

IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL FROM THE COURT OF APPEAL, CIVIL DIVISION (ENGLAND AND WALES)

BETWEEN:

**LONDON GYPSIES AND TRAVELLERS
FRIENDS, FAMILIES AND TRAVELLERS
DERBYSHIRE GYPSY LIAISON GROUP**

**Appellants/
First, Second, and Third Interveners**

and

WOLVERHAMPTON CITY COUNCIL

**Claimants/
Respondents**

and

PERSONS UNKNOWN

**Defendants/
Respondents**

and

**HIGH SPEED TWO (HS2) LIMITED
BASILDON BOROUGH COUNCIL**

Interveners

**APPLICATION FOR PERMISSION TO APPEAL TO THE
SUPREME COURT**

Form 1: Information about the decision being appealed

(i) Introduction

1. The Appellants seek permission to appeal the decision of the Court of Appeal to allow the appeal of Wolverhampton City Council (“Wolverhampton”) and restore its injunction obtained against Persons Unknown: *London Borough of Barking and Dagenham and others v Persons Unknown and others* [2022] EWCA Civ 13. The basis of the Court’s decision was

that the Judge in the High Court, Nicklin J, was wrong to hold that the Court cannot grant final injunctions that prevent persons, who are unknown and unidentified as at the date of the order, from occupying and trespassing on land.

2. This application is structured as follows:

- i. Introduction;
- ii. Appellants' standing to seek permission to appeal;
- iii. The Respondents;
- iv. Narrative of the facts;
- v. Statutory framework;
- vi. Chronology of the proceedings;
- vii. Relevant orders made in the Courts below;
- viii. Issues before the Court appealed from;
- ix. Treatment of the issues by the Court appealed from;
- x. Proposed grounds of appeal;
- xi. Reasons why permission to appeal should be granted; and
- xii. Conclusion

3. This appeal raises the question as to whether a final injunction may be granted against a person who is not a party to proceedings by the date of the final order. In *Canada Goose UK Retail Ltd v Persons Unknown* [2020] EWCA Civ 303, [2020] 1 WLR 280 ("*Canada Goose*"), the Court of Appeal held that it could not. In these proceedings, the Court of Appeal held that it could.

(ii) The Appellants' standing to seek permission to appeal

4. The Appellants are three small charities which represent the interests of Gypsies and Travellers. In the Courts below, they acted as the First, Second, and Third Intervenors.

5. The Supreme Court Rules ("SCR") define an "*appellant*" as "*a person who files an application for permission to appeal or who files a notice of appeal*": SCR 3(2). There is nothing in this definition which requires the appellant to have been a claimant or defendant (or even a party) in the proceedings below.

6. The Civil Procedure Rules (“CPR”) contain a similarly broad definition of an “*appellant*” as “*a person who brings or seeks to bring an appeal*”: CPR 52.1(3)(d). In *George Wimpey UK Ltd v Tewkesbury Borough Council* [2008] EWCA Civ 12, [2008] 1 WLR 1649, the Court of Appeal rejected an argument that this definition should be qualified by the words “*who was a party to the proceedings in the lower court*”: §17. The Court held that the definition should be given its “*plain and ordinary meaning*”: §17. It was wide enough to include a person who was not a party to the proceedings at first instance.

7. In *MS (Pakistan) v Secretary of State for the Home Department* [2020] UKSC 9, [2020] 1 WLR 1373, the appellant withdrew from the proceedings after having been granted permission to appeal. The Supreme Court allowed the Intervener (the Equality and Human Rights Commission) to step into his shoes, holding that:

The Rules do not expressly state that the court may permit an intervener in effect to stand in the shoes of an appellant. However, they do provide that if any procedural question arises which is not dealt with in the Rules, the court may adopt any procedure that is consistent with the overriding objective, the Constitutional Reform Act 2005 and the Rules (rule 9(7)). The overriding objective is to secure that the court is accessible, fair and efficient (rule 2(2)). Where an important question of law, which may well have been wrongly decided by the Court of Appeal, is raised in an appeal, it is clearly open to the court to consider that the question should be fairly decided even though one of the parties no longer wishes to pursue it.

8. The Appellants are all parties to the proceedings and have been so since 17 December 2020, when their application for permission to intervene was granted. They have a real interest in the outcome of this case, given its importance for Gypsies and Travellers whose interests they represent. In filing this application for permission to appeal, they fall within the definition of an appellant as defined in both the CPR and the SCR. The Court therefore has the power to grant them permission to appeal.

(iii) The Respondents

9. Before the Court of Appeal, there were 12 claimants representing between them 15 councils. The Appellants seek permission to appeal the decision in Wolverhampton’s case as a test case. This is intended to simplify the process before the Supreme Court. It is also a decision

dictated by practical considerations. The Appellants are seeking a protective costs order but unless and until this is granted, there is a risk that the Appellants may be liable for some or all of the Respondents' costs should, for example, permission to appeal be refused. The Appellants cannot afford to take the risk of incurring liability in respect of 12 different councils' costs. This does not affect the ambit of the issues arising or which aspects of the Court of Appeal's reasoning are challenged.

