



Neutral Citation Number: [2022] EWHC 2664 (KB)

Case No: QB-2022-002577

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21st October 2022

Before :

HHJ Lickley KC sitting as a Judge of the High Court

Between :

ESSO PETROLEUM COMPANY, LIMITED

Claimant

- and -

(1) SCOTT BREEN
(2) PERSONS UNKNOWN WHO ARE
DESCRIBED IN ANNEX 1 TO THE CLAIM
FORM DATED 10TH AUGUST 2022

Defendants

(1) JANE SUZANNE EVEREST
(2) HANNAH SHELLEY

Interested
Persons

Mr Timothy Morshead KC and Yaaser Vanderman (instructed by **Eversheds**) for the
Claimant

Mr Owen Greenhall (instructed by **Hodge, Jones and Allen Solicitors**) for the **Interested**
Persons

Hearing date: 5th October 2022

Approved Judgment

This judgment was handed down remotely at 10am on 21st October by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HHJ Lickley QC sitting as a Judge of the High Court:

1. This is the return date for an order made by Eyre J on 15th August 2022 (order sealed on 16th August 2022) and amended by order of Ritchie J on 8th September 2022 granting Claimant Esso Petroleum Company Ltd an interim injunction. The order concerns the unlawful disruption of and potential for more unlawful disruption of the Claimant's undertaking of works to install a new oil pipeline running some 105kms across southern England from Southampton to Heathrow airport. I am not concerned with the rights and wrongs of the pipeline works or the wider issue of the use of fossil fuels. My function is to decide if the Claimant is properly entitled to the injunction they seek.
2. I have heard submissions from counsel for the Claimant and the Interested Persons. I have read papers, skeleton arguments submitted and evidence served.

The facts

3. The history is set out in the witness statement of Jon Anstee De Mas (10th August 2022) and is not challenged. In summary the Claimants are engaged in the installation of a new oil pipeline known as the Southampton to London pipeline (SLP). The Claimant owns and operates a network of pipelines from its refinery in Fawley Southampton to terminals across England. One such pipeline conveys aviation jet fuel to the Claimant's West London terminal at London Heathrow Airport. The old pipeline was installed and operated from 1972. The pipeline runs for 105 kms. The initial 10kms of the pipeline was replaced in 2001. The remaining 95 kms of pipeline was considered to be in need of replacement. The new section of pipeline comprises 90 km of underground pipeline. The route is indicated clearly on the plans submitted.
4. The works are designated as a Nationally Significant Infrastructure Project under the Planning Act 2008. The consent for the works is called a Development Consent Order (DCO). As part of the planning process a wide ranging consultation exercise was undertaken from 2017 including Local Authorities and a public consultation. The public consultation exercise included asking for views on a preferred route within the corridor of the existing pipeline. Part of that exercise included indications of potential environmental impacts. Other consultations and assessments were carried out.
5. In June 2019 the Claimant's application for a DCO was accepted by the Planning Inspectorate for examination. The DCO was granted on 7th October 2020. The DCO authorises the pipeline to be laid within the limits of deviation shown on the works plans. The area in which works are authorised, including the pipeline itself, are confined by the terms of the DCO to a strip of land of varying width (often 30m wide) known as the 'Order Limits'. The area concerned will be wider than the pipeline itself to accommodate the space needed along the route of the pipeline which is required for working and for storage compounds etc. No issue is taken as to the planning process, consultations undertaken, working methods or other aspects of the project.
6. Jon Anstee De Mas (witness statement 10th August 2022) provides the detail of the operational parameters and how the majority of the works are undertaken on third party land, some of which is subject to public and private rights of way, and the remainder are street works within the public highway. When operating on the land of third parties the Claimant is doing so by way of Option Agreements with landowners, Deeds of

Easement or under Compulsory Acquisition Powers contained in the DCO. Some Crown land is also included.

7. The ownership of machinery, plant and other materials including sections of pipe belongs to third parties such as contractors until ownership is transferred to the Claimant. The Claimant also owns some items. The works are expected to be completed during 2023.
8. Part of the pipe laying process requires that segments of pipe are left above ground described as ‘stringing out’. Segments are welded together above ground and lowered into a trench. Other techniques are used. The effect is that large amounts of pipeline are on display to the public together with heavy plant and machinery at multiple sites throughout the length of the works within the Order Limits. The DCO requires the Claimant to erect temporary fencing to mark construction sites to keep the public away from dangerous operations. The type of fencing used varies and is not designed to be fully secure.
9. Jon Anstee De Mas has set out and described the incidents that affected the SLP project. In total he described 15 incidents at various sites from 19th December 2021 to 1st August 2022. I need not set out the full facts of each as part of this judgement. Incidents of note however are:
 - (i) 19th December 2021 Alton compound. Protestors cut through the compound fence, damaged vehicles and attempted to damage the security system. A message was sent indicating an intention to stop the SLP on 1/1/22 from a Twitter account for a group called ‘Stop Exxon SLP’. The message referred back to the events of the 19th December 2021 at the compound. The government’s failure to act to avert the climate crisis was said to be a reason to ‘*please halt all new fossil fuel infrastructure*’. Photographs of the damage have been produced.
 - (ii) 2nd February 2022 Queen Elizabeth Park Farnborough. A number of protesters, with banners, attended the car park within the Order Limits and formed a blockade across the entrance. Work was stopped for the day that was intended to involve surveys and the clearing of trees. Messages claiming responsibility from the ‘XR Group’ were posted later with photographs.
 - (iii) 15th February 2022 Queen Elizabeth Park Farnborough. This was similar to the event on 2nd February 2022 however the works were not disrupted.
 - (iv) 4th May 2022 Hartland Lodge Farnborough. Overnight protestors tampered with security fences. Barbed wire was removed from the top of a fence and a hole was cut in a second fence.
 - (v) 17th June 2022 Halebourne Lane compound. Damage was caused by protestors to plant belonging to Flannery Plant hire with repair costs of £11,000. A protest group ‘Pipe Busters’ claimed responsibility on 22nd June 2022.
 - (vi) 17th June 2022 Blind Lane Surrey Heath. Protestors gained access to the site and damaged a section of pipe that was above ground including spraying it with

