AMENDED PUSUANT TO CPR 40.12
Neutral Citation Number: [2023] EWHC 1229 (KB)

Case Numbers: QB-2022-001241
QB-2022-001259
QB-2022-001420

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/05/2023

Before :

MRS JUSTICE HILL

- -

Between:

Case Number: QB-2022-001241

SHELL UK LIMITED

Claimant

-and-

PERSONS UNKNOWN ENTERING OR REMAINING AT THE CLAIMANT'S SITE KNOWN AS SHELL HAVEN, STANFORD-LE-HOPE (AND AS FURTHER DEFINED IN THE PARTICULARS OF CLAIM) WITHOUT THE CONSENT OF THE CLAIMANT, OR BLOCKING THE ENTRANCES TO THAT SITE

Defendants

Case Number: QB-2022-001259

SHELL INTERNATIONAL PETROLEUM LIMITED

Claimant

-and-

PERSONS UNKNOWN ENTERING OR REMAINING IN OR ON THE BUILDING KNOWN AS SHELL CENTRE TOWER, BELVEDERE ROAD, LONDON ("SHELL CENTRE TOWER") WITHOUT THE CONSENT OF THE CLAIMANT, OR DAMAGING THE BUILIDNG, OR DAMAGING OR BLOCKING THE ENTRANCES TO THE SAID BUILDING

Defendants

Case Number: QB-2022-001420

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SHELL UK 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, IN CONNECTION WITH ENVIRONMENTAL PROTEST CAMPAIGNS WITH THE INTENTION OF DISRUPTING THE SALE OR SUPPLY OF FUEL TO OR FROM THE SAID STATION

Defendants

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Myriam Stacey KC and Joel Semakula (instructed by **Eversheds Sutherland**) for the **Claimants**
Stephen Simblet KC and Owen Greenhall (instructed by **Hodge Jones & Allen**) for Jessica Branch

Hearing dates: 25 and 26 April 2023

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Approved Judgment

This judgment was handed down remotely at 9:30am on 23 May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE HILL

Introduction

1. The Claimants in the first two of these claims are Shell UK Limited and Shell International Petroleum Limited. They are, respectively, the freehold owners of (i) the Shell Haven Oil Refinery ("Haven"), a substantial fuel storage and distribution installation; and (ii) the Shell Centre Tower ("Tower"), a large office building. On 5 May 2022 Bennathan J granted these two Claimants interim injunctions against Persons Unknown in respect of the Haven and the Tower.

2. The Claimant in the third claim is Shell UK Oil Products Limited. It markets and sells fuels to retail customers in England and Wales through a network of Shell-branded petrol stations, and in some cases has an interest in the land where the Shell petrol

station is located. On 20 May 2022 Johnson J granted this Claimant an interim injunction against Persons Unknown in respect of Shell petrol stations.

3. All three injunctions seek to restrain unlawful protests by environmental activists. The Haven and Tower injunctions were due to expire on 2 May 2023, with the petrol stations injunction expiring on 12 May 2023. By application notices dated 30 March 2023 Shell sought extensions of all three injunctions for a maximum of one year and various other orders. The applications were listed together over 25 and 26 April 2023.

4. During the morning of 24 April 2023, Jessica Branch, a member of one of the key protest groups, Extinction Rebellion ("XR"), served a witness statement and lengthy skeleton argument asking to be heard at the hearing. The Claimants objected to her being heard at the hearing given the lateness of her documentation and for other reasons. It was not possible to resolve the issue of Ms Branch's participation easily at the outset of the hearing. Mr Simblet KC on her behalf indicated that she was keen to avoid incurring further costs by being required to return on a further day. I therefore heard all his submissions on a provisional basis.

5. The issues that required determination were as follows:

> (1): Whether to permit Ms Branch to make submissions, and if so on what basis and to what extent;
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> (2): Whether to grant the Claimant in the petrol stations claim permission to amend the description of the Persons Unknown Defendants;
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> (3): Whether to extend the three injunctions for up to a further year in the manner sought by the Claimants;
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> (4): Whether to grant the Claimants permission to serve any order and ancillary documents by alternative means; and
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> (5): Whether to grant the Claimant in the petrol stations claim its application for a third party disclosure order against the Commissioner of Police of the Metropolis ("the Commissioner").

6. There were only two working days between the end of the hearing and the expiry of the Haven and Tower injunctions; and only three working days until the last date on which Shell could begin complying with the extensive service requirements in respect of any further injunction covering the petrol stations.

7. In those circumstances the parties raised the possibility of granting a short extension to the injunctions to permit proper consideration of the arguments raised, including certain novel legal points relating to CPR 40.9 advanced by Ms Stacey KC. On 27 April 2023 I indicated to the parties that I considered that this course was appropriate. On 28 April 2023 I made orders with the effect of extending the injunctions for one calendar month, until 25 May 2023. I also made the third party disclosure order sought.

8. This judgment gives my decisions and reasons on Issues (1)-(4) and my reasons for making the third party disclosure order referred to under Issue (5).

9. Regrettably, despite the fact that their submissions invited me to uphold the detail of Bennathan J's reasoning on the Haven and Tower claims, and despite the passage of over a year since his judgment, no transcript of his judgment has been obtained by the Claimants. It was therefore necessary to work from a note of his judgment taken by the Claimants' former solicitor. Johnson J's judgment can be found at *Shell UK Oil Products v Persons Unknown* [2022] EWHC 1215.

The background to the May 2022 injunctions

10. The background to the obtaining of the three injunctions was summarised in a witness statement from Christopher Prichard-Gamble, the Country Security Manager for the Shell group of companies' UK assets, dated 30 March 2023.

11. He explained that in early 2022 Shell became aware that XR, a campaign group formed in October 2018, which seeks to effect Government policy on climate change through civil disobedience, had published guidance about its intention to take disruptive action to end the fossil economy. It called upon members of the public to support its aims. Several other groups were associated with XR's stance including Just Stop Oil ("JSO"), Youth Climate Swarm ("YCS") and Scientists' Rebellion. Matters came to a head in April and May 2022 when various activities were undertaken with what Mr Prichard-Gamble described as the "apparent aim of causing maximum disruption to Shell's lawful activities and thereby generating publicity for the protest movement".

Haven

12. Bennathan J was provided with witness statements from Ian Brown, Distribution Operations Manager, dated 13 and 22 April 2022 in respect of the Haven. The protest activities relating to the Haven which Mr Brown described included (i) a six hour incident on 3 April 2022 which saw a group of protestors blocking the main access road to the Haven, boarding tankers and blocking a tanker, requiring police attendance; (ii) protestors scoping and attempting to access the jetty at Haven; and (iii) similar incidents at fuel-related sites geographically proximate to the Haven, causing concern that the Haven could be an imminent target.

13. In Mr Brown's second witness statement, provided after the grant of the ex parte injunction by Sweeting J on 15 April 2022, he indicated that there had been no further protests targeted at the Haven. However, he said that there had been other protests in the vicinity and indications of future action.

14. Mr Brown explained that his main concerns related to the fact that the Haven site is used for the storage and distribution of highly flammable hazardous products. If unauthorised access is gained, this could lead to a leak causing a fire or explosion and very significant danger. Unauthorised access to the jetty created an additional risk of damage which could lead to significant release of hydrocarbons into the Thames Estuary. He had concerns over the personal safety of staff/contractors and the protestors themselves (who had, for example, climbed on to moving vehicles) as well as the security of energy supply and Shell's assets.

Tower

15. Bennathan J was provided with witness statements from Keith Garwood, Asset Protection Manager dated 14 and 22 April 2022 in respect of this claim. The matters he referred to included (i) an occasion on 6 April 2022, when a paint-like substance was thrown, leaving large black marks and splashes on the walls and above one of the staff entrances to the Tower; (ii) a signficant incident on 13 April 2022, when around 500 protesters converged on the Tower, banging drums and displaying banners stating, "Jump Ship" and "Shell=Death" directed at Shell staff, with several glue-ing themselves to the reception area of the Tower and another Shell office nearby; (iii) an incident on 15 April 2022 when around 30 protestors holding banners obstructed the road where the Tower is located; and (iv) an incident on 20 April 2022 when 11 protestors held banners, used a megaphone and ignited smoke flares. He also described protestors having graffitied and stuck stickers on the outside of the Tower with the XR logo and how on several occasions it was necessary to place the Tower in "lockdown".

16. Having reviewed the evidence from Mr Brown and Mr Garwood, Bennathan J emphasised that there was "no account of any violence against any person" and that "[t]he protests are loud, no doubt upsetting to some and potentially disruptive, but are peaceful".

17. Mr Garwood expressed his concerns that protestors would continue to enter, vandalise or damage the Tower, intimidate staff/visitors and block the entrances and exits to the Tower. The latter was a health and safety risk, in particular, because it restricted access for emergency vehicles and sometimes meant that members of the public had to walk on the road.

The petrol stations

18. Johnson J was provided with witness statements from Benjamin Austin, the Claimant's Health, Safety and Security Manager, dated 3 and 10 May 2022. In his judgment he explained that on 28 April 2022, there were protests at two petrol stations (one of which was a Shell petrol station) on the M25, at Clacket Lane and Cobham. Entrances to the forecourts were blocked. The display screens of fuel pumps were smashed with hammers and obscured with spray paint. The kiosks were "sabotaged…to stop the flow of petrol". Protestors variously glued themselves to the floor, a fuel pump, the roof of a fuel tanker, or each other. A total of 55 fuel pumps were damaged (including 35 out of 36 pumps at Cobham) to the extent that they were not safe for use, and the whole forecourt had to be closed: [12]-[13]. Johnson J also referred to wider protests in April/early May 2022 at oil depots in Warwickshire and Glasgow: [14]-[15].

19. Johnson J explained that he had not been shown any evidence to suggest that XR, JSO or Insulate Britain had resorted to physical violence against others. He noted, however, that they are "committed to protesting in ways that are unlawful, short of physical violence to the person". He observed that their websites demonstrate this, with references to "civil disobedience", "direct action", and a willingness to risk "arrest" and "jail time": [9].

20. He summarised the various risks that arise from these types of protest, in addition to the physical damage and the direct financial impact on the Claimant (from lost sales), as follows:

> "18. Petrol is highly flammable. Ignition can occur not just where an ignition source is brought into contact with the fuel itself, but also where there is a spark (for example from static electricity or the use of a device powered by electricity) in the vicinity of invisible vapour in the surrounding atmosphere. Such vapour does not disperse easily and can travel long distances. There is therefore close regulation…
>
> 19. The use of mobile telephones on the forecourt (outside a vehicle) is prohibited for that reason. The evidence shows that at the protests on 28 April 2022 protestors used mobile phones on the forecourts to photograph and film their activities. Further, as regards the use of hammers to damage pumps, Mr Austin says: "Breaking the pump screens with any implement could cause a spark and in turn potentially harm anyone in the vicinity. The severity of any vapour cloud ignition could be catastrophic and cause multiple fatalities. Unfortunately, Shell Group has tragically lost several service station employees in Pakistan in the last year when vapour clouds have been ignited during routine operations." I was not shown any positive evidence as to the risks posed by spray paint, glue or other solvents in the vicinity of fuel or fuel vapour, but I was told that this, too, was a potential cause for concern."

21. He noted the evidence that the campaign orchestrated by the groups in question looked set to continue and cited JSO's statement on its website that the disruption would continue "until the government makes a statement that it will end new oil and gas projects in the UK": [16].

The terms of the injunctions

22. The Haven injunction provides that the Defendants must not (i) enter or remain upon any part of the Haven without the consent of the Claimant; (ii) block access to any of the gateways to the Haven, the locations of which are identified marked blue on plans appended to the order; or (iii) cause damage to any part of the Haven whether by (a) affixing themselves, or any object, or thing, to any part of the Haven, or to any other person or object or thing on or at the Haven; (b) erecting any structure in, on or against the Haven; (c) spraying, painting, pouring, sticking or writing with any substance on or inside any part of the Haven; or (d) otherwise. The injunction further provides that a Defendant must not do any of these actions by means of another person acting on his/her/their behalf, or acting on his/her/their instructions, or by another person acting with his/her/their encouragement.

