Neutral Citation Number: **[2022] EWHC 1324 (QB)**

Case No: QB-2022-001317

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 27 May 2022

Before:

HIS HONOUR JUDGE SIMON

(Sitting as a Judge of the High Court)

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Between:

(1) **THURROCK COUNCIL** (2) **ESSEX COUNTY COUNCIL**	Claimants
- and –	
(1) MADELINE ADAMS **(2)-(222) OTHER NAMED DEFENDANTS AS LISTED AT SCHEDULE 1 TO THE CLAIM FORM** **(223) PERSONS UNKNOWN, WHO ARE FOR THE PURPOSE OF PROTESTING, CAUSING THE BLOCKING, ENDANGERING, SLOWING DOWN, OBSTRUCTING, PREVENTING OR OTHERWISE INTERFERING WITH THE** **FREE FLOW OF TRAFFIC ON TO, OFF OR ALONG THE ROADS LISTED AT ANNEXE 1 TO THE CLAIM FORM** **(224) PERSONS UNKNOWN, WHO ARE FOR THE PURPOSE OF PROTESTING, AND WITHOUT THE PERMISSION OF THE REGISTERED KEEPER OF THE** **VEHICLE, ENTERING, CLIMBING ON, CLIMBING INTO, CLIMBING UNDER, OR IN ANY WAY AFFIXING THEMSELVES OR AFFIXING ANY ITEM TO ANY** **VEHICLE TRAVELLING ON TO, OFF, ALONG OR WHICH IS ACCESSING OR EXITING THE ROADS LISTED AT ANNEXE 1 TO THE CLAIM FORM**	Defendants

(225) PERSONS UNKNOWN, WHO ARE FOR THE PURPOSE OF PROTESTING, CAUSING THE BLOCKING, ENDANGERING, SLOWING DOWN, OBSTRUCTING, PREVENTING OR OTHERWISE INTERFERING WITH

VEHICULAR ACCESS TO, INTO OR OFF ANY PETROL STATION OR ITS FORECOURT WITHIN THE ADMINISTRATIVE AREA OF THURROCK (AS

MARKED ON THE MAP AT ANNEXE 2 TO THE CLAIM FORM)

(226) PERSONS UNKNOWN, WHO ARE FOR THE PURPOSE OF PROTESTING, CAUSING THE BLOCKING, ENDANGERING, SLOWING DOWN, OBSTRUCTING, PREVENTING OR OTHERWISE INTERFERING WITH

VEHICULAR ACCESS TO OR FROM ANY PETROL STATION OR ITS FORECOURT WITHIN THE ADMINISTRATIVE AREA OF ESSEX (AS MARKED

ON THE MAP AT ANNEXE 3 TO THE CLAIM FORM)

(227) PERSONS UNKNOWN, WHO ARE FOR THE PURPOSE OF PROTESTING, BLOCKING, PREVENTING OR OTHERWISE INTERFERING WITH THE

OFFLOADING BY DELIVERY TANKERS OF FUEL SUPPLIES AND/OR THE REFUELLING OF VEHICLES AT ANY PETROL STATION WITHIN THE ADMINISTRATIVE AREA OF THURROCK (AS MARKED ON THE MAP AT

ANNEXE 2 TO THE CLAIM FORM)

(228) PERSONS UNKNOWN, WHO ARE FOR THE PURPOSE OF PROTESTING, BLOCKING, PREVENTING OR OTHERWISE INTERFERING WITH THE OFFLOADING BY DELIVERY TANKERS OF FUEL SUPPLIES AND/OR THE

REFUELLING OF VEHICLES AT ANY PETROL STATION WITHIN THE ADMINISTRATIVE AREA OF ESSEX (AS MARKED ON THE MAP AT ANNEXE 3 TO THE CLAIM FORM)

(229) PERSONS UNKNOWN WHO ARE TRESPASSING ON, UNDER OR ADJACENT TO THE ROADS LISTED AT ANNEXE 1 TO THE CLAIM FORM BY UNDERTAKING EXCAVATIONS, DIGGING, DRILLING AND/OR TUNNELLING WITHOUT THE PERMISSION OF THE RELEVANT HIGHWAY AUTHORITY

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Ms Caroline Bolton & Ms Natalie Pratt (instructed by **Sharpe Pritchard**) for the **Claimants**

Mr Stephen Simblet QC (instructed by **Hodge Jones & Allen**) for the **63rd Defendant, Ms Ella Eason**

Hearing dates: 10 & 11 May 2022 & 27 May 2022

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APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE SIMON:

Introduction

1.The Claimants in these injunction proceedings are Thurrock Council (Thurrock) and Essex County Council (Essex). They are represented by Caroline Bolton and Natalie Pratt. On 24 April 2022 at an Out of Hours hearing without notice before Ritchie J, the Claimants applied for and obtained an interim injunction (the injunction) in the form annexed to this judgment as Annex 2. The injunction was made against 222 named Defendants and seven categories of persons unknown. The categories appear in the heading of this judgment as they appeared in the injunction.

2.The injunction provided, among other things, for a return date on 10 May 2022 with a time estimate of two days. At the return date, the 63rd Defendant, Ella Eason, was present and represented by Stephen Simblet QC. Also present, though neither a named Defendant nor a person seeking to be joined to the proceedings, was Jessica Branch, who wished her statement to be considered in support of Ms Eason’s opposition to the continuation of the injunction.

3.The injunction in its present form contains 19 prohibitions, the specifics of which are discussed further below. In broad terms, they seek to prohibit what the Claimants argue are acts of public nuisance and/or trespass in the administrative areas for which Thurrock and Essex are responsible.

4.As a result of the breadth of issues and submissions in this case, it has been necessary to summarise, albeit in some detail, those submissions in the body of the judgment. I am grateful to Ms Bolton and Mr Simblet QC for their assistance with the complexities of the case.

Background

5.Thurrock is an administrative area within Essex and encompasses, for the purposes of these proceedings, three fuel terminals (the Thurrock terminals). They are:

The Navigator Fuel Terminal, Oliver Road, West Thurrock RM20 3ED – the main entrance to the site is off Burnley Road/Oliver Road in West Thurrock. There is a secondary exit from the site on Oliver Close;

The Esso Fuel Terminal, London Road, Purfleet RM19 1RS – the primary access route to the site is off the A1090, London Road, Purfleet; and

Exolum Storage Ltd, off Askews Farm Lane, London Road, Grays RM17 5YZ.

6.In addition, a fourth fuel terminal, the Oikos site, is situated at Haven Road, Hole Haven Wharf, Canvey Island SS8 0NR, within the administrative area of Essex. Each of these sites is subject to the Control of Major Accidents Hazards (COMAH) Regulations 2015 and each has a risk assessment associated with this status.

7.The significance of these fuel terminals in their respective areas is that they, and the surrounding highway network, have been the target of repeated protest action by a large number of individuals, specifically during the period 1 – 15 April 2022. The banner, so to speak, under which many of the individuals participated in the protests was Just Stop Oil (JSO). In common with other protest groups, such as Extinction Rebellion and Insulate Britain, JSO advocates direct action to raise awareness of concerns about climate change and the need for urgent action. JSO's protests in Thurrock have been directed at the Thurrock terminals due to their significance as directly connected with fossil fuels. The Claimants do not say that every person who has taken part in the protests thus far, identified or otherwise, is necessarily an active member of JSO. It is in the nature of such groups that they have no formalised membership structure, but attract people variously to specific events. Individuals may also take part in protests promoted by other groups. In the present proceedings, the Claimants suggest that Extinction Rebellion (XR) and a group called Youth Climate Swarm (YCS) have also encouraged and facilitated some of the action seen in Thurrock.

8.The named Defendants in these proceedings are those who have been arrested by Essex Police (and officers from other forces providing mutual aid), some of them more than once, for involvement in the actions complained of by the Claimants.

