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Final injunctions against Persons Unknown 'newcomers': The barking dog bites the Canadian Goose

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The central question



London Borough of Barking and Dagenham and Others v Persons Unknown, London Gypsies and Travellers intervening [2022] EWCA Civ 13

The central question

- The central question raised by the appeals from Nicklin J in the “Cohort Claims”– [2021] EWHC 1201 (QB) is whether he was right to hold that the court cannot grant final injunctions that prevent persons, who are both unknown and unidentified at the date of the final order (*i.e.* “newcomers”), from occupying and trespassing on local authority land. [2]
- CoA (Sir Geoffrey Vos, MR, Lewison and Elisabeth Laing LLJ) holds that the judge was wrong so to hold. The court *may* grant such orders. It does not follow the CoA in *Canada Goose UK Retail Ltd -v-Persons Unknown* [2020] 1 WLR 2802

The wider dimension



Although the injunctions in issue were ones principally directed towards the actions of Romani Gypsies, Irish Travellers and New Travellers on local authority-owned land (described by Nicklin J as “Traveller Claims”) the logic of Nicklin J’s judgment applied to all claims where final injunctions were sought against newcomers (and effectively precluded them save in the most exceptional cases) including:

- Car Cruising Injunctions
- Injunctions to restrain raves and other nuisances on land
- Injunctions to restrain unlawful conduct at protests (private and public sector)
- Private landowner’s injunctions to restrain threatened trespass
- ‘Urban Exploring’ Injunctions
- Other Injunctions to restrain apprehended breaches of planning control

A note on terminology



“6. This area of law and practice has been bedevilled by the use of Latin tags. That usage is particularly inappropriate in an area where it is important that members of the public can understand the courts’ decisions. I have tried to exclude Latin from this judgment, and would urge other courts to use plain language in its place.” Per Sir Geoffrey Vos in *Barking*

Accordingly:

- ~~Quia Timet Injunction~~ – Precautionary Injunction
- ~~Injunction Contra Mundum~~ – Injunctions against the World
- ~~Party with Drinks and Dancing~~ – Work Meeting

How did we get here?



The 'Old' Approach to 'Persons Unknown' Injunctions

- Describing the defendants simply as 'Persons Unknown'
- Orders for alternative service under CPR 6.15 by erecting notices on the land / website
- Interim injunctions often granted 'without notice'
- No attendance by any 'defendants' at the final hearing
- Order for alternative service of the final injunction by erecting notices on the land / website
- Assumption that *everyone* is bound by the final injunction

The developing judicial landscape



- *Cameron -v-Liverpool Victoria Insurance Co Ltd* [2019] 1 WLR 1471
- *Ineos Upstream Ltd -v- Persons Unknown* [2019] 4 WLR 100
- *Bromley LBC -v- Persons Unknown* [2020] PTSR 1043
- *Cuadrilla Bowland Ltd -v- Persons Unknown* [2020] 4 WLR 29
- *Canada Goose UK Retail Ltd -v-Persons Unknown* [2020] 1 WLR 2802
- *LB Barking & Dagenham v Persons Unknown* [2021] EWHC 1201 (QB)

‘Persons Unknown’ - the description requirement



- Where the ‘Person Unknown’ is known by sight (photographs?) or by other description (current occupier of land / owner of a particular vehicle) there is no difficulty in so describing them.
- What of the more usual case where the ‘Person Unknown’ is not so known and cannot be identified, because they have not yet come to the land in question but are one of a class of potential person who the claimant fears may do so in the future?
- It is permissible to describe ‘Persons Unknown’ defendants by reference *to future unlawful acts* which the claimant considers they will, or are likely to, commit. There is no conceptual impossibility in suing persons by reference to future unlawful conduct: *Ineos* [30].
- In the Claim Form ‘Persons Unknown’ must be described “*by reference to... conduct which is alleged to be unlawful: Canada Goose [82(2)]. For example ‘Persons’ unknown entering or remaining without the consent of the claimant(s) on land and buildings shown shaded red on the plans annexed to the amended claim form.*”
- You cannot:
 - simply refer to defendants in the Claim Forms as ‘Persons Unknown’ or ‘Persons Unknown occupying land’. Such a description would embrace every householder in England & Wales.
 - describe the ‘Persons Unknown’ by including conduct that is, or may be, lawful. The description must be very carefully tailored: *Ineos; Canada Goose*.

