M25 and London to the Purfleet Terminal by jumping onto a truck and gluing themselves onto the road.

   (3) On 6 April 2022, a group of individuals blocked a roundabout on the main route to the West London Terminal by jumping onto trucks.

   (4) On 8 April 2022, around 30 individuals blocked a main route from the M25 and London to the Purfleet Terminal.

   (5) On 13 April 2022, a group of individuals blocked an access road near the Purfleet Terminal and 3 individuals climbed on top of a tanker.

8. These were not isolated events: "direct action" was being taken at other oil sites around the country: see Allybokus WS#3 ¶¶23–24; and Pullman WS ¶¶17–20.

9. Cs felt compelled to seek the Court's protection. The hearings which took place and the orders then made have already been referenced (para 1 above).

10. As explained by Pullman WS ¶¶23–26, the threat of direct action at and against the Sites continues **[HB2/276ff]**. For example, Just Stop Oil and related individuals:

    (1) Have targeted C1's Southampton to London pipeline (which does not comprise one of the Sites). This led to separate proceedings being brought in August 2022 and injunctions being granted by Eyre J (16 August 2022) and then HHJ Lickley KC (21 October 2022). 1 individual was committed to prison for breach of Eyre J's order and another individual admitted that he had breached Eyre J's order with the Court accepting his undertaking not to do so again.

    (2) Have targeted the offices of the Claimants' solicitors including by defacing the front of the building: see Allybokus WS #5 ¶¶22-23.

(3) Have organised a large number of events in order to carry out direct action against a number of targets, all with some connection to the energy industry.

(4) In its press releases, JSO continues to say things like "expect us every day and anywhere" and that its supporters "will be returning – today, tomorrow and the next day – and the next day after that – and every day until our demand is met: no new oil and gas in the UK".

(5) JSO has posted social media messages asking individuals to "Sign up for arrestable direct action... *".*

11. This demonstrates that the risk of direct action looks likely to continue.

12. "Direct action" produces a variety of consequences, all of them harmful and many of them dangerous: see Milne WS ¶¶10.2 and 11.3–11.6. At the risk of stating what is perhaps self-evident, by way of summary/ example:

(1) The operations at the various sites can involve use for the production and storage of highly flammable and otherwise hazardous substances. The Fawley site and each of the Terminals are regulated under the Control of Major Accident Hazards Regulations 2015 by the Health and Safety Executive. As one would expect, access to these sites is very strictly controlled.

(2) Cs' employees who work at such locations are appropriately trained and equipped. But the protesters do not understand the hazards, are untrained and unlikely to have the appropriate protective clothing or equipment. There are therefore risks in respect of personal injury and health and safety.

(3) Cs have important contractual obligations to customers which have to be fulfilled in order to 'keep the country moving', including road, rail and air travel. There is a clear risk of disruption to Cs' operations and the subsequent impact upon the UK's downstream fuel resilience.

Relevant legal tests

13. 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?

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

(3) Secondly, because the application is, in part, brought against persons unknown, Cs must satisfy the guidance in *Canada Goose UK Retail Ltd v. PU* [2020] 1 WLR 2802 at para 82 **[AB/119]**.

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

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

(6) The fifth matter relates to s12(3) of the Human Rights Act 1998. Where it applies, it displaces the "serious question to be tried" test with a higher threshold of "likelihood" of success at trial. Cs' position is that in fact s12(3) does not apply, but if it does apply, then nevertheless the evidence shows that Cs are "likely" (in the relevant sense) to obtain its desired relief at trial.

Submissions

14. Taking those matters in turn:

(1) The American Cyanamid test

Serious question to be tried: trespass

15. Cs' cause of action, on which the current injunction is based, is trespass. This is the simplest of torts and needs no elaboration. The entry of any person — protester or otherwise — onto any of the Sites, without permission or consent of Cs, is a clear trespass. So too, there would be a continuing trespass by remaining upon such site(s) without the appropriate consent.

Adequacy of damages for a party injured by the grant of, or failure to grant, an injunction

16. Damages would not be an adequate remedy for Cs. The risks which arise involve serious health and safety risks as well as financial risks in the event that the direct action involves operational disruptions. These damages are unquantifiable. Further, it is unlikely that any of the Ds would be able to pay such damages: see Milne WS ¶12.3.

17. 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. Cs freely offer the usual cross-undertaking to this end: Milne WS ¶¶13.2–13.3.

Balance of convenience

18. The balance of convenience favours Cs: there is really nothing in the scales the other way.

(2) The Canada Goose guidance

19. In *Barking & Dagenham LBC & Ors v. Persons Unknown* [2022] EWCA Civ 13; [2022] 2 WLR 946 **[AB/159]**, the Court of Appeal clarified that there is no relevant 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*. *Barking & Dagenham* has gone on appeal to the Supreme Court but at the time of writing judgment is awaited.

20. Taking the *Canada Goose* requirements in turn (from para 82 of the judgment **[AB/119]**):

"(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'."

21. Cs seek to join the individuals as named defendants by way of the applications dated 27 February 2023 and 21 March 2023. These individuals were arrested, charged and convicted of criminal offences in relation to their direct action at the Birmingham Terminal (D4-D8) and the Purfleet Terminal (D9). Their identities have come to the attention of Cs by virtue of their involvement in criminal proceedings.

22. Otherwise, Cs have not identified any individuals who pose a real risk of carrying out any of the acts proscribed by the injunction.

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

23. This has been achieved in the headers to the relevant court documents.

"(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."

24. "Imminence" in this context means that, in the circumstances, the claim is not brought prematurely – as might be the case if Cs could obtain proper vindication of their rights by waiting to bring a claim for an injunction after the threatened acts eventuated.