Submissions

9.The Claimants made extensive reference to the statements and exhibits filed in support of the interim injunction being continued. Rather than quoting large swathes within the body of the judgment, I have précised all of the written evidence in a separate document as Annex 3 to this judgment.

10.Ms Bolton began her oral submissions, building on her skeleton argument filed in advance and a further skeleton in reply to that of Mr Simblet, by setting out the chronology, noting that the injunction was not pure quia timet, because in relation to the Thurrock terminals it sought to restrain the resumption of activity already undertaken between 1 – 15 April 2022. It was quia timet in relation to the Oikos terminal, but based on the experience in Thurrock, the publicly stated intentions of JSO (Phase 2a activity having been experienced in other parts of the country) and the suspicious 'visitor' at the terminal that suggested it was being surveyed, the injunctive relief was well founded.

11.Ms Bolton clarified the underlying causes of action relied on, which are trespass and public nuisance. For present purposes at least, the Claimants do not seek to invoke the Court's power to injunct in support of the criminal law. She made reference to the detailed evidence of Mr Adesina as to the significance of the Thurrock terminals and the level of potential impact on all residents, though particularly emergency and essential services, if fuel supplies are disrupted. Expressing sympathy with the protesters' concerns for the future, she argued that the protests would cause significant harm to those in the present, realistically including potential loss of life. The protests had created, and if repeated would create, a real risk of public safety to the protesters, emergency services and the wider public. The Claimants bring their claim in public nuisance under s222 Local Government Act 1972, extending to the garage forecourts

12.Ms Bolton addressed the trespass aspect of the application by reference to the tunnelling undertaken by protesters extending under the highway and coming very close to significant infrastructure. This had no place in peaceful protest and risked harm to all. As the Claimants are also the relevant Highways Authority, they bring the claim in trespass, there being no reasonable use of the highway when it involves tunnelling. However, the Claimants' powers pursuant to s222 are equally in play in respect of protest activity amounting to trespass. Ms Bolton pointed out that many of the cases in Barking covered trespass with large numbers of defendants and far more extensive orders than in the instant application.

13.Ms Bolton then dealt with the evidence of TDCS Cronin which provided an overview of what the police have been dealing with during the period 1 – 15 April 2022. The specific incidents during this period within Thurrock appear in Annex 4 to this judgment. The police evidence also dealt with the compilation of the list of named Defendants. Ms Bolton emphasised that at this interim stage, where justified, an injunction can be granted against those concisely referred to as 'newcomers'. She submitted that Cameron was not concerned with 'newcomers' and to that extent Canada Goose (CA) had taken a "wrong turn" in thinking that it was. Barking has now made clear that category 2 in Cameron is not concerned with 'newcomers'. The Defendants in the instant case are Cameron category 1 (or in the process of becoming such) and 'newcomers'. The case law now makes clear the need to define persons unknown by the acts to be restrained as unlawful. Ms Bolton contrasted the decision in Ineos (CA), where the Court concluded that there was inadequate evidence of reasonable apprehension, with the current application which could rely on events that had already taken place, the harm caused and the intelligence as to future anticipated actions. She pointed to the expansion through paragraph 50 of Cuadrilla of sub-paragraph 4 of Longmore LJ's 'tentative' crafting of the requirements for interim injunctions against persons unknown at paragraph 34 of Ineos (CA), submitting that if I took the view that it was proportionate to restrain then I would be entitled to include potentially lawful conduct if this were the only way to achieve effective protection. In addressing the 'persons unknown' element, Ms Bolton submitted that Ineos (CA) clearly categorised 'newcomers' as those other than the two categories described in Cameron. The Ineos (CA) criteria at paragraph 34 were all satisfied in the present application. Indeed, she contended, Ineos involved purely apprehension of activity, whereas the events of 1-15 April in Thurrock are a clear foundation for seeking the injunction. The case of Gamell was also relevant to the question of 'newcomers' in that the Claimants were seeking to communicate to as many people as possible the existence, and then the terms, of the injunction. This was why the signs had QR codes to permit easy access to the details. The injunction does not bite until a person comes to the area and sees the notices, which is the whole point of the 'newcomer' principle.

14.Ms Bolton referred to TDCS Cronin's description of the particular dangers involved when there is any interception of a tanker from one of the fuel terminals, given the nature of the load being transported. She referred to the potential consequences of any protester climbing onto a tanker as "possibly unthinkable". When it happens on a highway, the entire area has to be secured and it creates risk for the protester(s) and those tasked with getting them down, not just from working at height, but also any damage to the integrity of the tanker. Standard methods of releasing protesters from glue or lock-on devices cannot be used, for obvious safety reasons, and one such protester spent three days atop a tanker as a result. Ms Bolton noted the disproportionate impact on the areas for which the Claimants are responsible by comparison with other parts of the country as a result of the presence and importance of the Thurrock terminals and the Oikos terminal. The impact on all other work by the police is also a matter of great concern. Ms Bolton relied on the evidence of Mr Rulewski to the effect that post-moratorium and the granting of the injunction there has not been a repeat of the obstruction and harm seen in April. She referred to the police intelligence briefing to argue that Phase 1 of JSO's action had been seen already and Phase 2a could reasonably be apprehended to occur in Thurrock/Essex as it has occurred elsewhere. Phase 2a includes action at petrol stations and JSO have called publicly for recruitment from universities of a thousand students. Ms Bolton contrasted the decision in Afsar, in which the public at large was not exposed to risk or to nuisance.

15.Ms Bolton pointed out that there was nothing in the evidence of Ms Eason or Ms Branch to suggest that the Claimants were wrong about any of the facts on which they rely, nor anything about why they cannot protest effectively with the injunction in place, utilising parts of the roads other than the carriageway.

16.Ms Bolton dealt separately with Canvey Island, relying on the evidence of Mr Crick. The strategic importance of the Oikos site, particularly in respect of air travel, was clear. Essex has a very specific concern in relation to Canvey Island because there are only two routes on and off the island. Without appropriate injunctive protection it would be very easy to obstruct the Oikos site, which is "on the doorstep" of Thurrock; there appears to have been a survey undertaken in advance of action; JSO has threatened escalation, which has occurred elsewhere; the limited roads available for fuel distribution; and there is a need to balance the protesters' rights with the police intelligence and potential for significant harm.

17.In addressing the terms of the injunction, Ms Bolton acknowledged that the list of affected roads in the schedule is long, but explained that they had been limited to the roads used by the tankers and that a major road with an A-road number may actually change its name a number of times along the route. The list of road names was intended for clarity. She submitted that paragraph 2.1 was made out on the evidence from Thurrock and the police. She added that the same provision appeared in what was referred to as the Insulate Britain order, made in the case which she submitted had been tested through the committal process in those proceedings. She distinguished Canada Goose (HC) & (CA) on the basis that the Claimant was a private company seeking to use public law rights, not, as in the instant case, a public body seeking to protect its inhabitants. Ineos had involved a pure quia timet injunction, whereas Thurrock could point to actual not just apprehended obstruction. Thurrock was able to provide evidence to justify the terms it sought as proportionate, because thought had been given to what was needed to prevent harm occurring and it was unclear how anything less would suffice.

18.Paragraph 2.2, specifying adjacent roads to those named was, Ms Bolton submitted, necessary to support paragraph 2.1 as otherwise the intent of the injunction could be frustrated, and 'adjacent' was not ambiguous but clear. Paragraphs 2.3 and 2.4, relating to action directed at any vehicle on the

roads had to be both unlawful (meaning without the permission of the registered keeper) and for the purpose of protest before it would be caught by these provisions. Ms Bolton added that provision could be added for "without the permission of the authorised driver". Without such restriction there was a real risk to public safety, which would itself form a significant obstruction of the highway. Paragraphs 2.5 and 2.6 would include protesters gluing themselves to tankers, which had occurred. Such action was simply unacceptable as was protesters affixing themselves to the roads themselves, which was covered by paragraphs 2.7 and 2.8. Paragraphs 2.9 to 2.17 had been drafted based on actual evidence or police intelligence, as well as the JSO's Phase 2a targeting of petrol stations, which had occurred elsewhere since the protests had resumed. The activity addressed by the injunction in relation to petrol stations would amount to a public nuisance and would, if not prevented, affect the whole county. A power of arrest was sought only in relation to paragraphs 2.1 to 2.16 as they all related to harm or threatened harm. Ms Bolton submitted that the test for attaching a power of arrest was made out because the potential harm was significant and a newcomer who might come and breach the order would not be capable of identification and subject to committal proceedings if not arrested and processed. The police should be relied on to act in a measured way when utilising their powers of arrest in an injunction. The 'refusing to leave' provision in paragraph 2.17 had been included in other similar injunctions, but did not need a power of arrest attached as the police would use the five-stage appeal process in such situations. Allowing any obstruction of the carriageway would permit harm to continue and would be exploited.

