

**IN THE HIGH COURT OF JUSTICE  
KING'S BENCH DIVISION**

BETWEEN:

**NATIONAL HIGHWAYS LIMITED**

Claimant

- and -

**(1) PERSONS UNKNOWN CAUSING THE BLOCKING OF,  
ENDANGERING, OR PREVENTING THE FREE FLOW OF TRAFFIC ON  
THE M25 MOTORWAY, A2 A20 AND A2070 TRUNK ROADS AND M2  
AND M20 MOTORWAY, A1(M), A3, A12, A13, A21, A23, A30, A414 AND  
A3113 TRUNK ROADS AND THE M1, M3, M4, M4 SPUR, M11, M26, M23  
AND M40 MOTORWAYS FOR THE PURPOSE OF PROTESTING  
(2) MR ALEXANDER RODGER AND 138 OTHERS**

Defendants

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**WRITTEN SUBMISSIONS  
OF THE CLAIMANT**

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**INTRODUCTION**

1. At [160 – 163] of the Judgment: [2023] EWHC 1073 (KB), the Court expressed concern in relation to the third party disclosure (“3PD”) provisions in the Injunction Order which the Court had granted and invited further written submissions. This document sets out the Claimant’s submissions in that regard.
2. The 3PD provisions are contained in paragraphs 11 – 15 of the Injunction Order. In essence, they compel the Police to provide to the Claimant the names and addresses of any person who has been arrested by one of their officers in the course of, or as a result of, protests on the Claimant’s roads; and the arrest notes, body camera

footage and/or all other photographic material relating to possible breaches of the Injunction Order.

3. In the Judgment, the Court expresses particular concerns in relation to 3PD, noting that the extent and nature of the third party disclosure jurisdiction has not been subject of any detailed consideration by any Judge [in protest injunctions]:
  - a. The 3PD provisions affects people who have not (yet) been arrested and who have not had an opportunity to object to the terms of the Injunction Order;
  - b. That incorrect disclosure has been made by the Police; and
  - c. The Police's reservations about supplying the information/personal data requested.
4. Each of those concerns are addressed in turn below.

## **THE LAW AND RULES**

5. Section 34(2) of the Senior Courts Act 1981 provides:

“On the application, in accordance with rules of court, of a party to any proceedings, the High Court shall, in such circumstances as may be specified in the rules, have power to order a person who is not a party to the proceedings and who appears to the court to be likely to have in his possession, custody or power any documents which are relevant to an issue arising out of the said claim—

(a) to disclose whether those documents are in his possession, custody or power; and

(b) to produce such of those documents as are in his possession, custody or power to the applicant or, on such conditions as may be specified in the order—

(i) to the applicant's legal advisers; or

(ii) to the applicant's legal advisers and any medical or other professional adviser of the applicant; or

(iii) if the applicant has no legal adviser, to any medical or other professional adviser of the applicant.”

6. The rules regarding disclosure are set out in CPR Part 31, the relevant sections of which are as follows.

7. CPR31.1 provides that Part 31 applies to all claims, except a small claims track claim.
8. CPR31.4 provides that the meaning of a document is “anything in which information of any description is recorded”.
9. CPR 31.11 provides that the duty of disclosure continues until the proceedings are concluded, and CPR 31.11(2) makes clear that:

“If documents to which [the duty to disclose] extends comes to a party’s notice at any time during the proceedings, he must immediately notify every other party”

10. CPR 31.17 governs order for disclosure against a person not a party as provides:

“(1) This rule applies where an application is made to the court under any Act for disclosure by a person who is not a party to the proceedings.

(2) The application must be supported by evidence.”

11. CPR 31.17(3) provides the limitations of the court’s power to make a 3PD order:

“(3) The court may make an order under this rule only where–

(a) the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; and

(b) disclosure is necessary in order to dispose fairly of the claim or to save costs.”

