



Neutral Citation Number: [2022] EWHC 2600 (KB)

QB 2022 002577

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 September 2022

Before:

MR JUSTICE RITCHIE

BETWEEN

ESSO PETROLEUM COMPANY LIMITED

Claimant

- and -

SCOTT BREEN (1)

THE PERSONS UNKNOWN (who

Are described in Annex 1 to the claim form dated 10 August 2022) (2)

Defendants

- and -

JANE SUZANNE EVEREST

AND

HANNAH SHELLEY

Interest Persons

Timothy Morshead QC instructed by Eversheds Solicitors for the **Claimant**.
Owen Greenhall instructed by Hodge Jones and Allen LLP for the **Interested Persons**.

Hearing date: 7 September 2022

Approved Judgment

Mr Justice Ritchie:

The Parties

1. The Claimant is a large petrochemical company.
2. The 1st Defendant is not involved in this hearing relating to the claim having been committed to prison for contempt of court for breaching an ex-parte interlocutory injunction (see paras. 4 and 17 below).
3. The second Defendants are “persons unknown” (PUs) identified in the Particulars of Claim by way of an Annex thereto.
4. The Interested Persons make an application for permission to make submissions and observations at the return date for the consideration of the ex-parte injunction granted to the Claimant by Mr. Justice Eyre on 15 August 2022 which in summary was or was intended to be a mandatory and prohibitory restraining order against unlawful protest interfering with the construction of a pipeline.

Bundles

5. For the hearing I had various bundles. These included: (1) the main hearing bundle consisting of 16 documents and 393 page; (2) a supplementary bundle relating to the third party disclosure application consisting of 22 pages; (3) a further supplementary hearing bundle with 29 documents consisting of 333 pages; (4) a bundle of authorities filed by the Interested Persons and a short bundle of further authorities filed by the Claimant; (5) skeleton arguments from the Claimant and the Interested Persons.

The Hearing

6. The hearing on the 7th of September 2022 was the return date for the Court to consider whether to continue the ex-parte injunction obtained by the Claimant to restrain protestors from interfering with their legitimate business interests. At the hearing none of the Defendants appeared but the Interested Persons were represented by counsel and one came to Court.

The overall issues

7. The 5 issues for the Court to determine at the hearing were as follows:
 - the status or standing of the Interested Persons;
 - the scope of the definition of “persons unknown”;
 - the scope of the prohibited actions;
 - the Human Rights Act section 12(3);
 - the scope of the alleged tort.
8. The application which was made by the Interested Persons, without any notice of application having been filed or served, was made by the service of two witness statements, one from each of the Interested Persons, the day before the hearing,

together with a long skeleton argument from the Interested Persons' counsel. They were applying for permission to address the court on the return date pursuant to CPR rule 40.9.

9. The time estimate for the return date was three hours which would have been adequate had there not been a last minute flurry of activity from the Interested Persons.
10. Any person affected by the order made by Mr. Justice Eyre on the 15th of August 2022 was required, under clause seven, to provide a full name and address including an address for service and to apply to be joined as a named defendant to the proceedings at the same time. The Interested Persons did not wish to apply to be joined and did not comply with that provision.
11. It became apparent some way into the hearing that there would not be time to hear argument and evidence on all of the five issues and so, with the parties' agreement, I adjourned the other four issues off to the full return date which will be on the 5th of October 2022 for a full day. The ex-parte injunction will continue in force until judgment is given on or after the return day. At the same time I amended the ex-parte order to add the physical maps which were previously referred to by a website link and to correct a typo in para 4(8). I allowed truncated service for those alterations.

The issue for this judgment

12. I proceeded to determine the status of the Interested Persons. The issue for me to determine was whether I would permit the Interested Persons to apply to have the ex- parte injunction set aside or varied or would require the Interested Persons to apply to become defendants to the claim should they wish to become involved in any way.

The Evidence

13. I read evidence from the following witnesses:
 - 13.1 Nawaaz Allybokus, witness statement dated 2nd September 2022;
 - 13.2 Jon Anstey de Mass dated 10th August 2022;
 - 13.3 Jon Anstey de Mass affirmation dated 25th August 2022;
 - 13.4 Affirmation of Stuart Whortley dated 31st August 2022;
 - 13.5 Witness statement of Stuart Wortley dated 4th September 2022;
 - 13.6 Affirmation of Timothy Sunderland dated 1st September 2022;
 - 13.7 Affirmation of Lynn Gardner dated 5th September 2022;
 - 13.8 Witness statement of Hannah Shelley dated 5th September 2022;
 - 13.9 Witness statement of Jane Suzanne Everest dated 5th September 2022.

