

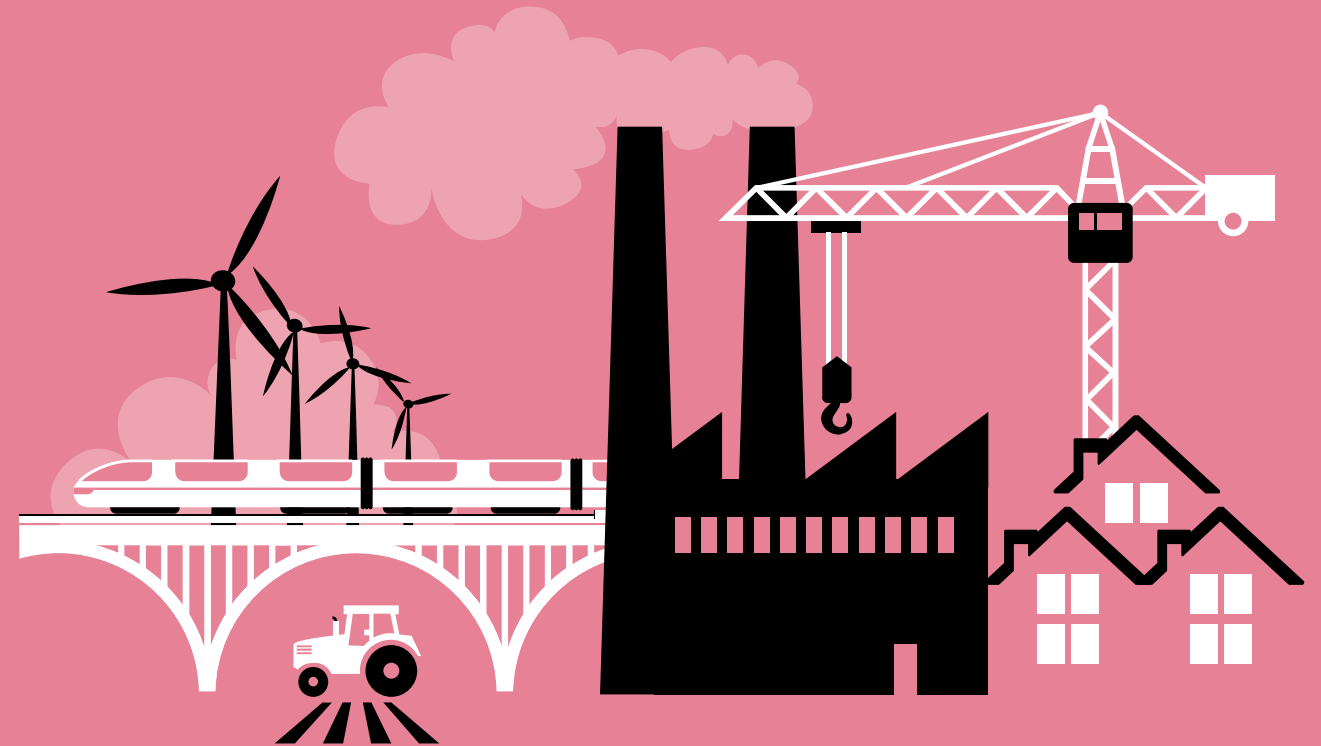


Falcon Chambers

Protests and Injunctions

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Causes of action

General principles of injunctions

Precautionary injunctions

Geography and letting go of the Latin

Ashpen Rajah

Persons Unknown

Human Rights



Injunctions: a remedy

They protect proceedings: Fourie v Le Roux [2007] 1 W.L.R. 320 [2]

E.g. they cannot prevent crimes in the abstract: Gouriet v Union of Post Office Workers [1978] A.C. 435

Generally there needs to be a cause of action

But a Court can put a stop to things before they start

'Just and convenient'

Ineos Upstream v Persons Unknown [2017] EWHC 2945 (Ch)

See discussion [40]-[73] per Morgan J



Some causes of action that may sound

- (1) *Trespass on private land;*
- (2) *Actionable interference with private rights of way;*
- (3) *Public nuisance caused by interference with the Claimants' right to pass and repass on the highway, where the Claimants are able to show they have suffered particular damage over and above the ordinary damage suffered by the public at large;*
- (4) *Harassment contrary to the Protection from Harassment Act 1997 ; and*
- (5) *Conspiracy to injure the Claimants by unlawful means, namely, various criminal offences*

Discretion is central – application in changing times



Lord Nicholls: Mercedes-Benz AG v Leiduck [1996] 1 A.C. 284

‘The court habitually grants injunctions in respect of certain types of conduct. But that does not mean that the situations in which injunctions may be granted are now set in stone for all time. The grant of Mareva injunctions itself gives the lie to this. As circumstances in the world change, so must the situations in which the courts may properly exercise their jurisdiction to grant injunctions. The exercise of the jurisdiction must be principled, but the criterion is injustice. Injustice is to be viewed and decided in the light of today’s conditions and standards, not those of yester-year.’ [307]-[308]

Cited with approval by Lord Leggatt in Broad Idea International Ltd v Convoy Collateral Ltd [2021] UKPC 24 at [174].