12. CPR 31.17(4) provides the requirements of any 3PD order:

“(4) An order under this rule must–

(a) specify the documents or the classes of documents which the respondent must disclose; and

(b) require the respondent, when making disclosure, to specify any of those documents–

- (i) which are no longer in his control; or
- (ii) in respect of which he claims a right or duty to withhold inspection.”

13. In *Constantin Medien Ag v Ecclestone and others* [2013] EWHC 2674 (Ch) Vos J (as he then was) endorsed the following structured approach to be adopted by Court in respect of applications under CPR 31.17:

- (1) First, per CPR 31.17(3)(a), the threshold test of whether it has been shown that each of the documents in the category or the class of documents are likely to help the claimant's case or damage the defendant's case.
- (2) Secondly, per CPR 31.17(3)(b), whether disclosure of the documents is necessary to dispose fairly of the claim or to save costs.
- (3) Thirdly, whether the definition of the documents is sufficiently clear and specific, so that no judgments about the issues in the case are required by the respondents. The documents must be identified with sufficient certainty to leave no real doubt in the mind of the third party what they are required to do.<sup>1</sup> Per Vos J at [69]: “It must be clear from the order what the non-party must produce. The order must be framed without regard to the issues in the case, or to the relevance of the documents in the non-party's possession to those issues.”
- (4) Fourthly, the question of whether, as a matter of overall discretion, disclosure of that class of documents should be ordered.

14. As to the first threshold test under CPR 31.17(3)(a), likely means “*may well*” rather than more probable than not – *Three Rivers District Council v Governor and Company of the Bank of England (No 4)* [2003] 1 WLR 210 (CA) per Chadwick LJ at [32]. Documents are likely to support the case of the application if they “have a potentially relevant bearing on one or more of the live issues in the case” – *Frankson v Secretary of State for the Home Department* [2003] 1 WLR 1952 (CA) at [10].

15. Once satisfied of the matters in CPR 31.17(3)(a) and (b), the Court has a wide discretion – indeed, in *State Bank of India v Qatar National Bank and Others* [2019]

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<sup>1</sup> See the review of authorities at [42] to [57].

7 WLUK 369, Robin Knowles J held that CPR 31.17 is available post-judgment. The learned judge also held at [17] that:

“I cannot rule out that [the order] will catch some irrelevant material, but that would be a by-product. It would be remarkable if the danger of some collateral irrelevant documents being caught up in an exercise that was otherwise entirely relevant was in some way fatal.”

16. CPR 31.18 also preserves any other power the court may have to order disclosure against a person who is not a party to proceedings. That would include the jurisdiction to order the disclosure of the identity of a potential wrongdoer by an innocent person caught up in the wrongdoing under the *Norwich Pharmacal* principle: *Hickox v Dickinson* [2020] EWHC 2520; *Collier v Bennett* [2020] EWHC 1884

### **Application of CPR 31.7 in Protest Cases**

17. Similar orders have been granted in numerous cases involving protest injunctions over the past year<sup>2</sup>. As stated in *Esso Petroleum Co Ltd v Persons Unknown* [2022] EWHC 1477 at [32],

“...the disclosure sought is the most sensible and efficient way to identify any breaches of the injunction”

“...any evidence that could be used by the claimants to pursue breaches [should be] gathered by the legally regulated and democratically accountable police forces of the United Kingdom”.

18. The application of CPR 31.17 in protest injunction cases has been considered in detail most recently in *Transport for London v Lee* [2023] EWHC 3102(KB), Freedman J held (emphasis added):

“94. Finally, there is the question of third party disclosure and a disclosure order under CPR 31.17 in respect of information held by the Metropolitan Police. The claimant seeks continuation of the provisions for third party disclosure of

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<sup>2</sup> See also e.g. *Transport for London v Alyson Lee & Ors* [2022] EWHC 3102 at [94]-[97]; *Valero Energy Ltd v Persons Unknown* [2022] EWHC 911 (KB) at [44]; *National Highways Ltd v Persons Unknown* [2022] EWHC 1105 (KB) at [53] and *Esso Petroleum Co Ltd v Persons Unknown* [2022] EWHC 1477 at [32]

information from the Metropolitan Police. The Metropolitan Police will not provide such information voluntarily, but does not oppose the making of such an order in this claim. CPR 31.17 provides a general power for the court to order a non-party to disclose information into the proceedings. Although it is established that such orders are the exception and not the rule (see *Frankson & Ors v SSHD* [2003] EWCA Civ 655 at 25 ), the court retains a wide discretion to make such an order in appropriate cases.

