INJUNCTIONS AGAINST PERSONS UNKNOWN

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The *Hampshire Waste* Decision and the introduction of the *'Onyx'* form of order

1.1 The case of *Hampshire Waste Service v Persons Unknown [2003] EWHC 1738 (Ch), [2004] Env LR 9* arose as a result of the 'Global Day of Action Against Incinerators 2003'. Members of the Onyx group of companies, who own the main large waste incinerator sites throughout the country, faced the likely risk that one or more of their plants would be a target of an invasion by trespassers styling themselves as environmental protestors. The experience of such global days of action in previous years had led to them suffering seriously damaging and costly invasions. In the preceding year, just one invasion alone at a plant in the course of construction had led to legal and enforcement costs of £120,000, not to mention the other consequential losses that had been experienced.

1.2 All of the evidence clearly disclosed a case for an interim injunction, subject only to the potential problem that the claimant companies could not name even one protestor who would be involved. Notwithstanding this, the Onyx companies successfully applied for an injunction from the Vice-Chancellor, who was willing to grant the first injunction of its type against 'persons unknown' to the context of trespass and protest demonstration situations. The persons who were to be subject to the injunction could, he held, be described in the following manner:-

> "*Persons entering or remaining without the consent of the claimants, or any of them, on any of the incinerator sites at [addresses] in connection with the 'Global Day of*

Action Against Incinerators' (or similarly described event) on or around 14th July 2003".

The Vice-Chancellor agreed that there would be considerable potential for injustice if such an order was not made. In so doing, the Vice-Chancellor has considerably developed the established law on injunctions to restrain trespasses and demonstrations.

1.3 In *South Cambridgeshire District Council –and Persons Unknown*[1], the Court of Appeal approved the Vice-Chancellor's approach in what they described as "*a difficult area of the law*". In that case, gypsies from an adjacent gypsy caravan site forming part of the Smithy Fen Site at Cottenham in Cambridgeshire were proposing to extend their site on to adjacent land. The Court of Appeal allowed an injunction to be granted against;

"Persons unknown (being persons other than those listed in the Schedule to the claim form) causing or permitting:-

Hardcore to be deposited, caravans, mobile homes or other forms of residential accommodation to be stationed or existing caravans or other mobile homes to be occupied on land at Victoria View, Smithy Fen, Cottenham, Cambridge"

The County Court Judge had refused the application at first instance on the grounds that he did not consider he had power to grant an injunction in such terms. The Court of Appeal disagreed. In this case, they were also able to rely upon certain specific provisions to be found in Section 187B of the Town and Country Planning Act 1990 which provided as follows:-

(1) Where a local planning authority consider it necessary or expedient for any actual or apprehended breach of planning control to be restrained by injunction, they may apply to the court for an injunction.

…

(3) Rules of court may provide for such an injunction to be issued against a person whose identity is unknown."

Such rules of court were to be found in County Court Rule Order 49, scheduled to the Civil Procedure Rules and provided as follows:-

"7(1) An injunction under;-

(a) Section 187B … of the Town and Country Planning Act 1990 … may be granted against a person whose identity is unknown to the applicant.

…

[1] [2004] EWCA Civ 1280

(2) An application for an injunction … under paragraph (1) shall describe the respondent by reference to:-

(a) photograph; or
(b) a thing belonging to or in the possession of the respondent; or
(c) any other evidence with sufficient particularity to enable service to be effected and the form of the claim form used shall be modified accordingly.

1.4 In drafting the description of the defendant in the title to the proceedings and in the body of the order, it is important that this description is defined by reference to the particular protest in issue. Injunctions will not now be granted where the defendants are defined by reference to such general phrases as *"persons occupying… in connection with protest action"*. The courts are not now attracted to the prospect of restraining all protests on such a broad basis. Furthermore, it is equally important that the terms of the injunction are limited in time. Usually, an appropriate period in connection with any specific trespass will be about 3 months and although injunctions are still being granted which last for a period of 12 months, these are becoming increasingly unpopular with the judiciary.

