

UPDATE ON OBTAINING ORDERS AGAINST PERSONS UNKNOWN

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Introduction

- 1.1 I anticipate that there have been considerably more orders against “persons unknown” in the energy sector in 2022 than in any preceding year as a result of the substantial number of direct action protests in respect of energy related matters in the early Summer of this year¹. For companies affected, the need for urgent action to be taken in the light of the potentially serious and imminent consequences of these disruptive forms of protest has meant that such orders against “persons unknown” have become of particular importance.
- 1.2 Looking back, it is perhaps surprising that some 20 years ago, there had not been any case in which an injunction against “persons unknown” had been granted in this type of situation. Whilst a well-established procedure was laid down in the rules of court for the obtaining of a summary order for possession against “persons unknown” who had already taken possession of land², no such procedural rules existed in order to confer a remedy where “persons unknown” threatened to trespass on land but had not yet done so.

¹ See, for example, (1) *Esso Petroleum Co Limited (2) Exxon Mobil Chemical Limited v Persons Unknown* [2022] EWHC 1477, *Shell UK Oil Products Limited v Persons Unknown* [2022] EWHC 1215, *Valero Energy Limited & Others v Persons Unknown* [2022] EWHC 911 (QB).

² A procedure which is now to be found in Part 55 of the Civil Procedure Rules.

- 1.3 It was in the case of *Hampshire Waste Services Ltd v Persons Unknown*³ in 2003 that the Court recognised that an injunction could be granted in such circumstances where a protest trespass was anticipated but had not yet occurred.
- 1.4 In the 19 years since that decision, there has been an increasing use of the remedy of an injunction against “persons unknown” in all manner of direct action protest situations. During that time, the jurisprudence and procedure relating to these types of injunctions have developed considerably such that in 2022, when the remedy has come to be of such importance in the energy sector, it is a specialist type of application and one to which quite rigorous rules of law, evidence and procedure apply.
- 1.5 The overriding reason for this arises from the need to ensure that an injunctive order against an unidentified person - the breach of which could result in a contempt of court - will only be granted in circumstances where it is fair and fully justified. As Mr Justice Julian Knowles said in a judgment delivered just over a week ago⁴:

“Injunctions against defined groups of persons unknown are now commonplace, in particular in relation to large scale disruptive protests by groups of people, and the courts have fashioned a body of law, ... in order to address the issues which such injunctions can raise, and to make sure they operate fairly.”

Injunctions against “Persons Unknown” – The Relevant Principles

- 2.1 The starting point is to identify the causes of action which would apply to the threatened direct action. The usual causes of action are trespass and nuisance. An act of trespass occurs by entry upon land, without the appropriate permission or consent. An act of nuisance arises from “*an act or omission which is an interference with or disturbance or annoyance to a person in the exercise or enjoyment of...his ownership or occupation of land or some easement, profit or other right used or enjoyed in connection with the land*”.⁵ In relation to activities which impede

³ [2003] EWHC 1738 (Ch) [2004] Env LR 9.

⁴ *High Speed Two (HS2) Limited (2) The Secretary of State for Transport v (1) Persons Unknown (2) Monaghan and Others* [2022] EWHC 2360 at [230].

⁵ Clerk & Lindsell’s *Law of Torts* (23rd Ed) at [19-01].

access to a site from the public highway, this will constitute a nuisance, on the basis that the adjoining owner enjoys a specific private right of access on to the public highway.⁶

2.2 Ordinarily in relation to the grant of an interim injunction to restrain apprehended protest trespasses or nuisances, the next question to be considered would be the general test in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 which requires there to be at least a serious issue to be tried and then refers to the adequacy of damages for either party and the balance of convenience. In relation to the degree of risk in relation to the apprehended protest, the question would be whether there is an imminent and real risk of harm.⁷

2.3 However, where the protestors are “persons unknown” there are a number of special additional requirements which now apply and which combine to make these applications quite complex.