Background

14. On the issue for me to determine there is no need for me to make any substantial findings of fact. However I do need to set out the context within which the issue is to be determined.

15. The Claimant has permission to replace a substantial pipe running from Southampton to London and specifically to Heathrow. The pipe replaces a smaller one and will have a larger capacity to supply aircraft fuel to the airport. The London Pipeline Development Consent Order (SI 2020 number 1099) [DCO] provided consent for the Southampton to London pipeline project in land owned by various third parties. The project was/is to last until late 2023 and no doubt costs very substantial sums of money. It is asserted by the Claimant that the project is in the national interest. The Interest Persons dispute that.
16. The first Defendant and various other potential and actual defendants who are unknown and the two Interested Persons are objectors to the renewal of the pipeline. For the reasons set out in their witness statements the Interested Persons object on environmental grounds to the laying of the renewed pipeline and wish to do so by way of active and disruptive protest to spread the word and to delay or prevent the pipeline being built. The Interested Persons are aligned to the campaigns run on environmental grounds by groups such as Extinction Rebellion.
17. This very week this Court has heard a committal application by the Claimant against the first Defendant in which the Claimant asserted that the First Defendant himself was personally in breach of the ex-parte injunction obtained by the Claimant. The First Defendant had dug a pit on land owned by a third party through which the Claimant's pipeline was to be laid and had therefore obstructed and delayed the laying of the pipeline. He did not leave when ordered to do so. He admitted his breaches and sought to mitigate the effects of the breaches. On 6th September 2022 he was imprisoned for 112 days alongside a fine of £1500.
18. The Interested Persons wish to make submissions and to vary the ex-parte injunction and/or have it withdrawn and assert that they are quite different from the first Defendant.
19. Ms. Everest is a semi-retired lady who cares for an elderly relative and is deeply committed to environmental causes. She admits carrying out two protests against the pipeline which involved direct activity:

The path protest

- 19.1 The first was on the 15th of February 2022 at Farnborough in a park where she and others agreed to and did stand on a footpath near the works being carried out by the Claimant's contractors or workmen so that the work had to stop for about 45 minutes because the workmen were using chainsaws and other equipment which could have given off sharp objects which could have injured Ms. Everest and the others who stood on the public footpath. It is not clear to me whether the footpath was on land covered by the DCO as defined in the injunction or not.

The mock funeral protest

- 19.2 Secondly Ms. Everest attended a mock funeral on the 25th of June 2022 on a piece of land through which the pipe was being run. She admits she was standing on the land owned by a third party which is covered by the DCO. It was in Church Crookham. She had planned with and attended with twenty other people for about 40 minutes and carried out a fake funeral for future children affected by the environmental catastrophe she considers that global warming and the use of fossil fuels will cause.
20. The other Interested Person is Hannah Shelley from Farnborough who is an actuarial pensions consultant and a single parent. She considers that she carries out lawful and peaceful protests. She took part in the same protests as Jane Everest set out above with one additional protest:
- The car park entrance protest**
- On the 2nd of February 2022, when she, in conjunction and in agreement with others stood on a public road, which formed the entrance to a car park which the Claimant and its contractors were using to access carrying out their construction work, blocking the entry of the Claimant's vehicles through that entrance and obstructing the progress of the works to a limited degree.
21. Both Interested Persons are proud of their actions, assert that they were lawful and peaceful and assert impliedly that they intended to interfere with the Claimant's business in building the pipeline to a limited degree as a method of getting their message across to the general public and the politicians in England and Wales.

