

INJUNCTIONS AGAINST PROTESTORS: Part 1, Substantive law

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CAUSE OF ACTION

- No freestanding right to seek an injunction – must be based on underlying cause of action in domestic law. Explained by Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (1959):

No better instance can indeed be found of the way in which in England the constitution is built up upon individual rights than our rules as to public assemblies. The right of assembling is nothing more than a result of the view taken by the courts as to individual liberty of person and individual liberty of speech. There is no special law allowing A, B and C to meet together either in the open air or elsewhere for a lawful purpose, but the right of A to go where he pleases so that he does not commit a trespass, and to say what he likes to B so that his talk is not libellous or seditious, the right of B to do the like, and the existence of the same rights of C, D, E, and F, and so on ad infinitum, lead to the consequence that A, B, C, D, and a thousand or ten thousand other persons, may (as a general rule) meet together in any place where otherwise they each have a right to be for a lawful purpose and in a lawful manner.
- Subject to ECHR, still represents English (and Welsh) law (per Longmore LJ in *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100).

CAUSE OF ACTION (2): Public vs Private Claimant

- Identity of Claimant may be important:
 - Public bodies such as local authorities may have standing to enforce criminal law, and to enforce trespass on public highway or other public land to which protestors may have
 - Private bodies such as e.g. fracking companies (Ineos, Cuadrilla) or highway contractors (like Amey in the Sheffield Trees (*Dillner / Fairhall*) cases only have standing in relation to trespass on their own land, and may need to be more inventive about causes of action

CAUSE OF ACTION (3)

- Likely causes of action:
 - Trespass to land (often sufficient for public body claimants, as in *Samede* [2012] PTSR 1624, *Sheffield CC v Fairhall* [2018] PTSR 719)
 - Nuisance
- Possible causes of action (relevant or needed by private claimants):
 - Conspiracy to injure by unlawful means (*SC BTA Bank v Ablyazov and another (No 14)* [2018] 2 WLR 1125)
 - Unlawful interference with business (*OBG Ltd v Allan and ors* [2008] 1 AC 1)

EUROPEAN CONVENTION ON HUMAN RIGHTS (1)

- Articles 9 (freedom of religion and thought), 10 (freedom of expression) and 11 (freedom of assembly) are potentially relevant to protesters.
- Article 11 most directly relevant and does not add much to consider issues under other Articles.
- Article 11 provides:
 1. *Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*
 2. *No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.*

EUROPEAN CONVENTION ON HUMAN RIGHTS (2): 「Landmark Chambers」 Is Article 11 engaged?

- Plainly, Article 11 is engaged in cases of protest generally.
- Controversy over whether Article 11 applies to *unlawful* protests, and in particular direct action which interferes with rights of others, now resolved decisively:
 - In *Samede* (Occupy movement on steps of St Paul's Cathedral), Article 11 engaged by unlawful protests
 - In *Fairhall*, unlawful direct action interfering with highway contractors engaged Article 11
 - *Cuadrilla* [2020] 4 WLR 29 now decisive that all protests engage Articles 10 and 11 even if unlawful direct action and even if intended to disrupt lawful public or private activities

EUROPEAN CONVENTION ON HUMAN RIGHTS (3): Justification

Landmark Chambers

- Wide range of factors relevant to justification, but clear that law will tend to come down in favour of some restriction on right to protest in any case of long term *unlawful* interference with rights of others. Per Lord Neuberger in *Samede*:

The essential point in the Hall case and in this case is that, while the protesters article 10 and 11 rights are undoubtedly engaged, it is very difficult to see how they could ever prevail against the will of the landowner, when they are continuously and exclusively occupying public land, breaching not just the owners property rights and certain statutory provisions, but significantly interfering with the public and Convention rights of others, and causing other problems (connected with health, nuisance and the like), particularly in circumstances where the occupation has already continued for months, and is likely to continue indefinitely

- Does not make ECHR a dead letter, both because (a) it has influenced way in which courts approach domestic law and (b) real issues on justification may be about form of injunction rather than whether to make it.

EUROPEAN CONVENTION ON HUMAN RIGHTS (4): Justification, factors

- Likely relevant factors:
 - Whether breach of domestic civil and / or criminal law
 - Extent of interference with rights of claimant. For public body claimant, extent of interference with ability to carry out public functions and duties
 - Extent of interference with rights of others
 - Location
 - Length of protest.
- *Content* of protest largely or wholly irrelevant (NB *Afsar*, but note that judge not impressed by inaccurate content of objections)

Section 12(3) of Human Rights Act 1998

- Section 12(3) of HRA 1998 applies where court is considering whether to grant relief which might affect exercise of right to freedom of expression, and says:
(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.
- In *Ineos* case at first instance ([2017] EWHC 2945 (Ch), Morgan J held that this applied to a case of an injunction, including a quia timet injunction, in a protester case.
- Court of Appeal [2019] 4 WLR 100 agreed but held that he had failed to apply it properly since judge must be satisfied that it is more likely than not that C will succeed in obtaining injunctive relief. So necessary to consider all uncertainties relevant to that overall issue (factual disputes, whether behaviour in breach of law, whether injunction appropriate).
- In practice v hard to see how interim injunction can now be granted in other than simple trespass case.