Are damages an adequate remedy?

Consideration of other factors: e.g. nature of the breach; can the Court enforce the order?

Considerations pointing against the award of mandatory injunctions: Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd [1998] A.C. - Lord Hoffmann's 4 factors



Starting points

CPR part 25

American Cyanamid CO v Ethicon Ltd [1975] A.C. 396

- *Serious issue to be tried*
- *Adequacy of damages and balance of convenience*

Precautionary Injunctions



Test

'Imminent and real risk of the trespass and nuisance continuing'

Boyd v Ineos Upstream Ltd [2019] EWCA Civ 515

Judge these factors by context

Geographical limits? Canada Goose Retail Ltd v Persons Unknown [2020] 1 WLR 2802

But can be extensive : National Highways Limited v Persons Unknown and others [2021] EWHC 3081 (QB)

Letting Go



Persons Unknown



Origins of claims against unnamed parties

***Friern Barnet Urban District Council v Adams* [1927] 2 Ch 25**

***In re Wykeham Terrace* [1971] Ch 204**

RSC Order 113

***Bloomsbury Publishing Group plc v News Group Newspapers Ltd* [2003] EWHC 1205**

“the person or persons who have offered the publishers of ‘The Sun’, the ‘Daily Mail’ and the ‘Daily Mirror’ newspapers a copy of the book *Harry Potter and the Order of the Phoenix* by J K Rowling or any part thereof 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”



(1) When can a remedy be obtained against persons unknown

London Borough of Barking and Dagenham v Persons Unknown [2022] 2 WLR 946, [120]

"Persons unknown injunctions have been granted in cases of unauthorised encampment and may be appropriate in some protester cases as is demonstrated by the authorities I have already referred to. I would not want to lay down any further limitations. Such cases are certainly exceptional, but that does not mean that other categories will not in future be shown to be proportionate and justified. The urban exploring injunctions I have mentioned are an example of a novel situation in which such relief was shown to be required."



(1) When can a remedy be obtained against persons unknown

Canada Goose v Persons Unknown [2000] 1 WLR 2802, [82]

“(1) ... The ‘persons unknown’ defendants must be people who have not been identified but are capable of being identified and served with the proceedings, if necessary by alternative service such as can reasonably be expected to bring the proceedings to their attention. In principle, such persons include both anonymous defendants who are identifiable at the time the proceedings commence but whose names are unknown and also newcomers, that is to say people who in the future will join the protest and fall within the description of the ‘persons unknown’.

(2) The ‘persons unknown’ must be defined in the originating process by reference to their conduct which is alleged to be unlawful.”

Approved in *Barking and Dagenham*, [56]



(1) When can a remedy be obtained against persons unknown

Canada Goose

"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 ... 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."



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Barking and Dagenham

"96. As I have explained, in my judgment, the judge ought not to have applied paras 89-92 of *Canada Goose*. ...

99. In my judgment, it is clear that *Gammell* [2006] 1 WLR 658 decided, and *Ineos* [2019] 4 WLR 100 accepted, that injunctions, whether interim or final, could validly be granted against newcomers... Accordingly, paras 89-92 of *Canada Goose* [2020] 1 WLR 2802 were inconsistent with *Ineos* and *Gammell*."

Persons Unknown



(1) When can a remedy be obtained against persons unknown

South Cambridgeshire District Council v Gammell [2006] 1 WLR 658, [32]

High Speed Two (HS2) Ltd v Persons Unknown, [108d]

"[A]s to the position of a non-party who behaves so as to satisfy the definition of persons unknown only after the injunction has been granted (i.e. a 'newcomer') such a person becomes a party on knowingly committing an act that brings them within the description of persons unknown set out in the injunction *South Cambridgeshire District Council v Gammell* [2006] 1 WLR 658, [32]. There is no need for a claimant to apply to join newcomers as defendants. There is 'no conceptual or legal prohibition on suing persons unknown who are not currently in existence but will come into existence when they commit the prohibited tort': *Boyd*, [30]."



(2) Prohibited conduct

Canada Goose, [82]

“(5) The prohibited acts must correspond to the threatened tort. They may include lawful conduct if, and only to the extent that, there is no other proportionate means of protecting the claimant’s rights.