19.Ms Bolton made clear that the Claimants were not seeking to prohibit peaceful protest, which could be facilitated as long as it involved neither obstructing the highway nor locking-on to roads or vehicles. The activity engaged in by the protesters in April 2022 in Thurrock was significantly harmful and many of those arrested and released on bail had returned to commit further offences. As to service, the signs put up on relevant roads indicate the existence of an injunction and provide a QR code and a link to the details of it. Ms Bolton wondered how else the Claimants might alert people to a serious order in place and to do so in strong terms. Every petrol station has full copies of the injunction and the named Defendants were sent the documents by post. She argued that finding and understanding the prohibitions was perfectly feasible and there was no evidence that anyone had breached the injunction as a result of the measures taken for service to persons unknown. She said the Claimants had made quite a significant effort at speed.

20.Ms Bolton referred to the various maps attached to the injunction, which reflected the choice of major routes through Thurrock and those distinct to Canvey Island. She submitted that one could not simply identify a road by its road number, as some roads change their name and clarity was needed. All of this was proportionate to the torts sought to be prevented.

21.In relation to Mr Simblet's submissions about the Claimants' failure to make full and frank disclosure to Ritchie J, Ms Bolton made clear that Ineos (HC) had been cited at the without notice hearing, not to mislead the judge about the outcome on appeal, but solely for the purpose of establishing that the elements of obstruction amounting to tortious public nuisance are the same as they are in the criminal offence. She submitted that Ritchie J was aware of the evidence filed, the causes of action and why no undertaking in damages was required. The relevant parts of Ziegler were also brought to the judge's attention. She argued that the current application involved no 'publication' such as to trigger consideration of the test in s12(3) HRA. What it is sought to restrain in the instant case is assembly, not publication. She explained that it had not been possible to obtain the first instance order in Ineos (HC), but there had been a harassment claim and that may explain why s12(3) was a live consideration. Ms Bolton referred to paragraph 32 of Sun Street in which Roth J held that

the Defendants in that case, who were occupying a large commercial building, were manifestly able to communicate their views without being in occupation of the specific building:

> "No one is seeking to prevent them from coming together to campaign or promulgate those views. I need hardly add that the fact that the occupation gives them a valuable platform for publicity cannot in itself provide a basis for overriding the respondent's own rights as regards the property."

22.This was intended as support for the contention that geographic location alone should not be considered as 'publication' and this would then exclude consideration of s12(3) because it was only the location of protests that the Claimants sought to restrict. Ms Bolton also made reference to CPR Practice Guidance on Interim Non-Disclosure Orders at Page 1-2008 of the White Book, which refers to 'publication', as do all the authorities, in a way which supports her submission. Even if I were to find that the Claimants were wrong not to bring s12(3) to the attention of Ritchie J, or indeed any other failure of the duty of candour, Ms Bolton invited me to deal with the failure in the same way that Warby J did in Afsar and regrant the injunction.

23.Finally, in respect of a cross-undertaking in damages, Ms Bolton made the point that the Claimants are acting in accordance with the administrative duties that they have to those residing and working in their areas and that neither Claimant would have the not insignificant resources required properly to give a cross-undertaking. Even applying the dicta in Sinaloa Gold, the Claimants should not be required to give a cross-undertaking, either at the without notice stage or at the on notice return date for the reasons identified particularly at paragraphs 42-43.

24.In detailed written and oral submissions, Mr Simblet began by challenging the entire approach of the Claimants to obtaining an injunction without notice, as well as the breadth and/or details of the terms of the injunction, including ancillary orders for alternative service. He emphasised on numerous occasions that protesting on the highway is a statutory right and he characterised the instant injunction as "a tool of totalitarian regimes rather than a liberal democracy". He relied on Ziegler at paragraph 57 and Jones at paragraph 76.

25.Mr Simblet's submissions against the maintenance of the injunction in any form or, if maintained, in the form currently in force fell under a number of headings.

Cause of action and 'persons unknown'

26.Mr Simblet submitted that there was inherent confusion in the Claimants' application as to the underlying cause(s) of action, the defendants to such cause(s) of action and the propriety of "proceeding against an ill-defined contrived defendant", referring to 'persons unknown'. He added that the Claimants must present a proper case for injunctive relief and comply with the proper rules affecting all litigants. He argued that seeking to injunct activity on garage forecourts seemed to be private rather than public nuisance, which would undermine the Claimants' right to bring the application. As to a claim in trespass, Mr Simblet contended that the Claimants were not in a similar position to the Mayor of London in Hall, who had statutory responsibility for Parliament Square, where such a claim was maintainable. He emphasised that the entrances to petrol stations and the fuel terminals belong to others who would be entitled to apply for injunctive relief; a point which would also be relevant to the court's exercise of discretion. In this case, the Claimants were seeking to invest a mischief and use that as a basis for the grant of an injunction against persons unknown.

27.Mr Simblet cautioned against adding together acts of individuals and creating a level of conduct that would justify an order, rather than assessing the conduct of an individual tortfeasor. He suggested that the former might be appropriate where individuals were congregating in one place all of the time, but that was not the case here. He challenged the schedule of named Defendants, their arrest details and the fact that there are so many gaps in them. Mr Simblet contended that there may have been people who committed tortious acts but have not been sufficiently described in evidence so that they could be identified. He said it was a misconception to aggregate actions of a number of people and then create a fourth class of Defendant said to be responsible for "all sorts of inchoate tortious misdeeds". He suggested that the Claimants had not put forward a case against any individual in any cause of action open to them, noting that this was exactly why the Court of Appeal in Ineos (CA) discharged two injunctions due to the absence of supporting material. In the instant case a claim in trespass can only apply to acts on the highway.

28.In relation to public nuisance, Mr Simblet said that there still had to be an identifiable Defendant, a claim cannot be brought against a protest group that has no distinct legal identity. Exceptionally, if the nuisance affected a widespread section of the population, a local authority would be able to bring a claim without proof of special damage. The widespread effects necessary to amount to public nuisance did not exist in this case. He suggested such a cause of action was not made out in this case and that left, in his words, the only cause of action to which the Claimants even came close, which was enforcement of the criminal law. That itself is an exceptional jurisdiction and Mr Simblet relied on B&Q at paragraph 22F-23B & 23F-H and on Bovis. He submitted that there was no evidence in the instant case that criminal penalties had proved insufficient, indeed no evidence that anyone had committed a specific offence and not been deterred by the consequences of conviction such as to continue committing it. What is being complained about by the Claimants amounts to discrete criminal offences, upon which the courts will adjudicate where there are prosecutions and this will act as a way of regulating such protests. Mr Simblet said the Court was being asked to continue prohibiting lawful conduct whilst elevating the penalty attaching to it.

29.The thrust of the argument under this head in relation to the use of 'persons unknown' by the Claimants was that there was insufficient evidence to underpin a legal cause of action. Directing an injunction at 'persons unknown' could not abrogate the need for proper service or depart from the fundamental rule that people affected by an order had to be given a fair opportunity to be heard before their legal rights are determined, relying on Cameron at paragraph 17 and Lord Sumption's categories of persons unknown.