95. The essence of the test that disclosure is necessary in order to dispose fairly of the claim, or to save costs, is capable of being fulfilled in many different circumstances. The court can approach the issue effectively with a view to ensuring that litigation is not hampered by a lack of disclosure. Such disclosure may engage the Article 8 rights of individuals. However, any interference with that right can be justified for the protection of rights and freedoms of others. Although there are occasions where the court should consider inviting submissions on behalf of interested third parties, this is much more likely where an order is being sought for the provision of detailed documents or records, as opposed to, for instance, simply asking for disclosure of a name and address.

96. This is an order that has been made throughout the history of these demonstrations and, in my judgment, the pre-conditions for an order under CPR 31.17(3) exist in this case. They include the following:

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

agents to interfere during the demonstrations in order to obtain such evidence.

97. For all these reasons, and subject to the undertakings and the other matters to which I have referred in this judgment, the injunctions sought are granted. A question arises that I will hear counsel about, about the duration of the injunctions and about how the actions will be progressed.”

## **SUBMISSIONS**

### *Prospective nature of the order*

19. In C’s respectful submission, no issue arises from the fact that the Order operates prospectively in the sense of covering future arrests and associated information/documents which would, by definition, not be in existence at the time of the making of the order.
20. Nothing on the face of either s.34(2) or CPR r.31.17 calls for restricting the application of the power to documents which must already be in existence at the time of the order.
21. There is no express limit explicitly confining the power to disclosure of *existing documents at the date the application is made* and the statutory jurisdiction under section 34 can and should be read in a generous and purposive way so as to extend to an ongoing order for disclosure by a non-party. That can be done by reading the statutory provision as if the words in brackets were incorporated: “who appears to the court to be likely [*at the relevant time*] to have in his possession, custody or power any documents which are relevant to an issue arising out of the said claim”.
22. Such a construction is implicit to prevent the power from having an unnecessarily and inappropriately narrow ambit as set out at paragraph 27 below. There is no literal rule of interpretation in the sense that the strict grammatical meaning must invariably be followed and when construing an enactment the court should assess the likely consequences of competing interpretations: see Bennion Code 11.6. Equally, the legislature must be assumed to have intended to create a rational and coherent legislative scheme and if a literal construction leads to an interpretation or consequence which Parliament could not have intended, it can and should be departed from: see Bennion Code 11.4, 11.5.
23. Indeed, in *Kerner v WX* [2015] EWHC 1247 at [25] to [26], Warby J at [25] warned against construing either section 34(2) or r. 31.17(3) in a narrow and literal way:

“In my judgment, however, it would be inappropriate to construe either provision in a narrow and literal way, .... To take that approach would tend to obstruct or hinder the fair disposal of litigation.”

