PLANNING INJUNCTIONS AGAINST PERSONS UNKNOWN

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Introduction

In the recent decision in *South Cambridgeshire District Council v Persons Unknown* [2] the Court of Appeal made an injunction under s187B of the Town and Country Planning Act 1990 against unknown persons restraining them from causing or permitting hardcore to be deposited or caravans to be stationed on identified land Smithy Fen, Cottenham, Cambridge. The site, a notorious gypsy encampment established in breach of planning control, was already the subject of injunction and contempt proceedings against known occupants. Fearing that existing breaches of planning control would be exacerbated by the arrival of more caravans, the local planning authority sought a second injunction under s187B against all future occupiers of the site, even though the identity of such occupiers could not be known at the time of the proceedings.

The matter was first heard by His Honour Judge O'Brien sitting in the Cambridge County Court. He refused to grant the injunction but gave permission to appeal, transferring the appeal directly to the Court of Appeal under CPR r.52.14.

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[2] [2004] EWCA Civ 1280

Although injunctions *contra mundum* and against unidentifiable defendants have been granted in recent years, *South Cambridgeshire* is the first occasion on which the jurisdiction to make s187B injunctions against unidentifiable defendants has been considered by the Court of Appeal.

Basis of the jurisdiction

As explained in the brief judgment of Brooke LJ, the basis for the *South Cambridgeshire* injunction is the wording of section 187B, the accompanying Court rules and two recent decisions of the Vice Chancellor dealing with the general jurisdiction of the Court, namely *Bloomsbury Publishing Plc v News Group Limited* [3] and *Hampshire Waste Services Limited et al v Persons Intending to Trespass and/or Trespassing Upon Incinerator Sites* [4].

Although not considered in any detail in *South Cambridgeshire*, the interrelation of these elements is quite interesting.

S187B of the 1990 Act and RSC O.110 r.1/CCR O.49 r.7

In 1989 the Carnwath Report *Enforcing Planning Control* recommended the creation of an express power to seek injunctive relief against actual or apprehended breaches of

[3] [2003] 1 WLR 163
[4] [2003] EWHC 1738 (Ch)

planning control, such power to be available even where the identity of those involved in the breach cannot be ascertained. The result was s187B, inserted in the Town and Country Planning Act 1990 by the Planning and Compensation Act 1991. Its terms are well known, but bear repetition –

> '(1) Where a local planning authority consider it necessary or expedient for any actual of apprehended breach of planning control to be restrained by injunction, they may apply to the court for an injunction, whether or not they have exercised or are proposing to exercise any of their other powers under this Part.
>
> '(2) On an application under subsection (1) the court may grant such an injunction as the court thinks appropriate for the purpose of restraining the breach.
>
> '(3) Rules of court may provide for such an injunction to be issued against a person whose identity is unknown.
>
> '(4) In this section "the court" means the High Court or the County Court.'

Pursuant to s187B(3) rules were made separately for the High Court and the County Court, namely RSC O.110 r.1 and CCR O.49 r.7[5]. These survive as Schedule Rules to the Civil Procedure Rules. The terms of RSC O.110 r.1 and CCR O.49 r.7 are identical for all practical purposes, and it is sufficient to consider only the former. This provides –

[5] These also cover injunctions under s44A of the Planning (Listed Buildings and Conservation Areas) Act 1990 and s26AA of the Planning (Hazardous Substances) Act 1990.

'(1) An injunction under … s187B … may be granted against a person whose identity is unknown to the applicant …

'(2) An applicant for [such] an injunction … shall in the claim form describe the defendant by reference to –

(a) a photograph;
(b) a thing belonging to or in the possession of the defendant; or
(c) any other evidence

with sufficient particularity to enable service to be effected.

'(3) An applicant for [such] an injunction … shall file in support of the application evidence by witness statement or affidavit –

(a) verifying that he was unable to ascertain, within the time reasonably available to him, the defendant's identity;
(b) setting out the action taken to ascertain the defendant's identity; and
(c) verifying the means by which the defendant has been described in the application and that the description is the best that the applicant is able to provide.

'(4) Paragraph (2) is without prejudice to the power of the Court to make an order in accordance with CPR Part 6 for service by an alternative method or dispensing with service.'

