

Fracking and quia timet interim injunctions (INEOS v Persons Unknown)

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Dispute Resolution analysis: With shale gas exploration being given the go-ahead despite objections from local communities, injunctions designed to prevent assembly and protest have become a live issue. Janet Bignell QC, of Falcon Chambers, analyses a case which pits environmental action against business interests.

Original news

INEOS Upstream Ltd and others v Persons Unknown and others, [\[2017\] EWHC 2945 \(Ch\)](#), [\[2017\] All ER \(D\) 190 \(Nov\)](#)

The claimants' application for an injunction against the defendants until the point of trial was largely allowed, and a range of activities relating to the disrupting of fracking activities at a number of sites was prohibited by the court. However, the claimants had not demonstrated a need for the court to make an order within the [Protection from Harassment Act 1997 \(PHA 1997\)](#), although they had permission to apply in the future for an order against harassment.

See our original coverage here: [Alert: quia timet interim injunctions granted in fracking case \(INEOS Upstream v Persons Unknown\)](#).

What are the practical implications of the judgment?

The judgment demonstrates the civil court's powers to order pre-emptive interim injunctive relief to protect private companies and individuals and third party suppliers from a range of threatened tortious and criminal activity by those protesting against their lawful business activities.

It is also an example of the exercise of the court's jurisdiction to order injunctive relief against persons unknown by description in an appropriate case.

For the purposes of the application, it was agreed that Articles 10 and 11 of the European Convention on Human Rights (ECHR) were engaged on the facts even though none of the claimants was a public authority. The right to freedom of speech under Article 10 ECHR and to freedom of assembly under Article 11 ECHR are however qualified rights in relation to matters which involve public safety, matters needed for the prevention of disorder or crime and for the protection of the rights of others. The judgment makes clear that they are not a trump card.

What was the background?

The claimants were aware that shale gas extraction is a contentious issue, and one on which opinions are divided. Although the first claimant was yet to drill on any exploratory site, details of its involvement in hydraulic fracturing were well known. Based on the experience of other shale gas operators, the first claimant therefore had very good reason to believe that its sites (including its office premises) were at real and imminent risk of being targeted by protestors opposed to the industry. While much protest is peaceful, other operators and the third party supply chain had experienced the setting up of long-term and large-scale protest camps on private land, repeated 'lock-on' protests at their sites and offices, protestors' slow walks to impede vehicular access to their sites and incidents of criminal damage and theft. The claimants sought pre-emptive injunctive relief such that they could enjoy their right to carry out their lawful business activities without risk of unlawful interference, and in order to protect their landlords and suppliers.

What issues were before the court?

The principle issues before the court were as follows:

- the acts which were alleged to be unlawful
- Articles 10 and 11 ECHR
- what was the test to be applied for the grant of an interim injunction and the test for a quia timet injunction at trial?
- what would a court be likely to do if this were an application for a final injunction and the court accepted the evidence put forward by the claimants?
- which of the risks apprehended by the claimants would be considered to be imminent and real?
- what were the appropriate remedies?
- should relief be granted against persons unknown by description?
- the need for clarity and precision

What did the court decide?

On the evidence there was an imminent and real risk of trespass on the claimants' land, interference with equipment on the claimants' land, substantial interference with private rights of way enjoyed by some of the claimants, action to prevent the claimants leaving their land and passing and repassing on the highway, action to prevent third party contractors leaving their land and passing and repassing on the highway, the court was satisfied that it was appropriate to grant injunctions against persons unknown by description. Since *Bloomsbury Publishing group Ltd v News Group Newspapers Ltd* [2003] EWHC 1205 (Ch), [2003] 3 All ER 736, there have been many cases where the courts have been asked to grant, and have granted such injunctions.

The appropriate causes of action were:

- trespass to land
- damage to and theft of equipment
- actionable interference with an easement
- obstruction of the highway as an actionable public nuisance
- conspiracy to injure INEOS by means of each of these matters in relation to third party contractors supplying goods and services to INEOS

The judge therefore granted interim injunctions to prohibit trespass onto specified private land, to prohibit interference with private rights of way and public rights of way over the highway, and to prohibit unlawful means conspiracy to commit certain criminal and tortious acts, such as criminal damage and offences under the [Highways Act 1980](#).

The judge did not however favour the grant of an additional injunction against 'harassment' under the [Protection from Harassment Act 1997](#) 'largely because of the lack of clarity of that term for the purposes of being included in an injunction'. Instead, the judge gave the claimants permission to apply in the future for an injunction against harassment expressed in clear and precise terms specifying the matters restrained by such an order.

What test did the court apply to the granting of interim relief?

Normally the test for interim injunctive relief is that stated in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, [1975] 1 All ER 504, which requires there be at least a serious question to be tried and then refers to the adequacy of damages for either party and the balance of convenience.

However, given the acceptance that ECHR rights were engaged, Morgan J applied the test laid down in [section 12](#) of the Human Rights Act 1998 ([HRA 1998](#)). The order he was asked to make 'might' affect the exercise of the ECHR right to freedom from expression. The meaning of 'likely' in [HRA 1998, s 12\(3\)](#) was considered in *Cream Holdings Ltd v Banerjee* [2004] UKHL 44, [2004] 4 All ER 617, in particular at para [22] by Lord Nicolls. In the present case, as there were no special considerations, 'likely' was simply taken to mean 'more likely than not'.

Interviewed by Julian Sayerer.

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