



Neutral Citation Number: [2023] EWHC 2013 (KB)

Case No: CLAIM NO. QB-2022-002577

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/08/2023

Before :

MR JUSTICE JULIAN KNOWLES

Between :

ESSO PETROLEUM COMPANY LIMITED

Claimant

- and -

(1) SCOTT BREEN

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

Defendants

**Timothy Morshead KC and Yaaser Vanderman (instructed by Eversheds Sutherland
(International) LLP) for the Claimant**

The Defendants did not appear and were not represented

Hearing date: 13 February 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on 31 August 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Julian Knowles:

Introduction

1. This is an application by the Claimant for a permanent injunction to restrain unlawful protests by the Defendants in relation to its Southampton to London Oil Pipeline Project. When it is completed, the Pipeline will stretch for over 100 km across southern England and terminate at the West London Terminal storage facility in Hounslow. It is referred to in places in the evidence as the SLP/SLPP (Southampton – London Pipeline (Project)). I will simply call it ‘the Pipeline’.
2. It is being built pursuant to the Southampton to London Pipeline Development Consent Order 2020 (SI 2020/1099) (the DCO). The Explanatory Note to the Order says:

“This Order grants development consent to Esso Petroleum Company, Limited to construct and maintain an underground pipeline commencing at Boorley Green, Hampshire and terminating at West London Terminal storage facility in the London Borough of Hounslow.

The Order also includes provisions in connection with the maintenance of the authorised development.”
3. On 15 August 2022, on the Claimant’s without notice application, Eyre J granted an interim injunction against one named individual and persons unknown. This prevented various types of protest, including damaging anything which is being used to construct the Pipeline, within the geographical limits set by the DCO (which I will call the Order Limits); traversing fences, etc, in order to enter such land; digging excavations; and protesters locking themselves to anything or any person, etc. The injunction was later amended by Ritchie J under the slip rule to correct a minor error.
4. On the return date, two interested parties (Jane Everest and Hannah Shelley) who oppose the Pipeline and who have taken part in protests, attended by counsel. They opposed the continuation of the injunction.
5. In a reserved judgment handed down on 21 October 2022, HHJ Lickley KC, sitting as a judge of the High Court, ruled in favour of the Claimant and ordered that the injunction should continue, with directions for a trial to be heard in February 2023. His decision is reported at [2022] EWHC 2664 (KB).
6. The trial came on for hearing before me. I heard from Mr Morshead KC for the Claimant. The Defendants did not appear and were not represented, and nor were the Interested Parties. There was accordingly no opposition to the order sought. I reserved judgment and continued the interim injunction until further order.

Factual background

7. This is gratefully adapted from the judgment of HHJ Lickley KC. Like him, I make clear at the outset that I am not concerned with the rights and wrongs of the Pipeline, nor the wider issue of fossil fuels. Parliament has approved construction of the

Pipeline, and my task is solely to determine whether the Claimant is entitled to the injunction it seeks, based upon the evidence and submissions I have read and heard.

8. There are in evidence various witness statements from those involved in constructing the Pipeline. The history is principally set out in the first witness statement of Jon Anstee De Mas of 10 August 2022 and was not challenged before the judge on the last occasion, nor before me. Mr Anstee De Mas is the Claimant's Land and Pipeline Technical Lead.
9. In summary, the Claimant owns and operates a network of oil pipelines from its refinery in Fawley, Southampton, to fuel terminals across England. One such pipeline conveys aviation jet fuel to the Claimant's West London Terminal at Heathrow Airport. The old pipeline was installed and operated from 1972. The Pipeline runs for 105 km. The initial 10 km of the old pipeline was replaced in 2001. The remaining 95 km has been determined to be in need of replacement. The new section of Pipeline comprises 90 km of underground pipeline.
10. The works are designated as a Nationally Significant Infrastructure Project under the Planning Act 2008. The DCO was preceded by a wide ranging consultation exercise from 2017 which involved local authorities and the public. 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.
11. In June 2019 the Claimant's application for a DCO was accepted by the Planning Inspectorate for examination. The DCO was granted on 7 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 geographically confined by the terms of the DCO to a strip of land of varying width (often 30m wide) (ie, the Order Limits). The area concerned is wider than the Pipeline itself, in order to accommodate the space needed along the route for working and for storage compounds etc.
12. Mr Anstee De Mas provided 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, whilst the remainder are street works on the public highway.
13. 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.
14. 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 in late 2023.
15. Part of the pipe laying process requires that segments of the pipe are left above ground; this is described as 'stringing out'. Segments are welded together above ground and lowered into a trench. Other techniques are also used. The effect is that large amounts

of pipeline are on display to the public, together with heavy plant and machinery, at multiple sites along the length of the works within the Order Limits . The DCO requires the Claimant to erect temporary fencing to mark construction sites in order to keep the public away from dangerous operations. The type of fencing used varies, and is not designed to be fully secure.

16. In his evidence Mr Anstee De Mas described some incidents that have affected the construction of the Pipeline. In total he described 15 incidents at various sites from 19 December 2021 to 1 August 2022. The following is a summary:
 - a. 19 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 Pipeline on 1 January 2022 from a Twitter account for a group called 'Stop Exxon SLP'. The message referred back to the events of the 19 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.
 - b. 2 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. 'XR' is the group Extinction Rebellion.
 - c. 15 February 2022, Queen Elizabeth Park, Farnborough. This was similar to the event on 2 February 2022, however the works were not disrupted.
 - d. 4 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.
 - e. 17 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 22 June 2022.
 - f. 17 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 22 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.
 - g. 25 June 2022, Naishes Lane, Church Crookham. Protestors gained access, said to be unlawful, by unbolting Heras fencing panels and conducting 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.
 - h. 4 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’.

- i. 9 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.
 - j. 31 July 2022, a protestor Scott Breen (the First Defendant) dug a pit at land east of Pannells Farm. The land is owned by Runnymede Borough Council and is within the Order Limits. On 1 August 2022 Mr 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 Mr Breen. The police told the Claimant’s staff that it was a civil matter and that they would not consider the offence of aggravated trespass. Mr Breen was subsequently committed to prison for contempt on 6 September 2022 by Ritchie J, having breached the earlier order. An appeal was allowed in part but the prison sentence was maintained: [2022] EWCA Civ 1405.
 - k. 1 August 2022, Sandgates Encampment. This encampment was set up to support Scott Breen. Despite the order being made on the 15 August 2022, Scott Breen remained within the pit and the DCO Order Limits .
17. At [13] of his judgment HHJ Lickley KC said this:

“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.”