Protest on the highway

30.Mr Simblet argued strongly that protest on the public highway is lawful and those doing it are exercising fundamental rights, including statutory rights, to put forward their views lawfully and effectively. He took particular issue with the wording and format of the notices put up in Thurrock and Essex which betrayed a starting point in relation to such protests that was wrong. Nuisance, he said, was about reasonableness, duration and the extent of the effects. He relied on Canada Goose (CA) at paragraph 93, which remained good law even following the decision in Barking. He pointed out that, in line with Dulgheriu, the Claimants have other means available to them for regulating protests through the Anti-Social Behaviour, Crime and Policing Act 2014.

31.Mr Simblet relied on numerous specific paragraphs in Ziegler and the fact specific assessment to be made for each interference of articles 10 and/or 11, taken with the opinion of Lord Bingham in Laporte, to submit that prior restraint of lawful protest is always exceptionally hard to justify, even

more so in the “incredibly wide and uncertain powers being deployed” in this case. The Court was asked to treat the signs put up by the Claimants as deterring lawful protest, based on the evidence of Ms Hardy and Ms Branch in this regard. Mr Simblet described them as too crude a measure to judge the efficacy of the injunction.

Enforceability

32.The argument under this head was the need for the language used in an injunction to be clear and capable of enforcement, restraining that which is unlawful while not unreasonably or unfairly restraining that which is lawful. The injunction, Mr Simblet submitted, sought a power to send people to prison on an ill-defined and inchoate basis. He strongly criticised the definition of ‘roads’ utilised and the very long list of roads affected, running over a number of pages of A4.

33.Mr Simblet also relied on Laporte at paragraphs 46-52 for the important high principle regarding the great care that must be exercised in terms of prior restraint of actions that involve Convention rights, particularly the fundamental rights in articles 10 and 11. Only the clearest prohibitions on the clearest possible legal basis can be invoked and only when absolutely necessary. He prayed in aid paragraphs 64-104 of Canada Goose (HC) as directly referrable to the present application.

34.Importantly, in reliance on Ineos (CA) at paragraph 43, Mr Simblet reminded the Court of the requirements for clear geographical and temporal limits within the injunction.

Power of arrest

35.Mr Simblet contended that the addition of a power of arrest to most of the prohibitions had the practical effect of reducing the threshold at which one could lose one’s liberty (without even breaching the order), due to the uncertainty inherent in the notices and the lack of control over the circumstances in which an officer has reasonable suspicion but the person arrested is unaware of the order. He referred to the evidence of TDCS Cronin and the importing of officers from outside Essex to assist with policing and how they will likely be affected by “the looseness of the language” in the injunction.

Service

36.Related to enforceability was the need for everyone affected to be heard on the terms of the injunction. Mr Simblet argued that Canada Goose (CA) did not suggest that service or notification of proceedings was unimportant. The methods permitted for alternative service in this case were an unsatisfactory way of bringing the injunction to people’s attention. Equally, people should not be oppressed by signs of the sort used in this case. He said that the Court had still not been furnished with proposals for how the Claimants can serve and publicise the injunction without interfering with other people’s rights. The added uncertainty of the definition of roads, the unclear maps, the challenge of understanding which roads were affected and the imprecision with which they are identified all combined to make the injunction incapable of being kept within proper bounds.

Duty of candour

37.Mr Simblet made complaint under this head in relation notably to two aspects of the hearing before Ritchie J: first, the Claimants’ reliance on Ineos (HC) at first instance without referencing Ineos (CA) on appeal; and secondly the failure of the Claimants to direct the judge to the correct test for granting an injunction under s12(3) HRA, but rather suggesting the standard – and lesser – threshold test for granting injunctions applied.

38.Amongst other cases, Mr Simblet relied on Canada Goose (HC) at paragraph 64 on for an exposition of the principle for applying s12(3). He rejected Ms Bolton's submission that the presence of a harassment claim in Ineos would make a difference. As to Lavender J's judgment in National Highways Ltd, Mr Simblet said that the judge did not explain why s12(3) was not applicable. By extension, if s12(3) is applicable, the Claimants would find it very difficult to satisfy the high test therein. He also cited Afsar (1) at paragraph 53 and following in relation to the absence of an urgency to justify a without notice application.

39.Mr Simblet suggested that the Claimants had decided to act of their own volition, essentially in circumstances without precedent, in a claim of considerable novelty and complexity. This put an onerous obligation on counsel for the Claimants at the without notice stage and the identified failures alone should lead to discharge of the order and the refusal of further discretionary relief.

Undertaking in damages

40.Mr Simblet relied on Afsar (2) as support for the argument that in a protest context a cross-undertaking in damages should be given by a local authority. Furthermore he contended that the correct test in the instant case was that in Sinaloa Gold and not Kirklees and that therefore the Claimants were wrong to seek, and the judge was wrong to grant, an injunction without the usual protection for affected Defendants provided by such a cross-undertaking. The point of principle, he argued, in Sinaloa Gold, as in Kirklees, was that the Claimant was acting under a statutory duty in applying to the Court. This contrasted strongly with the local authority Claimants in the present case which had decided to seek injunctive relief, but were not under any duty to do so. The usual safeguards for a Defendant should in the circumstances be provided for.

Further evidence

41.At the conclusion of the hearing, it was clear that there was a factual dispute about the terms of the order in the Insulate Britain case. I permitted further evidence in writing, but for the reasons set out below, I need not precis it.

Discussion

42.The Claimants bring the proceedings pursuant to section 222 Local Government Act 1972 (LGA) and section 130 Highways Act 1980 (HA).

43.The relevant part of section 222 LGA provides:

> "222.— Power of local authorities to prosecute or defend legal proceedings."
>
> (1) Where a local authority consider it expedient for the promotion or protection of the interests of the inhabitants of their area—
>
> (a) they may prosecute or defend or appear in any legal proceedings and, in the case of civil proceedings, may institute them in their own name, …"

44.Section 130(1) – (5) HA provides as follows:

> "130.— Protection of public rights.

(1) It is the duty of the highway authority to assert and protect the rights of the public to the use and enjoyment of any highway for which they are the highway authority, including any roadside waste which forms part of it.

(2) Any council may assert and protect the rights of the public to the use and enjoyment of any highway in their area for which they are not the highway authority, including any roadside waste which forms part of it.

(3) Without prejudice to subsections (1) and (2) above, it is the duty of a council who are a highway authority to prevent, as far as possible, the stopping up or obstruction of—

(a) the highways for which they are the highway authority, and

(b) any highway for which they are not the highway authority, if, in their opinion, the stopping up or obstruction of that highway would be prejudicial to the interests of their area.

(4) Without prejudice to the foregoing provisions of this section, it is the duty of a local highway authority to prevent any unlawful encroachment on any roadside waste comprised in a highway for which they are the highway authority.

(5) Without prejudice to their powers under section 222 of the Local Government Act 1972, a council may, in the performance of their functions under the foregoing provisions of this section, institute legal proceedings in their own name, defend any legal proceedings and generally take such steps as they deem expedient."

45.Regarding the attachment of a power of arrest to an injunction such as that sought in these proceedings, section 27 Police and Justice Act 2006 provides:

"27 Injunctions in local authority proceedings: power of arrest and remand"

(1) This section applies to proceedings in which a local authority is a party by virtue of section 222 of the Local Government Act 1972 (c. 70) (power of local authority to bring, defend or appear in proceedings for the promotion or protection of the interests of inhabitants of their area).

(2) If the court grants an injunction which prohibits conduct which is capable of causing nuisance or annoyance to a person it may, if subsection (3) applies, attach a power of arrest to any provision of the injunction.

(3) This subsection applies if the local authority applies to the court to attach the power of arrest and the court thinks that either–

(a) the conduct mentioned in subsection (2) consists of or includes the use or threatened use of violence, or

(b) there is a significant risk of harm to the person mentioned in that subsection.

