IN THE COURT OF APPEAL **A2-2021-10/1008/1009**
CIVIL DIVISION
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISON

BETWEEN:

LONDON BOROUGH OF BARKING AND DAGENHAM AND OTHERS

Appellant

and

(1) PERSONS UNKNOWN
(2) VARIOUS OTHER DEFENDANTS

Respondents

(1) LONDON GYPSIES AND TRAVELLERS
(2) FRIENDS, FAMILIES AND TRAVELLERS
(3) DERBYSHIRE GYPSY LIAISON GROUP

First, Second, and Third Interveners

(4) HIGH SPEED TWO (HS2) LIMITED

Fourth Interveners

(5) BASILDON BOROUGH COUNCIL

Fifth Interveners

APPLICATION FOR PERMISSION TO APPEAL TO THE SUPREME COURT
On behalf of the First, Second, and Third Interveners

Application for permission to appeal

1. The First, Second, and Third Interveners seek permission to appeal to the Supreme Court.

The decision of the Court is arguably wrong

2. The First, Second, and Third Interveners respectfully submit that there were arguable errors of law in the decision of the Court of Appeal.

3. The First, Second, and Third Interveners submit that a final injunction cannot be granted (whether under s37 of the Senior Courts Act 1981 or under s187B of the Town and Country Planning Act 1990 or otherwise) against persons who are unknown and unidentified and have not become parties by the date of the order ("newcomers"). This was confirmed to be correct in the context of a claim against protestors in the case of *Canada Goose UK Retail Ltd v Persons Unknown and another* [2020] EWCA Civ 202, [2020] 1 WLR 2802 at §§89-93. There are no grounds for either distinguishing or departing from that decision in this case. The First, Second, and Third Interveners submit that *Canada Goose* was correctly decided and was binding on this Court and that the Court erred in failing to follow it.

4. The Court misapplied Supreme Court/House of Lords authority. The Court's decision is contrary to the fundamental principle identified in *Cameron v Liverpool Victoria Insurance Co Ltd (Motor Insurers' Bureau Intervening)* [2019] UKSC 6, [2019] 1 WLR 1471 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. It is also contrary to the usual principle set out in *Attorney General v Times Newspapers Ltd (No 3)* [1992] 1 AC 191 that a final injunction operates only between the parties to the proceedings.

5. 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. They are not.

6. The Court erred in holding that there was no real distinction between interim and final injunctions and in holding that a person may become a party to proceedings after a final injunction has been made. There is a qualitative distinction between an injunction which is intended to preserve, protect, or otherwise assist a party's position in anticipation of a trial or other final hearing and an injunction which is the ultimate remedy sought by a claimant and which is granted after the determination of his or her claim. Once a claim has been determined

and the final remedy granted, the proceedings are at end and new defendants to the underlying claim cannot be added.

7. The Court also erred in failing to distinguish between injunctions "made against the world" and injunctions made against persons unknown and in declining to hold that injunctions to restrain trespass or unlawful encampments should not be granted against the world.

The case raises issues of general public importance

8. The First, Second, and Third Interveners submit that the decision raises issues of general public importance which ought to be considered by the Supreme Court at this time.

9. Injunctions which bind or purport to bind newcomers have been sought and granted with increasing frequency in recent years. They are made in a wide variety of factual and legal contexts. The jurisdiction to grant final injunctions which bind such persons has, it appears, never been considered by the Supreme Court (save to the extent that it was considered in *Cameron*, which is a matter in dispute in this case). This appeal alone involves 15 (and originally 38) different local authorities as well as two interveners in addition to the First, Second, and Third Interveners. The appeal has significant implications for Gypsies and Travellers, many of whom lack an authorised site on which to place their caravans and who are therefore forced onto unauthorised encampments of the type prohibited by these injunctions. The Court of Appeal itself recognises that *"the legal landscape in proceedings against persons unknown seems to have transformed"* within the last five years: §20.

10. Furthermore, there are now two inconsistent decisions of the Court of Appeal on this issue, both made within the last two years and both decided by a bench which included a (different) Master of the Rolls.

The First, Second, and Third Interveners have standing to appeal

11. The First, Second, and Third Interveners have standing to seek and be granted permission to appeal.

12. The Supreme Court Rules 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.

13. The Civil Procedure Rules 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.

14. In *MS (Pakistan) v Secretary of State for the Home Department* [2020] UKSC 9, 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.*

15. The First, Second, and Third Interveners 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.

Conclusion

16. 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 First, Second, and Third Interveners permission to appeal.

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GARDEN COURT CHAMBERS

12 JANUARY 2022