18. In his fifth witness statement of 30 January 2023, prepared for the hearing before me, Mr Anstee De Mas provided updating evidence and set out a number of reasons why a permanent injunction is necessary. He said that whilst XR announced at the end of 2022 that it was stopping its campaign of civil disobedience, Just Stop Oil had made public pronouncements that it would continue with such activities. During 2022 there were hundreds of arrests of Just Stop Oil protesters, in particular in relation to the Kingsbury oil terminal in Staffordshire.

Submissions

19. On behalf of the Claimant, Mr Morshead submitted as follows.

20. As the evidence, and current affairs reports of the disruption of events by Just Stop Oil in particular make clear, there is a continuing need to restrain unlawful protests in relation to the Pipeline. The Claimant adopts and relies on the judgment of HHJ Lickley KC and the updating evidence of Mr Anstee De Mas in his fifth witness statement. He said that it is plain that the Pipeline has, for some time now, been the target of unlawful protests, and that the protesters have not gone away.
21. The First Defendant is a known tunneller who was committed to prison in September 2022 for 112 days for contempt by breaching Eyre J's injunction. The Second Defendants are 'Persons Unknown' and are described in Annex 1 to the Claim Form by reference to the types of activity there specified.
22. Further committal applications were made against an individual named Anthony Green and an individual known as Roz Aroo. Mr Green eventually admitted that he had breached the order of Eyre J in providing assistance to the First Defendant and apologised to the Court. In light of various undertakings he gave, including not to breach the interim injunction and any further orders made against the Second Defendant, the Claimant agreed not to pursue the committal application against him. An order dismissing the application, by consent, was made by Bourne J following a hearing on 14 November 2022. Roz Aroo's whereabouts and address have never been definitively determined, and accordingly the committal application against her remains undetermined.
23. The Claimant's underlying cause of action is conspiracy to injure its business by unlawful means. The unlawful means in question consist of the actual and threatened private nuisances and trespasses to goods and to land which the Claimant has experienced. The subject of the unlawful acts that took place in August and September 2022 is substantially the property of third parties (eg, those persons who for the time being have legal ownership of the pipe segments and other 'Items' mentioned in the Particulars of Claim; and those persons who have ownership of the land where the works are taking place). But the protest activities have been primarily aimed at harming or disrupting Claimant's business and they have been coordinated. In the result, the activities/threatened activities also constitute a tort/threat of tort against the Claimant, namely, the tort of conspiracy to injure by unlawful means.
24. The interim application was essential because the actions of protesters demonstrated, and persuaded the Claimant, that their actions had (and have) the capacity to disturb the works in a way which might have serious implications.
25. That state of affairs has not abated. Details of the activities targeting the Pipeline are set out in various places including: Mr Anstee De Mas, first witness statement, [6.2]-[6.72]; his affirmation dated 25 August 2022, [12]-[18]; Lynn Gardner affirmation of 5 September 2022 (Ms Gardner works for one of the Claimant's security contractors); Lynn Gardner affirmation dated 16 September 2022; Ghulam Rabbani affirmation dated 16 September 2022 (he also works for a security contractor), Mark Edward Ions affirmation dated 16 September 2022, [32]-[44] (he also works for a security contractor); and Mr Anstee De Mas' fourth witness statement of 29 September 2022, [13]. The most recent evidence, including evidence demonstrating the continuing threat posed by the Defendants, is set out in Mr Anstee De Mas' fifth witness statement, to which I have already referred.

26. Mr Morshead said that the activities carried out by some protesters have gone far beyond what might reasonably be regarded as lawful and peaceful protest and have given rise to serious health and safety concerns. The risk of repetition is obvious and ‘imminent’ in the legally-relevant sense.

The legal test

27. In the next sections of the judgment I have lent on Mr Morshead’s thorough Skeleton Argument and his oral submissions.

28. Developing his case, Mr Morshead said there is little difference between an injunction made on an interim basis and one made on a final basis and, in particular, both should have clear temporal limits. An interim order (and indeed a final order, at least if it is otherwise expressed to continue indefinitely) should include provision for periodic review: *London Borough of Barking and Dagenham and others v Persons Unknown* [2023] QB 295, [108] (currently under appeal to the Supreme Court). The application before me is for an injunction until 31 December 2023 (by which time the Claimant hopes that the Pipeline will be completed).

29. For a final order, the claimant must satisfy the Court of the following:

- a. Firstly, the claimant must establish a specific cause of action.
- b. Second, because the application is, in part, brought against persons unknown, the claimant must satisfy the guidance in *Canada Goose UK Retail Ltd v. Persons Unknown* [2020] 1 WLR 2802, [82], insofar as it applies to final relief. I will come to this in a moment.
- c. Third, the claimant must satisfy s 12(2) of the Human Rights Act 1998 as to service. Sections 12(1) and (2) provide:

“(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.”

- d. Fourth, because the application affects the protesters’ rights under Articles 10 and 11 of the European Convention on Human Rights (the Convention), the claimant must show that any interference with those rights is justified.

30. The guidance in [82] of *Canada Goose* is as follows:

“Building on *Cameron* [2019] 1 WLR 1471 and the *Ineos* requirements, it is now possible to set out the following procedural guidelines applicable to proceedings for interim relief against ‘persons unknown’ in protestor cases like the present one:

(1) The ‘persons unknown’ defendants in the claim form are, by definition, people who have not been identified at the time of the commencement of the proceedings. If they are known and have been identified, they must be joined as individual defendants to the proceedings. The ‘persons unknown’ defendants must be people who have not been identified but are capable of being identified and served with the proceedings, if necessary by alternative service such as can reasonably be expected to bring the proceedings to their attention. In principle, such persons include both anonymous defendants who are identifiable at the time the proceedings commence but whose names are unknown and also Newcomers, that is to say people who in the future will join the protest and fall within the description of the ‘persons unknown’.

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

(3) Interim injunctive relief may only be granted if there is a sufficiently real and imminent risk of a tort being committed to justify *quia timet* relief [now generally referred to as an anticipatory injunction].