(4) Where a power of arrest is attached to any provision of an injunction under subsection (2), a constable may arrest without warrant a person whom he has reasonable cause for suspecting to be in breach of that provision."

46.Articles 10 and 11 of the Convention appear in Schedule 1 to the Human Rights Act 1998 (HRA):

Article 10

Freedom of expression

1Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11

Freedom of assembly and association

1Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

47.Section 12 HRA, which features in this case, states:

12Freedom of expression.

(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.

(3)No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

48.The causes of action upon which the Claimants relied at the return date were public nuisance and trespass. I am not being asked to consider granting injunctive relief in support of the criminal law and I have therefore not addressed that issue in this judgment.

49.It seemed to me that Mr Simblet's arguments on the paucity of causes of action conflated two separate stages of the Court's consideration of the Claimants' case in that it honed in on whether the Claimants had an action through which they could exercise rights over petrol station forecourts. Mr Simblet argued that this might amount to a private nuisance but not a public one and nor would it provide an actionable trespass claim for the Claimants. The proper approach, in my judgment, is to consider the causes of action relied on first and only if satisfied that one or more of them gives the Claimants standing to seek injunctive relief, does one move to the next stage which is determining the specific provisions which are justifiably included in the terms of the injunction, bearing in mind all factors including the important rights contained in articles 10 and 11.

50.Mr Simblet's construct of a paradigm for public nuisance of a noisy nightclub or that in Bovis, advanced in his submissions, is not an exclusive characterisation of such, nor does it deflect this court from what must be an assessment of the specific facts presented by the Claimants. Having said this, it is relevant to observe that in both of his examples the conduct to be curtailed by court order was emanating from private land, causing nuisance to a wider public.

51.The nature of the protest activity seen in Thurrock between 1 and 15 April 2022 is very evident from the incident log at Annex 4 and the Claimants' evidence more generally. It involved actions that presented a serious threat to the health and wellbeing of the protesters, the police and the general populace. The evidence of the reckless actions of some protesters who gained entry to the terminals underlines the level of potential risk to which people could be exposed by a repeat of activity conducted on the highways in April. This, in my judgment, justifies a cause of action in public nuisance. The significant reduction in fuel stock levels resulting from the April protests and its potential impact on emergency and essential services, many of which are intended for residents who would properly be considered as vulnerable, by whatever measure, adds further support to my conclusion that a cause of action in public nuisance is made out.

52.In addition, the care that must be exercised when responding to any impediment to the progress of tankers as described in the unchallenged evidence also justifies a cause of action in public nuisance. One need only take, as an example, the three days that were needed safely to free a protester from atop an intercepted tanker to understand the degree of obstruction (as well as risk of serious harm) that actions by some protesters have provoked. This too justifies the Claimants in bringing an action in public nuisance under s222 LGA as well as in the guise of the relevant Highways Authority under s130 HA. As to a cause of action in trespass, Mr Simblet acknowledged that Thurrock would at the very least be entitled to rely on this, as a result of the tunnelling activities described and depicted in the evidence.

53.Mr Simblet makes a good point that not all protesters have been directly involved in the differing acts complained of. However, I reject the submission that the Court must assess the conduct of an individual tortfeasor, on the basis that one is not dealing with a single group of individuals congregating in one place. In my judgment, a proper analysis of the acts engaged in by protesters entitles the Claimants and the Court to treat as a broad-based composite the Defendants, whose individual actions are intended to contribute to the goal of an alliance that shares a belief in the tactics promulgated by JSO, however loosely connected each person may be to it. Any other approach would neuter the Claimants in the exercise of their statutory duties. I use the word 'duties' because it

seems to me that contrary to the distinction sought to be made by Mr Simblet between actions of a local authority that are mandatory, such as under the Shops Act 1950 in B & Q Ltd., and what he characterised as the voluntary nature of the Claimants in bringing the instant proceedings, section 130 HA explicitly creates a duty on the Highway Authority to act in the circumstances envisaged in the section. Although section 222 LGA is framed in a permissive way, one need only contemplate this from the perspective of a powerful challenge in judicial review were a local authority to fail to determine the events of 1-15 April 2022 as sufficient justification for a requirement to act to promote or protect the interests of the inhabitants of their area. This applies both to Thurrock and, in terms of apprehended action, to Essex.

54.I turn now to the identity of the Defendants, named and persons unknown. Although the heading of the documents prepared for the return date referred to 222 named Defendants, Schedule 1 to the order actually contained 250 names of individuals arrested during the April incidents. This demonstrates the continuing efforts of Essex Police to provide the Claimants with the details of those who can be identified. Mr Simblet raised understandable concerns about blank sections of the Schedule where further details would be expected, but I accept the explanation by Ms Bolton that detailed arrest information is still being gathered. Some Defendants have been arrested more than once and the presently empty cells in the schedule will, I am told, be populated as further information is received from the police. A cursory analysis of Schedule 1 reveals the following:

Number of times arrested 1-15 April 2022	Number of named Defendants (Total 250)
1	121
2	66
3	35
4	20
5	6
6	1
7	1

55.Though admittedly a fairly crude measure, the above table representing 481 arrests does provide an at-a-glance snapshot of the scale of activity with which Thurrock and Essex Police were having to cope in the period 1-15 April 2022.

56.As far as the remaining Defendants are concerned they are in seven categories of Persons Unknown drafted, as required, to reflect the specific acts to which the injunction is directed. The point was made by Ms Bolton that I am dealing with interim injunctive relief and its availability against categories of Persons Unknown is not in doubt on the authorities. Such categories include those who are either not yet known, for reasons set out above, or what have become known in the authorities as ‘newcomers’.

57.It is worthwhile restating that in Ineos (CA) Longmore LJ said this about the Cameron categories enunciated by Lord Sumption:

27.…

> “The distinction is that in the first category the defendant is described in a way that makes it possible in principle to locate or communicate with him and to know without further inquiry whether he is the same as the person identified in the claim form, whereas in the second category it is not.”

Those in the second category could not therefore be sued because to do so would be contrary to the fundamental principle that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as would enable him to be heard (para 17).

28. Ms Harrison submitted that these categories were exclusive categories of unnamed or unknown defendants and that the defendants as described in the present case did not fall within the first category since they are not described in a way that makes it possible to locate or communicate with them, let alone to know whether they are the same as the persons described in the claim form, because until they committed the torts enjoined, they did not even exist. To the extent that they fell within the second category they cannot be sued as unknown or unnamed persons.

29. Despite the persuasive manner in which these arguments were advanced, I cannot accept them. In my judgment it is too absolutist to say that a claimant can never sue persons unknown unless they are identifiable at the time the claim form is issued. That was done in both the Bloomsbury and the Hampshire Waste cases and no one has hitherto suggested that they were wrongly decided. Ms Harrison shrank from submitting that Bloomsbury was wrongly decided since it so obviously met the justice of the case but she did submit that Hampshire Waste was wrongly decided. She submitted that there was a distinction between injunctions against persons who existed but could not be identified and injunctions against persons who did not exist and would only come into existence when they breached the injunction. But the supposedly absolute prohibition on suing unidentifiable persons is already being departed from. Lord Sumption's two categories apply to persons who do exist, some of whom are identifiable and some of whom are not. But he was not considering persons who do not exist at all and will only come into existence in the future. I do not consider that he was intending to say anything adverse about suing such persons. On the contrary, he referred (para 11) to one context of the invocation of the jurisdiction to sue unknown persons as being trespassers and other torts committed by protesters and demonstrators and observed that in some of those cases proceedings were allowed in support of an application for a quia timet injunction

"where the defendant could be identified only as those persons who might in future commit the relevant acts."

But he did not refer in terms to these cases again and they do not appear to fit into either of the categories he used for the purpose of deciding the Cameron case."

58.The Court of Appeal's approach in Ineos (CA) has now been affirmed by the decision in Barking.

