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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
[2020] EWHC 3153 (QB)

No. QB-2019-001304

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 30 October 2020

Before:

MR JUSTICE NICKLIN

B E T W E E N :

CANTERBURY CITY COUNCIL — Claimant

- and -

PERSONS UNKNOWN — Defendants

- and -

FRIENDS, FAMILIES AND TRAVELLERS — Interested Party

MR J. SMYTH appeared on behalf of the Claimant.

THE DEFENDANTS were not present and were unrepresented.

MR C. JOHNSON appeared on behalf of the Interested Party.

J U D G M E N T

MR JUSTICE NICKLIN:

1. This is one of some 38 claims in which injunctions have historically been granted to local authorities to protect what is called their "green spaces" from trespassers who are intent on taking up residence on the land. Most of these injunctions were targeted at Gypsies and Travellers, but were not limited to them, and many orders also sought to prevent using the land for the disposal of waste and so-called fly-tipping.

2. Local authority-wide injunctions of this type were reviewed by the Court of Appeal in the ***London Borough of Bromley -v- Persons Unknown*** **[2020] PTSR 1043**. More generally, ***LB Bromley*** was one of several cases which transformed the legal landscape of injunctions against persons unknown (see also ***Cameron -v- Liverpool Victoria Insurance Co Ltd*** **[2019] 1 WLR 1471**; ***Boyd -v- Ineos Upstream Ltd*** **[2019] 4 WLR 100**; ***Cuadrilla Bowland Ltd -v- Persons Unknown*** **[2020] 4 WLR 29** and ***Canada Goose UK Retail Ltd -v- Persons Unknown*** **[2020] 1 WLR 2802**).

3. In these 38 cases, local authority-wide injunctions have been granted sometimes for long durations; periods up to 3 years are not uncommon. Some of these cases are now coming back before the Court on the application of the relevant local authority to extend the period of the injunction and in some cases to modify the terms. As most of these injunctions have typically been granted, in Part 8 claims, as final orders, a preliminary point that will require to be addressed is whether the Court has jurisdiction to extend the period of an injunction granted by a final order. On one view, the proceedings are at an end. Further complications arise when, as in this case, in purported compliance with requirements identified by the Court of Appeal in ***Canada Goose*** to ensure that the defendant is properly identified by reference to his or her alleged wrongdoing, the claimant seeks to amend the description of the defendants *after* the final order against them has been granted.

4. A point which has arisen in this case, and in others, is the issue of the valid service of the Claim Form on the Persons Unknown defendants (see ***London Borough of Enfield v Persons Unknown*** **[2020] EWHC 2717 QB** [4(b)]). ***LB Enfield*** had failed validly to serve the Claim Form in that case. It had not effected personal service, no order had been granted for any form of alternative service, and the court had not dispensed with service of the Claim Form. The court, in that decision, refused LB Enfield's retrospective application for an order for alternative service.

5. The failure to serve the Claim Form has serious repercussions. In ***LB Enfield***, I explained in [24]:

> "The consequence of the failure of the application under CPR 6.15(2) is pretty stark. The failure to serve the Defendants in this case means that the Interim and Final orders were made in this case without jurisdiction over any Defendant. The period of validity of the original Claim Form has long since expired: CPR 7.5. For the last three years, therefore, an injunction has been posted at up to 130 sites, directed at Persons Unknown, prohibiting certain conduct, on pain of committal for breach, when jurisdiction had not been established over any individual Defendant because of the failure validly to serve the Claim Form."

6. As made clear by Lord Sumption in the ***Cameron*** case, [14]:

> "The court generally acts *in personam*. Although an action is completely constituted on the issue of the claim form, for example for the purpose of stopping the running of a limitation period, the general rule is that "service of originating process is the

act by which the defendant is subjected to the court's jurisdiction": ***Barton -v- Wright Hassall LLP*** **[2018] 1 WLR 1119**, para 8. The court may grant interim relief before the proceedings have been served or even issued, but that is an emergency jurisdiction which is both provisional and strictly conditional."

7. One of the conditions the Court routinely imposes when granting an interim injunction is to require prompt the service of the Claim Form on the defendant, or to issue and serve a Claim Form in cases of urgency where it has not been possible for the Claim Form to be issued. The reason for those requirements is obvious, and explained by Lord Sumption. Without service of the Claim Form, the defendant is not subject to the jurisdiction of the Court. If personal service of the Claim Form is not possible, the Court may permit alternative means under CPR 6.15, provided that the Court is satisfied that the proposed method of service is one that can reasonably be expected to bring the proceedings to the attention of the defendant(s): ***Cameron*** [21]. In exceptional cases, the Court can dispense with the requirement to serve the Claim Form under CPR 6.16.