Service of the claim form



- The court generally acts *in personam*. An action is completely constituted when the claim form is issued, but it is not until the claim form is served that the defendant becomes subject to the court's jurisdiction: *Barton v Wright Hassall LLP* [2018] 1 WLR 1119 [8], per Lord Sumption.
- *Cameron*
 - “It is a fundamental principle of justice that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard” [17], per Lord Sumption
 - Subject to any statutory provision to the contrary, it is an essential requirement for any form of alternative service under CPR 6.15 that the mode of service should be such as can reasonably be expected to bring the proceedings to the attention of the defendant
 - [NOTE: this “essential requirement” is later relied on by Nicklin J in *Barking* in doubting whether it is ever possible to devise provisions for alternative service in Traveller Claims]
 - It is difficult to envisage the circumstances in which it would be right to dispense with service of the claim form under CPR 6.16 in circumstances where there is no reason to believe that the defendant is aware of the proceedings

How does a 'Person Unknown' become party to proceedings?



South Cambridgeshire DC v Gammell

On 17.09.04 court grants an interim injunction against “Persons unknown ... causing or permitting ... caravans, mobile homes ... to be stationed [on land known as plots 1-11, Victoria View]”

- Order made for alternative service of the claim form and the interim injunction
- On 20.04.05 Mrs Gammell moves on to plot 10 with her caravan. The terms of the interim injunction are communicated to her on 21.05.05 and so, from that point, she is in breach of the interim injunction
- She also becomes party to the proceedings, by virtue of (a) the order for alternative service of the claim form having been made **and** (b) her commission of the acts which the interim injunction prevented (the “Gammell Principle”)

How does a 'Person Unknown' become party to proceedings?



Note that:

- A 'Person Unknown' does not become a party to the proceedings simply because an order for alternative service of the claim form has been made. They must, in addition, have committed acts which brings them within the category of defendant in the claim form (e.g. have actually trespassed upon land in breach of an interim injunction where the "Persons Unknown" have been described by reference to coming onto land without licence or consent)
- Even if a "Person Unknown" has a copy of the claim form and the interim injunction *in their hands* this does not render them a party to the proceedings. If they observe the terms of the interim injunction (i.e. do not satisfy the Description Requirement, they remain a *non-party*)

Canada Goose



- A final injunction cannot be granted in a protestor case against ‘persons unknown’ who are not parties at the date of the final order, that is to say **newcomers** who have not by that time committed the prohibited acts and so do not fall within the description of the ‘persons unknown’ and who have not been served with the claim form [89]
- There are some very limited circumstances, such as in *Venables v News Group Newspapers Ltd* [2001] Fam 430, in which a final injunction may be granted *contra mundum* (against the whole world) (ibid)
- Protestor actions do not fall within that exceptional category. The usual principle applies: a final injunction operates only between the parties to the proceedings: *Attorney General v Times Newspapers Ltd (No 3)* [1992] 1 AC 191, 224 (ibid)
- That is consistent with the fundamental principle in *Cameron* that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard (ibid)

The claims before Nicklin J in *Barking*



- Concerns injunctions, both interim and final, granted in 38 different sets of proceedings to local authorities
- Generally prohibit unauthorised occupation or use of land and are granted, generally, against 'Persons Unknown'. Some injunctions also restrain the deposit of waste or fly-tipping
- Claims rely on:
 - Trespass
 - Public and Private Nuisance
 - Section 187B TCPA 1990 – apprehended breaches of planning control
 - Section 222 LGA 1972 – threatened breaches of criminal law (s.222 simply provides standing to sue; it is not of itself a cause of action)
 - Section 130 HA 1980 – threatened obstruction of highway
 - Section 1 ASBCPA 2014 – anti-social behaviour
- Gathered together by Nicklin J as the 'Cohort Claims' and case managed
- Many final injunctions are set-aside and proceedings dismissed because no orders under CPR 6.15 have been made and, accordingly, the proceedings never served within the required 4 months: CPR 7.5 [14]
- Some remain, both final and interim, where orders under CPR 6.15 have been made (although deficient in some cases)

Determination by Nicklin J of an issue of principle



“Whether the Court has jurisdiction, and/or whether it is correct in principle, generally or in any relevant category of claim, to grant a claimant local authority final injunctive relief either against ‘Persons Unknown’ who are not, by the date of the hearing of the application for a final injunction, persons whom the law regards as parties to the proceedings, and/or on a contra mundum basis?”

Nicklin J holds:

- The court has power to grant an injunction that binds non-parties to proceedings pursuant to section 37 Senior Courts Act 1981, which power extends, exceptionally, to making *contra mundum* injunction orders [161]
- “Traveller Injunctions” [4] are subject to the principle that a final injunction only binds the parties to the action at the date of the order [190]. These are the “Trial Defendants” [163]
- Any other “Persons Unknown” - “newcomers” - are “not parties to the litigation” at that date and cannot be bound [149]
- A “newcomer” does not become a party to the proceedings simply by breaching the terms of a final injunction. That injunction simply does not apply to him
- Traveller Injunctions do not fall into the exceptional category where the court is compelled to act by way of a *contra mundum* injunction [§233]

Consequences for the Cohort Claims



- Final injunctions: the final injunction binds only those ‘Persons Unknown’ who the claimant can identify (whether by name or photograph etc) and demonstrate to have become a defendant to the proceedings *prior* to the grant of the final injunction (i.e. by having committed acts which resulted in their becoming defendants - c.f. the Description Requirement).