23. The Tower injunction is in materially similar terms.

24. The petrol stations injunction provides that:

> "2…the Defendants must not do any of the acts listed in paragraph 3 of this Order in express or implied agreement with any other person, and with the intention of disrupting the sale or supply of fuel to or from a Shell Petrol Station.
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> 3. The acts referred to in paragraph 2 of this order are:

> 3.1. blocking or impeding access to any pedestrian or vehicular entrance to a Shell Petrol Station or to a building within the Shell Petrol Station;
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> 3.2. causing damage to any part of a Shell Petrol Station or to any equipment or infrastructure (including but not limited to fuel pumps) upon it;
>
> 3.3. operating or disabling any switch or other device in or on a Shell Petrol Station so as to interrupt the supply of fuel from that Shell Petrol Station, or from one of its fuel pumps, or so as to prevent the emergency interruption of the supply of fuel at the Shell Petrol Station;
>
> 3.4. affixing or locking themselves, or any object or person, to any part of a Shell Petrol Station, or to any other person or object on or in a Shell Petrol Station;
>
> 3.5. erecting any structure in, on or against any part of a Shell Petrol Station;
>
> 3.6. spraying, painting, pouring, depositing or writing any substance on to any part of a Shell Petrol Station.
>
> 3.7. encouraging or assisting any other person do any of the acts referred to in sub-paragraphs 3.1 to 3.6."

25. Paragraph 4 then provides that a Defendant must not do any of these acts by means of another person acting on his/her/their behalf, or acting on his/her/their instructions, or by another person acting with his/her/their encouragement. This appears to replicate clause 3.7.

26. Johnson J made the following observations on how the injunction operates:

> "21. Some of the conduct referred to in paragraph 3 is, in isolation, potentially innocuous ("depositing… any substance on… any part of a Shell Petrol Station" would, literally, cover the disposal of a sweet wrapper in a rubbish bin). The injunction does not prohibit such conduct. The structure is important. The injunction only applies to the defendants. The defendants are those who are "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." So, the prohibitions in the injunction only apply to those who fall within that description. Further, the order does not impose a blanket prohibition on the conduct identified in paragraph 3. It only does so where that conduct is undertaken "in express or implied agreement with any other person, and with the intention of disrupting the sale or supply of fuel to or from a Shell Petrol Station."

> 22. It follows that while paragraph 3 is drafted quite widely, its impact is narrowed by the requirements of paragraph 2. This is deliberate. It is because the claimant is not able to maintain an action in respect of the activity in paragraph 3 (read in isolation) in respect of those Shell petrol stations where it has no interest in the land. It is only actionable where that conduct fulfils the ingredients of the tort of conspiracy to injure (as to which see paragraph 26 below). The terms of the injunction are therefore deliberately drafted so as only to capture conduct that amounts to the tort of conspiracy to injure".

27. The Claimants seek orders extending all three injunctions on the same terms for up to one further year, save that the Claimant on the petrol station claim seeks to amend the definition of Persons Unknown (see further under Issue (2) below).

Evidence in support of the applications to extend the injunctions

28. The Claimants' solicitors provided detailed chronologies setting out the incidents which they have been able to identify since May 2022 of direct-action protest against the Claimants, the Shell business and those operating within the wider oil/gas industry. Specific chronologies were prepared setting out incidents involving protest activity at the Haven and other oil refinery sites, the Tower and other corporate buildings and at petrol stations.

29. These incidents were more fully described in (i) a witness statement from Fay Lashbrook, the Haven's Terminal Manager; (ii) a third statement from Mr Garwood in respect of the Tower; and (iii) a third statement from Mr Austin in respect of the petrol stations. These statements were all dated 30 March 2023. They were supported by voluminous exhibits. The statement from Mr Prichard-Gamble referred to at [10] above provided further detail.

Haven

30. There do not appear to have been any further unlawful protest incidents at the Haven. However, the evidence shows a significant number of incidents in relation to oil refinery sites between August 2022 and February 2023. These included protest action at a number of oil refineries located in Kingsbury. The main road used to access the site was closed as a result of protestors making the road unsafe by digging and occupying a tunnel underneath it, access roads were also blocked by protestors performing a sit-down roadblock. Similar activity occurred at the Gray's oil terminal in west Thurrock in August/September 2022. On 28 August 2022 eight people were arrested after protestors blocked an oil tanker in the vicinity of the Gray's terminal, climbing on top of it and deflating its' tyres. On 14 September 2022 around fifty protestors acted in breach of the North Warwickshire local authority injunction in relation to the Kingsbury site.

Tower

31. In respect of the Tower, the evidence suggests that Bennathan J's injunction has had a deterrent effect: the Claimant's evidence shows no incidences of unlawful activity during protests held within the vicinity of the Tower. However, it continued to be a prime location for protests and corporate buildings more broadly have been the target

of unlawful activity since the injunction was made. For example, the evidence referred to (i) prominent buildings and venues across London having been targeted by JSO; (ii) various government and high-profile buildings such as a Rolex shop and high-end car dealerships having been targeted by protest groups; and (iii) on 14 November 2022, JSO supporters having targeted the Silver Fin building in Aberdeen where the Shell group have offices, covering it in orange paint.

The petrol stations

32. In relation to the petrol stations, there have been two further incidents, on 24 August and 26 August 2022. Fuel pumps were vandalised, customers' access to the forecourt was blocked and on the first of these dates protestors super glued themselves to the forecourt. The first incident involved three petrol stations on the M25 and the second related to seven across London.

33. Mr Prichard-Gamble also described a significant number of incidents of direct-action protest against the wider Shell business and the wider oil and gas industry and operators within it. He described over twenty such incidents between May 2022 and February 2023. These included (i) the targeting of Shell's annual shareholders meeting in May 2022; (ii) JSO's call in May 2022 for the seizure of Shell's assets; (iii) protestors spraying paint on the Treasury building; (iv) JSO's month-long campaign of civil disobedience and protest involving a series of incidents in October 2022; (v) JSO protestors starting a campaign of targeting motorway gantries in different locations on the M25 in November 2022 causing police to halt the traffic; and (vi) an incident in early 2023 involving protestors boarding and beginning to occupy a moving Shell floating production and storage facility while it was in transit heading for the North Sea.

34. These activities have led the Claimants to incur the costs of further security at the Kingsbury oil facility and the Tower and an additional vessel to shadow the floating facility referred to above.

The risk of future harm

35. Mr Prichard-Gamble's evidence on this issue was, in summary, as follows.

36. The Claimants liaise regularly with the police whose intelligence indicates that there continues to be an ongoing threat; that the protest campaign is not over; and that protest groups will continue to attempt to put pressure on the government to halt new investment in fossil fuels. It is apparent that JSO continues to have the ability to draw on a large group of protestors who are willing to be arrested; that they take action using a variety of tactics and target locations across the UK; and that they employ tactics that attract the media and public interest. Further there is a high level of crossover between the individual protest groups, who appear to share disruptive tactics between them. His view was that activities of the sort described above would be likely to increase as a result of the government's recent approval of the building of a new power station, the cost-of-living crisis and the likely increase in support for JSO given that environmental concerns affect the majority of the public.

37. There is the following specific evidence of the likelihood of continuing action against the Claimants and the wider Shell business: (i) a 30 November 2022 report that JSO

had stated they will "continue to escalate unless the government meets our demand to stop future gas and oil projects"; (ii) an 11 January 2023 report that JSO had said that they planned more large-scale disruption this year; (iii) a 29 January 2023 Twitter post from Fossil Free London inviting people to a meeting on the basis that "in the last year, we've closed down Shell's AGM, challenged their legal director, sabotaged their CEO's leaving party & more! Now we want to go bigger"; and (iv) JSO's 14 February 2023 "ultimatum letter" issued to 10 Downing Street which stated that unless the UK government provided an assurance that it would immediately halt all future licensing and consents for the exploration, development and production of fossil fuels in the UK by 10 April 2023, they would be forced to escalate their campaign.

38. Further, during the hearing Ms Stacey took me to press coverage dated 26 April 2023 indicating that following a four-day demonstration XR and other groups said that it would step up campaigns to force the government to tackle the climate emergency. The co-founder of XR was quoted as saying that the government had a week to respond to the group's demands.

39. Mr Prichard-Gamble's overall view was that (i) the incidents described demonstrate a clear nationwide targeting of members of the wider Shell group of companies and its business operations since April/May 2022; (ii) such demonstrations will continue for the foreseeable future; and (iii) the injunctions need to be extended as they provide a strong deterrent effect and mitigate against the risk of harm which unlawful activities at the sites would otherwise give rise to. Unlawful activity at the sites presents an unacceptable risk of continuing and significant danger to the health and safety of staff, contractors, the general public and other persons visiting them.

40. He emphasised that the Claimants do not wish to stop protestors from undertaking peaceful protests whether near their sites or otherwise. Many such peaceful protests have in fact taken place without breaching the injunctions, in particular outside and in the vicinity of the Tower and outside of Shell petrol stations.

Issue (1): Whether to permit Ms Branch to make submissions, and if so on what basis and to what extent

Ms Branch's application

41. Ms Branch provided witness statements dated 24 and 26 April 2023, a statement from Nancy Friel and a detailed skeleton argument from Mr Simblet and Mr Greenhall.

42. Ms Branch is an environmental activist who has been a member of XR since April 2019. She has not breached any of the injunctions obtained by the Claimants. However, she contended that she is directly affected by them as she is keen to participate in protests that make people aware of the damage caused by fossil fuels but does not wish to risk breaching the injunctions. She believes that the injunctions have a chilling effect on her right to peacefully protest in the manner and at the location of her choosing.

43. In relation to the Haven, Ms Branch noted that the injunction covers anyone who enters or remains at the site without consent. She was concerned that if a Shell employee asked her to leave the area outside the site and she chose to remain, she

could be caught by the injunction even though she had not entered the site, blocked any of its entrances or sought to do. She was also concerned that she could breach the injunction by placing a poster or flyer on the external walls of the site.

44. In respect of the Tower, she said that XR and many other protest groups see it as a key site from which to make their points. They often gather outside the building, hold banners and signs and chant slogans to make the reason for their protests clear. They do often cause some disruption, but they allow traffic to pass, and they do not prevent pedestrians from passing through. They welcome interaction with the public and make the most of the opportunities to speak to people about their protest. She said that in light of the fact that the injunction prohibits blocking the entrance or sticking anything to the building, she would be nervous about joining a protest outside the Tower because even if she blocked the entrance inadvertently for a few minutes this would risk breaching the order.

45. She is particularly troubled by the petrol stations injunction. She explained that they are a symbolically important place to hold demonstrations because they will gain the attention of people who drive cars and encourage them to think about their choices. She would be happy to participate in such a protest if that persuaded people to use their cars less and would be happy if petrol sales were drastically reduced. She is therefore concerned that simply by participating in protests at a petrol station she would be understood to be doing so with the intention of disrupting the sale or supply of fuel and would thus be within the wording of the injunction.

46. She argued that (i) the geographical scope of the injunction was unclear and it was not apparent whether it included areas of the public highway or other areas not necessarily owned by the Shell-branded petrol station where there is public access; (ii) there is a lack of clarity about the "blocking or impeding access" provisions; (iii) the prohibition on "affixing any object" might prevent her attaching a leaflet or flyer to a petrol station or a vehicle in a petrol station, including in the public area not owned by Shell but within the vicinity of a petrol station; (iv) and the "encouraging" provisions within the injunction might mean that if she was present and chanting, waving banners or handing out leaflets while someone else was blocking an entrance, even briefly, or placing leaflets on cars, she would be at risk of breaching the injunction. She also opposed Shell's application to extend the scope of the current petrol station injunction to all protestors and not simply environmental protestors: she argued that this would significantly increase the number of people who could be caught by it.

47. Several of Ms Branch's observations about the wording of parts of the petrol stations injunction also applied to the Haven and Tower injunctions.

48. Finally, Ms Branch made several overarching points about Articles 10 and 11 of the European Convention on Human Rights ("the ECHR"). She referenced the fact that the injunctions all state that they do not intend to prevent lawful protest. She said this did not reassure her: simply because the injunctions are not intended to have that effect does not mean that they will not in practice do so. She fears being arrested, especially if her children are present with her at the protest.

49. The skeleton argument from Mr Simblet and Mr Greenhall made detailed legal submissions in support of Ms Branch's position. In particular he addressed Articles 10 and 11, the tort underlying the petrol stations claim, the applicability of the HRA,

section 12(3) and Ms Branch's concerns about the wording of some specific terms in the injunctions.

50. Ms Branch was clear that she did not wish to be joined as a Defendant: she explained that the risk of having damages and costs awarded against her would be catastrophic for her as she does not have the resources to defend a civil action; and would cause her numerous difficulties in respect of her employability, credit score and other matters.

51. However, she sought the right to make submissions on the injunctions. Mr Simblet contended that this could be achieved by the inherent power of the court or by formally recognising Ms Branch under CPR 40.9.

CPR 40.9

52. CPR 40.9 provides that "A person who is not a party but who is directly affected by a judgment or order may apply to have the judgment or order set aside or varied". This provision has been recognised by the Court of Appeal as the route, or at least the primary route, to be used by non-parties wishing to set aside or vary Persons Unknown injunctions: see *Barking and Dagenham LBC v Persons Unknown* [2022] EWCA Civ 13, per Sir Geoffrey Vos MR at [89].