It is noteworthy that RSC O.110 r.1 is stated to apply to persons whose identity is unknown 'to the applicant', words that do not appear in s187B. Indeed it could be said that O.110 r.1 most obviously relates to a situation where, at the time of starting proceedings, a local planning authority could name the defendant, but for lack of time or

co-operation from him. This is rather different from the situation in *South Cambridgeshire* where the potential future occupiers of the site were unknown (and unknowable) to anyone at the time of the proceedings.

Bloomsbury Publishing Plc v News Group Limited

RSC O.110 r.1/CCR O.49 r.7 are the only provisions of the Civil Procedure Rules dealing expressly with injunctions against unknown persons (although CPR r.55 deals with possession orders against unknown trespassers). However, the two decisions of the Vice Chancellor referred to above recognise a *general* jurisdiction to make injunctions against unidentifiable defendants.

Bloomsbury Publishing Plc v News Group Limited was an action brought by the publishers of J K Rowling's book *Harry Potter and the Order of the Pheonix*. Shortly before publication, three copies of this eagerly-awaited volume were stolen. These were then offered to certain national newspapers for serialisation. The publishers, unable to name the possessors of the stolen copies, sought and obtained an injunction that the copies be delivered up against -

> "the person or persons who have offered the publishers of the [newpapers] a copy of the book … and the person or persons who has or have physical possession of a copy of the said book or any part thereof without the consent of the claimants."

The Vice Chancellor considered the traditional approach in English law, namely that proceedings had to be started against a defendant (it not being possible to start

proceedings against no-one, see *In re Wykeham Terrace, Brighton, Sussex* [6]) and that the defendant had to be named (*Friern Barnet UDC v Adams* [7]). He then noted with approval examples of a different approach taken in a number of Commonwealth jurisdictions. Two of these deserve to be mentioned. First, in *Jackson v Bubela* [8], the Court of Appeal of British Columbia accepted that, where proceedings following a road traffic accident named the defendant driver as 'John Doe' because, at the relevant time, the plaintiff did not know his name, they were properly started and could later be amended to insert the driver's real name. Here, as Bull J A said, the plaintiff 'was suing a living man whom she alleged was at a particular defined time and place operating a described motor vehicle … Her litigating finger was pointed at that driver and no one else, but she did not know his name.' This situation corresponds with that apparently contemplated by the language of RSC O.110/CCR O.49 r7.

Second in *Tony Blain Pty v Splain* [9], an action to prevent the sale of unlicensed merchandise, the High Court of New Zealand granted an injunction against 'all persons who sell unlicensed ... merchandise at or about the ... stadium on 26th March 1993 who are served with this statement of claim'. It was intended that the claimant's solicitors would attend at the stadium on the relevant day and serve the proceedings on any bootleggers there. The injunction required bootleggers so served to surrender their illicit merchandise and to give information about their identity. Anderson J said -

[6] [1971] Ch 204
[7] [1927] 2 Ch 25
[8] [1972] 5 WRR 80
[9] [1994] FSR 497

> 'The … defendants are identified as persons who sell unlicensed merchandise at the relevant concert venues. … The fact that persons cannot be identified at this stage of the proceeding is no bar to relief against persons who may be identified at a relevant time. It is not the name but the identity and identification of infringing persons which is relevant. The identity may not be immediately established but persons infringing will be identified by their act of infringement …'

Unlike the defendant in *Jackson v Bubela*, these defendants would only be identified by their *future* acts. Indeed if no bootleggers turned up on 26 March, or if they avoided the solicitors, there would never be any defendants.

Turning to the changes effected in England and Wales by the Civil Procedure Rules, the Vice Chancellor noted the following –

> The overriding objective of enabling the court to deal with cases justly (r.1(1));
>
> The power to 'take any other step or make any other order for the purpose of managing the case and furthering the overriding objective' (r.3.1(2)(m));
>
> The general power of dispensation in the event of a procedural error (r.3.10);
>
> That such a procedural error does not automatically invalidate any step taken in proceedings (r.3.10(m));

That proceedings are started when the Court issues a claim form at the request of the claimant (r.7.2(1));

That the claim form must be headed with the title of the proceedings and that the title '*should* state ... the full name of each party…' (7PD 4.1(1));

That the claim form can be varied "if required by the circumstances of a particular case" (r.4(2)).

