SteeleRaymond LLP
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3rd Annual Property Litigation Update

22nd October 2019

Making Experience Count

The Legal 500 United Kingdom — Top Tier 2020
The Legal 500 United Kingdom — Leading Firm 2020
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Welcome

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Making Experience Count

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Persons Unknown and *Quia Timet* Injunctions

Cameron Stocks

22 October 2019

Vastint Leeds BV v Persons Unknown [2018] EWHC 2456 (Ch)

Persons Unknown

- Against a background of illegal trespasses and an illegal rave culture, the owner of a site sought a final *quia timet* injunction against "*persons unknown*" to prevent them from entering or remaining on the site without its permission.
- In considering its jurisdiction to grant such orders, the court reaffirmed the position in *Bloomsbury Publishing Group plc v News Group Newspapers Ltd* [2003] EWHC 1205 (Ch) that established there is no requirement under the CPR that a defendant must be named but instead a direction that they should be named, if possible.

Persons Unknown

- How to identity a defendant depends on the circumstances of the case:
  1. ***Where there is a specific defendant, but where the name of that defendant is simply not known -*** describe the defendant by reference to an alias, a photograph, or some other descriptor that enables those concerned to know who is intended to be a party.
  2. ***Where there is a specific group or class of defendants, some of whom are known but some of whom (because of the fluctuating nature of the group or class or for some other reason) are unknown -*** defined by reference to their association with that particular group or class.
  3. ***Where the identity of the defendant is defined by reference to that defendant's future act of infringement*** - if the identity of the defendant cannot be immediately established, the defendant is established by his/her/its act of infringement.

Persons Unknown

- At first sight, the idea that someone only becomes party to proceedings by infringing an order seem counter intuitive.
- However, until an act infringing the order is committed, no-one is party to the proceedings. It is the act of infringement that makes the infringer a party.
- If a person affected becomes aware of such an order and opposes it, they would be entitled to apply to set it aside under CPR r40.9
- Vital that such orders are drafted in a clear manner and avoid undesirable legal assumptions
  - Eg making assumptions that someone is trespassing or intending to trespass

Quia Timet Injunctions

"*A quia timet (since he fears) injunction is an injunction granted where no actionable wrong has been committed, to prevent the occurrence of an actionable wrong, or to prevent repetition of an actionable wrong*"

- Preventative jurisdiction – may be interim or final relief.
- There is a distinction between final *mandatory* and final *prohibitory* injunctions, the former being harder to persuade the court to grant.
  - Mandatory - obliges the defendant to do something
  - Prohibitory - oblige the defendant not to interfere with the claimant's rights

Quia Timet Injunctions

- *Quia timet* injunctions are granted where the breach of a claimant's rights is threatened, but where (for some reason) the claimant's cause of action is not complete.
- There is a two stage test when considering whether to grant such an injunction:
  1. Is there a strong probability that, unless restrained by injunction, the defendant will act in breach of the claimant's rights?
  2. If the defendant did an act in contravention of the claimant's rights, would the harm resulting be so grave and irreparable that, notwithstanding the grant of an immediate interlocutory injunction to restrain further occurrence of the acts complained of, a remedy of damages would be inadequate?

The First Stage

- The following factors could be relevant when considering if there is a strong possibility of an infringement of rights:
  - if infringement is anticipated, what other steps the claimant might take to ensure that the infringement does not occur;
  - the attitude of the defendant or anticipated defendant. However, where acts that may lead to an infringement have already been committed, it may be that the defendant's intentions are less significant than the natural and probable consequences of their act; and
  - the time-frame between the application for relief and the threatened infringement. The courts often use the language of imminence, meaning that the remedy sought must not be premature.

The Second Stage

- For the second stage, the court must ask how easily the harm of the infringement can be undone after the event rather than before.
  - Eg by applying for an injunction in the usual course.
- The court will also then consider:
  - the gravity of the anticipated harm; and
  - the distinction between mandatory and prohibitory injunctions.

Boyd v Ineos Upstream Ltd [2019] EWCA Civ 515,

Boyd v Ineos

- Conflict between environmental protestors at fracking sites around the UK. The Defendant persons unknown were defined as:
  1. Persons unknown entering or remaining without the consent of the claimant(s) on land and buildings shown shaded red on the plans annexed to the amended claim form.
  2. Persons unknown interfering with the first and second claimants' rights to pass and repass with or without vehicles, materials and equipment over private access roads on land shown shaded orange on the plans annexed to the amended claim form without the consent of the claimant(s)
  3. Persons unknown interfering with the right of way enjoyed by the claimant(s) each of its and their agents, servants, contractors, sub-contractors, group companies, licensees, employees, partners, consultants, family members and friends over land shown shaded purple on the plans annexed to the amended claim form
  4. Persons unknown pursuing conduct amounting to harassment
  5. Persons unknown combining together to commit the unlawful acts as specified in para 10 of the [relevant] order with the intention set out in para 10 of the [relevant] order