Service Issues

2.1 The actual obtaining of an order against a defendant described in the manner referred to above is, of course, only part of the overall equation for a client faced with a threatened trespass. The crucial next step is that of service. How is this to be achieved? How do you serve injunctions on 'persons unknown' under the CPR? More problematically, how do you serve 'persons unknown' when the injunction to which they are to be subject is to prevent entry to large sites which for Onyx in the *Hampshire Waste* case were throughout the country and extended in certain cases to sites in excess of fifty acres?

2.2 The solution is to be found in a combination of the legal flexibility provided for under the CPR and the practical input of some hard-working process servers. The solution is to be found in CPR 6.15 which provides:-

"(1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place.

(2) On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service.

(3) An application for an order under this rule –
(a) must be supported by evidence; and
(b) may be made without notice.

(4) An order under this rule must specify –
(a) the method or place of service;
(b) the date on which the claim form is deemed served; and
(c) the period for –
(i) filing an acknowledgment of service;
(ii) filing an admission; or
(iii) filing a defence"

2.3 There is also the Practice Direction in CPR 6.8 paragraph 9 which provides:-

"9.1

Where an application for an order under rule 6.15 is made before the document is served, the application must be supported by evidence stating –

(1) the reason why an order is sought;

(2) what alternative method or place is proposed, and

(3) why the applicant believes that the document is likely to reach the person to be served by the method or at the place proposed.

9.2

Where the application for an order is made after the applicant has taken steps to bring the document to the attention of the person to be served by an alternative method or at an alternative place, the application must be supported by evidence stating –

(1) the reason why the order is sought;

(2) what alternative method or alternative place was used;

(3) when the alternative method or place was used; and

(4) why the applicant believes that the document is likely to have reached the person to be served by the alternative method or at the alternative place.

9.3

Examples –

(1) an application to serve by posting or delivering to an address of a person who knows the other party must be supported by evidence that if posted or delivered to that address, the document is likely to be brought to the attention of the other party;

(2) an application to serve by sending a SMS text message or leaving a voicemail message at a particular telephone number saying where the document is must be accompanied by evidence that the person serving the document has taken, or will take, appropriate steps to ensure that the party being served is using that telephone number and is likely to receive the message; and

(3) an application to serve by e-mail to a company (where paragraph 4.1 does not apply) must be supported by evidence that the e-mail address to which the document will be sent is one which is likely to come to the attention of a person holding a senior position in that company"

All of these provisions combine to allow a claimant to propose and implement a scheme for service which is likely to be the most effective and practical on the particular facts of each case.

2.4 As to the practical input for process servers, the scheme for Onyx involved the fixing of the claim form, orders and evidence to posts in conspicuous places round the perimeters of the six sites involved. This is the procedure which has been adopted by numerous other claimants in the years since the *Hampshire Waste* case.

2.5 For South Cambridgeshire District Council, the Court of Appeal indicated that service should be effected by placing a notice with the claim form and the injunction in clear plastic envelopes and nailed to a stake or gatepost or other prominent location on eleven different plots. Once a week the Council were to ensure that the notice was there. The notice was required to inform them that they could obtain copies of the application notice and the accompanying witness statement and exhibits by applying to the Council at an identified address at its planning offices during working hours.

2.6 On another occasion, when a protest brought the International Oil Exchange to a halt and then blockaded a dinner at The Dorchester Hotel, service was effected by the hotel manager announcing the order by "loud hailer" in the hotel foyer.

2.7 In addition to such schemes, the order can (and should) be served by more direct means on all potentially interested organisations or parties.