The Vice Chancellor explained the implications of these as follows -

'*Friern* was decided on two grounds, first that the prescribed form of writ required the defendant to be named, second that the description used was too vague. Both points were decided against the background of the regime prescribed by the Rules of the Supreme Court. The regime introduced by the Civil Procedure Rules is quite different. There is no requirement that a defendant must be named, merely a direction that he "should" be. The failure to give the name of the defendant cannot now invalidate the proceedings both because they are started by the issue of the claim form at the request of the claimant and because, unless the court thinks otherwise, Rule 3.10 so provides. The over-riding objective and the obligations cast on the court are inconsistent with an undue reliance on form over substance. The proper application of Rule 3.10 is incompatible with a conclusion that the joinder of a defendant by description rather than by name is for that reason alone impermissible. For these reasons I conclude that the decision of the Court of Appeal in *Friern* is not applicable to proceedings brought under the Civil Procedure Rules.' (paragraph 19)

Finally the Vice Chancellor declined to restrict the jurisdiction to situations where the defendant could, with sufficient information, be named (as in *Jackman v Bubela*) or where the defendant, though unidentifiable at the time of the proceedings, would be identified by service of documents (the *Tony Blain* situation).

> 'The crucial point, as it seems to me, is that the description used must be *sufficiently certain as to identify both those who are included and those who are not*. If that test is satisfied then it does not seem to me to matter that the description may apply *to no one or to more than one person nor that there is no further element of subsequent identification whether by service or otherwise.'* (paragraph 21) [emphasis added]

The recognition that there may never be any defendants to the action is significant. Under the pre-Civil Procedure Rules regime this nice point might have amounted to a substantial objection.

Hampshire Waste v Persons Intending to Trespass etc.

Bloomsbury did not principally concern persons becoming defendants by their future acts (although someone who acquired one of the stolen volumes after the date of the injunction would presumably have been caught by it). Future acts were, however, directly in issue in *Hampshire Waste v Persons Intending to Trespass etc.* Here owners of incinerator sites sought ex parte injunctions to restrain trespass by environmental activists on a forthcoming 'Global Day of Action Against Incinerators'. The Vice Chancellor, relying on the principles that he had enunciated in *Bloomsbury*, granted an injunction against 'persons entering or remaining without the consent of the claimants, or

any of them, on any of the incinerator sites … in connection with the "Global Day of Action Against Incinerators" … on or around 14 July 2003'.

It should be noted that this injunction, like that in *Tony Blain*, only related to acts on a particular day, whereas the *South Cambridgeshire* injunction in theory relates to all times in the future.

As the jurisdiction recognised by the Vice Chancellor is founded on general changes effected by the Civil Procedure Rules, it applies to all kinds of injunction, including a s187B injunction. It follows that, despite the appearance given by RSC O.110 r.1/CCR O.49 r.7, s187B injunctions against persons unknown are not limited to cases where there is an identifiable defendant at the time proceedings are started, albeit one whose name is not known to the claimant. This point is confirmed by the judgment of Brooke LJ in *South Cambridgeshire.*

Related developments

Hampshire Waste and *South Cambridgeshire* effectively recognise a power to make injunctions against the whole world, in the sense that they are capable of binding anyone who performs (or prepares to perform) the acts restrained. It is interesting to place this development within the wider context of injunctions having effect against persons other than named defendants.

Injunctions *contra mundum*

The Courts have already recognised a jurisdiction to make injunctions *contra mundum* to prevent the publication of information likely to endanger particularly vulnerable claimants. Initially this was seen as a special aspect of the Court's wardship jurisdiction (*X County Council v A* [10]). However in *Venables and Thompson v News Group Newspapers Ltd* [11] the President of the Family Division, Dame Elizabeth Butler-Sloss, made an injunction against the world at large prohibiting the publication of information about the whereabouts and appearance of the two murderers of James Bulger, now adults. The basis of the power to make an injunction of this breadth was not discussed in detail but seems to have been the duty imposed on the Court by the ECHR to protect the claimants' right to life: no reliance was placed on the import of the Civil Procedure Rules. It seems unlikely that a jurisdiction of this kind would be extended to planning injunctions.