53. The injunctions in this case all provided, as it is common in cases of this nature, that anyone "affected" by the order may apply to the court to vary or discharge it "at any time", upon giving not less than 24 hours' notice to the Claimant. Such a party was required to provide their name and address and "must" also apply to be joined as a Defendant.

54. However, it has been recognised that joinder as a Defendant is not a pre-requisite to applying under CPR 40.9, notwithstanding the existence of such a provision: see Johnson J's judgment on the petrol stations claim at [5]-[6], citing *National Highways Limited v Persons Unknown* [2022] EWHC 1105 (QB) at [20]-[22] and *Barking and Dagenham* at [89]. In *Esso Petroleum Company Limited v Breen and Persons Unknown* [2022] EWHC 2600 (KB) ("*Breen*"), Ritchie J set out a series of factors he had found helpful in deciding whether to require someone to become a named Defendant or simply permit them to apply under CPR 40.9.

55. Accordingly, despite the terms of the injunctions referred to at [53] above, the fact that Ms Branch did not wish to be joined as a Defendant was not fatal to her CPR 40.9 application. Ms Stacey did not argue that Ms Branch should be so joined.

56. In *National Highways Limited v Persons Unknown* [2022] EWHC 1105 (QB) at [20], Bennathan J observed that CPR 40.9 is, on its face, a "strikingly wide" rule which gives no guidance as to how its provisions are to be interpreted; nor is there appellate authority on the issue. In *Breen* at [40] Ritchie J made a similar observation about the lack of appellate authority on CPR 40.9 cited in the White Book.

57. In post-hearing submissions, Ms Stacey referred to *Mohamed & Others v Abdelmamoud* [2018] EWCA Civ 879 at [27], where Newey LJ said:

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

58. She also cited the underlying judgment which was upheld by the Court of Appeal, at [2015] EWHC 1013 (Ch). At [58]-[59] Edward Murray (as he then was, sitting as a Deputy Judge of the Chancery Division), after referring to a number of previous cases on CPR 40.9, held:

> "These cases support the proposition that in order for a non-party to be 'directly affected' by a judgment or order for the purposes of CPR 40.9, it is necessary that some interest capable of recognition by the law is materially and adversely affected by the judgment or order, or would be materially and adversely affected by the enforcement of the judgment or order.
>
> Since the "directly affected" test is for the purpose of establishing *locus standi*, it is sufficient that the relevant judgment or order would *prima facie* be capable of materially and adversely affecting a legal interest. It is not necessary to show that it would, in fact, do so, for that would be the subject of the application itself".

59. It does not appear that either judgment in *Abdelmamoud* were cited to Bennathan or Ritchie JJ in the cases referred to at [56] above. That said, in *Breen* at [43.1], Ritchie J observed that:

> "A person can be directly affected in many ways. The order may affect the person financially. It may affect the person's property rights or possession of property. It may affect the person's investments or pension. The order may affect a person's ability to travel or to use a public highway. The order may affect the person's ability to work or enjoy private life or social life or to obtain work and in so many other ways. It may affect rights enshrined in the Human Rights Act 1988".

60. Further, one of the factors he identified as pertinent to the issue of CPR 40.9 status in *Breen* was "Whether the final decision in the litigation will adversely affect the interested person, whether by way of civil rights, financial interests, property rights or otherwise" (factor (3)).

61. Both of these formulations chime with the test set out in *Abdelmamoud*.

62. In *Breen*, Ritchie J concluded that affording someone the right to be heard under CPR 40.9 required them to pass through a "gateway", requiring them to satisfy the court that they were (i) "directly affected" by the injunction; and (ii) had a "good point" to raise.

63. At [45(6)] he observed that given the draconian nature of injunctions against Persons Unknown, and the fact that they may be wide in geographical and/or temporal scope, there should be a "low" threshold for interested persons to be able to take part. This reflects Bennathan J's observations in *National Highways Limited v Persons Unknown* [2022] EWHC 1105 (QB) at [21(2)-(3)] that (i) in cases where orders are sought against unnamed and unknown Defendants and where Convention rights are engaged, it is proper for the court to adopt a "flexible" approach to CPR 40.9; and (ii) in a case where the court is being asked to make wide ranging orders and, but for a successful rule 40.9 application, would not hear any submissions in opposition to those advanced by the Claimants, it is desirable to take a "generous" view of such applications. I agree with and gratefully adopt these sentiments.

64. In *Ageas Insurance v Stoodley* [2019] Lloyds Rep. LR 1 (HHJ Cotter QC, as he then was) had approached an application under CPR 40.9 by asking whether the applicant had a "real prospect of success" in showing that the order should be set aside or varied. Ms Stacey contended that the court should determine Ms Branch's CPR 40.9 application by applying this and/or something akin to the test used for determining whether permission to appeal should be granted.

65. *Ageas* was not a Persons Unknown case. As *Breen* is the most recent High Court authority on the use of CPR 40.9 and is specific to the context of Persons Unknown injunctions, I consider it appropriate to follow Ritchie J's approach set out therein. I observe that applying an unduly strict approach to the merits of a CPR 40.9 application in a Persons Unknown case could cut across the need for a low threshold for involvement and a flexible/general approach, given the particular features of these cases, as set out at [63] above.

(i): Direct effect

66. Ms Stacey initially conceded that Ms Branch was directly affected by the petrol stations injunction (albeit not the Haven and Tower injunctions) but then withdrew that concession in her post-hearing submissions.

67. She relied on the fact that Ms Branch has expressly stated that she has no intention of breaching the prohibitions in the injunctions. On that basis she would not fall within the definition of Persons Unknown, is not a party and has no prospect of being a Defendant. It was therefore difficult to see on what basis she would be entitled to seek to defend the claim on a potential Defendant's behalf and to do so without being exposed to any of the costs risks associated with joinder. Moreover, given that the orders only prohibit specific acts which are by their nature unlawful, it is difficult to see how Ms Branch can assert that her interests are "materially" affected. She contended that the approach of Bennathan J and Ritchie J renders the qualifier 'directly' in the phrase "directly affected" otiose and is contrary to the approach of the Court of Appeal in *Abdelmamoud.*

68. I disagree. A key concern Ms Branch has raised is that the injunctions have a chilling effect on her rights under Articles 10 and 11. She does not accept that the injunctions only prohibit unlawful acts. She is keen to understand the limits of the injunctions as she fears inadvertently breaching them through her protest activity and thus leaving herself vulnerable to the damaging consequences of committal proceedings. She has specific concerns about the existence, scope and wording of each of these injunctions

and considers that they impede her right to lawful protest at those locations. I accept Ms Branch's evidence that a final decision in the litigation would adversely affect her civil rights under Articles 10 and 11 (albeit in a manner which is said to be justified) and if she breached any of them, this would affect her financial interests and expose her to the risk of a prison sentence.

69. For these reasons I consider that she meets the "direct effect" test set out in *Abdelmamoud* at first instance and in the Court of Appeal test: the injunctions are *prima facie* capable of materially and adversely affecting her recognised legal interests.

70. Although determinations under CPR 40.9 turn on their own facts, and although it does not appear that *Abdelmamoud* has been previously cited, my assessment as to Ms Branch's status mirrors Bennathan J's "tentative" view when considering the Haven and Tower injunctions that the words "directly affected" are "just wide enough" to encompass someone in Ms Branch's position, such that her submissions would have been taken into account had she not withdrawn her application under CPR 40.9 (on the basis that a named Defendant had applied to join the action). It is also consistent with the recognition of Ms Branch under CPR 40.9 in (i) *National Highways Limited v Persons Unknown (blocking traffic) and others* [2021] EWHC 3081 (QB) at [20]-[22], where Lavender J concluded that she was affected by the initial injunction although she had not taken part in the relevant protests and so took into account her submissions; and (ii) *National Highways Limited v Persons Unknown* [2022] EWHC 1105 (QB) at [21(1)], where Bennathan J accepted that her concern that the order "might catch people such as her who, while not involved in IB or any of its protests, might protest near some of the many roads specified in NHL's draft order and find herself inadvertently caught up in contempt proceedings" was "not fanciful and would amount to a sensible basis to regard her as "directly affected".

(ii): "Good point"

71. In *Breen* at [43.2], Ritchie J framed the relevant question thus: "Does the IP have a good point to raise? If the point raised is weak or irrelevant there is no need for the CPR rule 40.9 permission".

72. Ms Stacey argued that Ms Branch did not have a good point to make and therefore did not proceed through the second of Ritchie J's gateways. She argued that all the points Ms Branch wished to advance had been made at the earlier hearings by the Claimants' counsel and fully considered by Bennathan and Johnson JJ: for example, they had grappled with the issues she raised relating to *DPP v Ziegler* [2021] UKSC 23; [2022] AC 408 and the HRA, section 12(3).

73. I found this submission conceptually troubling: it amounted to an invitation to the court to approve a process by which one party is assumed to have advanced all of the opposing party's submissions, in exactly the same way as they would have done, such that the opposing party should be denied the right to be heard. Putting aside the question of whether such a submission might find favour in a conventional case, a court would surely be particularly nervous about adopting such a course in cases of this nature, for the reasons given at [63] above.

74. In any event, I am satisfied that Ms Branch had good points to make on all three injunctions. Her evidence and skeleton argument raised a series of important and helpful points about the tension between the injunctions and Articles 10 and 11; the conspiracy to injure tort underpinning the petrol stations claim; the section 12(3) issue and about the specific wording of some of the terms. As will become apparent I have accepted some of her arguments.

The Breen factors and discretion under CPR 40.9

75. The factors identified by Ritchie J in *Breen* are focussed on whether someone should be afforded CPR 40.9 status or joined as a Defendant. As Ms Stacey did not press any application to join Ms Branch as a Defendant, they are of limited direct relevance.

76. However, Ms Stacey contended that even if someone satisfied both elements of the CPR 40.9 "gateway", the use of the word "may" in the rule indicates that the court retains a residual discretion as to whether to permit that person to make an application under CPR 40.9. I am not confident that such an analysis is correct: it seems to me that this places a further gloss on the rule that is not indicated by its wording (which does not suggest that anything is necessary beyond the "gateways") nor supported by authority. It seems to me that the wording of CPR 40.9 simply establishes the basis on which someone "may" apply to have a judgment or order set aside or varied, but whether they succeed in doing so is a separate matter.

77. In case Ms Stacey's analysis is correct, and in case any or all of the factors identified by Ritchie J in *Breen* are relevant to how that discretion is exercised, I have considered them. In fact, taken as a whole they support the view that Ms Branch should be recognised under CPR 40.9 and not joined as a Defendant.

78. I understood Ms Stacey to accept Mr Simblet's submissions on factors (1) and (4)-(7): Ms Branch will not profit from the litigation financially or otherwise; she is not funding the defence of the litigation; she is raising a substantial public interest or civil liberties point; there is a need for a "low" threshold given the draconian and potentially wide nature of these injunctions; and Ms Branch could be faced with costs risks and difficulties due to orders which she did not instigate.

79. As to factor (2), Ms Branch is not "controlling the whole or a substantial part of the litigation": she is making wide-ranging submissions but does not purport to speak for all the protest groups caught by the orders or for those who have already been caught by the orders even if they have not yet been named.

80. As to factor (3), as noted above, I accept Ms Branch's evidence that a final decision in the litigation would adversely affect her rights as set out at [68] above.

81. Factor (8) is whether there would be any prejudice to the Claimant by granting someone CPR 40.9 status rather than requiring them to become parties. Ms Stacey did not press an argument about particular prejudice in this sense.

82. She did advance a much broader point about prejudice, which she contended was relevant to the general discretion under CPR 40.9, to the effect that the Claimants had been "ambushed" by Ms Branch's late application. She was keen to stress that the Claimants did not wish to "shut down" Ms Branch's submissions but argued that Ms

Branch had inappropriately delayed. She had been aware of the injunctions since they were made in May 2022 and her solicitors had been on notice since 28 February 2023 that applications to renew all three injunctions were being made.

83. I had limited sympathy with this argument. The injunctions obtained by the Claimants all permit someone who is merely "affected" (not "directly" so) to apply to vary or discharge them on 24 hours' notice, a timescale with which Ms Branch had complied. Interested members of protest groups regularly attend hearings of this kind and seek to be heard, as the cases referred to at [70] above and *Breen* illustrate: indeed Ms Branch had attended the hearing before Bennathan J and Ms Friel had attended before Johnson J. If the Claimants wish to ensure they are given greater notice of such applications it is open to them to seek to increase the 24 hours' notice provision. If they are concerned to make sure review hearings are not "derailed" by such applications it is open to them to provide more realistic time estimates for hearings which do not assume a lack of opposition to the orders they seek.

84. Further, Ms Branch provided a credible reason for only applying to the court when she did: she was willing to live with the May 2022 injunctions for a year but wished to wait to see if the Claimant sought to extend them for a further year; and she acted reasonably promptly once she became aware of that fact, especially bearing in mind she does not retain solicitors on a standing basis.