(4) As in the case of the originating process itself, the defendants subject to the interim injunction must be individually named if known and identified or, if not and described as ‘persons unknown’, must be capable of being identified and served with the order, if necessary by alternative service, the method of which must be set out in the order.

(5) The prohibited acts must correspond to the threatened tort. They may include lawful conduct if, and only to the extent that, there is no other proportionate means of protecting the claimant’s rights.

(6) The terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do. The prohibited acts must not, therefore, be described in terms of a legal cause of action,

such as trespass or harassment or nuisance. They may be defined by reference to the defendant's intention if that is strictly necessary to correspond to the threatened tort and done in non-technical language which a defendant is capable of understanding and the intention is capable of proof without undue complexity. It is better practice, however, to formulate the injunction without reference to intention if the prohibited tortious act can be described in ordinary language without doing so.

(7) The interim injunction should have clear geographical and temporal limits. It must be time limited because it is an interim and not a final injunction. We shall elaborate this point when addressing Canada Goose's application for a final injunction on its summary judgment application."

31. I would also (diffidently) draw the reader's attention to my judgment in *High Speed Two (HS2) Limited and another v Four Categories of Persons Unknown and others* [2022] EWHC 2360 (KB), in which I granted an injunction to restrain unlawful protest along the whole of the route of HS2. I conducted an extensive review of domestic and Convention case law, and an application for permission to appeal by the protesters against my judgment was refused by the Court of Appeal.
32. The judgment of Johnson J in *Shell UK Oil Products Limited v Persons Unknown* [2022] EWHC 1215 (QB), [17], also contains a helpful summary of the principles, cast in slightly different terms from Mr Morshead's formulation (this was an application for an interim and not final injunction):

“(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."

Application in this case

33. Taking those matters in turn, Mr Morshead submitted as follows.

(i) Cause of action

34. The Claimant relies on the tort of conspiracy to injure by unlawful means. The elements of this tort are as follows: see *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29, [18]: (a) an unlawful act by the defendant; (b) done with the intention of injuring the claimant; (c) pursuant to an agreement (whether express or tacit) with one or more other persons; (d) which actually injures the claimant

35. The Claimant frames its cause of action in this way because it does not have a sufficient

degree of possession or control of the whole of the land over which the Pipeline works are taking place to be entitled to plead trespass to land/nuisance directly against trespassers/ causers of nuisance (unlike the claimant in *High Speed Two (HS2) Limited*). Neither does it have sufficient ownership of the various Items targeted by the persons unknown, to be entitled to plead trespass to goods.

36. There are exceptions to this: for example, the Claimant is the freeholder of at least two of the parcels of land affected by the Pipeline project; and on analysis it might turn out that the terms of some, at least, of its licences in relation to other areas are sufficient for those purposes. But it says the picture when viewing the Pipeline project as a whole is a complex tapestry and, further, one which changes over time (for example, as particular Items become integrated into the Pipeline). Mr Morshead said it would be ‘excessively granular and impractical’ (or, at all events, disproportionate), as well as confusing to potential Defendants, to attempt to identify the multitude of different cases separately, let alone to customise separate forms of relief in relation to different parcels of land. The conspiracy cause of action overcomes this difficulty.
37. On the other hand, compared with a direct cause of action such as trespass, the conspiracy cause of action has the disadvantage (from the point of view of the Claimant) that there might in theory be individuals who commit unlawful acts as genuinely independent actors outside of any conspiracy. The Claimant accepts that such persons would not be captured by the proposed definitions of ‘Persons Unknown’ in Annex 1 to the Claim Form. But for these reasons, the Claimant has no real alternative that is practical or proportionate in relation to the route of the Pipeline taken as a whole.
38. Taking the four elements of the tort in turn:
 - a. *Unlawful act*: subject to one point of nuance mentioned below in relation to the fifth *Canada Goose* factor, the Claimant seeks to restrain only such acts as, by their nature, are themselves necessarily unlawful, whether or not the unlawfulness would be actionable by the Claimant directly (as distinct from the persons who own the Items and/or land in question), apart from the other elements of the tort of conspiracy. Subject to that one point, the unlawfulness consists of one or more of: trespass to land, trespass to goods, or private nuisance. All of the acts in question would be actionable in tort by the person in possession of the particular land where the activity occurs, or by the owner of the relevant Item. (Certain of the restrained acts would also constitute criminal offences (such as criminal damage under s 1(1) of the Criminal Damage Act 1971).

Mr Morshead said it appears not yet to have been determined judicially that unlawful means conspiracy is available to a claimant who relies on torts committed against another person, as distinct from a breach of contract committed against another person, or a crime. HHJ Lickley KC said at [20]-[27] of his judgment:

“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 judgment, 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.”

In addition to the points made by the judge, the Supreme Court has held that a contempt of court consisting of a breach of an injunction counts as ‘unlawful means’ sufficient to support this cause of action, whether or not contempt of court is also an actionable tort in its own right. The rationale is that what makes conduct by a defendant actionable, is the absence of lawfulness in what the defendant has done, combined with the conspiracy element: as distinct from the question of whether or not the claimant would otherwise have had an independent cause of action against the defendant for the conduct in question. For this, see *JSC BTA Bank v. Ablyazov* [2020] AC 727, [10]-[11] *per* Lord Sumption and Lord Lloyd-Jones. In a nutshell: means are unlawful for the purposes of this tort, if the defendant had no legal right to use them.

That rationale applies universally within the conspiracy tort on which the Claimant relies. Therefore, it is unsustainable in point of law (and logic) to suggest that the commission of a tort is incapable of comprising the ‘unlawful means’ element of an actionable conspiracy.

Further, recognising that the conspiracy tort is available in the present circumstances enables the law to provide an effective, practical solution to a genuine problem. It is the policy of the law to favour such outcomes, where they are available within the law: eg, *per* Lord Neuberger in *DEFRA v. Meier* [2009] 1 WLR 2780, [59]. Under such circumstances, it would require compelling reasons of principle or precedent to justify defeating that outcome. None is apparent.