Boyd v Ineos

- 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 and acknowledged there have been many cases where the courts have been asked to grant such injunctions:
  - trespass to land
  - damage to and theft of equipment
  - actionable interference with an easement
  - obstruction of the highway as an actionable public nuisance

Boyd v Ineos

- Injunctions were granted against persons unknown although those persons unknown had not yet participated in any such protest.
- The scope of the injunctions prevented the persons unknown from trespassing on the respondents' sites and from doing anything on site access roads, or to vehicles using the same roads, which caused danger.
- An appeal was lodged on three grounds:
  1. Whether the judge was right to grant the injunctions
  2. Whether the judge failed to apply the HRA
  3. Whether the judge was right to grant an injunction restraining conspiracy to harm the claimants by the commission of unlawful acts against contractors engaged by the claimants

Boyd v Ineos

- Longmore LJ confirmed the lawfulness of making injunctions against persons unknown and “tentatively” set out guidance for the court when considering making these injunctions:
  1. there must be a sufficiently real and imminent risk of a tort being committed to justify quia timet relief;
  2. it is impossible to name the persons who are likely to commit the tort unless restrained
  3. it is possible to give effective notice of the injunction and for the method of such notice to be set out in the order
  4. the terms of the injunction must correspond to the threatened tort and not be so wide that they prohibit lawful conduct
  5. the terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do
  6. the injunction should have clear geographical and temporal limits.

Points to consider…

Points to consider

- If you're thinking of seeking injunctive relief, consider the guidance prescribed in *Boyd*, especially to protect your position on costs.
- How have you defined persons unknown?
- Vital that the terms of the relied sought are thought through in detail.
  - Do you actually need it to be as wide as drafted?
  - Are there any unintended consequences to your relief?
  - Are there any other measures you could take before applying for relief?

Thank you! Any questions?

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| Questions?

Break?

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Property Round-Up

John Clargo

22 October 2019

Property round-up

- *Toms v. Ruberry* [2019] EWCA Civ 128
- *Haddock v. Churston Golf Club Ltd* [2019] EWCA Civ 544
- *New Crane Wharf Freehold Limited v. Dovener* [2019] UKUT 98 (LC)
- *Devani v. Wells* [2019] UKSC 4

Toms v Ruberry

- ‘Business development agreement’ re public house
  - L: ‘the Company’
  - T: ‘the Business Partner’
  - cl. 3.6: repairing obligations
  - cl. 3.7: decorating obligations
  - cl. 4.1: right of re-entry in various circumstances

Toms v Ruberry

- S. 146(1) Law of Property Act 1925
  - A right of re-entry or forfeiture under any proviso or stipulation in a lease for any breach of covenant shall not be enforceable, by action of otherwise, unless and until the lessor serves on the lessee a notice-
    - (a**) specifying the particular breach complained of**; and
    - (b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and
    - (c) in any case, requiring the lessee to make compensation in money for the breach;
  - and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

Toms v Ruberry

- cl. 3.6: repairing obligations
- cl. 3.7: decorating obligations
- cl. 4.1: forfeiture clause
- cl. 4.1.7:
  - ‘if the business partner commits any breach of his obligations under this agreement and (where such breach is capable of remedy) the business partner fails to remedy any such breach within 14 days following the receipt of written notice from the company to remedy the same (‘a default notice’)’
- L identifies breaches of cl. 3.6 and 3.7
- L serves default notice and (at the same time) s. 146 notice specifying breaches of cll. 3.6 and 3.7

Toms v Ruberry

- Possession claim issued months later
  - Recorder dismissed the claim
  - Judge upheld recorder on appeal
  - Court of Appeal (David Richards, Holdroyde, Nicola Davies LJJ) upheld them both
- cl. 4.1.7:
  - ‘if the business partner commits any breach of his obligations under this agreement and (where such breach is capable of remedy) the business partner fails to remedy any such breach within 14 days following the receipt of written notice from the company to remedy the same (‘a default notice’)’
- Contractual right of re-entry had not yet arisen

Haddock v Churston Golf Club

- Adjoining plots of land
  - A owned by Churston Golf Club
  - B owned by Trustees
- CGC conveyed to LA
  - LA covenanted with CGC (and Trustees) ‘that the purchaser and all those deriving title under it will maintain and forever hereafter keep in good repair at its own expense substantial and sufficient stockproof boundary fences walls and hedges along all such parts of the land as are marked T inwards on the plan annexed hereto’.