Liability for criminal contempt under the *Spycatcher* doctrine

Two decisions in the infamous *Spycatcher* litigation, that of the Court of Appeal in *AG v Newspaper Publishing* [12] and that of the House of Lords in *AG v Times Newspapers* [13], hold that, where an interlocutory injunction has been made in proceedings against a named newspaper preventing the publication of confidential information, another newspaper can be in contempt of court if, knowing of the injunction, it publishes the information. Publication by the non-party would destroy the confidentiality of the

[10] [1985] 1 All ER 53
[11] [2001] 1 All ER 908
[12] [1988] Ch 333
[13] [1992] 1 AC 191

relevant information and so render the trial of the action against the defendant newpaper pointless. The non-party is not bound by the injunction as such and its contempt is not the civil contempt of failing to comply with an injunction but the criminal contempt of interfering with the administration of justice.

It is an element of this kind of criminal contempt that the contemnor must intend to impede the purpose of the Court in making the order (*AG v Punch Ltd* [14]).

In considering whether this principle could have any application in the planning context, several points call for comment.

First the *Spycatcher* principle assumes the existence of an injunction against a named defendant and will nowadays only need to be utilised where the interference by a third party is unexpected. This is not impossible to imagine in a planning situation. Where breaches of planning control by identifiable and unidentifiable persons are expected, the s187B jurisdiction now allows for all the likely perpetrators to be bound directly by an initial injunction.

Second the actus reus of the contempt is an act which interferes with the administration of justice by subverting the court's purpose in making the order. Although the

[14] [2003] 2 WLR 49 Here the House of Lords held that the Court's purpose is to preserve the confidentiality of the information, so that the mental element is established if the defendant, knowing of the injunction, deliberately does that which it prohibits.

Spycatcher doctrine has only been invoked in the context of confidential information[15], there is no suggestion in either *AG v Newspaper Publishing* or *AG v Times Newspapers* that liability for criminal contempt of this kind cannot arise in other situations. Several of the judgments give supposed examples of the principle far removed from the context of confidential information, including the felling of trees, demolition of listed buildings and shooting of racehorses. Most of the judgments do not articulate any general principle. However Sir John Donaldson MR in *AG v Newspaper Publishing* indicated that the third party's act would only constitute a criminal contempt if it was irreversible (p370H) or irremediably damaged the subject matter of the action (p375B): this test is certainly consistent with the supposed examples of the contempt. A question arises whether interference with a s187B injunction could constitute the actus reus of this kind of contempt. Most breaches of planning control are remediable to an extent, if not completely reversible.

Third it appears that the *Spycatcher* principle is confined to interlocutory injunctions[16]: certainly undermining an *interlocutory* injunction has a very obvious effect on the administration of justice where the effect is to render the final trial pointless. Many s187B injunctions are, of course, interlocutory, being obtained at short notice to prevent the creation of a fait accompli. It should, however, be noted that the distinction between

[15] See *AG v Punch Ltd* [2001] QB 1028 at paragraph 119.

[16] In the Court of Appeal in *AG v Punch* Lord Bingham MR stated obiter that the principle was so limited, and his view was followed by Gray J in *Jockey Club v Buffham* [2003] 2 WLR 178. The decision of the Court of Appeal in *AG v Punch* was later overruled by the House of Lords, but without their Lordships addressing this question.

an interlocutory s187B injunction and a final s187B injunction is often more apparent than real. Frequently an interlocutory s187B injunction is not followed by any trial of the action. Conversely s187B injunctions that are final in form are often granted after fairly short hearings and on the basis of written evidence. The precise form of a s187B injunction would presumably be a matter of central importance in any attempt to prove a contempt of the *Spycatcher* type.

Finally proceedings for criminal contempt are normally brought by the Attorney General. The underlying actions in the *Spycatcher* cases and in *AG v Punch* happened to be brought by the Government in order to prevent former spies from disclosing official secrets. One assumes that the Attorney General is equally interested in restraining criminal contempts that undermine litigation of other types.

Practical points

Practitioners will be interested in a number of practical points relevant to s187B injunctions against persons unknown that emerge from *Bloomsbury, Hampshire Waste* and *South Cambridgeshire*.