- b. *Done with the intention of injuring the claimant*: in the case of an unlawful means conspiracy, the authorities do not suggest that it is necessary for the intention of injuring the claimant to be the predominant purpose of a defendant. By contrast, a requirement of such ‘predominance’ is the distinctive feature of a *lawful* means conspiracy (*per* Popplewell J in *FSDEA v Dos Santos* [2018] EWHC 2199, [31]) – but this is not the tort on which the Claimant in this case relies. In the present case, the proposed order only applies to acts done ‘with the intention of preventing or impeding construction of the Southampton to London Pipeline Project’. This formulation is appropriate for present purposes: see eg *Cuadrilla*, [30].
- c. *Pursuant to an agreement with one or more other persons*: the proposed order applies only to acts done ‘by express or implied agreement with any other person’.
- d. *Which actually injures the claimant*: it appears from the evidence that the conscious aim of those engaging in these protests is to disrupt the construction of the Pipeline. It really goes without saying that activity which succeeds in this objective will injure the Claimant, but nevertheless Mr Anstee De Mas confirmed this in his first witness statement of 10 August 2022, [9.2]-[9.7].

39. Accordingly, Mr Morshead said that the Claimant has proved a cause of action sufficient to found this injunction application.

(ii) *The Canada Goose* guidance

40. *Canada Goose* involved protests outside a shop selling clothing products which use fur. Taking the *Canada Goose* requirements in turn (from [82] of the judgment), and Mr Morshead’s submissions in relation to each:

“(1) The ‘persons unknown’ defendants in the claim form are, by definition, people who have not been identified at the time of the commencement of the proceedings. If they are known and have been identified, they must be joined as individual defendants to the proceedings. The “persons unknown” defendants must be people who have not been identified but are capable of being identified and served with the proceedings, if necessary by alternative service such as can reasonably be expected to bring the proceedings to their attention. In principle, such persons include both anonymous defendants who are identifiable at the time the proceedings commence but whose names are unknown and also Newcomers, that is to say people

who in the future will join the protest and fall within the description of the ‘persons unknown’.

With the exception of the First Defendant, Anthony Green and Roz Aroo, the Claimant has not identified any persons who can properly be named as defendants to the claim on the basis that there is a real risk of them carrying out any of the acts proscribed by the injunction.

As to the First Defendant: the facts are in Mr Anstee De Mas first witness statement at [6.54.1] to [6.54.12]; his affirmation of 25 August 2022 at [12]-[18]; and in Lynn Gardner’s affirmation of 5 September 2022.

As to Anthony Green: the facts are in the affirmations of Mark Edward Ions; Lynn Gardner; and Ghulam Rabbani. There is also a statement from Mr Green admitting breaches of Eyre J’s order and undertakings from him.

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

This has been achieved in the headers to the relevant court documents: see Annex 1 to the Particulars of Claim.

“(3) Interim injunctive relief may only be granted if there is a sufficiently real and imminent risk of a tort being committed to justify quia timet relief.”

Although expressed by reference to interim relief, the Claimant accepts that for all practical purposes the like requirement applies in the case of a final injunction. In the present case, the threat of the tort is demonstrated by:

a. The incidents of actual disruption which have already taken place and which are described in Mr Anstee De Mas’ first witness statement [6.2]–[6.72]; his affirmation at [12]–[18]; the two affirmations of Lynn Gardner from September 2022; the affirmation of Mark Edward Ions; the affirmation of Lynn Gardner; and the affirmation of Ghulam Rabbani.

b. The explicit and continuing threats of disruption made by protest groups/organisers, as identified by Mr Anstee De Masat [7.4]–[7.28] of his first witness statement; and [21]–[36] of his fifth witness statement. In relation to the geographical extent of the final order sought, the Claimant adopts the reasoning of HHJ Lickley

KC at [55]; and of myself in *HS2*. On behalf of the protesters, it was suggested that the shape/size of the area in question meant that ‘imminent danger of very substantial damage’ had not been demonstrated. I rejected that argument in *HS2* at [175–177] and [215]:

“175. I have carefully considered D6's argument that the Claimants must prove that there is an imminent danger of very substantial damage, and (per Skeleton, [48]):

‘The Claimant must establish that there is a risk of actual damage occurring on the HS2 Land subject to the injunction that is imminent and real. This is not borne out on the evidence. In relation to land where there is no currently scheduled HS2 works to be carried out imminently there is no risk of disruptive activity on the land and therefore no basis for a precautionary injunction.’

176. I do not find this a persuasive argument, and I reject it. Given the evidence that the protesters' stated intention is to protest wherever, and whenever, along HS2 route, I am satisfied there is the relevant imminent risk of very substantial damage. To my mind, it is not an attractive argument for the protesters to say: 'Because you have not started work on a particular piece of land, and even though when you do we will commit trespass and nuisance, as we have said we will, you are not entitled to a precautionary injunction to prevent us from doing so until you start work and we actually start doing so.' As the authorities make clear, the terms 'real' and 'imminent' are to be judged in context and the court's overall task is to do justice between the parties and to guard against prematurity. I consider therefore that the relevant point to consider is not now, as I write this judgment, but at the point something occurs which would trigger unlawful protests. That may be now, or it may be later. Furthermore, protesters do not always wait for the diggers to arrive before they begin to trespass. The fact that the route of HS2 is now publicly available means that protesters have the means and ability to decide where they are going to interfere next, even in advance of work starting.

177. In other words, adopting the *Hooper v Rogers* approach that the degree of probability of future injury is not an absolute standard, and that what is to be aimed at is justice between the parties, having regard to all the relevant circumstances, I am satisfied that (all other things being equal) a precautionary injunction is appropriate given the protesters' expressed intentions. To accede to

D6's submission would, it seems to me, be to licence the sort of 'guerrilla tactics' which the Lord Chief Justice deprecated in *DPP v Cucicirean*.

...

215. I have anxiously considered the geographical extent of the injunction along the whole of the HS2 route, and whether it should be more limited. I have concluded, however, given the plain evidence of the protesters' intentions to continue to protest and disrupt without limit – 'let's keep fucking up HS2's day and causing as much disruption and cost as possible. Coming to land near you' – such an extensive injunction is appropriate. The risks are real and imminent for the reasons I have already given. I accept that the Claimants have shown that the direct action protests are ongoing and simply move from one location to another, and that the protesters have been and will continue to cause maximum disruption across a large geographical extent. As the Claimants put it, once a particular protest 'hub' on one part of HS2 Land is moved on, the same individuals will invariably seek to set up a new hub from which to launch their protests elsewhere on HS2 Land. The HS2 Land is an area of sufficient size that it is not practicable to police the whole area with security personnel or to fence it, or make it otherwise inaccessible."