59.Having concluded that there are legitimate causes of action underpinning the proceedings brought by the Claimants, I accept Ms Bolton's submissions that in principle the Claimants are entitled to seek interim injunctive relief against the described newcomers, albeit that their final description will depend upon the parameters of the actual terms of any injunction granted.

60.Before considering the matters relevant to granting injunctive relief against persons unknown, it is important to restate the fundamental principles when assessing the extent to which, if at all, an interference with article 10 and/or 11 rights is justified. The Supreme Court in Ziegler (at paragraph 58) approved that which the Divisional Court described as “the usual enquiry” under the HRA, which requires consideration of five questions:

(a)Is what the defendant did in exercise of one of the rights in Articles 10 or 11?

(b)If so, is there an interference by a public authority with that right?

(c)If there is an interference, is it prescribed by law?

(d)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?

(e)If so, is the interference ‘necessary in a democratic society’ to achieve the legitimate aim?

61.The Divisional Court in Ziegler had noted that question (e) above would in turn require consideration of the sub-questions which arise in order to assess whether an interference is proportionate. The sub-questions are:

(a)Is the aim sufficiently important to justify interference with a fundamental right?

(b)Is there a rational connection between the means chosen and the aim in view?

(c)Are there less restrictive alternative means available to achieve that aim?

(d)Is there a fair balance between the rights of the individual and the general interest of the community, including the rights of others?

62.Putting aside an observation made later in this judgment about article 11, the ‘usual enquiry’ in this case yields positive responses (a) to (d) above, the legitimate aim certainly encompassing the protection of the rights of others. As to the sub-questions considering the necessity in a democratic society of the interference, (a) and (b) are answered in the affirmative. Bearing in mind my conclusions on the restrictions sought, I do not find that there are less restrictive alternative means of achieving the aim in view. The fact that protest in geographically proximate locations is facilitated by the order sought, I am satisfied that overall a fair balance is achieved, bearing in mind the risks that could be created by a repeat of action in April.

63.In Ineos (CA) Longmore LJ tentatively framed the requirements for granting a quia timet injunction against persons unknown, as follows:

1) there must be a sufficiently real and imminent risk of a tort being committed to justify quia timet relief;

2) it is impossible to name the persons who are likely to commit the tort unless restrained;

3) it is possible to give effective notice of the injunction and for the method of such notice to be set out in the order;

4) the terms of the injunction must correspond to the threatened tort and not be so wide that they prohibit lawful conduct;

5) the terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do; and

6) the injunction should have clear geographical and temporal limits.

64.This checklist must now be considered with the additional gloss on requirement 4) provided by Leggatt LJ (who was a member of the Court in Ineos (CA)) in Cuadrilla:

> "50.In the light of precedents which were not cited in the Ineos case but which have been drawn to our attention on the present appeal, I would enter a caveat in relation to the fourth of these requirements. While it is undoubtedly desirable that the terms of an injunction should correspond to the threatened tort and not be so wide that they prohibit lawful conduct, this cannot be regarded as an absolute rule. The decisions of the Court of Appeal in Hubbard v Pitt [1976] QB 142 and Burris v Azadani [1995] 1 WLR 1372 demonstrate that, although the court must be careful not to impose an injunction in wider terms than are necessary to do justice, the court is entitled to restrain conduct that is not in itself tortious or otherwise unlawful if it is satisfied that such a restriction is necessary in order to afford effective protection to the rights of the claimant in the particular case. In both those cases the injunction was granted against a named person or persons. What, if any, difference it makes in this regard that the injunction is sought against unknown persons is a question which does not need to be decided on the present appeal but which may, as I understand, arise on a pending appeal from the decision of Nicklin J in Canada Goose UK Retail Ltd v Persons Unknown [2019] EWHC 2459 (QB); and in these circumstances I express no opinion on the point.
>
> In the Ineos case the judge had proceeded on the basis that the evidence adduced by the claimants of protests against other companies engaged in fracking (including Cuadrilla) would, if accepted at trial, be sufficient to show a real and imminent threat of trespass on the claimants' land, interference with the claimants' rights of passage to and from their land and interference with their supply chain. On that basis he granted an injunction in similar – although in some respects wider and more vaguely worded – terms to the Injunction granted in the present case. The Court of Appeal allowed an appeal brought by two individuals who objected to the order made on the ground that the judge's approach – which simply accepted the claimants' evidence at face value – did not adequately justify granting a quia timet injunction which might affect the exercise of the right to freedom of expression, as it did not satisfy the requirement in section 12(3) of the Human Rights Act 1998 that the applicant is "likely" to establish at trial that such an injunction should be granted. The Court of Appeal also held that the parts of the injunction seeking to restrain future acts which would amount to an actionable nuisance or a conspiracy to cause loss by unlawful means should be discharged in any event, as the relevant terms were too widely drafted and lacked the necessary degree of certainty…"

65.The distinction to be drawn with Ineos (CA) and the present proceedings is that there is in my judgment detailed and reliable evidence from the Claimants to be drawn from past experience, the repetitive nature of the actions of a significant number of protesters already identified through arrests and the sufficiently real and immediate anticipated return to protest activity within Thurrock and

Essex to justify granting interim injunctive relief. Longmore LJ's requirements 2) and 3) are also satisfied, although I will deal with service in more detail below.

In what terms should injunctive relief be granted?

66.Mr Simblet's submissions that protest on the highway is lawful and that therefore no terms could be drafted that would not impinge on lawful conduct covered by articles 10 and 11 is, to borrow Longmore LJ's terminology, too absolutist. As all of the case law cited extensively in Ziegler and the Supreme Court's judgment itself in Ziegler makes clear, protest on the highway might be lawful, but its lawfulness, or the extent to which it can withstand interference, will depend on an individual, multifactorial assessment. Moreover, an interference with article 10 and 11 rights may arise in at least two ways: it may be due to a judicial conclusion that in balancing Convention rights, article 10 and 11 rights are outweighed by the rights of others, which may remove a lawful excuse or cause an activity to become a tortious act; alternatively as expressed in Cuadrilla, if it is necessary in order to afford effective protection to the rights of a claimant, conduct which is not itself tortious or unlawful may have to be restrained.

67.Mr Simblet relied on paragraph 93 of Canada Goose (CA) in which Sir Terence Etherton MR criticised the claimant company in that case for seeking to utilise the civil jurisdiction of the courts in circumstances in which private law remedies were ill-suited:

"93.As Nicklin J correctly identified, Canada Goose's problem is that it seeks to invoke the civil jurisdiction of the courts as a means of permanently controlling ongoing public demonstrations by a continually fluctuating body of protesters. It wishes to use remedies in private litigation in effect to prevent what is sees as public disorder. Private law remedies are not well suited to such a task. As the present case shows, what are appropriate permanent controls on such demonstrations involve complex considerations of private rights, civil liberties, public expectations and local authority policies. Those affected are not confined to Canada Goose, its customers and suppliers and protesters. They include, most graphically in the case of an exclusion zone, the impact on neighbouring properties and businesses, local residents, workers and shoppers. It is notable that the powers conferred by Parliament on local authorities, for example to make a public spaces protection order under the Anti-social Behaviour, Crime and Policing Act 2014, require the local authority to take into account various matters, including rights of freedom of assembly and expression, and to carry out extensive consultation: see, for example, Dulgheriu v Ealing London Borough Council [2019] EWCA Civ 1490, [2020] 1 WLR 609. The civil justice process is a far blunter instrument intended to resolve disputes between parties to litigation, who have had a fair opportunity to participate in it."

68.Mr Simblet also invoked the Dulgheriu case as support for his proposition that the Claimants have available statutory powers to make public spaces protection orders and that they were in essence wrong on both counts to seek an injunction from this court. I accept Ms Bolton's response to these points, namely that paragraph 93 of Canada Goose (CA) is considering final injunctive relief and, in any event, the Claimants in the instant proceedings are not a private company seeking to regulate a public space, but rather public authorities seeking an order of the Court pursuant to their statutory responsibilities. As to alternative statutory powers available to local authorities, I agree with Ms Bolton's observation that the process involved is lengthy and cannot adequately respond to the concerns of the Claimants in these proceedings. It is also correct to note that there is no exclusion zone sought by the Claimants. Indeed they seek to facilitate lawful protest by permitting it along routes used by tankers as long as it is not in the carriageway and does not interfere with the delivery of fuel.

