Neutral Citation Number: [2021] EWHC 977 (QB)

Case No: **QB-2021-001402**

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

Royal Courts of Justice, Strand,
London, WC2A 2LL

Date: **19 April 2021**

**Before** :

**Mr Justice Martin Spencer**

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**Re :**

**Ørsted Hornsea Project Three (UK) Limited** **Claimant**
**Injunction Hearing**

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**Richard Turney** (instructed by **Pinsent Masons**) for the **Claimant**

Hearing dates: **19th April 2021**

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# APPROVED JUDGMENT

**Mr Justice Martin Spencer** **Monday, 19 April 2021**

(**12.52** pm)

Judgment by **MR JUSTICE MARTIN SPENCER**

1. By this application Ørsted Hornsea Project 3 (UK) Limited seeks an order enabling it to carry out a geophysical and geotechnical survey of an area of the North Sea in respect of which they have been granted a licence and other facilities to exploit that area of the North Sea for the purpose of construction of a wind farm.

2. The background is that Ørsted acquired the rights from the Crown Estate to develop the Hornsea zone in August 2015, as explained in paragraph 8 of the witness statement of Ms Courtney French, and on 9 July 2019 Ørsted concluded an agreement for a lease with the Crown Estate Commissioners. By this time the first two phases were in operation. Hornsea 1 was fully operational and Hornsea 2 was currently under construction.

3. On 31 December 2020 the Secretary of State for Business, Energy and Industrial Strategy granted a development consent order under the Planning Act 2008 for Ørsted to carry out this third project in the zone, namely the Hornsea Project 3 Offshore Wind Farm, which is known as Hornsea 3, and the intention is to construct 231 offshore wind turbines capable of generating sufficient green electricity to meet the average daily needs of over 2 million homes in the UK with, it is said, significant contribution towards meeting the government's offshore wind ambition of 40 gigawatts by 2030 and its net zero commitments.

4. This area of the North Sea is also exploited by local fishermen and, therefore, the carrying out of the two surveys and, should the surveys be favourable, the construction and operation of the wind farm, is liable to interfere with the fishing rights of the local fishermen and, in those circumstances, Ørsted have been in negotiation with the local fishermen's organisations with a view to establishing a system of compensation for their loss of livelihood. In that regard, there had been a number of meetings between Mr Stephen Hepples, who is the onshore fishing industry representative of the National Federation of Fishermen's Organisations, and leaders of local fishing organisations, and

there have also been negotiations by Ms French, who is the Commercial Fisheries Manager at Ørsted Power (UK) Limited, and there has also been involvement of Ms Sophie Farenden, who is the Commercial Fisheries Adviser at Brown & May.

5. In his witness statement Mr Hepples has described the various meetings he has had with the leaders of local fishing organisations, and in particular Mr John Davies, who is the chairman of the North Norfolk Fishermen's Society, and Mr Nicholas - known as Nicky - King, chairman of the Wells & District Fishermen's Association. Also involved has been Mr David Shilling of the North Norfolk Fishermen's Society.

6. Thus there is evidence of both telephone contact and meetings through the last quarter of 2018 and through 2019 and 2020, and into 2021. By way of example, on 7 December 2020 there was a significant telephone call between Mr Hepples and Mr Shilling when it was said that Mr Shilling wanted to hear from Mr King and Mr Davies once they had spoken to each other and wanted to see the plans for the Hornsea 3 project in paper format on a large-scale paper chart with scales in degrees, minutes and seconds, and it was pointed out that a lot of the fishermen do not have modern navigational systems, and Mr Shilling proposed what he called a herd immunity light bulb agreement whereby the societies get a payment put in jeopardy if one member puts a pot in a cleared area and the light bulb referring to the fact that the agreement could be switched on and off as required by the developer within seven days.