"(4) As in the case of the originating process itself, the defendants subject to the interim injunction must be individually named if known and identified or, if not and described as 'persons unknown', must be capable of being identified and served with the order, if necessary by alternative service, the method of which must be set out in the order."

The proposed order sets out the proposed means of service of the order (eg, via social media; see draft order at [9]) and of the proceedings. Mr Anstee De Mas explained the rationale in his first witness statement at [14.4]. The proposed method is reasonably likely to bring the proceedings and the order to the notice of potential 'Persons Unknown'" defendants. Such service provisions have been included in the order of Eyre J and the order of HHJ Lickley KC without any issues arising.

"(5) The prohibited acts must correspond to the threatened tort. They may include lawful conduct if, and only to the extent that, there is no other proportionate means of protecting the claimant's rights."

The proposed order tracks the threatened torts and subject to what is said in the next paragraph does not seek to prohibit lawful conduct.

The possible exception (which the Claimant assumes for present purposes, though it is not conceded) is that in theory there might be no actionable wrong done by a person who, on public land, merely climbs over a compound fence and does nothing more; or by a person whose mere presence on public land is enough to obstruct the construction works. There may be other examples but they are not easy to think of.

In the case of private land, there is no relevant complication, because such persons entering without permission are trespassers whether or not the activities they undertake on the land are otherwise actionable. It is a problem specific to highways and other public land.

I come back to the point of nuance I mentioned earlier.

This nuance arises because the Order Limits include some highways, as well as some other areas of land to which the public has access. For reasons stated by Mr Anstee De Mas in his first witness statement at [5.12]–[5.15] and which are really self-evident from the scale of the project, the Claimant says it would be wholly impractical to attempt to identify the different parcels of land and apply different controls to them. Instead, the relief proposed by the order is in all cases the minimum means of protecting the Claimant’s rights that is proportionate.

So, in particular, the proposed order does not seek to restrain protesters from entering the Order Limits: this would be the simplest solution, but the Claimant considers that it is too broad to adopt as a general measure. Instead, the proposed injunction seeks to control what people *do within* the Order Limits, and the controls which it imposes on public land would not amount to any interference with any right exercised by any member of the public on such land who was not part of the alleged conspiracy.

For example, the Claimant says that it is proportionate that fence-climbing and obstruction of the construction works on public land should be prohibited, even if those acts would not otherwise be unlawful in and of themselves (for example, because of an exercise by protesters of their rights to use the highway). The particular activity might not be unlawful in and of itself. But significant protection

is built into the proposed order because a person will only become a defendant (and breach the proposed order) if the conspiracy elements are present in his or her case. Nothing less than this can vindicate the Claimant's rights.

Further, the DCO process (in which none of the protest movements made any representation) was conclusive that the Pipeline is in the public interest and indeed a matter of strategic national importance. In such circumstances, creating a bespoke 'carve out' from the effect of the proposed order in relation to private land, to deal with the peculiarities of public land, can hardly be said to be proportionate: it would be tantamount to an invitation to protesters to focus their activities in areas of land to which the public has access.

Overall, to the extent that *some* lawful activity on the highway might be captured and rendered unlawful by the injunction, it is no more than the least which is required to give effective protection to the Claimant's rights. The correct prism for this balancing exercise is explained in the authorities mentioned below. On highway land (unlike private land) Articles 10 and 11 are engaged (eg *per DPP v. Cuciurean* [63]–[69]). This means that any interference with those rights on the highway must be proportionate having regard to the circumstances. But those circumstances include in particular the need to vindicate the Claimant's own rights, including its own Convention rights. Any interference with Articles 10 or 11 on the highway which might emerge from the order is minor and (this, ultimately, the Claimant says is what counts) certainly proportionate given what is at stake in this case - where a strategically national important project has been explicitly threatened by persons who mean to stop it.

The Claimant also points to the terms of the order I made in *HS2* (see [188]–[193]) and notes the fact that the injunction sought by the Claimant in this case is much more narrowly tailored.

For reasons given, therefore, this is a proportionate intervention given the unusual facts of the case.

“(6) The terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do. The prohibited acts must not, therefore, be described in terms of a legal cause of action, such as trespass or harassment or nuisance. They may be defined by reference to the defendant's intention if that is strictly necessary to correspond to the threatened tort and

done in non-technical language which a defendant is capable of understanding and the intention is capable of proof without undue complexity. It is better practice, however, to formulate the injunction without reference to intention if the prohibited tortious act can be described in ordinary language without doing so.”

The proposed order respects all of this guidance. As in *Cuadrilla*, the drafting refers to ‘intention’. But this is unavoidable in a conspiracy case. Non-technical language is used, as required.

“(7) The interim injunction should have clear geographical and temporal limits. It must be time limited because it is an interim and not a final injunction. ...”

So far as concerns temporal limits: the Claimant does not seek an indefinite order with provision for review. Instead, it seeks a final order to last until 31 December 2022. Assuming the expected timetable is achieved, this will allow the project to complete without the need for repeated, costly, reviews in the meantime. If the timetable slips then the Claimant (like anyone else affected by the order) may apply for an extension. The temporal limits are therefore clear.

So far as concerns geographical limits, the relevant circumstances are:

- a. The scale of the project which requires the Court’s protection, is unusually large. The works are programmed to follow a careful structure which respects site-specific constraints (eg, optimum timeframe for working on environmentally-sensitive land, to minimise risk of harm to flora/fauna) (*per* Mr Anstee De Mas first witness statement at [9.2.2]-[9.2.4]).
- b. The works involve the Claimant’s contractors in maintaining works compounds surrounded by fences at various locations (demobilized as and when no longer required). Segments of un-laid pipe as well as equipment and other items/material required for the project – the Items – are often stored in such compounds.
- c. Such Items are also situated within works sites at the locations where the pipe is actually to be laid. Works sites are fenced or otherwise physically demarcated from the surrounding land.

- d. The fences/physical demarcation are not suitable to deter motivated persons from obtaining access.