(iv) Narrative of the facts

Wolverhampton's case

10. Wolverhampton's claim was issued on 29 June 2018. It was brought against "*Persons Unknown*". The relief sought was an injunction, a power of arrest, declaratory relief, further or other relief, and costs.
11. On 13 July 2018, Wolverhampton was granted permission to serve various documents, including its claim form and Particulars of Claim on the Defendants by various alternative methods, namely publishing them on its website, publicising them on social media and YouTube, issuing a press release, placing an editorial in the local paper, and affixing a copy of certain documents on the parcels of land in respect of which an injunction was sought.
12. On 2 October 2018, Wolverhampton was granted an injunction to restrain Persons Unknown from, inter alia, setting up an encampment on, or entering or occupying for residential purposes, any of 60 specified sites. The injunction was accompanied by a power of arrest.
13. A review hearing took place on 5 December 2019. Prior to this hearing, Wolverhampton applied to vary the injunction (by removing four sites and adding three other sites) and for permission to serve the application and any varied injunction by alternative methods. On 5 December 2019, the Court varied the injunction as requested and granted permission to serve the application and the varied injunction by alternative methods.
14. A further hearing took place on 20 July 2020 at which the injunction and power of arrest were ordered to continue in force.

These proceedings

15. The instant proceedings stem from what was described by the Court of Appeal in *Bromley London Borough Council v Persons Unknown* [2020] EWCA Civ 12, [2020] PTSR 1043 (“*Bromley*”), as a “*recent spate of wide-ranging injunctions...aimed at the Gypsy and Traveller community*”: §10. This began with an injunction granted to Harlow District Council in 2015 (*Harlow District Council v Stokes* [2015] EWHC 953 (QB)) and subsequently developed into a “*feeding frenzy*” whereby some 38 different local authorities obtained injunctions prohibiting unauthorised encampments in their areas (*Bromley* at §11).
16. Bromley London Borough Council applied for a similar injunction in August 2018. London Gypsies and Travellers (one of the Appellants in this case) applied and was granted permission to intervene. At first instance, Deputy Judge Mulcahy QC refused Bromley’s application for an injunction to restrain unauthorised encampments, instead granting a much more limited injunction prohibiting fly-tipping. Bromley appealed this decision. The Court of Appeal dismissed the appeal and gave general guidance as to when such injunctions should be granted. That case was concerned with the proportionality of granting wide injunctions as sought by Bromley: whether or not injunctions could be granted against Persons Unknown was not in issue.
17. At around the same time, the case of *Canada Goose* was making its way through the Courts. This concerned an application by a retail clothing company for an injunction to restrain Persons Unknown from protesting outside its Oxford Street shop. The claimant’s application for summary judgment was refused by Nicklin J on the grounds that the claim form had not been validly served and it was not appropriate to make an order dispensing with service of the claim form. The claimant’s appeal to the Court of Appeal was rejected, with the Court agreeing with Nicklin J that a “*final injunction cannot be granted in a protestor case against “persons unknown” who are not parties at the date of the final order, that is to say Newcomers who have not by that time committed the prohibited acts and so do not fall within the description of the “persons unknown” and who have not been served with the claim form*” (at §89).
18. On 18 September 2020, Enfield London Borough Council applied to amend their claim form and extend the final injunction they had previously obtained in the High Court. The case came before Nicklin J, who made directions to bring all of the (by that stage) 37 wide

injunctions back before the Court for review in light of the Court of Appeal’s decisions in *Bromley* and *Canada Goose*. A number of the injunctions were discharged, leaving 13 claimants to proceed to a consolidated hearing in January 2021. The subsequent history of the proceedings is set out below under “*Chronology of proceedings*”.

(v) Statutory framework

19. The High Court has the power to make an injunction under s37 of the Senior Courts Act 1981 (“SCA 1981”):

(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.

(2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just.

20. Both the High Court and the County Court have the power to make an injunction to restrain breaches of planning control under s187B of the Town and Country Planning Act 1990 (“TCPA 1990”):

(1) Where a local planning authority consider it necessary or expedient for any actual or apprehended breach of planning control to be restrained by injunction, they may apply to the court for an injunction, whether or not they have exercised or are proposing to exercise any of their other powers under this Part.

(2) On an application under subsection (1) the court may grant such an injunction as the court thinks appropriate for the purpose of restraining the breach.

(3) Rules of court may provide for such an injunction to be issued against a person whose identity is unknown.

(4) In this section “the court” means the High Court or the county court.

21. The rules of Court referred to at s187B(3) TCPA 1990 are contained at CPR 8APD.20:

20.1 This paragraph relates to applications under –

(1) section 187B or 214A of the Town and Country Planning Act 1990;

(2) section 44A of the Planning (Listed Buildings and Conservation Areas) Act 1990;

(3) section 26AA of the Planning (Hazardous Substances) Act 1990; or

(4) section 12 or 26 of the Energy Act 2008.

20.2 An injunction may be granted under those sections against a person whose identity is unknown to the applicant.

20.3 In this paragraph, an injunction refers to an injunction under one of those sections and 'the defendant' is the person against whom the injunction is sought.