8. The same basic principles apply where the defendant(s) cannot be named, and are sued as "Person(s) Unknown".

> "An identifiable but anonymous defendant can be served with the claim form or other originating process if necessary by alternative service under CPR r.6.15. This is because it is possible to locate or communicate with the defendant and to identify him as the person described in the Claim Form. Thus, in proceedings against anonymous trespassers under CPR r.55.3(4), service must be effected in accordance with CPR r.55.6 by attaching copies of the documents to the main door or placing them in some other prominent place on the land where the trespassers are to be found and posting them, if practical, through the letterbox."
>
> (Lord Sumption in ***Cameron*** [15])

9. Service of the Claim Form, or obtaining an order relieving the claimant from the requirement to serve it, is an essential prerequisite to the Court's jurisdiction. Its importance cannot be underestimated. There are many authorities that deal with the consequences of failing validly serve the Claim Form. Likely to be added to them are the increasing number of cases in which interim and final injunctions have been granted against Persons Unknown where this fundamental step to establishing the Court's jurisdiction over a defendant has not been completed. Although in conventional cases, where a claimant fails to serve a Claim Form validly or at all, the prejudice usually falls on the claimant. In these Persons Unknown injunctions cases, the prejudice falls on all those in the class of persons unknown whose actions have been restricted by an injunction of the Court.

10. Before turning to the issues that arise for determination today, I should set out the history of this action.

History

11. The Part 8 Claim Form was issued on 10 April 2019. The defendants were simply identified as "Persons Unknown". The details of the claim included on the Part 8 Claim Form the following:

> "In recent years, the City has experienced numerous unauthorised residential encampments at car parks and public open spaces managed by the claimant. The problem is escalating, rather than diminishing. The police are reluctant to

> intervene so that the incursions are dealt with by the claimant on application to the Magistrates' Court. This reactive process is slow and expensive. Once the trespassers have vacated, they frequently leave waste and mess which has to be cleaned up at public expense.
>
> In these circumstances, the claimant is concerned that there is a significant risk of trespass, an anticipated breach of planning control (by means of unauthorised residential use) and the stopping/obstruction of the highway which will be prejudicial to the interests of the area. Given the harm that would arise if this breach occurred, it is considered just and proportionate to seek an injunction to prevent it. The proposed order will have the effect of maintaining the status quo…
>
> The defendant has been identified as "Persons Unknown" as the identity of those who may undertake the unauthorised activity is unknown."

12. An application for an interim injunction was made the same day as the issue of the Claim Form. The application was supported by a witness statement, dated 9 April 2019, from Douglas Rattray. Mr Rattray has been the head of the Claimant's 'Safer Neighbourhoods and Environmental Protection for the Community Services Department' for some ten years. He stated that "*illegal incursions of Travellers*" had occurred regularly, and on an annual basis. In 2016, there had been 8 incidents, 17 in 2017 and 15 in 2018. The cost to the Council of dealing with the events in 2018 had amounted to just short of £60,000. He continued:

> "Over the last year, the Council has spent over £8,000 installing infrastructure measures to prevent illegal vehicle access onto car parks and open spaces, such as entrance barriers, over height barriers and heavy duty stud posts at entrances to its parks, car parks and open spaces… I am aware that some London boroughs have obtained preventative injunction relief. As a result, I believe that there may have been a displacement effect in persons living a Traveller lifestyle in that they will seek to set up camp in areas without the benefit of such an order."

13. Having read Mr Rattray's witness statement carefully, it does not disclose evidence of either very recent actual or threatened occupation of any of the land by the Travellers. Instead, Mr Rattray explained the decision to seek the injunction as follows:

> "Several month ago, our elected Members raised the possibility of an injunction being obtained to protect our open spaces and car parks from further incursions. We are aware that Harlow District Council secured a district-wide injunction, but we are also aware that the number of incursions they were handling were extreme, and may well justify the unusual nature of their injunction. However, I am aware that a number of other councils have applied for and been successful in obtaining injunctions of this type where more moderate numbers of incursions have been used to justify the application, such as Boston Borough Council and Blackpool Borough Council. Given the similarity to the number and type of incursions we have had in Canterbury seem to be similar to Boston District Council, we have made contact with the authority and have been provided with a copy of the Order they obtained dated 3 April 2018... In the Boston DC case, we are aware that the application was made jointly with their County Council. We have therefore contacted Kent County Council who declined to make a joint application with us, but they have indicated they would not oppose our application if we made one. Meetings were held with Senior Officers to consider whether Canterbury should seek an injunction and further discussions were held with the police, who are in full support of our intended action. A conference was undertaken with Counsel on 18 March 2019, to thrash out the issues and the legal implications of making the application for the injunction.

Further examples from Elmbridge, Runnymede, Central Bedfordshire and Merton are also attached… designed to show that other Councils are seeking similar assurances against incursion."

14. Without intending any discourtesy to Mr Rattray, I would summarise that evidence as follows: "We have historically had a problem with Travellers illegally occupying land. Other local authorities have been granted wide injunctions against persons unknown and we would like one, too."

15. It is quite apparent from Mr Rattray's evidence that the Council had been giving active consideration to making an application for such an injunction at least 3 weeks prior to the commencement of the Part 8 claim (and it appears from the evidence it may well have been a significant period before that).

16. The Part 8 Claim Form sought a final injunction, but, on 10 April 2019, the Claimant applied for an interim injunction. The application was made without notice to the defendants. A standard form of an Application Notice for an injunction was used. The copy I have is not sealed. There is no copy of an Application on the CE file. Mr Boyle, the Council's solicitor, is unable to recall whether it was issued, and the section of the Application Notice marked "This application is to be served upon" was left blank. I am told that no skeleton argument was provided for the hearing and no note of the hearing can now be produced. As a result, the Claimant would be unable to comply with a request made by a third-party for a note of the hearing as required by CPR Part 25 APD para.9.2(2). Given the length of time that the Council had been considering making the claim, and the lack of any immediate urgency, I cannot see that there was any justification for proceeding without notice and for the failure to provide a skeleton argument. In my judgment, the Council could and should have given notice of the application by at least posting notices on each site in respect of which it was seeking a prohibitory injunction. Without notice applications, brought on in an unjustifiable hurry, usually carry with them a significant risk of causing unfairness.