The final injunction does not bind anyone else

- Interim injunctions: if they want to maintain their claims they will have to identify the ‘Persons Unknown’ who have *become* defendants (c.f. the Description Requirement) and be case managed swiftly on to final hearings of the claims.

The trial will then be against those individuals only

The Court of Appeal's judgment in *Barking* (1)



- 1. The Court has the power under section 37 Senior Courts Act 1981 to grant an injunction that binds non-parties to proceedings [71]
- 2. Section 37 is a broad provision. The court should not cut down its breadth by imposing limitations which may tie a future court's hands in types of case that cannot now be predicted [72]
- 3. The judge was wrong to regard a final injunction as a remedy flowing from the final determination of rights between a claimants and the trial defendants and wrong in saying that there was a “fundamental difference” between interim and final injunctions [69, 74, 77]
- 4. There is no real distinction between interim and final, particularly in the context of those granted against persons unknown [89, 93]
- 5. *Gammell* decided, and *Ineos* accepted, that injunctions, whether interim or final, may validly be granted against newcomers [99]

The Court of Appeal's judgment in *Barking* (2)



- 6. The effect of *Gammell* is that a newcomer who knowingly violates the terms of an injunction – whether interim or final - automatically becomes a party by their acts of violation [30-31]
- 7. *Canada Goose* is inconsistent with *Gammell* and *Ineos*. Accordingly, under the doctrine of precedent the Court is entitled to follow *Gammell* and not *Canada Goose* [99-100]
- 8. The Judge was wrong to follow *Canada Goose* and misunderstood *Cameron*. He should have applied *Gammell*, *Ineos*, and *Bromley*
- 9. Such final injunctions may also be appropriate in other cases (including “some protester cases”), but it would be inappropriate to lay down further limitations [120]
- 10. Although such cases are certainly exceptional, that does not mean that other categories may not in future be shown to be proportionate and justified. Urban exploring injunctions are an example of a novel situation in which such relief was shown to be required [120]
- 11. Section 187B TCPA 1990 imposes the same procedural limitations on applications for injunctions of the type raised by the claims as does section 37 SCA 1981 [117]

Consequences – Interim Precautionary Injunctions (1)



- The CoA in *Barking* noted the *Canada Goose* guidelines for interim injunctive relief against ‘Persons Unknown’
- It did not revisit them in detail [56, 102, 103]. Accordingly, they remain good law, save insofar as it is necessary to qualify them to comply with *Barking*. Accordingly:
 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
 - 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
 - **Note that in *Barking* it is said (at [108]) that “A normal procedural approach should apply to the progress of the Part 8 claims, bearing in mind the importance of serving the proceedings on those affected and giving notice of them, so far as possible, to newcomers”. (emphasis added)**
 - In principle, such persons include both anonymous defendants who are identifiable at the time the proceedings commence but whose names are unknown and also people who in the future will join the protest and fall within the description of the ‘Persons Unknown’

Consequences – Interim Precautionary Injunctions (2)



- 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 preventive injunctive relief
- 4. 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

Consequences – Interim Precautionary Injunctions (3)



- 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 be described in terms of a legal cause of action, such as trespass or harassment or nuisance
 - It is better practice to formulate the injunction without reference to the wrongdoer's intention if the prohibited tortious act can be described in ordinary language without doing so
- 7. The interim injunction should have clear geographical limits. It must be time limited because it is an interim and not a final injunction

Note that in *Barking* it is said there is “no rule” that an interim injunction can only be granted for any particular period of time [108])

Consequences – other cases



- Car Cruising Injunctions:- should be available (such a case being described by Bean LJ as “as a classic case for the grant of an injunction” in *Birmingham CC v Sharif* [2021] 1 WLR 685 at [42])
- Injunctions to restrain raves and other nuisances on land: should be available, depending on the strength of the evidence, and so long as care is taken only to focus on unlawful activity
- Injunctions to restrain unlawful conduct at protests: remain more problematic because of Arts 10 and 11 ECHR, but note CoA in *Barking* at [120] and *Ineos / Cuadrilla*
- Private landowner’s injunctions to restrain threatened trespass/‘Urban Exploring’ Injunctions: in principle are available
- Injunctions to restrain anti-social behaviour under section 1 Anti-Social Behaviour, Crime and Policing Act 2014: not available. Section 1 envisages the grant of an injunction to restrain anti-social behaviour by an identified individual, not ‘Persons Unknown’: *Barking* (at 1st instance) [67]. Not appealed to the CoA