(6) The terms of the injunction must be sufficiently clear and precise so as to enable persons potentially affected to know what they must not do. The prohibited acts must not, therefore, be described in terms of a legal cause of action, such as trespass or harassment or nuisance. They may be defined by reference to the defendant’s intention if that is strictly necessary to correspond to the threatened tort and done in non-technical language which a defendant is capable of understanding and the intention is capable of proof without undue complexity. It is better practice, however, to formulate the injunction without reference to intention if the prohibited tortious act can be described in ordinary language without doing so.”



(3) Temporal limits

Barking and Dagenham

“For as long as the court is concerned with the enforcement of an order, the action is not at an end”. [89]

“...all persons unknown injunctions ought normally to have a fixed end point for review...” [91]

“I would also want to associate myself with Coulson LJ’s suggestion that persons unknown injunctions against unauthorised encampments should be limited in time, perhaps to one year at a time before a review.” [107]

“It is good practice to provide for a periodic review, even when a final order is made.” [108]



(4) Service

CPR 6.27

Method of alternative service against persons unknown must be such as can reasonably be expected to bring the proceedings to their attention: *Canada Goose*, [82].



(4) Service

e.g. **HS2**, [221]

- i. Affixing 6 copies in prominent positions on the perimeter each of the Cash's Pit Land (which may be the same copies identified in paragraph 8(a) above), the Harvil Road Land and the Cubbington and Crackley Land.
- ii. Advertising the existence of this Order in the Times and Guardian newspapers, and in particular advertising the web address of the HS2 Proceedings website, and direct link to this Order.
- iii. Where permission is granted by the relevant authority, by placing an advertisement and/or a hard copy of the Order within 14 libraries approximately every 10 miles along the route of the HS2 Scheme. In the alternative, if permission is not granted, the Claimants shall use reasonable endeavours to place advertisements on local parish council notice boards in the same approximate locations.
- iv. Publishing social media posts on the HS2 twitter and Facebook platforms advertising the existence of this Order and providing a link to the HS2 Proceedings website."



(4) Service

Cf. *National Highways Limited* [2022] EWHC 1105 (QB), [51]-[52]

"51. In other cases, it has been possible to create a viable alternative method of service by posting notices at regular intervals around the area that is the subject of the injunctions; this has been done, for example, in injunctions granted recently by the Court in protests against oil companies. That solution, however, is completely impracticable when dealing with a vast road network. Ms Stacey QC suggested an enhanced list of websites and email addresses associated with IB and other groups with overlapping aims, and that the solution could also be that protestors accused of contempt of court for breaching the injunction could raise their ignorance of its terms as a defence. I do not find either solution adequate. There is no way of knowing that groups of people deciding to join a protest in many months' time would necessarily be familiar with any particular website. Nor would it be right to permit people completely unaware of an injunction to be caught up with the stress, cost and worry of being accused of contempt of court before they would get to the stage of proceedings where they could try to prove their innocence .

52. In the absence of any practical and effective method to warn future participants about the existence of the injunction, I adopt the formula used by Lavender J that those who had not been served would not be bound by the terms of the injunction and the fact the order had been sent to the IB website did not constitute service. The effect of this will be that anyone arrested can be served and, thus, will risk imprisonment if they thereafter breach the terms of the injunction."



Articles 10 and 11

Article 10 Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11 Freedom of assembly and association

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. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."



(1) Applicability – private land

Appleby v UK (2003) 37 EHRR 38, [47]

"[Article 10], notwithstanding the acknowledged importance of freedom of expression, does not bestow any freedom of forum for the exercise of that right. While it is true that demographic, social, economic and technological developments are changing the ways in which people move around and come into contact with each other, the Court is not persuaded that this requires the automatic creation of rights of entry to private property, or even, necessarily, to all publicly owned property (Government offices and ministries, for instance). Where however the bar on access to property has the effect of preventing any effective exercise of freedom of expression or it can be said that the essence of the right has been destroyed, the Court would not exclude that a positive obligation could arise for the State to protect the enjoyment of Convention rights by regulating property rights. The corporate town, where the entire municipality was controlled by a private body, might be an example"



(1) Applicability – private land

DPP v Cuciurean [2022] 3 WLR 446

"45. We conclude that there is no basis in the Strasbourg jurisprudence to support the defendant's proposition that the freedom of expression linked to the freedom of assembly and association includes a right to protest on privately owned land or upon publicly owned land from which the public are generally excluded. The Strasbourg court has not made any statement to that effect. Instead, it has consistently said that articles 10 and 11 do not "bestow any freedom of forum" in the specific context of interference with property rights (see *Appleby* at paras 47 and 52). There is no right of entry to private property or to any publicly owned property. The furthest that the Strasbourg court has been prepared to go is that where a bar on access to property has the effect of preventing any effective exercise of rights under articles 10 and 11, or of destroying the essence of those rights, then it would not exclude the possibility of the state being obliged to protect them by regulating property rights."