85. I also accept Mr Simblet's submissions that (i) Ms Branch could be placed in no worse a position than someone who sought joinder as a Defendant who only had to give 24 hours' notice under the order; (ii) it was consistent with the overriding objecting for her to make her application at a hearing when the court would already be reviewing the injunctions, rather than by insisting that the court conduct a further hearing to hear her submissions; and (iii) she was entitled to limit her costs liability in this way. As to the overriding objective, her actions in seeking to have her application dealt with at the review hearing were consistent with CPR 1.4(2), which provides that active case management includes "(i) dealing with as many aspects of the case as it can on the same occasion".

86. In the event, Ms Stacey was able to reply in detail to Mr Simblet's submissions during the hearing (a half day of further court time having been made available for it) and was permitted to make additional written submissions after it, to which Mr Simblet could respond. Accordingly, any prejudice the Claimants suffered by the timing of Mr Branch's application has been mitigated by these case management steps.

87. Ms Stacey argued that the poor merits of Ms Branch's submissions were also relevant to the residual discretion under CPR 40.9. Aside from the issue of whether such a discretion exists (see [76] above) I have addressed the merits in the context of the "good point" element of the gateway at [74] above.

The limits of CPR 40.9

88. During the hearing the hearing Ms Stacey advanced a novel point about the limits of CPR 40.9 which does not appear to have been taken in any of the other Persons Unknown cases. She developed this further in her written post-hearing submissions.

89. She contended that CPR 40.9 must be construed by reference to its language which sets out its parameters. It only permits submissions to be made as to whether an order that has already been made should be set aside or varied but cannot relate to any future order the court was being asked to make. She submitted that there was a window of time in which Ms Branch could have made her application in relation to the May 2022 orders, but she had now lost that opportunity due to delay. Instead, she would need to wait until the court made any orders extending the injunctions and if so, return to court to make her submissions.

90. I pause to observe that the "window of time" point in this submission is directly contrary to the wording of the injunctions themselves, which make clear that someone seeking to vary or discharge them may do so "at any time".

91. As to the main point about the scope of CPR 40.9 involvement, Ms Stacey's interpretation of the provision is understandable in conventional cases between two or more named defendants, where a final order has been made after trial, that does not involve an injunction.

92. However, matters are more complicated in cases involving Persons Unknown injunctions. This is primarily because unlike most court orders, they are not made against known individuals; and because the injunctions so made are the subject of regular review by the court: either at the return date (shortly after an ex parte injunction) or at a review hearing (as here, after an injunction has run for a considerable period of time such as a year). At either type of hearing, if a person seeks to make submissions under CPR 40.9, it is in my judgment artificial to regard them as only being permitted to do so in relation to the injunction that has already been made, because the very focus of that hearing is whether the injunction that has already been made should be set aside, renewed or varied in some form.

93. The point is illustrated by the fact that the only orders Ms Stacey sought from me were ones that had no independent existence of their own, but which referred back to the May 2022 injunctions, and amended their temporal scope. Ms Stacey was, herself, effectively seeking a variation of the May 2022 injunctions in those respects. In those circumstances it is artificial to contend that Ms Branch could not challenge the proposed variation and submit that other variations should be made, if the injunctions were not set aside in full.

94. Albeit that I appreciate this is a novel legal point that has not been taken before, the practical position is illustrated by how previous cases have played out. In *National Highways Limited v Persons Unknown (blocking traffic) and others* [2021] EWHC 3081 (QB), Lavender J took into account Ms Branch's submissions not only as to terms but also the service provisions of the injunction he was being asked to make. He clearly did not consider that his role was solely "backward-looking". Indeed, he discharged the interim injunction and made an entirely fresh order for the future. Similarly, in *National Highways Limited v Persons Unknown* [2022] EWHC 1105 (QB), Bennathan J took into account Ms Branch's submission to the effect that the IB protests described by NHL were all in 2021 and there had been no repetition of them in the past year, which was clearly a "future-facing" point about whether the injunctions should be renewed.

95. Indeed, the very nature of the ability to "vary" an order under CPR 40.9 illustrates that the right to intervene under that rule is to some degree "forward-looking".

96. Interpreting CPR 40.9 in this way in Persons Unknown cases would limit the efficacy of this route for non-parties, the route having been recognised at Court of Appeal level. There is also a need for flexibility of approach in these cases for the reasons given at [63] above.

97. Even if Ms Stacey's interpretation of CPR 40.9 is correct, it would make limited difference on the facts of this case. That is because I would be able to consider all of Ms Branch's submissions on the basis that they related solely to the May 2022 injunctions or indeed the short extension orders I made in late April 2023. If I was persuaded by any of her submissions that the orders were wrong in principle and should be set aside or varied, I would, by definition, not be persuaded that extending them in materially identical terms to their current form was appropriate.

98. In her post-hearing submissions Ms Stacey modified her position that Ms Branch could not be heard now and would need to return to court in the future once I had made any fresh orders. Rather, she contended that it would be open to me to "treat the application as having been made immediately after the review and consider it on that basis". This was a pragmatic suggestion. To the extent that the same is necessary I consider that such a step is sensible case management, consistent with CPR 1.4(2) (see [85] above).

99. For all these reasons I conclude that Ms Branch should be permitted to apply to set aside or vary the May 2022 injunctions under CPR 40.9. I do not therefore need to determine Mr Simblet's submission that I could have heard her submissions under a wider court power. I simply observe that there may well be force in the argument: for example, I note that in *Boyd v Ineos* [2019] 4 WLR 100 at [16] the Court of Appeal felt able to take into account submissions from counsel for two named Defendants in a Persons Unknown case, where there were some concerns about their locus standi, on the simple ground that they were of assistance to the court.

The nature of Ms Branch's involvement

100. As to the nature of Ms Branch's involvement, Ms Stacey took me to Gee on Commercial Injunctions (Seventh Edition) at paragraphs 24-020-021. This provides that where a defendant who wishes to set aside a Mareva injunction obtained without notice applies to discharge it, they should do so promptly and by application notice; and that what takes place is in the form of a "complete rehearing of the matter, with each party being at liberty to put in evidence".

101. In my judgment the same should apply to a non-party such as Ms Branch applying under CPR 40.9. That said, I accept Ms Stacey's submission that "the matter" in this context necessarily includes consideration of the judgments of the previous judges.

Issue (2): Whether to grant the Claimant in the petrol stations claim permission to amend the description of the Persons Unknown Defendants

102. The Claimant in the petrol stations claim seeks permission under CPR 19.4(1) and 17.1(3) to amend the description of the Persons Unknown Defendant to remove the word "environmental" from "environmental protest campaigns".

103. Once a claim form has been served, the court's permission is required to add a party under CPR 19.4(1). The White Book at paragraph 19.4.4 notes that in *Allergan Inc v Sauflon Pharmaceuticals Ltd* [2000] All ER (D) 106, Ch D, Pumfrey J refused an application to join a party as a second defendant where the claimant failed to plead a good arguable case. Further, in *Pece Beheer BV v Alevere Ltd* [2016] EWHC 434 (IPEC) HH Judge Hacon stated that, in most cases, in order to show a good arguable case for this purpose, the correct test to be applied is that which would be applied in an application to strike out a claim against a defendant pursuant to CPR r.3.4(2)(a) or (b)).

104. Paragraph 1.2 of the PD3A (Striking Out a Statement of Case) gives examples of cases where the court may conclude that the particulars of claim disclose no reasonable grounds for bringing the claim under CPR 3.4(2)(a) as those which set out no facts indicating what the claim is about; those which are incoherent and make no sense; and those which contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim against the defendant. CPR 3.4(2)(b) applies to statements of case that are an abuse of the court's process or are otherwise likely to obstruct the just disposal of the proceedings.

105. Ms Stacey submitted that the purpose of the amendment was to ensure that the description of Persons Unknown is as clear and accurate as possible and properly reflects the most recent evidence which suggests that there is movement between groups and protest campaigns which are not necessarily limited to environmental protests.

106. She referred to Mr Austin's evidence which illustrated the growing trend in recent months of broader interest groups, beyond environmental protest groups, engaging in protest actions against Shell petrol stations. He exhibited a press report to the effect that on 21 January 2023, two dozen members of Fuel Poverty Action and other groups had protested at a petrol station in Cambridge. They were quoted as accusing Shell of "profiteering as people struggle to pay for essentials such as energy and food". The article confirmed the presence of the notice at the petrol station warning protestors of the existence of the injunction. He also described a protest by austerity protestors on 3 February 2023 at a Shell petrol station in the Bristol area. He confirmed that the protestors on both occasions respected the terms of the injunction.

107. Further, Mr Prichard-Gamble's evidence was that there is a "high level of crossover" between "individual protest groups" and that the cost-of-living crisis is likely to increase JSO's animosity towards oil companies including the Claimant.

108. In light of this evidence, I am satisfied that the CPR 3.4(2)(a)/(b) test is met.

109. Accordingly I grant the Claimants permission to amend in the manner sought, such that the Defendants on the claim form and ancillary documents in the petrol stations claim become: "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, IN CONNECTION WITH ~~ENVIRONMENTAL~~ PROTEST CAMPAIGNS WITH THE INTENTION OF DISRUPTING THE SALE OR SUPPLY OF FUEL TO OR FROM THE SAID STATION".

110. Whether to grant the Claimant an injunction in relation to this more widely defined group of Persons Unknown is a separate issue which I address at [148] below.

Issue (3): Whether to extend the three injunctions for up to a further year in the manner sought by the Claimants

111. I have taken as a framework for my analysis the list of issues identified by Johnson J in his judgment on the petrol stations claim, which had come from the Claimants' submissions. This is appropriate given the rehearing approach I have determined was necessary in light of Ms Branch's application under CPR 40.9 (see [101] above), rather than the slightly narrower approach appropriate on an uncontested review hearing.

112. As Johnson J explained at [23] these different legal issues arise because the injunctions are sought are on an interim basis before trial against Persons Unknown on a precautionary basis to restrain anticipated future conduct; and because they interfere with the rights to freedom of expression and assembly under Articles 10 and 11.

(1): Is there a serious question to be tried, applying the test set out in *American Cyanamid v Ethicon* [1975] AC 396 per Lord Diplock at 407G?

The Haven and Tower claims

113. The Haven and Tower injunctions were sought and obtained on the basis of the Claimant's underlying claim of trespass to their land and private nuisance, in the form of unlawful interference with their right of access to their land via the highway and their exercise of a private right of way (as discussed in *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29 at [13] and Gale on Easements (21st ed) at paragraph 13-01).

114. Although there do not appear to have been further incidents specifically at the Haven and Tower sites, the evidence of Mr Brown and Mr Garwood to which Bennathan J was taken led him to conclude that the Claimants had a strong claim in trespass or nuisance for events that took place before the injunctions were made. I have read all that evidence. The position remains as it was before Bennathan J and the evidence shows that there is a real and imminent risk of the offending conduct occurring.

115. The *American Cyanamid* test is therefore met in relation to these two claims. To the extent that the relevant test is, in fact, that the Claimants are "likely" to succeed, due to the operation of the HRA, section 12(3) (see further under sub-issue (12) below), that test is met.

The petrol station claims

116. The Claimants' claim in relation to the petrol stations is advanced under the tort of conspiracy to injure by unlawful means. Ms Stacey relied heavily on Johnson J's findings on this issue.

117. His first key finding was as follows:

> "25. The claimant has a strong case that on 28 April 2022 the defendants committed the activities identified in paragraph 3 of the draft order: those activities are shown in photographs and videos. There are apparent instances of trespass to goods (the damage to the petrol pumps and the application of glue), trespass to land (the general implied licence to enter for the purpose of purchasing petrol does not extend to what the defendants did) and nuisance (preventing access to the petrol stations). None of this gives rise to a right of action by the claimant in respect of those Shell petrol stations where it does not have an interest in the land and does not own the petrol pumps. It is therefore not, itself, able to maintain a claim in trespass or nuisance in respect of all Shell petrol stations".

118. As with the Haven and Tower claims I have reviewed the underlying evidence that led to this conclusion and I agree with it. The Claimant has a strong prospect of showing that the various acts said to have taken place on 28 April 2022 did in fact take place. There have also been further incidents at petrol stations on 24 and 26 August 2022 of a similar nature (although no application to amend the Particulars of Claim to refer to these has been made).