2.8 In relation to hearings at which a possession order is to be sought and for which the time for service has been abridged, in the recent case of *Sun Street Properties v Persons Unknown* [2011] EWHC (Ch), [2011] All ER (D) 72, Mr Justice Roth indicated that reasonable steps had to be taken to give the occupiers 'adequate notice' of the hearing. He said:-

> *"The form of service of a possession claim is indeed specified in Rule 55.6, but it is the obligation of the claimant seeking relief, especially when it has the benefit of professional solicitors and the party against whom relief is sought are litigants in person, to take reasonable steps to give them adequate notice. What is reasonable and adequate is dependent on the circumstances. It should be self-evident that the shorter the period of notice, the more prominent the steps that have to be taken to bring the matter to the other party's attention."*

In relation to possession proceedings, notice of an abridged possession hearing might therefore require a text message or telephone call to any telephone number known to the claimant and/or it might involve providing an 'out of hours' telephone number at which the claimant's solicitors might be contacted and/or an 'out of hours/ number for the court and/or a covering letter with the documentation. Although these particular comments were concerned with the provision of notice for a possession hearing, it is now to be recommended that a covering letter is prepared to be provided with the injunction documentation for service and the defendants informed of the injunction by telephone or text where possible.

The Role of the Injunction v the Role of the Possession Order

3.1 In *Secretary of State for Environment, Food and Rural Affairs v Meier and others* [2009] UKSC 11 [2009] PLSCS 335 [2009] 49 EG 70 (CS), the Supreme Court decided that an order for possession could not be made in favour of a landowner in respect of areas of land that were wholly detached and separated, possibly by many miles, from the land occupied by the trespassers. However, various comments were also made with respect to the obtaining of injunctions in such circumstances.

3.2 The Supreme Court made it clear that whether or not an injunction would be granted to restrain a person from trespassing on land would depend on the facts of each particular case.

The Supreme Court considered that where a trespass was threatened in relation to a particular area of land (and especially where it was being committed and had been committed in the past) an injunction to restrain the threatened trespass would be appropriate, unless there were good reasons to the contrary. Even though the court should not make orders that it did not intend (or would be unable) to enforce and even in cases where there was little prospect of enforcing the injunction by imprisonment or sequestration, it might be appropriate to grant an injunction if it would have a real deterrent effect on the particular trespassers. As Lady Hale recognised, an injunction is a useful means of support for a speedy possession order, with abridged time limits if appropriate.

3.3 It is to be noted that the injunction procedure cannot be used as a means of circumventing CPR 55 in order to obtain possession. The usual procedure when a protest trespass has already started is to abridge time for the hearing of a possession claim whilst at the same time obtaining an injunction to prevent further trespassers from entering upon the site. This was a point which was also emphasised by Mr Justice Roth in the *Sun Street* case when he said:-

> *"The distinct purpose of the injunction was to stop more people coming onto the Property and a genuine concern about their safety, given that this was a large building complex that had been unoccupied for a considerable period. The respondent could not know how many more people might seek to occupy the building and produced to the court as an exhibit to Mr Freeman's witness statement a report from a newspaper website on 18 November which quoted one of the Occupiers, who said:*
>
> > *"We've got more people joining us from the rest of the UK and Ireland tomorrow."*
>
> *It was not suggested in argument before me that this report was inaccurate. The injunction was an interim injunction to restrain such entry. Therefore, understandably and in my view very properly, it was against persons unknown. It followed the clear precedent established in the judgment of Sir Andrew Morritt (then Vice Chancellor) in Hampshire Waste Service v Persons Unknown [2003] EWHC 1738 (Ch), [2004] Env LR 9, and effectively approved by the Supreme Court in Secretary of State v Meier [2009] UKSC 11 [2009] 1 WLR 2780 per Lord Rodger at para 2. As Lord Neuberger observed in the same case at para 83, in some cases it may be appropriate to grant an injunction where the court considers it could have a real deterrent effect."*

4. **Enforcement Issues**

4.1 Any anticipated difficulty in enforcing an order of the type described is no bar to its grant. In the *Hampshire Waste* case, the Vice-Chancellor noted that the evidence on behalf of Onyx claimed that *"the police are largely powerless, the sheriff's officers overstretched and a claimant's remedy of damages entirely inadequate"*. As a result of this, the Vice-Chancellor expressly considered the question of *'whether, if the criminal law and the remedy in damages are inadequate, is a remedy by way of interim injunction any better?'* but found that this was not a ground for refusing the injunction.

