

Welcome to Landmark Chambers'

Injunctions etc against protesters and travellers webinar

The recording may be accessed [here](#).

Your speakers today are...



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INJUNCTIONS AGAINST PROTESTORS



Tim Buley QC and Yaaser Vanderman

INJUNCTIONS AGAINST PROTESTORS: Part 1, Substantive law

**Tim Buley QC and Yaaser Vanderman
21 May 2020**

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): 「 Landmark Chambers 」

Justification

- 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.

INJUNCTIONS AGAINST PROTESTORS: Part 2, Getting to court

Yaaser Vanderman

Main issues

- Without notice?
- Persons Unknown
- Service
- Draft order

Without notice?

- *Birmingham CC v Afsar* [2019] EWHC 1560 (Warby J)
 - Protests at Anderton Park School re sex education etc.
 - “Exceptional”, particularly where Art 10 ECHR involved: para 20
 - Is there a risk that Respondents would take steps to “*defeat the purpose of the application*”? para 54
 - Mere escalation insufficient: para 54

Without notice?

- Para 19:
 - Evidence must state why no notice
 - Duty of full and frank disclosure (para 21): s12(2)-(3) HRA 1998
 - Duty to make note of hearing and serve on Respondent without delay

Persons Unknown - authorities

- *Ineos Upstream Ltd v Boyd* [2019] 4 WLR 100 (CA)
- *Cuadrilla Bowland v Lawrie* [2020] EWCA Civ 9
- *Canada Goose v Persons Unknown* [2020] EWCA Civ 303 (5 March 2020)
- *Birmingham City Council v Afsar* [2020] EWHC 864 (QB) (8 April 2020)

Persons Unknown - general

- No conceptual or legal prohibition on seeking an injunction against Persons Unknown
- BUT, only where: (1) it is impossible to name the persons who are likely to commit the tort unless restrained; and, (2) it is possible to give effective notice of the injunction and for the method of such notice to be set out in the order.
- Includes (1) anonymous defendants who are identifiable at the time the proceedings commence but whose names are unknown; and (2) newcomers: people who in the future will join the protest and fall within the description of the “persons unknown”.

Persons Unknown - definition

- How to describe Persons Unknown in the claim form?
 - “Persons Unknown” **insufficient**: *Birmingham CC v Afsar*
 - “*Persons unknown who are protestors against the manufacture and sale of clothing made of or containing animal products and against the sale of such clothing at Canada Goose, 244 Regent Street, London W1B 3BR*” – **impermissibly wide**: *Canada Goose*, para 85
 - “*blocking any part of the bell-mouth at the Site Entrance...with a view to slowing down or stopping the traffic...with the intention of causing inconvenience or delay to the claimants*”: *Cuadrilla*, paras 61-65

Persons Unknown - definition

- Essentially, want to use the same wording as in the draft injunction order
- Will deal with this later

Persons Unknown – final orders

- *Canada Goose*
 - Final orders?
 - “89. A final injunction cannot be granted in a protester case against “persons unknown” who are not parties at the date of the final order, that is to say Newcomers who have not by that time committed the prohibited acts and so do not fall within the description of the “persons unknown” and who have not been served with the claim form.”

 - “91. That does not mean to say that there is no scope for making “persons unknown” subject to a final injunction. That is perfectly legitimate provided the persons unknown are confined to those within Lord Sumption’s Category 1 in *Cameron*, namely those anonymous defendants who are identifiable (for example, from CCTV or body cameras or otherwise) as having committed the relevant unlawful acts prior to the date of the final order and have been served (probably pursuant to an order for alternative service) prior to the date.”