119. The next element of Johnson J's reasoning addressed the legal consequences of his factual finding at [25], thus:

> "26. The claim advanced by the claimant is framed in the tort of conspiracy to injure by unlawful means ("conspiracy to injure"). The ingredients of that tort are identified in *Cuadrilla Bowland Ltd v Persons Unknown* [2020] EWCA Civ 9; [2020] 4 WLR 29 *per* Leggatt LJ at [18]: (a) an unlawful act by the defendant, (b) with the intention of injuring the claimant, (c) pursuant to an agreement with others, (d) which injures the claimant.
>
> 27. To establish the tort of conspiracy to injure, it is not necessary to show that the underlying unlawful conduct (to satisfy limb (a)) is actionable by the claimant. Criminal conduct which is not actionable in tort can suffice (so long as it is directed at the claimant): *Revenue and Customs Commissioners v Total Network SL* [2008] UKHL 19; [2008] 1 AC 1174 *per* Lord Walker at [94] and Lord Hope at [44]. A breach of contract can also suffice, even though it is not actionable by the claimant: *The Racing Partnership Ltd v Done Bros (Cash Betting) Ltd* [2020] EWCA Civ 1300; [2021] Ch 233 *per* Arnold LJ at [155].
>
> 28. The question of whether a tort, or a breach of statutory duty, can suffice was left open by the Supreme Court in *JST BTS Bank v Ablyaszov (No 14)*[2018] UKSC 19; [2020] AC 727. Lord Sumption

> and Lord Lloyd-Jones observed, at [15], that the issue was complex, not least because it might – in the case of a breach of statutory duty – depend on the purpose and scope of the underlying statute and whether that is consistent "with its deployment as an element in the tort of conspiracy."
>
> 29. For the purposes of the present case, it is not necessary to decide whether a breach of statutory duty can found a claim for conspiracy to injure, or whether every (other) tort can do so. It is only necessary to decide whether the claimant has established a serious issue to be tried as to whether the torts that are here in play may suffice as the unlawful act necessary to found a claim for conspiracy to injure. Those torts involve interference with rights in land and goods where those rights are being exercised for the benefit of the claimant (where the petrol station is being operated under the claimant's brand, selling the claimant's fuel). Recognising the torts as capable of supporting a claim in conspiracy to injure does not undermine or undercut the rationale for those torts. It would be anomalous if a breach of contract (where the existence of the cause of action is dependent on the choice of the contracting parties) could support a claim for conspiracy to injure, but a claim for trespass could not do so. Likewise, it would be anomalous if trespass to goods did not suffice given that criminal damage does. I am therefore satisfied that the claimant has established a serious issue to be tried in respect of a relevant unlawful act".

120. Having addressed this legal issue, he continued:

> "30. There is no difficulty in establishing a serious issue to be tried in respect of the remaining elements of the tort. The intention of the defendants' unlawful activities is plain from their conduct and from the published statements on the websites of the protest groups: it is to disrupt the sale of fuel in order to draw attention to the contribution that fossil fuels make to climate change. They are not solitary activities but are protests involving numbers of activists acting in concert. They therefore apparently undertake their protest activities in agreement with one another. Loss is occasioned because the petrol stations are unable to sell the claimant's fuel".

121. All of the evidence before me leads me to the same factual conclusion as he reached at [30].

122. Johnson J concluded as follows:

> "31. I am therefore satisfied that there is a serious issue to be tried.
>
> 32. Further, the evidence advanced by the claimant appears credible and is supported by material that is published by the groups to which the defendants appear to be aligned. That evidence is therefore likely to be accepted at trial. I would (if this had been a trial) wished to have clearer and more detailed evidence (perhaps including expert evidence) as to

> the risks that arise from the use of mobile phones, glue and spray paint in close proximity to fuel, but it is not necessary precisely to calibrate those risks to determine this application. It is also, I find, likely that the court at trial will adopt the legal analysis set out above in respect of the tort of conspiracy to injure (including, in particular, that the necessary unlawful act could be a tort that is not itself actionable by the claimant). It follows that not only is there a serious issue to be tried, but the claimant is also more likely than not to succeed at trial in establishing its claim".

123. Mr Simblet submitted that neither the *American Cyanamid* test nor the "likely to succeed" test derived from the HRA, section 12(3) were met on this claim.

124. First, he was critical of the drafting of the Claimants' statements of case and with some good reason. The claim form asserts that the Claimant seeks an injunction "to restrain the Defendants from obstructing access to or damaging petrol stations using its brand, by unlawful means and in combination with others". The "unlawful means" are not specified. The claim form does not therefore make clear on its face that the overarching tort relied on is the tort of conspiracy to injure by unlawful means. Further, neither the current draft nor the amended version of the Particulars of Claim specify what the underlying unlawful means are meant to be – Mr Simblet was right to identify that the Particulars do not mention the torts of trespass to land, trespass to goods and nuisance referred to by Johnson J. They simply list the unlawful acts that occurred at the Cobham services on 28 April 2022. It is clear from the nature of the unlawful acts that they are said to constitute the torts of trespass to land, trespass to goods and private nuisance but the Particulars would benefit from greater clarity. Ms Stacey sought to persuade me that avoiding legalese and writing in plain language was appropriate when dealing with Persons Unknown. That is correct as far as the injunctions are concerned but the requirements of the CPR and the need for legal clarity still apply to the statements of case.

125. Mr Simblet submitted that the Claimants have not complied with the mandatory obligation in PD16.7.5 applying to a claim based upon agreement by conduct, where "the particulars of claim must specify the conduct relied on and state by whom, when and where the acts constituting the conduct were done". The conduct in question has been specified: namely the unlawful acts on 28 April 2022 referred to above. Further, the Claimant has pleaded that they involved "coordinated action by a group of persons" and were also "carried out as part of the wider [JSO] movement", noting that some of the protestors were carrying or displaying banners which referred to JSO. The requirements of PD16.7.5 have been met, just, by this brief pleading.

126. Second, the Claimant is relying on the tort of conspiracy to injure because it is not in legal possession of all the petrol stations and does not own all the equipment on them. Accordingly, the underlying torts, depending on their precise location, may only be directly actionable in their own right by third parties. Mr Simblet argued that given the complexities of land ownership in multi-retailer commercial environments, it cannot confidently be asserted that the landowner would not tolerate the presence of those protesting against the Claimant in each and every case where this might occur. For present purposes, I am satisfied that there is a serious issue to be tried as to whether the landowners would tolerate unlawful activity of the type restrained by the

injunction, noting the observations as to protest on private land in *DPP v Cuciurean* at [45]–[46]. To the extent necessary, I consider it likely that the Claimant would succeed at trial on this issue.

127. Third, Mr Simblet contended that as the Claimant appeared to accept that it does not have sufficient rights of possession to bring a claim in its own name for trespass or private nuisance, it was not clear on what basis claims of trespass and private nuisance could form the underlying unlawful means for this tort. The answer is found in the caselaw summarised by Johnson J at [27], which establish that it is not necessary to show that the underlying unlawful conduct is actionable by the Claimant. As he noted at [28], whether the unlawful means relied upon can be a tort actionable by a third party rather than a breach of contract is a novel point that has yet to be determined. The skeleton argument placed before Johnson J advanced reasons why the answer to that question should be in the affirmative. He has alluded to these in the latter part of [29]. As he did, I consider that the Claimants can show a serious issue to be tried on that point.

128. Fourth, he argued that "instrumentality" - meaning that the conduct must be the means by which the Claimant has suffered loss - is an additional element of the tort of unlawful means conspiracy. He contended that the poor state of the pleadings meant that this issue had not been addressed and that Johnson J had erred by not addressing the instrumentality issue. I disagree. The Claimant's pleaded case refers to the significant duration of the protests on 28 April 2022 and the loss suffered by the Claimant due to the fact that petrol sales were significantly prevented or impeded while the protest was ongoing. The Claimant's case also refers to different kinds of loss namely damage to equipment for the distribution of highly flammable fuels and consequential health and safety risks. Johnson J specifically referred to the fourth limb of the tort as being the injury to the Claimant and addressed the evidence on loss: see [26] and [30]. Further in *Cuadrilla* at [67]-[69], the Court of Appeal explained that the requirement of the conspiracy tort to show damage can be incorporated into a *quia timet* injunction by reference to the Defendants' intention, which is the approach taken here. The extent of actual damage would need to be proved at a final hearing or on any committal.

129. Fifth, he noted that reliance on wide-ranging economic torts such as conspiracy to injure through unlawful means was discouraged by the Court of Appeal in *Boyd v Ineos* [2019] 4 WLR 100. The Court discharged those parts of an order based on public nuisance and unlawful means conspiracy leaving only those based on trespass and private nuisance. Further, in *Cuadrilla*, the prohibitions were made out on the facts from claims in private nuisance and at [81] the Court described the prohibition corresponding to unlawful means conspiracy as "a different matter" on which Cuadrilla did not need to rely. However, as Ms Stacey highlighted, the discharge of the injunction based on conspiracy by the Court of Appeal in *Ineos* involved materially different facts, namely a challenge to an injunction sought before any offending conduct had taken place; and terms which were impermissibly wide. In *Cuadrilla* at [47], the Court of Appeal noted that the injunction had been made before any alleged unlawful interference with the claimant's activities had occurred was "important in understanding the decision" and I agree. In contrast, the injunction granted by Johnson J was based on past conduct having already occurred and was suitably narrow in focus.

130. Sixth, he contended that while the courts will in certain circumstances allow claims to be brought against Persons Unknown, this does not mean that claims can be brought against purely hypothetical Defendants. The courts will strike out claims brought against persons without legal personality, such as occurred in *EDO v Campaign to Smash EDO and others* [2005] EWHC 837, a case seeking injunctive relief against protestors. Here, the Claimants were simply "imagining or conjuring up" the alleged conspirators and a year into the life of the injunctions, there were still no named individuals involved. This was an example of the serious conceptual and practical problems in using "Persons Unknown" injunctions in in protestor cases. This was particularly so where the injunctions are underpinned by an alleged conspiracy (namely a state of mind and agreement). However, *Cuadrilla* shows that the use of Persons Unknown injunctions in cases of this nature is conceptually acceptable.

131. I therefore agree with Johnson J for the reasons he gave at [25]-[31] that there is a serious issue to be tried on this claim.

132. Further, I share his conclusion at [32] that in light of the credible evidence provided and the persuasive nature of the legal arguments on the third party tort issue, the Claimant is more likely than not to succeed at trial in establishing its claim.

(2) Would damages be an inadequate remedy for the Claimants and would a cross-undertaking in damages adequately protect the Defendants?

133. The note of Bennathan J's judgment indicates that he accepted that (i) the activities at the Haven and Tower sites would cause grave and irreparable harm; (ii) trespassing on the sites could lead to highly dangerous outcomes, especially given the presence on the sites of flammable liquids; and (iii) the blocking of entrances could lead to business interruption and large scale cost to the Claimant's businesses. He concluded that given the sorts of sums involved and the practicality of obtaining damages, the latter would not be an adequate remedy.

134. Johnson J accepted at [34] that the Defendants' conduct with respect to the petrol stations gives rise to potential health and safety risks and if those risks materialise they could not adequately be remedied by way of an award of damages. He took into account the fact that there is no evidence that the Defendants have the financial means to satisfy an award of damages, such that it is "very possible that any award of damages would not, practically, be enforceable."

135. The evidence before me shows that all of these considerations remain valid.

136. There is also an element to which the losses at the Haven and Tower sites may be impossible to quantify, though like Johnson J at [33], I do not find the Claimants' argument to similar effect with respect to the petrol stations persuasive.

137. However, for the other reasons set out at [133]-[135] above I am satisfied that damages would not be an adequate remedy for the Claimants.

138. As to the issue of a cross-undertaking, as Johnson J noted at [36], while the petrol stations injunction does interfere with the Defendants' rights of expression and assembly, to the extent that a court finds that there has been any unjustified

interference with those rights, that could be remedied by an award of damages under the HRA, section 8.

139. The evidence from Alison Oldfield, the Claimants' solicitor, made clear that the Claimants have offered a cross-undertaking in damages, in the event that the same becomes necessary. The Claimants have the means to satisfy any such order.

140. Accordingly, a cross-undertaking in damages would be an adequate remedy for the Defendants.

(3) Alternatively, does the balance of convenience otherwise lie in favour of the grant of the order: *American Cyanamid* per Lord Diplock at 408C-F?

141. As damages are not an adequate remedy and the cross-undertaking is adequate protection for the Defendants, it is not necessary separately to consider the balance of convenience: see Johnson J at [38].

142. To the extent necessary, Ms Stacey relied on his further reasoning at [39] to this effect:

> "…the balance of convenience favours the grant of injunctive relief. If an injunction is not granted, then there is a risk of substantial damage to the claimant's legal rights which might not be capable of remedy. Conversely, it is open to the defendants (or anybody else that is affected by the injunction) at any point to apply to vary or set aside the order. Further, although the injunction has a wide effect, there are both temporal and geographical restrictions."

143. She submitted that this analysis, save for the final sentence, applies equally to the Shell Haven and Tower claims, and even more strongly since those orders do not have such wide effect.