24. Whether a prospective order should be granted in any particular case would plainly be subject to establishing the relevant threshold tests and the Court’s discretion under r. 31.17, but it is submitted that there is no principled reason why a 3PD order cannot be made to have ongoing effect per CPR 31.11. Where (as here) there are documents within the same class which are likely come into the third party’s possession during the proceedings, such an order would be appropriate.
25. Section 34(2)(a) and (b) requires the party to disclose whether the documents are in his possession and to produce such documents. Whilst it is obvious that a party cannot disclose a document before it exists, the third party can and would nevertheless come under an obligation to disclose that document once it exists.
26. The 3PD provisions in the Injunction Order have that effect: they impose a duty to disclose documents on a conditional basis and make clear that, insofar they relate to a document which is not in existence, those obligations would only arise at the future point in time when the documents would be expected to be in existence and a request for such future disclosure was made. If those conditions arise, so does the duty to disclose. There is accordingly no issue with future documents being created and falling within the terms of the 3PD order.
27. Any more narrow or literal construction to the effect that s.34 or r. 31.17 cannot operate prospectively would, in a case such as this, lead to an interpretation or consequence which Parliament could not have intended and hinder the fair disposal of litigation:
  - a. The Claimant is under a duty to identify and serve both anonymous defendants who were identifiable at the time the proceedings commenced and ‘Newcomers’, that is to say people who will join the protest and breach the Injunction Order by carrying out the prohibited activities on the Claimant’s roads and thereby bring themselves within the description of the “Persons Unknown”. That imposes an ongoing obligation on the Claimant to identify and join Newcomers and



identifiable persons throughout the course of the proceedings. If r. 31.17 were interpreted as being limited to documents that existed at the date of the disclosure order, the only way in which the Claimant could comply with its duty to identify and join persons by naming them would be by making repeated applications, in materially identical terms, to the Court, in each case filing evidence and submissions which would be materially identical, each time having to liaise with the Respondent and ask it to consider its position. Such an approach would be costly, wasteful and disproportionate.

- b. Whilst such an outcome may not be considered as problematic in a case where there has been and is anticipated to be only limited protest activity, the practical difficulties of having to make repeated applications in respect of either individual arrests or individual protests are very significant in a case such as this, where the Injunction Order extends to a wide strategic road network and extensive and unpredictable protest activity has been experienced, there is no indication that the direct action protest has “reached its zenith” and the Claimant’s roads continue to be a prime target for direct action protest activities. The requirement for a Claimant to come to court each time, rather than setting up a process of disclosure in advance, would materially undermine the effectiveness of the orders obtained and impede the Claimant in its ability to secure and enforce orders which are effective. An interpretation of section 34 (or r. 31.17) which limited applicants in that way and required repeated applications would be problematic and makes little sense.
- c. Such a construction would also fly in the face of the provision in the CPR 31.11 for an ongoing duty of disclosure until proceedings are concluded.<sup>3</sup> As set out above, the Injunction Order simply reflects the fact there would be an ongoing duty on the Police to disclose the relevant categories of document for the period that the order remains in place, in a way which is entirely consistent with the duty of continuing disclosure provided for in CPR 31.11 and thereby avoids the prospect of a series of repeat applications having to be brought throughout the course of the proceedings.

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<sup>3</sup> Unlike 31.11(2), 31.11(1) is not limited to parties to the proceedings.

- d. As a matter of principle, the contrary interpretation would mean that a third party required to disclose a document and who comes into possession etc of an updated version of that document while proceedings are ongoing would be under no obligation to disclose it.
28. Nor is there is any conceptual difficulty with the ability of the court to determine prospectively whether a third party is likely to have the relevant documents (for the purposes of s.34(2)) or whether the threshold tests are satisfied (for the purpose of CPR r.31.17), in a case (as here) where the future documents are clearly identified and fall within the same class as the existing documents. In this case, the considerations which arise in relation to a 3PD application for existing arrest notes in respect of unidentified persons would be identical to those which would arise in relation to any future application for subsequent arrest notes.
29. It may therefore necessary to draw a distinction between two categories of documents being:
- a. A class of documents, which may (as in this case) include documents already in existence, which is sufficiently defined by reference to criteria making it straightforward for the third party to identify whether or not it has, or would have, those documents in its possession, custody or control;
  - b. A class of documents or description of documents where it is not clear either:
    - (1) whether the class or description itself exists; or
    - (2) whether a document that is already in or that will be in the possession, custody or control of the third party would fall within the class or satisfy the description.
30. In the Claimant's submission, it would be impermissible to make a third-party disclosure order in relation to documents in category (2) (see *Constantin Medien* in particular), but no such difficulty arises in relation to the documents in category (1). The question is whether or not it is clear what the Police will have to produce.

