



Neutral Citation Number: [2023] EWHC 1981 (KB)

Case No: KB-2023-002914

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 August 2023

Before :

MR JUSTICE SWEETING

Between :

Elephant and Castle Property Co. Limited
- and -
Persons Unknown

Claimant

Defendant

Timothy Morshead KC (instructed by Evershed Sutherlands) for the Claimant
The Defendant Did Not Appear in Court and Was Not Represented

Hearing dates: 28 July 2023

Approved Judgment

This judgment was handed down remotely at 16.00pm on 31 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....
MR JUSTICE SWEETING

Mr Justice Sweeting :

1. This is a claim for an injunction to prevent the Defendants (who can only be identified as “Persons Unknown”) from trespassing within the construction compound at the construction site formerly occupied by the Elephant & Castle Shopping Centre (and other buildings) at Elephant & Castle, London SE1 6TE (“the Site”). The hearing before me was an application for interim injunctive relief.
2. The First and Second Claimants are the registered owners of the land forming the Site. The Third Claimant agreed to undertake major construction works on the Site under a JCT Design and Build (2016) contract. The contract sum is around £435 million. The Third Claimant was granted a licence to occupy and is responsible for safety on site.
3. The Third Claimant was also granted permission by the Highway Authority, Transport for London, to occupy sections of New Kent Road, Walworth Road and Newington Butts in connection with the construction works and to erect 3.0 metre high hoardings to separate these parts of the highway from the adjoining public highway.
4. The work at the Site involves the use of five “tower” cranes to erect tall buildings. The Site is protected by continuous hoardings along its perimeter. Security personnel are present 24 hours a day for 365 days a year. There are limited points of entry. There are “anti climb” measures on all tower cranes and 24 hour monitoring by closed circuit television. This includes coverage of the site boundary and the crane bases.
5. Whilst it is possible to make a construction site difficult to access with such precautions, experience suggests that it is impossible to prevent those who are determined enough from gaining entry.
6. The Claimants say that there is a threat of trespass by so called “urban explorers” who trespass on high rise buildings and construction sites and commonly upload photographs and / or video recordings of their exploits to the internet. These recordings can then be viewed for entertainment by their subscribers or followers on social media. The purpose of posting this material appears to be to depict the individuals involved at heights and in precarious or exposed situations. The Claimants believe that there is a real and significant risk that trespassers will enter the Site (or attempt to do so) in order to climb the tower cranes and/or the buildings under construction, unless they are restrained from doing so by the Court.
7. Such activity is inherently dangerous and involves risks for other people such as the Claimants’ employees or contractors and the emergency services and others who have to assist if those attempting to scale cranes or buildings get into difficulties. There have been well publicised fatalities both in this country and elsewhere as a result of urban exploring leading to falls from high buildings and other structures. The Claimants’ experience is that when challenged urban explorers will often run away. Attempts to do so feature in videos posted online. This is in itself dangerous in the context of a construction site where there may be an elevated risk of falls and other injury to those who are not familiar with the layout, who have not received specific training and who are not wearing safety equipment. Where there is an incursion by trespassers, equipment and structures on site, including cranes, must be checked before work can resume. This means that one of the potential consequences of such trespass is delay and interruptions to work on site with associated financial loss.
8. The Claimants’ initial assessment, and hope, was that the site was sufficiently far away from central London that it would not attract interest from urban explorers. The Claimants have reconsidered the position in the light of recent events.
9. The Project Director for the redevelopment which is being undertaken by the Third Claimant is Mr Michael Waters. His witness statement sets out the recent history of attempted and actual incursions between the 16th of March 2023 and the 11th of June 2023. Some of these at least bear the hallmarks of trespass by urban explorers, including the use of high visibility vests as a disguise and black hoodies and balaclavas.
10. There have been a number of previous injunctions made to prevent trespass by urban explorers at other sites in London, including construction sites (see for example *Canary Wharf Investment Limited & others v Brewer & others* [2018] EWHC 1760). A witness statement from the Claimants’ solicitor, Mr Wortley, exhibited a schedule of urban explorer videos and still images

uploaded since 2021. The focus of this Internet material was on construction sites in London, much of it involving tower cranes. Mr Wortley has considerable experience in cases of this sort acting on behalf of the owners and occupiers of construction and other sites. In his view the injunctions which have been obtained to date have reduced the activity of urban explorers at or on the construction sites or tall buildings to which they related. He also referred to the deterrent effect of an injunction to restrain trespass having been increased by judgments in committal applications relating to Canary Wharf in November 2018 and the Shard in October 2019. The deterrent effect of an injunction may be a reason for granting it. In *Secretary of State for the Environment, Food and Rural Affairs v Meier and others* [2009] UKSC 11 Lord Neuberger said at [83]:

“In some cases, it may be inappropriate to grant an injunction to restrain a trespassing on land unless the court considers not only that there is a real risk of the defendants so trespassing, but also that there is at least a real prospect of enforcing the injunction if it is breached. However, even where there appears to be little prospect of enforcing the injunction by imprisonment or sequestration, it may be appropriate to grant it because the judge considers that the grant of an injunction could have a real deterrent effect on the particular defendants.”