2.4 The first set of additional requirements arises from the European Convention on Human Rights, Article 10 of which relates to freedom of expression and Article 11 of which relates to freedom of peaceful assembly and freedom of association. Although it is now clear from a number of cases that these Articles would not normally give rise to a defence in relations to acts of trespass or nuisance on private land⁸, nevertheless, section 12 of the Human Rights Act 1998 does impose various extra requirements upon a claimant seeking an injunction in these types of cases. In summary, if the case is one in which the Court can be said to be considering whether to grant relief which, if granted, might affect the exercise of the Convention right to freedom of expression, then:

2.4.1 The effect of section 12(2) of the Act is that where a respondent is not present or represented, the relief is not to be granted unless the court is satisfied that *either* all practicable steps have been taken to notify the respondent *or* that there are compelling reasons why the respondent should not be notified. So, it must either be established on the evidence that all practicable steps have been taken to notify the unknown protestors

⁶ *Halsbury's Laws* Volume 55 at [261] and *Cuadrilla Bowland v Persons Unknown* [2020] 4 WLR 29.

⁷ *Boyd v Ineos Upstream* [2019] EWCA Civ 515 at [34(1)] (Court of Appeal) and the first instance decision of Morgan J [2017] EWHC 2945 (Ch) at [88].

⁸ *DPP v Cuciurean* [2022] EWHC 736 (Admin) and see also *Secretary of State for Transport v Persons Unknown* [2018] EWHC 1404 and *UK Oil & Gas v Persons Unknown* [2021] EWHC 599.

or it must be established on the evidence that there are compelling reasons why the unknown protestors should not be notified.

2.4.2 The effect of section 12(3) of the Act is that the relief is not to be granted unless the applicant satisfies the court that it is likely to establish at the trial that the activity should not be allowed. This imposes a much higher threshold than the ‘serious issue’ test under the *American Cyanamid* principles. The claimant must instead show that it is *likely* to win at trial.⁹ ‘Likely’ in this context means more likely than not.¹⁰

2.5 The second set of additional requirements arise from special principles which been developed over the course of the recent case law to acknowledge the special position of defendants in claims for pre-emptive relief where they are “persons unknown”.¹¹ In summary:

2.5.1 There must be a sufficiently real and imminent risk of a tort being committed to justify pre-emptive relief;

2.5.2 It must be impossible to name the persons who are likely to commit the tort unless restrained;

2.5.3 It must be possible to give effective notice of the injunction and for the method of such notice to be set out in the order;

2.5.4 The terms of the injunction must correspond with the threatened tort and not be so wide that they prohibit lawful conduct;

2.5.5 The terms of the injunction must be sufficiently clear and precise to enable the persons potentially affected to know what they must not do;

2.5.6 The injunction should have clear and geographical temporal limits.¹²

⁹ *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100 at [44]-[48].

¹⁰ *Cream Holdings Limited v Bannerjee* [2005] 1 AC 253, [22].

¹¹ *Boyd v Ineos Upstream* [2019] EWCA Civ 515, *Canada Goose Retail Ltd v Persons Unknown* [2020] EWCA Civ 303, *Barking & Dagenham LBC v Persons Unknown* EWCA Civ 13, *National Highways Limited v Persons Unknown and Others* [2021] EWHC 3081 (QB) (Lavender J) and *National Highways Limited v Persons Unknown and Others* [2022] EWHC 1105 (QB) (Bennathan J).

Injunctions against Persons Unknown – Practical Preparations

- 3.1 The rules set out above can be quite simply stated but the satisfaction of the tests laid down may not always be easy. The sometimes arduous reality of urgently preparing for an injunction against “persons unknown” means that it is sensible to consider what preparations might be undertaken well in advance of any direct action situation occurring.
- 3.2 As the usual cause of action to feature in such claims is that of trespass, for which it is essential to establish title to the land in question, it is critical to ensure that ownership of an affected site and its boundaries can be easily proven. A full title review is strongly to be recommended for sites which might one day be exposed to the risk of direct action. Undertaking a full title review when preparing for an urgent injunction is simply impracticable and may well mean that there is no practical prospect of even seeking an injunction in time for it to be of effective use. It is therefore very useful in advance to ensure that there is a pre-prepared pack of documents readily proving ownership of the land. This will also ensure that any ‘gaps’ in the title can be considered and any necessary applications for registration made well in advance. In relation to access roads which are neither highways nor owned by a claimant, it will be useful to ascertain what rights of way exist as these can also potentially be the subject of injunctive relief to restrain acts of nuisance.
- 3.3 There is a further reason why the identification of the sites in question is so important at an early stage. This is because the case law requires the defendants in injunction situations not simply to be described as “Persons Unknown” but instead requires that they be named as parties in the proceedings by reference to a specific description incorporating reference to the land upon which the trespass or nuisance is threatened. So, for example, a standard form of description of defendants will be something along the lines of *“Persons Unknown who in connection with the [description of the protest campaign] enter or remain, without the consent of the claimant, on land at [full address description] as shown on the attached plan”*.
- 3.4 A practical review could also be undertaken in advance in order to plan how the court documents will be properly served on the “persons unknown”. Given that a person whose identity is not known cannot be served directly, it is necessary to apply the procedures for