Persons Unknown – final orders

- *Afsar* (8 April 2020) (Warby J), para 22:

Unknown person in protest can only be subject to Final Injunction if:

1. Claim form describes “Persons Unknown” sufficiently;
2. Person fell within that description or came within it later (but before Final Injunction);
3. Person served with proceedings; AND,
4. Impossible or impracticable to identify the person and join as named defendant

- (1) At time of issuing claim, apply for order for service by an alternative method for claim form and all accompanying documents – CPR r.6.15 (claim form) and 6.27 (other documents – e.g. Response Pack, Interim Injunction application, Witness Statements, etc.). Usually attach it to prominent place.
 - (2) Usually before a High Court Master
 - (3) Then serve in line with above Order
- Looks straightforward but was fatal in *Canada Goose*

Draft order

- *Canada Goose*, para 82
 - Refer to acts which correspond to the tort. May include lawful conduct of only no other proportionate means of protecting C's rights
 - Sufficiently clear and precise:
 - Do not use legal terms – e.g. trespass, harassment or nuisance;
 - Better to formulate without reference to intention
 - May be defined by reference to intention if necessary and non-technical language used and capable of proof without undue complexity;
 - Clear geographical limits
 - Clear temporal limits

Draft order - examples

– *Cuadrilla*

“4.1 blocking any part of the bell-mouth at the Site Entrance with persons or things when done with a view to slowing down or stopping the traffic;

“4.2 blocking or obstructing the highway by slow walking in front of vehicles with the object of slowing them down;

“4.3 climbing onto any part of any vehicle or attaching themselves or anything or any object to any vehicle at any part of the Site Entrance; in each case with the intention of causing inconvenience or delay to the claimants and/or their agents, servants, contractors, sub-contractors, group companies, licensees, invitees or employees.”

- Acceptable;
- Heavily-context dependent. Similar wording unacceptable in *Ineos* because no history of such conduct at that site.

Draft order - examples

– *Canada Goose*

“(2) behaving in a threatening and/or intimidating and/or abusive and/or insulting manner directly at any individual or group of individuals within the definition of ‘protected persons’

(3) intentionally photographing or filming the protected persons with the purpose of identifying them and/or targeting them in connection with protests against the manufacture and/or sale or supply of animal products;

(4) making in any way whatsoever any abusive or threatening electronic communication to the protected persons”,

...

(9) projecting images on the outside of the Store,”

- Unacceptable;

- the specific prohibited acts were not confined, or inevitably confined, to unlawful acts

Borough-wide injunction against travellers: where are we now?



Richard Langham

Borough-wide injunction against travellers

Before 2015

Injunctions against persons unknown were used to restrain breaches of planning control and threatened trespass on individual sites.

Borough-wide injunctions were granted against named defendants.

Borough-wide injunction against travellers

The legal and planning policy definition of ‘gypsies and travellers’ requires a nomadic habit of life – ie travelling for the purpose of making a living.

There are no transit sites in Greater London and the closest transit site to Bromley is the site at South Mimms.

Guidance on unauthorised encampment contemplates tolerated trespass on public land.

Borough-wide injunction against travellers

Starting in 2015 authorities sought injunctions against persons unknown (and sometimes named defendants) to prevent the stationing of caravans on *any* of the publicly owned open spaces in the authority's area.

Eventually 38 such injunctions were granted.

Borough-wide injunction against travellers

Pleaded basis of the claims was trespass and s187B of the TCPA 1990.

The injunctions identified all the open spaces sought to be protected, usually numbered in the hundreds.

The injunctions usually prohibited –

- setting up an encampment on a site without the written permission of the local authority or the grant of planning permission by an Inspector
- entering a site for residential purposes;
- putting caravans on a site;
- depositing waste on a site without a licence/permit.

Borough-wide injunction against travellers

There was usually an interim order followed by a prompt final order which was invariably time-limited.

Until Bromley the claims were never contested.