11. The Claimants accordingly seek injunctive relief, with permission to issue without a named defendant and to dispense with service but with the incorporation of measures to bring the existence of the injunction to the attention of potential defendants.
12. Section 37(1) of the Senior Courts Act 1981 provides that the High Court may grant an interlocutory or final injunction where it appears to the court to be just and convenient (my emphasis). CPR Practice Direction 25A, paragraph 5.1 sets out the general procedural requirements.
13. Because the application is for interim relief, the Claimants must meet the test in *American Cyanamid Co v. Ethicon Ltd* [1975] AC 396:
14. First, is there a serious question to be tried? There is plainly a serious question to be tried in relation to the Claimants' entitlement to an injunction to restrain a threatened tort of trespass. A landowner is entitled to seek to restrain acts which would constitute a trespass (see *Patel v. W H Smith (Eziot) Ltd* [1987] 1 WLR 853 per Balcombe LJ at 858E – 859E) as is a licensee in temporary occupation of land (see *Manchester Airport v. Dutton* [2000] 1 QB 133 at 147D–G; 149H–150E; approved in *SSEFRA v. Meier* [2009] UKSC 11; [2009] 1 WLR 2780, [6] where the remedy sought was an order for possession, such an order being inappropriate in the present case given that the “urban explorers” are not permanently occupying the Site or part of the Site).
15. Secondly, would damages be an adequate remedy for a party injured by the grant of, or failure to grant, an injunction? The relief sought by the claimants is an injunction rather than damages. It does not appear at all likely that the individuals who commit torts of the sort which the injunction seeks to prevent would have the means to satisfy any financial remedy which the Claimants could obtain. Damages would not be an adequate remedy in relation to the principal harm which the injunction is intended to prevent; the risk of serious injury to individuals involved in urban exploring or those caught up in attempts to assist them or remove them from the Site. There is, conversely, nothing to suggest that the making of the injunction could cause any injury to any person affected by it and certainly no injury which could not be compensated by an award of damages. The usual cross-undertaking in damages has been offered through the Third Claimant which has provided evidence of its financial means.
16. Thirdly and alternatively where does the balance of convenience lie? Damages are not an adequate remedy in this case. The cross-undertaking is sufficient protection for the Defendants. It is not therefore necessary to consider the balance of convenience separately. However, it is clear that it would favour the granting of the injunction that the Claimants seek.
17. Because this is an application for precautionary injunctive relief against persons unknown the claimants must satisfy the procedural guidance set out in *Canada Goose UK Retail Ltd v. PU* [2020] 1 WLR 2802 at [82] to the extent affirmed in *Barking & Dagenham LBC & Otrs v.*

Persons Unknown [2022] EWCA Civ 13. I take each of the *Canada Goose/ Barking & Dagenham* requirements in turn.

“(1) The ‘persons unknown’ defendants in the claim form are, by definition, people who have not been identified at the time of the commencement of the proceedings. If they are known and have been identified, they must be joined as individual defendants to the proceedings. The “persons unknown” defendants must be people who have not been identified but are capable of being identified and served with the proceedings, if necessary by alternative service such as can reasonably be expected to bring the proceedings to their attention.”

18. Because the defendants are identified by reference to a future infringing act, they will become a defendant upon committing that act in breach of the order. I am satisfied that the Claimants have not been able to identify any persons who can properly be named as defendants because they have already trespassed or pose a real risk that they will carry out the acts prohibited by the injunction. The methods of alternative service proposed can be expected to bring the proceedings to their attention (see further below) and are similar to those used in other, like, cases.

“(2) The “persons unknown” must be identified in the originating process by reference to their conduct which is alleged to be unlawful.”

19. This requirement is met. The Claimant's cause of action is based upon trespass to land. “Persons unknown” are identified as “persons unknown entering or remaining at the construction site at Elephant and Castle SY160E without the claimant s’ permission or other lawful authority.”

“(3) Interim injunctive relief may only be granted if there is a sufficiently real and imminent risk of a tort being committed to justify *quia timet* relief.”