‘alternative methods of service’ which are set out in the court rules.¹³ The essential requirement for any form of alternative service is that the mode of service should be such as could reasonably be expected to bring the proceedings to the attention of the defendant.¹⁴ This is of fundamental importance because an unknown person is treated as served and made a party to proceedings when that person violates an order of which they have knowledge (which does not mean that they need to have been personally served)¹⁵. This leads to the practical consequence that cumulative forms of service may be directed to be undertaken. Examples include:

- 3.4.1 The provision of copies of the case documents and the order in clear transparent sealed envelopes at the entrances to the sites in question and at other prominent locations around the perimeter of the sites;
- 3.4.2 The posting of copies of the case documents and the order on a specifically created website established for the purpose of service;
- 3.4.3 The fixing of large warning notices in a form attached to the order to be placed at the entrances and exits to the sites;
- 3.4.4 The sending of emails to any email addresses which have been identified as emails for the relevant protest campaigns.

Possession Orders against Persons Unknown – Some Important Distinctions

- 4.1 If protestors have taken over possession of a part of a site, the usefulness of an actual order for possession should also not be overlooked. A possession order to obtain vacant possession of land can be sought in conjunction with an application for an injunction to restrain further acts of trespass. However, the procedural rules for these two forms of application differ. The procedural rules laid down for possession orders against persons unknown are set out clearly in Part 55 of the Civil Procedure Rules.

¹³*Civil Procedure Rules 6.15, 6.27 and 81.4(2)(c).*

¹⁴ *Cuciurean v Secretary of State for Transport and High Speed Two (HS2) Limited* [2021] EWCA Civ 357 at [14]-[15], [25]-[26] and [60]-[70] and *Canada Goose Canada Goose Retail Ltd v Persons Unknown* [2020] EWCA Civ 303 at [82].

¹⁵ *Barking & Dagenham LBC v Persons Unknown* EWCA Civ 13 at [84]-[85] and [91].

- 4.2 The advantages in also pursuing a claim for possession against “persons unknown” if the circumstances are such that possession has been ‘taken’ of a particular area of land include the following:
- 4.2.1 Possession orders can be enforced by the Court’s enforcement officers whereas injunctions can only be enforced pursuant to contempt of court procedures. A possession order can therefore prove to be a more immediately effective remedy.
- 4.2.2 If trespassers are located on just one part of a larger parcel of land, the inclusion of the whole of the area of land in the order for possession may be justified in order to stop the protestors moving to another part of the site.¹⁶
- 4.2.3 The writ of possession, even after it has been enforced, may still prove to be of assistance by virtue of the fact that a claimant may be entitled, in the event of further occupational incidents, to apply for a writ of restitution under CPR 83.13(5). This is because a court has power, following the recovery of possession pursuant to a writ of possession, to issue a writ of restitution even if not all of the people in possession were in possession when the original order was made, provided that there is a “*plain and sufficient nexus*” between the original recovery of possession and the need to effect recovery of the same land.¹⁷ Furthermore, if enforcement has never actually been carried out because the protest simply comes to an end, it may be possible to extend the original writ of possession if there is evidence of the likelihood of a similar protest in the near future.¹⁸

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¹⁶ *Secretary of State for Environment, Food and Rural Affairs v Meier and others* [2009] UKSC 11.

¹⁷ *Wiltshire County Council v Fraser (No 2)* [1986] 1 WLR 109.

¹⁸ *Birmingham University v Persons Unknown* [2014] EWHC 544.