



Protest Injunctions and Contempt of Court

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GARDEN COURT CHAMBERS



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Torts

The torts used as the basis for contemporary injunctions are:

- Trespass
- Private Nuisance
- Public Nuisance
- Harassment under the Prevention of Harassment Act 1997
- Trade Union and Labour Relations (Consolidation) Act 1992 s241.
- Economic Torts



Trespass

Mayor of London v Hall [2011] 1 WLR 504

City of London v Samede [2012] AllER 1039



Private Nuisance

- Tort of private nuisance requires that any interfere with private rights of entry/access to land be both substantial and unreasonable: *Bamford v Turnely* (122 E.R. 25 (1860) 3B & S 62.
- Any right of entry /access which is directly on to the public highway is be treated under the tort of public nuisance and requires a higher threshold of obstruction than mere interference and which also has to be without lawful excuse and/or unreasonable: *Hiscox Syndicates Ltd v The Pinnacle Ltd* [2008] EWHC 1386 (QB)



Public Nuisance

- Public nuisance reflects the criminal offence in s137 of the High Ways Act 1980 and is subject to lawful excuse and/or unreasonable requirements: *Nagy v Weston* [1965] 1 ALL ER 78.
- Even if an obstruction is caused it may still be disproportionate on the facts to prohibit and penalise such conduct by threat of imprisonment/fine through contempt proceedings because the conduct is in the context of the exercise of fundamental rights to freedom of speech and assembly which public authorities have a duty to facilitate:
 - *Ineos Upstream Ltd v Persons Unknown* [2019] EWCA Civ 515 at [39-40].
 - *DPP v Ziegler* [2019] EWHC 71 (Admin) at [69], [80] and [94].
 - Fact sensitive issue which a High Court Judge in injunctions proceedings is not best placed to make: *R (Laporte) v Chief Constable of Gloucestershire* [2006] UKHL 55; [2007] 2 AC 105 at [34-37] and [46].



Public Nuisance (Cont.)

- Canada Goose UK Retail Limited and Others v Persons Unknown and Others [2020] EWCA Civ 303 at [93] upholding the judgment of Nicklin J [2019] EWHC 2459 (QB) at [101-04].

“difficulties and limits of trying to fashion civil injunctions into quasi public order restrictions” and that “police officers making decisions on an assessment on the ground is immeasurably more likely to strike the proper balance between demonstrators rights of freedom of expression/assembly and the legitimate rights of others, than a Court attempting to frame a civil injunction prospectively against unknown protestors”.

“invoking the civil jurisdiction as a means of permanently controlling ongoing public demonstrations and the use of private litigation to prevent what the C sees as public disorder is not appropriate”. “Private law remedies are not well suited to the task”.

- Slow Walking as a form of obstruction of the high way: Ineos Upstream at [40] *“too wide and insufficiently defined”.*



Harassment

- S1 prohibits harassment

A person must not pursue a course of conduct —

(a) which involves harassment of two or more persons, and

(b) which he knows or ought to know involves harassment of those persons, and

(c) by which he intends to persuade any person (whether or not one of those mentioned above)—

(i) not to do something that he is entitled or required to do, or

(ii) to do something that he is not under any obligation to do.



Harassment (Cont.)

- s 1(3)(a-c) defences
 - (a) that it was pursued for the purpose of preventing or detecting crime,
 - (b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or
 - (c) that in the particular circumstances the pursuit of the course of conduct was reasonable
- s 2 creates a criminal offence;
- s 3 provides for civil remedy of an injunction;
- s 3(6) breach of injunction can constitute an arrestable offence:

Heathrow Airport Ltd v Garmen and Others [2007] EWHC 1957(QB) (no order made)

Ineos Upstream Ltd and Others v Person Unknown and Others [2017] EWHC 2945 (no order made)



s241 of the TRADE UNION and LABOUR RELATIONS (Consolidation) ACT 1992

Intimidation or annoyance by violence or otherwise:

- Intimidation or annoyance by violence or otherwise. Distinction between “*dissuasion rather than one of compulsion*”: *DPP v Fiddler* [1992] 1 WLR 91;
- Conduct must independently of s. 241 constitute either a criminal offence or a tort .
Thomas and Others v National Union of Mineworkers (South Wales Area) and Others [1985 T. No. 60] (secondary picketing);
- Reasonable justification: *J. Lyons & Sons v. Wilkins* [1899] 1 Ch. 255, 267;
- *UKOG v Persons Unknown* [2018] EWHC 2252(Ch) – *no order made because too uncertain.*



Economic Torts

- Conspiracy to Injure: Combining Together

JSC BTA v Alyazov (No 14) (SC) [2018] 2 WLR 1125

Ineos Upstream at [40]

- Proof of damage for pure economic loss. Claimants must be able to prove that the loss to those companies was intended, as opposed to being just a consequence of campaigning/protesting against them.

OBG v Allan [2007] UKHL 21, [2008] AC 1

JSC BTA v Ablyazov (No. 14) [2018] 2 WLR 1125, at 1132 H- 1133A and 1135B.

Ineos Upstream at [40]

Caudrilla v Persons Unknown [2020] EWCA Civ 9, [2020] 4 WLR 29 at [81]



Economic Inference

- Withdrawn in *UKOG v Persons Unknown* [2018] EWHC 2252(Ch)



Defending Injunctions Against Protestors: Some Procedural Points

Stephen Simblet QC, Garden Court Chambers

14 July 2020



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The Claimants want the broadest injunctions, with the most uncertainty for those opposed to it

How do they try to achieve this objective?

- Proceed in novel causes of action- Stephanie Harrison QC will speak about it
- Include claims in the tort of harassment, since then there will be a power of arrest
- Try not to have any opposition
- Try not to name anyone, or any named individuals as defendants.



No “defendants”: the use of “persons unknown” injunctions

Companies began bringing claims by simply setting out their allegations in evidence and not serving anyone affected. The position in INEOS at first instance was that the judge permitted the claimants to obtain:

- An order that affected potentially everyone;
- On evidence alone, without any formulated pleaded case;
- While serving no- one; AND further
- Obtaining permission from the court to keep the initial hearing secret!



Companies relying on various commercial torts to deter protest: BUT

- The right to protest engages rights under the ECHR, including Article 10 and Article 11 ECHR.
- There is also a common law right to protest, in the sense discussed in *Boyd v INEOS*.
- Injunctions are discretionary remedies.
- Since injunctions such as this affect protest, the court when applying the balance of convenience test has to consider whether the claimants are more likely than not to get their order at trial: see section 12 (3) HRA 1998.



If nobody turns up, the order stays in place

- See also section 12 (2) HRA: ought to be compelling reasons.
- The court was prepared to grant interim remedies on that basis, and essentially to leave it to anyone who wished to oppose this course to apply to court to be joined to the proceedings.
- When people did turn up, the order made was substantially different: *INEOS v Persons Unknown* (at **first instance** [2017] EWHC 2945): included getting rid of claim in harassment which knocked out the power of arrest.



If you don't turn up, that might worry the court more...

See judgment of Nicklin J in *Canada Goose v Persons Unknown* [2019] EWHC 2459 (this is the first instance decision- see also the appeal decision): especially at [149-151].

[151] “...the grant of quia timet interim injunctions against "persons unknown" is the exercise of an emergency jurisdiction which is provisional and strictly conditional:

- i) It is provisional because the party seeking the injunction will be expected to take all practical steps to identify the alleged wrongdoers so that they can have an opportunity, if they wish, to defend themselves. The continuation of an injunction against "persons unknown" can only be justified for as long as it remains practically impossible to identify the alleged wrongdoers.
- ii) It is conditional upon the Court being satisfied that there is a sufficiently real and imminent risk of a tort being committed to justify quia timet relief; that it is impossible to name the persons who are likely to commit the tort unless restrained; that it is possible to give effective notice of the injunction; and that the terms of the injunction correspond to the threatened tort and are not so wide that they prohibit lawful conduct – see *INEOS* [29], [34].”