20.4 In the claim form, the applicant must describe the defendant by reference to –

- (1) a photograph;*
- (2) a thing belonging to or in the possession of the defendant; or*
- (3) any other evidence.*

20.5 The description of the defendant under paragraph 20.4 must be sufficiently clear to enable the defendant to be served with the proceedings.

(The court has power under Part 6 to dispense with service or make an order permitting service by an alternative method or at an alternative place).

20.6 The application must be accompanied by a witness statement. The witness statement must state –

- (1) that the applicant was unable to ascertain the defendant's identity within the time reasonably available to him;*
- (2) the steps taken by him to ascertain the defendant's identity;*
- (3) the means by which the defendant has been described in the claim form; and*
- (4) that the description is the best the applicant is able to provide.*

20.7 When the court issues the claim form it will –

- (1) fix a date for the hearing; and*
- (2) prepare a notice of the hearing date for each party.*

20.8 The claim form must be served not less than 21 days before the hearing date.

20.9 Where the claimant serves the claim form, he must serve notice of the hearing date at the same time, unless the hearing date is specified in the claim form.

(CPR rules 3.1(2) (a) and (b) provide for the court to extend or shorten the time for compliance with any rule or practice direction, and to adjourn or bring forward a hearing)

20.10 The court may on the hearing date –

- (1) proceed to hear the case and dispose of the claim; or*
- (2) give case management directions.*

22. A local authority may have standing to bring proceedings for an injunction under s222 of the Local Government Act 1972:

(1) Where a local authority consider it expedient for the promotion or protection of the interests of the inhabitants of their area—

(a) they may prosecute or defend or appear in any legal proceedings and, in the case of civil proceedings, may institute them in their own name, and

(b) they may, in their own name, make representations in the interests of the inhabitants at any public inquiry held by or on behalf of any Minister or public body under any enactment.

(vi) Chronology of proceedings

23. The brief chronology of these proceedings is as follows:

- i. 18 September 2020: Enfield London Borough Council apply to amend their claim form and extend their final injunction.
- ii. 29 September 2020: Enfield withdraw their application.
- iii. 30 September 2020: Enfield apply for an order for alternative service to validate the steps they had taken to bring the original claim to the attention of Persons Unknown.
- iv. 1 October 2020: Enfield bring a fresh claim seeking another wide injunction.
- v. 2 October 2020: Nicklin J refuses Enfield's application for alternative service and for an interim injunction and adjourns the claim to a Case Management Hearing on 17 December 2020.
- vi. 16 October 2020: Nicklin J orders the claimants in the 37 wide injunction cases to complete a Questionnaire with information about the claims and, depending on the response to the Questionnaire, to attend the Case Management Hearing on 17 December 2020.
- vii. 1 December 2020: Nicklin identifies nine issues of principle for determination and makes directions for the Case Management Hearing.
- viii. 17 December 2020: the Case Management Hearing takes place. By this stage, 21 claimants have discontinued their claims or had their claims dismissed or their injunctions discharged, or they do not otherwise have subsisting injunctions: 16 claimants remain. At this hearing, the Appellants are granted permission to intervene. Nicklin J identifies four issues of principle to be determined at a hearing on 27 and 28 January 2021 and makes directions for that hearing. These issues are: (1) whether the Court has the power to case manage proceedings and/or vary or discharge injunctions granted by final order; (2) whether the Court has jurisdiction and/or whether it is

correct in principle to grant final injunctive relief against Persons Unknown who are not persons whom the law regards as parties to the proceedings; (3) if so, whether it is possible to identify those Persons Unknown who were parties by the date of the final order and whether the final injunction, in so far as it binds Newcomers, should be discharged; and (4) if there is no jurisdiction to grant final injunctive relief against Persons Unknown, in what circumstances interim injunctive relief should be granted against Persons Unknown.

- ix. 27-28 January 2021: the hearing of the four issues of principle.
- x. 12 May 2021: Nicklin J hands down judgment, holding that final injunctions cannot be granted against Newcomers.
- xi. 24 May 2021: Nicklin J discharges Wolverhampton's injunction (but grants a stay of the discharge provided that Wolverhampton files an Appellant's Notice in accordance with the terms of the order). Permission to appeal is granted. Similar orders are made between 24 May 2021 and 2 June 2021 in respect of the other councils.
- xii. 30 November-2 December 2021: hearing in front of the Court of Appeal.
- xiii. 13 January 2022: the Court of Appeal hands down judgment.
- xiv. 1 February 2022: the Court of Appeal allows Wolverhampton's appeal and sets aside the paragraphs of Nicklin J's order of 24 May 2021 by which the injunction was discharged. Wolverhampton's injunction is restored but Wolverhampton is not permitted to seek to enforce it until a review hearing has taken place. The Appellants' application for permission to appeal is refused.

(vii) Relevant orders made in the Courts below

24. The relevant orders made below are as follows:

- i. The order of 17 December 2020, in which Nicklin J identified the four issues of principle to be determined at the hearing on 27-28 January 2021.
- ii. The order of 24 May 2021, in which Nicklin J discharged Wolverhampton's injunction and granted it permission to appeal.
- iii. The order of 1 February 2021, in which the Court of Appeal allowed Wolverhampton's appeal and set aside the paragraphs of Nicklin J's order of 24 May 2021 by which the injunction was discharged.