144. I agree: for these reasons the balance of convenience is in favour of continuing the relief.

(4) Is there a sufficiently real and imminent risk of damage so as to justify the grant of what is a precautionary injunction?

145. It is only appropriate to grant an interim injunction if there is a sufficiently "real" and "imminent" risk of a tort being committed to justify precautionary relief (see, for example, *Canada Goose UK Retail Limited v Persons Unknown* [2020] EWCA Civ 303; [2020] 1 WLR 2802 at [82(3)], per Sir Terence Etherton MR).

146. All three injunctions were made because of conduct causing harm that had already taken place. Since then, further conduct and harm has occurred at petrol station sites. The risk of repetition is demonstrated by this further action and the various statements made by the protest groups indicating their intention to continue with similar activities, as summarised at [35]-[40] above.

147. I am therefore satisfied that unless restrained by injunctions the Defendants will continue to act in breach of the Claimants' rights; that there continues to be a real and imminent risk of future harm; and that the harm which might eventuate is sufficiently

"grave and irreparable" that damages would not be an adequate remedy: see *Vastint Leeds BV v Persons Unknown* [2018] EWHC 2456 (Ch)] at [31(4)(d)], per Marcus Smith J at [31(3((d)].

148. It is appropriate to deal at this juncture with the element of the Claimant's application for an extension of the petrol stations injunction which deals with the newly defined Defendants. I deal with the issue here because the evidence in relation to non-environmental protestors at petrol stations summarised at [106] above makes clear that they respected the terms of the injunction. This means that the aspect of the extension to the petrol stations injunction sought by the Claimant in relation to this wider group is "purely" precautionary, as it is not based on any past tortious conduct. However, in light of the evidence suggesting movement between groups and protest campaigns which are not necessarily limited to environmental protests, summarised at [107] above, I am satisfied that the *Canada Goose* and *Vastint* tests are met with respect to this more widely defined group of Defendants.

149. Finally, I agree with Johnson J's reasoning at [421]-[42], illustrating that the injunctions are not premature, due to the fact that warnings of protests are unlikely to be given in sufficient time to obtain an injunction:

> "41. If the claimant is given sufficient warning of a protest that would involve a conspiracy to injure, then it can seek injunctive relief in respect of that specific event. If there were grounds for confidence that such warnings will be given, then the risk now (in advance of any such warning) might not be sufficiently imminent to justify a more general injunction. There is some indication that protest groups sometimes engage with the police and give prior warning of planned activities. But it is unlikely that sufficient warning would be given to enable an injunction to be obtained. That would be self-defeating. Further, it is not always the case that warnings are given. Extinction Rebellion say in terms (on its website) that it will not always give such warnings. Moreover, the claimant did not receive sufficient (or any) warning of the activities on 28 April 2022.
> 42. Accordingly, I am satisfied that this application is not premature, and that the risk now is sufficiently imminent. The claimant may not have a further opportunity to seek an injunction before a further protest causes actionable harm".

(5) Do the prohibited acts correspond to the threatened tort and only include lawful conduct if there is no other proportionate means of protecting the Claimant's rights: *Canada Goose* at [78] and [82(5)]?

150. The acts prohibited in the Haven and Tower injunctions necessarily correspond to the threatened torts of trespass to their land and private nuisance.

151. The acts prohibited in the petrol stations injunction reflect those in the petrol stations injunction necessarily amount to conduct that constitutes the tort of conspiracy to injure, provided that the injunction is read in full in the way described by Johnson J at [26 above]. This means that the concerns raised in Mr Simblet's submission to the effect that clause 3.4 ("affixing any object or person") would prohibit placing leaflets or signs on any objects on or in a Shell petrol station and his similar concerns about

clauses 3.5 and 3.6 ("erecting any structure in, on or against any part of" or "painting or depositing or writing in any substance on any part of" a Shell petrol station) are to some degree mitigated by the fact that such activities are only prohibited by the injunction if they are (i) such that they damage the petrol station; (ii) done in agreement with others; and (iii) done with the intention of disrupting the sale or supply of fuel. These are similar to the "sweet wrapper" example given by Johnson J at [26] above: the prohibited acts in paragraph 3 need to be read in conjunction with the definition of Defendants. When that is done, it can be seen that they mirror the torts underlying the overarching tort of conspiracy to injure.

152. I do not agree with Mr Simblet that it is necessary to revise the wording to make clear that the conduct must have the "effect" of disrupting the sale or supply of fuel to or from a Shell petrol station as this is an element of the conspiracy to injure tort. The same is not necessary given that this is an anticipatory injunction. The current wording focusses on the Defendants' intention to cause harm which is consistent with *Cuadrilla* at [67]-[69] (see [128] above). Actual loss or damage can be addressed in due course.

153. Each injunction contains an order making clear that it is not intended to prohibit behaviour which is otherwise lawful. To the extent that it does, the same is a proportionate means of protecting the Claimant's rights for the reasons given under sub-issue (10) below.

(6) Are the terms of the injunctions sufficiently clear and precise: *Canada Goose* at [82(6)]?

154. In my judgment the wording of all three injunctions is in clear and simple language, save for two caveats with respect to the petrol stations injunction: (i) some wording should be inserted before clauses 3.4-3.6 to reflect that the acts are only prohibited if they cause damage (such wording being clear on the face of the Tower and Haven injunctions but not on the petrol stations one); and (ii) clause 3.7 should be removed as it duplicates paragraph 4.

155. In respect of the petrol stations injunction, as Johnson J noted at [46], it is usually desirable that such terms should, so far as possible, be based on objective conduct rather than subjective intention. However, for the reasons he gives, the element of subjective intention in paragraph 2 ("with the intention of disrupting the sale or supply of fuel to or from a Shell Petrol Station") is necessary because of the nature of the tort of conspiracy to injure and to avoid the language being wider than is necessary or proportionate (noting the sweet wrapper example he gave at [21]).

156. I do not accept Mr Simblet's contention that the "encouragement" provisions are unduly vague: they are clearly defined as being linked with the underlying acts and are intended to ensure that the injunctions are effective. To the extent that they capture lawful activity, they are proportionate as explained under sub-issue (10) below.

(7) Do the injunctions have clear geographical and temporal limits: *Canada Goose* at [82(7)] (as refined and explained in *Barking and Dagenham LBC v Persons Unknown* [2022] EWCA Civ 13 per Sir Geoffrey Vos MR at [79] - [92])?

157. As to geographical limits, the extent of the Haven and Tower injunctions is made clear by the plans appended to them. The Haven injunction includes a clear definition of, and plan showing, the boundary of the injunction. This should address Ms Branch's concern about where she would need to be to risk breaching it if asked to leave by an employee. As to Ms Branch's concern that she might breach the Haven injunction by placing a poster or flyer on the external walls of the site, the injunction only prohibits the affixing of objects which cause damage, within the geographical boundary as defined (the latter of which should help her identify which "external walls" are covered).

158. The petrol stations injunction applies only to "petrol stations displaying Shell branding (including any retail unit forming part of such a petrol station, whatever the branding of that retail unit)". I agree with the reasons Johnson J gave at [48] as to why it is necessary and proportionate to protect the Claimant's interests to include all such petrol stations rather than, for example, those that have already been targeted or certain types of petrol station.

159. However, Ms Branch and Mr Simblet had raised valid concerns about the extent to which the injunction covers land around or approaching the petrol stations. Accordingly in my draft judgment I invited the Claimant to propose some words that would greater delineate where the scope of the injunction ends and the public highway over which the injunction does not apply begins (albeit not using wording such as "short" distance as that would be insufficiently clear: see *Cuadrilla* at [57]). Ms Stacey, having explained why a simple "radius" provision was not practicable, proposed that the injunction would apply to those "directly blocking or impeding access to any pedestrian or vehicular entrance to a Shell Petrol Station forecourt to a building within the Shell petrol station". I am satisfied that this revised wording renders the petrol stations order sufficiently geographically specific as it makes it clear that the area of focus is the petrol station forecourts. It also correctly focusses on the nature of the prohibited activity, in the form of direct obstructions.

160. As to temporal limits, the Claimants seek an extension to each injunction until trial or further order, with a backstop of a duration of one year.

161. Ms Stacey referred to the observations of the Court of Appeal in *Barking and Dagenham LBC and others v Persons Unknown* [2022] EWCA Civ 13 at [98] and [108] to the effect that "For as long as the court is concerned with the enforcement of an order, the action is not at end" and "there is no rule that an interim injunction can only be granted for any particular period of time. It is good practice to provide for a periodic review, even when a final order is made".

162. She made clear that the Claimants intend to await the outcome of the appeal to the Supreme Court in *Barking & Dagenham*, which is expected to clarify the central issue of whether final injunctions are capable of being obtained against persons unknown or whether they can only be obtained against named individuals, before seeking a final hearing on these injunctions. Both interim and final orders must be kept under review in any event. That said, she put on record that the Claimants are mindful of their obligations to progress the litigation and intend to do so by seeking directions to bring the matter to a final hearing as soon as practical once judgment in *Barking & Dagenham* is available. If there is a proper evidential basis to join named Defendants, that may occur, and then they can be permitted to file a Defence.

163. I accept her assurance that the proposed "backstop" period of one year is just that, in light of the matters referred to in the preceding paragraph. I am satisfied that this period strikes the correct balance between the need to keep orders under review and the express indications by JSO and other groups that their campaigns are escalating rather than being brought to an end in the near term. I note that, for example, in *HS2 v Persons Unknown* [2022] EWHC 2360 at [109], Knowles J granted an interim injunction on the basis of yearly review periods to determine whether there was a continued threat which justified the continuation of the order, with the usual provisions allowing for persons affected to vary or discharge it.

(8) The Defendants having not been identified, are they in principle, capable of being identified and served with the orders: *Canada Goose* at [82(1)] and [82(4)]?

164. The note of the hearing before Bennathan J makes clear that a Mr Smith was joined as a Defendant to the Tower claim on an unopposed basis, but he is no longer so joined.

165. Johnson J's judgment explained at [13] that on 28 April 2022 five people were arrested and charged with offences, including criminal damage, in respect of the Clacket Lane and Cobham petrol station protests. He noted that the Claimant had not sought to join them as individual named Defendants to this claim because (in the case of four of them) it considered that, in light of the bail conditions, there was no significant risk that they will carry out further similar activities, and (in the case of the fifth) it is not sufficiently clear that the conduct of that individual comes within the scope of the injunction.

166. Accordingly, there are currently no named Defendants to any of the claims.

167. However, Ms Oldfield's evidence explains how the Claimants are keeping the issue under review. They are liaising with the relevant police forces in an effort to identify persons falling within Persons Unknown description; and comply with the undertaking to join such persons as named Defendants to the three orders as soon as reasonably practicable following the provision of their names and addresses by the police.

168. Pursuant to the third party disclosure order made by May J (see [218] below), on 29 March 2023 Surrey Police provided the Claimant in the petrol stations claim with the names and addresses of individuals arrested at Clacket Lane and Cobham motorway services on 28 April 2022 and 24 August 2023. The Claimant is liaising with Surrey Police to obtain the further information necessary to enable them to decide whether there is a proper evidential basis for applying to join any of the individuals as named Defendants, following the approach set out by Freedman J in *TfL v Lee* [2022] EWHC 3102 at [71]-[79]. A similar process is no doubt underway in relation to the Commissioner following the third party disclosure order I made on 28 April 2023.

169. Therefore, while no named Defendants have yet been identified, the Claimants are taking active steps to identify such people. On that basis I am satisfied that when people take part in protests at the relevant sites, they are, in principle, capable of being identified and that there is a process in place focussed on achieving that. Such persons can then be personally served with court documents. In the meantime, effective alternative service on the Persons Unknown Defendants can take place in a manner

that can reasonably be expected to bring the proceedings to their attention, as explained under Issue (4).

(9) Are the Defendants identified in the claim forms and the injunctions by reference to their conduct: *Canada Goose* at [82(2)]?

170. The descriptions of the Persons Unknown are sufficiently precise to identify the relevant Defendants as the descriptions target their conduct. Ms Oldfield's evidence makes clear that (i) effective service has taken place on Persons Unknown pursuant to the alternative service provisions in the orders; and (ii) the Claimants are taking steps to identify persons falling within the description of the persons unknown and to comply with the undertaking to join such persons as named Defendants.

(10) Are the interferences with the Defendants' rights of free assembly and expression necessary for and proportionate to the need to protect the Claimants' rights: Articles 10(2) and 11(2), read with the HRA, section 6(1)?

171. As Mr Simblet highlighted, Articles 10 and 11 contain important protections on the right to protest, which supplement those at common law. Further, it is the essence of protest that many, including those in power, will regard it as unwelcome (see, for example, the observations of Laws LJ in *R(Tabernacle) v Secretary of State for Defence* [2009] EWCA Civ 23).