slogans including ‘No SLP’. The repairs necessary cost £8000. ‘Pipe Busters’ claimed responsibility on 22nd June 2022 with a message and photographs showing someone using an angle grinder to damage the pipe. The message was that peaceful action was taken to halt expansion of the pipeline.

- (vii) 25th June 2022 Naishes Lane Church Crookham. Protestors gained access, said to be unlawful, by unbolting Heras fencing panels and conducted a staged funeral with a child sized coffin that was laid into a pipeline trench. The protest was within the Order Limits. A local XR group later claimed responsibility.
 - (viii) 4th July 2022 Flannery Plant hire. Contractors engaged in the works were visited by protestors at their head office in Wembley. Posters were put up and the main entrance door locks were glued. Messages were posted by ‘Pipe Busters’ warning the company to stop working on the SLP or ‘*we will find you complicit in ecocide and will take steps to ensure your equipment cannot cause any further harm*’.
 - (ix) 9th July 2022. Excavators belonging to Flannery Plant hire were damaged at sites near Fleet Hampshire within the Order Limits. The repair costs were estimated to be £5000.
 - (x) 31st July 2022 a protestor Scott Breen (First Defendant) dug a pit at land east of Pannells Farm. The land is owned by Runnymede BC and is within the Order Limits. On 1st August 2022 Scott Breen released a press statement through Facebook and later a video stating his purpose was to disrupt the pipeline and to stop the expansion of the pipe by direct action. The Police attended the site and maintained contact with Scott Breen. I note that the Police, who attended the site, informed the Claimant’s staff that it was the landowner or Claimant’s responsibility to obtain and enforce a possession order from the Civil Courts. They stated that they did not consider that the offence of aggravated trespass needed consideration at that stage. This has a bearing on the submission of Mr Greenhall for the Interested Persons who submitted that an injunction was not necessary in this case because the police were available to intervene and act as necessary. Scott Breen was subsequently committed to prison for contempt on 6th September 2022 by Ritchie J having breached the earlier order. Another contempt hearing is listed in November for an individual said to have assisted Scott Breen.
 - (xi) 1st August 2022 Sandgates Encampment. This encampment was set up to support Scott Breen. Despite the order being made on the 15th August 2022 Scott Breen remained within the pit and the DCO Order Limits.
 - (xii) A plan has been produced showing the wide geographical range of the protests (ex.JA16 p.915).
10. Scott Breen left the site on 2nd September 2022. Therefore action had taken place from 31st July 2022 at the Chertsey site. Work was disrupted as a consequence of his activities.

11. The interested persons are Hannah Shelley (witness statement 5th September 2022) and Jane Everest (witness statement 5th September 2022). Both have taken part in the protests against the SLP. These took place on the 2nd February 2022, 12th February 2022, and 25th June 2022 (see above). Hannah Shelley was present at all three. Jane Everest was present for the last two. They describe the protests as peaceful. Hannah Shelley describes the protests as ‘lawful’. Both wish to continue to protest against the building of the pipeline. They give their reasons namely that flying and the use of aviation fuel has a detrimental impact on the environment. They have concerns that their actions may breach the order. In summary they say: peaceful protest is prevented by the order, the maps are not clear to show what land is covered, if they are asked to stop they might not know the person making the request is authorised to do so and they are worried about being arrested for the reasons given.
12. Jon Anstee de Mars (witness statement 29th September 2022) has said that the protests that the Interested Persons were involved in on 12th May 2021 and 25th June 2022 would have breached the order if it had been in place. First, because the protestors’ actions deliberately blocked workers access to the SLP and second, because they traversed the Heras fencing intending to prevent or impede construction. On 15th February 2022 although the protest took place within the DCO Order Limits, the protestors did not act in any way that was prohibited in the order.
13. Jon Anstee de Mars has set out why the injunction is still required namely to prevent further action and disruption. He says an unknown number of individuals have taken part in the protests who were supported by known organisations, the campaign against the SLP is longstanding and is designed to stop the pipeline construction, protests against the fossil fuel industry remain active across the UK and the Interested Persons themselves have said they wish to continue protesting. It has been said in argument that the injunction has worked as no other disruptive protest action has been reported since the order was made.
14. The original injunction order was amended by Ritchie J on 8th September 2022 in accordance with the slip rule given the error in paragraph 4(8). Annex 1 to the order describes the description of persons unknown who, by their conduct, are or who may become defendants to the proceedings. Appended to the order are the plans showing the entire route and the order limits. Save for a few limited exceptions, public rights of way within the DCO order limits remain open and closed only temporarily to facilitate the installation of pipeline across the right of way (Anstee de Mars witness statement 29th September 2022).
15. The order (the relevant parts) provided:
 3. *Until trial or further order, the First and Second Defendants must not do any of the acts listed in paragraph 4 of this order in express or implied agreement with any other person, and with the intention of preventing or impeding construction of the Southampton to London Pipeline Project.*
 4. *The acts referred to in paragraph 3 of this order are:*
 - (1) *within the DCO order limits, damaging anything which is used or to be used in or in the course of the construction of the SLPP;*