17. The court granted the claimant an interim injunction; I am told that no judgment was given. The order, dated 10 April 2019, endorsed with a penal notice, contained the following prominently on the front page:

> "YOU MUST NOT PARK ANY CARAVAN OR MOBILE HOME HERE.
>
> UPON HEARING COUNSEL FOR THE CLAIMANT AND THERE BEING NO NOTICE TO THE DEFENDANT
>
> UPON READING THE PAPERS AND HEARING THE APPLICATION FOR AN INTERIM INJUNCTION ORDER PENDING THE FINAL INJUNCTION HEARING
>
> UPON READING THE WITNESS STATEMENT IN SUPPORT OF THE CLAIM AND
>
> UPON ANYONE FROM THE GYPSY AND TRAVELLER COMMUNITY WHO WISHES TO ATTEND THE RETURN DAY BEING AT LIBERTY TO DO SO
>
> IT IS ORDERED:
>
> Until further order, the defendant, as persons unknown occupying land, are forbidden from:

(1) setting up encampment on any land identified on the attached map without the grant of planning permission or the written permission of the claimant;

(2) entering and/or occupying any part of the land identified on the map for residential purposes (temporary or otherwise), including siting caravans, mobile homes, vehicles and residential paraphernalia;

(3) for the avoidance of doubt, if a person claims that they were unaware of the terms of this order when they breached it, they must vacate the site within four hours of being informed of the terms of the order, otherwise they shall be in contempt of court.

The land in the Order means:

(4) all land within the City identified on the attached map;

(5) service of the order shall be deemed served pursuant to CPR 6.27 by affixing a copy of this order, as opposed to an original, contained in a transparent, waterproof envelope in a prominent position at each of the entrances to the sites falling within the land identified on the map;

(6) any person who is presently a "persons unknown occupying land" (or anyone notified of this order) who wishes to identify him or herself to join as a named defendant to the proceedings may apply to the court on 72 hours' written notice to the court and the claimant to vary or discharge this order (or so much as it affects that person);

(7) this application will be listed for its return day at 10.30 on 3 June 2019, with a time estimate of one hour;

(8) costs reserved."

Paragraphs 9 to 11 contained guidance notes as to the effect of the order on persons unknown and anyone knowingly assisting in a breach of the order; paragraphs 12 to 13 recorded undertakings given to the court by the claimant as follows:

"(12) The claimant will serve a copy of this order in a transparent, waterproof envelope in a prominent position at all the entrances to the land on each of the sites marked on the map;

(13) The claimant will place a copy of this order, together with the evidence served in support and the Part 8 claim form, on the claimant's website."

18. The map attached to the interim injunction prohibited the acts in paragraph (1) and (2) of the order at 82 separate sites.

19. The following points should be made about the application for the interim injunction and the order.

a. No attempt was made to serve the Application Notice on the Defendants, whether at least 3 days before the application or such shorter period of service as permitted by the court: CPR 23.7 and CPR Part 25 APD §2.2. The Order contained no provision regarding service of the Application Notice on the Defendants or any undertaking to

do so. The only undertakings the Claimant gave were set out in paragraphs (12) and (13). Insofar as the Court permitted the application to be made without notice, pursuant to CPR 25.3, I have no evidence that there was compliance with CPR 23.9.

b. The witness statement of Mr Rattray did not explain why notice of the application for the interim injunction had not been given to the defendants as required by CPR Part 25 APD §3.4.

c. The Application Notice contained no application for an order for alternative service of the Claim Form on the Defendants pursuant to CPR 6.15 (as required by CPR 6.15(3)). Mr Rattray's evidence did not address the issue of service of the Claim Form at all, as required by CPR 6.16(3)(a), and the Order did not grant the Claimants permission to serve the Claim Form by alternative means (or contain any of the directions that were required by CPR 6.15(4)). All that the Order contained was a recital (in paragraph 13) that the Claimant would make the Claim Form, and other identified documents, available on its website. That undertaking is not and cannot be, and does not purport to be, an order for alternative service.

20. As directed, the matter came back before the Court on 3 June 2019. The Claimant had filed further evidence from Mr Rattray in his second witness statement. The hearing was only attended by counsel for the Claimant. No-one attended as a defendant to the Claim or to represent their interests. Mr Smyth, who appeared for the Claimant at that hearing, did provide a skeleton argument. In its introduction it sought to reassure the court that:

> "The High Court has previously granted similar prohibitory injunctive relief to 34 other local authorities."

He continued:

> "In this case, an interim injunction, *ex parte,* was granted on 10 April 2019. The matter was listed for a return date today. To effect service the Council has affixed a copy at the entrance to each of the sites and displayed it on its website. It has gone further to bring the interim injunction to the attention of others by advertising the fact by press release and Twitter. Nobody has objected to the interim injunction or made themselves known to the Council.
>
> The Council asked the Court to make a final order by continuing the terms of the interim injunction for 3 years. This appears to be the length of time preferred by the High Court in other cases."