But if you do go, you can probably make effective arguments about the strength of the claim and seek to limit any relief granted

- See *Boyd v INEOS* [2019] EWCA Civ 515, especially at 39- 40 emphasising the fact-specific nature of many of the economic torts pursued, e.g. claims for damages for conspiracy to cause damage by unlawful means AND whether an injunction is necessary e.g. whether the quia timet test is made, and/ or fact- specific matters relating to the places and circumstances in which the protests are taking place.
- Also Nicklin J’s decision that a *final* injunction unavailable against “persons unknown” who have not been served upheld on appeal in *Canada Goose* [2020] EWCA Civ 303, especially para 89.
- Also , did Claimants satisfy the court of the requirements of section 12 (2) HRA?



If no proper pleadings, is harder for the claimant to make out their case

- Generally, it ought to be appropriate for a claimant to proceed using CPR Part 7, i.e. to proceed on the basis that allegations are disputed.
- If served with a “Part 8” claim, contest the appropriateness and say the facts are disputed.
- Argue that if no particulars of claim, claimant is not setting out the facts as required and therefore court should conclude that no proper case: CPR Part 3.4



This is all basic stuff: surely the court wants to know who is before it

- CPR Part 1: duties of the parties to assist the court, see CPR Part 1.3 and CPR Part 1.4.
- If the Claimants have not proceeded against named defendants, very difficult for them and for court to comply with this.
- CPR Part 2.3 interpretation, “defendant” means a person against whom a claim is made.’
- How can a party have a remedy if there is no one to whom it applies?



It is possible to become a defendant after the injunction is made, but only if you can be given proper notice of it

- Claims in trespass: can proceed against persons unknown by putting notices up.
- *Gammell v South Cambridgeshire* [2005] EWCA Civ 1429, cited and considered in *Boyd v INEOS*.
- The difference between a real, and an imaginary defendant.
- Legal personality: unincorporated associations, *EDO v Smash EDO* [2005] EWHC 837 (QB).



Litigate, don't capitulate- apply to strike out

CPR Part 3.4

- no reasonable grounds for bringing the claim AND/ OR
- statement of case is an abuse of process or is otherwise likely to obstruct the just disposal of the proceedings AND/ OR
- failure to comply with a rule, practice direction or court order.



“The same interest”

Duke of Bedford v Ellis [1901] AC 1

- Concerned a dispute about the management of Covent Garden market, where 5 claimants sued “*on behalf of themselves and all other growers of fruit, flowers, vegetables, roots or herbs*”.
- Duke of Bedford had the claim struck out, but claimants successfully appealed and claim proceeded. Case still good law for what is meant by “the same interest”.
- “the same interest” requires ALL of the below:
 - (a) a common interest;
 - (b) a common grievance;
 - (c) a remedy beneficial to all.



When might a representation order be made?

- Has to be all the claimants or defendants, not a sub-group, though see *Oxford University v Webb* [2006] EWHC 2490.
- Decision based on facts and pleadings, at the time the court is being asked to make the order. Authority for that is *Sinclair v Commissioners for HMRC* [2016] EWHC 2820. However, it is possible for membership of the class to change at different stages: see *Emerald Supplies v British Airways* [2010] EWCA Civ 1284, [2011] Ch 345.
- Whether to make such an order can be contested by the opponent in the case, as well as those who might wish not to be represented by that person.
- Cannot represent those who might, for instance, have a different defence, as there is then no common interest.



Order might be made

General exposition of the principles in *Millharbour Management v Weston Homes* [2011] EWHC 661, [2011] 3 All ER 1027 (see especially paragraph 22).

- Still a discretion: although it has substantive consequences, this is a case management tool.
- Court should not look at the likely result of substantive proceedings when deciding whether it is appropriate to make a 19.6 order.



Difference between judgment and enforcement

Representative proceedings particularly against defendants, may mean that a person is bound without knowing about the case or being heard.

- See *Huntingdon Life Sciences v Stop Huntingdon Animal Cruelty* [2007] EWHC 522 (QB) and *Oxford University v Webb* [2006] EWHC 2490.
- in *RWE Npower v Caroll and others* [2007] EWHC 947. The claimants sought an order under CPR 19.6 (4) permitting enforcement against people that had not been defendants. Teare J refused such prospective enforcement against people who had never been brought before the court as defendants.