(2) *within the DCO order limits, traversing any fence surrounding (or other physical demarcation of) any area of land which is used or to be used in or in the course of the construction of the SLPP;*

(3) *within the DCO order limits, digging any excavation or affixing or locking themselves to anything or any person;*

(4) *within the DCO order limits, erecting any structure;*

(5) *within the DCO order limits, spraying, painting, pouring, depositing or writing any substance on to anything which is used or to be used in or in the course of the construction of the SLPP;*

(6) *within the DCO order limits, obstructing construction of the SLPP by their presence or activities after having been requested by or on behalf of the Claimant or the police to cease and desist from such obstruction;*

(7) *whether within or without the DCO order limits, blocking or impeding access to any land within the DCO order limits.*

(8) *assisting any other person do any of the acts referred to in subparagraphs 4.1 to 4.7.*

A Defendant who is ordered not to do something must not: (A) do it himself/herself/themselves or in any other way. (B) do it 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.

16. Mr Greenhall for the Interested Persons takes no issue with paragraph 4(1) to (5) and (8) of the order above. No issue is taken concerning the service of orders. The order provides from paragraph 10 the process to be complied with. Certificates of service have been produced. Service of further documents was to be effected in accordance with paragraph 14 of the order. The evidence of Nawaz Allybokus (witness statement dated 29th September 2022) provides the evidence to support the effective service of the amended order of Ritchie J.

The law

17. The various tests and requirements to be considered and met before an order for an interim injunction can be made, and renewed, in protest cases are helpfully set out by Johnson J in *Shell Oil Products Ltd v Person Unknown [2022] EWHC 1215 (QB)*. He said at [23]:

“The injunction is sought on an interim basis before trial, rather than a final basis after trial. It is sought against “persons unknown”. It is sought on a precautionary basis to restrain anticipated future conduct. It interferes with freedom of assembly and expression. For these reasons, the law imposes different tests that must all be satisfied before the order can be made. The Claimant must demonstrate:”

(1) There is a serious question to be tried: *American Cyanamid v Ethicon [1975] AC 396* per Lord Diplock at 407G.

(2) Damages would not be an adequate remedy for the Claimant, but a cross undertaking in damages would adequately protect the defendants, or

(3) The balance of convenience otherwise lies in favour of the grant of the order: American Cyanamid per Lord Diplock at 408C-F.

(4) There is a sufficiently real and imminent risk of damage so as to justify the grant of what is a precautionary injunction: *Islington London Borough Council v Elliott* [2012] EWCA Civ 56 per Patten LJ at [28], *Ineos Upstream Ltd v Persons Unknown* [2019] EWCA Civ 515 [2019] 4 WLR 100 per Longmore LJ at [34], *Canada Goose UK Retail Limited v Persons Unknown* [2020] EWCA Civ 303 [2020] 1 WLR 2802 per Sir Terence Etherton MR at [82(3)].

(5) 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)].

(6) The terms of the injunction are sufficiently clear and precise: *Canada Goose* at [82(6)].

(7) The injunction has 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]).

(8) The defendants have not been identified but are, in principle, capable of being identified and served with the order: *Canada Goose* at [82(1)] and [82(4)].

(9) The defendants are identified in the Claim Form (and the injunction) by reference to their conduct: *Canada Goose* at [82(2)].

(10) The interferences with the defendants’ rights of free assembly and expression are necessary for and proportionate to the need to protect the Claimant’s rights: articles 10(2) and 11(2) of the European Convention on Human Rights (“ECHR”), read with section 6(1) of the Human Rights Act 1998.

(11) All practical steps have been taken to notify the defendants: section 12(2) of the Human Rights Act 1998.

(12) The order does not restrain “publication”, or, if it does, the Claimant is likely to establish at trial that publication should not be allowed: section 12(3) of the Human Rights Act 1998.”

18. For the purposes of this judgment, and with the greatest of respect to Johnson J, I will merge the S.12(3) Human Rights Act 1998 issue (12) with ‘*serious question to be tried*’ (1) given the link between the two points and merge ‘*interference with the rights of*

defendants' (10) with '*the balance of convenience*' (3) given what I regard as the considerable connection and overlap between the two issues.

19. Subject to the above I take those points in turn:

(1) Serious issue to be tried - Unlawful means conspiracy:

20. The claim is brought alleging 'the tort of conspiracy by unlawful means' [Particulars of Claim p.19]. The Claimant has chosen to allege this tort because it does not have a sufficient degree of control or possession of the whole of the land where works are taking place to enable them to plead trespass to land or nuisance against the individuals concerned. Neither does it have necessary ownership of all of the items targeted and damaged to allege trespass to goods. There are however areas of land and items of property that the Claimant does own. A 'tapestry' of varying owners and rights over property is said to feature over the 90km of the pipeline. To avoid attempting a very detailed and complex exercise in identifying all possible cases, a conspiracy is alleged. The downside for the Claimant is that the actions of an individual acting alone who commits unlawful acts would not be caught. It is said the chosen tort is practical and proportionate.
21. The essential ingredients of the tort are set out in *Cuadrilla Bowland Ltd and others v Person Unknown and others* [2020] EWCA Civ 9 per Leggatt LJ at [18]. The ingredients to be proved to establish liability are (i) an unlawful act by the defendant (ii) done with the intention of injuring the Claimant (iii) pursuant to an agreement (whether express or tacit) with one or more persons and (iv) which actually does injure the Claimant. See also Johnson J in *Shell UK Oil Products Limited v Persons unknown* [2022] EWHC 1215 (QB) at [26].
22. The Interested Persons challenge the availability of the tort selected. An issue arises concerning whether the Claimant can pursue such a cause of action if the unlawful act (this may take many different forms) is not actionable by the Claimant itself. It is important to remember however the need for an intention to injure the Claimant is a key ingredient of the tort. In passing one can envisage a number of factual scenarios where there is a conspiracy to commit a tort or to damage the property of a person that will have a direct and intended consequence to injure and damage another. Johnson J in *Shell* considered this point and concluded that '*..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)*' [27] and at [32].
23. In *Revenue and Customs Commissioners v Total Network SL* [2008] 1 AC 1174 the issue was considered. Lord Hope and Lord Walker saw no requirement for an actionable tort at the hands of the Claimant to be necessary. Lord Hope at [44] said:

"The situation that is contemplated is that of loss caused by an unlawful act directed at the Claimants themselves. The conspirators cannot, on the commissioners' primary contention, be sued as joint tortfeasors because there was no independent tort actionable by the commissioners. This is a gap which needs to be filled. For reasons that I have already explained, I do not

accept that the commissioners suffered economic harm in this case. But assuming that they did, they suffered that harm as a result of a conspiracy which was entered into with an intention of injuring them by the means that were deliberately selected by the conspirators. If, as Lord Wright said in *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435, 462, it is in the fact of the conspiracy that the unlawfulness resides, why should that principle not apply here? As a subspecies of the tort of unlawful means conspiracy, the case is virtually indistinguishable from the tort of conspiracy to injure. The fact that the unlawful means were not in themselves actionable does not seem, in this context at least, to be significant.These factors indicate that a conspiracy is tortious if an intention of the conspirators was to harm the Claimant by using unlawful means to persuade him to act to his own detriment, even if those means were not in themselves tortious.”

24. Lord Walker at [94] said:

“From these and other authorities I derive a general assumption, too obvious to need discussion, that criminal conduct engaged in by conspirators as a means of inflicting harm on the Claimant is actionable as the tort of conspiracy, whether or not that conduct, on the part of a single individual, would be actionable as some other tort. To hold otherwise would, as has often been pointed out, deprive the tort of conspiracy of any real content, since the conspirators would be joint tortfeasors in any event (and there are cases discussing the notion of conspiracy emerging into some other tort, but I need not go far into those.”

25. Finally, in *Ineos Upstream Limited v Persons Unknown* [2017] EWHC 2945 (Ch), a case concerning protests at sites used for shale gas extraction (fracking), Morgan J did not disapprove of the Claimant’s choice of unlawful act conspiracy given the facts at [59]. He said:

“The tort of conspiracy allows a victim of a conspiracy to sue where the acts are aimed at that victim even where the unlawful behaviour has its most direct impact on a third party. The other value of the tort of conspiracy from the Claimant’s point of view is that it enables them to claim a remedy on a civil court for breach of a criminal statutes where the conduct in question does not, absent a conspiracy, lead to civil liability.”

26. On the facts set out in the witness statements, the Claimant has a strong case given the incidents that have occurred which included and involved trespass to land and trespass to goods including causing significant damage to property. Criminal offences have been committed in some instances. The intention of those participating can thus be demonstrated from the facts themselves to be to stop or interrupt the work and thereby

cause damage to the Claimant. In addition, if more proof of intention were needed, the social media messages and photos that follow the events demonstrate not only who is responsible but the aims and thereby the intentions of those taking such action.

27. The weight of authority strongly supports the proposition that the unlawful means need not be actionable at the suit of the Claimant. Accordingly, the chosen cause of action is available to the Claimant. Given the facts, in my judgement, they are likely to succeed. On any view, there is a serious issue to be tried. I deal with S.12.(3) Human Rights Act 1998 below.

S.12(3) Human Rights Act 1998:

28. It is accepted that ECHR articles 10 (freedom of expression) and 11 (freedom of peaceful assembly) are engaged in this case. Both rights are qualified.
29. The caveat to the '*serious issue to be tried*' test arises if S.12(3) of the Human Rights Act 1998 is engaged. The section relates to '*Freedom of expression*' and S.12(1) states '*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*'.
30. If the relief sought might affect the said Convention right, the test to be applied per S.12(3) becomes '*No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed*'. In *Cream Holdings v Banerjee* [2005] AC 245 Lord Nicholls said that in a breach of confidence case, the test was stricter than the '*serious issue to be tried*' test, however a degree of flexibility was noted in certain situations at [22]. In *Ineos Upstream*, Morgan J said at [86] that '*likely*' in this context meant '*more likely than not*'.
31. It is said the section applies to the acts of protesters in this case. It is said the injunction is too wide in that it prohibits the past and planned future actions of people such as the Interested Persons who have not been violent or destructive and who have carried out peaceful demonstrations. They have however gained unauthorised access to the areas designated as the DCO Order Limits and have deliberately interrupted pipeline work, albeit for relatively short periods of time. It has been submitted on behalf of the Interested Persons that such acts of protest carried out and envisaged by them is a form of communication in the sense that, to those who can see and hear what they are doing, they are communicating a message concerning the use of fossil fuels and the impact on the environment. It is said by the Claimant that, in some instances, such acts would be actionable given the intention of the participants despite the peaceful nature of them. The addition of the word '*publication*' to S.12(3) is an important qualification and potentially narrows '*freedom of expression*'. The question is therefore what is the '*publication*' in protest cases?
32. The submission made by the Interested Parsons is that S.12(3) applies to their protests following the decision in *Birmingham City Council v Afsar* [2019] EWHC 1560 per Warby J (as he then was). That case concerned parents who were protesting outside a primary school against aspects of the teaching at the school. Part of the original order prohibited the printing and distribution of leaflets (Appendix A). The original order was discharged because of a breach of the duty of full and frank disclosure on the part of