7. The applicant was pressing for an evidence-based form of compensation and there was negotiation as to whether that was appropriate as other fishermen would be affected by the wind farm activity due to displacement of gear by those moving their gear from the work areas into the remaining fishing grounds, so that the effect of the works would be somewhat wider than simply in relation to those fishing the particular area of the wind farm activity.

8. There was a meeting on the same day between Mr Hepples, Mr King and representatives of Ørsted. There was a further significant meeting on 12 March 2021 between Mr Hepples and Mr King when

Mr Hepples noted that he had spoken to Mr King to explain that negotiations with Mr Shilling had come to an impasse and that Mr Shilling had suggested that they get on and pursue individual agreements. Mr Hepples asked Mr King if Ørsted could arrange for Mr King to meet with Ms French and Ms Farenden, for them to explain how events were likely to proceed. There was also on the same day a telephone call between Mr Hepples and Mr Davies.

9. The reason I refer to these meetings and telephone conversations and negotiations is that it is asserted strongly on behalf of the applicant by Mr Turney that the making of this application has come as a last resort, only after significant negotiations and discussions have been entered into between the applicant and those with an interest in this matter with a view to avoiding the need for legal proceedings.

10. Before the wind farm project can be proceeded with, it has been explained that it is necessary for two surveys to be carried out: firstly, a geophysical survey which is a licensable activity under the Marine and Coastal Access Act 2009 with the applicant relying on an exemption under Article 17 of the Marine Licensing (Exempted Activities) Order 2011, and this is a necessary survey; together with the geotechnical survey for the applicants to carry out to give them information as to the design and construction phase by identifying the environmental and geological conditions as well as the local sediment transport systems, and it is also necessary to ensure the safety of those working in the area by identifying any unexploded ordnance left by historical military activity deposited from wrecks or uncovered by dynamic seabed activity.

11. The geophysical survey is scheduled to take place between 22 April 2021 and 2 May 2021, followed by the geotechnical survey between 13 May 2021 and 17 June 2021. Thus in the period since the meetings which I have described on 12 March 2021, the discussions and negotiations have had an additional urgency. Those surveys can only proceed once the survey area and the drilling locations have been cleared of fishing gear and any other equipment or obstructions which may affect the activities of Ørsted and its contractors in conducting the surveys.

12. Accordingly, Ørsted have arranged for scouting surveys to be carried out by a vessel to identify whether the area subject to the proposed surveys are obstructed by fishing gear. On 14 April 2021 the first scout survey was carried out by a vessel, the ISLA-B, and gear markers were observed in the survey area, but unfortunately none of those were marked with a vessel PLN, which stands for port letter and number, and so they were not capable of being identified as belonging to a particular vessel or person. It is this which has prompted this application being made to the court today. As Mr Turney has explained, and as the evidence demonstrates, by and large the negotiations have been sensible, constructive and productive in that the vast majority of the fishermen who fish the particular area have agreed not to put their gear in the survey area or to remove their gear which is there, but there appear to have remained a small number who have left their gear in a way which would prevent the carrying out of the surveys. This is despite the efforts of the applicant and its solicitors to bring to the attention the need for the fishing gear to be removed, and in particular on 12 April the applicant's solicitors sent an email to the harbour master of Wells harbour, attaching a Notice to Fishermen, and the same notice was also sent to 64 individual fishermen and representatives for whom Ørsted had the relevant email addresses.
13. Thus it is asserted, and I find, that Ørsted have done everything within their power reasonably to bring to the attention of those who have an interest in fishing the relevant area the need for fishing gear to be removed and the intention of the applicant to make an application should that not be done voluntarily.
14. In view of the scout survey carried out on 14 April, the claim was issued together with this application on 15 April and that has been filed with supporting witness statements from Ms French, Ms Farenden, Mr Hepples and also Mr Michael Timothy Fenn, a partner at the applicant solicitors, Messrs Pinsents.
15. Two further scout surveys have been carried out. Firstly, a second survey was carried out on 17 April by the ISLA-B when at that time seven fishing gear markers were observed in the survey area,

again none marked with a vessel PLN, and so not capable of being identified to a particular vessel or person. It is not clear to me at the moment whether the location of those fishing gear markers coincided with the ten in the previous survey so that three of the original ten had been removed and seven left in place or whether more than three have been removed but some have been placed anew.