21. That was all that was said about service of any document on the putative Defendants. It referred only to service of the injunction order of 10 April 2019. The skeleton argument left entirely unaddressed the question of service of the Claim Form.

22. In a list of five reasons why the Court should grant the final order sought by the Claimant, Mr Smyth's fifth submission, in paragraph15 of his skeleton argument, was as follows:

> "… The High Court has already determined that this form of relief is proportionate in respect of the claims brought by other local authorities with one exception - Bromley. Three points are made:
>
> (a) Bromley was given permission to appeal by the trial judge;

(b) the judgment is not binding on this Court; and

(c) in any event, this case can be easily distinguished, given that the restraint sought is far less sweeping and ambitious (Bromley's covered all public open spaces and car parks in the borough and also prohibited fly-tipping) and, unlike Bromley, the Council does not have a significant unmet need for gypsy traveller pitches."

23. The reference to "Bromley" was to the important decision of Leigh-Ann Mulcahy QC, sitting as a Deputy Judge of the High Court on 17 May 2019 in ***Bromley London Borough Council -v- Persons Unknown*** **[2019] EWHC 1675 QB**. That decision had been made between the grant of the interim injunction on 10 April 2019 and the hearing on 3 June 2019. As it happened, Mr Smyth was also counsel for the Claimant in that action. The decision of the Deputy Judge was important because it was, in this type of case, a rare example of a judgment following details submissions by counsel acting for the relevant Claimant and, indeed, leading counsel acting for an interested party, the London Gypsies and Travellers. In the history of grant of injunctions like this, it stood out, exceptionally, as a reasoned judgment following an adversarial hearing.

24. I asked Mr Smyth whether he thought that his skeleton rather downplayed the significance of the decision of the Deputy Judge, seeking, perhaps, to characterise it as something of an outlier. He responded by confirming that he had given a copy of the judgment of the Deputy Judge to Moulder J on 3 June 2019 and that the Judge had read it. He points also to the fact that in Mr Rattray's second witness statement, Mr Rattray had himself sought to respond and to distinguish the action being taken by Canterbury from that that was found in ***LB Bromley***. Mr Rattray explained why he thought that the case could be distinguished from the injunction the Claimant was seeking. Had one been present, Counsel acting on behalf of persons unknown would, no doubt, have made several points about Mr Rattray's second statement in light of the ***LB Bromley*** case and, in particular, the lack of an equality impact assessment. That demonstrates the importance of making sure the Court is addressed on all points that could be fairly raised against the application that is being made.

25. In my judgment, the decision of the Deputy Judge merited a great deal more respect and analysis than to be dismissed in a single paragraph in Mr Smyth's skeleton argument, all the more so because he was appearing, effectively, *ex parte*. In paragraphs [7] to [12] of the ***LB Bromley*** judgment, the Deputy Judge noted that some 34 injunctions had been granted in similar terms and that "*their cumulative effect does now merit consideration*" (see also [17]). Perhaps more importantly, the Deputy Judge had not been referred to any reasoned judgment in any of the other 34 cases dealing with the points of discrimination that had been raised in the ***LB Bromley*** case. In my judgment, Mr Smyth was obliged to take the Judge carefully through the decision of the Deputy Judge in ***LB Bromley***. She had refused the injunction sought by the Claimant in that case. Many of the issues raised in that case could fairly have been said to apply to Canterbury's case. It was not for Mr Smyth to dismiss the case in his skeleton argument as "*easily distinguished*". It was his obligation to take the Judge through the authority, explain the points that could be raised against his submissions and then seek to persuade the Judge that it could be distinguished. On any view, the decision in ***LB Bromley*** had a very significant bearing on Canterbury's case. Mr Smyth's skeleton argument did not contain a section identifying, on the *ex parte* application, what could fairly be said in answer to the Claimant's application. Had such a section been included, as it should have been, by far the most prominent part would have been a careful analysis of the decision in ***LB Bromley***. Instead, it appears it was rather brushed aside.

26. In the absence of opposition on 3 June 2019, a final order was granted in similar terms to the interim injunction that had been granted on 10 April 2019. The material differences were as follows:

    a. in paragraphs (1), (2), (4) and (5), four maps were attached to the final order; and

    b. in the final order paragraph 6 provided:

    > "Adjourned generally with liberty to apply. Any person who is presently a Persons Unknown Occupying a site identified in the 4 maps (or anyone notified of this order) who wishes to identify him or herself to join as a named defendant to the proceedings may apply to the court on 72 hours' written notice to the Court and the claimant to vary or discharge this Order (or so much as it affects that person)."

27. The final order, like the interim order of 10 April 2019, did not grant the Claimant permission to serve the Claim Form by alternative means.

28. There is apparently no note available of this hearing either. Moulder J gave a short judgment on 3 June 2020 (**[2019] EWHC 3012 (QB)**). It is clear that the injunction granted by the Court on 3 June 2019 was a final order and was granted for a period of 1 year, not the 3 years sought by the Claimant. Because the Claimant had not focused on this issue, the judge did not deal with the issue of service of the Claim Form or any order for alternative service. The Judge also did not refer to the decision in ***LB Bromley***.

