

Injunctions against “Persons Unknown”: uncertain territory

by Jan O'Neill Professional Support Lawyer at Herbert Smith Freehills

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The past few years have seen a significant increase in cases where claimants commence an action and obtain an injunction against “Persons Unknown”, who are defined by reference to their actions or role in respect of the alleged conduct.

Such orders can be extremely useful to claimants, allowing them to enlist the assistance of the court despite being unable to identify the intended defendants by name, or even where they have no knowledge of who the appropriate defendants might be.

However, the procedure does throw up a number of novel issues and challenges, and it is likely that these will continue to crystallise as such orders become more common.

A recent High Court decision has highlighted a number of such issues arising from the fact that these orders have the potential to catch ‘newcomers’ – people who did not fall within the defined category of “Persons Unknown” at the time the injunction was made but are subsequently brought within the definition as a result of some later conduct or event (*MBR Acres Ltd and others v McGivern*).

The judgment suggests some uncertainty in the law as to whether newcomers can be bound by an injunction if they did not have actual subjective knowledge of it (as distinct from the objective knowledge that is deemed upon valid service). It also flags a number of procedural anomalies that potentially arise from the fact that newcomers also automatically become parties to the substantive proceedings.

As the court observed:

“These perhaps are some of the consequences of moving civil litigation out of its established and conventional bounds and into the uncertain territory of prohibitions by injunction that are potentially binding on the whole world.”

Claimants pursuing an action against Persons Unknown would be well advised to give thought to the potential for it to catch such newcomers in the future. This could be relevant to how the Persons

Unknown should be defined and how they should be served with any orders (including possibly different methods of service for different categories of Persons Unknown). It will also be relevant when deciding whether to pursue enforcement against an individual.

Actions against “Persons Unknown”

Historically, the Persons Unknown procedure was mainly seen in the context of trespass and related actions against protestors and squatters, where the intended targets of the action are identifiable by reference to their involvement in particular activities but cannot be named individually. In such cases, the use of such orders tends to be focused on deterring future conduct.

In the last few years, the procedure has expanded beyond that context and has risen to prominence in several ‘hot topic’ areas of civil litigation where there is particular scope for substantial loss to be caused by wrongdoers acting anonymously. Those areas include cyberfraud and data hacking, online defamation and privacy breach and, increasingly in the past few years, fraud involving crypto and other digital assets.

In those more recent types of cases, Persons Unknown orders have come into their own as an important way in which courts can assist victims of wrongdoing after the event in their efforts to identify the wrongdoers, and to trace and freeze misappropriated assets or otherwise limit damage (such as by taking down websites).

Alternative service

A key challenge in the use of Persons Unknown orders is how such orders may be served.

Judges making orders against Persons Unknown almost invariably need to permit the order to be served by alternative methods, under CPR 6.15. In some of the more recent [cases](#), where the claimants’ only information about the wrongdoers

is an anonymous email address or other communication link, judges have been prepared to permit service by means that are far removed from the orthodox methods (such as via a non-fungible token).

For both traditional injunctions and those against Persons Unknown, a court permitting service by an alternative method must be satisfied that the method could reasonably be expected to bring the proceedings to the attention of the defendant(s) – it does not need to be satisfied that it will necessarily do so.

It is against that backdrop that the issue concerning the position of ‘newcomers’ arose recently before the High Court.

MBR Acres Ltd v McGivern

It is established law that a person can become one of the Persons Unknown to whom an injunction is addressed as a result of them doing some act only after the order was made (that is, newcomers). That was confirmed by the Court of Appeal in *South Cambridgeshire District Council v Gammell* and has been recognised in several decisions since, including earlier this year in *LB Barking and Dagenham v Persons Unknown*.

The recent decision of Nicklin J in the High Court in *MBR Acres Ltd v McGivern* considered the application of that ‘Gammell principle’ to a Persons Unknown injunction in a traditional context: restraining animal rights protestors’ activities at the premises of a business which bred animals for medical experiment.

Broadly, the injunction prohibited entry into an exclusion zone around the premises, and the court had permitted alternative service of the order by displaying copies of the relevant documents at specified locations around the site.

The claimants brought committal proceedings against a solicitor who had attended the site in her professional capacity to speak to the protestors. She accepted that, in the course of doing so, she had briefly entered into the exclusion zone and engaged in conduct that was technically prohibited by the injunction. However, her evidence, which the judge accepted fully, was that she was unaware of the existence of the injunction at the time.

Ultimately, the committal application fell at the first hurdle and was dismissed on the basis that the injunction had not been validly served, because the claimants had not complied fully with the specific procedures set out in the order for alternative

service. (This aspect of the judgment is itself a useful reminder that an applicant in contempt proceedings needs to prove service to the criminal standard of ‘beyond reasonable doubt’, and that the court will require the service procedure to have been followed to the letter.)

Nicklin J also held that, in any event, the solicitor’s conduct would only have been a trivial or wholly technical breach and would not have warranted any penalty for contempt. In the circumstances, the claimants’ pursuit of the contempt application was “wholly frivolous”, bordering on “vexatious”, and the application was certified as being totally without merit.

Is awareness of the order a prerequisite for contempt?

In terms of wider application to Persons Unknown orders, the more interesting aspects of Nicklin J’s judgment were his observations regarding the relevance of the fact that the solicitor was unaware of the injunction.

In the context of traditional injunctions against named defendants, as long as the order is properly served (in compliance with the applicable rules or a court order), a defendant will be deemed to have had notice of it and may be liable in contempt for any breach, regardless of whether they were actually aware of it or its terms. Ignorance of the order is likely to be relevant to what, if any, penalty should be imposed for contempt, but not to the issue of liability.

With regard to injunctions against Persons Unknown, the applicants here relied on the Court of Appeal’s decision last year in *Cuciurean v Secretary of State for Transport* as confirmation that the above position applies equally in this context.

Nicklin J accepted that *Cuciurean* is authority that, provided there has been compliance with the terms of the order permitting alternative service, a respondent to a Persons Unknown injunction will be taken to have notice of its terms, with no further requirement of knowledge.

However, he also drew attention to several statements by the Master of the Rolls, Sir Geoffrey Vos, in the recent *Barking* decision suggesting that the *Gammell* principle operates to make a newcomer liable for breach of an injunction only when they *knowingly* breached it. Nicklin J found it difficult to reconcile that with the *Cuciurean* rejection of any requirement for actual knowledge, and noted that *Cuciurean* was not considered by

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the court in *Barking*. However, it was not necessary to resolve the perceived tension in this case.

It may be noted that the court in *Cuciurean* was not specifically considering the position of newcomers, but whether that is sufficient to reconcile the authorities remains to be seen.

What happens when newcomers automatically become parties?

The uncertainties regarding such newcomer Persons Unknown extend beyond the question of when they will be bound by an injunction and liable for contempt.

Gammell also made clear that when an event brings a person within the definition of Persons Unknown, that person automatically becomes a defendant to the substantive proceedings. However, as Nicklin J in the present case pondered, how is that to work in practice?

Where the person is subsequently individually identified, will a claimant need to formally confirm whether it is pursuing a substantive claim against them? If so, it would presumably need to amend to make them a named defendant and plead a case specifically against them, triggering the need for an acknowledgement of service and defence. If the claimant does not intend to pursue a substantive claim against them individually, would it need to discontinue, potentially triggering a costs liability? Even so, would the person remain bound by the injunction on the basis that they still technically fall within the Persons Unknown definition?

These issues might not arise in many cases but they do illustrate the need for the courts to consider further the precise legal basis of orders against Persons Unknown and the procedural ramifications.

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