69.These proceedings clearly engage articles 10 and 11 rights, being freedom of expression and freedom of assembly, in a combination that has understandably been termed a right to protest, about which Leggatt LJ in Cuadrilla said:

> “41.The right to engage in public protest is an important aspect of the fundamental rights to freedom of expression and freedom of peaceful assembly which are protected by articles 10 and 11 of the Human Rights Convention. Those rights, and hence the right to protest, are not absolute; but any restriction on their exercise will be a breach of articles 10 and 11 unless the restriction (a) is prescribed by law, (b) pursues one (or more) of the legitimate aims stated in articles 10(2) and 11(2) of the Convention and (c) is "necessary in a democratic society" for the achievement of that aim. Applying the last part of this test requires the court to assess the proportionality of the interference with the aim pursued.
>
> 42.Exercise of the right to protest – for example, holding a demonstration in a public place – often results in some disruption to ordinary life and inconvenience to other citizens. That by itself does not justify restricting the exercise of the right. As Laws LJ said in Tabernacle v Secretary of State for Defence [2009] EWCA Civ 23, para 43:
>
> "Rights worth having are unruly things. Demonstrations and protests are liable to be a nuisance. They are liable to be inconvenient and tiresome, or at least perceived as such by others who are out of sympathy with them."
>
> Such side-effects of demonstrations and protests are a form of inconvenience which the state and other members of society are required to tolerate.
>
> 43.The distinction between protests which cause disruption as an inevitable side-effect and protests which are deliberately intended to cause disruption, for example by impeding activities of which the protestors disapprove, is an important one, and I will come back to it later. But at this stage I note that even forms of protest which are deliberately intended to cause disruption fall within the scope of articles 10 and 11. Restrictions on such protests may much more readily be justified, however, under articles 10(2) and 11(2) as "necessary in a democratic society" for the achievement of legitimate aims.
>
> 44.The clear and constant jurisprudence of the European Court of Human Rights on this point was reiterated in the judgment of the Grand Chamber in Kudrevicius v Lithuania (2016) 62 EHRR 34. That case concerned a demonstration by a group of farmers complaining about a fall in prices of agricultural products and seeking increases in state subsidies for the agricultural sector. As part of their protest, some farmers including the applicants used their tractors to block three main roads for approximately 48 hours causing major disruption to traffic. The applicants were convicted in the Lithuanian courts of public order offences and received suspended sentences of 60 days imprisonment. They complained to the European Court that their criminal convictions and sentences violated articles 10 and 11 of the Convention. In examining their complaints, the Grand Chamber first considered whether the case fell within the scope of

> article 11 and concluded that it did. The court noted (at para 97) that, on the facts of the case, "the disruption of traffic cannot be described as a side-effect of a meeting held in a public place, but rather as the result of intentional action by the farmers, who wished to attract attention to the problems in the agricultural sector and to push the government to accept their demands". The judgment continues:
>
> "In the Court's view, although not an uncommon occurrence in the context of the exercise of freedom of assembly in modern societies, 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."
>
> Despite this, the court did not consider that the applicants' conduct was "of such a nature and degree as to remove their participation in the demonstration from the scope of protection of … article 11" (see para 98).”

70.It is not necessary to reach a conclusion as to whether the danger created by the actions described in the current proceedings is sufficiently in excess of “serious disruption” such that it could potentially put protesters outside the ambit of article 11. However, the following observation is relevant to the extent of any interference with Convention rights that would flow from imposing an injunction. Individual protesters are conceivably at liberty in certain circumstances to put their own lives in danger, but the untrammelled exercise of their article 10 and 11 rights cannot extend the ambit of that danger such as to imperil the lives (a) of other protesters joining in who may not appreciate or acquiesce in the extent of such danger, (b) of members of the emergency services or (c) of the public at large. The protest actions directed at impeding tankers carries with it such a high level of established risk that it can only be ameliorated by framing injunctive relief in sufficiently wide terms to prevent both the blocking of routes used by the tankers and any interference with the vehicles themselves. This includes from the point of tankers leaving a terminal, through the full process of delivery and then return to the terminal. The measures are in my view unavoidable as being both necessary and proportionate interferences with the protesters’ Convention rights. It remains important in that assessment that the injunction does not seek to prohibit protest along the routes taken by the tankers so long as it is confined to places other than the carriageway. This approach permits proper account to be taken of the significance of the object and location of the protest to those wishing to take part.

71.I acknowledge the correctness of Mr Simblet’s submissions on the need for the terms of any injunction to be clear and capable of enforcement. However, his submission that they must not include lawful conduct is inconsistent with Leggatt LJ’s view in paragraph 50 of Cuadrilla. The terms of the injunction must be “necessary to afford effective protection to the rights of the claimant in the particular case”.

72.My conclusions justify the terms in the order at paragraphs 2.1 to 2.16. Though superficially there seems to be a plethora of terms that might conceivably lack clarity, this is merely the result of a more comprehensive term having been broken down into more digestible and understandable units. There is room for improvement in the form of collating those affecting Thurrock separately from those affecting Essex and with headers that highlight the distinction. This would enhance clarity and readability.

73.As to paragraph 2.17, this generated what might almost be termed satellite litigation, in that further evidence was filed by both sides after the hearing to address whether or not other judges in other protest injunction applications had or had not made or maintained a provision in the terms sought by the Claimants in this case. However laudable the principles of consistency and predictability are, the very nature of Convention rights is such that each situation must be judged individually. An order which may be proportionate in the context of one application may, notwithstanding all appearances of similarity or confluence, be quite disproportionate in another context. Despite the submissions on both sides in the instant application, in my judgment, the specific provisions of any injunction made, at whatever stage, in other proceedings are of limited persuasive value. The Supreme Court in Ziegler emphasised:

“59.Determination of the proportionality of an interference with EHCR rights is a fact-specific enquiry which requires evaluation of the circumstances in the individual case.”

74.Reminding myself of the comprehensive nature of the other injunctive provisions which I have approved as necessary and proportionate, I am not persuaded that paragraph 2.17 can be justified in addition and it will be deleted from the approved order.

Enforceability & Power of arrest

75.Mr Simblet’s arguments flowed from the foundations he laid on the lack of clarity and therefore enforceability of the order sought. I do not share his pessimism about the way in which attaching a power of arrest will unleash an uncontrollable loss of liberty. For the reasons set out above, the wording in the order is clear, uses ordinary English language and is capable of ready comprehension. The geographic delineation between where protest is permitted and where it is not is plain, both for protesters and for the police. The list of roads is long, but necessarily so not only to provide clarity to the protesters, but equally to fix the Claimants with the duty to serve the order on each and every listed road. This acts as a further protection for those in and coming to the Claimants’ areas, who should be confident from the presence or absence of a notice as to the whether the road they are on is included in the order.

76.Ms Bolton’s submission about the undermining of the injunction if there is no power of arrest and identification of those who should become named Defendants is thwarted is one that is highly persuasive.

Service

77.Service on named Defendants is achieved in the usual way pursuant to the CPR. It is clear that at least for a period of time and in some locations full copies of the order were posted, including details about named Defendants. Although such information may be in the public domain as a matter of court record, I repeat my disquiet about this for two reasons. First, if as was being suggested some of those named are, in law, children, they should have had an opportunity to make representations to the Court as to whether they might be entitled to any order protecting release of their details. Secondly, the actions of the protesters are not universally supported or welcomed and I acknowledge the concern that individual Defendants, such as Ms Eason, may fear reprisals in one form or another from the publication of her details including her home address. Ms Bolton assured me that this state of affairs was unintended and short-lived, but Ms Hardy’s first statement indicated that the situation lasted sufficiently long for the photographs exhibited to be taken.