Haddock v Churston Golf Club

- Subsequently:
  - A leased back from LA to Churston Golf Club
  - B let to Haddock
  - Fence between A and B fell into disrepair
  - Haddock sued Churston Golf Club for damages
- Decisions:
  - HHJ Carr: awarded damages (easement (enforceable); covenant (enforceable))
  - Birss J: upheld judgment (easement (enforceable); covenant (not enforceable))
  - Court of Appeal (Patten, Baker LJJ, Nugee J): overturned (not an easement; covenant (not enforceable))

Haddock v Churston Golf Club

- CGC conveyed to LA
  - LA **covenanted** with CGC (and Trustees) ‘that the purchaser and all those deriving title under it **will maintain and forever hereafter keep in good repair** at its own expense substantial and sufficient stockproof boundary fences walls and hedges along all such parts of the land as are marked T inwards on the plan annexed hereto.
- Drafted as a covenant not as the grant of an easement
- Left open question of whether fencing easement can be subject of an express grant (see further *Egerton v. Harding* [1975] 1QB 62

New Crane Wharf Freehold Limited v Dovener

- Residential tenancy
- Cl. 3.08:
  - ‘to permit the Lessor and its agents and workment at all reasonable times on not giving less than 48 hours notice (except in case of emergency) to enter the Demised Premises [for various purposes]

New Crane Wharf Freehold Limited v Dovener

- L to T (11/9/2017):
  - '[You] are required to give our client access to inspect the property on 29/9/2017'
- T to L (17/9/2017):
  - 'Why does your client require access to my flat? This is an invasion of privacy and prevents my quiet enjoyment of my property.'
- L to T (18/1/2018):
  - 'You should be aware that clause 3.08 of the Lease clearly entitles our client to access upon giving 48 hours notice. Notice was given to you as far back as 11/9/2017 but you have failed to afford our client or its agents access to inspect the Property.
  - In the circumstances, we will await hearing from you by close of business on Friday 19/1/2018 with a copy of the plans and/or your confirmation that access will be given to the property by 5 p.m. on 23/1/2018.'

New Crane Wharf Freehold Limited v Dovener

- Ft-T:
  - L: Failure to respond positively to 2 letters was a breach
  - T: Access not refused; L had a key and had let themselves in before (not always having given notice); T was in on 29/9/2017 and 23/1/2018
  - Failure to respond positively was insufficient; cl. 3.08 gave L a right of entry; had L attended and been refused access that would have been a breach;
- UT (HHJ Behrens QC):
  - Time for assessment of breach is (absent clear refusal) at time access is required
    - Observing (1) cl. 3.08 is an obligation requiring T to permit access not giving L right of entry in absence of permission (2) doubtful if L's letter of 18/1/2018 sufficient notice

New Crane Wharf Freehold Limited v Dovener

- L to T (11/9/2017):
  - '[You] are required to give our client access to inspect the property **on 29/9/2017**'
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Devani v. Wells

- Mr Wells and Mr White were unable to sell their development in the UK
- Mr Nicholson said he might be able to find a purchaser and passed details of the development to Mr Devani
- Mr Devani telephoned Mr Wells on 29/1/2008 and a conversation took place
- Mr Devani introduced Newlon to Mr Wells and Newlon completed on the purchase on 5/2/2008
- (Mr Wells' contact) said he might know of a potential purchaser and told Mr Devani about itMr Well's'Business development agreement' re public house
  - L: 'the Company'
  - T: 'the Business Partner'
  - cl. 3.6: repairing obligations
  - cl. 3.7: repairing obligations
  - cl. 4.1: right of re-entry in various circumstances

Devani v. Wells

- Contents of the conversation on 29/1/2008
  - Mr Wells: Mr Devani was a potential purchaser
  - Mr Devani: Mr Devani was 2% estate agent
  - Judge believed Mr Devani
- Following sale on 5/2/2008
  - Mr Devani sent his terms and conditions
  - And an invoice

Devani v. Wells

- S.18(2) Estate Agents Act 1979 requires the agent to explain to the client the trigger for payment
- R. 3(1) Estate Agent (Provision of Information) Regulations 1991 requires that information to be provided when communications between agent and client commence or a.s.a.r.p. thereafter and before any liability arises
- S. 18(5) &(6) EA 1979 provide that failure to comply renders contract unenforceable unless agent applies to court:
  - Application only dismissed if just, bearing in mind (1) prejudice to client and (2) culpability of agent
  - If not dismissed court may reduce or discharge payment

Devani v. Wells

- Trial Judge: there was a contract and the trigger of completion would be implied (fee reduce by one third)
- Court of Appeal (Lewison and McCombe LLJ): there was no contract and one could not be created by implying the missing essential term (1/3 reduction undisturbed)
- Supreme Court (Kitchen, Wilson, Carnwath, Sumption andBriggs JJSC):
  - there was a contract without having to imply a term (1/3 reduction undisurbed
  - there was no rule that a contract could not be perfected by the implication of a necessary term
  - had it been necessary they would have implied the trial judge's term

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