29. The 4-month period to serve the Claim Form under CPR 7.5 expired at midnight on 10 August 2019. No application had been made under CPR 7.6 to extend the period within which the Claim Form had to be served. Any application now made would be required to be made under CPR 7.6(3) and CPR 7.6(3)(b) might be regarded as something of an obstacle to such an application. Nevertheless, no such application has been made.

The Application to extend the final injunction order

30. An Application Notice, dated 22 May 2020, was prepared, but not filed until 23 June 2020. In it the Claimant sought:

    > "to renew the order for injunction obtained on 8 June 2019 (sic) which is due to expire, but on a narrower basis than previously for a period of two years".

    The Application was supported by the fourth witness statement of Mr Rattray dated 23 June 2020.

31. The application was originally listed before Linden J, on 7 July 2020, but was adjourned to allow submissions to be prepared on behalf of Friends, Families and Travellers, a national organisation that advises gypsies and travellers throughout England. The adjourned application came before Thornton J on 30 July 2020. The Judge had a skeleton argument from Mr Smyth, and written submissions from Mr Johnson on behalf of the Friends, Families and Travellers. Mr Smyth's skeleton advanced the Claimant's submission as to why the injunction ought to be extended for a further period of 2 years. He addressed the Court of Appeal authorities of ***Boyd -v- Ineos*** and ***LB Bromley***, in which the Court dismissed an appeal against Leigh-Ann Mulcahy QC's decision at first instance. The Claimant did not refer to, or address, the Court of Appeal decision in ***Canada Goose*** and, in particular, the issue about who is bound

by a final injunction granted against persons unknown. In his written submissions, Mr Johnson drew attention to the limits of final injunctions:

> "In the case of ***Canada Goose -v- Persons Unknown***… a case involving an injunction application against protestors, the Court of Appeal stated:
>
> > "[89] A final injunction cannot be granted in a protestor 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 do not fall within the description of the "persons unknown" and who have not been served with the claim form. There are some very limited circumstances… in which a final injunction may be granted against the whole world. Protestor actions, like the present proceedings, do not fall within that exceptional category. The usual principle, which applies in the present case, is that a final injunction operates only between the parties to the proceedings… That is consistent with the fundamental principle… that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard…
> >
> > [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 that the persons unknown are confined to those… 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 that date."
>
> Therefore, the injunction obtained in this case, even if it were justifiable on other grounds, can only be applied to those who were on the land prior to the final order being obtained."

32. Thornton J gave an *ex tempore* judgment: [2020] EWHC 2122 (QB). She noted that the Council had reconsidered its approach to the terms of the injunction against "Persons Unknown" in light of the ***LB Bromley*** decision ([6]) and summarised Mr Smyth's submissions ([23]). The Judge considered that the description of the Defendants as "Persons Unknown" did not comply with the requirement, identified in ***Canada Goose***, that the "Persons Unknown" must be defined by reference to their conduct which is contended to be unlawful ([34]-[36]). She granted the Claimant permission to amend the description of the Defendants in the Claim Form ([37]). Although the judge was not satisfied with some of the evidence presented by the Claimant, she was prepared to grant a short extension to the injunction ([56]). The Judge directed that the matter should be reviewed at an adjourned hearing to be fixed in October.

33. Two matters were not raised before the Judge and so were not the subject of any determination by her. The first was the jurisdiction of the Court to extend or vary an injunction granted by final order and to amend the description of a Defendant after a final order. The second was whether the Claim Form had been validly served on any Defendant.

34. The adjourned hearing was listed for 30 October 2020. In the meantime, I heard the case of ***LB Enfield -v- Persons Unknown*** on 29 September 2020 and on 2 October 2020. That was another of the 38 cases in which a borough-wide injunction had been granted, on that occasion

for a period of 3 years. The injunction, granted by final order, had been due to expire on 4 October 2020. The Council, in that case, had similarly applied to extend this final injunction, modify its terms (in terms of the numbers of sites to which it applied) and to change the description of the Defendants. It emerged in that case, like this one, that the Claim Form had not been validly served on any Defendant. That led to the Claimant withdrawing its application to extend and amend the injunction it had previously been granted. I refused an application by the Claimant for retrospective permission for alternative service under CPR 6.15(2). As I noted at the beginning of this judgment ([5]), the failure validly to serve the Claim Form meant that the London Borough of Enfield had been enforcing an injunction at some 130 sites for 3 years when it had failed to establish jurisdiction over any defendant.

35. On 1 October 2020, the London Borough of Enfield issued a fresh Part 8 Claim seeking a fresh injunction against trespassers and fly-tippers. On 2 October 2020, I refused to grant an interim injunction against fly-tippers. Directions were given for a hearing at which the Court would determine whether the Claimant should be granted a final injunction and, if so, in what terms. That hearing has been fixed for 27 and 28 January 2021.

36. On 16 October 2020, with the concurrence of the President of the Queen's Bench Division and Mr Justice Stewart, the Judge in charge of the Civil List in the Queen's Bench Division, I made orders in all 38 similar persons unknown cases that the Court was able to identify. A copy of this order is available on the Courts and Tribunals Judiciary website at www.judiciary.uk/wp-content/uploads/2020/10/Various-v-Persons-Unknown-Various-Claim.pdf. The Order seeks to manage the claims in which similar injunctions have been granted. Actions that were commenced in District Registries or in the County Court have been transferred to the Royal Courts of Justice. The Court has sought to extract basic information about each claim by requiring completion of a questionnaire. The object is to identify lead cases and common issues to enable them to be tried with the ***LB Enfield*** case. All cases have now been reserved to me.