Pleadings and chronology of the action

22. The Claim Form in this case was issued on the 10th of August 2022 and in that the Claimant sought an injunction preventing protesters from interfering with their construction work along the full 100 kilometres of the Southampton to London pipeline.
23. The Particulars of Claim are in the main bundle at pps 8-11. Ignoring the parts relevant only to the 1st Defendant, the torts alleged therein against "Persons Unknown" (PUs) as defined therein are thin. Paras 1-13 describe the DCO and the project. Paras 14 -20 cover the alleged or feared torts.
24. The feared threats against the project are not particularised. Cross reference to the first witness Statement of Mr Anstey de Mas is used instead of particularisation. Actual actions alleged to be torts are set out in para. 6 again by back referring to the witness statement instead of particularisation. Generic threats by protest groups are summarised in para. 7.
25. At para.16 the Claimant pleads "*whether or not actionable at the suit of the Claimant directly*" ... the actions complained of, which were not particularised in the pleading, were torts.

26. Para. 17 contains the assertions against PUs and back refers to the unparticularised torts against unparticularised land owners or equipment owners set out above. I perceive that the key words are *“with the intent of injuring the Claimant by preventing or impeding the SLPP”*
27. Paras 18 relates to D1. Para.19 related to D2 and contained that assertion of the Ups committing the tort of conspiracy to injury by unlawful means.
28. Para 20 relates to the claims against PUs and pleads unparticularised loss and damage.
29. It will be for the Judge at the return date to determine whether the Claimant’s pleading makes the case in tort upon which the Claimant itself can seek an injunction or an extension of the ex-parte injunction.
30. The Claimant applied for an ex-parte interim injunction and a hearing took place before Mr. Justice Eyre on the 15th of August 2022 when, on the evidence provided to him, the Judge made an ex-parte injunction against the first Defendant and persons unknown (PUs). The terms of that injunction broadly were that the first Defendant was to remove himself from the relevant land; all PUs were prohibited from damaging anything used in the construction on the DCO land; from traversing any fence around the DCO land; from digging on or locking onto the DCO land; from putting any items or matters onto the DCO land; from obstructing the pipeline on DCO land; from blocking or interfering with the construction of the pipeline on the land and from assisting others to do the above.
31. The injunction was made expressly subject to the condition that those actions had to be carried out in agreement with other persons with the intention of preventing or impeding the construction of the pipeline project. So the terms of the injunction focussed on the economic tort of conspiracy.
32. By clause 7 of the ex-parte injunction any person could apply to vary or discharge the order but had to provide a full name and addresses (including an address for service) and had to also apply to be joined as a named defendant to the proceedings at the same time. In addition under paragraph 6 any Defendant and any person interested in the order could apply to vary or discharge the order at anytime on giving not less than 24 hours notice to the Claimant’s solicitors at the e-mail address provided. CPR 40.9 was not mentioned in the order or provided for.
33. The Interested Persons in this case did give 24 hours notice to the Claimant’s solicitors.

The Application

34. By way solely of the skeleton argument submitted on behalf of the Interested Persons they applied to have permission to make representations on the return date for the ex-parte injunction pursuant to CPR rule 40.9.
35. That rule states:

“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.”
36. The notes to the rule in the Supreme Court Practice point out that the rule itself does not set out the criteria for granting the permission. They go on to state “generally where a non party is likely to succeed in an application it will be in circumstances where at least arguably they are entitled to be made a party to the proceedings”.
37. The scope of the rule was considered in *IPcom GmbH v HTC Europe* [2013] EWHC 2880 (Ch) a decision of Mr. Justice Roth. That decision concerned inspection of documents held by a non party who was affected by the inspection order. Permission was granted.
38. Mr. Justice Cotter considered the scope of the provision in *Ageas Insurance v Stoodley* [2019] Lloyd's reports I.R. 1. He rejected the application under the rule because in his judgment although the applicant was directly affected there was no real prospect of success in changing the order that had been made.
39. In *National Highways v Persons Unknown* [2022] EWHC 1105, Mr Justice Bennathan dealt with an application by the Claimant for summary judgment against some persons unknown and some persons who were known who were protesting under the banner of Insulate Britain. Various interim injunctions had been granted in three sets of proceedings. The interested person by the name of Jessica Branch was an environmental activist who was not a named defendant and had not attended any of the Insulate Britain protests. She wished to be given permission to make representations about the scope of the injunction ordered under CPR rule 40.9. She asserted that the scope would have a chilling effect on protest generally and made submissions relating to the effects on pedal cyclists. At paragraph 20 Bennathan J noted that the words of the rule are “strikingly wide” and provided “no guidance”. He decided to grant permission on the grounds that the concerns raised by Miss Branch were not fanciful and found that she was directly affected; the European Convention on Human Rights was engaged and he ruled that the Court should adopt a flexible approach when the Court was making wide-ranging orders. He considered that without allowing interested parties to make representations under rule 40.9 the Court would not hear any submissions in opposition, which seemed to be generally undesirable for such wide applications so he granted permission.