(viii) Issues before the Court appealed from

25. Prior to the hearing in the Court of Appeal, the parties agreed the following list of issues:

- i. Whether the Judge erred in holding, as a generally applicable proposition of law, that save in claims for *contra mundum* injunctions, a final injunction will only bind persons who were parties to the proceedings by the date of the final order. (This issue was raised by all the appeals.)
- ii. Whether the Judge erred in holding that injunctions prohibiting the unauthorised occupation or use of land are not properly to be granted on a *contra mundum* basis. (This issue was raised by all the appeals.)
- iii. Whether the Judge erred in holding that the Court had jurisdiction to discharge the “final injunctions” which are the subject of the Court’s Judgment, notwithstanding that no person had applied for them to be discharged. (This issue was raised in the appeals of Barking and Dagenham London Borough Council, Redbridge London Borough Council, and Basingstoke and Deane Borough Council.)
- iv. Whether the Judge erred in holding that, in claims brought pursuant to section 187B of the Town and Country Planning Act 1990, a final injunction will only bind persons who were parties to the proceedings by the date of the final order. (This issue was raised in the appeals of Wolverhampton City Council, Hillingdon London Borough Council, Richmond London Borough Council, Barking and Dagenham London Borough Council, Redbridge London Borough Council, Basingstoke and Deane Borough Council, Havering London Borough Council, Nuneaton and Bedworth London Borough Council, Rochdale Metropolitan Borough Council, Test Valley Borough Council, and Thurrock Council.)
- v. Whether the Judge erred in holding that in claims brought by local authorities to uphold public rights whether by restraint of public nuisance, restraint of breaches of the criminal law and/or upholding the rights of the public to use and enjoy land, a final injunction will only bind persons who were parties to the proceedings by the date of the final order. (This issue was raised in the appeals of Wolverhampton City Council, Hillingdon London Borough Council, Richmond London Borough Council, Barking and Dagenham London Borough Council, Redbridge London Borough Council, Basingstoke and Deane Borough Council, Havering London Borough Council, Nuneaton and Bedworth London Borough Council, Rochdale Metropolitan Borough Council, Test Valley Borough Council, and Thurrock Council.)

(ix) Treatment of issues by the Court appealed from

26. The Master of the Rolls summarised his conclusions at §7 of the judgment:

I have concluded that: (i) the judge was wrong to hold that the court cannot grant final injunctions that prevent persons, who are unknown and unidentified at the date of the order, from occupying and trespassing on land, and (ii) the procedure adopted by the judge was unorthodox. It was unusual insofar as it sought to call in final orders of the court for revision in the light of subsequent legal developments, but has nonetheless enabled a comprehensive review of the law applicable in an important field. Since most of the orders provided for review and nobody objected to the process at the time, there is now no need for further action. (iii) Section 37 of the Senior Courts Act 1981 (section 37) and section 187B impose the same procedural limitations on applications for injunctions of this kind. (iv) Whilst it is the court's proper function to give procedural guidelines, the court cannot and should not limit in advance the types of injunction that may in future cases be held appropriate to make under section 37 against the world.

(x) Proposed grounds of appeal

Ground 1: Canada Goose was correctly decided and the Court of Appeal erred in departing from it

27. In *Canada Goose UK Retail Ltd v Persons Unknown* [2020] EWCA Civ 303, [2020] 1 WLR 2802, the Court of Appeal (Sir Terence Etherton MR, David Richards, Coulson LJ) held:

*89. A final injunction cannot be granted in a protestor case against “persons unknown” who are not parties at the date of the final order, that is to say Newcomers who have not by that time committed the prohibited acts and so do not fall within the description of the “persons unknown” and who have not been served with the claim form. There are some very limited circumstances, such as in *Venables v News Group Newspapers Ltd* [2001] Fam 430, in which a final injunction may be granted against the whole world. Protestor actions, like the present proceedings, do not fall within that exceptional category. The usual principle, which applies in the present case, is that a final injunction operates only between the parties to the proceedings: *Attorney General v Times Newspapers Ltd* (No 3) [1992] 1 AC 191, 224. That is consistent with the fundamental principle in *Cameron**

[2019] 1 WLR 1471, para 17 that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard.

28. The Appellants' case, in summary, is that this decision was correct and the Court of Appeal in this case was wrong. In brief:

- i. It is 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 will enable him to be heard*": *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] UKSC 6, [2019] 1 WLR 1471 ("*Cameron*") at §17.
- ii. The act by which the defendant is subjected to the Court's jurisdiction is service of the originating process: *Barton v Wright Hassall LLP* [2018] UKSC 12, [2018] 1 WLR 119 at §8.
- iii. The Court may dispense with service of the claim form, but this will only be appropriate if there is reason to believe that the defendant is aware that proceedings have been or are likely to be brought: *Cameron* at §25.
- iv. The Court may also grant interim relief before proceedings have been served, "*but that is an emergency jurisdiction which is both provisional and strictly conditional*": *Cameron* at §14.
- v. A person "*who is not just anonymous but cannot be identified with any particular person, cannot be sued under a pseudonym or description, unless the circumstances are such that the service of the claim form can be effected or properly dispensed with*": *Cameron* at §26.
- vi. A person who is unknown and unidentifiable as at the date of the final order cannot be (and will not have been) served with the claim form and, in the absence of evidence that the person is seeking to evade the proceedings, it will not be appropriate to dispense with service. They will therefore not be a party to the proceedings. As such, they will not be bound by the injunction, because a final injunction binds only those who are parties to the proceedings: *Attorney General v Times Newspapers Ltd (No. 3)* [1992] 1 AC 191 at 203, 224. In the present case, the Court of Appeal erred in holding that such persons would be bound by a final order, whether made under s37 SCA 1981 or s187B TCPA 1990 or otherwise.

Ground 2: the Court of Appeal’s decision was contrary to the Supreme Court/House of Lords authorities of *Cameron* and *Attorney General v Times Newspapers Ltd (No. 3)* [1992] 1 AC 191 (“*Spycatcher*”)

29. The Appellants contend that:

- i. The Court of Appeal misunderstood the Supreme Court case of *Cameron*. *Cameron* was concerned with Newcomers and/or in any event the result of *Cameron* is that persons who are unknown and unidentifiable cannot be parties to a final order; and
- ii. The Court of Appeal wrongly failed to follow *Spycatcher*, which held that persons who are not parties to a final order are not bound by it.

30. The Court of Appeal held that, in *Cameron*, Lord Sumption was not concerned with the position of Newcomers and that his decision did not affect the validity of orders made against Newcomers because “*before any steps could be taken against such newcomers, they would, by definition, have become aware of the proceedings and of the orders made, and made themselves parties to the proceedings by violating them*” (at §§35 and 39).

31. In *Cameron*, Lord Sumption held that it was 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 will enable him to be heard*”: at §17. Lord Sumption concluded that a person “*who is not just anonymous but cannot be identified with any particular person, cannot be sued under a pseudonym or description, unless the circumstances are such that the service of the claim form can be effected or properly dispensed with*”: *Cameron* at §26.

32. The Appellants contend, firstly, that Lord Sumption did have Newcomers in mind and the Court of Appeal was wrong to hold that His Lordship did not. Lord Sumption described the “*question in issue*” in *Cameron* as being “*in what circumstances is it permissible to sue an unnamed defendant?*”: at §1. The unnamed defendant in *Cameron* was an unknown driver who had been negligent and it is therefore correct that the facts of *Cameron* concerned past, as opposed to future or ongoing, misconduct. However, the jurisdiction with which the Supreme Court was concerned – and the case-law on which the Court of Appeal in *Cameron* relied when concluding that the unnamed driver could be sued – was squarely that relating to Newcomers.

33. In a section entitled “*Suing unnamed persons*”, Lord Sumption noted first the “*general rule*” that “*proceedings may not be brought against unnamed parties*”: §9. His Lordship then referred to (1) “*the limited exceptions contemplated by the Rules*” (representative actions and possession claims against trespassers) and (2) “*specific statutory exceptions*”, such as s187B TCPA 1990: §9. Lord Sumption went on to note that “*English judges have allowed some exceptions*” (to the general rule), namely “*representative actions where the representative can be named but some or all of the class cannot*” and “*actions and orders against unnamed wrongdoers where some of the wrongdoers were known so they could be sued both personally and as representing their unidentified associates*” §10.

34. His Lordship then observed that “*the possibility of a much wider jurisdiction*” had first been “*opened up*” by the case of *Bloomsbury Publishing Group plc v News Group Newspapers Ltd* [2003] EWHC 1205 (Ch), [2003] 1 WLR 1633. After summarising this decision, Lord Sumption stated:

11. Since this decision, the jurisdiction has regularly been invoked. Judging by the reported cases, there has recently been a significant increase in its use. The main contexts for its exercise have been abuse of the internet, that powerful tool for anonymous wrongdoing; and trespasses and other torts committed by protesters, demonstrators and paparazzi.

35. Lord Sumption gave examples of cases falling into both of these two categories. The three specific examples listed in respect of the second category were *Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator Site* [2004] EWHC 1738 (Ch), [2004] Env LR 9, *Ineos Upstream Ltd v Persons Unknown* [2017] EWHC 2945 (Ch) (“*Ineos*”), and *UK Oil and Gas Investments plc v Persons Unknown* [2019] JPL 161. All three cases concerned preventative (or quia timet) interim injunctions granted against various categories of Persons Unknown. After citing these cases, Lord Sumption then immediately went on to say (§11):

*In some of these cases, proceedings against persons unknown were allowed in support of an application for a **quia timet** injunction, where the defendants could be identified only as those persons who **might in future** commit the relevant acts. The majority of the Court of Appeal followed **this body of case law** in deciding that an action was permissible against the unknown driver of the Micra who injured Ms Cameron. **This is the first occasion on which the basis and extent of the jurisdiction has been considered** by the Supreme Court or the House of Lords (emphasis added).*