It can thus be seen that there are four matters to be taken into account when applying the requirement of 'clear geographical limits' to the particular facts of the present case:

- a. areas where the Items are situated, are physically demarcated with a fence or otherwise;
- b. in some cases, the demarcation will move as and when the works move elsewhere;
- c. even where demarcation takes the form of a fence, this is not of a kind which can deter a determined protester from obtaining entry - as experience has shown; and
- d. the route of the Pipeline within which these areas are situated is unusually long. It is straightforward to give the order clear geographical limits: the proposed order refers to the DCO Order Limits ". But it is impractical to identify the DCO Order Limits otherwise than by reference to the DCO itself; and equally impractical to identify the areas within the DCO Order Limits where Items are located from time to time.

The proposed order reflects those considerations.

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

41. I set out s 12(1) and (2) of the Human Rights Act 1998 earlier.
42. Mr Morshead said that the Claimant has taken all practicable steps to notify the Defendants of these proceedings. In particular:
 - a. Eyre J's order was served pursuant to paragraphs [10]-[13] of the order in relation to the Defendants: see the second witness statement of Nawaaz Allybokus.
 - b. The order of Ritchie J, following the hearing on 7 September 2022, which set out the date of this hearing at [5] and was served on the Defendants according to the methods set out in the order of Eyre J: see the third witness statement of Mr Allybokus.
 - c. The order of HHJ Lickley KC was served on the Defendants according to the methods set out in that order: see the fourth witness statement of Nawaaz Allybokus.

- d. The bundle for this hearing was served on the Defendants according to the methods set out in the order of HHJ Lickley KC.

(iv) *Articles 10 and 11*

43. Mr Morshead said that the Court next had to consider, in the round, whether appropriate weight has been given to the Defendants' qualified rights under Article 10 (freedom of expression) and Article 11 (freedom of assembly) of the Convention. In protest cases, Articles 10 and 11 are linked. The right to freedom of assembly is recognised as a core tenet of a democracy.
44. There exist Strasbourg decisions where protest which disrupted the activity of another party has been held to fall within Articles 10 and 11. But 'deliberately obstructing traffic or seriously disrupting the activities of others is not at the core of these Convention Rights': *DPP v. Cuciurean* [2022] EWHC 736, [36], and *Attorney General's Reference (No. 1 of 2022)* [2022] EWCA Crim 1259, [86], both per Lord Burnett of Maldon CJ.
45. It is material to have in mind the distinction between protest and persuasion on the one hand, which are proper subjects for protection under Articles 10 and 11; and coercion and compulsion on the other hand, which do not engage those Articles, or do not strongly engage them: see *Cuadrilla*, [94]. Indeed, coercion and compulsion are the antithesis of what a free democratic society can or should tolerate.
46. Further, Articles 10 and 11 do not bestow any 'freedom of forum', and do not include any ancillary right to trespass on private property: *Ineos (CA)* per Longmore LJ at [36]; *Cuciurean* at [40]–[46]. Neither could they reasonably be argued to include an ancillary right to damage private property or to injure others. I considered the relevant Strasbourg principles in *HS2*, [131] et seq.
47. HHJ Lickley KC considered these issues at [43]–[49] of his judgment.
48. Mr Morshead said that, at least in theory, it is possible to imagine a scenario in which the inability to enter unlawfully upon particular property had the effect of preventing the effective exercise of an individual's freedom of expression or assembly. In such a case, barring entry to that property could be said to have the effect of 'destroying the essence of those [Article 10 and 11] rights'. If that were the case, then the State might well be obliged (in the form of the Court) to regulate (ie, interfere with/ sanction interference with) another party's rights in order to vindicate effective exercise of the protester's rights under Articles 10 and 11: see *Cuciurean* at [45]. But that would involve a very unusual situation, which cannot immediately be foreseen, at least in this country, where there are plentiful outlets for lawful protest. And this is plainly not such a case. As Lord Burnett CJ said in *Cuciurean* at [46]:

"... [i]t would be fallacious to suggest that, unless a person is free to enter upon private land to stop or impede the carrying on of a lawful activity on that land by the landowner or occupier, the essence of the freedoms of expression and assembly would be destroyed. Legitimate protest can take many other forms."

49. In *HS2* I said at [81]:

“81. A protestor's rights under Articles 10 and 11 of the ECHR, even if engaged in a case like this, will not justify continued trespass onto private land or public land to which the public generally does not have a right of access: see the passage from Warby LJ's judgment in *Cuciurean I* quoted earlier, *Harvil Road*, [136]; and *DPP v Cuciurean* at [45]-[49] and [73]-[77]. There is no right to undertake direct action protest on private land: *Crackley and Cubbington*, [35], [42]. In the most recent of these decisions, *DPP v Cuciurean*, the Lord Chief Justice said:

‘45. We conclude that 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.

46. The approach taken by the Strasbourg Court should not come as any surprise. articles 10, 11 and A1P1 are all qualified rights. The Convention does not give priority to any one of those provisions. We would expect the Convention to be read as a whole and harmoniously. Articles 10 and 11 are subject to limitations or restrictions which are prescribed by law and necessary in a democratic society. Those limitations and restrictions include the law of trespass, the object of which is to protect property rights in accordance with A1P1. On the other hand, property rights might have to yield to articles 10 and 11 if, for example, a law governing the exercise of those rights and use of land were to destroy the essence of the freedom to protest. That would be an

extreme situation. It has never been suggested that it arises in the circumstances of the present case, nor more generally in relation to section 68 of the 1994 Act. It would be fallacious to suggest that, unless a person is free to enter upon private land to stop or impede the carrying on of a lawful activity on that land by the landowner or occupier, the essence of the freedoms of expression and assembly would be destroyed. Legitimate protest can take many other forms.

47. We now return to *Richardson [v Director of Public Prosecutions [2014] AC 635]* and the important statement made by Lord Hughes JSC at [3]:

‘By definition, trespass is unlawful independently of the 1994 Act. It is a tort and committing it exposes the trespasser to a civil action for an injunction and/or damages. The trespasser has no right to be where he is. Section 68 is not concerned with the rights of the trespasser, whether protester or otherwise. References in the course of argument to the rights of free expression conferred by article 10 of the European Convention on Human Rights were misplaced. Of course a person minded to protest about something has such rights. But the ordinary civil law of trespass constitutes a limitation on the exercise of this right which is according to law and unchallengeably proportionate. Put shortly, article 10 does not confer a licence to trespass on other people's property in order to give voice to one's views. Like adjoining sections in Part V of the 1994 Act, section 68 is concerned with a limited class of trespass where the additional sanction of the criminal law has been held by Parliament to be justified. The issue in this case concerns its reach. It must be construed in accordance with normal rules relating to statutes creating criminal offences.’