40. Other than these cases there appears to be no authority on the point or at least none was put before me and none is set out in the Supreme Court Practice.

Gateway and factors

41. I have been greatly assisted by counsel both for the Claimant and for the Interested Persons in reaching the conclusions which I do below.
42. The relevant gateway and the subsequent factors that I consider that this Court should take into account, when deciding whether to grant the application for permission under CPR rule 40.9 or whether to refuse it and thereby force the Interested Persons to make their decision about whether they will apply to become defendants in the action, seem to me to be as follows.

43. Gateway:

Directly affected

43.1 Is the person applying directly affected by the injunction? 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.

Good point

43.2 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.

Factors

44. If the Interested Persons get through the two parts of the gateway the next issue is whether the person should be required to be a party to take part or permitted to remain an IP with permission. Interestingly the factors which seem to me to affect that decision are not dissimilar to the factors which determine whether an IP may be made liable for costs. I shall explain this below.
45. Overall in my judgment the closer the connection between the IP and the claim or the defence the more likely the Court will require the IP to join the action to take part. When considering the nature and degree of a non party's connection with proceedings it seems relevant to me to consider the following seven factors.

- (1) Whether the interested person will profit from the litigation financially or otherwise.

- (2) Whether the interested person is controlling the whole or a substantial part of the litigation.
- (3) 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.
- (4) Whether the interested person is funding the litigation or the defence thereof.
- (5) Whether there is a substantial public interest point or a civil liberties point being raised by the interested person.
- (6) The court should take into account the wide or draconian nature of injunctions against unknown persons which may be geographically large or temporarily large or both. There should be a low threshold for interested persons to be able to take part in such broad and or wide orders.
- (7) The costs risks and difficulties faced by interested persons who are affected by orders which they did not instigate.
- (8) Any prejudice which would be suffered by the Claimant in granting the Interested Persons their request and refusing to require them to become parties.

Costs and costs cases

46. Before applying the gateway and factors I should put the costs matters in context.
47. If the interested person is directly affected by the injunction, should that person be required to join the proceedings as a defendant and thereby suffer the disadvantages of being a party to litigation, alongside gaining the benefit of the advantages of being a party to litigation? The advantages include a measure of control and input into the litigation and the ability to affect the result. The disadvantages for the Interested Person becoming a party include that he/she would be liable to pay his/her own lawyers' costs and would suffer the prospect of an adverse costs order either on a single issue or on all of the issues in the case were he/she to lose.
48. At the heart of the distinction between being a party and being an Interested Person making submissions under CPR 40.9 is the difference in the costs and costs risks. A party is subject to the normal cost rules set out in CPR rule 44 and the other rules. The general rule is that the winner has his or her costs paid by the loser. In contrast an Interested Person making submissions on the CPR rule 40.9 basis has far less prospect of suffering adverse costs orders. The court's powers to order costs in favour of or against non parties are set out in CPR 46.2 (1) and that rule states:

“where the court is considering whether to exercise its power under section 51 of the Senior Courts Act 1981 (costs are in the discretion of the court) to make a costs order in favour of or against a person who is not a party to proceedings that person must:

- (a) be added as a party to the proceedings for the purposes of costs only; and
- (b) be given a reasonable opportunity to attend the hearing at which the court will consider the matter further.

49. The general principles as to the jurisdiction to make costs orders against non parties are summarised in the notes by reference to the following cases: *Aiden Shipping v Interbulk* [1986] AC 965; *Symphony Group v Hodgson* [1994] QB 179; and *Dymocks Franchise v Todd* [2004] UKPC 39.
50. In summary costs orders against non parties are exceptional or, written another way, outside of the ordinary run of cases which parties pursue or defend for their own benefit and at their own expense. The ultimate question in any such case is whether in all the circumstances it is just to make the order. This is fact specific to a large extent.
51. Guidance is given as to the jurisdiction to make costs orders against litigation funders who have no personal interest in the litigation and do not stand to benefit from it. Likewise for those who do not seek to control litigation.
52. The Courts also note the public interest in parties getting access to justice through third party funding.
53. However the main principle is that a non party who funds litigation and controls and benefits from litigation will ordinarily be required to pay the costs on losing.
54. In *Deutsche Bank v Sebastian* [2016] EWCA civ 23 the Court of Appeal considered that the main factor to consider was the nature and degree of the non party’s connection with the proceedings. It can be seen from this case that the “connection” issue affects both the decision on whether a person can remain an IP or should be a party and whether the person is more or less likely to be liable to an adverse costs order on losing an issue or argument.