36. The Appellants submit that, in light of this, the Court of Appeal's conclusion that *Cameron* was not concerned with Newcomers was wrong. Lord Sumption described the jurisdiction with which the Supreme Court was concerned. It was a jurisdiction which began with *Bloomsbury Publishing*; which had been exercised mainly in cases involving abuse of the internet and “*trespasses and other torts committed by protesters, demonstrators and paparazzi*”; and it included cases of preventative (interim) injunctions granted against defendants “*identified only as those persons who might in future commit the relevant acts*”. It was precisely this “*body of case law*” upon which the Court of Appeal's decision in *Cameron* was based. Although the facts of *Cameron* were concerned with an historic wrongdoer, the alleged jurisdiction to sue that wrongdoer was the same as that which has been relied on to sue Newcomers. Lord Sumption went on to hold that a person “*who is not just anonymous but cannot be identified with any particular person, cannot be sued under a pseudonym or description, unless the circumstances are such that the service of the claim form can be effected or properly dispensed with*”: *Cameron* at §26. As such, the decision in *Cameron* is binding authority that Newcomers – who cannot be identified or served with the claim form - cannot be made parties to a final order, and the Court of Appeal erred in concluding otherwise.

37. Further, and in the alternative, the Appellants argue that in any event the effect of the decision in *Cameron* is that Newcomers cannot be made parties to a final order. Lord Sumption held at §§16-17 that the “*conceptual*” problem of service when “*it is not known who the defendant is*” constitutes:

17....a more serious problem than the courts, in their more recent decisions, have recognised. Justice in legal proceedings must be available to both sides. It is 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 will enable him to be heard. The principle is perhaps self-evident. The clearest statements are to be found in the case law about the enforcement of foreign judgments at common law. The English courts will not enforce or recognise a foreign judgment, even if it has been given by a court of competent jurisdiction, if the judgment debtor had no sufficient notice of the proceedings. The reason is that such a judgment will have been obtained in breach of the rules of natural justice according to English notions. In his celebrated judgment in Jacobson v Frachon (1927) 138 LT 386, 392, Atkin LJ, after referring to the "principles of natural justice" put the point in this way:

"Those principles seem to me to involve this, first of all that the court being a court of competent jurisdiction, has given notice to the litigant that they are about to proceed to determine the rights between him and the other litigant; the other is that having given him that notice, it does afford him an opportunity of substantially presenting his case before the court."

38. A final injunction which binds Newcomers is contrary to this fundamental principle. The Newcomer – a person who is unknown and unidentifiable at the date on which the final order is made – will not have had notice of the proceedings until after the final order is made. At this stage, if the Court of Appeal’s decision is correct, they will be in immediate breach of the order if they knowingly do something which is contrary to the order, even though they have not been served with the claim form and do not constitute a party to the proceedings. It is no answer to this to say that they may at that stage apply to vary or set aside the order. If this were so, then there would have been no barrier to Mrs Cameron suing the unnamed driver: the driver could simply have applied to vary the judgment once he knew of it. The right retrospectively to challenge an order already made by the Court does not satisfy the fundamental principle. As recognised in Atkin LJ’s judgment in *Jacobson v Frachon* (1927) 138 LT 386, the requirement is to give the litigant notice “*that they are about to proceed to determine the rights between him and the other litigant*” - not that they have done so but that he may challenge that determination if he so wishes.
39. The Court of Appeal failed to consider that it is conceptually impossible to give notice of proceedings to a person who does not yet exist. That being the case, he or she cannot be served; he or she does not become subject to the Court’s jurisdiction; and he or she is not a party to the proceedings.
40. As a non-party, he or she is not bound by the final injunction, pursuant to the well-established House of Lords authorities of (inter alia) *Spycatcher* and *Iveson v Harris* (1802) 7 Ves. Jun. 251 (“*Iveson*”), which held that a final injunction binds only the parties to the action. The Court of Appeal in this case did not properly grapple with those decisions. *Iveson* was not mentioned at all. As to *Spycatcher*, the Master of the Rolls stated that this “*was a very different case, and only described the principle [that a final injunction operates only between the parties to the proceedings] as the usual one, not a universal one. Moreover, it is a principle that sits uneasily with parts of the CPR, as I shall shortly explain*”: at §82. It is submitted that this provides no proper basis for the Court of Appeal to hold that a final

injunction binds persons who have not been served with the claim form and who are therefore not parties to the action, in direct conflict with binding House of Lords authority.

Ground 3: the Court erred in holding that previous Court of Appeal decisions (including in particular *South Cambridgeshire District Council v Gammell* [2006] 1 WLR 658 and *Ineos Upstream Ltd v Persons Unknown and others* [2019] EWCA Civ 515, [2019] 4 WLR 100) are authority for the proposition that a final injunction can bind newcomers

41. The Court of Appeal held that the fundamental principle delineated in *Cameron* was not infringed by the making of orders against Newcomers because “*before any steps could be taken against such newcomers, they would, by definition, have become aware of the proceedings and of the orders made, and made themselves parties to the proceedings by violating them*”: at §81, applying *South Cambridgeshire v Gammell* [2005] EWCA Civ 1429, [2006] 1 WLR 658 (“*Gammell*”). This is wrong.