37. As part of the review of the 38 cases, I identified the current case as having already been listed for hearing on 30 October 2020. Documents available on the CE-File suggested that Canterbury Council, like Enfield, had failed to serve the Claim Form in the period allowed by CPR 7.5. I therefore also made an order in Canterbury's case on, 16 October 2020, in the following terms:

> "By 4.30 p.m. on 23 October 2020… the Claimant is to file a witness statement which… demonstrates the method of service of the original Claim Form, during its period of validity, that is relied upon by the Claimant as giving the Court jurisdiction over the Defendants."

38. On 27 October 2020, four days late, the Claimant filed two witness statements, both dated 27 October 2020, from Steven Boyle and a fifth statement from Mr Rattray, dealing with service of the Amended Claim Form following the Order of Thornton J. These statements did not deal with the service of the original Claim Form.

39. Prior to the hearing, on 28 October 2020, an email was sent to the Claimant's representatives, copied to Mr Johnson, indicating the questions and issues the Court would wish to address at the hearing today. It included the following:

> "(1) In respect of the hearing on 10 April 2019: (a) why was no application notice issued or undertaking to issue one provided?; (b) why was no notice given to the defendants of the application for an interim injunction, for example, by posting notices at the relevant sites?; (c) why did Mr Rattray's evidence

not explain why notice of the application had not been given to the Defendants, as required by CPR Part 25 APD para.3.4?; (d) why was no skeleton argument provided to the Court?; (e) why is no note of the *ex parte* hearing available (so as to be able to comply with CPR Part 25 APD para. 9.2(2) should a request be made for the note)...

(4) In respect of the hearing on 3 June 2019… why is no note of the *ex parte* hearing available?

(5) In respect of the order of 3 June 2019, … does the Claimant contend that it grants permission to serve the Claim Form by alternative means pursuant to CPR 6.15?

(6) Subject to submissions of the Claimant on the above points and on the basis of the material the Court has reviewed so far, is not the position as follows: the Claim Form has not been served personally on any Defendant; no order has been made permitting service of the Claim Form by alternative means; the Court has not dispensed with the requirement to serve the Claim Form; and the period within which to complete the relevant step to serve the Claim Form expired at midnight on 10 August 2019. No order has been made - or sought - under CPR 7.6 extending the time for service of the Claim Form. If that is so, the Claimant has failed to establish jurisdiction over these Defendants; the proceedings are a nullity and the injunction orders should all be set aside.

(7) In the alternative, assuming that the Claim Form has been validly served, under what jurisdiction can the court (a) extend or vary the terms of an injunction granted by final order; and (b) change the description of the Defendants? See ***Canada Goose*** (CA [89]-[92]: "*Once the trial has taken place and the rights of the parties determined, the litigation is at an end.*"

(8) Do not the terms of the order of 3 June 2019 (and the subsequent order of 30 July 2020) fall foul of the Court of Appeal's decision in ***Canada Goose*** that a final order cannot bind newcomers?"

40. Mr Smyth responded to the email at 19:45 on 28 October 2020 indicating that the Council intended to withdraw its application seeking an extension of its injunction and to ask the Court to discharge the previous injunctions. He attached a proposed draft order reflecting the withdrawal of the injunction application. It provided as follows:

"**UPON** the claimant withdrawing its application dated 27 October 2020

UPON the court recording (a) the Claim Form has not been served personally on any defendant (b) no order has been made permitting service of the Claim Form by alternative means (c) the Court has not dispensed with the requirement to serve the Claim Form and (d) the period within which to complete the relevant step to serve the Claim Form expired at midnight on 10 August 2019.

<u>BY CONSENT IT IS ORDERED</u>

1. The interim injunction of Thornton J is discharged
2. The claim stands dismissed."

41. On 29 October 2020, I indicated that, notwithstanding the Claimant's decision to withdraw the application, the Court would still want to address the points that I had identified in [39] above.

42. Also, on 29 October 2020, Mr Johnson sent the following further questions which he submitted the Court should ask the Claimant to answer.

> "(1) Since the granting of the injunction on 10th April 2019, have any Gypsies or Travellers who have been encamped on any of the parcels of the land in question been evicted in reliance on the injunction order?
>
> (2) Why was reliance placed on the temporary site set up due to the Covid pandemic at the hearing before Mrs Justice Thornton when it is now revealed that the site has never been used? Were any of the gypsies or travellers who moved on to unauthorised encampments in the area since the granting of the injunction directed to that temporary site? If not, why not?
>
> (3) Is it the case that there is not a real problem with unauthorised encampments and, therefore, no need for a transit site, or is it the case that there is a problem and, therefore, there is a need for a transit site?
>
> (4) Why was question 8(a) in the questionnaire answered in the affirmative when it is now apparent that the principles in the ***Bromley*** and ***Canada Goose*** cases were not fully met?"

The reference in paragraph (4) to the answers provided to the questionnaire was to the questionnaire filed by the Clamant in response to the Order of 16 October 2020 as provided by the Claimant in this case.