Applying the gateway and factors to this application

55. Gateway: I consider that these Interested Persons in this case are directly affected by the ex-parte injunction. They are long term conscientious objectors against fossil fuel use. They seek to protest lawfully but actively. The injunction would have bound them and could have put them in breach by both the “public path” protest that they carried out on the 15th of February and the “car park” entrance protest that Hannah Shelley carried out on the 2nd of February and in addition could have put both in breach for the funeral protest they carried out on the 26th of June 2022 on DCO land.

56. It is not for me to decide at this hearing whether one, two or all three of those protests were lawful or unlawful. That is a matter of fact and degree on full evidence which I have not heard.
57. Turning then to the future, both Interested Persons intend to continue protesting in a way that they hope is lawful because it will very seriously affect the work of one of them and the standing in the community of both of them were they to be in breach of the criminal law or in contempt of court. So they wish to be astute to protest inside the law and outside the terms of the interlocutory injunction.
58. I also consider that set out in the skeleton argument of the IPs are some potentially good points in relation to the scope of the injunction. Those are issues 2-5 at para 7. of this judgment above.
59. Factors: Taking into account the seven factors that I set out above and looking at factor 1, neither of these ladies will profit directly from the litigation.
60. In relation to factor 2, they do not seek to control the litigation but they do seek to restrict the breadth of the injunction granted or indeed to prevent it being granted so that they can protest lawfully and exercise their rights under the European Convention on Human Rights especially Arts 10 and 11.
61. Factor 3, the final decision in the claim will not have adverse affects on them financially and will not adversely affect their civil rights so long as any injunction is properly so drafted and granted and they are interested in it being properly drafted, constrained and considered.
62. Factor 4, the Interested Persons are involved in funding only their submissions on the injunction but they are not involved in or on behalf of Extinction Rebellion or any other group on the evidence that has been been put before me.
63. Factor 5, the points the Interested Persons raise are matters of public interest and relate to fundamental civil liberties and it seems to me that these are important points of wide public interest.
64. Factor 6, the draconian nature and the breadth of large injunctions against persons unknown (PUs) leads me to consider that there is relatively low threshold to allow Interested Persons to make representations on a return date.
65. Factor 7, there is no legal aid provided for civil liberties Interested Persons or conscientious objectors who wish to be involved and so these two Interested Persons have to fund their representations themselves. In my judgment it is not unreasonable for them to do so with a reduced (but not extinguished) cost risk, on the contrary it is just and fair.

66. Factor 8, prejudice. No evidence of prejudice was put forwards by the Claimant. Indeed the Claimant expressly stated that it did not wish to close out submissions, merely that it sought the benefit of having the IPs as parties. The only prejudice I can infer is that it will more difficult for the Claimant to achieve a costs order against the IPs if they remain IP instead of parties. I do not characterise that as prejudice. Costs orders are a result of the Courts exercising discretion under the CPR on the facts. In addition if the Claimant wishes to name these two Interested Persons as Defendants they can join them as Defendants. If, as Jon Anstey De Mas asserted in his first witness statement, the 3 past protests by these Interested Persons amounted to tortious actions causing loss to the Claimant, then the Claimant could have and still can chose to claim damages. In the event the Claimant has chosen so far not to do so.

Conclusions

67. I consider that the Interested Parties pass the CPR rule 40.9 gateway and on the factors set out above I exercise the discretion allowed to this Court to permit them to make representations at the return date on the injunction.
68. At that hearing on 7 th September 2022 I granted permission for the IPs to make representations at the return date hearing under CPR rule 40.9. This judgment contains my reasons for doing so.
69. The Claimant shall draw up the order.
70. The costs of this part of the hearing shall be reserved.

END