48. *Richardson* was a case concerned with the meaning of 'lawful activity', the second of the four ingredients of section 68 identified by Lord Hughes (see [12] above). Accordingly, it is common ground between the parties (and we accept) that the statement was *obiter*. Nonetheless, all members of

the Supreme Court agreed with the judgment of Lord Hughes. The *dictum* should be accorded very great respect. In our judgment it is consistent with the law on articles 10 and 11 and A1P1 as summarised above.

48. The proposition which the respondent has urged this court to accept is an attempt to establish new principles of Convention law which go beyond the "clear and constant jurisprudence of the Strasbourg Court". It is clear from the line of authority which begins with *R (Ullah) v. Special Adjudicator* [2004] 2 AC 323 at [20] and has recently been summarised by Lord Reed PSC in *R (AB) v. Secretary of State for Justice* [2021] 3 WLR 494 at [54] to [59], that this is not the function of a domestic court.

49. For the reasons we gave in para. [8] above, we do not determine Ground 1 advanced by the prosecution in this appeal. It is sufficient to note that in light of the jurisprudence of the Strasbourg Court it is highly arguable that articles 10 and 11 are not engaged at all on the facts of this case.

...

73. The question becomes, is it necessary to read a proportionality test into section 68 of the 1994 Act to render it compatible with articles 10 and 11? In our judgment there are several considerations which, taken together, lead to the conclusion that proof of the ingredients set out in section 68 of the 1994 Act ensures that a conviction is proportionate to any article 10 and 11 rights that may be engaged.

74. First, section 68 has the legitimate aim of protecting property rights in accordance with A1P1. Indeed, interference by an individual with the right to peaceful enjoyment of possessions can give rise to a positive obligation on the part of the State to ensure sufficient protection for such rights in its legal system (*Blumberga v. Latvia* No.70930/01, 14 October 2008).

75. Secondly, section 68 goes beyond simply protecting a landowner's right to possession of land. It only applies where a defendant not merely trespasses on the land, but also carries out an additional act with the intention of intimidating someone performing, or about to perform, a lawful

activity from carrying on with, or obstructing or disrupting, that activity. Section 68 protects the use of land by a landowner or occupier for lawful activities.

76. Thirdly, a protest which is carried out for the purposes of disrupting or obstructing the lawful activities of other parties, does not lie at the core of articles 10 and 11, even if carried out on a highway or other publicly accessible land. Furthermore, it is established that serious disruption may amount to reprehensible conduct, so that articles 10 and 11 are not violated. The intimidation, obstruction or disruption to which section 68 applies is not criminalised unless it also involves a trespass and interference with A1P1. On this ground alone, any reliance upon articles 10 and 11 (assuming they are engaged) must be towards the periphery of those freedoms.

77. Fourthly, articles 10 and 11 do not bestow any "freedom of forum" to justify trespass on private land or publicly owned land which is not accessible by the public. There is no basis for supposing that section 68 has had the effect of preventing the effective exercise of freedoms of expression and assembly."

50. The main nuance in this connection has already been considered. The only other acts within the terms of the order which might at least potentially occur without a trespass to land or goods are the blocking or impeding of access by the Claimant's contractors from the highway (or other land to which the public has a right of access) to the land within the Order Limits. But such activity would still constitute a private nuisance (see *Cuadrilla* at [13]). Furthermore, even in relation to the highway, the right of protest does not extend to the right to conduct coercive activities.
51. The Claimant accepts that protest on the public highway and, accordingly, other public land, will not always be unlawful, or constitute either a trespass (actionable by the highway owner) or a nuisance, merely because it results in some disruption. The Supreme Court held in *DPP v Ziegler* [2021] 3 WLR 179 that the issues which may arise under Articles 10 and 11 require consideration of five questions (at [16]) and see *HS2* at [132] et seq:
- 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 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 that legitimate aim ?
52. Those restrained by the terms of an injunction from obstructing access to the land within the Order Limits from the public highway (or other land to which the public has a right of access) would otherwise at least arguably be exercising their Article 10 and 11 rights, and the grant of an injunction would constitute some interference with those rights – even if not within ‘the core’ of those rights.
 53. However, such an interference is prescribed by the law because it is a vindication of the Claimant’s rights (and indeed the private law rights and the rights of others under Article 1 of Protocol 1) and take place pursuant to a Court order. The vindication of those rights of the Claimant is itself a legitimate aim. The vindication of third party rights, and the protection of the wider public from interference with access to fuels are two more. HHJ Lickley KC considered these issues at para 50 of his judgment and C adopts his analysis.
 54. Accordingly, Mr Morshead said the issue in this case is whether such interference as the injunction might comprise is ‘necessary’ in a democratic society” to achieve that aim, in other words, proportionate, as to which there are four questions to be considered (see *HS2*, [137]):
 - 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 individuals and the general interest of the community, including the rights of others ?
 55. In *Ziegler* the Supreme Court suggested that proportionality involved ‘a fact-specific inquiry which requires the evaluation of the circumstances in the individual case’ ([59]). Mr Morshead said that that might no longer be reliable as a statement of universal application, as explained in *In re Abortion Services (Safe Access Zones) (NI) Bill* [2023] 2 WLR 33, [29]–[35], where the Supreme Court has held that it may rather involve:

“... the application, in a factual context (often not in material dispute), of the series of legal tests set out ... above together with a sophisticated body of case law and may also involve the application of statutory provisions such as sections 3 and 6 of the Human Rights Act, or the development of the common law”.
 56. However, he said that it is unlikely that the present case calls for a resolution of the possible differences in practice between these approaches. That is because any

interference with any Convention right occasioned by the order will be minimal, especially when set against the national importance of the Pipeline.