43. Yesterday afternoon, Mr Smyth provided a written response to the questions I had asked.

a. As to why no application notice has been issued in respect of the application for the interim injunction application on 10 April 2019, the Claimant's response is that it had been able to locate only an unsealed copy.

> "Mr Boyle has been unable to establish whether the application, which he brought to Court was issued at the counter when he issued the Part 8 claim form and paid the fee."

The answer is not satisfactory. It shows a lax approach to the issuing of Court documents and a failure to understand their importance.

b. As to why no notice was given to the Defendants of the application for the interim injunction, Mr Smyth's response was:

> "At that time, the Council did not consider it necessary. Mr Justice Davis was satisfied that the claim was properly made *ex parte* and made an interim order on that basis."

Of course, the Court today is hampered in considering that submission by the absence of any note of the hearing and the lack of a skeleton argument. At the hearing, I asked Mr Smyth why it was not considered necessary to serve the Application Notice. Mr Smyth accepted that it did not fall into either of the established categories where

the Court permits applications to be made without notice, the first being instances of real urgency and the other being cases in which there is a risk or a fear that what is sought to be protected by the injunction would be destroyed if notice were to be given to the respondent. Having considered the chronology of the claim, I do not consider that there was any proper justification for failing to give notice of the application.

c. In response to the question why Mr Rattray's evidence in support of the application had not explained why notice of the application had not been given to the Defendants as required by CPR Part 25 APD §3.4, Mr Smyth's answer was to suggest that the matter was dealt with "briefly" in paragraph 24 of Mr Rattray's first witness statement. In that paragraph, Mr Rattray had said this:

> "The Order is being sought against persons unknown because it has not proved possible to name the people who have been illegally occupying sites in the district at present, let alone those who might be attracted here in the future and there have been occasions in the past where names have been given but which later proved to be false."

That paragraph did not provide any evidence as to why notice had not been given of the application; it provided, if anything, the Claimant's explanation for why it was suing persons unknown.

d. As to why the court was not provided with a skeleton argument, Mr Smyth responded:

> "Mr Justice Davis was the appointed Judge for the interim injunction Court that week and it was understood that he had dealt with a number of other similar applications that week. Counsel brought copies of the relevant authorities to the hearing, but the Judge did not require them. The Judge did not ask for a Skeleton.; Had he required one, Counsel would have been in a position to draft one that day and to return to court in the afternoon."

It is clear from the chronology of matters that the application for an interim injunction was not urgent and it is not suggested that it was. No-one was currently trespassing on the land and there was nothing beyond a very generalised threat that they might do so. There was no justification for the application being brought to Court 37. Court 37 is reserved for urgent applications. The Claimant's application should have been issued properly, served in accordance with the rules and listed for a hearing before a Queen's Bench Division Judge. As required for any hearing before a Judge, a skeleton argument should have been provided the day before the hearing.

e. The explanation for the inability to provide a note of the hearing on 10 April 2019 has been stated by Mr Smyth to be as follows:

> "Mr Boyle, solicitor for the Council, attended the hearing and, at Counsel's request, took a note of what was said. The note was handwritten in a notebook. Mr Boyle kept the notebook and had anyone (such as an interested party) requested a copy of it, he would have typed the note up in a manner which was legible. The notebook was misplaced or lost on or about May 2020 when his office was cleared out and he has been unable to locate it. He has tried to retrieve it without success. He apologises for this failing."

Mr Boyle should have typed up his notes of the hearing while they were still fresh in his mind and placed the note on the file. This is basic litigation practice.

f. Mr Smyth's response to question 6, set out above, was to confirm that the Claimant accepted the propositions advanced.

g. Mr Smyth submitted that the words "*adjourned generally with liberty to apply*" in paragraph 6 of the order of 3 June 2019 "*was taken to be an acknowledgement that the Council could return to Court to renew or recast the terms of the injunction after the expiry of a year*". Mr Smyth submitted that the order of 3 June 2019 was "*strictly*" a final order, but he argued that because it was time limited "*it was understood that the Council could return to renew, recast, extend its life*". So, in a "*non-literal*" sense he contended that it was an interim order. I am not persuaded by this analysis and it was not a matter that was raised with the court on 30 July 2020. I am aware that in ***Harlow District Council v McGinley & Ors*** **[2017] EWHC 1851 (QB)** (a claim that was brought against named Defendants as well as "Persons Unknown") the Court did grant an extension to a final injunction. The point of jurisdiction was not, however, addressed in the judgment and it appears to have been assumed that the Court did have jurisdiction to grant such an extension.

h. I have already expressed doubt in the ***LB Enfield*** case whether the Court has such a general jurisdiction: **[2020] EWHC 2717 (QB)** [4(b)]. As a general proposition, once the Court has adjudicated on a civil claim and granted a final order, the claim is at an end. This fundamental orthodoxy was recognised by the Court of Appeal in ***Canada Goose***: "*Once the trial has taken place and the rights of the parties has been determined, the litigation is at an end.*": [92] (see also my judgment in ***Canada Goose*** **[2020] 1 WLR 417** [55]-[60] and [159]). If an injunction is granted as part of a final order and is time limited, once it expires, it is arguable that the claimant would have to commence a new claim and seek relief afresh (if it considers that there are grounds upon which the Court could grant a further injunction). Given that, as the Court of Appeal also recognised in ***Canada Goose***, a final injunction can only bind the parties to it, in cases like this, it is arguable that a programme of renewal and extension of a final injunction against persons unknown (whether amended or not) is legally incompetent. It purports to bind newcomers, but in law it cannot do so. Ultimately, this is a point which will have to be resolved in a case where it falls directly for determination.