42. It puts the cart before the horse: a person can only “*violate*” an order if they are bound by that order. If a person is not a party to the order, then they are not bound by it, and an act which is contrary to the order will not be a breach of the order. The act may, of course, be a contempt of court if it impedes or prejudices the administration of justice, as held in *Spycatcher*. That situation may arise where “*the subject matter of the action is such that, if it is destroyed in whole or in part before the trial of the action, the purpose of the trial will be wholly or partly nullified*”: *Spycatcher* at 207. However, this will not occur where what is enjoined is the act of trespass, as confirmed in *Spycatcher* at 206:

Suppose for instance that A brings an action against B for an injunction restraining B from trespassing on A's land, and that in that action the court grants A an interlocutory injunction against B restraining B from going on A's land pending the trial of the action. Suppose further that C, solely of his own volition and in no way aiding or abetting B, himself goes on A's land while the action between A and B is still pending. On those facts C would not be committing any contempt of court, because he would not, by his conduct in going on A's land, be impeding or prejudicing the administration of justice by the court in the action between A and B.

43. Furthermore, the Court of Appeal’s decision is based on a misinterpretation of *Gammell*. In *Gammell*, the Court of Appeal held that a person who occupied land in breach of an injunction

granted against Persons Unknown thereby became a person to whom the injunction was addressed and a defendant to the proceedings. However, the decision *Gammell* was explained in *Cameron* as being a mechanism by which to achieve service on the defendants at the interim stage:

15. An identifiable but anonymous defendant can be served with the claim form or other originating process, if necessary by alternative service under CPR 6.15. This is because it is possible to locate or communicate with the defendant and to identify him as the person described in the claim form. Thus, in proceedings against anonymous trespassers under CPR 55.3(4), service must be effected in accordance with CPR 55.6 by attaching copies of the documents to the main door or placing them in some other prominent place on the land where the trespassers are to be found, and posting them if practical through the letter box. In Brett Wilson LLP v Persons Unknown, supra, alternative service was effected by email to a website which had published defamatory matter, Warby J observing (para 11) that the relevant procedural safeguards must of course be applied. In Smith v Unknown Defendant Pseudonym "Likeicare", supra, Green J made the same observation (para 11) in another case of internet defamation where service was effected in the same way. Where an interim injunction is granted and can be specifically enforced against some property or by notice to third parties who would necessarily be involved in any contempt, the process of enforcing it will sometimes be enough to bring the proceedings to the defendant's attention. In Bloomsbury Publishing Group, for example, the unnamed defendants would have had to identify themselves as the persons in physical possession of copies of the book if they had sought to do the prohibited act, namely disclose it to people (such as newspapers) who had been notified of the injunction. The Court of Appeal has held that where proceedings were brought against unnamed persons and interim relief was granted to restrain specified acts, a person became both a defendant and a person to whom the injunction was addressed by doing one of those acts: South Cambridgeshire District Council v Gammell [2006] 1 WLR 658, para 32. In the case of anonymous but identifiable defendants, these procedures for service are now well established, and there is no reason to doubt their juridical basis.

16. One does not, however, identify an unknown person simply by referring to something that he has done in the past...Nor is there any specific interim relief such as an injunction which can be enforced in a way that will bring the proceedings to his attention...(emphasis added).

44. The Court of Appeal held at §37 that in *Cameron*:

Lord Sumption seems to have accepted that, where an action was brought against unknown trespassers, newcomers could, as Sir Anthony Clarke MR had said in Gammell, make themselves parties to the action by (knowingly) doing one of the prohibited acts. This makes perfect sense, of course, because Lord Sumption's thesis was that, for proceedings to be competent, they had to be served. Once Ms Gammell knowingly breached the injunction, she was both aware of the proceedings and made herself a party. Although Lord Sumption mentioned that the Gammell injunction was "interim", nothing he said places any importance on that fact, since his concern was service, rather than the interim or final nature of the order that the court was considering.

45. The Appellants submit that this is not a correct interpretation of Lord Sumption's treatment of *Gammell* (or, indeed, of *Gammell* itself). *Gammell* is not authority for the proposition that a non-party is bound by a final order. First, *Gammell* was explained by Lord Sumption in *Cameron* as being authority for the proposition that the process of enforcing an interim injunction may amount to acceptable alternative service. It was not open to the Court of Appeal to depart from this interpretation. Second, there is nothing in *Gammell* to support the assertion that it decided that a final injunction could bind Newcomers. As recognised by the Court of Appeal, the injunction granted in Ms Gammell's case was interim. It is (at best) unclear whether the injunction granted in the linked case of Ms Maughan was interim or final, although as it was expressed to be "until further order" it is submitted that it was more likely to be interim. In the absence of any evidence that *Gammell* concerned a final order at all, the case cannot be taken as authority for the proposition that Newcomers may be bound by a final order. Equally, the fact that subsequent Court of Appeal decisions, including *Bromley* and *Ineos*, have accepted without deciding that a final injunction may bind Newcomers is immaterial.