16. I am further told that another survey has been carried out by the ISLA-B as at 10.15 this morning and that has revealed that there are now only four fishing gear markers left in the survey area of which one is marked with the identity of the vessel. That implies that a maximum of three have been left from the seven which were observed on 17 April or the ten which were observed on 14 April, and the result is that there has certainly been some further significant cooperation by the local fishermen in the removal of their fishing gear and the clearance of the survey area.

17. Although it is not impossible that the remaining four pieces of gear observed this morning will be removed by 22 April, the applicant wishes to have the power to remove them should they not have been removed voluntarily and also seeks an injunction preventing the placing of any further fishing gear with their markers in the area before the surveys are to be carried out from 22 April.

18. The basis for the application is set out in the helpful skeleton argument from Mr Turney on behalf of the applicant who submits that the placing of fishing gear in the survey area is an arguable interference with the applicant's rights capable of amounting to a nuisance. He submits that the court must be satisfied that the presence of the fishing gear is at least arguably capable of amounting to a tort and he says that it is, that the claimant's right to use the survey area takes precedence over any common law right that may be exercised by the fishermen, and on that basis the interference with the claimant's right amounts to a nuisance.

19. The basis for the claimant having precedence is that: firstly, the claimant has statutory authority to construct Hornsea 3; secondly, the claimant has the express permission of the Crown as owner of the seabed to carry out the surveys; thirdly, the claimant has a licence to carry out the geotechnical survey and an exemption to allow it to carry out the geophysical survey, and; fourthly, the claimant

has made clear to the other users of the sea what its survey requirements are, both geographically and temporally.

20. On that basis Mr Turney submits that the claimant has a strong case for the final declaratory relief sought and, therefore, for the interim relief to prevent the interference with the claimant's rights. He relies upon the principles set out in the case of *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 setting out the four issues to be considered: firstly, whether there is a serious issue to be tried; secondly, if so, whether damages would be an adequate remedy for the claimant and whether the defendants would be able to pay them; thirdly if not, whether damages would be an adequate remedy for the defendants, whether the claimant would be able to pay them; and finally where the balance of convenience lies.

21. For the purposes of this hearing, Mr Andrew Roper has submitted a witness statement and a skeleton argument on the basis that he, a former fisherman, has experience of assisting and representing fishermen in negotiating mitigation measures and compensation agreements when their commercial fishing operations are disrupted by developers of offshore infrastructure. On this occasion, he represents two local fishermen, a Mr David Little and a Mr Glen Weston, and also two larger fishing and fish processing enterprises in the Norfolk area, John Lake Shellfish Limited and Lynn Shellfish Limited.

22. He submits that the appropriate test is not the *American Cyanamid* test but rather the test laid down in *Lansing Linde Limited v Kerr* [1991] 1 AER 418. He submits that on the basis of the *Lansing Linde* case the application for injunctive relief should only be granted if the court is satisfied that the applicant's substantive claim is likely to succeed if a final hearing were to be held on its merits. In this regard, Mr Turney has accepted the force of Mr Roper's point and draws to the court's attention what was said by Lord Justice Staughton at page 423J to 424B of the judgment as follows:

> "If it will not be possible to hold a trial before the period for which the plaintiff claims to be entitled to an injunction has expired, or substantially expired, it seems to me that justice requires some consideration whether the plaintiff would be likely to succeed at a trial. In those circumstances, it is not enough to decide merely that there is a serious issue to be tried. The assertion of such an issue should not operate as a 'lettre de cachet', by which the defendant is prevented from doing that which, as it later turns out, he has a perfect right to do, for the whole or substantially the whole of the period in question. On a wider view of the balance of convenience it may still be right to impose such a restraint, but not unless there has been some assessment of the plaintiff's prospects of success. I would emphasise 'some assessment', because the courts constantly seek to discourage prolonged interlocutory battles on affidavit evidence. I do not doubt that Lord Diplock, in enunciating the American Cyanamid doctrine, had in mind what its effects would be in that respect. Where an assessment of the prospects of success is required, it is for the judge to control its extent."