i. Mr Smyth's position appears to treat the Order of Thornton J on 30 July 2020 as an interim injunction, perhaps in a "non-literal sense". It was not. The Order of 3 June 2019 was a final order. The purported extension of it, by the Order of 30 July 2020, did not convert it into an interim injunction, it remained a final injunction, but these points were not explored before Thornton J and the issue of jurisdiction was not addressed by the Claimant.

44. Mr Smyth has today, in Court, responded to the questions that have been asked by Mr Johnson. I do not need to set out the answers he gave. Suffice to say that I am satisfied that a clear answer needs to be provided and that I have directed that a Witness Statement should be provided by the Claimant, responding in detail to the points raised.

45. Ultimately, Mr Smyth's acceptance, on behalf of the Claimant, that the Claim Form in this case has not been validly served means that, like the London Borough of Enfield, Canterbury City Council has been enforcing interim and final injunctions since 10 April 2019 where it, too, has failed to establish jurisdiction over any defendant. In consequence, the Claimant has asked the Court to set aside the previous injunction and to dismiss the claim. Mr Smyth's

proposed draft order sets aside the extension of the injunction order by the Order of 30 July 2020. I will also make an Order setting aside the injunction granted on 3 June 2019. I will direct that the Council is to remove the injunction orders displayed at the sites covered by the injunction.

46. These are disturbing discoveries. In what Coulson LJ described as a "*feeding frenzy*" to obtain these injunctions (see the Court of Appeal decision in ***LB Bromley*** [11]), there appear to have been serious failures on the part of two local authorities, and their representatives, to observe basic procedural rules and safeguards. The full extent of these failures, and whether they have occurred in other cases, is likely to emerge in the future case management of the cohort that is now being undertaken. But I should make this clear now. If a local authority discovers that it, too, has obtained an injunction in a case where the Claim Form has not been validly served within the period permitted by CPR 7.5, then it is incumbent on that local authority to take steps immediately to remedy that situation, if it can. It must not continue to rely upon the injunction it has obtained in such circumstances unless the position has been remedied, if it is capable of being remedied.

Costs

47. The final issues that fell to be addressed today was the issue of costs. Mr Johnson has again appeared on behalf of FFT. He has provided a very valuable service to the Court in filling the void that exists in these cases as a result of the Defendants not being present or represented. His submissions provide much assistance to the Court in addressing the issues, and raising matters that the Court should consider. Mr Johnson has substantial experience in this area and has, for some years, represented organisations like FFT and the London Gypsy and Traveller Group. The stretched resources of those groups are not unlimited. Mr Johnson has expressed concerns of these interested parties regarding costs. First, that the resources of these groups are necessarily limited, which means the occasions on which he is able to step in and to make representations at a hearing like this on behalf of interested parties are limited. Second, there is a real concern that if a group such as Friends and Family of Travellers were to seek to apply to intervene formally in proceedings, that they may thereby themselves become potentially liable for costs orders made in favour of the claimant.

48. It would be regrettable if the regime of costs and the limited resources of those groups who are seeking to assist the Court in "Persons Unknown" cases combined to disincentivise their valuable participation. I had considered, before the hearing, whether s.51 Senior Courts Act 1981 enabled the Court to make an order in relation to the interested party's costs. s.51 provides (so far as is material):

> "**Costs in civil division of Court of Appeal, High Court and county courts.**
>
> (1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in—
>
> (a) the civil division of the Court of Appeal;
>
> (b) the High Court; and
>
> (c) any county court, shall be in the discretion of the court.
>
> …

(3) The court shall have full power to determine by whom and to what extent the costs are to be paid."

49. The power conveyed by s.51(3) appears to give the Court a very broad jurisdiction in respect of orders for costs. However, s.51(1) provides that the discretion to award costs is subject to, amongst other things, the rules of Court. CPR 46.2 provides as follows:

> "(1) Where the court is considering whether to exercise its power under section 51 of the Senior Courts Act 1981 (costs are in the discretion of the court) to make a costs order in favour of or against a person who is not a party to proceedings, that person must –
>
> (a) be added as a party to the proceedings for the purposes of costs only; and
>
> (b) be given a reasonable opportunity to attend a hearing at which the court will consider the matter further."

Subparagraph (2) provides certain exceptions, but none seem to me to apply here.

50. Mr Smyth's initial submission was he was content to recognise the Court had jurisdiction to make an order for costs in favour of Mr Johnson's clients, but they would require to be joined as required by CPR 46.2. However, in the circumstances of this case, it appeared to me that there might be an argument that, consequent on the failure to serve the Claim Form, there were no proceedings to which the interested party could be joined. Mr Smyth has practically and sensibly, in my judgment, indicated that the Claimant is willing to pay the costs sought by Mr Johnson. That concession means I do not need to resolve the issue of jurisdiction today. It may arise for determination in another case.

CERTIFICATE

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