"50. ... in light of the jurisprudence of the Strasbourg court it is highly arguable that articles 10 and 11 are not engaged at all on the facts of this case."

HS2, [198]

"I acknowledge that Articles 10 and 11 do not confer a right of protest on private land, per *Appleby*..."



(2) s.12 HRA 1998

s.12 – Freedom of expression

- (1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
- (2) If the person against whom the application for relief is made (“the respondent”) is neither present nor represented, no such relief is to be granted unless the court is satisfied—
 - (a) that the applicant has taken all practicable steps to notify the respondent; or
 - (b) that there are compelling reasons why the respondent should not be notified.
- (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.



(3) Proportionality

s.6 HRA 1998

“(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(3) In this section “public authority” includes-

(a) A court or tribunal...”



(3) Proportionality

DPP v Ziegler [2021] UKSC 23, [16] and [58]

1. Is what the defendant did in exercise of one of the rights in Articles 10 or 11?
2. If so, is there an interference by a public authority with that right?
3. If there is an interference, is it 'prescribed by law'?
4. If so, is the interference in pursuit of a legitimate aim as set out in paragraph (2) of Articles 10 and 11, for example the protection of the rights of others?
5. If so, is the interference 'necessary in a democratic society' to achieve that legitimate aim?
 - (a) Is the aim sufficiently important to justify interference with a fundamental right?
 - (b) Is there a rational connection between the means chosen and the aim in view?
 - (c) Are there less restrictive alternative means available to achieve that aim?
 - (d) Is there a fair balance between the rights of the individual and the general interest of the community, including the rights of others?



(3) Proportionality

Relevant factors in Ziegler:

- a) The peaceful nature of the protest;
- b) The fact that the defendants' action did not give rise, either directly or indirectly, to any form of disorder;
- c) The fact that the defendants did not commit any criminal offences other than obstructing the highway;
- d) The fact that the defendants' actions were carefully targeted and were aimed only at obstructing vehicles heading to the arms fair;
- e) The fact that the protest related to a 'matter of general concern';
- f) The limited duration of the protest;
- g) The absence of any complaint about the defendants' conduct;
- h) The defendants' longstanding commitment to opposing the arms trade.



(3) Proportionality

DPP v Cuciurean, [76] and [84]

[76] “...a protest which is carried out for the purposes of disrupting or obstructing the lawful activities of other parties, does not lie at the core of articles 10 and 11, even if carried out on a highway or other publicly accessible land. Furthermore, it is established that serious disruption may amount to reprehensible conduct, so that articles 10 and 11 are not violated.”

[84] “The rights enshrined in articles 10 and 11, long recognised by the common law, protect the expressions of opinions, the right to persuade and protest and to convey strongly held views. They do not sanction a right to use guerrilla tactics endlessly to delay and increase the cost of an infrastructure project which has been subjected to the most detailed public scrutiny, including in Parliament.”



(3) Proportionality

Samede [2012] EWCA Civ 160, [40]-[41]

"40. The defendants argue that the importance of the issues with which the Occupy Movement is concerned is also of considerable relevance. That raises a potentially controversial point, because, as the [first instance Judge said]:

'[I]t is not for the court to venture views of its own on the substance of the protest itself, or to gauge how effective it has been in bringing the protestors' views to the fore. The Convention rights in play are neither strengthened nor weakened by a subjective response to the aims of the protest itself or by the level of support it seems to command ... [T]he court cannot – indeed, must not - attempt to adjudicate on the merits of the protest. To do that would go against the very spirit of Articles 10 and 11 of the Convention. ... [T]he right to protest is the right to protest right or wrong, misguidedly or obviously correctly, for morally dubious aims or for aims that are wholly virtuous.'

41. Having said that, we accept that it can be appropriate to take into account the general character of the views whose expression the Convention is being invoked to protect. For instance, political and economic views are at the top end of the scale, and pornography and vapid tittle-tattle is towards the bottom."



(3) Proportionality

Samede, [63]

"63. For instance, in each case a significant amount of court time was taken up by the defendant protesters explaining to the court the views they were seeking to promote. In strict principle, little if any court time need be taken up with such evidence. The contents of those views should not be in dispute, and, as we have sought to explain, they are very unlikely to be of much significance to the legal issues involved. Of course, any judge hearing such a case will not want to be thought to be muzzling defendants, who want to explain their passionately held views in order to justify their demonstration (and, at least where the defendants are as they are in this case, it is informative and thought-provoking to hear those views). Accordingly, while it would be wrong to suggest that in every case such evidence should be excluded, a judge should be ready to exercise available case management powers to ensure that hearings in this sort of case do not take up a disproportionate amount of court time."



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