Borough-wide injunction against travellers

Harlow District Council v Stokes [2015] EWHC 953

Harlow District Council v McGinley [2017] EWHC 1851

Tendring District Council v Persons Unknown [2016] EWHC 2050

Wolverhampton City Council v Persons Unknown [2018] EWHC 3777

Waltham Forest LBC v Persons Unknown [2018] EWHC 2400

Kingston upon Thames LBC v Persons Unknown [2019] EWHC 1903

Havering LBC v Stokes [2019] EWHC 3006

Borough-wide injunction against travellers

Bromley v Persons Unknown [2019] EWHC 1675

The judge found that the requirements for an interim injunction to restrain trespass had been satisfied – ie -

- there was “a strong probability” that, unless restrained by an injunction, the defendants would act in breach of the appellant’s rights;
- if the defendant did the act sought to be prohibited, the resulting harm be so grave and irreparable that a remedy of damages would be inadequate.

Borough-wide injunction against travellers

- a) The injunction amounted to “a *de facto* borough-wide prohibition of encampment and upon entry/occupation for residential purposes... in relation to all accessible public spaces in Bromley except cemeteries and highways”.
- b) The injunction was not aimed specifically at prohibiting antisocial or criminal behaviour, but just entry and occupation.
- c) The lack of any alternative transit sites in Greater London.
- d) The cumulative effect of injunctions of this kind – to transfer the problem to other authorities.
- e) The absence of an equality impact assessment, amounting to a failure to consider A8, the best interests of children and the PSED.
- f) The length of the proposed injunction (5 years).
- g) The issue of permitted development rights had not been satisfactorily addressed.

Borough-wide injunction against travellers

108. Whilst I do not accept the written submissions produced on behalf of the third intervener, to the general effect that this kind of injunction should never be granted, the following summary of the points noted above may be a useful guide:

- a) When injunction orders are sought against the Gypsy and Traveller community, the evidence should include what other suitable and secure alternative housing or transit sites are reasonably available. This is necessary if the nomadic lifestyle of the Gypsy and Traveller community is to have effective protection under [article 8](#) and the [Equality Act](#).
- b) If there is no alternative or transit site, no proposal for such a site, and no support for the provision of such a site, then that may weigh significantly against the proportionality of any injunction order.
- c) The submission that the Gypsy and Traveller community can “go elsewhere” or occupy private land is not a sufficient response, particularly when an injunction is imposed in circumstances where multiple nearby authorities are taking similar action.
- d) There should be a proper engagement with the Gypsy and Traveller community and an assessment of the impact of an injunction might have, taking into account their specific needs, vulnerabilities and different lifestyle. To this end, the carrying out of a substantive EIA, so far as the needs of the affected community can be identified, should be considered good practice, as is the carrying out of welfare assessments of individual members of the community (especially children) prior to the initiation of any enforcement action.
- e) Special consideration is to be given to the timing and manner of approaches to dealing with any unlawful settlement and as regards the arrangements for alternative pitches or housing.

Borough-wide injunction against travellers

109. Finally, it must be recognised that the cases referred to above make plain that the Gypsy and Traveller community have an enshrined freedom not to stay in one place but to move from one place to another. An injunction which prevents them from stopping at all in a defined part of the UK comprises a potential breach of both the Convention and the [Equality Act](#), and in future should only be sought when, having taken all the steps noted above, a local authority reaches the considered view that there is no other solution to the particular problems that have arisen or are imminently likely to arise.

Borough-wide injunction against travellers

Alternative sites

What sort of engagement is contemplated?

Do the travellers now have a defence against a possession action?

Borough-wide injunction against travellers

The lockdown

Possession proceedings are stayed until 30 October. But the stay does not apply to

Proceedings against unknown trespassers (CPR 55.6)

Proceedings for an injunction

The proposed extension of police powers against unauthorised encampments



Matthew Fraser

Trespass – a re-cap

- Trespass is a tort / civil wrong. It consists of any unjustifiable intrusion by one person upon land in the possession of another.
- To bring a private action for trespass, it is not necessary to show any actual damage.
- Trespass is not generally a criminal offence.
- However, there are lots of criminal offences, created by statute, which involve trespass.