25. A sufficiently real and imminent risk is demonstrated by:

    (1) The incidents of actual disruption which have already taken place in relation to the Sites and which are described in Milne WS ¶¶8.1–8.8 and Allybokus WS#3 ¶22.

(2) The incidents of actual disruption which have already taken place in relation to C1's other projects, as described in Pullman WS ¶¶14–15.

(3) The explicit and continuing threat of disruption posed to Cs and those in the energy sector, in particular by Just Stop Oil, as identified in Pullman WS.

"(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."

26. Effective notice is achievable: Milne WS ¶¶15.2–15.6. The order can be served by affixing it to prominent positions at the Sites and the Chemical Plant, in order to ensure that it comes to the attention of any person who is in close proximity, and in various other ways. The methods of service are those already used in the 27 April Order.

"(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."

27. The forms of relief in the first two injunctions set out in the draft order sought would prohibit Ds from entering or remaining upon the Sites in question or causing damage or affixing themselves or items thereto or erecting structures thereon. These prohibited acts all correspond to the tort of trespass and do not prohibit any 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."

28. The terms of the injunction sought are precise. It will be obvious to all persons what activities they are prohibited from undertaking, namely entering or remaining upon the identified sites, causing damage, affixing people or objects to the Sites, erecting structures on them and obstructing the accesses to and exits from the Sites.

"(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. ..."

29. The prohibition is clearly defined by reference to the specific Sites, the geographical location of which is identified by their address and the accompanying plans. In relation to the temporal limits, a 1-year period is sought at this stage subject to further order in the meantime:

a 1-year period was previously granted by Bennathan J in the 27 April Order in these proceedings and, in similar circumstances, a period just greater than 1 year was recently granted in the *Valero* litigation by Soole J. A similar approach was also adopted by Soole J in the *Exolum* litigation in an Order, dated 20 January 2023.

(3) Articles 10 and 11 ECHR

30. As the Court may be aware, many of these cases have become bedevilled by a perceived need to dwell or at least expatiate on Convention matters in terms of whether an injunction would have an effect which is "proportionate" on the Convention rights of protesters. In view of recent developments in the Supreme Court, it is debateable whether this is appropriate in any case, even where the public has a right of some kind to be present, such as the highway: *Re Abortion Services* [2023] 2 WLR 33 **[AB/294]**, *passim* but esp paras 28–30 and 53–61. The reasoning in that decision suggests strongly that the role of the Convention has been misunderstood; that, properly applied in this context, its role is to explain why, in English law, we have tests such as the *American Cyanamid* test and to show that, without such tests, we would need them; but that beyond this the Convention provides no proper basis for operating (so to speak) a "parallel" set of tools for testing the lawfulness the decisions taken by independent judges when they conscientiously apply legal tests which are, themselves, Convention-compliant. So viewed, there can be no possible basis for impugning the tests developed by English law over centuries in connection with whether to grant or withhold an injunction: they are the very embodiment of the balancing process which the Convention requires. They may occasionally be "hard cases": but the Convention does not guarantee that there will never be any of those: *Abortion Services* paras 35 and 137.

31. However, this interesting topic only tangentially arises, if at all, because in the present case Cs do not seek to restrain Ds from conduct on land to which they have a right of access (such as the highway) for protest or otherwise. They seek only to restrain Ds from entry onto Cs' own property. The case law demonstrates that direct action occurring on private land is not protected by Articles 10 and 11 — even if those Articles can in theory be invoked in this context outside a challenge to the Convention-compliance of the legal tests applied in English law to the question of whether or not to grant an injunction: *DPP v. Cuciurean* [2022] EWHC 736 (Admin) **[AB/196]** at paras 45 and 76-77.

32. For these reasons, Articles 10/11 cannot provide any defence to this claim.

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

33. Section 12 states:

> "(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."

34. Section 12(2) has been satisfied on the basis that Cs have taken all practicable steps to notify Ds. In particular:

(1) The 27 April Order was served pursuant to the service provisions within that Order in relation to Ds: see Nawaaz Allybokus WS5, dated 20 March 2023, ¶4.

(2) The application notice, dated 27 February 2023, and the Witness Statement of Martin Pullman, dated 27 February 2023, were served personally on D4-D6 and D8-D9 and pursuant to the alternative service provisions in the 27 April Order, as well as other methods, in relation to Persons Unknown and D7: see Nawaaz Allybokus WS5, dated 20 March 2023, ¶¶5-18.

(5) Section 12(3) of the Human Rights Act 1998 as to "publication"

35. Section 12(3) provides that:

"(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."

36. There has been some debate in the cases about whether this applies to protest activities which include no "publication" of leaflets etc. Bennathan J in the present case thought he was bound by Court of Appeal authority to hold that it does so apply: but it has since been established that this view of what the Court of Appeal has decided, is not correct. The view which has now emerged is, clearly, "no": e.g., *Shell v. Persons Unknown* [2022] EWHC 1215 (QB) **[AB/256]** at paras 66–76; and HHJ Lickley KC sitting as a judge of the High Court in *Esso v Breen* [2022] EWHC 2664 at para 40 **[AB/285]**. However, even if it applies, the only effect is to adjust the threshold for the *American Cyanamid* test somewhat. How much? As it turns out, not by much, because as glossed by Lord Nicholls in *Cream Holdings* the test of "likely" actually means that the applicant's prospects of success are "sufficiently favourable to justify such an order being made in the particular circumstances of the case": *Cream Holdings Ltd v. Banerjee* [2005] AC 253 at para 22 **[AB/11]**. In any event, Cs suggest that they are more likely than not, to succeed at any trial. And so, on any possible view, the s12(3) threshold is passed, even if (contrary to the better view) s12(3) applies.

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23rd March 2023