

Fracking, protests and injunctions: An essential update

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Concerns about energy supplies and the ongoing steep rises in energy prices across the UK have been exacerbated by the Russian invasion of Ukraine. Against that backdrop, the prime minister has revived the debate as to whether fracking should be resumed. As part of a new energy supply strategy which should be set out by the end of March 2022, Boris Johnson has asked ministers to take a fresh look at whether fracking could help meet the UK's energy needs.

Fracking is, however, highly controversial. In 2019, although it stopped short of legislating an outright ban, the UK government imposed a moratorium on fracking after the process caused two minor earthquakes in Lancashire. Fracking still faces fierce opposition from environmental and community groups, who argue that its impact makes a mockery of net zero ambitions and that the process is dangerous. Anti-fracking campaigners have, in the last few days, vowed to give energy companies 'no peace' (as per Tina Rothery, a member of the so-called Nanas 'geri-activist' anti-fracking protestors) if the moratorium is lifted and have confirmed that they are ready to recommence protesting at a moment's notice and at multiple locations.

Whether it be protestors blockading sites, harassing staff or disrupting trading, or whether it be campaign groups setting up encampments, trespass can cause financial loss, distress and reputational damage for businesses. In terms of even wider impact, traffic chaos, supply chain disruption and even, on occasion, civil unrest, can result for the general public or other lawful occupiers.

Dealing quickly and effectively with protestors

Dealing quickly and effectively with protestors can therefore be of vital importance, but it is not always easy. Resourcing issues, or uncertainty as to whether protestors' behaviour actually amounts to criminal activity, can prevent the police from being able to help. Private landowners or businesses often need to obtain a court order before they are able to forcibly remove protestors, but that can prove difficult where the identities of any

protestors are unknown or constantly changing, so that they can't be named in legal proceedings.

In addition, granting injunctions against unidentified persons, whether or not it is in the context of fracking or other environmental protests, is controversial. An injunction is a remedy which has serious 'teeth'. It is an order, issued by the court, for persons to do or not to do something. It contains a penal notice, which means that if an affected person breaches the injunction, they are in contempt of court and can be imprisoned (in the case of local authority landowners, the Anti-Social Behaviour Police and Crime Act 2014 also affords the court the ability to attach a direct power of arrest to the injunction, meaning that applying to the court for a contempt of court order can be avoided before an offender is taken into custody). The severity of the potential consequences of an injunction means it is vitally important that the order should only capture those persons or potential defendants, and those particular circumstances, that it really needs to. Otherwise there is a risk that innocent persons could get caught in the crossfire.

Recent case law will be of significant interest to businesses and landowners or occupiers who find themselves troubled by protestors because it clarifies the correct approach for obtaining an injunction requiring unidentified individuals to vacate and stay away from a site - an area in which the law has been in flux in recent years.

Persons unknown injunctions: what businesses need to know

As mentioned above, businesses and other landowners or occupiers cannot lawfully remove protestors unless they have obtained a court order allowing them to do so. But how can an order be obtained against persons whose identity is unknown or constantly changing? And how can businesses deal with protestors who simply return to the site or relocate to another of the business' premises?

The answer is to obtain an injunction, with sufficient geographical and temporal limits to prevent further disruption, against 'persons unknown'. The courts do not, however, grant such injunctions without first undertaking a thorough assessment as to whether they are an appropriate remedy.

The *Canada Goose v Persons Unknown* [2020] litigation authoritatively set out key guidelines for claimants wishing to obtain injunctions against persons unknown, particularly against unlawful protestors. The Court of Appeal decision in *Barking and Dagenham v Persons Unknown* [2022], however, overturned a key aspect of the *Canada Goose* case. In doing so, it has updated the law in favour of businesses and landowners or lawful occupiers.

As well as clarifying the legal guidelines for obtaining injunctions against 'persons unknown', *Barking and Dagenham* may signal the beginnings of a move away from the arguably 'pro-protestor' approach which has been adopted by the courts in recent years.

What legal and practical advice arises?

One key principle arising out of *Canada Goose* has now been overturned. This was that final injunctions against 'persons unknown' are not generally available, such that interim injunctions against unknown individuals will usually be discharged at trial, leaving an injunction only against persons who have, by the time of the trial, been identified (not necessarily by name, but perhaps by CCTV or bodycam footage) and been served with the order.

Helpfully for businesses, *Barking and Dagenham* clarifies that interim injunctions obtained against persons unknown or unidentified persons can now be continued at trial on a final basis. Crucially, final injunctions can therefore even cover newcomers who may not have been subject to the injunction at the time the order was made, but who subsequently commit an act in breach of the injunction.

This decision enables the enforcement of injunctions against individuals acting in breach, at the time or in the future, where those persons are not a party to proceedings, so long as they fall within the class of people caught by the injunction.

The *Barking and Dagenham* case should therefore significantly extend the protection against trespass and other unlawful conduct (including harassment of staff and others) afforded by a persons unknown injunction to provide long-term relief to a business.

It is important to note, however, that all of the following aspects of the *Canada Goose* authority remain good law and in effect:

Persons unknown defendants must be people who have not been identified but are capable of being identified and served with proceedings, if necessary by alternative service such as can reasonably be expected to bring the proceedings to their attention (such as, say, handing the order to them, or affixing copies around the perimeter of the site). Such persons include both anonymous defendants who are identifiable in some way at the time the proceedings commence and also newcomers (people who, in future, fall within the specific description of the persons unknown).

The persons unknown must be defined in the originating injunction application by reference to their conduct which is alleged to be unlawful.

Interim injunctive relief may only be justified and granted if there is a sufficiently real and imminent risk of a tort being committed (this is intended to avoid the risk of an injunction preventing lawful protest).

As in the case of the originating process itself, the defendants subject to the interim injunction must, in the continuation application, be individually named if known and identified or, if not, must be capable of being identified and served.

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.

The terms of the injunction must be sufficiently clear, precise and non-technical, so as to enable persons potentially affected to know what they must not do.

The injunction should have clear geographical and temporal limits. This includes time limits on final injunctions where appropriate, so that the injunction must come back before the court for further consideration if it is to be extended beyond that time limit.

In terms of practical advice, when seeking any injunction against 'persons unknown', applicants or claimants should focus on the specific actions or risks against which they are trying to guard against and should not try to obtain any wider injunction than is strictly necessary to prevent unlawful conduct. Applications and notices should use clear, plain English and, where possible, should not include legal jargon or technical terminology.

Expert legal assistance will also be required, not only when it comes to the preparation and conduct of court proceedings, but also when it comes to ensuring that the order requested affords appropriate and (so far as possible) future-proofed protection for the business.

Finally, the need to apply for an injunction usually arises in highly pressured situations and businesses are often required to pursue relatively complex court proceedings with real urgency. In the context of fracking or other environmental protests, the behaviour of, and action taken by, businesses can also be the focus of media spotlight and public opinion, which can further raise the stakes. Remaining calm, and retaining experienced, specialist legal counsel, can help to keep stress levels and mistakes, to a minimum, thereby enabling any business faced with protestor or trespasser disruption to successfully navigate the process.

Cases Referenced

- Barking and Dagenham v Persons Unknown [2022] EWCA Civ 13
- Canada Goose v Persons Unknown [2020] EWCA Civ 303; [2019] EWHC 2459 (QB)

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