Examples of criminal offences involving trespass

- Trespass on land / in a building with a firearm: s.20 Firearms Act 1968
- Squatting in residential premises: s.144 LASPO 2012
- Trespass on protected sites (e.g. Royal / Governmental / Parliamentary / MOD / Nuclear sites): s.128-131 Serious Organised Crime and Police Act 2005
- Failing to comply with a police direction to leave land: s.61(4) Criminal Justice Public Order Act 1994

My favourite trespass-related offence

- Failure to comply with a direction to leave a “rave”: s.63 CJPO 1994
- What is a “rave”? *A “gathering on land in the open air of 100 or more persons at which amplified music is played during the night (with or without intermissions) and is such as, by reason of its loudness and duration and the time at which it is played, is likely to cause serious distress to the inhabitants of the locality”.*
- What is “music”? *“Sounds wholly or predominantly characterised by the emission of a succession of repetitive beats”.*

Current position on unauthorised encampments

- Trespass for the purpose of setting up an unauthorised encampment is not itself an offence.
- It is only an offence if all of the following ingredients are present (s.61 CJPO):
 - Two or more persons trespass on land
 - With the common purpose of residing there for any period
 - Reasonable steps have been taken by or on behalf of the occupier to ask them to leave
 - Either:
 - Any person has caused damage to land/property or used threatening/insulting/abusive words or behaviour towards occupier **OR**
 - 6 or more vehicles on the land
 - Police have directed persons to leave, and they knowingly haven't.

Recent consultation on proposed changes

- **Strengthening police powers to tackle unauthorised encampments:**
 - Consultation from 5/11/19 to 5/3/20
- Two alternative proposals:
 - Criminalise unauthorised encampments
 - Amend the existing powers

Proposal (1): criminalise unauthorised encampments

- Based on examples from Ireland and Scotland:
 - In Ireland, unauthorised encampments are criminalised if they substantially damage the land or prevent use of the land by the owner or other lawful users. The police are given a discretion to direct trespassers to leave if suspected to be committing the offence: s.24 Housing (Miscellaneous Provisions) Act 2002
 - In Scotland, it is an offence to occupy private land without the landowner's permission: Trespass (Scotland) Act 1865

Proposal (1): criminalise unauthorised encampments

- **Why?** Deterrent to future encampments, speedier enforcement, reducing cost of eviction and clean-up.
- **What would the ingredients of the offence be?**
 - Actual / likely future damage?
 - Requirement for landowner to take reasonable steps to ask trespasser to leave?
 - Requirement for the encampment to prevent those entitled to use the land from making use of it?
 - Trespassers have demanded money in return for departure?
 - Actual / likely future anti-social behaviour?

Proposal (2): Amending existing powers

- Currently it is an offence to return to site within **3 months** after being directed to leave by police. The proposed amendment is to extend this to **12 months**.
- Currently police powers to direct persons to leave require either anti-social behaviour / damage or **6 or more vehicles**. The proposed amendment is to reduce this to **2 or more vehicles**.
- Currently the police powers don't apply to **highway land**. The proposed amendment would remedy this.
- Currently the police can direct trespassers to suitable authorised sites within the **same authority area**. The proposed amendment would widen this to **neighbouring authority areas**.

Proposal (2): Amending existing powers

- Potential issues about extending to neighbouring authority sites
 - Having agreements in place about directing to neighbouring authority sites;
 - Maximum distances for travel to neighbouring authority sites;

Consultation responses

- Local Government Association: supportive of strengthened powers, but needs to be done in conjunction with:
 - Financial support to local authorities and police for exercising the powers
 - Financial support for provision of transit sites
 - Reform to court process for obtaining injunctions
 - More collaborative approach with Gypsy, Roma and Traveller community
- Friends Families and Travellers: opposed to strengthened powers, and switch to improved site provision duties/targets and funding (citing support for these views among the police).

Conclusions

- We await the Government's response;
- No consensus on whether the extended powers are desirable (it basically depends on who you ask);
- Consensus that there needs to be a joined-up approach with more funding to LAs and police / provision for available transit sites.

Q&A

We will now answer as many questions as possible.

Please feel free to continue sending any questions you may have via the chat section which can be found along the top or bottom of your screen.

Thank you for listening

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