46. Third, the effect of *Gammell* in any event cannot be that a final injunction binds a non-party, as this would be contrary to the House of Lords authorities of *Spycatcher* and *Iveson v Harris* (discussed above). This cannot be circumvented by the artifice that the Newcomer "becomes a party" by breaching the injunction. An act can only be a "breach" of the injunction if the actor is bound by the injunction. If the consequences of a particular action are that a person is liable to be committed for contempt for breach of the injunction, then that person is bound by the injunction.

47. Moreover, it ignores the legal and procedural difficulties involved in a person becoming a party to an action after the final relief has been granted. At §89, the Master of the Rolls identified various provisions of the CPR concerned with either non-parties or the addition of parties. These were as follows:

- i. CPR 40.9: a person who is not a party but who is directly affected by a judgment or order may apply to have the judgment or order set aside or varied.
- ii. CPR 46.2: where the Court is considering making a costs order in favour of or against a non-party, that person must be added as a party to the proceedings for the purposes of costs only and be given a reasonable opportunity to attend a hearing at which the Court will consider the matter further.
- iii. CPR 70.4: a judgment or order which is given or made in favour of or against a non-party may be enforced by or against that person by the same methods as if he was a party.
- iv. CPR 73.10: any person who objects to the making of a final charging order must file and serve grounds of objection.
- v. CPR 83.8A: a notice of eviction must be addressed to all persons against whom the possession order was made and any other occupiers.

48. These provisions do not, and could not, confer jurisdiction on the Court to order final substantive relief against a person who is not a party to the proceedings. They do not displace the fundamental principle set out in *Cameron* that “a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard” or the ruling in *Spycatcher* that a final injunction does not bind non-parties.

Ground 4: the Court erred in holding that there was no real distinction between interim and final injunctions

49. The Court of Appeal also erred in holding that “*there is no real distinction between interim and final injunctions, particularly in the context of those granted against persons unknown*”: at §89. First, no authority was cited for this proposition. The Master of the Rolls relied on what was effectively a perception of common practice, as at §92: “*There is, as I have said, almost never a trial in a persons unknown case*”. Even if it is correct that in practice cases in which interim injunctions have been granted rarely progress to a trial (as to which there

was no evidence before the Court), this does not mean that there is no distinction in principle between interim and final injunctions. *Snell's Equity* (34th ed.) states as follows:

A perpetual (or final) injunction can only be granted after the court has been able to adjudicate upon the matter. A perpetual injunction is so called because it is granted at the final determination of the parties' rights and not because it will necessarily operate forever. For instance, a perpetual injunction may be granted so as to continue only during the currency of a lease. By contrast an interlocutory (or interim) injunction is granted before the trial of an action; its object is to keep matters in status quo until the question at issue between the parties can be determined.

50. A similar statement is made in *Injunctions* (13th ed.):

Injunctions may be further classified according to the period of time for which the order is to remain in force. A final or perpetual injunction is a final judgment, and for that reason is usually only granted (except by consent of the defendant) after a trial on the merits. An interim injunction, by contrast, is a provisional measure taken at an earlier stage in the proceedings, before the court has had an opportunity to hear and weigh fully the evidence on both sides.

51. An interim injunction “is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties”: *The Siskina* [1979] AC 210 at 256. It is recognised that the law has developed since *The Siskina* and that other types of interim injunction exist beyond those recognised in that decision. However, there still remains a principled difference between an injunction which is designed to preserve or otherwise protect the position or a party's interests pending trial and an injunction which represents the substantive and ultimate relief sought by a party. The Court erred in eliding the distinction between these types of injunction.

(xi) Reasons why permission to appeal should be granted

52. In recent years there has been a proliferation of orders made which bind or purport to bind Newcomers. These orders have been made in a wide variety of contexts, from unauthorised encampments (as in the claims before the Court of Appeal in this case) to planning, protests, urban exploring, and unauthorised punting.

53. This appeal raises an arguable point of law of general public importance which ought to be considered by the Supreme Court at this time. The Court’s jurisdiction (or lack thereof) to make orders which bind unknown and unidentifiable defendants is one of substantial wider significance. The Court of Appeal recognised that this was “*an important field*” of law (at §7) and that “*the legal landscape in proceedings against persons unknown seems to have transformed*” within the last five years (at §20). Precisely because the claims are brought against anonymous and unidentifiable defendants, they are often not defended and rarely result in a trial. Such orders have not yet been directly addressed by the Supreme Court (other than as considered in *Cameron*), despite having been made in large numbers over the last twenty years, demonstrating the difficulty in bringing these matters to appellate attention. It is unlikely that the Supreme Court will have the opportunity to consider these claims again soon.

54. The law is in a state of confusion. There are two Court of Appeal authorities, handed down with two years of each other, both involving (successive) Masters of the Rolls, which reach contradictory conclusions. Clarity is urgently needed from the Supreme Court.

(xii) Conclusion

55. This application raises arguable matters of general public importance that ought to be considered by the Supreme Court at this time and the Court is invited to grant the Appellants permission to appeal.

**RICHARD DRABBLE QC
LANDMARK CHAMBERS**

**MARC WILLERS QC
TESSA BUCHANAN
OWEN GREENHALL
GARDEN COURT CHAMBERS**

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