the applicants and because there was a failure to identify the threshold for granting an injunction as set out in S.12(3) in the submissions made as part of the ex parte hearing. Accordingly, the judge was not informed of the potential for the ‘*likely to succeed*’ test to be applicable. Warby J stated that ‘*publication*’ within the section did not have a limited meaning restricted for example to commercial publication. He did say at [60] ‘*Section 12(3) applies to any form of communication that falls within article 10 of the Convention*’. I note that at that point, the Judge was considering comment via social media as opposed to commercial publication hence, it would appear, his reference to the law of defamation.

33. In *Lachaux v Independent Print Ltd* [2019] UKSC 27, Lord Sumption at [18] said ‘*publication does not mean commercial publication, but communication to a reader or hearer other than the Claimant*’.
34. The order made in this case does not restrain ‘*publication*’ in the strict sense. There is no bar to pictures, videos, comment or other messaging being used. Additionally, there is no bar to leaflets, banners or placards, chanting or singing. Therefore ‘*communication*’ in that way is not prohibited or restrained. In that sense there is no bar to ‘*publication*’.
35. In *Ineos Upstream*, Morgan J was satisfied that S.12(3) applied to the facts of that case. He did so because at [86] ‘*...the order I am being asked to make ‘might’ affect the exercise of the convention right to freedom of expression*’.
36. In *High Speed Two (HS2) Limited v Persons Unknown* [2022] EWCA 2360 (KB), Julian Knowles J considered the point in the context of widespread protests against the HS2 rail project and said at [97-98] that S.12(3) applied. That was however because the Claimant accepted the fact of applicability and conceded the point. It was not therefore argued and analysed further.
37. Protests may take many different forms. In *Shell*, protestors went to Shell filling stations and damaged fuel pumps. Other activity at oil depots included digging tunnels under tanker routes and climbing on top of tankers. In *National Highways Ltd v Persons Unknown* [2021] EWHC 3081, protests included the blocking of motorways.
38. The facts of the present case are clearly similar and the objectives of the protesters the same as in *Shell* and *National Highways Ltd*. Lavender J in *National Highways Ltd* said, without saying more, at [41] ‘*Indeed although S.12(3) of the Human Rights Act 1998 is not applicable, I consider that the test which it imposes is met....*’
39. Johnson J in *Shell* said on this point at [70-72]:

“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.”

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”.

I therefore respectfully agree with the observation of Lavender J in *National Highways Limited v Persons Unknown* [2021] EWHC 3081 (QB) at [41] that section 12(3) is “not applicable” in this context.”

40. In my judgement, the acts of protest in this case involving trespass and, in some instances, criminal damage are not acts of publication. S.12 is concerned with freedom of expression i.e. communication and not freedom of assembly. Aspects of a protest may involve the expression of opinions and aspects which do not and are not primarily about communication namely the damaging of property causing considerable loss to a third party intending to cause additional loss to another. I agree with Johnson J and his analysis, namely that acts of trespass etc. in the course of a protest while publicising the protestor’s views do not amount to ‘*publication*’. Accordingly S.12(3) does not apply. In any event I am satisfied, given the clear evidence in this case, that the test in S.12(3) is met. The Claimant is ‘*likely*’ to succeed in its claim to prevent such activity.

(2) Damages as an adequate alternate remedy:

41. The Claimant seeks an injunction. The losses to the wider public from disruption to the pipeline may be capable of quantification or they may not. It is said the activities of protestors risk injury to themselves, pipeline workers, emergency workers and the public as works are taking place where they have access. There is no evidence that any defendant has the means to satisfy any judgement.
42. Conversely the granting of an injunction would not cause any injury or loss to a protester and, even if it did the Claimant, as a large multi-national oil company, would be able to compensate. Hence the usual cross-undertaking is offered.

(3) The balance of convenience and proportionality:

43. This question turns on the human rights analysis applied to the particular facts of the case. Articles 10 and 11 are fundamental rights and are central to a democratic society. Both rights permit a degree of disruption and the expression of unpopular views however both are qualified. The right under Article 11 is ‘*to freedom of peaceful assembly*’. That is not the case where protesters have violent or criminal intentions. There may be instances where some protest peacefully and others, at the same time, act independently and are not peaceful and act unlawfully. Where the line is to be drawn is a matter of fact and degree. A judge is required to undertake a proportionality

assessment balancing the competing interests and the degree to which rights and freedoms of individuals can be legitimately restricted by law.