57. In the similar context of the Insulate Britain protests, in *National Highways Ltd v. Persons Unknown* [2021] EWHC 3081, Lavender J (at [38]) set out the factors which Lords Hamblen and Stephens JSC had identified in *City of London Corporation v Samede* [2012] PTSR 1624 as being potentially relevant to the issue of proportionality, and consequently how the four proportionality sub-questions might be answered:

“Lords Hamblen and Stephens JSC reviewed in paragraphs 71 to 86 of their judgment the factors which may be relevant to the assessment of the proportionality of an interference with the article 10 and 11 rights of protestors blocking traffic on a road. Disagreeing with the Divisional Court, they held that each of the eight factors relied on by the district judge in that case were relevant. Those factors were, in summary:

- (1) The peaceful nature of the protest.
- (2) The fact that the defendants’ action did not give rise, either directly or indirectly, to any form of disorder.
- (3) The fact that the defendants did not commit any criminal offences other than obstructing the highway.
- (4) The fact that the defendants’ actions were carefully targeted and were aimed only at obstructing vehicles heading to the arms fair.
- (5) The fact that the protest related to a “matter of general concern”.
- (6) The limited duration of the protest.
- (7) The absence of any complaint about the defendants’ conduct.
- (8) The defendants’ longstanding commitment to opposing the arms trade.”

58. For similar reasons to those expressed by Lavender J in *National Highways*, Mr Morshead submitted that the four sub-questions relevant to the ‘proportionality’ test can be answered as follows - thus satisfying the requirements for obtaining that part of the relief which might potentially affect the rights of those on the highway (and other land to which the public has a right of access).

59. The aims of restraining the Defendants’ activities are the vindication of the Claimant’s own private law rights, the avoidance of harm to others including its own contractors/staff, the emergency services and the general public (both of which also

have consequent harmful effects upon the Claimant), as well as the avoidance of harm to the protesters themselves - and the avoidance of disruption to the provision of fuel to the public.

60. There is an obviously rational connection between the means chosen in this case and the aim in view: the means narrowly focus on the prevention of interference with the Claimant's rights and with the construction of its pipeline.
61. There is no less restrictive alternative means available to achieve the aim. An action in damages would not prevent the disruption which the Defendants seek to cause. There is little reason to suspect that any identifiable defendant would be capable of satisfying any claim anyway. Further, the harms in question are (so to speak) larger than money can compensate for.
62. The grant of an injunction strikes a fair balance between the Defendants' rights, the Claimant's rights, and the general interests of the community. The observations of Leggatt LJ in *Cuadrilla* at [94]–[95] are apt. He said:

“94. The common feature of these cases, as the court observed in the *Kudrevious* case, is that the disruption caused was not a side-effect of a protest held in a public place but was an intended aim of the protest. As foreshadowed earlier, this is an important distinction. 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 *Kudrevious* case [*Kudrevious v Lithuania* (2016) 62 EHRR 34] – 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.

95. Where, as in the present case, individuals not only resort to compulsion to hinder or try to stop lawful activities of others of which they disapprove, but do so in deliberate defiance of a court order, they have no reason to expect that their conscientious motives will insulate them from the sanction of imprisonment.”

63. The proposed order demonstrates a careful and moderate striking of the balance, which preserves the right to lawful protest.

64. Any interference with anyone's Article 10 and 11 rights caused by a court order preventing that person's deliberate disruption of the Claimant's business, and not mere protest, is outweighed by:
- a. the Defendants' interference with the ability of the Claimant (and third parties) to carry out their lawful business;
 - b. the wider interests in protecting the Defendants, and those in the vicinity of the Pipeline works, from injury, and the potential harm to the Claimant which would eventuate if such an injury were to eventuate (tunnelling and protesting at height carry particular risks);
 - c. the interest of the public in continuing access to the fruits of the Claimant's undertaking.
65. HHJ Lickley KC agreed with this analysis at [52]–[53] of his judgment.
66. Consequently, Mr Morshead said that the degree to which the injunctions sought might interfere at all with any individual's Article 10 and 11 rights, any such interference is proportionate, and does not require the Court to modify the approach which it would take (ie, before consideration of the Convention) to the threatened interference with the Claimant's rights.

Discussion

67. For the substance of the reasons advanced by Mr Morshead (which I have fully set out, and adopt); those given by HHJ Lickley KC in his judgment of 21 October 2022; and the following reasons, I am satisfied that the Claimant is entitled to the injunction it seeks.
68. Firstly, I am satisfied that the Claimant has established, on the evidence, the tort of conspiracy to injure by unlawful means such that it is entitled (all other things being equal) to a permanent injunction. I understand and accept why the Claimant has framed its case in the way that it has given the complexities of the right to possession and ownership of the land involved. The campaign of protest which the Pipeline has attracted is plainly intended to impede the Claimant's ability to construct the Pipeline and to harm it economically. The fact that some of the overt acts pursuant to the conspiracy may be aimed at third parties and not directly actionable by the Claimant (eg the owners of the Items) does not impair the Claimant's ability to rely upon this tort: see HHJ Lickley KC at [22]; *Shell* at [27] and [32]; *Ineos*, [59]; and *Total Network SL*, [44] and [94]. Third parties are merely collateral damage. I agree with HHJ Lickley KC, [27]:

“On the facts set out in the witness statements, the Claimant has a strong case [now in fact proved following the uncontested trial] 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.”

69. Next, I consider that the *Canada Goose* requirements are made out and in particular: (a) that there has been effective service; (b) there are clear geographical and temporal limits to the injunction. Although the order affects a significant area of land measured on a linear basis across about 100km, the land in question is sometimes quite narrow, as I have explained. It is certainly less extensive than the affected land in *HS2* and the roads network that were the subject of injunctions in the *Insulate Britain/National Highways* injunction cases which in some cases stretched for thousands of miles. The order is clear. No-one subject to the injunction can be in any doubt as to what they can and cannot do. The Claimant has plainly thought carefully about the terms of the order sought and has taken a responsible and balanced approach.
70. On the question of the Convention and proportionality, I adopt without repeating my analysis in *HS2*, [194]-[277], which applies *mutatis mutandis* to the facts before me, although as Mr Morshead rightly said, the order in this case is much more limited in its scope than the order sought in *HS2*. I also adopt the proportionality analysis of HHJ Lickley KC at [43]-[53]. He dealt with the four relevant questions at [53], in terms with which I agree:

“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 protesters 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 protesters 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."

Conclusion

71. For these reasons, I grant the application sought.