**Does reference to Incorrect Disclosure justify a different approach?**

31. The Injunction Order is appropriately clear and focused in this case and, as such, there

can be no room for reasonable doubt as to what the Police are required to produce i.e. constitutes 'names and addresses' or whether a document falls within the type of documents described. For the relevant threshold to be met, the person in question must have been: (i) arrested; (ii) in relation to conduct and/or activity which constitute a breach of the Order; and (iii) on the Claimant's roads.

32. In respect of each arrest the Police have been involved in extraordinarily pressurised circumstances: dealing with protestors climbing, gluing and otherwise obstructing roads, often during the morning rush hour. Notably, in each case, the Police must have had reasonable grounds to arrest the person (s. 24 PACE 1984).
33. In the Claimant submission, the stated examples of incorrect disclosure are isolated and very far from the Police disclosing arbitrary, purposeless or unrelated material to the Claimant. In respect of each such complaint, the point raised by defendants is not that they were not engaged in the type of unlawful direct action protest activity which forms the subject of the claim, but that they were not engaged in such activity on the Claimant's roads. In many instances, this was because the Police were efficient, and arrested the defendants before they reached the Claimant's roads. The Claimant accepts that this may well take the disclosure outside the strict ambit of the 3PD provisions, but such protestors cannot be said to be unrelated to the incidents forming the subject of the claim.
34. As the Claimant has demonstrated in respect of some of the named defendants to the proceedings, where there has been incorrect disclosure, the Claimant has sought to remove or not add those persons as named defendants. However, it cannot necessarily be said that such persons are not appropriately joined. Where a person has been arrested on a road which is not within the Claimant's roads, they may still be part of the coordinated protest campaign intending to go onto the Claimant's roads. Whether they are or not is a question of evidence. If for example, the person was arrested in the course of attempting to go on the Claimant's roads for the purposes of protesting, the fact that that person has not in fact taken part in protest on the Claimant's roads does not preclude their joinder, given the nature of the precautionary relief sought and the Claimant's duty pursuant to [82] of *Canada Goose* to name persons who might carry out the prohibited activity and thereby make themselves a defendant. The effect of *Canada Goose* is that someone who has essentially failed to carry out the prohibited activity by the efficiency of the Police and for no other reason, is a person who ought properly to be named in the Injunction

Order.

35. The Claimant is aware of a single case where a journalist was arrested, but even in that case, as the Court has noted in [74] of its Judgment, pedestrians, even journalists, are not allowed on the motorway save in cases of accident or emergency per regulation 15 of the Motorways Traffic (England and Wales) Regulations 1982.
36. Whilst it is regrettable that there have been some errors in disclosure, an error in the outcome of provisions does not indicate that the legal basis for those provisions is flawed. It simply evidences that there is potential for human error. The Claimant must be entitled to the opportunity to consider the disclosure, comply with its legal obligations to identify named defendants and secure orders which are effective.
37. There is no wording to narrow further the scope of disclosure, which is precise and appropriately limited to the details of persons arrested on the Claimant's roads, and documents relating to breaches of the Injunction Order.
38. In any event, generally, and even if there is incorrect disclosure, defendants are adequately protected. The uses which the Claimant may put that information to are strictly limited by paragraph 12 of the Injunction Order which contains conditions which ensure that the information can only be used for the purposes of the proceedings. The Injunction Order also contains provision for any party who is joined to apply for a variation or discharge of the Order which would include their removal if the circumstances justified it.
39. The collateral use of any documents thus disclosed is also automatically restricted by CPR 31.22(1).
40. There are therefore adequate safeguards against the potential for error and to ensure that the documents will only be used in these proceedings, and any applications arising from them.

### **Future Objectors to 3PD**

41. The starting point is that in these proceedings, the Court has determined that the Claimant is entitled to injunctive relief. The injunction must be obeyed, as to do otherwise strikes at the heart of the rule of law and the authority of the Court. If an injunction is wilfully

breached, an application for committal may be made, or the Court may act of its own volition.