44. In *DPP v Ziegler [2021] UKSC 23*, the court considered and approved the Divisional Court’s assessment of the questions relevant to the proportionality assessment at [16] and [58] (the court was concerned with offences of wilful obstruction of the highway – S.137 Highways Act 1980 namely a single 90 minute peaceful blockage of a road leading to an arms fair causing limited disruption and no disorder). The court at [16] citing from the decision of the lower court stated that questions are as follows:

“63. That then calls for the usual enquiry which needs to be conducted under the HRA. It requires consideration of the following questions: (1) Is what the defendant did in exercise of one of the rights in articles 10 or 11? (2) If so, is there an interference by a public authority with that right? (3) If there is an interference, is it ‘prescribed by law’? (4) If so, is the interference in pursuit of a legitimate aim as set out in paragraph (2) of article 10 or article 11, for example the protection of the rights of others? (5) If so, is the interference ‘necessary in a democratic society’ to achieve that legitimate aim?

64. That last question will in turn require consideration of the well-known set of sub-questions which arise in order to assess whether an interference is proportionate: (1) Is the aim sufficiently important to justify interference with a fundamental right? (2) Is there a rational connection between the means chosen and the aim in view? (3) Are there less restrictive alternative means available to achieve that aim? (4) Is there a fair balance between the rights of the individual and the general interest of the community, including the rights of others?

65. In practice, in cases of this kind, we anticipate that it will be the last of those questions which will be of crucial importance: a fair balance must be struck between the different rights and interests at stake. This is inherently a fact-specific enquiry.”

45. The court provided commentary as to the relevant factors for a court to consider when evaluating proportionality. These include the duration of any protest, the degree to which land is occupied and the actual interference the protest causes to the rights of others, whether the views giving rise to the protest relate to *very important issues* and if the protesters believed in the views they were expressing [72]. In addition, I note:

- (i) The extent to which the protest was targeted at the object of the protest. Meaning was there a direct connection with the object of the protest, namely the government’s failure to reduce carbon emissions and the blocking of pipeline work? At [75].
- (ii) The extent to which the continuation of the protest would breach domestic law ‘*so whilst there is autonomy to choose the manner and form of a protest an*

evaluation of proportionality will include the nature and extent of actual and potential breaches of domestic law’ at [77].

- (iii) Prior notification and co-operation with the police, especially if the protest is likely to be contentious and provoke disorder at [78].

46. The court however noted in relation to deliberate disruption at [67]:

“The ECtHR in *Kudrevičius* at para 97 recognised that intentional disruption of traffic was “not an uncommon occurrence in the context of the exercise of freedom of assembly in modern societies, ...”. However, the court continued that “physical conduct purposely obstructing traffic and the ordinary course of life in order to seriously disrupt the activities carried out by others is not at the core of that freedom as protected by article 11 of the Convention” (emphasis added). However, again, the point of relevance to this appeal is that deliberate obstructive conduct which has a more than de minimis impact on others still requires careful evaluation in determining proportionality.”

47. Following that theme, Lord Burnett of Maldon LCJ in *DPP v Cuciurean [2022] EWHC 736 (Admin)* said at [37]:

“Furthermore, intentionally serious disruption by protesters to ordinary life or to activities lawfully carried on by others, where the disruption is more significant than that involved in the normal exercise of the right of peaceful assembly in a public place, may be considered to be a “reprehensible act” within the meaning of Strasbourg jurisprudence, so as to justify a criminal sanction.”

And at [45] in relation to protests on private land:

“... there is no basis in the Strasbourg jurisprudence to support the respondent’s proposition that the freedom of expression linked to the freedom of assembly and association includes a right to protest on privately owned land or upon publicly owned land from which the public are generally excluded. The Strasbourg Court has not made any statement to that effect. Instead, it has consistently said that articles 10 and 11 do not “bestow any freedom of forum” in the specific context of interference with property rights (see *Appleby* at [47] and [52]). There is no right of entry to private property or to any publicly owned property. The furthest that the Strasbourg Court has been prepared to go is that where a bar on access to property has the effect of preventing any effective exercise of rights under articles 10 and 11, or of destroying the essence of those rights, then it would not exclude the possibility of a State being obliged to protect them by regulating property rights.”

48. Leggatt LJ (as he then was) in *Cuadrilla Bowland Ltd v Persons Unknown* [2020] EWCA Civ 9 said at [94]:

“It was recently underlined by a Divisional Court (Singh LJ and Farbey J) in *Director of Public Prosecutions v Ziegler* [2019] EWHC 71 (Admin); [2019] 2 WLR 1451, a case – like the *Kudrevičius* case – involving deliberate obstruction of a highway. After quoting the statement that intentional disruption of activities of others is not "at the core" of the freedom protected by article 11 of the Convention (see paragraph 44 above), the Divisional Court identified one reason for this as being that the essence of the rights of peaceful assembly and freedom of expression is the opportunity to persuade others (see para 53 of the judgment). The court pointed out that persuasion is very different from attempting (through physical obstruction or similar conduct) to *compel* others to act in a way you desire.”

49. In the present case, the sort of behaviour described above as ‘*involving the intentional disruption of the activities of others*’ has, given the evidence, taken place. As a consequence, Articles 10 and 11 do not attach significant weight to such activities because they are not at the core of these rights.

50. I turn to the applicable questions at [44] above:

- (i) Those restrained by the terms of the injunction from obstructing access to land within the DCO order limits from the public highway or other land that the public has a right of access are conceded by the Claimant to arguably be exercising their rights under Articles 10 and 11. That, I assume for present purposes, is correct although some of their activities are not at the core of the rights as I have pointed out.
- (ii) The injunction would interfere with the exercise of those rights.
- (iii) If the injunction is ordered, such interference with rights will be prescribed by law i.e. it will be a lawful order of the court.
- (iv) The interference is, in my judgement, in pursuit of a legitimate aim in that the proposed injunction seeks to protect the rights of others, namely the Claimant to pursue its lawful activities in installing the new pipeline.