Consequences – Final Traveller Injunctions(1)



In *Bromley* the CoA gave wider guidance, obiter, as to how local authorities should deal with the “plainly pressing issue” which had caused them to seek Traveller Injunctions [102-108]. According to Coulson LJ:

- 1. There was an inescapable tension between the “Article 8 rights of the Gypsy and Traveller community” and the common law of trespass. The obvious solution was the provision of more designated transit sites
- 2. Local authorities must regularly engage with the travelling communities; a process of dialogue and communication was recommended
- 3. If a precautionary injunction was thought to be the only way forward, then engagement was still of the utmost importance; welfare assessments should be carried out (particularly in relation to children)

Consequences – Final Traveller Injunctions (2)



- 4. Particular considerations included that:
 - (a) injunctions against persons unknown were exceptional measures because they tended to avoid the protections of adversarial litigation and Art.6 ECHR
 - (b) there should be respect for the travelling communities' culture, traditions and practices, in so far as those factors were capable of being realised in accordance with the rule of law
 - (c) the clean hands doctrine might require local authorities to demonstrate that they had complied with their general obligations to provide sufficient accommodation and transit sites
 - (d) borough-wide injunctions were inherently problematic
 - (e) it was sensible to limit the injunction to one year with subsequent review.
 - (f) credible evidence of criminal conduct or risks to health and safety were important to obtain a wide injunction.

Consequences – Final Traveller Injunctions (3)



- 5. The cases made plain that “the gipsy and traveller community have an enshrined freedom not to stay in one place but to move from one place to another”: “[a]n injunction which prevents them from stopping at all in a defined part of the UK comprised a potential breach of both the Convention and the Equality Act 2010, and in future should only be sought when, having taken all the steps noted above, a local authority reaches the considered view that there is no other solution to the particular problems that have arisen or are imminently likely to arise”

Consequences – Final Traveller Injunctions (4)



In *Barking*, the CoA made the following comments on the *Bromley* guidance [104-108]

- 1. It doubted whether point 1 was right. The scheme of the HRA 1998 is “individualised”
 - “it is when individual newcomers make themselves parties to an unauthorised encampment injunction, they have the opportunity to apply to the court to set aside the injunction praying in aid their private and family life right to pursue a nomadic lifestyle. Of course, the court must consider that putative right when it considers granting either an interim or a final injunction against persons unknown, but it is not the only consideration. Moreover, it can only be considered, at that stage, in an abstract way, without the factual context of a particular person’s article 8 rights. The landowner, by contrast, has specific Convention rights under article 1 protocol 1 to the peaceful enjoyment of particular possessions. The only point at which a court can test whether an order interferes with a particular person’s private and family life, the extent of that interference, and whether the order is proportionate, is when that person comes to court to resist the making of an order or to challenge the validity of an order that has already been made.” [105]

Consequences – Final Traveller Injunctions (5)



- 2. It doubted whether point 5 was right.
 - “Each member of those communities, and each member of any community, has such a freedom in our democratic society, but the communities themselves do not have Convention rights as I have explained. Individuals’ qualified Convention rights must be respected, but the right to that respect will be balanced, in short, against the public interest, when the court considers their challenge to the validity of an unauthorised encampment injunction binding on persons unknown. The court will also take into account any other relevant legal considerations, such as the duties imposed by the Equality Act 2010.” [106]
- 3. It did not doubt points 2, 3 and 4.(b) [107]
- 4. It agreed with point 4.(e); persons unknown injunctions against unauthorised encampments should be limited in time “perhaps to one year at a time before a review” [107]. The provision of a review is “good practice” [108]

Service – alternative service



- Remains a critical part of process
- Court has shown increasing flexibility as to potential alternative modes of service
- Consider *cumulative* approach to alternative service
- Site notices, last known address, text message, email, agent, WhatsApp (even under CPR 6.15) (other services are available!)

Planning injunctions – s187B (1)



- See CA central reliance on *Gammell* principles and their correctness
- Position as before largely intact
- Importance of messages outlined above:
 - Correct identification of parties
 - Including PU (by appropriately restrictive description)

Planning injunctions – s187B (2)



- Final injunctions can bind “newcomers”
- Consider what, applying *Gammell*, will happen automatically, and what will not
- Will be need to ensure injunction orders are
 - Suitably worded; and
 - Provide adequate mechanisms to protect “newcomers”

Planning injunctions – s187B (3)



- Some miscellaneous matters / recent developments
- Mandatory orders, when appropriate and potential terms of
- Bench warrants, *A.G. v. Branch* [2021] EWHC 1735 (Admin)
- Committal, *Basildon v. Anderson* [2021] EWCA Civ 363



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Any Questions?

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