4.2 Enforcement is accordingly to be effected by contempt of court procedures. In this context, much of the value of the order results from the principle that any person who, knowing of the order, assists in its breach, will be liable for contempt: *Acrow (Automation) Ltd v Rex Chainbelt Inc [1971] 3 All ER 1175* and *A-G v Times Newspapers Limited [1992] 1 AC 191*. It is in this way that the actions of bodies involved in the organisation of protests can be effectively discouraged.

4.3 In particular, one of the ways in which the injunction has a valuable deterrent effect relates to the potential consequential likelihood for organisations involved of an action of the type which has become known as a S.L.A.P.P.[2] action in the event of a challenge to the injunction. Such an action involves the organisation being made the immediate subject of a substantial damages claim coupled with an injunction freezing its assets. The threat of liquidation of the organisation's assets can then be withdrawn in return for the organisation's co-operation[3]. If a protest organisation seeks to challenge the grant of the injunction it exposes itself to the risk of being seen to assume responsibility for the proposed event and increases the risk that it will become the subject of a S.L.A.P.P. action. Similarly, if the injunction is served on such an organisation and a trespass then occurs for which it publicises its involvement after the event, it has again heightened its risk of being made the subject of a SLAPP action.

4.4 Although it had previously generally been accepted that an injunction restraining trespass to land can only be enforced by sequestration or imprisonment, Lord Neuberger questioned whether this was correct in the *Meier* case. He said:-

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[2] *(Strategic Lawsuits Against Public Participation)*

[3] *As occurred, for example, when BP took such action against Greenpeace when protestors stormed the Stena Dee oil rig in the North Sea.*

"In the light of the terms of RSC Order 45 rule 5(1), this may very well be right. Certainly, in the light of the contrast between the terms of that rule and the terms of RSC Order 45 rule 3(1) and CCR 26 rule 16(1) (which respectively provide for writs and warrants of possession only to enforce orders for possession), it is hard to see how a warrant of possession in the County Court or a writ of possession in the High Court could be sought by a claimant, where such an injunction was breached.

However, where, after the grant of such an injunction (or, indeed, a declaration), a defendant entered onto the land in question, it is, I think, conceivable that, at least in the High Court, the claimant could apply for a writ of restitution, ordering the sheriff or bailiffs to recover possession of the land for the benefit of the claimant. Such a writ is often described as one of the "writs in aid of" other writs, such as a writ of possession or a writ of delivery –see for instance RSC Order 46 rule 1. Restitution is normally the means of obtaining possession against a defendant (or his privy) who has gone back into possession after having been evicted pursuant to a court order. It appears that it can also be invoked against a claimant who has obtained possession pursuant to a court order which is subsequently set aside (normally on appeal) – see sc46.3.3 in Civil Procedure, Vol 1, 2009. Historically at any rate, a writ of restitution could also be sought against a person who had gone into possession by force: see Cole on Ejectment (1857) pp 692–4. So there may be an argument that such a writ may be sought by a claimant against a defendant who has entered onto the land after an injunction has been granted restraining him from doing so, or even after a declaration has been made that the claimant is, and the defendant is not, entitled to possession. It may also be the case that it is open to the County Court to issue a warrant of restitution in such circumstances."

4.5 The Supreme Court has therefore sent out a strong message that the present procedural rules governing the enforcement of injunctions against trespass are currently unsatisfactory. Lord Neuberger considered that the issues arising were ripe for consideration by the Civil Procedure Rules Committee. He considered that the precise ambit of the circumstances in which a writ or warrant of restitution would be granted could usefully be clarified. On 13 July 2011 the Ministry of Justice Consultation Paper 'Options for Dealing with Squatters' was published and the Post Consultation Report was published on 26 October 2011. It is therefore quite possible that with the current movements for change in relation to law on squatting, these unsatisfactory procedures may well be removed. In the meantime, however, the use of injunctions in relation to trespasses and protests continues to be in an evolutionary phase.