51. The final issue concerns the remaining question ‘*is the interference necessary in a democratic society to achieve the legitimate aim*’? The four sub-questions or rather the answers to them determine if the potential interference is ‘*proportionate*’. The terms of the order are to be noted as specifically limiting activity within the DCO Order Limits, save for (7) which prevents whether within or without the DCO Order Limits blocking or impeding access to any land within the DCO Order Limits. I have noted that only (6)

(being told to move) and (7) are the subject of criticism by counsel for the Interested Persons.

52. In this case I note from the evidence:

- (i) The protests in this case have been peaceful in that there has been no widespread public disorder.
- (ii) The protesters have a belief in the cause they are pursuing.
- (iii) Trespass onto the land of others has undoubtedly taken place. Trespass to goods has occurred. Criminal offences have been committed, namely criminal damage to property that has, in some instances, cost many thousands of pounds to repair.
- (iv) The protests are targeted against the Claimant and those engaged by the Claimant in the construction of the pipeline to slow or stop the works as a means of demonstrating the need for the government to give greater emphasis to reducing fossil fuel use and in particular aviation fuel. That said, the environmental policy of the government is the main target of the protesters and not the pipeline itself.
- (v) The protests were widespread and over a large geographical area.
- (vi) The protests were organised and planned.
- (vii) The protests were not notified to the Claimant or police in advance.
- (viii) The acts of Scott Breen disrupted works for a considerable time. He was assisted by others to do that.
- (ix) A clear intention has been demonstrated to continue the protests and the disruption, which has the potential to be significant, of the pipeline works. That would include further acts of trespass, and damage.

53. The questions are:

- (i) *Sufficiently important to justify interference with a fundamental right?* The pipeline works are a major piece of engineering infrastructure that will serve the UK for many years. The Claimant submits that the aim of restricting the activities of protesters permits the Claimant to conduct its lawful business, prevents harm to others and permits aviation fuel to be transported to London Heathrow airport and thereby the airport can operate. Disruption has a potential significance to UK trade and the transportation of people and goods. The aim is therefore sufficiently important to justify interference with the rights of protestors in my judgement.
- (ii) *A rational connection between means and aim?* The connection between the means chosen and the aim is rational because it is limited to the area where the pipeline is to be constructed and prevents disruption. The means chosen allow the Claimant to fulfil its contractual obligations. The terms are worded to prohibit activity that would amount to the conspiracy alleged. There is a rational connection.
- (iii) *Is there less restrictive alternative means to achieve the aim?* A claim for damages will not prevent disruption. Damages may be impossible to calculate or an award impossible to satisfy by the protestors. The terms of the order are specifically limited to the DCO Order Limits which is, in many areas, a strip of land approximately 30m wide. The injunction is and will be limited in time. An

application may be made to vary or discharge the order. In my judgement there is no less restrictive means to permit the construction of the pipeline.

- (iv) *Is there a fair balance between the rights of the individual and the general interest of the community, including the rights of others?* In my judgement taking into account all of the factors which I have identified, the injunction granted by Eyre J strikes a fair balance between the rights of the protestors, the Claimant, the contractors and the general public. Importantly, in my judgement, the order does not prohibit protestors from entering the DCO Order Limits as it might because the Claimant has accepted that is too broad. What the order does is control what they do within the DCO Order Limits. In addition, there are areas very close to the DCO Order Limits, for example paths and rights of way, where protest is not restricted by the order. As a consequence, there is no need to climb fences and get close to potentially hazardous machinery, tools and deep trenches to demonstrate. Having considered the issues and the evidence, the balancing exercise I have performed comes down very clearly in the Claimant's favour given the importance of the works and the threat posed by the protestors to disrupt and cause damage against the protestors' rights under Articles 10 and 11.

(4) A real and imminent risk of harm to justify a precautionary injunction:

54. Given the facts, harm has occurred as a result of the protests. The risk of repetition is evident from that past conduct and accompanying messages posted on social media indicating a plan to continue and disrupt into the future. Those who protest against the use of fossil fuels continue to protest. The Interested Persons have stated that they wish to continue to protest. They appreciate they risk breaching the order should they enter the DCO Order Limits if their intention is to cause damage to the Claimant.
55. The Interested Persons argue that there is no risk to areas where there is no plan for works at present. That ignores the reality of such protests that may target any part of the works that cover a large area at any time. The alternative would be for the Claimant to seek injunctions as and when works were going to start in any given area. That is inherently impractical, cumbersome and costly. Finally given that the route is clearly set out and plotted on the plans absent an order the protestors may 'plan in advance' and select an area to be the subject of works in the future and act to prevent work from starting for example by tunnelling or placing obstructions across a wide area designated as the path of the pipeline. I have to consider the position now. The geographical spread of the action thus far demonstrates the need for the whole of the pipeline route to be protected from what I consider to be a real and imminent risk of harm. On the evidence, I find that the protestors will engage in essentially the same activities in areas not covered by the injunction if it does not cover those areas.

(5) 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:

56. The proposed injunction focuses on specific conduct within the DCO order limits save for part (7) concerning access to the area of the DCO order limits. So far as the order may prohibit lawful conduct, a person may theoretically climb a compound fence on

public land and thereby commit no wrong assuming they do nothing more, or a person may be on public land and their mere presence may obstruct construction. On private land such acts would constitute a trespass absent consent from the landowner. These examples are not caught by the terms of the injunction. The order specifically prohibits activity by more than one person intending to damage the Claimant hence the tort of conspiracy pleaded.