172. All three injunctions interfere with the Defendants' rights under Articles 10(1) and 11(1). However, such interferences can be justified where they are necessary and proportionate to the need to protect the Claimants' rights. As Lord Sales JSC explained in *DPP v Ziegler* [2021] UKSC 23; [2022] AC 408 at [125] the test is as follows:

> "…the interference must be "necessary in a democratic society" in pursuance of a specified legitimate aim, and this means that it must be proportionate to that aim. The four-stage test of proportionality applies: (i) Is the aim sufficiently important to justify interference with a fundamental right? (ii) Is there a rational connection between the means chosen and the aim in view? (iii) Was there a less intrusive measure which could have been used without compromising the achievement of that aim? (iv) Has a fair balance been struck between the rights of the individual and the general interest of the community, including the rights of others?".

173. As to element (i), in the petrol stations claim, Johnson J at [57] identified the aim of the interference as the need to protect the Claimant's right to carry on its business. The same applies to the Haven and Tower claims which also involve the Claimants' rights over their privately owned land, as protected by Article 1, Protocol 1. Johnson J observed that the Defendants are "motivated by matters of the greatest importance" and "might say that there is an overwhelming global scientific consensus that the business in which the claimant is engaged is contributing to the climate crisis and is thereby putting the world at risk, and that the claimant's interests pale into insignificance by comparison". Ms Branch's statement indicates that these are her firm beliefs. However, as he continued, this is not "a particularly weighty factor: otherwise judges would find themselves according greater protection to views which

they think important" (see *City of London v Samede* [2012] EWCA Civ 160; [2012] 2 All ER 1039 at 41, per Lord Neuberger at [41]); and "it is not for the court...to adjudicate on the important underlying political and policy issues raised by these protests. It is for Parliament to determine whether legal restrictions should be imposed on the trade in fossil fuels".

174. I agree with his analysis that the Claimant in the petrol stations claim is entitled to ask the court to uphold and enforce its legal rights, including its right to engage in a lawful business without tortious interference. The same is even clearer with respect to the Claimants on the Haven and Tower claims, given that the injunctions only cover their private property. The Claimants' rights in these respects are prescribed by law and their enforcement is necessary in a democratic society. As Johnson J held at [57], the aims of the injunctions are therefore "sufficiently important to justify interferences with the Defendants' rights of assembly and expression".

175. As to issues (ii) and (iii) in the test described by Lord Sales JSC, I am satisfied that in each of the three cases there is a rational connection between the terms of the injunction and the aim that it seeks to achieve. The terms of the injunction are drafted so that they only prohibit activity that would amount to the torts of trespass and private nuisance (in the case of the Haven and Tower claims) and conspiracy to injure (in the case of the Petrol station claim). The terms of the injunctions, including their geographical and temporal scope, are no more intrusive than is necessary to achieve the aims of the injunctions.

176. As to issue (iv), as Johnson J said at [36] and [59], the Defendants are not prevented from congregating and expressing their opposition to the Claimants' conduct, including, "in a loud or disruptive fashion", in a location close to Shell petrol stations, so long as it is not done in a way which involves the unlawful conduct prohibited by the injunctions. The same applies to the Haven and Tower sites. The injunctions do not therefore prevent activities that are "at the core" or which form "the essence" of the rights in question (see *DPP v Cuciurean* [2022] EWHC 736 at [31], [36] and [46], per Lord Burnett of Maldon CJ). All that is prohibited on each of the injunctions is specified deliberate tortious conduct.

177. Leggatt LJ observed in *Cuadrilla* at [94]-[95] that intentional disruption of activities of others (as opposed to disruption caused as a side-effect of protest held in a public place) is not "at the core" of the freedom protected by Article 11. As Johnson J noted at [62], the petrol station injunction sought to restrain protests which have as their aim such intentional unlawful interference with the Claimant's activities; and the same is true of the Haven and Tower injunctions.

178. On the other hand, as Johnson J observed at [60], simply leaving it to the police to enforce the criminal law would not adequately protect the rights of the Claimant in the petrol station claim: such enforcement could only take place after the event, meaning inevitable loss to the Claimant; and some of the activities that the injunction sought to restrain are not breaches of the criminal law and could not be enforced by the exercise of conventional policing functions. The same is true of the Claimants' rights at the Haven and Tower sites. Indeed the balance is even clearer in those respects given that the sites involve the Claimants' private property, as to which see *Cuciurean* at [45], [46], [76] and the conclusion at [77] that Articles 10 and 11 "do not bestow any

"freedom of forum" to justify trespass on private land or publicly owned land which is not accessible by the public".

179. The injunctions therefore strike a fair balance between the Defendants' rights to assembly and expression and the Claimants' rights: they protect the Claimants' rights insofar as is necessary to do so but not further.

180. Overall, I am satisfied that the interferences with the Defendants' rights of free assembly and expression caused by the injunctions are necessary for and proportionate to the need to protect the Claimants' rights.

(11) Have all practical steps been taken to notify the Defendants: the HRA, section 12(2)?

181. The HRA, section 12(1)-(2) provide as follows:

> "(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".

182. Ms Oldfield's evidence sets out the steps the Claimants have taken to effect service of the orders and thus explains how the Claimants have complied with the section 12(2) requirement in respect of the Persons Unknown Defendants.

(12) If the order restrains "publication", is the Claimant likely to establish at trial that publication should not be allowed: the HRA, section 12(3)?

183. The HRA, section 12(3) provides as follows:

> "No such relief [ie. that defined by section 12(1) at [181] above] 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".

184. Johnson J addressed this issue in detail in his judgment. He found that section 12(3) is not applicable in this context as the injunction sought did not restrain publication. His reasons were as follows:

> "67. Nothing in the injunction explicitly restrains publication of anything. Nor does it have that effect. The defendants can publish anything they wish without breaching the injunction. The activities that the injunction restrains do not include publication. It does not, for example, restrain the publication of photographs and videos of the protests that have already taken place. Nor does it prevent anyone from, for example, chanting anything, or from displaying any message on any placard or from placing any material on any website or social media site.

> 68. Lord Nicholls explained the origin of section 12(3) in *Cream Holdings Limited v Banerjee* [2004] UKHL 44 [2005] 1 AC 253 (at [15]). There was concern that the incorporation of article 8 ECHR into domestic law might result in the courts readily granting interim applications to restrain the publication by newspapers (or others) of material that interferes with privacy rights. Parliament enacted section 12(3) to address that concern, by setting a high threshold for the grant of an interim injunction in such a case. It codifies the prior restraint principle that previously operated at common law. The policy motivation that gave rise to section 12(3) has no application here.
> 69. The word "publication" does not have an unduly narrow meaning so as to apply only to commercial publications: "publication does not mean commercial publication, but communication to a reader or hearer other than the claimant" – *Lachaux v Independent Print Limited* [2019] UKSC 27; [2020] AC 612 *per* Lord Sumption at [18]. Lord Sumption's observation was made in the context of defamation, but Parliament legislated against this well-established backdrop. Section 12(3) should be applied accordingly so that "publication" covers "any form of communication": *Birmingham City Council v Asfar* [2019] EWHC 1560 (QB) *per* Warby J at [60].
> 70. The meaning set out by Lord Sumption in *Lachaux* is sufficient to achieve the underlying policy intention. There is therefore no good reason for giving the word "publication" an artificially broad meaning so as to cover (for example) demonstrative acts of trespass in the course of a protest. Such acts are intended to publicise the protestor's views, but they do not amount to a publication.
> 71. Further, the wording of section 12 itself indicates that the word "publication" has a narrower reach than the term "freedom of expression". That is because the term "freedom of expression" is expressly used in the side-heading to section 12, and in section 12(1), and is used (by reference ("no such relief")) in section 12(2) and section 12(3). The term "publication" is then used in section 12(3) to signify one form of expression. If Parliament had intended section 12(3) to apply to all forms of expression, then there would have been no need to introduce the word "publication".

185. He went on to consider the fact that in *Ineos Upstream v Persons Unknown* [2017] EWHC 2945, at first instance, Morgan J held (i) that section 12(3) applied (at [86]) and (ii) the statutory test was satisfied because if the court accepted the evidence put forward by the claimants, then it would be likely, at trial, to grant a final injunction (at [98] and [105]). He noted that Morgan J found the injunction that he was considering might affect the exercise of the right to freedom of expression, continuing:

> "73…. That was plainly correct, because the injunction restrained activities that were intended to express support for a particular cause. It does not, however, necessarily follow that section 12(3) is engaged (because, as above, "publication" is not the same as "expression"). There does not appear to have been any argument on that point – rather the focus was on the question of whether there was an interference with the right to freedom of expression. To the extent that Morgan J

> in *Ineos* and Lavender J in [*National Highways Limited v Persons Unknown* [2021] EWHC 3081 (QB) at [41]] reached different conclusions about the applicability of section 12(3) in this context, I respectfully adopt the latter's approach for the reasons I have given".

186. At [74]-[76], he observed that on appeal ([2019] EWCA Civ 515 [2019] 4 WLR 100), there was no challenge to the holding of Morgan J that section 12(3) applied, such that the Court of Appeal did not consider the issue. On that basis he found that while the Court of Appeal decision in *Ineos* is authority for the approach that should be taken where section 12(3) applies, it is not authority for the proposition that section 12(3) applies in the circumstances where "there is no question of restraining the defendants from publishing anything".

187. If he was wrong with respect to section 12(3) not being applicable, he found that the Claimant was likely to succeed at a final trial: [76] and [32].

188. It appears from the solicitor's note of the judgment on the Haven and Tower claims that Bennathan J took a different view and considered that section 12(3) applied, apparently on the basis that he considered himself bound by the Court of Appeal decision in *Ineos*. That is consistent with the approach he took in *National Highways Limited v Persons Unknown* [2022] EWHC 1105 (QB) at [40]). The solicitor's note is unclear, though, and can only be properly understood by looking at the *National Highways* judgment to which Mr Simblet referred. This sort of issue underscores why having an approved transcript of Bennathan J's judgment was important.

189. Ms Stacey contended that Johnson J's reasoning was correct and should be adopted in respect of all three injunctions.

190. Mr Simblet took issue with this analysis. He contended that a number of High Court judges including Bennathan J have accepted that section 12(3) does apply in cases concerning protest. Further, contrary to Johnson J's findings, the Court of Appeal judgment in *Ineos* is clear authority for the proposition that section 12(3) applies to cases such as the present, permission to appeal having been explicitly granted on the question of whether the trial judge "failed adequately or at all to apply section 12(3) of the Human Rights Act 1998". *Ineos* was binding on Johnson J who erred in failing to follow it; and it was binding on me.

191. He referred to the broad definition of "publication" applied by Warby J in *Birmingham City Council v Afsar* [2019] EWHC 1560 (QB) at [60] thus:

> "But I would go further. I am satisfied that it would be quite wrong to treat the word "publication" in s 12(3) as having a limited meaning, restricted for example (as Mr Manning's submission seemed to imply) to commercial publication. It is hard to see how that such an approach could be rationally defended. It would give commercial publishers preferential treatment compared to other defendants, such as individuals communicating for private purposes, on social media. As everybody knows, some social media accounts have larger readerships than some paid-for newspapers. But there is a more fundamental point. In the law of defamation, "publication does not mean commercial publication, but communication to a reader or hearer other

> than the claimant": *Lachaux v Independent Print Ltd [2019] UKSC 27* [18] (Lord Sumption). This is generally true of the torts associated with the communication of information, sometimes known as "publication torts", and the related law (see the discussion in *Aitken v DPP [2015] EWHC 1079 (Admin) [2016] 1 WLR 297* [41-62]). Parliament must be taken to have legislated against this well-established background. Section 12(3) applies to any application for prior restraint of any form of communication that falls within Article 10 of the Convention. This is appropriately reflected in the language of the Practice Guidance, quoted above." [emphasis added].

192. He submitted that the proper test for the application of section 12(3) is therefore whether an order restrains: "any form of communication that falls within Article 10 of the Convention". Whilst Johnson J was correct that this is narrower than simply acts which fall within the scope of Article 10, this is only to the extent that the act must additionally be a "form of communication". Therefore, whilst an act of expression that was not intended to be communicated to any audience would not be included, the application of section 12(3) is not otherwise restricted. He cited *Murat Vural v Turkey* (App. No. 9540/07) at [54] where the Strasbourg Court held that "an assessment must be made of the nature of the act or conduct in question, in particular of its expressive character seen from an objective point of view, as well as of the purpose or the intention of the person performing the act or carrying out the conduct in question." That case involved pouring paint on a statute and the Court observed that "from an objective point of view", this "may be seen as an expressive act".