23. Mr Roper submits that for an interim injunction to be granted there is a requirement for the conduct which it is sought to restrain to be unlawful. He submits that the activity of local fishermen is not unlawful at all but is the exercise of a right which has been exercised by local fishermen for many centuries. He submits that there is nothing in the consents granted to the applicant for the exploitation of the North Sea for wind farm activities which makes the activities of the local fishermen unlawful. He submits that the grant of the development consent order to the applicant has not conferred on the applicant rights which would allow it to obviate the public rights of fishery and navigation, relying on the judgment of Mr Justice Davis, as he then was, in *Isle of Anglesey County Council and Another v Welsh Ministers and Others* [2008] AER 60 where at page 96 the learned judge said:

> "The authorities cited to me in argument in my view established the proposition that where a public fishery in tidal waters exists no person including the Crown has the right to exclude the public or substantially to interfere with fishery (safeguarding navigation being one exception)."

The learned judge went on to say that the Crown's beneficial ownership of the foreshore or seabed is subject to the public's right to fish, as recognised by Mr Justice Parker in *Lord Fitzhardinge v Purcell* [1908] 2 Ch 139 at page 166.

24. The position, therefore, on the basis of Mr Roper's intervention, is that there are two competing lawful rights in play in this case. One, the rights of the applicant to exploit the licenses and

permissions which it has obtained in order to construct the wind farms for the general benefit of the population as well as their own commercial benefit, and the rights of the local fishermen on the other hand to fish these waters and to ply their centuries-old trade, in particular in relation to the abundant shellfish which can be fished in these waters.

25. Mr Turney argues that by analogy one can rely upon the law of nuisance and he draws to the court's attention the discussion of public nuisance by obstruction of the highway and the passage at paragraph 19-181 of Clerk & Lindsell which states:

> "It is a public nuisance to obstruct or hinder the free passage of the public along the highway by land or water. A private individual has a right of action in respect of a public nuisance if he can prove that he has sustained particular damage other than and beyond the general inconvenience and injury suffered by the public, and that the particular damage which he has sustained is direct and substantial."

26. Mr Turney has also drawn to the court's attention paragraph 19-68 of Clerk & Lindsell, a passage dealing with the rights of owners of incorporeal hereditaments which states:

> "The owner of an easement, profit-à-prendre or other incorporeal right can sue for the disturbance of its right. The interference will be actionable if it is substantial and it will not be substantial if it does not interfere with the reasonable use of the right of way or similar right in question. If therefore the owner of an exclusive right of fishing in a particular place finds that the fish are being driven away or destroyed by the fact of a person in fouling or disturbing the water, he may bring an action against the wrongdoer because the object of such actions is essentially to vindicate a right of property claimed by the owner, it is only necessary for him to prove that his right has been infringed and it is not necessary to prove actual damage."

27. By analogy Mr Turney argues that the granting of the rights and permissions to Ørsted put them in the equivalent position of owners of easements, profits-à-prendre and other incorporeal rights, giving them a precedent right over the common law rights of the local fishermen.