57. Where lawful activity on the highway might be caught by the order, Articles 10 and 11 are engaged and thereby any restriction must be proportionate. A distinction must however be drawn, as I have set out, between lawful activity which would give rise to no cause of action and, for example, the unlawful obstruction of the highway which is designed and intended to cause the disruption of the activities of others as being not ‘*at the core*’ of the rights under consideration. Persuasion is very different to attempting by the use of obstruction to compel others to act in a way desired i.e. to stop work - see *Ziegler* at [94]. I have already given my conclusions regarding the overall balancing test concerning the infringement of the rights of protestors and those of the Claimant. Specifically in this regard and for the same reasons where potentially lawful conduct might be restrained by the order, the balance comes down firmly in favour of the Claimant given the strategic importance of the pipeline project and the potential to protest peacefully without obstruction of the highway.

(6) The terms are of the injunction are sufficiently clear:

58. The terms of the order have been the subject of challenge. The tort requires an intention to damage. In *Cuadrilla*, Leggatt LJ at [69] said that to make the terms of the order correspond with the tort alleged and given that future conduct is the subject of the injunction and that may prohibit conduct that is lawful ‘*it is necessary to include a requirement that the defendant’s conduct was intended to cause damage to the Claimant*’.
59. The order refers at 3. to not doing acts listed ‘*with any other person with the intention of preventing or impeding construction of the Southampton to London pipeline*’. To meet the requirements of the tort an intention to damage requirement is needed. An intention to cause damage might be implied in the wording chosen, however to avoid confusion and to add clarity the following amendment is necessary: ‘*with the intention of causing damage to the Claimant by preventing or impeding the construction of the Southampton to London pipeline*’.
60. In addition, it is accepted by the Claimant that paragraph 5.(B) which provides ‘*or by another person acting with his/her/their encouragement*’ is open to misinterpretation given the many ways in which encouragement might be construed. I agree and that part of paragraph 5.(B) is to be deleted. That is consistent with an earlier deletion by Eyre J of a phrase including the word ‘*encouragement*’.
61. Objection is raised as to the request to the ‘*cease and desist*’ requirement at 4(6). It is said to be unclear who may make such a request and the basis of so doing and as such confers powers on others. The wording is sufficiently clear in my judgement. The protestor would have to be within the DCO Order Limits and obstructing construction of the SLP. It would not be difficult to understand why a person was being asked to

move in such a location and the person making the request is unlikely to be unconnected with the works. Any potential breach of the order would not lead to committal unless an agreement with another, intention to cause damage etc, actual obstruction and a request made by or on behalf of the Claimant or police were proved.

62. Finally, objection is raised as to paragraph 7. *‘whether within or without the DCO order limits blocking or impeding access to any land within the DCO order limits’*. I do not see how that can be misinterpreted or misunderstood. The order prevents blocking access to the working areas that would be unlawful if done by for example, obstructing the highway or trespassing onto land intending to cause damage to the Claimant. The order is clear in that the acts of an individual are not caught by the order. More than one person must be part of the conspiracy alleged with the requisite intent. The blocking and impeding of access has the potential to cause not only delay but loss. The Claimant is entitled to carry on with the works unhindered by such action.

(7) The injunction has clear geographical and temporal limits:

63. *Geographical limits*: The works are taking place over a large distance and are due to be completed in 2023. The work requires storage of materials and pipes at compounds surrounded by fencing and the work will move as is necessary along the designated route. The works are carefully programmed and take into account matters such as sensitive flora and fauna. The fences have not prevented access to the compounds and working areas. It would be impractical to identify areas within the DCO order limits where items are located or work was to be undertaken from time to time. To leave an area unprotected by an injunction risks exposing that area to disruption. A patchwork of orders changing from time to time will not provide sufficient protection to the Claimant in my judgement. The entire pipeline requires protection. The order is limited to DCO Order Limits identified by the DCO.
64. *Temporal limits*: The Claimant has requested that the order continue until December 2023 to enable the works to be completed. That would in effect be a final order. This is an application for an interim injunction and a shorter period is necessary. The issues that arise require resolution at trial. I will extend the order for 4 months from the date of this decision. I will invite the parties to make representations as to a timetable for preparation and listing of the trial. At that stage, the justification and need for any continuation of the order will be determined.

(8) and (9) Defendants have not been identified but are, in principle, capable of being identified and served with the order or can be identified in the Claim form (and the injunction) by reference to their conduct:

65. Save for Scott Breen, Anthony Green and Roz Aroo being the two people who are said to have assisted Scott Breen, no other persons have been identified as being capable of being properly named as defendants and they cannot be served as a result.
66. The order contains in Annex 1 a comprehensive and detailed list of activities headed *‘description of persons unknown who are or who may become defendants to these proceedings’*. The prohibited acts contained within the order are set out. Following my decision, amendment will be necessary as set out above.

Result:

67. The Claimant succeeds in its application to continue the order of Eyre J for a period of 4 months so as to restrain the specified acts of the defendants (set out at paragraph 15 above) as amended in relation to the SLP and the DCO Order Limits.
68. I give the parties 7 days to agree directions regarding the future conduct of the case and setting the case down for trial. Failing agreement, the parties have 14 days to submit written submissions including the issue of costs. These issues to be dealt with on the papers unless there is good reason to do otherwise.