COMMITTAL FOR CONTEMPT: Procedure, defences, funding & costs

Tim Baldwin, Garden Court Chambers

14 July 2020



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Where to start

- Procedure and how an application to commit starts
- Preparation in respect of defending any application
- Funding – the availability of legal aid to defend an application to commit
- Costs implication for losing or defeating an application to commit



Starting point

- The starting point is that a person (Respondent) has to be subject to a court order, namely an injunction, preventing them from doing an act or requiring them to do something.
- Respondent must be aware of the order. It is for the Applicant to enforce the order.
- There must a proven breach of the order beyond a reasonable doubt to result in a “penal” sanction – leading to the application to commit to prison, imprisonment is not the only sanction.
- Being found in contempt is not a criminal conviction but it can lead to be committed to prison to serve a sentence the terms of which are governed by the court.



Procedure for committal: common law where no power of arrest

- Part 81 of the Civil Procedure Rules and Practice Direction: Part II and Part III
 - Rule 81.1 – Scope; Rule 81.2 Saving for other powers; Rule 81.3 Interpretation
- Part II (the application)
 - Rule 81.4 Enforcement
 - Rule 81.5 Requirement of service
 - Rule 81.6 Method – personal service
 - Rule 81.8 Dispensation with personal service
 - Rule 81.9 Requirement for a penal notice
 - Rule 81.10 Process of making the application
 - PD 81



The hearing

- Part VIII
- Rule 81.28 The hearing
- Rule 81.29 Power to suspend the execution of a committal order
- Rule 81.30 Warrant of committal
- Rule 81.31 Discharge of a person in custody
- Rule 81.32 Discharge of a person in custody
- PD 81, 8.1 16.1
- Note PD 81, 10.2



Preparation

- Is there a defence to the grounds claimed?
- Is there a defect in process or procedure?
- Are you really a Respondent or subject to the terms of the injunction?
- Are there grounds to make an application to set aside or vary the terms of the injunction as well as defending the breach?
- Preparation of grounds of response
- Do you want to test the Applicant's evidence: Witness statements and witnesses
- Adjournment to a contested hearing with oral evidence and cross examination: Prepare case management directions, disclosure including possible sanctions for non disclosure, witness statements and trial preparation.
- "Yaxley-Lennon" case: Fair procedure
- Appeals r 52.3 committal and committal orders (no permission required)



Cases of interest

- *Cuadrilla v Persons unknown and others* [2020] EWCA Civ 9, [2020] 4 WLR 29
Protesters found in contempt and sentenced to imprisonment. Whether injunction sufficiently clear and certain to allow committal Whether suspended orders for imprisonment appropriate sanction
Standard of review [85]
 - Right to protest: Important under Art 11 and covered protests intended to cause disruption.
 - Any interference had to be lawful, necessary and proportionate.
 - Injunction and sanctions imposed were restrictions on rights and required justification
 - Clarity of injunction: Terms of injunction had to be clear and sufficiently precise to enable persons potentially affected to know what they must not do.
 - Did doubt *Boyd* that requirement of tort of conspiracy to show damage could only be incorporated into *quia timet* injunction by reference to defendant's intention
 - On sentence motivation – show greater clemency to non-violent act and no circumstances of actual damage
- *Sheffield CC v Brooke* [2018] EWHC 1540, [2019] QB 4.
In considering an application to commit following an intentional breach of an undertaking court held that in principle it was a defence to prohibited act to act in defence of another. Protestor genuinely believed another protester was in imminent danger of being assaulted by a security guard and it had been reasonable in all the circumstances to breach a condition of an undertaking to defend another. Necessity Defence?



Funding the Defence

- Legal aid is available under LASPO
- Problem it is criminal legal aid but appears not subject to means test
- Direction by County Court – Central London County Court example
- How to apply and guidance: Re F (Committal Appeal) [2018] EWHC 1310
- Interests of justice test
- Powers of the Higher Courts



Costs: win or lose?

- Is cost protection available under section 26 LASPO – short answer is no as not civil legal aid.
- What sort of order to seek, how would costs be assessed in civil proceedings– means to pay – assets.
- The “no order” as to costs?
- Defending costs application and addressing quantum
- What if committal is dismissed can you recover costs from applicant and can it be at interpartes rates? Can recover costs but if legally aided not at interpartes rates as not Civil Legal aid and strict adherence to indemnity principle.



Thank you

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