42. The Court held at [165]:

“...there is very widespread knowledge that an injunction against protesting on strategic roads, and especially the M25, is in force. This provides...constructive knowledge... “it is very unlikely, perhaps vanishingly unlikely”, that anyone who is minded to take part in the protests on the strategic roads network is unaware that injunctive relief has been granted by the courts”.

43. There is no principled basis upon which a future person, who has breached the Injunction Order ought to be entitled to argue that their name and addresses, which the Claimant would require in any application for committal, should not be disclosed to the Claimant.

44. As the Court has accepted, there is no right at all for protestors to trespass on the motorway. It is both a criminal offence, and now, a breach of a long-standing injunction order. If a person does so, and they are arrested, given the widespread knowledge of the injunction, the Claimant submits that it is vanishingly unlikely that that future person will not have had an opportunity to challenge the injunction and/or the 3PD provisions and the prospects of any such future person being able to argue credibly that the 3PD provisions should not operate to provide their details to the Claimant are also vanishingly unlikely.

45. The only conceivable argument that a future objector may raise is in respect of Article 8 ECHR but that argument can be considered at this stage. As set out above, the considerations arising on 3PD application in respect of current arrest information arises in exactly the same way in respect of future arrest information, as the documents sought are all in the same class and relate to the same thing.

46. The Claimant’s first submission is that Article 8 is not engaged: the individuals covered by the 3PD provisions will, by definition, be individuals participating in protests of the kind covered by the Injunction Order. As such, those persons will have chosen to take part in protests in a way that: (i) is intentionally disruptive and, in many cases, clearly constitutes criminal conduct; (ii) is visible to the general public; and (iii) as part of an organised group. In those circumstances, there cannot be sensibly said to have been any reasonable expectation of privacy as to the facts surrounding such persons’ arrest or

documenting their protests - where that documenting relates to breaches of criminal law or court orders: *In re JR38* [2016] A.C. 1131; *Kinloch v HM Advocate* [2013] 2 AC 93.

47. In particular, Article 8 cannot be relied on in order to complain of a loss of reputation which is the foreseeable consequence of one's own actions, such as, for example, the commission of a criminal offence: *Medžlis Islamske Zajednice Brčko v. Bosnia and Herzegovina* (2018) 66 E.H.R.R. 1 at [76].
48. Moreover, any interference with Article 8 would be proportionate in any event, for the following reasons:
  - a. As set out above, the information sought is clearly necessary to allow the Claimant to discharge its legal obligations to name and identify defendants; to enable the fair disposal of the proceedings by service on defendants; and to allow orders properly obtained from the Court to be enforced.
  - b. In the context of the nature of the activities, the fact of an individual's arrest in connection with such a protest is a sensible threshold for inclusion within the terms of the 3PD order.
  - c. As set out above, the Injunction Order contains provision for any party who is joined to apply for their removal if the circumstances justified it and ensure that the information can only be used for the purposes of the proceedings.
49. It follows that in the Claimant's respectful submission, no issues arise in respect of future objectors such that the 3PD provisions should not be maintained.

### **Police Reservations**

50. In respect of any reservations the Police may have had in respect of the information, the Claimant understands that the Police have an internal policy of not disclosing details of arrest, and names and addresses in proceedings without the Court ordering that disclosure. The policy of the Police not providing such information voluntarily, but not opposing the making of such orders has been consistent across police forces throughout the history of these protest campaigns (see e.g. reference in *TfL v Lee* at paragraph 18 above).

51. The Police's position continues to be that they do not oppose the imposition of the duty of disclosure. They do not have any reservations about supplying the information identified in the Injunction Order. It is appropriate for the Court to make an order for disclosure, given its general supervisory duty in the context of the injunction and committal jurisdiction.

## **CONCLUSION**

52. For all of these reasons, the Claimant respectfully submits that the 3PD provisions in the Injunction Order should be maintained as drafted.

**5 June 2023**

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