28. He further relies upon the decision of the Court of Appeal in *Canada Goose UK Retail Limited v Persons Unknown* [2020] 1 WLR 2802 which concerned an application by the claimant, a retail

clothing company with a store in London, seeking injunctions against persons demonstrating outside the store on the grounds that their actions amounted to harassment, trespass and/or nuisance. The application was in fact refused by Mr Justice Nicklin, and that refusal was upheld by the Court of Appeal, but in the course of the judgment in the Court of Appeal it was pointed out that an interim injunction could be granted in appropriate circumstances against persons unknown who wished to join an ongoing protest and it was in principle open to the court in appropriate circumstances to limit even lawful activity where there was no other proportionate means of protecting the claimant's rights. Thus at paragraph 78 of the judgment the Master of the Rolls said this:

> "We consider that, since an interim injunction can be granted in appropriate circumstances against 'persons unknown' who are Newcomers and wish to join an ongoing protest, it is in principle open to the court in appropriate circumstances to limit even lawful activity. We have had the benefit of submissions from Ms Wilkinson on this issue. She submits that a potential gloss to the fourth *Ineos* requirement might be that the court may prohibit lawful conduct where there is no other proportionate means of protecting the claimant's rights. We agree with that submission, and hold that the fourth *Ineos* requirement should be qualified in that way."

29. In my judgment, where there are competing rights, in this case statutory rights and common law rights, it is open to the court in any particular case to decide which of the competing rights should take precedence on the basis of an examination of all the circumstances, including the benefit to the individual parties, the benefit to the public in general, the extent to which there is economic imbalance in preferring the right of one party to the right of another, and the extent to which the exercise of a particular right is limited by geographical and temporal considerations. On that basis, in my judgment, the rights of the applicant in this case clearly outweigh and take precedence over the rights of the fishermen. The right which Ørsted have established to carry out these surveys is within a limited geographical area of the North Sea and does not prevent the fishermen from fishing other areas of the North Sea and thus earning their living. The right they seek to exploit for the purposes of this application is limited temporally in the sense that it is only from 22 April until the 17th June. Furthermore, I take into account the fact that Ørsted have agreed to offer compensation to

those fishermen who can establish, on the basis of evidence, loss as a result of being unable to fish the relevant area in the time concerned.

30. On all those bases, in my judgment, this is a case where the rights of the applicant take precedence over the rights of the fishermen with the result that, at a trial, I take the view that those rights would be held to prevail. That is, of course, on the basis of Mr Roper's submissions, a significant finding for the purposes of deciding whether to grant an interim injunction in a case where it is likely that by the time this matter came to trial the period in question would have expired as explained by Lord Justice Staughton in the *Lansing Linde* case.

31. Considering then the other issues raised by the *American Cyanamid* case, whilst there is no prospect that the fishermen would be able to pay the damages which would be sustained by the applicant were it to be found that they had a right to carry out the surveys and exploit this area, those damages potentially amounting to many hundreds of thousands of pounds, the converse is not the case. Ørsted is a significant organisation, as has been explained in the witness statement of Mr Michael Fenn. He has produced the financial documents of the applicant which shows that it is an organisation with revenue of about £303 million and an operating profit of about £114 million and is in any event a wholly owned subsidiary of a Danish company, Ørsted A/S, which has worldwide revenue of about £6 billion and a worldwide operating profit of about £1.2 billion. As Mr Fenn points out, this demonstrates that any order made pursuant to the cross-undertaking in damages will be capable of being met.

32. In those circumstances, the final question is where the balance of convenience lies, and I have no doubt that the balance of convenience lies in the making of the order sought as amended in the course of submissions by Mr Turney so as to add named organisations as defendants and so as to remove the mandatory parts of the proposed order which would not have been capable of being served on those whom they were intended to address, given that the owners of the three remaining unidentified fishing gear markers could not be identified.

33. The balance of convenience clearly lies in favour of the applicant to enable it to carry out these surveys in order to promote and forward its objectives in exploiting the licences and permissions it has obtained at potentially minimal inconvenience to those fishermen who would otherwise have fished this particular area and in any event those fishermen will be able to seek compensation pursuant to the undertaking in damages should they wish. Furthermore, the applicant has agreed to compensate them on the basis of the FLOWW system, which has been agreed within the industry.
34. For those reasons, I grant the application and I will make an order in the terms to be submitted to me by the applicants later today.