

Supreme Court gives guidance on newcomer injunctions

In a judgment which tackles fundamental questions with regard to the courts' equitable jurisdiction and power to develop new forms of relief, on 29 November 2023 the UK Supreme Court answered the question whether, and if so, on what basis and subject to what safeguards the court has power to grant "newcomer injunctions": ones which bind persons who are not identifiable when the order is granted, and have not at that time infringed or threatened to infringe any right or duty which the claimant seeks to enforce, but may do so at a later date.

The issue of newcomer injunctions arises in many contexts where future wrongdoers cannot be identified in advance, including industrial picketing, public protests, breaches of confidence, breaches of intellectual property rights and a wide variety of unlawful activities related to social media.

Thirteen local authorities opposed appeals by gypsy and traveller groups against injunction orders granted against unidentified "persons unknown" to prevent unauthorised encampments. Friends of the Earth, Liberty, HS2 Ltd and the Secretary of State for Transport intervened.

The Court, dismissing the appeals, departed from previous analyses of the nature of newcomer injunctions, identified them as without notice orders to which the duty of disclosure attaches, declined to approach them in terms of interim and final orders and gave important guidance relevant not only to orders of the kind before it, which were to restrain unauthorised encampments (trespass to land and nuisance), but to all such injunctions.

In summary, the Supreme Court concluded:

- (1) The court has power to grant newcomer injunctions, necessarily on an application without notice.
- (2) Such an injunction will bind anyone who has notice of it while it remains in force, irrespective of whether, at the time it was granted, the applicant had a cause of action against that person. The Court said that it was "inherently an order with effect contra mundum" – against all the world.
- (3) The principles applicable when deciding whether and if so upon what terms to grant such an injunction are those of justice and equity; in particular:
 - a. Equity provides a remedy where the others available under the law are inadequate to vindicate or protect the rights in issue.
 - b. Equity looks to the substance rather than to the form.
 - c. Equity takes an essentially flexible approach to the formulation of a remedy.
 - d. Equity has not been constrained by hard rules or procedure in fashioning a remedy to suit new circumstances.

The Court went on to summarise what was likely to be required of an applicant in the context of trespass and breach of planning control by Travellers:

- 1) To demonstrate a compelling need for the protection of civil rights or enforcement of public law not adequately met by any other remedies available to the applicant.

- 2) To build into the application and order sought procedural protections for the rights, including Convention rights, of the newcomers affected by the order. The protections are likely to include advertisement of an intended application, full provision for liberty to apply and temporal and geographical limits on the scope of the order to ensure proportionality.
- 3) To comply fully with the duty of disclosure which attaches to the making of a without notice application.
- 4) To show that it is just and convenient in all the circumstances to make the order sought.

In so doing the Court reaffirmed that injunction is an equitable jurisdiction of ancient origin which is merely restated by section 37 of the Senior Courts Act 1981. Further, it noted that the High Court has the power and responsibility to act so as to maintain the rule of law. It is well established that the grant of injunctive relief is not always conditional on the existence of a cause of action.

The Court mentioned examples of equity's ability to innovate, both in respect of orders designed to protect and enhance the administration of justice, which frequently affect third parties such as financial institutions, and in respect of orders designed to protect substantive rights.

Orders designed to protect and enhance the administration of justice include the *Mareva* or freezing injunction, the *Anton Piller* or search order, the *Norwich Pharmacal* or third party disclosure order and the *Bankers Trust* order for disclosure of confidential documents relating to an alleged fraudster's bank account in aid of tracing funds.

Orders designed to protect substantive rights include the internet blocking order and the orders sought in the cases before it, to restrain illegal encampments. Wardship orders, orders of the *Venables* type, made to enforce a right under the Human Rights Act 1998, and reporting restrictions, among others made against all the world, were also discussed.

It is and remains a fundamental principle of justice that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as would enable him to be heard.

See *Wolverhampton City Council & Ors (Respondents) v London Gypsies and Travellers and others (Appellants)*, [2023] UKSC 47.