Starting and serving the claim

A final injunction under RSC O.110 r.1/CCR O.49 r.7 has to be sought using a 'claim form'. Table 2 of the Part 8B Practice Direction provides that the appropriate claim form

for a CCR O.49 r.7 injunction is the Part 8 claim form. Curiously no equivalent provision is made for claims under RSC O.110 r.1, although presumably the same form should be used in the High Court.

If any of the conventional methods of service is possible a claimant can file and serve a Part 8 claim form on the unknown defendant in the normal way. This scenario is not wholly improbable - personal service will be possible in the case of a defendant who is unknown simply because he refuses to give his name.

None of the conventional methods of service will be possible against defendants of the kind in *Hampshire Waste* and *South Cambridgeshire.* An order for substituted service of the claim form will therefore have to be sought at the outset of proceedings. An application for an order for substituted service can be made without notice to the potential defendant (CPR r.6.8(2)(b)).

If an interlocutory injunction is required, this must be sought by an application notice. The same issues of service will arise.

The application in *South Cambridgeshire* illustrates these points. This sought an interlocutory injunction before service of a claim form. The application notice was not served and, in addition to the injunction, sought (i) an order dispensing with service of the application notice, (ii) an order for substituted service of the claim form and (iii) an order for substituted service of the injunction (see below).

Description of defendants

If, as in *Hampshire Waste* and *South Cambridgeshire*, the unknown defendants are described by reference to the act that it is proposed to restrain, the description should correspond as closely as possible to the terms of the injunction. Thus the description of the defendants in *South Cambridgeshire* was amended by the Court of Appeal to -

> 'Persons unknown … causing or permitting hardcore to be deposited … on [the land], caravans, mobile homes or other forms of residential accommodation to be stationed on the said land or existing caravans, mobile homes or other forms of residential accommodation on the said land to be occupied …'

In *Hampshire Waste* the Vice Chancellor rejected a description of defendants that referred to 'persons intending to trespass', preferring instead 'persons entering … without consent'. A reference to intention, he said, imported an inappropriate subjective element. No doubt the reference reflected an ingrained preference to have defendants who are presently identifiable (at least conceptually): this preference no longer needs to be accommodated. What matters, of course, is that the wording must satisfy the test enunciated in *Bloomsbury*, ie 'be sufficiently certain as to identify both those who are included and those who are not.'

Evidence

Although the jurisdiction to make s187B injunctions is wider than RSC O.110 r.1/CCR O.49r.7 would suggest, this is no excuse for laziness. A claimant will obviously not be

granted an injunction against an un-named defendant if the Court considers that insufficient efforts have been made to ascertain his identity. The issues raised in subparagraph (3) of the rule should therefore be addressed in evidence, even if the defendants are identifiable only by their future acts, and even if there may never be any defendants.

Service of the injunction and enforcement

Unless the Court permits some form of substituted service, an injunction must be *personally* served on all defendants (RSC O.45 r.7(2), CCR O.29 r.1(2)). Personal service involves 'leaving [the document] with [the] individual' (CPR r.6.4(3)). The injunction must bear the penal notice (RSC O.45 r.7(4), CCR O.29 r.1(3)).

Personal service on unknown defendants will often not be possible. In the case of injunctions that relate to actions on land the most obvious form of substituted service is to display the injunction on the land. Orders permitting service in this manner were made in both *Hampshire Waste* and *South Cambridgeshire*.

However, enforcement of an injunction by means of a committal for contempt requires the claimant to show that a defendant *intentionally* breached the injunction, ie that he knew of the injunction and thereafter deliberately did that which the injunction prohibited etc. Where an injunction has not been served personally the claimant will have to adduce specific evidence that the defendant actually knew of it. The fact that the injunction has

been served in accordance with an order for substituted service may or may not be sufficient to establish actual knowledge.

Relevance of difficulty of enforcement

It will be appreciated from the above that injunctions against presently unidentifiable defendants may be difficult to enforce. Potential difficulty of enforcement is not in itself a reason for the Court to refuse to make an injunction (*Hampshire Waste* paragraph 11). On the other hand, an injunction that cannot be enforced is of limited value to a claimant.

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