78.There is a proper balance to be struck between achieving the required publicity of the injunction's existence for persons unknown and inadvertently representing the injunction as having wider reach than it does, such that there is a 'chilling effect' on permissible protest. I welcome further submissions on the exact wording to be used. [At the consequentials hearing a suitable wording was alighted on, as reflected in the order.] Beyond this, the various methods of alternative service are required to ensure that the existence of the injunction is made known to anyone whom it might affect and the exact terms of it are readily accessible to promote compliance.

Duty of candour

79.A "NOTE OF HEARING 24 April 2022", filed by the Claimants, reflects a contemporaneous short-form record of the without notice application to Ritchie J. It is not a transcript. The hearing lasted two hours and the judge indicated that he had concerns about the application early on, having read some of the documents. He then asked to be taken through the statements, cross-referenced to the skeleton. Specifically on page 6 the judge queries why the application is without notice and could not be scheduled on notice with hearing a few days later. There was reference by Ms Bolton to swift mobilisation if notice given, which the Judge considered may be eclipsed by evidence of activity in breach of injunctions. He referred to the elements of American Cyanamid and acknowledged the application of Kirklees in respect of damages (dealt with separately below). Ritchie was referred to s12 HRA by Ms Bolton, although, on Ms Bolton's own admission, this can only be to s12(2) as the Claimants' position was that s12(3) did not apply.

Should an order have been made without notice?

80.The simple answer is yes. Ritchie J was entitled to grant the application at what Mr Simblet termed "a secret hearing". The moratorium on protest activity was coming to an end without JSO securing any acceptable commitment from government, and there was strong evidence to suggest a resumption of activity from 25 April 2022, the nature of which could justifiably be quantified as at least similar to that which occurred earlier in the month. The evidence available at the hearing supported Ritchie J's conclusion that notice of a hearing without interim relief would be self-defeating as much could be done quickly in advance of such hearing to act in exactly the ways the order sought to prevent, with the inescapable risks described in the evidence.

Section 12(3) HRA

81.The applicability of s12(3) HRA arises first in the context of the submission that the Claimants' deliberately failed in their duty of candour to bring it to Ritchie J's attention, such that he applied the lesser standard test for the grant of injunctive relief. That submission turns simply on whether the Claimants should have raised the possibility that it did, given the differing conclusions in different judgments of equal standing. Ms Bolton's suggestion, for it was no more than that, as to how Morgan J in Ineos (HC) might have concluded that s12(3) applied in the circumstances of that case, lacked the quality of adequacy to support a conclusion by the Claimants that s12(3) could not apply – all the more so when dealing with a without notice application. Ms Bolton may be right about the section's non-applicability, but the divergence of judicial opinion should at the very least have been raised. That divergence is well illustrated by Johnson J's exposition in Shell UK Oil Products Ltd v Persons Unknown, although the judgment was only published on 20 May 2022 and his support for the Claimants' contention on s12(3) is only after the event.

82.The question of whether the failure that I have identified during the without notice hearing should lead to setting aside the order without consideration of the merits is one to be answered by reference

to the principles set out by Warby J at paragraph 21 of Afsar (1). The failure being deliberate is not determinative; neither did the Claimants obtain advantage they would not otherwise have achieved. The evidence available to Ritchie J would have caused him to grant the order even on application of the s12(3) test. Even if I were not in a position to reach that conclusion and felt compelled to discharge the order, I would have regranted it.

83.As to whether I am bound to apply s12(3), I respectfully adopt Johnson J's analysis at paragraphs 66 - 76, particularly because he was considering 'publication' in a context closely aligned with that before me. The crafting of s12 does appear to draw a distinction between relief affecting the exercise of article 10 and the restraint of publication as a sub-set of that Convention right. Nothing in the instant proceedings affects any act that would appear to come within the admittedly broad definition of 'publication'. The restrictions sought relate to where protesters are free to express themselves not what they are free to express. The result is that I do not find that s12(3) is directly applicable to the Claimants' application. If, at such time as the point is authoritatively determined, I am wrong in my analysis, I am nonetheless satisfied that the Claimants would likely succeed at final trial for the reasons identified above in relation to strength of evidence and need for an order.

Undertaking in damages

84.A further point taken by Mr Simblet, both as to the conduct of the without notice hearing and the return date hearing, was that the Claimants' reliance on Kirklees to avoid being bound by cross-undertakings in damages was wrong. Reliance was principally placed on Afsar (2) in which Warby J dealt in some detail with the applicability of such an undertaking to a situation said to be akin to the present proceedings. At paragraph 5, Warby J said this:

"5.Here, I take account of the following: (1) The Council has a duty to protect public rights to use the highway, but that is not at the centre of its claim. The provisions that are principally relied on (s 222 of the Local Government Act and, in particular, the 2014 Act) are permissive. (2) The main target of the action is anti-social behaviour in the form of speech. The nature of the behaviour is harassment, causing alarm or distress, to individuals. The action is not being taken on behalf of the public at large but rather a section, or some sections, of the public. The main beneficiaries are teachers, other staff, and pupils at the school. (3) The individuals concerned could, in principle, bring their own private law actions to prevent harassment, if it attained the level of criminal behaviour required by the Protection from Harassment Act 1997. If they did so, they would undoubtedly be required to give undertakings as to damages. (4) There is nothing wrong with the Council pursuing this action in their stead, but there is no particular magic in the fact that a public authority is taking on that burden. It seems to me to be reasonable to provide the respondent/defendants with a corresponding level of protection. (5) The fact that the action is brought by a public authority, and (by concession) interferes with the Convention rights of the respondent/defendants is a factor in favour of exercising my discretion to require the undertakings. Breaches of the Convention by public authorities can sound in damages, where that is necessary. This is one of the recognised exceptions to the general rule. The provision of an undertaking sets up a relatively simple mechanism for the resolution of any such claim. Finally, (6) there is little prospect that the provision of these undertakings will in practice impose a great burden on the Council. It is improbable that the injunctions will cause any material loss; the damage which could realistically be suffered is injury to rights and freedoms. Those are not to be treated lightly, but the scale of any compensation required, even if unlawful conduct were established, would probably be relatively modest. Again, the provision of undertakings is a proportionate means of dealing with the assessment of any such compensation."

85.I have quoted the paragraph in full so that it should not be suggested that I have cherry-picked from the judge's list of considerations. However, it is evident that Warby J was dealing with a very different, and far more confined, type of protest. His considerations (1) and (2) taken on their own permit immediate distinguishing of Afsar (2) from the case before me. Arguably, the only consideration that causes pause for the thought is consideration (5), but it creates no more than a factor in favour of exercising the discretion to require an undertaking, rather than creating anything more mandatory. Having previously addressed the duty on the Claimants to bring proceedings as the Highway Authority and the way in which s222 operates in this case, I do not find any reasoning in Sinaloa Gold to cause me to impose a cross-undertaking in damages. I have concluded that the principle in Kirklees properly applies in this case.

American Cyanamid & Ineos/Cuadrilla

86.Consequent on my conclusions above as to the test that applies, I am satisfied that (a) there is a serious question to be tried in these proceedings; (b) damages would not be an adequate remedy; and (c) the balance of convenience certainly lies in favour of granting injunctive relief.

87.I am also satisfied that the checklist in Ineos/Cuadrilla can be met. There is geographic limitation to the ambit of the injunction. The temporal limitation is a matter upon which further submissions will be needed as they will in relation to the specifics of alternative service. [Following the consequentials hearing, I am satisfied that the provisions of the order adequately address my concerns.]

88.[For the reasons given orally at the consequentials hearing, I make the order for costs in the terms now set out in the order.

89.Mr Simblet QC sought permission to appeal in respect of my conclusion as to the operation of the causes of action and/or in relation to the costs order. For the reason given briefly at the consequentials hearing, I refused permission.]