193. Mr Simblet argued that once an act is categorised as "expressive", it is only if it is violent, incites violence or has violent intentions that the conduct will be considered to fall outside the protection of Article 10; and that this was recently confirmed in *AG Reference on a Point of Law (No 1 of 2022)* [2022] EWCA Crim 1259 (at [96]), citing the Strasbourg principle that "an assessment of whether an impugned conduct falls within the scope of Article 10 of the Convention, should not be restrictive, but inclusive".

194. He submitted that while there could be arguments about whether any form of visible or performative protest amounted to "publication", it was clear that the petrol stations injunction involved publication as it prohibited "writing in any substance on any part of a Shell Petrol station". It was absurd to suggest that this was not a publication, not least as it could make out the necessary component of a libel claim (see Clerk and Lindsell on Torts, Chapter 21, section 5, referring, for example, to proof of posting a postcard amounting to "publication" for the purposes of a libel claim).

195. I do not consider that *Ineos* is binding authority for the proposition that section 12(3) applies. Johnson J was correct to point out that it proceeded on the assumption that section 12(3) applied and did not hear argument to the contrary, whatever the basis on which permission was originally granted.

196. However, I agree with Mr Simblet that the injunctions in this case do involve some elements of element of publication for these purposes, at the very least the prohibition on "writing". I make this finding applying the broad approach taken to the definition of "publication" by Warby J in *Birmingham City Council* and the expansive approach of the Strasbourg court to this issue as evidenced by *Murat Vural* and *AG Reference*

on a Point of Law (No 1 of 2022). I therefore take the same approach as Bennathan J in the Haven and Tower claims and *National Highways*.

197. It must be remembered that Johnson J did not have the benefit of submissions from anyone other than the Claimants. Further, the focus of his reasoning was the general concept of "demonstrative acts of trespass in the course of a protest": see [184] above. It does not appear that he was asked to give specific consideration to the narrower question of whether the prohibition on "writing" within the petrol stations injunction might engage section 12(3).

198. On that basis, the test is whether the Claimants are "likely" to succeed at a final trial, at least in relation to the "writing" aspects of the injunctions. However, I am satisfied that that test is met for the reasons given under Issue (1).

Overall conclusion on Issue (3)

199. For all these reasons I consider it appropriate to extend the injunctions in the manner sought by the Claimants with the modifications referred to at [154] and [159] above.

Issue (4): Whether to grant the Claimants permission to serve any order and ancillary documents by alternative means

200. Under CPR 6.15(1), in order to authorise service of proceedings by a method or at a place not otherwise permitted by that Part of the CPR, the court requires "good reason". That reason is made out here because the Defendants are Persons Unknown, such that it is not possible to serve them personally.

201. The alternative means of service proposed for the order in the Tower claim are (i) affixing warning notices to and around the Tower which (a) warn of the existence and general nature of the order, and of the consequences of breaching it; (b) indicate when it was last reviewed and when it will be reviewed in the future; (c) indicate that any person affected by it may apply for it to be varied or discharged; (d) identify a point of contact and contact details from which copies of the order may be requested; and (e) identify http://www.noticespublic.com/ as the website address at which copies of the order may be viewed and downloaded; (ii) uploading a copy of the notice to http://www.noticespublic.com/; (iii) emailing a copy of the notice to a series of emails relating to the main protest groups listed in the schedule of the order; and (iv) sending a copy of the notice to any person who has previously requested a copy of documents in the proceedings.

202. The alternative means of service proposed for the order in the Haven claim are (i)-(iii) above.

203. The alternative means of service proposed for the order in the petrol stations claim are (i)-(iv) above. The interim orders which I made on 28 April 2023 mirrored the terms of Johnson J's order and provided for the notices to be affixed by use of conspicuous notices in prescribed locations in the petrol stations, in alternative locations in the stations, depending on the physical layout and configuration of the stations.

204. The alternative means of service proposed for the amended claim form and any ancillary documents in the petrol stations claim are (ii)-(iv) above.

205. Alternative service by means of this kind has been found to be appropriate in respect of Persons Unknown in similar proceedings involving coordinated campaigns by protest groups. In *TfL v Lee* [2023] EWHC 402 (KB) at [32], Cavanagh J said:

> "Alternative service is necessary for the relief to be effective. Moreover… the Defendants already have a great deal of constructive knowledge that the [injunctions] may well be extended: the extent and disruptive nature of the JSO protests since March 2022 (and the Insulate Britain protests which began in September 2021); the multiple civil and committal proceedings brought in response to those protests by National Highways Limited, TfL, local authorities and energy companies and the frequent service of documents on defendants within those proceedings including multiple interim injunctions; the extensive media and social media coverage of the protests, their impact, and of the legal proceedings brought in response; the large extent to which, in order to organise protests and support each other, JSO protesters are in communication with each other both horizontally between members and vertically by JSO through statements, videos etc. shared through its website and social media. These are not activities that single individuals undertake of their own volition. In my judgment, in the perhaps unusual circumstances of this case, it is very unlikely, perhaps vanishingly unlikely, that anyone who is minded to take part in the JSO protests…is unaware that injunctive relief has been granted by the courts."

206. Bennathan and Johnson JJ also approved service of the orders in these proceedings in materially identical terms. The note of Bennathan J's judgment indicates that he observed that in Persons Unknown cases, it is sensible to adopt a variety of methods of service and considered that the proposals for alternative service in the Tower and Haven claims were "sensible" and "broad". The note of the hearing before Johnson J makes clear that counsel for the Claimant in the petrol stations claim explained why other methods of alternative service such as the use of newspapers and social media had been considered but discounted.

207. Ms Oldfield's evidence sets out the efforts that have been made to identify individuals who ought properly to be named as Defendants and the steps that had been taken to serve the previous three orders and the draft amended claim form and related documents in the petrol stations claim.

208. I am satisfied that the proposed methods of alternative service are appropriate and sufficient. I accept Ms Oldfield's evidence as to why these methods of service remain an appropriate means by which the documents may be brought to the attention of potential Defendants. I am satisfied that the proposed methods of alternative service should apply to the further sealed injunctions orders I make and to the amended claim form and ancillary documents in the petrol stations claim. For the purposes of the injunctions, I dispense with personal service for the purposes of CPR 81.4(2)(c)-(d).

209. Ms Stacey rightly highlighted that even once alternative service is approved, it remains open to any Defendant on a committal application to argue that they have

operated unfairly against them: *Secretary of State for Transport v Cuciurean* [2020] EWHC 2614 (Ch) at [63(9)].

Issue (5): Whether to grant the Claimant in the petrol stations claim its application for a third party disclosure order against the Commissioner

210. The Claimant in the petrol stations claim is currently unable to name any individual Defendants. The third party disclosure application under CPR 31.17 sought documents from the Commissioner relating to the arrests of a number of people, some falling within the category of Persons Unknown as defined in the petrol stations injunction, who were arrested on 26 August 2022 in protests at the Shell Acton Park and Acton Vale petrol stations, both sites covered by injunction. It has been reported that 43 people were so arrested. The application was supported by the third witness statement from Ms Oldfield.

211. The draft order sought the names and addresses of those arrested. The purpose of this disclosure was to help the Claimant identify and name, so far as possible, Defendants to the claim, so that the Claimant can consider whether to join them as Defendants and so that they can be served with the proceedings in the usual way.

212. The draft order also provided for the Claimant to revert to the Commissioner on provision of the names and addresses and seek (i) arrest notes, incident logs or similar written records relating to the activity and/or conduct in question and those involved; (ii) other still photographic material; and/or (iii) body-worn or vehicle camera footage; and for the Commissioner to provide the same insofar as it discloses any conduct and/or activity which may constitute a breach of the injunctions granted in these proceedings and/or may assist in identifying any person who might have undertaken such conduct and/or activity. This information was sought to support potential contempt proceedings.

213. The Commissioner did not object to providing the disclosure sought, provided a court order was made.

214. In the first hearing in *TfL v Lee* [2022] EWHC 3102 at [94], Freedman J reiterated that CPR 31.17 provides a general power for the court to order a non-party to disclose information into the proceedings; and that although it is established that such orders are the exception and not the rule (see *Frankson & Ors v SSHD* [2003] EWCA Civ 655 at 25), the court retains a wide discretion to make such an order in appropriate cases.

215. In *Esso Petroleum Co Ltd v Persons Unknown* [2022] EWHC 1477 (QB) at [32], Bennathan J accepted that ordering the similar disclosure sought from various police forces as "evidence of breaches of the injunctions" was "the most sensible and efficient way to identify any breaches of the injunction" and that it was "best that any evidence that could be used by the claimants to pursue breaches is gathered by the legally regulated and democratically accountable police forces of the United Kingdom."

216. Further, In *TfL v Lee* at [96] Freedman J made a materially similar order to the one sought in this case in respect of the name and address of the relevant individuals on the basis that:

> "(1) The name and address of the people concerned are likely to support the case of the claimant or adversely affect the case of one of the other parties to the proceedings. Being able to identify who the people are who have been acting in the way complained of is a central facet of the interim relief that the court has already granted. Evidence of breach will go to upholding the […] injunction.
> (2) Disclosure is necessary in order to dispose fairly of the claim or to save costs, because (a) without the names and addresses the claimant cannot enforce the […] injunction without significant impediments; and (b) the claimant needs the names and addresses in order to make good an undertaking it has given to the court to add defendants as named defendants wherever possible.
> (3) Identifying the protesters will allow them to defend their position in the proceedings and it increases the fairness of the proceedings to have named defendants as far as possible.
> (4) The Metropolitan Police have stated to the claimant that it will only disclose the requested information pursuant to a court order and they do not oppose the grant of the making of that order.
> (5) The disruption to the public and the risks involved mean that it is proportionate to order third party disclosure.
> (6) It is much more desirable for the evidence gathering to be undertaken by the police, rather than for third parties such as inquiry agents to interfere during the demonstrations in order to obtain such evidence."

217. It appears that the order Freedman J made was in materially identical terms to the one sought in this case. I therefore assume it covered not only the names and addresses but also the material described at [212] above.

218. On 13 March 2023 May J made a materially identical third party order against Surrey Police in these proceedings in relation to arrests at the Shell petrol station at Cobham Motorway Services and Clacket Lane services on 28 April 2022 and/or 24 August 2022, having received submissions from the Equality and Human Rights Commission and having permitted the Attorney-General and the Press Association the opportunity to do so.

219. In my judgment the same general considerations as were set out by Bennathan and Freedman JJ above and found to apply by May J in the specific context of the petrol stations injunction, applied here. I was satisfied that the names and addresses and further information referred to should be the subject of a third party disclosure order because the requirements of CPR 31.17 were met, in that (i) the documents are relevant to an issue arising out of the claim; (ii) they are likely to support the Claimant's case (or adversely affect the case of one of the other parties); and (iii) disclosure is necessary to dispose fairly of the claim or to save costs.

Conclusion

220. For all these reasons I:

(i) Grant Ms Branch permission to apply to set aside or vary the existing injunctions under CPR 40.9 and have taken her submissions into account;

(ii) Grant the Claimant in the petrol stations claim permission to amend the description of the Persons Unknown Defendant:

(iii) Extend the three injunctions for up to a further year in the manner sought by the Claimants, subject to the modifications identified at [154] and [159] above; and

(iv) Grant the Claimants permission to serve the three orders as well as the amended claim form and ancillary documents in the petrol stations claim by alternative means.

221. This judgment also explains why I made the third party disclosure order sought against the Commissioner.

Post-script

222. After circulation of my draft judgment, the Claimants provided revised draft orders. These addressed the geographical scope issue referred to at [159] above. They also correctly removed the duplicative provisions relating to "encouragement" referred to at [154] above, albeit preserving the word "assisting" which only appeared in one of the original "encouragement" clauses. I am content to approve that revision.

223. I indicated that I was prepared to extend all three orders to 12 May 2024. Accordingly any hearing to review them will need to take place in April 2024 (not May 2024 as the Claimants proposed). Any application to extend them should be made by 28 February 2024 (not by 29 March 2024 as was proposed). I consider a time estimate of 1.5 days realistic (not the 5 hours proposed). That may need to be revised if any applications to vary or set aside the orders are made.

224. As to the notice required for any applications to vary or set aside the orders, the original draft orders provided with these applications sought a notice provision of 48 hours, not the 24 hours originally approved by Bennathan and Johnson JJ. For the reasons alluded to at [83] I consider a 48 hours' notice provision appropriate.

225. The draft orders, which were provided very shortly before the hand down was due to take place, sought to increase this period to 3 clear days (excluding weekends and Bank Holidays). As Mr Simblet highlighted in his response, this issue had not been the subject of argument. It also raises issues as to how the Claimants, and the court, deal with unrepresented Defendants. If the Claimants seek a further variation of the orders to this effect, they should apply by way of an application notice, on notice to Ms Branch.

Typographical amendments have been made under the slip rule to paragraphs 54, 59, 76, 124, 188, 196 and 215 above.