20. The application for injunctive relief has not been brought prematurely (see *Hooper v. Rogers* [1973] Ch 43 at 50B.) The Claimants have made an application to the court against the background of a pattern of trespass at the Site which can reasonably be attributed to those seeking to gain entry for the purpose of ascending cranes and other structures. The site is, on the evidence before me, a likely candidate for further incursions of the same nature and the risk is therefore sufficiently real to justify the court's intervention. In *Vastint Leeds BV v. Persons Unknown* [2018] EWHC 2456; [2019] 1 WLR 2, per Marcus Smith J at [31] it was suggested that what was required was a “strong probability” of breach of a claimant’s rights absent an injunction and grave and irreparable harm to a claimant’s rights, if breach occurs. For my part I share the view expressed by Linden J. in *Esso Petroleum Company Limited v. Persons Unknown* [2023] EWHC 1836 at [63–64] that these questions may be relevant but cannot operate as a threshold requirement. The test is the simple evaluative question originally posed by Longmore LJ in *Ineos Upstream Ltd v. Boyd* [2019] 4 WLR 100 at [34] of whether there is a “sufficiently real and imminent risk of a tort being committed to justify *quia timet* relief” which was adopted in *Canada Goose* (see also *Bromley BC v. PU* [2020] EWCA Civ 12 per Coulson LJ at [29–30] describing Longmore LJ’s summary in *Ineos* as an “elegant synthesis of a number of earlier statements of principle, which makes it now unnecessary to refer to other authorities”). In any event I consider that the requirements in *Vastint* are met in this case.

“(4) As in the case of the originating process itself, the defendants subject to the interim injunction must be individually named if known and identified or, if not and described as “persons unknown”, must be capable of being identified and served with the order, if necessary by alternative service, the method of which must be set out in the order.”

21. The Order provides for notice of the injunction, explaining the operation of the injunction with an accompanying marked-up map ,to be posted regularly and extensively around the site. These notices will contain a URL which will allow any potential trespasser to access the order and associated documents from a mobile phone. The proposed method is reasonably likely to bring

the proceedings and the Order to the notice of potential “Persons Unknown” defendants. This satisfies the requirements of CPR PD 25A, para 5.1(2).

“(5) 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.”

“(6) The terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do. The prohibited acts must not, therefore, be described in terms of a legal cause of action, such as trespass or harassment or nuisance. They may be defined by reference to the defendant’s intention if that is strictly necessary to correspond to the threatened tort and done in non-technical language which a defendant is capable of understanding and the intention is capable of proof without undue complexity. It is better practice, however, to formulate the injunction without reference to intention if the prohibited tortious act can be described in ordinary language without doing so.”

22. The prohibition in the order is straightforward and corresponds to the tortious act on which the claim is based: “the Defendants must not until 28 July 2024 or further order, without the consent of the Claimants or other lawful authority, enter or remain upon any part of the land as shown edged red on the plan at Schedule 2 to this Order as demarcated from time to time by hoarding or security fencing (the “Elephant and Castle Construction Site”). .”

“(7) The interim injunction should have clear geographical and temporal limits. It must be time limited because it is an interim and not a final injunction. ...”

23. As far as geographical limits are concerned the scope of the Order is defined by reference to the physical features which demarcate the Site itself. In addition the order provides:

“In the event that any change in the configuration of the hoarding has the effect of making the plan at Schedule 2 (which shows, in red, the outline of the hoarding) materially inaccurate, the Claimants shall as soon as practicable (a) update the plan attached to the notices mentioned at paragraph (5) above and (b) update the plan attached as Schedule 2 to this Order at the website mentioned in that paragraph.”

24. I have given directions for the future conduct of the claim as follows:

“This Order shall be reviewed by the Court by not later than 31 December 2023 (having regard in particular to any judgment of the Supreme Court which has by then been delivered in the appeal now known as *Wolverhampton City Council v. London Gypsies and Travellers* (2022/0046)) — such review to be conducted in writing unless the Court otherwise directs, on application to be made by the Claimants (and served in accordance with paragraph (12) above) in the week commencing 11 December 2023.

The Claimants shall by not later than 28 July 2024 apply to the Court for an extension of this order or for a final order (such application to be served in accordance with paragraph (12) above).”

25. The order is therefore subject to a clear temporal limit insofar as the question of whether it should be continued or will become a final order will be before the court within a year and in circumstances where it will be reviewed within six months.
26. As Mr Morshead KC submitted on behalf of the Claimants there is no reason to suppose in this case that any Convention rights are engaged by the relief sought, save for the Claimants’ right to property protected by Article 1 of the First Protocol. In particular, there is no reason to believe that the Site is or is likely to be or become a target of protest activity. Even if that were to be

the case the relief claimed extends only to private land on which there is no right to protest, as distinct from land to which the public has a right of access (and which, apart from an injunction, would otherwise be available for public protest). Whilst small sections of highway are involved, the Highways Authority has excluded the public from those sections for the duration of the works, so that in relation to those small areas of highway there is no public right of access.

27. There is, equally, no reason to suppose that section 12(3) of the HRA 1998 applies to the interim relief “so as to restrain publication before trial” so engaging the heightened test for the grant of injunctive relief, namely that the court is satisfied that the applicant is likely to obtain the desired relief at trial. However I also accept Mr Morshead’s submission that “even if s12(3) were to apply (on the improbable basis that urban exploration is, somehow, a publication), ... the heightened test for the grant of injunctive relief which it imposes, would be satisfied.”
28. For these reasons and with the modifications discussed at the hearing and now reflected in this judgment I grant the order sought.